Even there, some delegates clearly believed it should be retained. For example, the French representative insisted that equality between groups of refugees was an insufficiently inclusive goal, as "if all refugees received equally bad treatment, the State concerned could claim to have observed the provisions of Article 3."[481] Particularly where all refugees in a given asylum state belong to the same race or religion, or come from the same country, skewed rights allocations that are in substance racially, religiously, or nationally motivated might not be caught by a simple prohibition of discrimination *between classes of refugees* (since all refugees would be equally harmed). Some representatives therefore identified the need for a stronger commitment to prohibit the kinds of discriminatory actions that generate refugee flows in the first place.[482]

Despite these concerns, the Israeli delegate successfully moved the deletion of Art. 3's prohibition of discrimination against refugees in general on the grounds that this issue was already regulated by the Convention's provisions on required standards of treatment.[483] This position was in line with the view he had earlier expressed in the Ad Hoc Committee that priority should be given to the express language which defined the various levels of obligation:

> It was important to clear up the exact place of Article 3 in the Convention and its relation to the other articles. It proclaimed a principle, but the exact conditions under which refugees might enjoy the benefits conferred by it were enumerated in later articles. There was nothing abnormal about that. The United Nations Charter itself began by speaking of the "sovereign equality" of all members of the United Nations and then proceeded to divide those members into great Powers and small Powers, permanent and non-permanent members of the Security Council, members with the right of veto and members without. There would be no objection to retaining Article 3 as formulated, on the understanding that its function was to establish a principle to which the exceptions would be specified in later articles, as was usual practice in any legal instrument.[484]

[481] Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 18.

[482] "Such a provision was all the more necessary because most refugees had left their countries of origin in order to escape discrimination on grounds of race, religion, or political opinion": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 11.

[483] Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 17–19. While the textual modification to Art. 3, in which the words "nor because they are refugees" were deleted, arguably determines this issue, it should be noted that even after the adoption of the Israeli motion, remarks of the Australian, French, and American delegates during the final substantive discussion of this article support a broader reading: UN Doc. A/CONF.2/SR.5, July 4, 1951, at 7–9. Moreover, the final language proposed by the Style Committee was said to be primarily designed to restrict the substantive ambit of this duty of non-discrimination to actions of a kind regulated by the Refugee Convention: UN Doc. A/CONF.2/72, July 11, 1951, at 3.

[484] Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 9.

It is, of course, true that the extent of permissible differentiation between refugees and citizens in the delivery of rights is explicitly set out in the Refugee Convention's mixed contingent and absolute rights structure.[485] Many of the rights in regard to which the issue of discrimination vis-à-vis nationals might arise are required to be implemented only insofar as they are guaranteed to some other category of non-citizens.[486] To this extent, the Refugee Convention clearly presumes the legitimacy of treating refugees less favorably than citizens with respect to any of the rights defined by a contingent standard less than nationality. For example, Art. 17 requires only that refugees benefit from "the most favorable treatment accorded to nationals of a foreign country in the same circumstances" as regards the right to work. In view of this clear language, the structure of the Refugee Convention argues against a finding of discrimination simply because refugees enjoy access to work on terms less favorable than those extended to citizens.

Conversely, a duty of non-discrimination between citizens and refugees would add nothing to the force of those rights that are already defined to mandate implementation on terms of parity with citizens. All refugees must be assimilated to nationals in terms of the rights to rationing, primary education, and fair taxation.[487] Where the relevant degree of attachment is satisfied, refugees are also entitled to national treatment in regard to religion and religious education, artistic rights and industrial property, public relief, labor legislation, social security, and legal assistance and security for costs before the courts.[488] The duty to implement these rights on terms of parity with nationals is actually more powerful than a duty of non-discrimination relative to nationals would be, since the issue of reasonable differentiation inherent in non-discrimination analysis simply does not arise.

As discussed earlier,[489] the prohibition of generalized discrimination against refugees is in any event now largely achieved by the binding duty of non-discrimination subsequently codified in the Human Rights Covenants. Art. 2 of each of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights prohibits discrimination on the

[485] See chapters 3.2 and 3.3 above.

[486] Freedom of association and the right to engage in employment are guaranteed at the level of most-favored-national treatment; the rights to private property, internal freedom of movement, housing, and to engage in self- and professional employment are granted to refugees only to the extent afforded aliens generally.

[487] Refugee Convention, at Arts. 20, 22, and 29.

[488] See chapter 3.3.2 above. Equality of treatment with regard to religion and religious education are guaranteed to all refugees "within the territory"; rights to public relief, and to benefit from labor and social security legislation to all refugees who are "lawfully staying"; and the protection of artistic rights and industrial property and access to legal assistance and avoidance of security for costs to refugees who are "habitually resident."

[489] See chapter 2.5.5 above, at pp. 127–128.

basis of a list of grounds, including "other status."[490] Relying on this open-ended formulation, the duty of non-discrimination has been authoritatively interpreted to establish the general rule "that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens,"[491] and specifically to require that rights not be limited to citizens of a state, but that they "must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers [and] refugees."[492] Unlike Art. 3 of the Refugee Convention (which prohibits only discrimination of particular kinds against refugees – namely on the basis of race, religion, or country of origin), the duty set by the Covenants is thus fully inclusive, prohibiting every kind of status-based discrimination (including on the basis of refugee status) in relation to a right established by the Covenants. This guarantee of non-discrimination found in Art. 2 of each of the Human Rights Covenants therefore partly fills the gap left by the limited prohibition of discrimination *against refugees in general* in the Refugee Convention.

First, where a given right is found in both the Refugee Convention and one of the Covenants, Art. 2 of the Covenants disallows discrimination relative to nationals. In such circumstances, it is simply not necessary to rely on the relevant refugee right in order to contest treatment below national treatment. Since virtually all rights in the Covenants must be implemented without discrimination between nationals and non-citizens,[493] refugees who invoke the cognate Covenant protection can effectively avoid the lower standard of treatment prescribed by the Refugee Convention.

For example, Art. 15 of the Refugee Convention guarantees freedom of association to refugees only to the extent of "the most favourable treatment accorded to nationals of a foreign country, in the same circumstances." The failure to grant refugees the same associational rights as citizens would therefore not contravene the terms of the Refugee Convention. On the other hand, because the right to freedom of association is also established by Art. 22 of the Civil and Political Covenant and by Art. 8 of the Economic, Social and

[490] See chapter 2.5.5 above, at p. 125.

[491] UN Human Rights Committee, "General Comment No. 15: The position of aliens under the Covenant" (1986), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 140, para. 2. While this General Comment interprets only the Civil and Political Covenant, it is reasonable to assume that the virtually identical prohibition of discrimination on the basis of "other status" in the Economic, Social and Cultural Covenant will be similarly interpreted to protect the entitlement of aliens to national treatment in relation to its catalog of rights. The relevance of the minor differences in the language of the prohibition of discrimination in the two Human Rights Covenants is discussed in chapter 2.5.5 above, at note 130.

[492] UN Human Rights Committee, "General Comment No. 31: The nature of the general legal obligation imposed on states parties to the Covenant" (2004), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 192, para. 10.

[493] Civil and Political Covenant, at Art. 2(1).

Cultural Covenant, refugees can invoke Art. 2 of the Covenants as the basis for asserting the same *prima facie* entitlement to associational rights as nationals. It would then fall to the state party denying equal treatment to advance the case that the distinction between refugees and citizens should be adjudged reasonable.[494] In addition to freedom of association, refugees may rely on parallel provisions in the Covenants (which are subject to a general duty of non-discrimination) to assert a right to national treatment in access to employment, housing, and internal freedom of movement,[495] each of which is guaranteed by the Refugee Convention only at a lower contingency level.[496]

Second, reliance on the Covenants to assert a duty of non-discrimination relative to nationals may actually allow refugees to contest a broader range of substantive disfranchisement. This is because the Covenants guarantee a significant number of rights not provided for at all in the Refugee Convention. In particular, the Civil and Political Covenant establishes the rights to life, to freedom from slavery, against torture, cruel, inhuman, and degrading treatment, to liberty and security of the person, freedom of thought, conscience, and religion, to leave the country, to equality before courts and tribunals,[497] against retrospective application of criminal law, to recognition as a person, to protection of family, children, and privacy, against advocacy of hatred or discrimination, to freedom of opinion, expression, and assembly, and to the protection of minority rights.[498] Additional rights derived from the Economic, Social and Cultural Covenant include guarantees of just and favorable working conditions, adequate food and clothing, protection of the family (including of mothers and of children), secondary and

[494] See chapter 2.5.5 above, at pp. 128–145.

[495] Only refugees who are "lawfully in the territory of a State Party" may claim the right to non-discrimination relative to nationals in regard to internal freedom of movement and choice of place of residence: Civil and Political Covenant, at Art. 12(1).

[496] Under the Refugee Convention, the rights to self-employment, professional employment, housing, and internal freedom of movement are granted to refugees only to the extent afforded to aliens generally (Articles 18, 19, 21, and 26). Access to wage-earning employment is guaranteed to refugees at the most-favored-national level (Article 17). The comparable provisions in the Human Rights Covenants make no differentiation between the entitlement of nationals and aliens (Economic, Social and Cultural Covenant, at Arts. 6 and 11; Civil and Political Covenant, at Art. 12, which does, however, require lawful presence in the state's territory).

[497] International aliens law also prohibits discrimination by courts against aliens (including refugees) in the adjudication of claims involving core rights, such as legal status, physical security, personal and spiritual liberty, and some economic and property rights. While not enforceable by refugees themselves, this customary norm of international aliens law can nonetheless be invoked as evidence of a principled, legally defined limitation on discrimination. See chapter 2.1 above, at pp. 76–77.

[498] Civil and Political Covenant, at Arts. 6–11, 12(2), 14–21, 23–24, and 27.

higher education, social security, access to healthcare, and participation in cultural life.[499] Each of these rights must in principle be guaranteed to non-citizens, including refugees, without discrimination relative to nationals.

Beyond the context-specific duty of non-discrimination derived from Art. 2 of the Covenants, additional value may also be secured from Art. 26 of the Civil and Political Covenant. As elaborated earlier, Art. 26 establishes a general duty to guarantee everyone equality before the law and the equal protection of the law without discrimination.[500] As a matter of principle, this overarching duty should be understood to compel states not only to avoid any intentional disfranchisement of refugees, but also affirmatively to adopt measures which provide refugees with the substantive benefit of all public goods.[501] In theory, even the levels of attachment set by the Refugee Convention are themselves subject to scrutiny under Art. 26 to ensure that the withholding of benefits from some refugees is justifiable.

The major challenge to the efficacy of the various non-discrimination rights set by the Human Rights Covenants is that, as previously described, the contemporary practice of the Human Rights Committee has been to defer to state perceptions of "reasonableness" in determining whether a given form of differentiation amounts to discrimination.[502] Whether the assessment occurs under one of the endogenous Art. 2 guarantees or in relation to the more generally applicable Art. 26, a refugee arguing that inequality of treatment is discriminatory must make the case that certain kinds of differential allocation should be understood to be impermissible as a general matter, or at least in particular circumstances. Given the mixed success in advancing this argument on behalf of non-citizens generally,[503] it is by no means clear that general norms of non-discrimination law will, in practice, make up for the decision to exclude discrimination against refugees in general from the scope of Art. 3 of the Refugee Convention. On the other hand, reliance on the Human Rights Covenants can at least compel states to justify differential treatment of refugees as a class, in contrast to Art. 3 of the Refugee Convention.

Stripped of its role in prohibiting discrimination against refugees as a group, the purpose of Art. 3 of the Refugee Convention as finally adopted is instead to disallow any discrimination in the allocation of Convention rights between and among refugees on the basis of race, religion, or country of origin. While not requiring that all groups of refugees who arrive in an asylum country be treated identically, Art. 3 establishes a presumption that differential treatment based on any of the enumerated grounds is illegitimate.

[499] Economic, Social and Cultural Covenant, at Arts. 7, 9–13, and 15.
[500] See chapter 2.5.5 above, at pp. 125–129.
[501] See chapter 2.5.5 above, at pp. 126–128.
[502] See chapter 2.5.5 above, at pp. 128–145.
[503] See chapter 2.5.5 above, at pp. 131–133 and 135–138.

This presumption would apply, for example, in the case of India's decision to grant permission to work to Tibetan refugees, even as Sri Lankan refugees were restricted to self-employment and Bangladeshi refugees afforded no right to earn a livelihood.

As is clear from its text, however, Art. 3 (in contrast, for example, to Art. 26 of the Civil and Political Covenant) applies only to matters that are regulated by the Refugee Convention. Those who drafted the provision emphasized that "[t]he members of the Committee were in full agreement in their adherence to the principle of non-discrimination, in their desire to reach an acceptable (preferably a unanimous) solution *which should cover the whole Convention*, and in their determination *not to 'legislate' beyond the Convention* [emphasis added]."[504] Their particular concern was to avoid any implication that states are subject to a duty to administer their immigration laws in a non-discriminatory way.[505] Art. 3 is not therefore a generalized prohibition of discrimination, but speaks only to invidious differentiation in the implementation of rights set by the Refugee Convention.[506]

In considering the question of whether a Convention right is engaged, it is important to take real account of the breadth of the protected interest. For example, states are not under a legal obligation to grant any form of durable or permanent status to even recognized refugees. Yet Art. 34 of the Refugee Convention, while setting a weak obligation, is nonetheless not purely hortatory: as the analysis below makes clear, Art. 34 is breached where a state party simply does not allow refugees to secure its citizenship, and refuses to provide a cogent explanation for that inaccessibility.[507] As such, the complete bar imposed by Australia on access to even durable residence in the case of recognized refugees who arrive without authorization, and even more clearly the British decision to exclude the nationals of three countries from the usual right to secure permanent residence, may well amount to discrimination unless found to be reasonable by reference to international standards. Similarly, the right of access to the courts under Art. 16(1) of the Refugee Convention requires that all refugees be able to pursue any remedies that are within the usual subject-matter jurisdiction of the courts.[508] The United Kingdom's decision substantively to withdraw the right to appeal a negative refugee status assessment from the citizens of certain countries – since an

[504] "Report of the Committee Appointed to Study Article 3," UN Doc. A/CONF.2/72, July 11, 1951, at 3.

[505] See text above, at p. 246.

[506] "The non-discrimination provision in article 3 is limited to the application of 'the provisions of this convention.' Article 3 does not contain a freestanding non-discrimination provision. It resembles the weak provision in article 14 of the European Convention on Human Rights (1950)": *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at para. 43.

[507] See chapter 7.4 below, at pp. 988–989.

[508] See chapter 4.10 below, at pp. 646–649.

appeal that can be pursued only once a refugee is returned to the place in which persecution is feared is not in substance an appeal that is capable of ensuring protection against that risk – should thus be understood *prima facie* to raise an issue of discrimination contrary to Art. 3.[509]

Importantly, the implementation of a Convention right may be implicated even in actions or policies which are not on their face linked to an interest protected by the Convention. For example, the nature of the refugee status determination procedure is not specifically regulated by the Refugee Convention, thus suggesting that discrimination in relation to such procedural matters would be unlikely to infringe Art. 3. But to the extent that it can be shown that a heightened risk of rejection is the foreseeable consequence of the American decision to require all Haitians to make their claims to refugee status in the truncated "expedited removal" system (rather than under the more elaborate procedures applicable to the citizens of other states),[510] an issue of compliance with Art. 33's duty of *non-refoulement* arises. Because the duty of *non-refoulement* is set by the Convention itself, the discriminatory nature of the American policy of requiring Haitians to establish their claims under inferior procedures can be challenged by reference to Art. 3's duty of non-discrimination.

[509] In considering whether this system was fair, the English Court of Appeal relied upon the fact that the listed countries – which include, for example, both the Czech Republic and Slovakia, each of which has in fact produced genuine (Roma) refugees recognized as such by many state parties – had been determined by the government to be countries from which applications for protection are to be deemed "clearly unfounded." The Court reasoned that so long as individuals had an opportunity nonetheless to demonstrate that they had an arguable claim, there was no inherent unfairness in a general policy of denying in-country appeal rights to refugee claimants from the listed states: *R (ZL) v. Secretary of State for the Home Department*, [2003] 1 WLR 1230 (Eng. CA, Jan. 24, 2003). In view of the way in which this challenge was framed, the Court was not called upon explicitly to consider the requirements of either Art. 16(1) or Art. 3 of the Refugee Convention. Had it done so, it is likely that the real challenge to a discrimination claim under Art. 3 would have been to decide whether the existence of an individuated "escape valve" was sufficient to render the system as a whole a "reasonable" enterprise. In this regard, it is noteworthy that an American court determined that Art. 16 of the Refugee Convention should be considered in the adjudication of a comparable claim of discrimination. In assessing the legitimacy of a US rule that required stowaways to have their refugee claims determined solely by an official rather than having the usual access to an immigration judge, the US Court of Appeals (4th Cir.) cited Art. 16(1) of the Refugee Convention, noting that it was indirectly incorporated into US law. It went on to determine that the relevant domestic statute should be understood to require the Attorney General "to establish a single procedure for asylum claims that appl[ies] to all applicants without distinction": *Selgeka v. INS*, 184 F 3d 337 (US CA4, June 7, 1999).

[510] See University of California Hastings College of the Law, "Annual Reports on Implementation of Expedited Removal" (1998, 1999, and 2000), available at www.uchastings.edu (accessed Aug. 24, 2004).

In contrast, because the Convention does not establish a right to family reunification, Australia's policy of withholding this right from some refugees, even if that exclusion were implemented on the basis of a prohibited ground, cannot be successfully contested under Art. 3. As in the case of claims of discrimination against refugees generally, however, the Human Rights Covenants provide at least a partial answer to the fact that Art. 3 addresses only discrimination in relation to rights that are specifically provided for in the Refugee Convention. This is because the guarantee of equal benefit of the law without discrimination set by Art. 26 of the Civil and Political Covenant applies not only to matters regulated by that Covenant; rather, "[i]t prohibits discrimination in law or in fact in any field regulated and protected by public authorities."[511] As such, a state bound by both Art. 3 of the Refugee Convention and Art. 26 of the Civil and Political Covenant must now abide by a duty of non-discrimination in the allocation of any legal rights.

A second concern is that the Refugee Convention's duty of non-discrimination is strictly limited to the three listed grounds of race, religion, and country of origin. The protection against discrimination on grounds of "country of origin" is of particular value, given the prevalence of discrimination against refugees based upon their citizenship. There can be little doubt that this ground is sufficient, for example, to contest the nationality-based Saudi refusal to recognize the refugee status of other than Iraqis. A purposive reading of prohibition of discrimination on grounds of "country of origin" would moreover extend also to practices and policies which are aimed at refugees from a given category of states. Thus, the refusals of Uganda, Sudan, and some Southern African states to recognize the refugee status of persons coming from particular groups of states or regions is also inconsistent with the Convention's duty of non-discrimination. Even more clearly, any attempt to implement the European Union treaty sanctioning formal inadmissibility bars on refugees originating inside the Union would contravene Art. 3.[512]

It remains, however, that Art. 3's restriction to only three grounds is oddly conceived. It does not, for example, replicate the United Nations Charter's prohibition of discrimination on the grounds of race, sex, language, or

[511] UN Human Rights Committee, "General Comment No. 18: Non-discrimination" (1989), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 146, para. 12. See generally chapter 2.5.5 above, at pp. 126–128.

[512] G. Goodwin-Gill, "The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam," in E. Guild and C. Harlow eds., *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* 141 (2001), at 158–159. Nor is it an answer to this concern to assert the right of European Union citizens simply to move to another member state, as "free movement within the European Union is to be withheld by most EU states from the union's new members for between five and ten years": R. Prasad, "No place of refuge: What EU enlargement means for the much-persecuted Roma population is that they may have no escape from ethnic violence and abuse," *Guardian*, Oct. 24, 2002, at 21.

religion.[513] Even though the drafters expressed a desire to conform to the Universal Declaration of Human Rights,[514] they refused to sanction an open-ended duty of non-discrimination of the kind contained in the Universal Declaration.[515] Nor does it include the Universal Declaration's explicit references to color, sex, language, political or other opinion, social origin, property, or birth as prohibited bases of discrimination.[516] While some of the drafters defended the scope of Art. 3 on the basis of its symmetry with the usual grounds on which refugees were persecuted, the failure to make reference to political opinion as a prohibited ground of discrimination was acknowledged to be at odds with this understanding of the purpose of Art. 3.[517] Thus, for example, Art. 3 cannot be relied upon to challenge the political bias of China's refusal to protect refugees from North Korea.

A particularly disturbing discussion occurred in response to a proposal that sex be included as a prohibited ground of discrimination. Some states

[513] See chapter 2.4.1 above, at p. 94. In a dissenting opinion in the Full Federal Court of Australia, the view was taken that where differential treatment of certain refugees resulted largely from their inability to communicate in English, this was – if examined on the basis of effects – discrimination on grounds of national origin. "[T]o say that any differential impact is suffered not because of national origin, but rather as a result of individual personal circumstances, appears to me to adopt a verbal formula which avoids the real and practical discrimination which flows as a result of the operation of the [twenty-eight-day limit to seek review]": *Sahak v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 215 (Aus. FFC, July 18, 2002), per North J. The majority of the Court, however, was of the view that "such discrimination or disadvantage as arose from the practical operation of ... the Act ... does not deprive persons of one race of a right that is enjoyed by another race, nor does it provide for differential operation depending upon the race, color, or national or ethnic origin of the relevant applicant. For example, persons whose national origin is Afghani or Syrian are able to take advantage of the relevant right if their comprehension of the English language is sufficient, or if they have access to friends or professional interpreters so as to overcome the language barrier": ibid.

[514] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 11.

[515] The Yugoslavian delegate, Mr. Makiedo, unsuccessfully proposed that the list be made open-ended by the addition of the words "or for other reasons": UN Doc. A/CONF.2/SR.4, July 3, 1951, at 13.

[516] Universal Declaration of Human Rights, UNGA Res. 217A(III), Dec. 10, 1948, at Art. 2.

[517] "Political opinion," together with race and religion, was acknowledged to be one of the three traditional grounds that led persons to seek protection as refugees: Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 11. Yet it was omitted in the statement of the President of the Conference of Plenipotentiaries that "the original idea underlying Article 3 [was] that persons who had been persecuted on account of their race or religion, for example, should not be exposed to the same danger in their country of asylum": UN Doc. A/CONF.2/SR.5, July 4, 1951, at 10. The Yugoslavian delegate later sought (unsuccessfully) to justify an open-ended list of prohibited grounds of discrimination on the basis that "[t]he President had suggested that the text was satisfactory because it in fact enumerated all the reasons for which refugees were generally persecuted. There were, however, others, such as the holding of certain political opinions": Statement of Mr. Makiedo of Yugoslavia, ibid. at 12.

took umbrage at the mere suggestion that any government might be guilty of sex discrimination,[518] while others clearly acknowledged that sex discrimination was common, but ought not to be challenged.[519] One state actually defended its opposition to including sex as a prohibited basis of discrimination on the grounds that to prohibit discrimination on the basis of sex might interfere with cigarette distribution quotas.[520] The lack of serious and principled intellectual engagement in this discussion confirms the essentially arbitrary approach to the decision on which substantive grounds to include in Art. 3. The final 17–1 (5 abstentions) vote in opposition to any expansion of the scope of Art. 3 makes clear, however, that there is no basis upon which to argue that the Refugee Convention was intended to grant refugees the benefit of a comprehensive duty of non-discrimination.[521] The women refugees denied equal access to health facilities, food, and educational opportunities by Ethiopia and Nepal cannot therefore claim protection under Art. 3's duty of non-discrimination.

Here again, however, the interaction between the Refugee Convention and the guarantee of equal benefit of the law without discrimination set by Art. 26

[518] "He would ... oppose the insertion of the words 'and sex' which would imply that certain countries at present practised discrimination on grounds of sex. Such was not the case": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.5, July 4, 1951, at 9. It is interesting to consider whether this position should be taken as an acknowledgment that reception countries *were* engaged in discrimination on the enumerated grounds of race, religion, and country of origin.

[519] "If that were done ... States whose legislation provided for different hours of work for men and women, for instance, might be hesitant to accede to the Convention": Statement of Mr. Warren of the United States, ibid. at 10. "The President added that ... married women might be prevented by national legislation from establishing their own domiciles. The inclusion of a reference to sex in Article 3 might therefore present legislative difficulties for the State in question": Statement of the President, ibid.

[520] "[T]he inclusion of a reference to sex might well conflict with national legislation, and he was therefore opposed to it as well. To quote one example, during a tobacco shortage in Austria the ration for women had been smaller than that for men. It had been alleged in the constitutional courts that that was a violation of the equality of the sexes, but the finding of the courts had been that women needed less tobacco than men. Thus, to include the reference to sex might bring the Convention into conflict with national legislation, because a woman refugee might not obtain as many cigarettes as a male refugee": Statement of Mr. Fritzer of Austria, ibid. at 11. The trivialization of the importance of sex discrimination – not to mention the fact that cigarette distribution is clearly not within the substantive ambit of the Refugee Convention – attest to a shockingly weak grasp of the issues at hand.

[521] Ibid. at 12. Interestingly, the observer from the Confederation of Free Trade Unions resurrected the issue of amending Art. 3 to embrace sex discrimination during final reading of the Convention. There is no reported discussion of her proposal, the present text of Art. 3 being adopted without amendment by a vote of 21–0(1 abstention): UN Doc. A/CONF.2/SR.33, July 24, 1951, at 7.

of the Civil and Political Covenant now establishes an expanded breadth of protection. Art. 3 of the Refugee Convention clearly establishes that there was an explicit intention to insulate refugee rights from discrimination (albeit then on the basis of only the three enumerated grounds). Art. 26 of the Civil and Political Covenant, in turn, today requires that any rights (including to non-discrimination) allocated to one group be presumptively extended to all. Taken together, the protections of Art. 3 of the Refugee Convention must now be read to apply generally, that is without discrimination based upon *any of the grounds* set by Art. 26, namely race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[522]

On the basis of this analysis, the refusal by some states (once including the United States) to protect HIV-positive refugees, and the Pakistani decision to deny certain material assistance rights to less educated, rural refugees – both immune from challenge under Art. 3 of the Refugee Convention standing alone – are nonetheless appropriately subject to scrutiny under Art. 26 of the Civil and Political Covenant (the discrimination against HIV-positive refugees being on the basis of immutable health status, while that against less educated, rural refugees being for reasons of social origin or property). In contrast, even this combination of legal duties may not suffice to find Australia in breach of the duty of non-discrimination when it routinely detains refugees arriving unlawfully, but not those who arrive with some form of legal status. Because the Human Rights Committee has yet clearly to embrace an effects-based approach to analysis of whether actions amount to discrimination for a relevant reason,[523] the fact that the detention policy as written is directed to persons simply on the basis of a

[522] Civil and Political Covenant, at Art. 26.

[523] See chapter 2.5.5 above, at pp. 133–139. It has been argued by some that the impact of Australia's detention policy, and the circumstances in which it was implemented, suggest that it is essentially driven by considerations of race. "Boat people are predominantly South-East Asian asylum-seekers who come to Australia by sea without authority ... They are all unlawful non-citizens ... Although Australia had a detention policy, it had been used only for specific cases and only for individuals until the arrival of the boat people. It was activated to incarcerate this particular group. This discriminatory response arose out of the fear of Australia's 'significant other': Asia": D. McMaster, *Asylum Seekers: Australia's Response to Refugees* (2001), at 2–3. Alternatively, Fonteyne suggests that the underlying basis for discrimination might be the region (or countries) of origin. "[T]he policy in effect violate[d] the non-discrimination standard mandated by Article 3 of the Refugee Convention (as only boat people, and not on-shore applicants are routinely detained, and boat people in reality predominantly come from particular geographic regions)": J.-P. Fonteyne, "Illegal Refugees or Illegal Policy?," in Australian National University Department of International Relations ed., *Refugees and the Myth of the Borderless World* (2002), at 16.

failure to comply with immigration laws may well defeat the discrimination claim.[524]

Even where it is necessary to rely on the non-discrimination duty set by Art. 26 of the Covenant, Art. 3 of the Refugee Convention may be of real value in addressing the central question in non-discrimination analysis of whether a differential allocation of refugee rights may be found to be "reasonable." In answering this question, reliance should be placed on the fact that Art. 3 of the Refugee Convention defines a series of entitlements that are presumptively to follow from refugee status. These include not only rights which mirror those found in the Covenants and elsewhere (e.g. freedom of movement, right to work), but also other rights uniquely relevant to the situation of refugees (e.g. non-penalization for illegal entry, *non-refoulement*, and access to identity documents). A state party seeking to justify differential protection of some part of the refugee population on any status-based ground therefore faces a particular hurdle when the subject matter of the differentiation is a right expressly guaranteed in the Refugee Convention itself: because these are rights that are explicitly intended to inhere in persons who are refugees *simply because* they are refugees, the government withholding these rights should be expected to overcome that presumption in seeking to demonstrate the reasonableness of its failure to treat all refugees equally.

Despite both its direct and indirect value to contesting discrimination against subsets of the refugee population, the efficacy of Art. 3 is nonetheless sometimes questioned on the grounds that it appears to be overridden by Art. 5 of the Refugee Convention, which provides that "[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention."[525] Because Art. 3 is subordinate to conflicting provisions of the Convention,[526] it is arguable that Art. 5 authorizes states to grant superior rights to preferred categories of refugees, so long as no class receives treatment below the minimum standard

[524] The issue of whether discrimination against "boat people" was a violation of the duty of non-discrimination on the basis of "other status" was not adjudicated by the Human Rights Committee in *A v. Australia*, UNHRC Comm. No. 560/1993, UN Doc. CCPR/C/59/D/560/1993, decided April 30, 1997. Australia's detention of the "boat people" was, however, found to violate Arts. 9(1), 9(4), and 2(3) of the Civil and Political Covenant. The question of Australia's breach of the duty to avoid arbitrary detention is examined in chapter 4.2.4 below, at p. 430; the only point being made here is that the approach to detention is unlikely to be determined to be *discriminatory*, not that it is lawful. Even if the status of "unlawful entrant" is deemed a form of "other status" for purposes of non-discrimination analysis, the deference traditionally afforded states to engage in differential treatment based upon non-citizen status would likely result in a finding of reasonable justification, thereby defeating the claim of discrimination: see chapter 2.5.5 above, at pp. 129–133.

[525] See generally chapter 2.4.5 above, at pp. 128–145. [526] See text above, at p. 248.

of treatment required by the Convention.[527] Particularly because Art. 5 was originally incorporated in the Convention immediately after the duty of non-discrimination,[528] it may therefore be read to authorize governments to depart from the principle of Art. 3 if a subset of the refugee population is thereby benefited.[529]

The better view, however, is that Art. 5 should be given a narrow reading.[530] As previously argued, the drafting history suggests that it was addressed to the maintenance of certain historical advantages accorded refugees at the time the Refugee Convention was drafted.[531] In any event, there is nothing in Art. 5 that *requires* a reading that abrogates Art. 3's duty of non-discrimination. If understood as an interpretive provision that encourages governments to uphold standards higher than those mandated by the Refugee Convention,[532] Art. 5 and Art. 3 can clearly be read in harmony. This means, however, that Art. 5 cannot be relied upon to countenance privileges granted to only a select subset of refugees subsequent to the entry into force of the Refugee Convention. Rights and benefits may be granted to refugees apart from the Convention, but they may not be differentially allocated on the grounds of race, religion, or country of origin. Thus, for example, if access to the labor market on terms of parity with nationals is granted immediately to any part of the refugee population, it must be extended to all absent a showing of differing capabilities and potentialities sufficient to justify the preferred treatment of only a subset of the refugee population.

In sum, Art. 3 of the Refugee Convention and cognate provisions of the Human Rights Covenants combine to provide a solid guarantee of non-discrimination between and among refugee sub-populations. While to a real extent the Covenants provide the greatest value, Art. 3 of the Refugee Convention plays an important role by defining a core sphere of interests in regard to which the allocation of differential rights to refugees should be presumed not to be justifiable. Art. 3 of the Refugee Convention, in other words, acts as an important check on the possibility of an overly broad interpretation of "reasonableness" that could undermine the scope of the

[527] See e.g. S. Blay and M. Tsamenyi, "Reservations and Declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees," (1990) 2(4) *International Journal of Refugee Law* 527 (Blay and Tsamenyi, "Reservations"), at 556–557.

[528] UN Doc. E/AC.32/SR.43, Sept. 28, 1950, at 14.

[529] See Weis, *Travaux*, at 44; and Robinson, *History*, at 76.

[530] See chapter 2.4.5 above, at pp. 109–110.

[531] See chapter 2.4.5 above, at pp. 108–109.

[532] There was clearly interest in encouraging states to grant protections that exceed those stipulated by the Refugee Convention. See e.g. the exchange between Mr. Warren of the United States and Mr. Herment of Belgium: UN Doc. A/CONF.2/SR.5, July 4, 1951, at 8; and generally, chapter 2.4.5 above.

general duty of non-discrimination. While it remains unclear whether Art. 26 of the Civil and Political Covenant will force states increasingly to equate refugees to nationals for the purpose of rights allocation, Art. 26 has considerable value as a complementary prohibition of *discrimination between classes of refugees* in the allocation of a wide-ranging set of rights, and on the basis of any type of actual or imputed group identity.

Equally important, the drafting history of the Refugee Convention makes it clear that refugees are owed a duty of non-discrimination wherever they are encountered, not just once admitted to an asylum country. And because Art. 26 of the Civil and Political Covenant requires that all laws must extend protection without discrimination "on any ground," governments that are bound by both treaties must now extend this broad-ranging protection against discrimination to claims grounded in any form of status, not just in relation to the three grounds set out in Art. 3 of the Refugee Convention.

3.5 Restrictions on refugee rights

A state that makes no reservation to the terms of the Convention, and which does not avail itself of the formal option to limit its obligations temporally[533] or geographically,[534] may validly restrict refugee rights under only one of two very narrow circumstances. First, a small number of Convention rights may be withdrawn for reasons of security or criminality, in accordance with the express terms of the relevant articles of the Convention.[535] Second, the rights of persons whose refugee status has yet to be confirmed may be provisionally suspended on national security grounds during a war or other grave emergency.

[533] This can be achieved by acceding to the Refugee Convention, without also acceding to the Refugee Protocol. See chapter 2.4.3 above, at pp. 97–98.

[534] A state may restrict its obligations to persons who became refugees as the result of events occurring in Europe by acceding to the Refugee Convention, but not to the Refugee Protocol, and making a declaration at the time of signature, ratification, or accession specifying that it is governed by the interpretation of the refugee definition set out in Art. 1(B)(1)(a) of the Refugee Convention. Those states which became parties to the Refugee Convention and which elected to adopt the interpretation set out in Art. 1(B)(1)(a) prior to 1967 may also validly retain that geographical limitation, even while broadening the temporal scope of their obligations by accession to the Refugee Protocol. Other governments that opt to bind themselves to refugees without temporal limitation by accession to the Refugee Protocol must, however, also accept obligations without geographical limitation. See chapter 2.4.3 above, at pp. 97–98.

[535] These include Art. 33 (*non-refoulement*: "may not, however, be claimed . . . [if] danger to the security of the country . . . or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country"); Art. 32 (freedom from expulsion: "save on grounds of national security or public order"); and Art. 28 (travel documents: "unless compelling reasons of national security or public order otherwise require"). See generally chapters 4.1.4, 5.1, and 6.6 below.

The provisional measures taken for security reasons during a grave emergency must, however, come to an end once refugee status is verified. Refugees must also be exempted from any peacetime measures of retaliation or retorsion imposed on the grounds of their formal nationality. And most fundamentally, the Refugee Convention – in contrast, for example, to the Civil and Political Covenant – does not grant governments a general right to suspend or withhold Convention rights, even under emergency situations.

3.5.1 Suspension of rights for reasons of national security

> **Refugee Convention, Art. 9 Provisional measures**
> **Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.**

The drafters of the Convention considered, but rejected, an all-embracing power of derogation in time of national crisis.[536] The British proponent of the derogation clause wanted governments to be in a position to withhold rights from refugees if faced with a mass influx during wartime or other crisis. Because it would be impossible immediately to verify whether each person should be excluded from refugee status on security grounds,[537] governments might otherwise be effectively compelled to grant rights to persons who represented a danger to the host state.[538] His concern was valid, since a significant number of rights accrue to refugees even before their status has

[536] "A contracting State may at a time of national crisis derogate from any particular provision of this Convention to such extent only as is necessary in the interests of national security": Proposal of the United Kingdom, UN Doc. E/AC/32/L.41, Aug. 15, 1950.

[537] Refugee Convention, at Art. 1(F). The exclusion clauses which form an integral part of the definition of refugee status also provide critical safeguards for governments. On this topic, see generally Grahl-Madsen, *Status of Refugees I*, at 262–304; and Hathaway, *Refugee Status*, at 214–233.

[538] "He recalled the critical days of May and June 1940, when the United Kingdom had found itself in a most hazardous position; any of the refugees within its borders might have been fifth columnists, masquerading as refugees, and it could not afford to take chances with them. It was not impossible that such a situation could be reproduced in the future": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 8. See also the comments of Mr. Theodoli of Italy, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 20: "[T]he main concern was to know whether at a time of crisis the Contracting States could resort to exceptional measures. He referred to the situation of Italy at the outset of the war when thousands of refugees had flocked to the frontiers of Italy."

been formally determined.[539] Yet, as the American delegate insisted, it was equally important that any exception to the duties owed refugees be limited to "very special cases."[540] The focus of attention therefore became how to ensure that states faced with a critical emergency could protect vital national security interests during the time required to investigate particular claims to refugee status.[541]

The resultant Art. 9 grants state parties the discretion to withhold rights from refugees "in time of war or other grave and exceptional circumstances." Serious economic difficulties do not warrant a suspension of rights.[542] Nor is it sufficient for a government to invoke "public order" concerns,[543] or even "national security" interests.[544] While the original formulation, in which governments could suspend rights only during a "national emergency," was

[539] See generally chapters 3.1.1, 3.1.2, and 3.1.3 above. The assurance of the representative of the United States that "the doubts of the United Kingdom representative might be resolved by the fact that any Government would be free to hold that any individual was not a *bona fide* refugee, in which case none of the provisions of the convention would apply to him" failed to recognize this critical point: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 8. See also UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 19.

[540] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 21. In particular, Mr. Henkin agreed that the Convention "ought not to prevent Governments in time of war from screening refugees to weed out those who were posing as such for subversive purposes." His concern was simply that "any limitation . . . ought to be defined more precisely than had been proposed, rather than leaving it open to countries to make far-reaching reservations. He would like the limitation to be as narrow as was possible": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 6.

[541] "The President recalled that . . . there had been no doubt that dangerous persons, such as spies, had to be dealt with under national laws. The question had then been raised as to the action to be taken in respect of refugees on the declaration of a state of war between two countries, which would make it impossible for a particular State to make an immediate distinction between enemy nationals, in the country, supporting the enemy government, and those persons who had fled from the territory of that enemy country. The Ad Hoc Committee had come to the conclusion that, while a government should not be in a position to treat persons in the latter category as enemies, it would need time to screen them": Statement of the President, Mr. Larsen, UN Doc. A/CONF.2/SR.6, July 4, 1951, at 15.

[542] Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 21.

[543] A suggestion to adopt this traditional formulation made by Mr. Perez Perozo of Venezuela was not taken up by the drafters: UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 10. Thus, for example, the suggestion by Zimbabwe that it would "round up" urban refugees not employed or attending school in urban centers and remove them to refugee camps because "[s]ome of the refugees could end up being destitute or getting involved in illegal activities or prostitution for survival" would not be justified under Art. 9: see *Daily News* (Harare), May 20, 2002.

[544] This language was suggested by Mr. Shaw of Australia: UN Doc. A/CONF.2/SR.6, July 4, 1951, at 13. It was, however, "felt that there might be reasonable grounds for objecting to the Australian proposal that the phrase 'or in the interests of national security' should be

ultimately softened,[545] more than just "grave tension"[546] is clearly required. The circumstances must truly be "exceptional."[547]

Assuming relevant exceptional circumstances to exist, officials may take only "measures which [the state] considers to be *essential* to the national security in the case of a particular person [emphasis added]." The specific steps must therefore follow from a good faith assessment of the risk to national security that would follow from a failure to act.[548] Historically, the purpose of Art. 9 was to allow for flexibility where the government of the asylum state is faced with the risk of overthrow by illegal means.[549] This is in line with Grahl-Madsen's classic understanding of national security:

inserted, since it would enable a State to take exceptional measures at any time, and not only in time of war or a national emergency": Statement of Mr. Hoare of the United Kingdom, ibid. at 14. See also Statements of Mr. Chance of Canada and Baron van Boetzelaer of the Netherlands, ibid. In the result, only a subset of national security concerns, namely those that arise during war or other grave and exceptional circumstances, were deemed sufficient to justify provisional measures.

[545] This standard was adopted by the Ad Hoc Committee on Refugees and Stateless Persons at its Second Session: UN Doc. E/AC.32/8, Aug. 25, 1950, at 16. It was, however, dropped at the Conference of Plenipotentiaries, at which it was noted that "the expression 'national emergency' seemed unduly restrictive": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.6, July 4, 1951, at 14.

[546] The Australian delegate proposed the language "time of grave tension, national or international," which was explicitly rejected by the Conference of Plenipotentiaries: UN Doc. A/CONF.2/SR.6, July 4, 1951, at 16. The French view that derogation should be allowed in the event of "cold war, approximating to a state of war, tension, a state of emergency or an international crisis calling for certain precautions" must therefore also be taken to have been impliedly rejected: ibid. at 14.

[547] This language was proposed by the representative of the Netherlands, and adopted by the British delegate in the motion which ultimately was approved at the Conference of Plenipotentiaries: ibid. at 16. It remains that this is a more fluid standard than, for example, that subsequently adopted in the Civil and Political Covenant, which allows a suspension of rights only if there is a "public emergency which threatens the life of the nation": Civil and Political Covenant, at Art. 4(1).

[548] "It had therefore been decided that there should be a blanket provision whereby, *in strictly defined* circumstances of emergency, derogation from any of the provisions of the Convention would be permitted in the interests of national security [emphasis added]": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.28, July 19, 1951, at 6.

[549] "It must be borne in mind that . . . each government had become more keenly aware of the current dangers to its national security. Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against the country of their asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 8. See also Statement of Mr. Chance of Canada, ibid.: "In drafting [Art. 33], members of [the Ad Hoc] Committee had kept their eyes on the stars but their feet on the ground. Since that time, however, the international situation had deteriorated, and it must be recognized,

> If a refugee is spying against his country of residence, he is threatening the national security of that country ... The same applies if he is engaged in activities directed at the overthrow by force or other illegal means of the government of his country of residence, or in activities which are directed against a foreign government, which as a result threatens the government of the country of residence with intervention of a serious nature.[550]

There is also little doubt that national security may be at risk where there is a fundamental threat to a state's citizens, wherever they may be located.[551] But as Lord Slynn observed for the House of Lords in *Rehman*, "I do not accept that these are the only examples of action which makes it in the interests of national security to deport a person."[552]

In line with greater contemporary concern about the risks of terrorism,[553] senior courts have come to embrace a more ample understanding of national security. They have expressed concern that the traditional definition of national security, under which there is a requirement to show the risk of a direct impact on the host state,

> limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defense but democracy, the legal and constitutional systems of the state, need to be protected. I accept that there must be a real possibility of an adverse effect on the [host state] for what is done by the individual under inquiry, but I do not accept that it has to be direct or immediate.[554]

albeit with reluctance, that at present many governments would find difficulty in accepting unconditionally the principle [of *non-refoulement*]."

[550] A. Grahl-Madsen, "Expulsion of Refugees," in P. Macalister-Smith and G. Alfredsson eds., *The Land Beyond: Collected Essays on Refugee Law and Policy by Atle Grahl-Madsen* 7 (2001), at 8.

[551] This was accepted even at the initial hearing level: *Rehman v. Secretary of State for the Home Department*, [1999] INLR 517 (UK SIAC, Sept. 7, 1999) per Potts J, at 528. This decision was subsequent considered in *Secretary of State for the Home Department v. Rehman*, [2000] 3 WLR 1240 (Eng. CA, May 23, 2000); and in *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47 (UK HL, Oct. 11, 2001), discussed below.

[552] *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47 (UK HL, Oct. 11, 2001), per Lord Slynn of Hadley at para. 16.

[553] "It seems to me that, in contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the United Kingdom. The means open to terrorists both in attacking another state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may be capable of reflecting on the safety and well-being of the United Kingdom or its citizens. The sophistication of means available, the speed of movement of persons and goods, the speed of modern communication, are all factors which may have to be taken into account in deciding whether there is a real possibility that the national security of the United Kingdom may immediately or subsequently be put at risk by the action of others": ibid.

[554] Ibid. See also *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at para. 135: "It is clear from the *travaux préparatoires* for the Refugee Convention that there

Thus, the House of Lords in *Rehman* expressly authorized the executive to adopt a "preventative or precautionary" approach to the assessment of risks to national security,[555] finding that "[t]he United Kingdom is not obliged to harbour a terrorist who is currently taking action against some other state (or even in relation to a contested area of land claimed by another state) if that other state could realistically be seen by the [executive] as likely to take action against the United Kingdom and its citizens."[556]

The Supreme Court of Canada not only endorsed the logic of the *Rehman* decision, but defined a relatively liberal evidentiary framework for meeting the broadened test of a risk to national security. In *Suresh*, the Court first acknowledged that not every danger to the public of a host state rises to the level of a threat to national security,[557] and that it was generally accepted that "under international law the state must prove a connection between the terrorist activity and the security of the deporting country."[558] In line with the House of Lords, it held that "possible future risks must be considered,"[559] and that the risk to national security "may be grounded in distant events that indirectly have a real possibility of harming Canadian security."[560] But in defining how the ultimate question of a "real and serious possibility of adverse effect [on] Canada"[561] should be proved, the Supreme Court of Canada went beyond the approach of the House of Lords to endorse what appears to be an evidentiary presumption grounded in modern global interdependence, namely that proof of a risk to the security of another country is generally probative of a threat to Canadian national security:

> International conventions must be interpreted in the light of current conditions. It may once have made sense to suggest that terrorism in one country *did not necessarily implicate* other countries. But after the year 2001, that approach is no longer valid [emphasis added].[562]

was intended to be a margin of appreciation for States in the interpretation of that phrase ... Indeed, one would expect that views on security could well differ between States, depending on the particular circumstances of those States ... Views as to what would constitute a danger to national security can also legitimately change over time."

555 *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47 (UK HL, Oct. 11, 2001), per Lord Slynn of Hadley at para. 17.

556 Ibid. at para. 19.

557 *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002), at para. 84.

558 Ibid. at para. 85, citing J. Hathaway and C. Harvey, "Framing Refugee Protection in the New World Disorder," (2001) 34(2) *Cornell International Law Journal* 257, at 289–290.

559 *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002), at para. 88.

560 Ibid. The views of the House of Lords and Supreme Court of Canada on this point were adopted by the New Zealand Court of Appeal in *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at para. 147.

561 *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002), at para. 88.

562 Ibid. at para. 87.

The implied assertion that terrorism in one country necessarily implicates the security of other countries is surely an empirical overstatement. But if understood to suggest instead that a connection is more likely than not, there are good grounds to accept the notion of a (rebuttable) presumption, namely that proof of risk to the most basic interests of one state by reason of the refugee's actions justifies a *prima facie* belief that the refugee poses a risk to the national security of his or her host state. This more moderate notion seems to infuse the Court's summary of the meaning of national security:

> [A] person constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country *is often dependent* on the security of other nations. The threat must be "serious," in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible [emphasis added].[563]

In sum, a refugee poses a risk to the host state's national security if his or her presence or actions give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions.

In an appropriate case, provisional measures necessary to counter a threat to national security may involve suspension of any of the rights set by the Refugee Convention,[564] even authorizing states to mandate generalized internment pending status determination.[565] As such, the recent decision of the United States that critical national security interests require the detention of persons applying for recognition of refugee status from any of more than thirty Arab and Muslim countries could potentially be justifiable within the

[563] Ibid. at para. 90.

[564] See Mr. Hoare's intervention to this effect at UN Doc. A/CONF.2/SR.6, July 4, 1951, at 13. Because Art. 9 explicitly takes precedence over any contrary requirement in the Refugee Convention ("Nothing in this Convention shall prevent a Contracting State . . . from taking provisionally measures which it considers to be essential"), a government is not required to respect even the limitations on security-based resort to expulsion and *refoulement* set out in Art. 32 and 33 so long as the criteria of Art. 9 are satisfied. But see the discussion of the requirement that the provisional measures be "essential," at p. 267 below.

[565] "Everyone would agree that a Government in time of crisis might be forced to intern refugees in order to investigate whether they were genuine or not and therefore a possible danger to the security of the country": Statement of Mr. Bienenfeld of the World Jewish Congress, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 18. See also Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.28, July 19, 1951, at 6: "The kind of action which he envisaged States might take under the provisions of [Art. 9] would be, for example, the wholesale immediate internment of refugees in time of war, followed by a screening process, after which many could be released."

parameters of what Art. 9 allows.[566] But because only "essential" restrictions are authorized, the state is limited to taking measures that are logically connected to avoidance of the threat to national security.[567] While provisional measures may be taken collectively against all refugees, or in relation to a national or other subset of the refugee population,[568] this kind of wholesale suspension of rights will be justifiable as "essential" only in response to an extremely compelling threat to national security.[569] Thus, for example, there can be no presumption that the existence of a "mass influx" of refugees necessarily grants states the authority provisionally to suspend rights.[570]

[566] "The Department of Homeland Security announced . . . 'Asylum applications from nations where al-Qa'ida, al-Qa'ida sympathisers and other terrorist groups are known to have operated will be detained for the duration of their processing period' . . . It described the initiative as temporary, 'reasonable and prudent'": A. Gumbel, "On the brink of war: US to round up all Muslim and Arab asylum-seekers: Security," *Independent*, Mar. 19, 2003, at 10.

[567] In his description of the scope of "exceptional measures," the British representative to the Ad Hoc Committee made clear that actions taken must be directly related to the threat perceived. "He wished to explain that the term 'exceptional measures' covered not only internment but such measures as restrictions on the possession of wireless apparatus, in order to prevent the reception of code messages and the conversion of receiving into transmitting apparatus": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 8.

[568] The reference to measures "in the case of a particular person" was agreed to without any substantive discussion, apparently on the grounds that the original reference to "any person" was unduly general relative to the usual reference in the Convention to "refugees": UN Doc. A/CONF.2/SR.6, July 4, 1951, at 13. Taking account of the purpose of the article as a whole, Grahl-Madsen's view that this reference is intended to "restrict the applicability of provisional measures to individual persons, thus ruling out large scale measures against groups of refugees" should not be adopted: Grahl-Madsen, *Commentary*, at 45. Measures are taken in the case of a particular person whether they are *directed against* a particular person, or simply *define the treatment* of a particular person on the basis of a generalized assessment. This clause may therefore be read to allow provisional measures to be taken in particular cases so long as those measures derive from a (specific or general) assessment that national security would be jeopardized but for the actions in question.

[569] The requirement that the provisional "measures . . . *be essential* . . . in the case of a particular person [emphasis added]" can be read to mean that the government in question should satisfy itself that the consequential violation of the human rights of particular refugees is an unavoidable necessity to avert the security risks occasioned by war or other exceptional circumstances. A refusal to sanction resort to "avoidable" provisional measures is consistent with the insistence of the drafters that this authority be "exceptional" and reserved for "very special cases": see text above, at pp. 261–262.

[570] Some scholars nonetheless erroneously suggest that it is permissible to deliver less than full respect for refugee rights in the case of a "mass influx." B. S. Chimni, for example, has written that "[i]t is often the complaint of states in the [South Asian] region that the rights regime embodied in the 1951 Convention is unsuited to the conditions of the poor world as they do not have the resources to fulfill their obligations. In this respect there is a

Perhaps most important, Art. 9 does not authorize generalized derogation on an ongoing basis, but only as a provisional measure.[571] A state that wishes to avail itself of the provisional measures authority must proceed in good faith to verify the claims to refugee status of all persons whose rights are thereby suspended.[572] If a particular person is found not to be a Convention refugee, including on the basis of criminal or other exclusion under Art. 1(F), no rights under the Refugee Convention accrue, and removal from the territory or the imposition of other restrictions is allowed.[573] If, on the other hand, an individual is found to satisfy the Convention refugee definition, Art. 9 establishes a presumption that the provisional measures shall come to an end.[574]

Provisional measures may be maintained in force in a particular case only if security concerns remain to be investigated even at the time a determination of refugee status is made. War or other exceptional circumstances might deny a government the resources routinely to investigate each applicant for refugee status. Inquiries would instead be instigated only in response to a particular concern which might or might not surface in time to be thoroughly canvassed before a determination of refugee status was made. If the authorities of an asylum state were denied the ability to investigate even late-

need for research to determine a minimal core of assistance and the bundle of rights to be applicable in situations of mass influx": B. Chimni, "The Law and Politics of Regional Solution of the Refugee Problem: The Case of South Asia," RCSS Policy Studies 4, Regional Centre for Strategic Studies, Colombo (1998), at 13.

571 This is, of course, clear from the literal text of the article, which explicitly sanctions a state "taking provisionally measures which it considers to be essential to the national security . . . pending a [refugee status] determination." Indeed, while the Australian representative argued perhaps most strenuously for a wide-ranging power of derogation, even he made clear "that it was never his delegation's intention to open the way to an indefinite extension of the circumstances in which states could take exceptional measures": Statement of Mr. Shaw of Australia, UN Doc. A/CONF.2/SR.6, July 4, 1951, at 14.

572 "During the war . . . [i]t was impossible to give all persons entering the country as refugees a thorough security examination, which had to be deferred till exceptional circumstances made it necessary": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 8. As Robinson observes, "[t]he purpose of Art. 9 is to permit the wholesale provisional internment of refugees in time of war, followed by a screening process": Robinson, *History*, at 95.

573 Countervailing domestic or international legal obligations, for example duties to avoid removal under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/46, adopted Dec. 10, 1984, entered into force June 26, 1987, may operate independently to prevent removal from the asylum country.

574 Robinson argues that the provisional measures "have to be suspended if the person involved can prove conclusively his status as a refugee": Robinson, *History*, at 95. The literal meaning of Art. 9 cannot, however, sustain this interpretation. The requirement that in the case of a refugee "the continuance of such measures [must be] necessary in his case in the interests of national security" is, however, a sufficient basis to argue that absent such a finding, provisional measures must be terminated.

breaking security risks in a specific case, they might take a less generous attitude toward the admission of refugees.[575]

The drafting Committee therefore approved an exception to the presumption that a positive determination of refugee status ends the application of provisional measures. If there is a specific finding in regard to a particular refugee "that such measures are still necessary in his case in the interests of national security,"[576] the Committee agreed that it should be possible to continue provisional measures for the time it takes to investigate the concerns. As an exception to the general purpose of Art. 9, however, this authority must be restrictively construed. In particular, it authorizes only the continuance of provisional measures, not the establishment of indefinite restrictions in the interests of national security.[577] Nor does it provide any general authority to limit the rights of persons already recognized to be Convention refugees.[578]

The duty to terminate provisional measures does not mean, however, that the government of the asylum country is prevented from protecting itself against risks to its national security posed by a person recognized as a genuine refugee. It must, however, ground its actions in the authority of a particular article of the Convention, rather than relying on the generic authority of Art. 9.[579] There is therefore no logical inconsistency between the strictly temporary and situation-specific nature of provisional measures and the understandable concern of governments to be in a position to safeguard their basic interests.

In sum, provisional measures may be taken only in time of war or comparable exceptional circumstances, and on the basis of a good faith assessment that they are essential to protection of the receiving state's most vital national interests. The specific actions authorized are broad-ranging, though they must be logically connected to eradication of the security concern and be justifiable as essential, taking full account of the particularized harms

[575] "In his country refugees were granted legal status after a previous examination on their entering the country; later information obtained sometimes threw new light on their possible danger to the community. If the State were not permitted to take measures against refugees in the light of such later information, it would be less willing to accord them citizen status": Statement of Mr. Winter of Canada, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 10.

[576] UN Doc. E/1850, Aug. 25, 1950, at 16. There is no indication that the rephrasing of the provision ("that the continuance of such measures is necessary in his case") was intended to effect a substantive change of any kind.

[577] This is clear both from the reference to the continuance of "such measures," and from the inclusion of the provision as part of an article expressly dedicated to provisional measures.

[578] Art. 9 authorizes the "continuance" of provisional measures in exceptional cases, but not their initiation or reestablishment.

[579] See p. 260 above, at n. 535.

consequentially occasioned. Provisional measures may not be of indefinite duration, but instead normally come to an end if and when an individual's refugee status is formally verified. While they may exceptionally be continued where case-specific national security concerns have not been resolved by the time refugee status is formally determined, provisional measures may not otherwise be applied against persons already recognized as Convention refugees.

3.5.2 Exemption from exceptional measures

> **Refugee Convention, Art. 8 Exemption from exceptional measures**
> **With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.**

Outside the context of war or comparable crisis, the drafters of the Refugee Convention opposed any general right of states to suspend refugee rights.[580] Of particular concern was the practice following the Second World War of subjecting refugees to confiscatory and other penalties imposed on enemy aliens:

> After the Second World War, many refugees who had been persecuted by the Governments of the Axis countries were subjected to exceptional measures taken against the nationals of enemy countries (internment, sequestration of property, blocking of assets, etc.) because of the fact that formally they were still *de jure* nationals of those countries. The injustice of such treatment was finally recognized and many administrative measures (screening boards, special tribunals, creation of a special category of "non-enemy" refugees, etc.) were used to mitigate the practice.[581]

To ensure that refugees would not be stigmatized by the fact of their formal nationality,[582] the International Refugee Organization played an instrumental

[580] See text above, at p. 261.

[581] Secretary-General, "Memorandum," at 48.

[582] The nature of the dilemma is neatly summarized in Ad Hoc Committee, "First Session Report," at 42: "Unless a refugee has been deprived of the nationality of his country of origin he retains that nationality. Since his nationality is retained, exceptional measures applied . . . to such nationals would be applied to him. The article provides therefore that exceptional measures shall not be applied only on the grounds of his nationality." The French delegate to the Ad Hoc Committee indicated that "the word 'formally' meant

role in persuading governments to adopt Art. 44 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War:

> [T]he Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any Government.[583]

As the Secretary-General convincingly argued, "[i]f this rule is to be applied in time of war, a similar rule must *a fortiori* be applied in time of peace. The object of Art. [8] is to remove both the person and property and interest of refugees from the scope of exceptional measures."[584]

Nor was the concern of the drafters restricted to the particular measures that had been taken at the end of the Second World War. The French representative to the Ad Hoc Committee observed that refugees were sometimes penalized during peacetime on the grounds of their formal nationality by subjection to both retaliatory measures and restrictions resulting from economic or financial crisis.[585] While states required a margin of discretion to withhold rights from persons claiming refugee status during wartime, Mr. Juvigny insisted that there was no basis to assert a comparable prerogative during peacetime.[586] The decision was therefore taken to separate the rules relating to exceptional measures applicable only during war or comparable emergencies (Art. 9) from those governing measures which might be taken at any time (Art. 8).[587]

'legally'": Statement of Mr. Juvigny, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 7. Grahl-Madsen concludes that "[t]he word 'formally' means 'legally' or *de jure*, that is to say, according to the municipal law of the State concerned": Grahl-Madsen, *Commentary*, at 40.

583 Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, done Aug. 12, 1949, entered into force Oct. 21, 1950, at Art. 44. The Red Cross recently affirmed that Art. 8 of the Refugee Convention "clearly reflects Article 44 of the Fourth Geneva Convention": "Humanitarian Debate: Law, Policy, Action," in (2001) 83(843) *International Review of the Red Cross* 633.

584 Secretary-General, "Memorandum," at 48.

585 Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 5.

586 The French representative noted the importance of "making a distinction between two types of exceptional measures ... namely: on the one hand, measures taken in peacetime or during crises of a non-military type ... and, on the other hand, measures taken in exceptional circumstances which affected peace or national security. The provisions relating to the latter type of measures would naturally be more severe than the former": ibid.

587 "The measures referred to in article [8] were not designed only for times of emergency. A second paragraph should be added to cover the particular case of emergency in which the rights of refugees could be restricted, but only as little as was absolutely necessary": Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 22. In the Report of the Ad Hoc Committee, the two concerns were therefore addressed in different paragraphs of the same article. The Report notes simply that "the Committee thought it advisable to add a paragraph in order to clarify the application of this article in regard to

The logic of exempting refugees from measures of retaliation or retorsion is fairly straightforward. The sorts of penalties sometimes applied against the citizens of a particular nationality during peacetime – for example, freezing or blocking of assets, the denial of visas, or curbing of civil liberties – are intended to punish or pressure the state of nationality to act or refrain from acting in a particular way. As observed above in the discussion of reciprocity,[588] there is little reason to believe that a state which is the target of acts of retaliation or retorsion would be influenced by the suffering of persons who have rejected its protection by the act of seeking refugee status. The injustice of including refugees in the scope of exceptional measures is therefore clear.[589]

The context governed by Art. 8 is quite broad.[590] It is applicable during time of war or other critical national emergency, though the more specific provisions of Art. 9 grant states expanded authority over refugees still seeking recognition of their status in such extreme circumstances. In addition, Art. 8 governs resort to exceptional measures during a "cold war, approximating a state of war, tension, a state of emergency or an international crisis calling for certain internal precautions."[591] There could also be a temporary dispute between states, for example in consequence of trade concerns or the failure to pay damages.[592] Diplomatic relations may have been suspended or broken off completely. In all such circumstances, whatever measures may be taken *en bloc* against the citizens of the offending state may not be applied against refugees, irrespective of the duration and character of a particular refugee's presence.[593]

measures related to national security in time of war and national emergency": Ad Hoc Committee, "Second Session Report," at 12. The Conference of Plenipotentiaries adopted a British proposal (UN Doc. A/CONF.2/26) to separate the two paragraphs into distinct articles of the Convention: UN Doc. A/CONF.2/SR.6, July 4, 1951, at 16.

588 See chapter 3.2.2 above, at pp. 204–205.

589 The over-breadth of such measures may also violate the duty of non-discrimination. See chapter 2.5.5 above, at pp. 144–145.

590 "[I]t was impossible to legislate for future possible contingencies ... It was, therefore, important that [Art. 8] should be made as flexible as possible": Statement of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.26, July 19, 1951, at 9.

591 Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.6, July 4, 1951, at 14.

592 In the Ad Hoc Committee, the Israeli representative "inquired whether the article was broad enough to include possible retaliation and retorsion by countries against subjects of States with which they had a temporary disagreement. He did not think that exceptional measures of that kind should apply to refugees from countries against whose subjects such measures were directed": Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 7. The Chairman, Mr. Chance of Canada, confirmed that such measures would be precluded by Art. 8: ibid. at 8.

593 Indeed, Grahl-Madsen suggests that "[t]here can be no doubt that the Article applies to all Convention refugees, irrespective of whether they are present in the territory of the Contracting State concerned": Grahl-Madsen, *Commentary*, at 40.

There are two important qualifications to this general rule. First, the duty to exempt refugees from exceptional measures governs only measures taken solely on the grounds of nationality.[594] Because the objective of Art. 8 is to avoid unfairly stigmatizing refugees on the basis of their possession of a formal, but de facto ineffective, nationality,[595] only "wholesale measures"[596] defined by nationality contravene Art. 8. Robinson observes that

> a state is free to apply to a refugee exceptional measures if they are taken on grounds other than his [formal] nationality. Thus Art. 8 ... would not hinder the application of exceptional measures on account of the economic or political activity or special unwanted contacts of a refugee, if such activity or contacts are, in general, a reason for applying all or some of the exceptional measures.[597]

As this analysis suggests, the critical issue is the generality of the measure in question.[598] So long as the exceptional measure is not aimed simply at persons of a particular nationality, but is instead applicable to all persons who meet the contingent standard that governs the right suspended, then refugees cannot complain that they too are subject to its impact.[599] For

[594] "[T]he word 'solely' ... indicated that, while exceptional measures could be taken against refugees, they could not be taken on the grounds of nationality alone": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 7. This understanding was affirmed by both the Turkish representative, ibid., and by the Chairman, Mr. Chance of Canada, ibid. at 8: "[T]he article would prevent exceptional measures of retaliation or retorsion from being applied to refugees solely on the grounds of their nationality."

[595] "Article 8 does not mention former nationals of a foreign State. If, however, measures are taken against persons solely because they are, or have been (at any time) or are suspected of being, nationals of a certain State, it goes without saying that the case will fall within the scope of Article 8": Grahl-Madsen, *Commentary*, at 40. See also Statement of the President, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 6; and Robinson, *History*, at 93–94: "[I]n practice denaturalized citizens of an enemy state or persons whose origin was in such a state were frequently subjected to all or some of the measures taken against nationals. A proper interpretation of Art. 8 would lead us to the conclusion that mere former citizenship or origin in such a state cannot *a fortiori* be a reason for the application of exceptional measures to a refugee."

[596] Weis, *Travaux*, at 75.

[597] Robinson, *History*, at 91.

[598] See Grahl-Madsen, *Commentary*, at 39: "The reference to 'nationals of a foreign State' considerably restricts the applicability of the Article. It does not apply to measures which may be taken against stateless persons as such, or against aliens generally, not to speak of measures which are directed at one's nationals and aliens without discrimination."

[599] "The Belgian representative appeared to be opposed to any possibility of interning refugees; the text however only prohibited such internment if it were effected simply on account of the refugees' nationality. In 1939–40, and at later periods, the French authorities had interned not only aliens, but also a few French nationals suspected of fifth-column activities. Such a measure, which only conditions of crisis could justify, could not be prohibited under article [8]": Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 7.

example, refugees are entitled to property rights on terms "not less favourable than [those] accorded to aliens generally in the same circumstances."[600] Confiscatory exceptional measures applied to all aliens (whatever their nationality) would thus not contravene Art. 8. On the other hand, refugees are entitled to access rationing systems on terms of equality with nationals of the asylum state.[601] Exceptional measures directed to aliens generally cannot therefore lawfully be applied against refugees, since refugees are outside the scope of the group legally subject to the measures. Importantly, exceptional measures that do not contravene Art. 8 may nonetheless be challenged on the basis of the general duty of non-discrimination,[602] though the margin of appreciation usually accorded states may undercut the utility of that remedy.[603]

Second, the goal of Art. 8 is to ensure that exceptional measures defined by nationality do not, in practice, result in the denial of rights to refugees. The Swedish government waged a determined battle at the Conference of Plenipotentiaries to ensure that Art. 8 was not understood to require governments to rewrite domestic laws that fail to codify an exemption from exceptional measures in the case of refugees. Originally, the Swedish objective seemed to be to grant states a near-complete right to decide for themselves when refugees should benefit from an exemption from exceptional measures.[604] But as the Belgian representative noted, the validation of state discretion to define the circumstances in which exemption is warranted "would considerably reduce the rights accorded to refugees by the Convention."[605] More specifically:

> It was ... to be feared that [the Swedish approach] would result in a regime of arbitrary decisions, since countries of residence would be at liberty either

[600] Refugee Convention, at Art. 13. [601] Ibid. at Art. 20. [602] See chapter 2.5.5 above.
[603] See chapter 2.5.5 above, at pp. 128–145.
[604] Sweden asserted that "[o]ne could easily imagine cases in which it would appear fully justified to maintain the confiscation of the property of a refugee even if that property, in his hands, did not constitute a menace to national security. A person might for instance have fled from Nazi Germany at a very late stage of the Second World War after having been a militant Nazi up to then. Should States decide to take certain measures against the nationals of another State, it would have to be left to their administrations to decide whether refugees from the country in question could be exempted from them": Statement of Mr. Petren of Sweden, UN Doc. A.CONF.2/SR.27, July 18, 1951, at 28–29. Yet, as the British representative subsequently observed (UN Doc. A/CONF.2/SR.28, July 19, 1951, at 8), each state party would first have to determine whether or not the individual in question even qualified as a refugee. In the case cited by the Swedish delegate, there is good reason to believe that exclusion from refugee status under Art. 1(F)(a) is a real possibility. In any event, it is unclear that a militant Nazi fleeing Nazi Germany would in any sense have a well-founded fear of being persecuted in Nazi Germany.
[605] Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.27, July 18, 1951, at 31.

> not to apply to a refugee the exceptional measures which they might be obliged to take against the person, property or interests of other nationals of his country of origin, or to grant certain exemptions in the case of such refugees. Refugees would therefore have no absolute right to exemption from the application of those measures, and decisions as to the cases in which exemption was appropriate would be left to Governments.[606]

Even more emphatically, the Canadian representative asserted that the Swedish initiative resulted in an approach to Art. 8 that was "guilty of the unhappy fault of, so to speak, taking away with one hand what it gave with the other. In its original form, and before an attempt had been made to take into account the circumstances and laws of a certain country, the article had consisted of a simple and straightforward statement."[607]

Confronted with such direct attacks, the Swedish government sought to downplay the significance of the amendment it had sponsored to the text of Art. 8. It insisted that the addition of the words "or shall provide for appropriate exemptions in respect of such refugees"[608] was simply intended to allow governments the option of meeting their Art. 8 obligation either by way of a generic exemption for refugees from exceptional measures, or by extending case-specific exemptions to all refugees.[609] Whichever option was taken, the result would be the same, namely, a mandatory duty to exempt refugees from exceptional measures.[610] As the President of the Conference concluded, "the problem turned on the question of whether the application of certain measures should be ensured by means of automatic legislation or by means of exemptions. *In either case the obligations of the State would be the same* [emphasis added]."[611]

[606] Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.28, July 19, 1951, at 8.

[607] Statement of Mr. Chance of Canada, UN Doc. A/CONF.2/SR.34, July 25, 1951, at 18.

[608] UN Doc. A/CONF.2/37.

[609] The French representative's view of the Swedish approach was that it "was very far from suggesting measures of an illiberal nature. It laid upon states the obligation to grant certain exemptions at the time when they were unable to observe the general principle enunciated in the article. If that principle was not acceptable to States, they would enter a general reservation to the article. He would interpret the words 'ou accorderont' as imposing an obligation to grant exemptions": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.34, July 25, 1951, at 20.

[610] "Either legislation could be passed exempting certain categories of aliens from the application of the enemy property act, or some arrangement could be made to enable such persons to claim the return of their property provided they could substantiate their right to restoration. Those two possibilities must both be allowed for, or administrative difficulties would arise": Statement of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.28, July 19, 1951, at 8.

[611] Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.34, July 25, 1951, at 19.

In a last-minute effort to capture the essence of this consensus,[612] the Canadian representative persuaded delegates to accept an oral amendment to the previously accepted Swedish phrasing of Art. 8. Sadly, the precise language chosen can be construed so as to give rise to the very concern that both the Canadian delegate and the Conference as a whole appeared determined to avoid.[613] Instead of the Swedish language "or shall provide for appropriate exemptions in respect of such refugees,"[614] the Canadian amendment adopted by the Conference provides that state parties whose domestic legislation prevents the granting of *en bloc* exemption from exceptional measures to refugees "shall, *in appropriate cases*, grant [exemptions] in favour of such refugees [emphasis added]."[615] Thus, even though the Swedish government had been content with language that appeared quite clearly to impose a mandatory duty to exempt all refugees (albeit via a process of particularized exemptions), the literal text of the Canadian amendment – which includes the qualifying phrase "in appropriate cases" – may be read to suggest that there will be some cases in which exemption will not be appropriate, and hence not necessary.[616]

This is clearly a case in which reliance simply on the plain language of the treaty would result in an interpretation that is inconsistent not only with the general purpose of the Refugee Convention,[617] but moreover with the express

[612] "[H]e believed that the meeting was on the brink of agreement. There was no objection to the general principle that no exceptional measures should be applied to a refugee solely on account of his nationality": Statement of Mr. Chance of Canada, ibid. at 22.

[613] "The Conference posed the question whether the word 'shall' should be interpreted as being mandatory or permissive and came out firmly in favor of the first interpretation[ ]. With regard to substance if not to form, the obligations of the Contracting States would be the same whether they based themselves on the first or the second sentence": Grahl-Madsen, *Commentary*, at 41. Robinson, however, takes the view that "the second sentence (included by the Conference) considerably restricts the import of this article . . . It is obvious that the sentence was included in order to 'appease' states which are not or would not be willing to accept the general rule as expressed in the first sentence": Robinson, *History*, at 90–91.

[614] UN Doc. A/CONF.2/37.

[615] The oral amendment proposed by Canada referred to "exceptions" rather than "exemptions": Statement of Mr. Chance of Canada, UN Doc. A/CONF.2/SR.34, July 25, 1951, at 22.

[616] See e.g. Robinson, *History*, at 93: "What these cases are depends on what the law provides; in other words, by domestic legislation the state can fix the instances in which exemption is granted but the limits cannot be such as to refuse exemption when it would not threaten the proper application of the measures and their contemplated effects."

[617] "By entering reservations to Article 8, a State reserves the right, for instance, in time of war to intern refugees considered to be enemy aliens. While conceding that the fact of internment may not necessarily undermine the humanitarian basis of the Convention in every case, the very fact of internment or other related restrictions defeat[s] the ideal of the Convention as the vehicle for providing a safe haven for the refugee in the State of

intention of every state that addressed the desirable scope of Art. 8 at the Conference of Plenipotentiaries. This unhappy result can be avoided, however, by seeing the reference to "appropriate cases" not as an invitation to exercise discretion, but as a shorthand reference to any effort to impose exceptional measures solely on account of nationality. It is clear, however, that states need not formally enact exemptions from exceptional measures that accrue to the benefit of refugees, so long as they are prepared in practice dependably to grant refugees exemption from such measures.[618]

refuge where he or she may enjoy basic civil liberties": Blay and Tsamenyi, "Reservations," at 554.

[618] Robinson argues that "[i]f, as seems to be the case, 'legislation' refers not only to past but also to future laws, the second sentence is an 'invitation' to enact [legislation prohibiting *en bloc* exemption from exceptional measures for refugees], wherever it does not yet exist. From the viewpoint of a state it is undoubtedly more prudent not to be bound by a general rule of exemption": Robinson, *History*, at 93. It is unclear that this is so. Given the consensus in favor of a duty to exercise discretion in favor of refugees, the net result may simply be increased processing costs for the asylum country.

4

Rights of refugees physically present

This chapter addresses those rights which follow automatically and immediately from the simple fact of being a Convention refugee within the effective jurisdiction of a state party. These primary protection rights must continue to be respected throughout the duration of refugee status, with additional rights accruing once the asylum-seeker's presence is regularized, and again when a refugee is allowed to stay or reside in the asylum country.

Convention rights can obviously not be claimed until all the requirements of the Convention refugee definition are satisfied, including departure from one's own state.[1] But since refugee rights are defined to inhere by virtue of refugee status alone, they must be respected by state parties until and unless a negative determination of the refugee's claim to protection is rendered. This is because refugee status under the Convention arises from the nature of one's predicament rather than from a formal determination of status.[2] Refugee rights, however, remain inchoate until and unless the refugee comes under the de jure or de facto jurisdiction of a state party to the Convention. This is because the Convention binds particular state parties, each of which is required to meet obligations only within its own sphere of authority.[3]

Assuming that these two conditions are met, what rights ought refugees to be able to invoke as matters of basic entitlement, whether or not their status has been formally assessed? While the extension of some rights can logically

[1] "For the purposes of the present Convention, the term 'refugee' shall apply to any person who ... *is outside the country of his nationality* and is unable or ... 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* ... is unable or ... unwilling to return to it [emphasis added]": Convention relating to the Status of Refugees, 189 UNTS 2545, done July 28, 1951, entered into force Apr. 22, 1954 (Refugee Convention), at Art. 1(A)(2).

[2] "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee": UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, reedited 1992) (UNHCR, *Handbook*), at 9. See chapter 3.1 above, at pp. 157–160.

[3] See chapter 3.1.1 above, at pp. 160–161.

be delayed until a refugee's status has been regularized, for example by admission to a procedure for verification of refugee status, which refugee interests should be immediately and unconditionally recognized?

There are six categories of vital concern. First, persons who claim to be refugees are generally entitled to enter and remain in the territory of a state party until and unless they are found not to be Convention refugees. Second, they should not be arbitrarily detained or otherwise penalized for seeking protection. Third, it should be possible to meet essential security and economic subsistence needs while the host state takes whatever measures it deems necessary to verify the claim to Convention refugee status. Fourth, basic human dignity ought to be respected, including by respect for property and related rights, preservation of family unity, honoring freedom of thought, conscience, and religion, and by the provision of primary education to refugee children. Fifth, authoritative documentation of identity and status in the host state should be made available. Sixth, asylum-seekers must have access to a meaningful remedy to enforce their rights, including to seek a remedy for breach of any of these primary protection rights.

4.1 Right to enter and remain in an asylum state (*non-refoulement*)

The most urgent need of refugees is to secure entry into a territory in which they are sheltered from the risk of being persecuted. This fundamental concern must somehow be reconciled to the fact that all of the earth's territory is controlled or claimed by governments which, to a greater or lesser extent, restrict access by non-citizens. This clash of priorities has led to proposals to lease land from states on which to shelter refugees,[4] and even to attempts to establish internationally supervised sanctuaries for would-be refugees within the territory of their own states.[5] To date, however, limited international authority and resources have prevented these options from replacing entry into a foreign state as the most logical means to access safety. The stakes are high: refugees denied admission to a foreign country are likely either to be returned to the risk of persecution in their home state, or to be thrown into perpetual "orbit" in search of a state willing to authorize entry.

There are many historical cases which illustrate the potentially grave consequences of a failure to recognize this need of refugees to be able to enter another state. A particularly notorious example involved 907 German Jews who

[4] E. Burton, "Leasing Rights: A New International Instrument for Protecting Refugees and Compensating Host Countries," (1987) 19(1) *Columbia Human Rights Law Review* 307.

[5] These regimes are effectively critiqued in B. Frelick, "Preventive Protection and the Right to Seek Asylum: A Preliminary Look at Bosnia and Croatia," (1992) 4(4) *International Journal of Refugee Law* 439; and A. Shacknove, "From Asylum to Containment," (1993) 5(4) *International Journal of Refugee Law* 516.

fled persecution in their homeland aboard the ocean liner *St. Louis*. After the Cuban government refused to recognize their entrance visas, these refugees were denied permission to land by every country in Latin America. The United States dispatched a gunboat to ensure that the *St. Louis* remained at a distance which prevented its passengers from swimming ashore. Canada argued that the passengers of the *St. Louis* were not a Canadian problem. As Abella and Troper observe, "the Jews of the *St. Louis* returned to Europe, where many would die in the gas chambers and crematoria of the Third Reich."[6]

Similarly blunt denials of access continue to face modern refugees. One of the most notorious cases was the "pushback" order issued by the Thai Ministry of the Interior in 1988. The government deputized fishermen in Khlong Yai to prevent entry of any boats which might be carrying Vietnamese refugees, an order interpreted by fishermen "as a mandate to abuse defenceless boat people. Smugglers, fearing prosecution or vigilante attack, dumped their human cargo into the gulf."[7] Nepal has often refused entry to Tibetan asylum-seekers, including Buddhist monks and nuns, who have thereupon been returned to, and jailed by, Chinese authorities.[8] Hundreds of refugees fleeing conflict in Sierra Leone were summarily sent back by Guinea.[9] Namibia imposed a dusk-to-dawn curfew – with soldiers being ordered to shoot violators – along a 450 km stretch of the Kavango river in late 2001. This effectively prevented Angolan refugees seeking to escape violence in that country's Cuando Cuban Province from being able to seek asylum, since Angolan government and UNITA patrols could be safely avoided only at night.[10] In the wake of the flight of ethnic Albanians from Kosovo, Greek officials simply turned away twenty busloads of refugees at the Macedonian border on the grounds that because they had "not been informed of the influx," they were not prepared to admit the refugees.[11] And Jordan admitted only about 150 of more than 1,000 Iranian, Palestinian, Sudanese, Somali, and

[6] I. Abella and H. Troper, *None is Too Many: Canada and the Jews in Europe 1933–1948* (1992), at 64.

[7] A. Helton, "Asylum and Refugee Protection in Thailand," (1989) 1(1) *International Journal of Refugee Law* 20 (Helton, "Thailand"), at 28.

[8] In 1990, Nepalese border guards refused entry to forty-three Tibetan asylum-seekers, including twenty-seven monks and six nuns, who were thereupon jailed by Chinese authorities in Gutsa Prison: US Committee for Refugees, "Tibetan Refugees: Still At Risk" (1990), at 2. There are also efforts to remove the Tibetans after they have entered Nepal. In a recent operation carried out jointly by Nepalese and Chinese authorities, the Tibetans were "carried crying and screaming into vehicles before being driven in the direction of the border": Amnesty International, "Nepal: Forcible Return of Tibetans to China Unacceptable," June 2, 2003.

[9] "Refugee influx concerns President," (1999) 41 *JRS Dispatches* (Jan. 15, 1999).

[10] "Curfew could trap Angolan refugees, says UNHCR," *UN Integrated Regional Information Networks*, Oct. 30, 2001.

[11] J. Hooper, "They vanished in the night: 10,000 refugees unaccounted for after camp cleared," *Guardian*, Apr. 8, 1999, at 1.

Syrian refugees who had received asylum in Iraq, but who were forced to flee that country when threatened by armed Iraqis after the collapse of Saddam Hussein's government.[12]

Turn-back policies can also be implemented by the complete closure of borders. Both Zaïre and Tanzania at times simply closed their borders to refugees attempting to flee the brutal conflict for dominance between Hutus and Tutsis in Northeastern Africa.[13] Tanzania's Foreign Minister reportedly told his Parliament that "[e]nough is enough. Let us tell the refugees that the time has come for them to return home, and no more should come."[14] In 1999, Macedonia cited the failure of Greece, Turkey, Bulgaria, and the European Union to do enough for Kosovo Albanian refugees as justification for its decision to close its borders to all but the most frail refugees, as well as those destined for another country.[15] After providing a haven for more than 2 million Afghan refugees, the Pakistani government closed its borders to most new arrivals in November 2000,[16] arguing that it had not received the support

[12] "The refugees told UNHCR that groups of armed Iraqis forced them from their homes and threatened that, if they refused to leave Iraq, the men would be killed and the women raped. Others said that they fled because of the lack of food and water in the places where they normally reside, including the Bijii and Balediyat neighborhoods in Baghdad, and the al-Hurriya and al-Tash refugee camps outside of Baghdad": Human Rights Watch, "US and Allies Must Protect Refugees; Jordan Should Not Block Trapped Refugees," Apr. 23, 2003.

[13] On August 19, 1994, Deputy Prime Minister Malumba Mbangula of Zaïre declared that no refugees would be allowed to cross from Rwanda into Zaïre. Immediately prior to his announcement, 120 refugees per minute had been crossing into Zaïre at the frontier post of Bakavu: "Le Zaïre ferme ses frontières aux réfugiés," *Le Monde*, Aug. 22, 1994, at 4. As some 50,000 refugees attempted to flee ethnic clashes in Burundi, the Tanzanian government officially closed its border with Burundi on March 31, 1995: US Agency for International Development, "Rwanda: Civil Strife/Displaced Persons Situation Report No. 4," Apr. 5, 1995, at 4. The Tanzanian Prime Minister told Parliament that "[t]he gravity of the situation, especially for those coming from Burundi and Rwanda, has made it inevitable for Tanzania to take appropriate security measures by closing her border with Burundi and Rwanda": Speech by the Prime Minister to the Parliament of Tanzania, June 15, 1999, at 5, on file at the library of the Oxford University Refugee Studies Centre.

[14] "Border closure triggers debate," *Guardian*, July 19, 1995.

[15] "Macedonia today effectively closed its borders to tens of thousands of ethnic Albanian refugees caught in no-man's land at the Kosovo frontier, saying the numbers had driven it to the breaking point ... The Interior Minister ... said it was time for its neighbors ... to take up their share of the burden ... Macedonia has become increasingly bitter in recent days about what it sees as the slow response of its neighbors and Western nations to provide help": "Beleaguered Macedonia tries to staunch flood from Kosovo," *New York Times*, Apr. 4, 1999, at A-10.

[16] "Tens of thousands [of refugees] have been camped in the open since January [2001] ... The UNHCR said that more than 80,000 were squatting in squalid conditions on a strip of land at Jalozai, and more were arriving each day": E. MacAskill, "Pakistan keeps Annan from 'world's worst' camp," *Guardian*, Mar. 13, 2001, at 14.

it required from the international community.[17] Its policy was adopted by the other five countries bordering Afghanistan after the September 11, 2001 attack on the World Trade Center.[18]

Blunt barriers can serve much the same end as border closures. During the *apartheid* era, South Africa erected a 3,000 volt electrified, razor wire fence to prevent the entry of refugees from Mozambique.[19] In the summer of 2002, France and the United Kingdom cooperated to build a double fence around the French railway terminal near Calais in order to "close the last loophole" for refugees wishing to travel to Britain in order to seek asylum.[20] A year later, the British immigration minister reported that "the French port was proving impenetrable, without any noticeable shift of asylum-seekers to other ports in northern France or Belgium."[21]

[17] "Pakistan rightly complains about the economic burden of supporting such a large influx of people. More than 30,000 crossed in the weeks before the border was closed. The UNHCR appealed for $7.5 million for its Afghan programme this year. It received just $2 million. For every $200 donated for each refugee in the Balkans, just $20 is given for each Afghan refugee. That's a quarter of the cost of one ticket for the Khyber steam train": R. McCarthy, "Comment," *Guardian*, Nov. 27, 2000, at 20.

[18] K. Kenna, "Pakistan closes border to desperate Afghans," *Toronto Star*, Nov. 3, 2001, at A-14. "'If we open the gates freely, we will have to be ready for another 2 million refugees,' Pakistan's president, Gen. Pervez Musharraf, said recently. 'There will be social and economic problems. Do we want another 2 million refugees?'": R. Chandrasekaran, "Predicted outpouring of Afghan refugees is more like trickle," *Washington Post*, Nov. 1, 2001, at A-21. "Many refugees said they tried to enter Pakistan, only to be turned away. Although the United Nations estimates that more than 130,000 refugees have crossed into Pakistan since Sept. 11 [2001], most either have Pakistani identification cards, family members willing to sponsor them, or the money to hire smugglers to take them across unmanned sections of the border": J. Pomfret, "Refugees endure lives of squalor in Taliban camp," *Washington Post*, Nov. 21, 2001, at A-01. By November 2001, "[a]n estimated 100,000 asylum-seekers [were] stranded in the Afghanistan desert": K. Kenna, "Pakistan closes its border to Afghani males," *Hamilton Spectator*, Nov. 28, 2001, at C-05. See generally Human Rights Watch, "Closed Door Policy: Afghan Refugees in Pakistan and Iran" (2001).

[19] As of 1990, official statistics reported that ninety-four refugees had been killed trying to get through the fence: C. Nettleton, "Across the Fence of Fire," (1990) 78 *Refugees* 27, at 27–28. But observers report that the toll was likely much higher. "On the 9th of July 1988, while on a visit to the fence . . . a soldier on the border assured me that while patrolling the fence he used to find between 4–5 bodies per week (in the fence) which, if true, would then mean an average of 200 casualties per year on the southern section of the fence": South African Bishops' Conference, Bureau for Refugees, "The Snake of Fire: Memorandum on the Electric Fence Between Mozambique and South Africa" (1989), at 2–3.

[20] A. Travis, "French to close 'last' way for refugees to use tunnel," *Guardian*, June 26, 2002, at 8.

[21] A. Travis, "New asylum centres open by end of year," *Guardian*, May 9, 2003, at 6, quoting remarks by immigration minister Beverley Hughes to the House of Commons on May 8, 2003.

Even refugees who manage to cross an asylum state's border may still face summary ejection by officials. Cambodia forcibly arrested Montagnard refugees living in Koh Nheak, and forcibly returned them to Vietnamese border police;[22] it has also deported Chinese refugees under the formal protection of UNHCR.[23] Despite the continuation of conflict between the Sri Lankan army and LTTE rebels, Tamil refugees from Sri Lanka were returned by India to Talaimannar in northern Sri Lanka.[24] Pakistani police have randomly stopped Afghan men to check their identification, and driven those without papers to the Afghan border for immediate expulsion.[25] Many Colombians crossing the Rio de Oro to seek protection in Venezuela from paramilitary violence have been intercepted by army patrols, and forced back to Colombia.[26] Australia came under attack from UNHCR in 2003 when it ordered that a boat carrying asylum-seekers be towed back to Indonesia, despite the fact that the boat was already inside Australian territory near Melville Island.[27] The United States has acted similarly. In January 2000, for example, "an overloaded fishing boat with more than 400 Haitians aboard was turned away from the south Florida coast, its passengers transferred to Coast Guard cutters and quickly sent back to Haiti – apparently with no questions asked."[28]

At times, the ejection of refugees can be both a matter of formal policy, and truly massive in scope. In July 1999, Zambia ordered the immediate deportation without court review of all nationals of the Democratic Republic of Congo (clearly including many refugees), noting that "it is necessary that

[22] "Subsequently, around the third week of January 2003, another group of 30 Montagnards ... was again arrested by the Cambodian police near Koh Nheak. But the men in this second group were reportedly beaten up by the Cambodian police before they were handed over to the Vietnamese border guards": (2002) 126 *JRS Dispatches* (Feb. 13, 2002).

[23] "Two Chinese asylum-seekers ... were deported by the Cambodian authorities on 9 August 2002 and are now being held in detention in China's Hunan Province ... The Chinese couple are Falun Gong practitioners and were persons of concern under the protection of the UNHCR in Cambodia": (2002) 117 *JRS Dispatches* (Aug. 29, 2002).

[24] (2000) 74 *JRS Dispatches* (July 5, 2000).

[25] P. Constable, "Afghan refugees facing eviction," *Washington Post*, June 16, 2001, at A-14.

[26] S. Wilson, "Influx burdens Venezuela," *Washington Post*, Oct. 1, 2000, at A-28. Venezuelan President Hugo Chavez reportedly gave Colombians an eight-day ultimatum to leave the country or face repatriation: (2000) 78 *JRS Dispatches* (Sept. 15, 2000).

[27] "UNHCR's spokesman Kris Jankowski ... said that by sending them to Indonesia, which has not signed the [Refugee Convention], Australia ... had shirked its obligations under international law ... 'These people had already entered Australian territory and should have been given access to a fair asylum procedure ... Instead they were sent back to a country which has no asylum procedure in place and where there is no possibility of being granted durable asylum'": UNHCR, "UN refugee agency says Australia has shirked its international obligations," Nov. 11, 2003.

[28] S. Pressley, "In Little Haiti, the Elian fight sheds a painful light," *Washington Post*, Jan. 15, 2000, at A-03.

these people are cleared because they are not budgeted for."[29] In 2001, the Iranian government ordered the removal of several thousand refugees into western Afghanistan against their will. According to UN sources, the Afghans were "randomly rounded up in neighborhoods in the capital city or villages and towns around the border area, then taken to a detention center and put back on trucks without any recourse."[30] More recently, Thailand rebuked UNHCR for seeking to delay its plan to repatriate more than 100,000 ethnic Burmese refugees.[31] Indeed, the Thai National Security Council announced in January 2003 that it would no longer welcome any refugees from neighboring countries, and "would force them back home as soon as the authorities found them."[32]

Ejection is at times carried out by non-state agents with the encouragement or toleration of authorities. For example, immediately after Kenyan President Moi decreed that Ugandan and other refugees would have to leave his country, "police and members of the youth wing of the ruling Kenya African National Union (KANU) began seizing refugees from their homes, bars and lodges ... Despite urgent appeals to the [UNHCR], refugees [were] being persecuted by the security forces and at least one thousand [were] deported across the Ugandan border."[33] Similarly, Liberian and Sierra Leonean refugees fled Guinea in late 2000 after a wave of xenophobic violence was unleashed when President Lansana Conte encouraged citizens to form militia groups[34] with a view to forcing refugees to "go home."[35]

Beyond rejection at the border or being physically forced back to their country of origin, refugees may be subject to removal when refused access to a procedure

[29] *Xinhua News Agency* (Lusaka), July 19, 1999, quoting Zambian Deputy Minister for Home Affairs Edwin Hatembo.

[30] P. Baker and A. Sipress, "Concern grows over refugees," *Washington Post*, Dec. 1, 2001, at A-16, quoting Yusuf Hassan, spokesman for UNHCR in Kabul.

[31] "General Khajadpai says the government's policy is to close the camps and send the people back home. But non-governmental border relief agencies say they do not want to send the Burmese back, citing the country's uncertain political and economic outlook, and reports of clashes and violence by pro-Burmese government groups opposing greater Karen autonomy": *Voice of America News*, Aug. 19, 2000.

[32] (2003) 125 *JRS Dispatches* (Jan. 27, 2003).

[33] Africa Watch, "Kenya: Illegal Expulsion of More Than 1000 Refugees" (1990), at 1. Somali refugees were also pushed back from border camps within Kenya: Africa Watch, "Kenya: Forcible Return of Somali Refugees; Government Repression of Kenyan Somalis" (1989); and F. del Mundo, "The Future of Asylum in Africa," (1994) 96 *Refugees* 3, at 7. When in 1997 Moi referred to refugees as "foreign spies and criminals," the police responded with enthusiasm, including a pattern of arbitrary arrests, detention without charge, and forcible removal: G. Verdirame, "Refugees in Kenya: Between a Rock and a Hard Place," unpublished paper on file at the library of the Oxford University Refugee Studies Centre, 1998, at 2–3.

[34] D. Farah, "For refugees, hazardous haven in Guinea," *Washington Post*, Nov. 6, 2000, at A-24.

[35] "Over 400 refugees arrived in Monrovia on 12 October following a two-day sea voyage. Many complained of being beaten and raped by Guineans": (2000) 80 *JRS Dispatches* (Oct. 16, 2000).

to verify their refugee status. For example, Japan declined to consider the refugee claims of Chinese pro-democracy dissidents in the immediate post-Tiananmen era, and forced many of them back to China.[36] China refuses to consider the claims of refugees from North Korea, insisting on its right forcibly to return refugees to that country under the terms of a bilateral agreement.[37] Malaysian police waiting outside the local UNHCR office have arrested and deported Indonesians seeking to make appointments to have their refugee status claims processed.[38] Namibia has summarily classified Angolan refugees as "illegal immigrants" subject to removal without affording them any opportunity to apply for asylum;[39] Zimbabwe treated Rwandan refugees in much the same way.[40] UN workers trying to verify the refugee claims of persons who had arrived from Afghanistan were ordered by the Pakistani government to cease their efforts when it became clear that the majority qualified for protection.[41] Thailand bluntly refused UNHCR's request to recognize the status of ethnic Karen refugees who had arrived from Burma, arguing that "[i]f we toe the agency's line, thousands of Shan people may flood into Thailand."[42]

[36] Asia Watch, "Japan: Harassment of Chinese Dissidents" (1990), at 1. "In a number of cases, the authorities refused to renew visas which were about to expire and individual Chinese students were told to return home, including some who had played a prominent part in the pro-democracy movement and who were clearly at risk of serious human rights violations in China": Amnesty International, "Japan: Inadequate Protection for Refugees and Asylum Seekers" (1993), at 8.

[37] "Asylum in China," *Washington Post*, May 12, 2002, at B-06. "[P]osters had appeared along the border between China and North Korea exhorting Chinese to turn in North Korean refugees and warning of steep fines for harboring a refugee": J. Pomfret, "China steps up repatriation of North Korean refugees," *Washington Post*, July 23, 2001, at A-16. Moreover, when a small number of North Korean refugees managed to enter foreign embassies prepared to resettle them, China bluntly ordered the foreign governments concerned to turn over North Korean refugees to China for purposes of immediate removal to North Korea: Human Rights Watch, "China: Protect Rights of North Korean Asylum Seekers," Nov. 19, 2002. After a number of refugees entered the South Korean embassy, Foreign Ministry spokesperson Kong Quan is quoted as having stated, "We require the South Korean Embassy to hand these people over to the Chinese side to be dealt with": J. Pomfret, "China presses Seoul to turn over four North Korean refugees," *Washington Post*, May 29, 2002, at A-13. The Chinese government has even stopped the departure of a group of North Korean refugees from China to South Korea and Japan: "Back to the gulag," *Washington Post*, Jan. 27, 2003, at A-18.

[38] "The UNHCR office has now closed its operations because of the continued police presence outside its office. Although police arrested some Burmese and Bangladeshi asylum-seekers, most of those arrested are Achenese": Human Rights Watch, "Malaysia: Don't Return Indonesian Asylum Seekers," Aug. 29, 2003.

[39] *Mail & Guardian* (Johannesburg), Mar. 27, 2000.

[40] *Daily News* (Harare), Feb. 21, 2003.

[41] "Nowhere to turn," *Toronto Star*, Apr. 8, 2001.

[42] "UNHCR . . . said last week that 4,300 illegal immigrants had been turned away from the Mae La refugee camp in Thailand's western Tak province despite UNHCR requests to let them stay": *Agence France Presse*, Aug. 19, 2001.

The refusal to process claims to refugee status may also be more specifically focused. Some European states have traditionally been unwilling to assess the refugee status of unaccompanied persons less than eighteen years old;[43] the Australian immigration minister urged states to adopt much the same position as a general rule.[44] During the 1991 Gulf War, New Zealand enacted legislation which effectively precluded authorities from fully considering the claims of refugees – in practice, mostly Muslims – presumed to present a risk to national security.[45] Thus, Pakistanis provisionally classified as refugees by immigration authorities – but who "the police say . . . fit the general 'profile' of terrorists, although there was no positive evidence pointing to that"[46] – were removed before their claims to protection were considered on the merits. The New Zealand Court of Appeal conceded that "because of the security risk . . . Government officers may have at times to send away, and perhaps back to persecution, persons who *may* have genuine reasons to fear persecution for their political beliefs"; but that "such persons as the appellants may be seen as, in a sense, casualties of war."[47] The United States has similarly asserted the right to deny asylum to refugees on security and related grounds without the need fully and fairly to investigate entitlement to refugee status.[48]

[43] (2000) 76 *JRS Dispatches* (Aug. 3, 2000).

[44] K. Lawson, "Send minors back home immediately: Ruddock," *Canberra Times*, Oct. 2, 2002, at A-7.

[45] The "Provisional Procedures for Determining Refugee Status Applications During the Gulf War Where There is a Security Risk" were in effect between January 28, 1991 and April 30, 1991: R. Haines, *International Academy of Comparative Law National Report for New Zealand* (1994), at 57. Their operation was explained by authorities as being that "[d]uring the course of the Gulf War, a person disembarks in New Zealand and before having been granted a permit applies for refugee status. At that point, a preliminary security screening is performed by the police to determine whether the person can be given a security clearance. If the result of that security screening is negative, then the provisional procedures apply": W. F. Birch, Minister of Labour of New Zealand, "Provisional Procedures for Determining Refugee Status Applications During the Gulf War Where There is a Security Risk," paper on file at the library of the Oxford University Refugee Studies Centre.

[46] *D v. Minister of Immigration*, [1991] 2 NZLR 673 (NZ CA, Feb. 13, 1991), at 675.

[47] Ibid. at 676. The Court did observe, however, that "[i]t would appear . . . that the Gulf War may have brought to light a deficiency in the New Zealand legislation for dealing with persons arriving in this country and claiming refugee status . . . Where security clearance is available, such persons can be allowed to remain here while the refugee question is fully investigated . . . But in practice they cannot be fully used within 28 days . . . Yet if security clearance cannot be given, there is no statutory provision for detaining such people for more than 28 days and there is no way in which the Court could invent such a provision": Ibid.

[48] "'We don't do investigations,' the general counsel of the immigration agency, Paul Virtue, said. 'There is a low evidentiary threshold for finding whether someone is eligible for

Refugees may also face removal because of practical weaknesses in the operation of domestic asylum systems. The system itself may simply be unsound, as is the case in Austria where inexpert border guards play an often decisive role in the registration and adjudication of asylum claims,[49] or in South Africa where officers in repatriation centers have little awareness of refugee law.[50] The risk may also follow from failure of even a carefully designed procedure to take notice of the most accurate human rights data. For example, in January 2002, the United Kingdom summarily deported members of opposition parties to Zimbabwe, basing its decision on dated Home Office risk assessments rather than on updated Foreign Office warnings of a serious deterioration of conditions there.[51]

Initiatives to promote voluntary repatriation are sometimes used as the pretext to engage in the disguised withdrawal of protection from refugees. For example, Turkey allowed Iraqi officials to "visit" Kurdish refugees in Turkey

asylum here. It is wholly unlike a criminal case . . . ' The immigration service says it has the right to deny the Iraqis [who worked with the CIA against then-President Saddam Hussein] asylum without the normal due process required under law because they arrived without visas and have never been officially allowed to enter the United States": J. Risen, "Evidence to deny 6 Iraqis asylum may be weak, files show," *New York Times*, Oct. 13, 1998, at A-9.

[49] A report of two fact-finding missions to interview rejected asylum-seekers in Hungary concluded that "almost all [refugees] were handed over to Hungarian authorities after only one day of arrest in Austria, and in only two cases was an asylum procedure conducted in Austria . . . Both conversations with refugees and reports from the two representatives of Hungarian NGOs show that the interviews conducted by the foreigners police or the border authorities are not aimed at documenting possible reasons for fleeing. The inquiries concentrate on the route of flight and escape agents. Only well-informed refugees who explicitly request asylum manage to access the asylum procedure": Asylkoordination Österreich, "Bericht über die Fact-finding-mission in Ungarn am 20 Mai 1998 und 15 Juni 1998" (1998), at 1 (unofficial translation). This is a long-standing concern: see E. Wiederin, *International Academy of Comparative Law National Report for Austria* (1994), at 7–8.

[50] The South African Human Rights Commission found that "most officers [at the Lindela Repatriation Centre] were not trained to make decisions about asylum . . . and referred all those cases to a few, overloaded senior immigration officers. People at Lindela who claimed they were asylum-seekers were not given the opportunity to apply for asylum as was the policy. The commission heard that immigration officers at Lindela had repeatedly asked for training": "Home Affairs ignores SAHRC recommendations," *Business Day*, Dec. 13, 2000.

[51] "They were waiting for him at the airport, just as he feared. Gerald Mukwetiwa was still recovering from the eight-hour flight to Harare when British immigration officers handed him over to their Zimbabwean counterparts. But the airport officials were not what they seemed. They were members of Zimbabwe's feared Central Intelligence Organisation . . . [A]n *Observer* investigation has discovered that scores of members of opposition parties in Zimbabwe face being sent back to President Mugabe's regime with little regard for their safety": P. Harris and M. Bright, "Crisis in Zimbabwe: Special Investigation: They flee here for safety but are sent back to face death," *Observer* (London), Jan. 13, 2002, at 8.

to promote their repatriation. This encouragement was reinforced by ill-treatment at the hands of their Turkish hosts, including reductions in food and water supplies for those who did not return to Iraq.[52] In August 2002, Rwanda not only allowed members of a Congolese rebel group backed by it to meet with refugees from the Democratic Republic of Congo in order to promote their return home, but advised the refugees that both camp services and the offer of transportation home would soon be withdrawn from those who did not choose to repatriate.[53] India coerced Sri Lankans to repatriate through a combination of arbitrary arrests, withholding stipends and food rations, blocking information about conditions in Sri Lanka, and pressuring the refugees to sign consent forms they could not read.[54] Roma refugees from Kosovo felt compelled to leave Macedonia after being denied basic sanitary facilities and services there.[55] Hundreds of Burundian refugees reported to be voluntarily repatriating from Tanzania were actually leaving because of dramatic reductions in their food rations, coupled with denial of the right to earn a living through economic activity.[56] Nearly 1,000

[52] "Amnesty International's concern is intensified by reports received in the past eighteen months that hundreds of Iraqi Kurds ... have 'disappeared' in custody, were tortured or executed in Iraq, after surrendering to the authorities under official amnesties or after receiving assurances that they would come to no harm": Amnesty International, "Iraqi Kurds: At Risk of Forcible Repatriation from Turkey and Human Rights Violations in Iraq" (1990), at 1, 7. "Even those asylum-seekers recognized by UNHCR as refugees are not safe in Turkey. Amnesty International knows of numerous cases where non-Europeans recognized by the Ankara office of the UNHCR as refugees were detained by the Turkish authorities and sent back to their country of origin, despite protests by UNHCR": Amnesty International, "Turkey: *Refoulement* of Non-European Refugees – A Protection Crisis" (1997).

[53] US Committee for Refugees, "The Forced Repatriation of Congolese Refugees Living in Rwanda," Nov. 13, 2002. See also "Opening Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at the Fifty-Third Session of the Executive Committee of the High Commissioner's Programme," Sept. 30, 2002, at 4: "In Rwanda I remain concerned about the imposed return of Congolese refugees, and I have taken this up with the Rwandan government."

[54] "We felt compelled to go back because the conditions in the camp were so bad. We came [back to Sri Lanka] with the impression that we would be taken back to our villages. The Indian police at the camp assured us that the Sri Lankan army and police could protect us. We had no radio, no letters, no direct contact with Sri Lanka": Asia Watch, "Halt Repatriation of Sri Lankan Tamils" (1993), at 18, quoting an interview with a Sri Lankan refugee. "[A] leaflet distributed by the Tamil Nadu government officers in camps refers to the refugees as cowards, and poses the question, 'Are only your lives dear?' The leaflet also urged the refugees to shed their cowardice and return to Sri Lanka": Tamil Information Centre, "Tamils Concerned Over Safety of Refugee Returnees to Sri Lanka," Nov. 18, 1992.

[55] (2003) 133 *JRS Dispatches* (May 30, 2003).

[56] (2000) 76 *JRS Dispatches* (Aug. 3, 2000). A coalition of non-governmental groups noted that Tanzania was also "placing political and psychological pressure" on the refugees to return: *UN Integrated Regional Information Networks*, May 15, 2002. More recently, a leading humanitarian organization working with Burundian refugees in Tanzania reported that "[a]mong the reasons for departure mentioned by the refugees were bad

refugees returned to Sudan because they were starving in camps in Uganda.[57] As part of its strategy to force Afghan refugees to return home, Pakistan barred foreign aid agencies from providing material assistance to refugees in the Jalozai camp.[58] Refugees International determined that Bangladesh, working in concert with UNHCR, was promoting the repatriation of Rohingya refugees from Burma by "creat[ing] an environment in which protection for the Rohingya is virtually untenable ... Methods of coercion ... include a reduction in certain basic entitlements, including food, withholding of medical services or pharmaceuticals, forced relocation within camps to poorer housing, beatings, and, most commonly, threats of and actual jail sentences."[59] The government of the United States engaged in threats, subterfuge, and other forms of coercion to persuade Salvadorans to agree "voluntarily" to depart.[60] Australia offered Afghan families a twenty-eight-day option to abandon their asylum claims and return home in exchange for a payment of up to A$10,000[61] – with the warning that those who did not accept "at some point down the track ... will be going home."[62] Tanzania relied on an agreement with Rwanda and UNHCR to impose an arbitrary deadline by which all refugees from Rwanda were required "voluntarily" to repatriate.[63]

conditions in the refugee camps in western Tanzania, where food rations had been cut by 50 percent since February, and only recently increased to 72 percent": "Limitations in refugee camps forcing hundreds to leave," *UN Integrated Regional Information Networks*, May 15, 2003, quoting a statement issued by the Tanganyika Christian Refugee Service.

[57] "[T]he refugees accused UNHCR and the World Food Program of abandoning them": (2000) 75 *JRS Dispatches* (July 20, 2000).

[58] R. McCarthy, "Wrapped in plastic, the rejected wait to die," *Guardian*, Mar. 16, 2001, at 15.

[59] Refugees International, "Lack of Protection Plagues Burma's Rohingya Refugees in Bangladesh," May 30, 2003.

[60] *Orantes-Hernandez v. Meese*, (1988) 685 F Supp 1488 (US DCCa, Apr. 29, 1988), affirmed as *Orantes-Hernandez v. Thornburgh*, (1990) 919 F 2d 549 (US CA9, Nov. 29, 1990).

[61] "Refugee groups criticised the measures. 'It's bribery on the one hand and blackmail on the other,' Simon O'Neill, a spokesman for Refugee Action Collective, told the ABC": P. Barkham, "Australia offers Afghan asylum-seekers £3,800 to go home," *Guardian*, May 24, 2002, at 6.

[62] K. Lawson, "Afghan detainees to be offered $2000 each to go home," *Canberra Times*, May 24, 2002, at A-3, quoting a spokesman for immigration minister Philip Ruddock. It was reported that "[t]he UNHCR welcomed the scheme being voluntary and people being given 28 days to respond": ibid.

[63] "[T]he message was clear. The Tanzanian Government had decided that national security concerns had the highest priority and that these concerns would prevail. Although it did agree to individual screening of those who did not return as of [Dec. 31, 1996], this option was not in any systematic way made known to the refugees. In addition, the whole set-up of this mass return certainly did not suggest that it would be feasible for a refugee to receive special treatment and an evaluation of the merits of his or her claim. Correspondingly, no formal mechanism was provided or established for identifying individuals who risked persecution if they were to be sent back": A. Eggli, *Mass Refugee Influx and the Limits of Public International Law* (2001) (Eggli, *Mass Influx*), at 247. A

Beyond the refusal of protection at or within its borders, a state can also use arm's-length legal maneuvers to repel asylum-seekers in areas of arrogated jurisdiction beyond its formal frontiers. Most notoriously, the United States not only interdicted Haitians fleeing the murderous Cedrás dictatorship on the high seas, but forced the asylum-seekers to board its Coast Guard vessels, destroyed their boats, and delivered the refugee claimants directly into the arms of their persecutors.[64] The United States continues to engage in interdiction and forcible repatriation of Haitian and some other refugees in international waters. While current practice is to conduct a cursory review of protection needs onboard the interdicting ship,[65] the United States nonetheless maintains that it has no legal obligations to interdicted refugees, even if they manage to reach its territorial sea.[66] Australia similarly seeks to turn away refugees in international waters before they can reach its territory, though it does not return them directly

similar absolutism was clear in the subsequent repatriation effort by Tanzania. "The repatriation program was launched in November 2002 rooted in a tripartite agreement signed in Geneva by UNHCR and the Tanzanian and Rwandan governments. The agreement provides that every effort will be made to complete the operation 'by the end of December 2002' ... Refugees said that public statements by Tanzanian authorities declaring that all Rwandans must repatriate by December 31 completely eroded their sense of safety": Lawyers' Committee for Human Rights, "Rwandans May Be Forced to Leave Tanzanian Refugee Camps," Dec. 27, 2002.

[64] Tang Thanh Trai Le, *International Academy of Comparative Law National Report for the United States* (1994), at 11. This was not the first attempt by the United States to exercise authority over asylum-seekers in international waters. In 1993, three boats carrying 659 Chinese asylum-seekers were intercepted by the United States in international waters off the coast of Mexico. Based on cursory Immigration and Naturalization Service and UNHCR screening, one person was accepted for protection in the United States, while the rest were handed over to Mexico for return to China: ibid. at 13.

[65] President Clinton ordered US authorities to "attempt to ensure that smuggled aliens detained as a result of US enforcement actions, whether in the US or abroad, are fairly assessed and/or screened by appropriate authorities to ensure protection of *bona fide* refugees": US President William Clinton, "Alien Smuggling," Doc. PDD-9, June 18, 1993, at 1–2. But in practice, "it appears that Haitians and Dominicans received very minimal or no procedural protections while the Chinese received some degree of screening ... ": K. Musalo, "Report of the Expedited Removal Study" (2000), at n. 44. In the case of interdicted Haitians, access to protection amounted to the reading of the following declaration at least once to those onboard: "This is (interpreter name) speaking for the captain of the Coast Guard Cutter *Valiant*. We would like to remind you again that you can speak to the interpreters or any Coast Guard person on board about specific problems, issues, or medical concerns that you may wish to tell us about": ibid. at note 48.

[66] "Aliens interdicted within United States territorial waters do not have a right to exclusion proceedings ... [T]he [Immigration and Nationalization Act's] sections relating to asylum and withholding do not require that an exclusion hearing be provided for aliens interdicted within territorial waters": US Department of Justice, Office of Legal Counsel, "Memorandum for the Attorney General: Immigration Consequences of Undocumented Aliens' Arrival in United States Territorial Waters," Oct. 13, 1993, at 9, 14.

to their country of origin. For example, the Australian troop ship *HMAS Manoora* paused on its well-publicized journey to ferry refugees taken from the *Tampa* to be processed in Nauru in order to intercept an Indonesian fishing boat, the *Aceng*, carrying 237 (largely Iraqi) asylum-seekers believed to have been bound for Australia.[67] More recently, British Home Secretary Blunkett confirmed that Royal Navy ships might be used to intercept unauthorized migrants being smuggled in the eastern Mediterranean Sea.[68] The UK has, however, already extended control efforts beyond its borders under a land-based system of stationing its immigration officers at foreign airports to screen out passengers bound for Britain deemed likely to seek refugee protection there – effectively trapping such persons inside their own country.[69]

Rather than relying on physical interdiction, it is more common for states to seek to avoid the arrival of refugees by the adoption of relatively invisible *non-entrée* policies.[70] In essence, the goal of these mechanisms is to implement legal norms which have the effect of preventing refugees from even reaching the point of being able to present their case for protection to asylum state authorities.

The classic mechanism of *non-entrée* is to impose a visa requirement on the nationals of genuine refugee-producing countries, enforced by sanctions against any carrier that agrees to transport a person without a visa. Canada, for example, has long required the nationals of countries likely to produce refugees to obtain a visa before boarding a plane or otherwise coming to

[67] P. Barkham, "Migrants step ashore to flowers and fences," *Guardian*, Sept. 20, 2001, at 17. These refugees were similarly taken to Nauru.

[68] A. Travis, "French to close 'last' way for refugees to use tunnel," *Guardian*, June 26, 2002, at 8. One commentator observed that "[t]his would be a new departure for Britain indeed – though already a staple of Australian political theatre – and gives a literal twist to Blair's war on asylum": S. Milne, "Declaration of war on asylum," *Guardian*, May 23, 2002, at 18.

[69] "In the first 10 days British officials were at the [Prague] airport, 90 people – mostly Roma – were refused entry to the UK": R. Prasad, "Airport colour bar," *Guardian*, July 30, 2001, at 15. Officials operated under an instruction that particular national groups could be targeted for enhanced scrutiny where "there is statistical evidence showing a pattern or trend of breach of the immigration laws by persons of that nationality": H. Young, "Ministerial double-talk simply masks a racist law," *Guardian*, Apr. 24, 2001, at 16. The likelihood of "breach of immigration laws" was taken to include unauthorized arrival for purposes of making a refugee claim; indeed, the Home Office resumed the scheme after it had been adjudged to have served its original deterrent purpose because of "a renewed increase in claims for asylum by Czech citizens": S. Hall, "Protests as Prague airport screening resumes," *Guardian*, Aug. 28, 2001, at 2. It is reported that senior UK immigration officials are also stationed as "airline liaison officers" in Accra, Dhaka, Delhi, Colombo, and Nairobi: P. Field, "Breaching the fortress," *Guardian*, June 24, 2002, at 19.

[70] *Non-entrée* is a term coined to describe the array of legalized policies adopted by states to stymie access by refugees to their territories. See J. Hathaway, "The Emerging Politics of *Non-Entrée*," (1992) 91 *Refugees* 40.

Canada.[71] Because a visa will not be issued for the purpose of seeking refugee protection, only those who lie about their intentions or secure forged documentation are able successfully to satisfy the inquiries of the transportation company employees who effectively administer Canadian law abroad.[72] Most persons in these states, however, are simply barred from traveling to Canada altogether. Much the same approach is taken by New Zealand. When introducing a visa requirement for Indonesian nationals in 1998, the Immigration Minister justified his actions on the grounds that "[t]here have been over 300 refugee applications received in the last four months alone from Indonesian nationals ... By suspending the visa-free status for Indonesian nationals we are better placed to manage the risk of people seeking refugee status once they arrive here."[73] Britain was equally candid when it imposed a visa requirement on Zimbabweans in 2003: the High Commissioner to Zimbabwe indicated that the visa requirements "were intended to reduce the rising number of Zimbabweans seeking asylum in the UK."[74] The European Union has adopted an even more sweeping visa control policy. Building upon earlier arrangements

[71] "Canada is buffered from large scale [refugee] flows by the United States and, to a lesser extent, by Europe. What the government does to reinforce or counteract those buffers affects how accessible Canada is to people who do not submit to selection abroad, or who are in such circumstances that they cannot do so. The record of successive governments in imposing visa requirements on sources of refugee claims emphasizes the policy choice": R. Girard, "Speaking Notes for an Address to the Conference on Refuge or Asylum – A Choice for Canada," unpublished paper, 1986, on file at the library of the Centre for Refugee Studies, York University, at 4. "There is a correlation between the imposition of a visa requirement by Canada and the kinds of human rights abuses that cause refugees to flee. The worse the human rights abuses, the more likely the country is to have a visa requirement imposed on it": Canadian Council for Refugees, "Interdicting Refugees" (1998), at 23.

[72] See generally E. Feller, "Carrier Sanctions and International Law," (1989) 1(1) *International Journal of Refugee Law* 48 (Feller, "Sanctions"); and Danish Refugee Council and Danish Center of Human Rights, "The Effect of Carrier Sanctions on the Asylum System" (1991).

[73] "Indonesian nationals require visas to enter New Zealand," New Zealand Executive Government News Release, Oct. 21, 1998, quoting Minister of Immigration Hon. Tuariki Delamere.

[74] "UK tries to stop entry of Zimbabweans," *Daily News* (Harare), Nov. 8, 2002, referring to comments made by High Commissioner Brian Donnelly. Interestingly, even the British government conceded that in 2001 (that is, even before the onset of the most serious human rights abuse in Zimbabwe) 115 of 2,115 asylum applications in the UK by Zimbabweans had been found to be genuine: ibid. In the decision of *European Roma Rights Centre v. Immigration Officer at Prague Airport*, [2002] EWCA 1989 (Eng. QBD, Oct. 8, 2002), the court noted that "[o]ne of the objectives of imposing new visa regimes ... is to address the questions of asylum overload. When, for example, Colombia and Ecuador were included as visa states, this was directly in response to an increase in the number of those nationals coming to the United Kingdom in order to apply for asylum."

agreed to by core EU members,[75] the European Council now requires all member states to impose visas on the nationals of some 131 countries – including, for example, such refugee-producing countries as Afghanistan, Iraq, Somalia, and Sudan.[76] The effectiveness of visa controls as a means of barring genuine refugees from securing protection is clear. When Sweden imposed a visa requirement on Bosnians in 1992, for example, asylum requests by Bosnians dropped immediately from 2,000 to less than 200 per week.[77] More generally, Kjaerum suggests that much of the nearly 50 percent drop in the number of refugees seeking asylum in Europe from 1992 to 1998 was due to the impact of visa and related policies.[78]

A second mechanism of *non-entrée* is the deportation chain that can be set in motion by "first country of arrival" and "safe third country" rules. Taken together, "first country of arrival" and "safe third country" rules have traditionally posed a legal barrier to the entry into Europe of very large numbers of refugees.[79] For example, during the early 1990s invocation of these rules resulted in the return of refugees by Greece to Turkey, Libya, and the Sudan, from where some were then returned to their countries of origin.[80] Similarly, Norway returned Kosovo Albanian asylum-seekers to Sweden (where their claims had already been rejected), with the knowledge that they would be returned by Sweden to Serbia.[81]

The "first country of arrival" principle purports to collectivize responsibility to protect refugees among a select group of participating states. The two formal

[75] See generally J. Hathaway, "Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration," (1993) 26(3) *Cornell International Law Journal* 719, at 722–728.

[76] EC Reg. No. 539/2001 (Mar. 15, 2001). Exemptions are possible for persons admitted to a temporary protection regime, but not more generally: Council Directive 2001/55/EC (July 20, 2001), at Art. 8.3.

[77] M. Eriksson, *International Academy of Comparative Law National Report for Sweden* (1994), at 19.

[78] M. Kjaerum, "Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?," (2002) 24 *Human Rights Quarterly* 513, at 515.

[79] "There is now a latent danger of a deportation chain – in breach of international law – at the end of which refugees will find themselves dumped back in the country from which they fled. Far from mutually clarifying responsibilities for examining refugee status, the concept of safe third countries serves merely to justify refusing access to the asylum process": S. Teloken, "The Domino Effect," (1993) 94 *Refugees* 38, at 40.

[80] Z. Papassiopi-Passia, *International Academy of Comparative Law National Report for Greece* (1994), at 59. The new Law 2452/1996, however, "abolished the conditions of admissibility and laid down that 'an alien who is in any way on Greek territory shall be recognized as a refugee and shall be granted asylum if the conditions of Article 1(A) of the Geneva Convention . . . are fulfilled'": A. Skordas, "The New Refugee Legislation in Greece," (1999) 11(4) *International Journal of Refugee Law* 678, at 681.

[81] T. Einarsen, *International Academy of Comparative Law National Report for Norway* (1994), at 23. See also G. Tjore, "Norwegian Refugee Policy," (2002) 35 *Migration* 193, at 203.

harmonization regimes thus far established – that predicated on the Dublin Convention and Dublin Regulation in Europe,[82] and the more embryonic arrangement between Canada and the United States[83] – assign protective responsibility to the first partner state in which a given refugee arrives (at least where there are no issues of prior authorization to travel or family unity[84]). Other participating states are authorized summarily to remove the refugee to that single designated state, without conducting any examination of the merits of the claim to protection.

The "first country of arrival" principle is also increasingly applied in the domestic laws of states in many parts of the world. A variant of the principle is implicit in United States law which denies asylum to persons it deems to have been "firmly resettled" in another asylum state even if there is no reason to believe that the refugee can, in fact, return there.[85] At an informal level, the "first country of arrival" principle is often relied upon even in the less developed world. For example, persons seeking asylum in Kenya have been told by UNHCR to go back to Uganda or Tanzania through which they may already have passed.[86] Ugandan officials, in turn, have refused to consider the claims of Rwandan refugees previously present in Tanzania, even as Tanzania was threatening the refugees with forced repatriation to Rwanda.[87] South Africa ordered its border officials to turn back or detain refugees who traveled to that country via safe

[82] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 30 ILM 425 (1991) (Dublin Convention), at Arts. 4–8; European Council Reg. EC 343/2003, Feb. 18, 2003 (Dublin Regulation).

[83] Agreement between the Government of Canada and the Government of the United States Regarding Asylum Claims Made at Land Borders, Aug. 30, 2002, (2002) 79(37) *Interpreter Releases* 1446, at Art. 4.

[84] Priority in the determination of the state responsible for assessing refugee status is given to the member state in which an applicant's family members live, or are already being assessed for refugee status; and secondly, to the state, if any, which is responsible for a person's entry and presence within the European Union: Dublin Regulation.

[85] "Whether Germany will re-admit the Nasirs is not . . . a question which is now before us. Although the Nasirs may have trouble re-entering Germany, 'the pertinent regulations [8 CFR §208.13(c)(2)(i)(B)] specifically focus on resettlement status prior to the alien's entry into this country; they preclude a deportable alien from bootstrapping an asylum claim simply by unilaterally severing these existing ties to a third country after arriving in the United States'": *Nasir v. Immigration and Naturalization Service*, 30 Fed. Appx 812 (US CA9, Feb. 7, 2002).

[86] (1999) 53 *JRS Dispatches* (July 16, 1999).

[87] "Ethnic Rwandese asylum-seekers entering [Uganda] from Tanzania are no longer recognised by this government, Minister for Disaster Preparedness Brg. Moses Ali has said. 'On advice of UNHCR, the government stopped recognising Rwandese asylum-seekers from Tanzania since they were already accessing international protection,' Ali said": "Government no longer recognises Rwanda asylum-seekers," *Monitor* (Kampala), Oct. 7, 2002. See also *UN Integrated Regional Information Networks*, Dec. 21, 2002.

neighboring countries – though that policy was ordered withdrawn when challenged in the High Court.[88]

The "first county of arrival" rule is in essence a specific application of what have come to be known as "safe third country" rules, which authorize a person claiming refugee status to be sent to any "safe" state through which he or she may have passed en route to the country in which he or she is now present. Indeed, European law allows even the state designated to consider a refugee claim to send the refugee applicant onward to a "safe third country," including even to a non-European state, and whether or not that country is bound by refugee law. To qualify as a "safe third country" there must simply be a determination that the destination country is prepared to consider the applicant's refugee claim, and will not expose the claimant to persecution, (generalized) risk of torture or related ill-treatment, or *refoulement*.[89] Indeed, the European Union has recently sanctioned what has come to be known as the "super safe third country" notion, allowing refugees to be sent with no risk assessment whatever to states that are bound by both the Refugee Convention and the European Convention on Human Rights, which are adjudged to observe their provisions, and which operate a formal asylum procedure.[90]

Nor is application of the "safe third country" rule limited to states which participate in formal harmonization regimes. Some governments not party to any such agreement have unilaterally opted not to consider the claims of persons for whom a "safe third country" can be identified. In Australia, for example, this means that refugee claims are not addressed on the merits if the person seeking protection can be sent to another state to which he or she will be admitted; where there is no real chance of being persecuted for a Convention reason; and from which there is no real chance of *refoulement* to the country of origin.[91] Notably, the Australian version of the "safe third country" rule, in contrast to that adopted by the European Union, does not require that the applicant be granted access to a refugee status determination

[88] "Department of Home Affairs Backs Down on Asylum Policy," *Business Day*, May 10, 2001. See e.g. *Katambayi and Lawyers for Human Rights v. Minister of Home Affairs et al.*, Dec. No. 02/5312 (SA HC, Witwatersrand Local Division, Mar. 24, 2002), in which the court intervened to stop the removal of a refugee claimant in transit at Johannesburg Airport, ordering the government "to allow [the applicant] to apply for asylum in South Africa."

[89] Council Directive on minimum standards of procedures in Member States for granting and withdrawing refugee status, Doc. 8771/04, Asile 33 (Apr. 29, 2004) (EU Procedures Directive), at Art. 27.1.

[90] Ibid. at Art. 35A(2).

[91] *V872/00A v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 185 (Aus. FFC, June 18, 2002).

procedure in the destination country. Nor is the destination country limited to a state through which the applicant passed en route to Australia.

A third variant of *non-entrée* is the designation of entire countries or populations as manifestly not at risk, and hence unworthy of serious consideration for refugee status. Since being sanctioned by European immigration ministers in the early 1990s,[92] this concept has been a tool of *en bloc* exclusion of nationally defined groups. For example, the "safe country of origin" designation has been applied by Switzerland to all of India,[93] and by Germany to Romania and Senegal.[94] France treats some thirteen countries as presumptively safe, including Mali and Ghana.[95] Britain began applying the "safe country of origin" principle more recently, but has included a particularly wide range of states on its "white list" – for example, Bangladesh, Serbia, Sri Lanka, and Ukraine.[96] Applications for asylum made by persons from listed states are examined in the UK in a "fast-track" procedure designed to reach a result within ten days.[97]

The safe country of origin principle has recently been codified in European Union law, albeit with an explicit safeguard provision:[98] asylum states are entitled to assume that all nationals of listed countries are not refugees, though applicants must be allowed to attempt to rebut the presumption that their claims

[92] "Resolution on Manifestly Unfounded Applications for Asylum," Ad Hoc Group on Immigration Doc. SN4822/1/92 (WG1 1282), 1992.

[93] W. Kälin, *International Academy of Comparative Law National Report for Switzerland* (1994), at 22. By the late 1990s, this list included also Albania, Bulgaria, the Czech Republic, Gambia, Hungary, Poland, Romania, Senegal, and Slovakia: R. Boed, "Human Rights Postscript: Comments on the Concept of 'Safe Country of Origin,'" (1997) 7 *Human Rights Interest Group Newsletter* 15 (Boed, "Safe Country"), at 16.

[94] R. Hofmann, *International Academy of Comparative Law National Report for Germany* (1994), at 5. Other countries deemed safe by German law have included Bulgaria, the Czech Republic, Ghana, Hungary, Poland, and Slovakia: Boed, "Safe Country," at 16.

[95] M. Toumit, "Les associations refusent que le droit d'asile soit a la botte de l'interieur," *Le Monde*, Feb. 20, 2003.

[96] A. Travis, "Outcry as asylum 'white list' extended," *Guardian*, June 18, 2003, at 7.

[97] "The Home Office . . . said the introduction of a 'white list' of countries – from which applications were presumed to be unfounded – had halved the number of applications from those countries": A. Travis, "Tough asylum policy hits genuine refugees," *Guardian*, Aug. 29, 2003, at 11.

[98] A high-profile decision by Sweden in 2001 to refuse protection to a US citizen on the grounds that the US was a "safe country" may have accounted for some of the pressure to constrain the applicability of the principle. The applicant was a justice of the peace who had campaigned to make US law enforcement officials more accountable, leading to vicious reprisals which authorities were apparently powerless either to prevent or redress. The Swedish decision that the claim was "manifestly unfounded" because the United States is "an internationally recognized democracy" was criticized by Members of the European Parliament, who observed "that his case raises serious questions about the EU's proposed common asylum policy": J. Henley, "Swedes face call for asylum u-turn," *Guardian*, June 21, 2001, at 14.

are unfounded in the context of an accelerated procedure.[99] The safe country of origin rule moreover applies as among European Union states in a tacit if significantly more aggressive way, since European Union law now significantly constrains the recognition of refugee status to EU citizens.[100] Thus, for example, at-risk members of the Roma community in EU states have no effective means of securing refugee status within Europe, even though free movement within the Union is being withheld from the citizens of most of the states recently admitted for a period of years.[101] The UN High Commissioner for Refugees has nonetheless recommended a more aggressive and collectivized application of the "safe country of origin" notion by European countries.[102]

[99] EU Procedures Directive, at Art. 30.

[100] "'Refugee' means a *third country national* who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality [emphasis added]": EU Procedures Directive, at Art. 2(c). Moreover, "[t]his Directive is without prejudice to the Protocol on asylum for nationals of Member States of the European Union as annexed to the Treaty Establishing the European Community": ibid. at Preamble, para. 13. Under the Protocol on Asylum for Nationals of Member States of the European Union, annexed to the Treaty establishing the European Community, OJ 97/340/01, at 103 (Nov. 10, 1997), it is agreed that "Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters." It is further agreed that asylum applications are only receivable from a European national where the European Council is engaged in action against the country of origin, where the country of origin has derogated from the European Convention on Human Rights, or with the exceptional consent of the destination country – though the European Council must be informed of such a decision, and the claim must in any event be treated as "manifestly unfounded."

[101] "'It is frankly absurd that people can routinely claim that they are in fear of their lives in Poland or the Czech Republic,' [UK Home Secretary David Blunkett] wrote. 'These are democratic countries which live under the rule of law.' The UN, the European Commission, and even the Foreign Office disagree. A report by the UN's Human Rights Committee last year said it was 'deeply concerned about the discrimination against the Roma and the persistent allegations of police harassment.' This year's Foreign Office human rights report acknowledges that new anti-discrimination laws in the 10 [newly admitted EU] countries have not banished 'ingrained attitudes' towards minorities": R. Prasad, "No place of refuge," *Guardian*, Oct. 24, 2002, at 21.

[102] "Since the time that you collectively declared ten EU candidate countries to be 'safe countries of origin,' it is interesting to note that the number of applications from these countries has dropped. My Office is ready to consider more such situations, wherever there is a clear indication that flows are composed, overwhelmingly, of persons without a valid claim for international protection. For these groups, why not pool your processing and reception resources, with the aim of reaching decisions more quickly and disencumbering domestic systems ... Such an approach could have a dynamic impact on your harmonization process. Is it not time to move ahead with this?": UNHCR, "Statement by Mr. Ruud Lubbers, UN High Commissioner for Refugees, at Informal Meeting of the European Union Justice and Home Affairs Council, Veria, March 28, 2003."

The determination of many states to rely on *non-entrée* policies has reached new heights in recent years, with states apparently prepared even to deem parts of their own territory to be outside their own territory, with the hope of thereby avoiding protection responsibilities to persons present therein. A particularly insidious mechanism of *non-entrée* is the designation by some states of part of their airports as a so-called "international zone," in which neither domestic nor international law is said to apply.[103] Invoking this mechanism, France and other states have summarily expelled persons seeking recognition of their refugee status without any examination of their need for protection.[104] Even more creatively, the Australian government has sought to "excise" more than 3,500 of its islands from Australia's self-declared "migration zone."[105] In essence, the result would be that refugees arriving at one of the excised islands – including not only main destinations for those arriving by boat from Southeast Asia, such as Christmas Island, but even an island only 2 km from the coast of the Australian mainland[106] – would not be entitled to have their claims assessed under Australia's refugee status determination system. Rather, they would be treated as though they were in an overseas refugee camp and considered for discretionary admission either immediately or after having their circumstances considered in the territory of a partner state, such as Nauru, to which they might be removed.[107] While the Australian Senate has consistently disallowed regulations and defeated

[103] Z. Papassiopi-Passia, *International Academy of Comparative Law National Report for Greece* (1994), at 15–17.

[104] See D. Lochak, "L'accès au territoire français: la réglementation," in F. Julien-Laferrière ed., *Frontières du droit, Frontières des droits* (1993), at 179.

[105] Australia's "migration zone" includes land above the low water mark and sea within the limits of a port in a State or Territory but does not include the sea within a State or Territory or the "territorial sea" of Australia: Migration Act 1958, as amended, ss. 5(1) and 7. While Australia has attempted to escape much legal responsibility in its territorial seas, such efforts are of no value as matters of international law. "The provision in the Migration Act which in effect excludes territorial waters from Australia's domestically created 'Migration Zone' is internationally incapable of excluding [the duty of *non-refoulement*] ... As the 1969 Vienna Convention on the Law of Treaties (Article 27) expressly indicates, domestic legislation cannot be used to escape treaty obligations": Jean Pierre Fonteyne, "Skulduggery on the high seas," *Canberra Times*, Sept. 11, 2001, at A-9.

[106] K. Lawson, "Ruddock flags alternative plan," *Canberra Times*, June 18, 2002, at 3, referring to Milingimbi Island, said to be 1–2 km from the mainland at low tide.

[107] "A person who enters ... an 'excised offshore place' now becomes an 'offshore entry person.' The Law empowers the arrest and detention of an offshore entry person (or those who would become so should they enter an excised offshore place ...) and removal from Australian territory to a designated place outside Australia ... Furthermore the law prohibits judicial proceedings relating to offshore entry by an 'offshore entry person' ... [including the] right to apply for a [protection or other] visa. The exception relates to proceedings brought under the original jurisdiction of the High Court under Section 75 of the Constitution, which of course cannot be utilized once the individual concerned has been removed from Australian territory": F. Motta, "Between a Rock and a Hard Place: Australia's Mandatory Detention of Asylum Seekers," (2002) 20(3) *Refuge* 12 (Motta, "Rock"), at 17.

legislation authorizing the excision of the islands,[108] the government refuses to abandon the strategy.[109]

Beyond all of the strategies deployed to date to avoid the admission of refugees, an even more assertive form of collectivized action may still emerge. The UNHCR, for example, has declared itself committed to the negotiation of a "Convention Plus" regime under which the secondary movement of refugees beyond their regions of origin would be discouraged in exchange for the agreement of developed countries to provide resettlement opportunities and development assistance.[110] The British government has proposed the establishment of "regional protection areas" to which persons claiming refugee status outside their own region would be sent for processing in an internationally funded and administered center. Only those "most in need" would be resettled to a (developed) state outside the region of origin.[111] In line with this general goal, the Intergovernmental Consultations on Refugees, Asylum and Migration Policies – an informal grouping of core members of the EU in addition to Australia, Canada, New Zealand, Norway, Switzerland, and the United States – is developing what it describes as a proposal for "effective protection" predicated on reducing demand for secondary and tertiary movement out of regions of origin, and on enhancing the capacity of countries in regions of origin to protect genuine refugees.

In sum, refugees face a broad array of practices and policies which may prevent them from entering and remaining in an asylum state. They may face blunt pushbacks from a state's territory, whether in particular instances, as part of a generalized border closure, or by the erection of physical barriers to access. Even if able to enter an asylum state, they may be summarily ejected by specific official action, under mass removal policies, or by non-state agents acting with the encouragement or toleration of the state. Refugees may also be sent away because they are denied access to a system to verify their refugee status, or because whatever system is in place fails accurately to identify them as refugees. Refugees are also frequently forced back to their country of origin under the pretext of "voluntary" repatriation efforts. Governments at times even reach out into international areas, particularly the high seas, to repel

[108] "Mr. Ruddock was given the power to excise islands by regulation in laws passed by Parliament late [in 2001]. Regulations are disallowable by Parliament ... and when Mr. Ruddock tried in May to excise the thousands of northern islands, the Senate blocked the move. Mr. Ruddock tried again with legislation instead, but last week the Senate threw out the legislation": K. Lawson, "Ruddock puts excising ploy to the test," *Canberra Times*, Dec. 19, 2002, at A-4.

[109] "Mr. Ruddock's spokesman did not rule out ... excising individual islands off the northern coast if suspicious boats appeared, despite the Senate's position, saying the 'principle of excision' remained on the agenda": ibid.

[110] "Lubbers Proposes 'Convention Plus' Approach," UNHCR Press Release, Sept. 13, 2002.

[111] United Kingdom (Home Office), "A New Vision for Refugees," Mar. 7, 2003.

refugees heading for their territory. There is an ever-expanding array of *non-entrée* policies which rely on law to deny entry to refugees. These include the classic approach of imposing visa controls on refugee-producing states, enforced by carrier sanctions; deportation chains set in motion by "first country of arrival" and "safe third country" rules; the *en bloc* denial of access to persons from states deemed to be safe for all their citizens; and even the designation of parts of a state's territory as an "international zone" or as "excised" for purposes of access to refugee protection systems. In the future, there is reason to believe that refugees may be routinely sent back to their regions of origin for status assessment, with only a minority selected there for resettlement to extra-regional countries.

> **Refugee Convention, Art. 33 Prohibition of expulsion or return ("refoulement")**
>
> **1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.**
>
> **2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.**

Art. 33 of the Refugee Convention is the primary response of the international community to the need of refugees to enter and remain in an asylum state.[112] The duty of *non-refoulement* is not, however, the same as a right to asylum from persecution,[113] in at least two ways. First and most critically, the

[112] The ambiguous relationship between *non-refoulement* and a right of entry is clear from the remark of Justices McHugh and Gummow of the High Court of Australia that "[a]lthough none of the provisions in Chapter V [of the Refugee Convention] gives to refugees a right to enter the territory of a contracting state, in conjunction they provide some measure of protection": *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14 (Aus. HC, Apr. 11, 2002), per McHugh and Gummow JJ.

[113] Interestingly, even the (non-binding) Universal Declaration of Human Rights provides only that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution" – a formulation which stops distinctly short of requiring states to grant asylum: Universal Declaration of Human Rights, UNGA Res. 217A(III), Dec. 10, 1948 (Universal Declaration), at Art. 14(1). Perhaps most tellingly, not even a vague formulation of this kind made its way into the (binding) Covenant on Civil and Political Rights. This treaty provides only that "[e]veryone shall be free to leave any country, including his own": International Covenant on Civil and Political Rights, UNGA Res. 2200A(XXI), adopted Dec. 16, 1966, entered into force Mar. 23, 1976 (Civil and Political Covenant), at Art. 12(2).

duty of *non-refoulement* only prohibits measures that cause refugees to "be pushed back into the arms of their persecutors";[114] it does not affirmatively establish a duty on the part of states to receive refugees.[115] As an obligation "couched in negative terms,"[116] it constrains, but does not fundamentally challenge, the usual prerogative of states to regulate the entry into their territory of non-citizens.[117] State parties may therefore deny entry to refugees so long as there is no real chance that their refusal will result in the return of the refugee to face the risk of being persecuted.[118] This is so even if the refugee has not previously been recognized as a refugee by any other country.[119] But where there is a real risk that rejection will expose the refugee "in any manner whatsoever" to the risk of being persecuted for a Convention ground, Art. 33 amounts to a de facto duty to admit the refugee, since admission is normally the only means of avoiding the alternative, impermissible consequence of exposure to risk.

[114] Statement of Mr. Chance of Canada, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 7.

[115] Art. 33 was said to be "a negative duty forbidding the expulsion of any refugee to certain territories but [which] did not impose the obligation to allow a refugee to take up residence": Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 33. See E. Lauterpacht and D. Bethlehem, "The Scope and Content of the Principle of *Non-Refoulement*," in E. Feller et al. eds., *Refugee Protection in International Law* 87 (Lauterpacht and Bethlehem, "*Non-Refoulement*"), at para. 76: "[T]he 1951 Convention and international law generally do not contain a right to asylum ... [W]here States are not prepared to grant asylum to persons who have a well-founded fear of persecution, they must adopt a course of action which does not amount to *refoulement*. This may involve removal to a safe third country or some other solution such as temporary protection or refuge."

[116] *M38/2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2003] FCAFC 131 (Aus. FFC, June 13, 2003).

[117] "Apart from any limitations which may be imposed by specific treaties, states have been adamant in maintaining that the question of whether or not a right of entry should be afforded an individual, or to a group of individuals, is something which falls to each nation to resolve for itself": *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14 (Aus. HC, Apr. 11, 2002), per McHugh and Gummow JJ. This formulation was endorsed in *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at para. 19.

[118] In defining the relevant evidentiary standard for sending a refugee to another state in line with Art. 33, the Full Federal Court of Australia has helpfully insisted that the destination country must be one in which "the applicant will not face a *real chance* of persecution for a Convention reason," and that there is not "a *real chance* that the person might be refouled [from the state of immediate destination] to a country where there will be a *real risk* of persecution [emphasis added]": *V872/00A v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 185 (Aus. FFC, June 18, 2002).

[119] *Rajendran v. Minister for Immigration and Multicultural Affairs*, (1998) 166 ALR 619 (Aus. FFC, Sept. 4, 1998).

The second critical distinction between *non-refoulement* and a right of asylum follows directly from the purely consequential nature of the implied duty to admit refugees under Art. 33. Because the right of entry that flows from the duty of *non-refoulement* is entirely a function of the existence of a risk of being persecuted, it does not compel a state to allow a refugee to remain in its territory if and when that risk has ended. Thus, "[r]efugee status is a temporary status for as long as the risk of persecution remains."[120] Indeed, as the High Court of Australia has observed,

> The term "asylum" does not appear in the main body of the text of the [Refugee] Convention; the Convention does not impose an obligation upon contracting states to grant asylum or a right to settle in those states to refugees arriving at their borders.[121]

4.1.1 Beneficiaries of protection

The original prohibition of *refoulement*, contained in the 1933 Convention, could be claimed only by "refugees who have been authorized to reside [in the state party] regularly."[122] In line with this precedent, the original drafts of the duty of *non-refoulement* in the 1951 Refugee Convention seemed also to advocate this restriction:[123] the explicit prohibition of *refoulement* applied only to refugees whose arrival was sanctioned by the asylum state. Yet both the Secretary-General's and French drafts of the Convention also contained an additional sub-paragraph not conditioned on authorized entry, providing for a duty "in any case not to turn back refugees to the frontiers of their country of origin, or to territories where their life or freedom would be threatened."[124]

[120] *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002), per Lord Scott.

[121] *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14 (Aus. HC, Apr. 11, 2002), per McHugh and Gummow JJ. See also *Ruddock v. Vadarlis*, (2001) 110 FCR 491 (Aus. FFC, Sept. 18, 2001), at 521: "By Art. 33, a person who has established refugee status may not be expelled to a territory where his life and freedom would be threatened for a Convention reason. Again, there is no obligation on the coastal state to resettle in its own territory."

[122] Convention relating to the International Status of Refugees, 159 LNTS 3663, done Oct. 28, 1933, entered into force June 13, 1935 (1933 Refugee Convention), at Art. 3.

[123] The drafts prepared by both the Secretary-General and France that were before the Ad Hoc Committee on Statelessness and Related Problems in February 1950 accorded protection against *refoulement* only to refugees "who have been authorized to reside [in the state party] regularly": United Nations, "Proposal for a Draft Convention," UN Doc. E/AC.32/2, Jan. 17, 1950 (United Nations, "Draft Convention"), at 45 (draft Art. 24(1)); and France, "Proposal for a Draft Convention," UN Doc. E/AC.32/L.3, Jan. 17, 1950 (France, "Draft Convention"), at 9 (draft Art. 19(1)).

[124] United Nations, "Draft Convention," at 45 (draft Art. 24(3)); and France, "Draft Convention," at 9 (draft Art. 19(3)).

A non-governmental text submitted by the Agudas Israel World Organization was, however, selected over the two official drafts as the basis for this part of the work of the Ad Hoc Committee on Statelessness and Related Problems.[125] Under the Agudas approach as modified by the delegates, the distinct provisions addressing *non-refoulement* and non-return to the risk of persecution were collapsed into a single provision applicable to all refugees, with no mention of the need for authorized arrival.[126] This critical conceptual shift attracted no comment.[127] The drafting process thereafter proceeded on the assumption that prior permission to reside in the asylum state was not a relevant issue.[128] This decision to protect all refugees from the risk of *refoulement* is clearly of huge importance to most contemporary refugees, since they have generally not been authorized to travel to, much less to reside in, the state from which they request protection. Because of this shift, for example, the Greek turn-back of busloads of Kosovar refugees because their entry had not been previously authorized was in breach of Art. 33.

On a related point, it has previously been explained why the duty of *non-refoulement* inheres on a provisional basis even before refugee status has been formally assessed by a state party.[129] In brief, because it is one's de facto

[125] UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 3. The representative of the United Kingdom argued that this text "presented the question of expulsion and non-admittance in a more logical form than did the others": ibid.

[126] "Each of the High Contracting Parties undertakes not to expel or to turn back refugees to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality or political opinions": UN Doc. E/AC.32/L.22, Feb. 1, 1950.

[127] Indeed, an exchange between the Venezuelan, French, and Canadian representatives makes clear that the provision was not to be limited to refugees lawfully admitted to residency. "The Chairman, speaking as the representative of Canada, said that his country was in a similar situation to that of Venezuela in that shiploads of emigrants were often landed far away from any port control authorities. The difficulties entailed by such practices were, however, very small compared with those facing European countries. That was why he wanted to achieve unanimity on article [33], which gave refugees the minimum guarantees to which they were entitled": Statement of Mr. Chance of Canada, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 22.

[128] A Swiss protest that the article "concerned only refugees lawfully resident in a country and not those who applied for admission or entered the country without authorization" evoked an immediate answer from the Israeli representative that in fact "[t]he Swiss observer was apparently under a misapprehension with regard to the application of article [33]. In the discussions at the first session it had been agreed that article [33] referred both to refugees legally resident in a country and those who were granted asylum for humanitarian reasons. Apparently the Swiss Government was prepared to accept the provisions of the article with regard to lawfully resident refugees but not to those entering illegally and granted asylum. He feared that the Swiss Government might find its interpretation in conflict with the general feeling which had prevailed in the Committee when it had drafted the article": Statements of Mr. Schurch and Mr. Robinson, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 32–33.

[129] See chapter 3.1 above, at pp. 158–160.

circumstances, not the official validation of those circumstances, that gives rise to Convention refugee status, genuine refugees may be fundamentally disadvantaged by the withholding of rights pending status assessment. They are rights holders under international law, but could be precluded from exercising their legal rights during the often protracted domestic processes by which their entitlement to protection is verified by officials. Unless status assessment is virtually immediate, the adjudicating state may therefore be unable to meet its duty to implement the Refugee Convention in good faith. While Convention rights clearly inhere (even provisionally) only on the basis of satisfaction of the relevant attachment requirement, the duty of *non-refoulement* is one of a small number of rights that is not contingent even on arrival at a state's territory, much less on the formal adjudication of status.[130] The duty therefore applies whether or not refugee status has been formally recognized.

A somewhat more contentious question is whether the beneficiary class for protection against *refoulement* under the terms of Art. 33 is the same as the class of refugees defined by Art. 1 of the Refugee Convention. On the one hand, a narrow textual analysis might lead one to believe that not all refugees are guaranteed Art. 33 rights, since the text of the provision prohibits only the return of refugees to places where their "life or freedom would be threatened" for a Convention reason.[131] As Weis affirms, however, the drafting history of the Convention makes it quite clear that there was no intention to grant protection against *refoulement* to only a subset of refugees.[132] Rather, the reference to "life or

[130] See chapter 3.1.1 above, at pp. 161–164.

[131] In a misguided effort to reconcile domestic US law (which does not grant protection against *refoulement* to all persons who meet the Convention refugee definition, but rather entitles them only to seek discretionary relief from the Attorney General) to the requirements of international law, the US Supreme Court seized on the "life or freedom" language in Art. 33 to validate the more limited American approach. It was therefore led to determine that "those who can only show a well-founded fear of persecution are not entitled to anything, but are eligible for the discretionary relief of asylum": *Immigration and Naturalization Service v. Cardoza Fonseca*, (1987) 480 US 421 (US SC, Mar. 9, 1987). But see generally J. Hathaway and A. Cusick, "Refugee Rights Are Not Negotiable," (2000) 14(2) *Georgetown Immigration Law Journal* 481.

[132] "The words 'where their life or freedom was threatened' may give the impression that another standard is required than for refugee status in Article 1. This is, however, not the case. The Secretariat draft referred to refugees 'escaping from persecution' and to the obligation not to turn back refugees 'to the frontier of their country of origin, or to territories where their life or freedom would be threatened on account of their race, religion, nationality, or political opinions.' In the course of drafting the words 'country of origin,' 'territories where their life or freedom was threatened' and 'country in which he is persecuted' were used interchangeably. The reference to Article 1 of the Convention was introduced mainly to refer to the dateline of 1 January 1951 but it also indicated that there was no intention to introduce more restrictive criteria than that of 'well-founded fear of persecution' used in Article 1(A)(ii)": P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (posthumously pub'd., 1995) (Weis, *Travaux*), at 303, 341.

freedom" was intended to function as a shorthand for the risks that give rise to refugee status under the terms of Art. 1.[133] The drafting history not only supports this view, but affords no evidence whatever for the contrary thesis that this choice of language was intended fundamentally to limit the ability to claim the Convention's most basic right.[134]

Lauterpacht and Bethlehem have more recently advanced the extreme opposite thesis, namely that "the threat contemplated in Article 33(1) [may be] broader than simply the risk of persecution . . . . [including] a threat to life or freedom [that] may arise other than in consequence of persecution."[135] In support of this thesis, they rely on the broadening of UNHCR's competence as an agency, on the humanitarian objectives of the Refugee Convention, and on the fact that various regional human rights instruments are now understood to provide for more broadly applicable forms of protection against *refoulement*. This leads them to conclude that "a broad reading of the threat *contemplated by Article 33(1)* is warranted [emphasis added],"[136] and specifically that:

> [T]he words "where his life or freedom would be threatened" must be construed to encompass circumstances in which a refugee or asylum-seeker (a) has a well-founded fear of being persecuted, (b) faces a real risk of torture or cruel, inhuman or degrading treatment or punishment, or (c) faces other threats to life, physical integrity, or liberty.[137]

Putting to one side the question of whether there is today a broader duty of *non-refoulement* under customary international law,[138] and recognizing that the threats noted in (b) and (c) are in any event likely to fall within modern understandings of a risk of "being persecuted,"[139] the analysis presented is

[133] See chapter 4.2.1 below, at pp. 399–401, for discussion of the choice of comparable language for Art. 31(1).

[134] As Grahl-Madsen observes, "it was quite unwittingly that the concept of 'life [or] freedom' was introduced [into] Article 31, and it seems that the widening of [the] scope of the provision . . . must not lead us to restrict its meaning with regard to the kinds of persecution which warrant exemption from penalties. It is likewise inadmissible to use the language of Articles 31 and 33 to restrict the meaning of 'persecution' in Article 1. The word 'freedom' must be understood in its widest sense": A. Grahl-Madsen, *Commentary on the Refugee Convention 1951* (1963, pub'd. 1997) (Grahl-Madsen, *Commentary*), at 175.

[135] Lauterpacht and Bethlehem, "*Non-Refoulement*," at para. 127.

[136] Ibid. at paras. 128–132. [137] Ibid. at para. 133. [138] See chapter 4.1.6 below.

[139] Justice Kirby of the High Court of Australia has observed that "decision-makers in several other jurisdictions [have approached] the meaning of the word 'persecuted' by reference to the purpose for which, and the context in which, it appears rather than strictly by reference to local dictionaries . . . [The Refugee Convention's] meaning should be ascertained having regard to its object, bearing in mind that the Convention is one of several important international treaties designed to redress 'violation[s] of basic human rights, demonstrative of a failure of state protection'": *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14 (Aus. HC, Apr. 11, 2002), per Kirby J. For example, the Canadian Supreme Court has held that "[u]nderlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination . . . . Persecution, for

simply unsustainable as a matter of law. The fact that there has been an expansion of UNHCR's agency mandate and of the duty of non-return under international human rights law more generally cannot be invoked to determine the meaning of Art. 33(1) of the Refugee Convention. While reference can, of course, be made to understandings of these more general developments in order to interpret cognate ambiguous language,[140] evolution outside of refugee law cannot be relied upon to override the linkage between the risks described in Art. 33(1) and entitlement to recognition of refugee status under Art. 1.[141]

The middle-ground position – namely, that Art. 33's guarantee against *refoulement* where "life or freedom would be threatened" for a Convention ground extends to situations where there is a risk of "being persecuted" for a Convention ground – was adopted by Lord Goff in the decision of the House of Lords in *Sivakumaran*:

> It is, I consider, plain, as indeed was reinforced in argument by counsel for the High Commissioner with reference to the *travaux préparatoires*, that the *non-refoulement* provision in Article 33 was intended to apply to all persons determined to be refugees under Article 1 of the Convention.[142]

The approach has also been routinely endorsed in the Australian jurisprudence,[143] is affirmed in the more recent English caselaw,[144] and has been

example, undefined in the Convention, has been ascribed the meaning of sustained or systemic violation of basic human rights demonstrative of a failure of state protection": *Canada v. Ward*, (1993) 103 DLR 4th 1 (Can. SC, June 30, 1993). "[C]ore entitlements [relevant to the meaning of 'being persecuted'] ... may be found by reference either to obligations under international law (obligations between states), or by reference to the human rights of individuals, for example pursuant to the conventions on human rights, or as recognized by the international community at large": *Sepet v. Secretary of State for the Home Department*, [2001] EWCA Civ 681 (Eng. CA, May 11, 2001), per Waller LJ, appeal to the House of Lords rejected in *Sepet and Bulbul v. Secretary of State for the Home Department*, [2003] UKHL 15 (UK HL, Mar. 20, 2003).

140 See chapter 1.3.3 above, at pp. 64–68.

141 See chapter 1.3.2 above, at p. 52.

142 *R v. Secretary of State for the Home Department, ex parte Sivakumaran*, [1988] 1 All ER 193 (UK HL, Dec. 16, 1987), per Lord Goff at 202–203.

143 "Article 33 states the principle of *non-refoulement*, which applies to persons who are refugees within the meaning of Article 1. Although the definition of 'refugee' in Article 1 and the identification of persons subject to the *non-refoulement* obligation in Article 33 differ, it is clear that the obligation against [*refoulement*] applies to persons who are determined to be refugees under Article 1": *M38/2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2003] FCAFC 131 (Aus. FFC, June 13, 2003). See also *Minister for Immigration and Multicultural Affairs v. Savvin*, (2000) 171 ALR 483 (Aus. FFC, Apr. 12, 2000).

144 "In my judgment it is Art. 1 ... which must govern the scope of Art. 33 rather than the other way round": *Adan v. Secretary of State for the Home Department*, [1997] 1 WLR 1107 (Eng. CA, Feb. 13, 1997), per Simon Brown, LJ. While the House of Lords reversed the result reached in the Court of Appeal, four members of the House of Lords (Lord Lloyd of Berwick, Lord Goff of Chieveley, Lord Nolan, and Lord Hope of Craighead) nonetheless specifically endorsed the views of Simon Browne LJ on this point: *R v. Secretary of State for the Home Department, ex parte Adan*, [1999] 1 AC 293 (UK HL, Apr. 2, 1998), at 306, 301, 312, and 312.

adopted in New Zealand.[145] Not only is it a position that is firmly rooted in the actual intentions of the drafters, but it most effectively meshes with the internal structure of the Convention itself. In contrast, the conservative view championed by the American Supreme Court[146] implies that at least some persons with a well-founded fear of being persecuted may nonetheless be forced back to persecution unless the risk they face is particularly egregious – surely an interpretation at odds with the Convention's basic purpose of ensuring that refugees are granted the Convention's protections.[147] Equally of concern, the liberal optic seems designed effectively to require state parties to the Refugee Convention to implement duties that in fact follow from other human rights conventions – even if states are not actually parties to those other accords. The middle-ground position on Art. 33 contended for here, in contrast, ensures that all persons who are refugees are protected from return to the risks which gave rise to that status: no more, and no less.

4.1.2 Nature of the duty of non-refoulement

It follows from the endorsement of a coordinated understanding of Arts. 1 and 33 described above[148] that there is at least one, quite fundamental limitation on the scope of Art. 33's duty of *non-refoulement*. If the duty of *non-refoulement* under Art. 33 of the Refugee Convention can be claimed only by persons who are, in fact, refugees, then it is not a right that inheres in persons who have yet to leave their own country. This is because Art. 1 of the Convention defines a refugee as a person who "is outside the country of his nationality."[149] Art. 33 is not therefore a constraint on actions which deny would-be refugees the ability to leave their own state.

[145] The New Zealand Court of Appeal has determined that the scope of prohibited return under Art. 33(1) "is usually interpreted as covering all situations where the refugee risks any type of persecution for a Convention reason": *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at para. 36.

[146] As previously noted, the United States Supreme Court takes the view that a risk to "life or freedom" is a more demanding notion than a risk "of being persecuted": see text above at p. 304, n. 131.

[147] "*The High Contracting Parties* . . . [c]onsidering that it is desirable to revise and consolidate previous international agreements . . . and to extend the scope of and the protection accorded by such instruments by means of a new agreement . . . [h]ave agreed as follows": Refugee Convention, at Preamble. The Convention then provides a definition of refugee status in Art. 1, and defines the rights that follow from refugee status in Arts. 2–34.

[148] See chapter 4.1.1 above, at pp. 306–307.

[149] Refugee Convention, at Art. 1(A)(2). In the case of persons who are stateless, Art. 1 requires that they be "outside the country of [their] former habitual residence": ibid.

This issue was thoroughly considered in the English *European Roma Rights Centre* case.[150] One of the arguments advanced was that the pre-entry clearance procedure operated by British authorities at Prague Airport was in breach of Art. 33. It was agreed that the system was "aimed principally at stemming the flow of asylum-seekers from the Czech Republic, the vast majority of these being of Romani ethnic origin (Roma), and that in this it has plainly had some considerable success."[151] Moreover, it was also understood that "[t]he object of these controls ... so far as asylum countries are concerned, is to prevent [refugees] from reaching [British] shores."[152] The key issue was therefore "whether a scheme designed to prevent any such asylum claims (whether genuine or otherwise) being made in the United Kingdom is inconsistent with the United Kingdom's obligations in international law, in particular under the Convention."[153] The Court of Appeal determined that it was not:

> That Article 33 of the Convention has no direct application to the Prague operation is plain ... [I]t applies in terms only to refugees, and a refugee is defined ... as someone necessarily "outside the country of his nationality" ... For good measure, Article 33 forbids "*refoulement*" to "frontiers" and, whatever precise meaning is given to the former term, it cannot comprehend action which causes someone to remain on the same side of the frontier as they began; nor indeed could such a person be said to have been returned to any frontier.[154]

This conclusion is legally sound, even as it clearly points to a serious protection risk that arises by virtue of the gap between the duty of *non-refoulement* and a broader notion of access to asylum.[155] In truth, in-country interdiction schemes would be more effectively challenged as violations by the home state

[150] *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), rev'd on other grounds at [2004] UKHL 55 (UK HL, Dec. 9, 2004).

[151] *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at para. 3.

[152] Ibid. at para. 1. [153] Ibid. at para. 18.

[154] Ibid. at para. 31. The House of Lords agreed, noting succinctly that "[t]he requirement that a foreign national applying for refugee status must, to qualify as a refugee, be outside his country of nationality is unambiguously expressed in the Convention definition of refugee": *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at para. 16.

[155] In the High Court decision, it is recorded that counsel advanced the argument that the Prague pre-screening system is "if not in breach of an express term or obligation under the Convention, yet a breach of the obligation of good faith owed by a signatory state, in that it would be preventing those seeking asylum from gaining international protection": *European Roma Rights Centre v. Immigration Officer at Prague Airport*, [2002] EWCA 1989 (Eng. HC, Oct. 8, 2002), at para. 34. In response, the court noted that "[t]he UNHCR has, it seems, reservations about a pre-clearance system, but it does not explain

of Art. 12(2) of the Civil and Political Covenant, which provides that "[e]veryone shall be free to leave any country, including his own."[156] The Human Rights Committee has determined that

> Freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus traveling abroad is covered, as well as departure for permanent emigration. Likewise, the right of the individual to determine the State of destination is part of the legal guarantee.[157]

This right may only be limited for a reason deemed legitimate under the Covenant,[158] and may in any event not be limited on a discriminatory basis.[159] Thus, at least in a situation akin to the Prague Airport case – where the prohibition of seeking protection abroad is unlikely to be deemed a legitimate reason for denial of the right to leave one's country, and where the prohibition was, at least in practice, implemented on a race-specific basis[160] – the home state should be found in breach of the Covenant. Indeed, both the home state and any

either how in practice it is to be distinguished from a visa system, and whether that system too is to be regarded as objectionable, and if so on what basis, or how the position it takes ... is consistent with its own Handbook": ibid. at para. 49. The House of Lords emphatically rejected the notion that the duty of good faith treaty interpretation could effectively result in the imposition of duties at odds with the text of the treaty, finding that "there is no want of good faith if a state interprets a treaty as meaning what it says and declines to do anything significantly greater than or different from what it has agreed to do": *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), per Lord Bingham at para. 19. See generally the discussion of the implications of the duty of good faith interpretation in the opinion of Lord Hope, ibid. at paras. 57–64, leading to the conclusion that "[w]hat the Convention does is assure refugees of the rights and freedoms set out in chapters I to V when they are in countries that are not their own. It does not require the state to abstain from controlling the movements of people outside its border who wish to travel to it in order to claim asylum": ibid. at para. 64.

156 Civil and Political Covenant, at Art. 12(2).

157 UN Human Rights Committee, "General Comment No. 27: Freedom of movement" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 173, para. 8.

158 This right is subject only to "restrictions ... provided by law, [and which] are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant": Civil and Political Covenant, at Art. 12(3). The scope of these permissible limitations is discussed at chapter 6.7 below, at pp. 897–902.

159 Art. 12(3) requires that restrictions be "consistent with the other rights recognized in the present Covenant"; if discriminatory, e.g. on grounds of race, there would be a breach of both Arts. 2(1) and 26 of the Covenant, thus disqualifying them from meeting the requirements of Art. 12(3): Civil and Political Covenant, at Art. 12.

160 Indeed, the House of Lords struck down the British pre-screening system at Prague Airport precisely on the grounds that "[a]ll the evidence before us, other than that of the intentions of those in charge of the operation, which intentions were not conveyed to the officers on the ground, supports the inference that Roma were, simply because they were Roma, routinely treated with more suspicion and subjected to more intensive and

foreign countries with which it chooses to share jurisdiction over departure from its territory should be held jointly liable for a breach of Art. 12(2).[161] But this does not change the fact that prohibitions on departure operated from within the territory of one's own state, and which preclude exit altogether, cannot breach rights under the Refugee Convention, including to protection against *refoulement*:

> Article 33 ... is concerned only with where a person must not be sent, not with where he is trying to escape from. The Convention could have, but chose not to, concern itself also with enabling people to escape their country by providing for a right of admission to another country to allow them to do so ...
>
> In an ideal world there would no doubt be provision for states to facilitate the escape of persecuted minorities ... I am satisfied, however, that on no view of the Convention is this within its scope. The distinction between, on the one hand, a state preventing an aspiring asylum-seeker from gaining access from his own country to its territory, and on the other hand returning such a person to his own country ... can be made to seem a narrow and unsatisfactory one. In my judgment, however, it is a crucial distinction to make and it is supported by both the text of the Convention and by the authorities dictating its scope.[162]

Art. 33 is similarly incapable of invalidating the classic tool of *non-entrée*: visa controls imposed on the nationals of refugee-producing states,[163]

intrusive questioning than non-Roma ... [S]etting up an operation like this, prompted by an influx of asylum seekers who are overwhelmingly from one comparatively easily identifiable racial or ethnic group, requires enormous care if it is to be done without discrimination. That did not happen. The inevitable conclusion was that the operation was inherently and systematically discriminatory and unlawful": *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), per Baroness Hale at para. 97.

[161] The UN Human Rights Committee has read Art. 2(1) of the Civil and Political Covenant disjunctively, finding that the obligation to respect rights "within [a state's] territory and to all persons subject to [its] jurisdiction" means that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party": UN Human Rights Committee, "General Comment No. 31: The nature of the general legal obligation imposed on states parties to the Covenant" (2004), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 192, para. 10. See generally chapter 3.1.1 above, at pp. 165–169.

[162] *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at paras. 37, 43, affirmed in this regard in *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at paras. 13–17.

[163] In many cases, of course, visa requirements are imposed for general migration control reasons, with no intent to stop the departure of refugees. Yet it remains that visa controls are unquestionably crude mechanisms that fail to distinguish between persons at risk of persecution and others, or between those at-risk persons who can safely access protection in other countries, and those who have no options.

enforced by carrier sanctions.[164] Visa control policies are generally enforced in countries of origin by airline and other common carriers, aware that failure to do so could result in penalties or prosecution by the destination country. Because no country issues visas for the purpose of entering its asylum system, any traveler who honestly states that he or she intends to claim refugee status upon arrival will in practice be turned back at the port of departure. Countries of origin are normally aware of such practices, or could readily inform themselves with minimal effort.[165]

In contrast to in-country interception of the kind implemented by the United Kingdom at Prague Airport, most visa controls – including, for example, those routinely imposed by Canada, New Zealand, and now required by European Union law – operate passively, with no need for the state imposing the controls to establish a physical presence in the would-be refugee's country of origin. UNHCR argued before the English courts that reliance could be placed on this distinction in order to strike down the Prague system without simultaneously invalidating visa control systems that operate to keep refugees inside their own countries. It suggested "that there is a distinction to be made between 'the active interdiction or interception of persons seeking refuge from persecution' on the one hand and 'passive regimes, such as visa controls and carrier sanctions' on the other." The Court of Appeal sensibly found this distinction to be without merit:[166]

[164] UNHCR has traditionally seemed unwilling to confront the fact that the denial of access to refugees by the imposition of visa controls is not simply the inadvertent consequence of a general policy of migration control, but can actually be a policy targeted at those who wish to claim protection. For example, the only mention of visa controls in UNHCR's position paper on interception notes that "[s]tates have a legitimate interest in controlling irregular migration. Unfortunately, existing controls, such as visa requirements and the imposition of carrier sanctions ... often do not differentiate between genuine asylum-seekers and economic migrants. National authorities, including immigration and airline officials posted abroad, are frequently not aware of the paramount distinction between refugees, who are entitled to international protection, and other migrants, who are able to rely on national protection": UNHCR, "Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach," UN Doc. EC/50/SC/CRP.17, June 9, 2000 (UNHCR, "Interception"), at para. 17.

[165] See Feller, "Sanctions"; and J. Hathaway and J. Dent, *Refugee Rights: Report on a Comparative Survey* (1995), at 13–14.

[166] *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at para. 48. In another context, though, UNHCR seemed to argue that visa controls *can* breach Art. 33. "Immigration control measures, although aimed principally at combatting irregular migration, can seriously jeopardize the ability of persons at risk of persecution to gain access to safety and asylum. As pointed out by UNHCR in the past, the exclusive resort to measures to combat abuse, without balancing them by adequate means to identify genuine cases, *may result in the refoulement of refugees* [emphasis added]": UNHCR, "Interception," at para. 18.

> In my judgment, there is nothing in these criticisms and indeed the Prague scheme seems to me to constitute if anything a less, rather than more, serious problem for would-be asylum-seekers than visa control ...
>
> ... [Objections] to visa controls ... do not sound in international law. Rather one must hope that when in truth acute humanitarian concerns arise states will respond beyond the strict call of their international obligations. This, I believe, is the only answer the Court is entitled to give when [counsel] conjures up the spectre of a fresh holocaust. Visa controls are, in short, clearly not outlawed under the Convention or under international law generally.[167]

The Court is quite right that visa controls, which operate routinely and in many places, actually pose a greater risk to refugees than do in-country interception schemes, which tend to be more selective and less routinely operationalized.[168] Yet the Court is equally correct that "[o]n the basis of the [Refugee] Convention as it stands at present, there is no obligation on a signatory state not to introduce or continue a system of immigration control, whether by way of a requirement for visas or by the operation of a pre-clearance system."[169]

As in the case of in-country interdiction schemes described above, the most effective legal avenue to challenge visa control systems of this sort is to invoke Art. 12 of the Civil and Political Covenant, in this case in order to hold the home state liable for its complicity in efforts conducted under its jurisdiction to stymie the departure of at-risk persons who wish to claim refugee status abroad.[170] The UN Human Rights Committee has indicated its view

[167] *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at paras. 49–50. The House of Lords was in full agreement on this point, noting that "[h]ad a visa regime been imposed, the effect on the appellants, so far as concerned their applications for asylum, would have been no different. But it could not plausibly be argued that a visa regime would have been contrary to the practice of nations": *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at para. 28.

[168] See also *R v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520 (Eng. HC, July 29, 1999), per Simon Brown L J: "Although under the Convention subscribing states must give sanctuary to any refugee who seeks asylum (subject only to removal to a safe third country), they are by no means bound to facilitate his arrival. Rather they strive increasingly to prevent it. The combined effect of visa requirements and carrier's liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents."

[169] *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at para. 49, affirmed in this regard in *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at para. 34.

[170] See text above, at pp. 308–310. In addition to reliance on Art. 12(2) of the Civil and Political Covenant, it has also been contended that where visa controls are applied after a refugee's departure from his or her own country – for example, in a transit country – this

that, in at least some cases, the operation of a system of visa controls and carrier sanctions will put a state party in breach of the duty to respect the right of persons to leave their own country, and more generally to enjoy freedom of international movement:

> The practice of States often shows that legal rules and administrative measures adversely affect the right to leave, in particular, a person's own country. It is therefore of the utmost importance that States parties report on all legal and practical restrictions on the right to leave which they apply both to nationals and to foreigners, in order to enable the Committee to assess the conformity of these rules and practices with article 12, paragraph 3 [which defines permissible limitations on this right]. States parties should also include information in their reports on measures that impose sanctions on international carriers which bring to their territory persons without required documents, where those measures affect the right to leave another country.[171]

The case for finding a breach of Art. 12 would seem particularly strong where the visa requirement is set explicitly to avoid the departure of at-risk persons; but there is more generally a real question about the legitimacy of even visas set to regulate non-coerced migration, but which are known in practice also to preclude the freedom of movement of would-be refugees.

It may, however, be more difficult to find a breach of Art. 12(2) of the Covenant by the country which imposed the visa controls since, in contrast to situations in which that country actually operates an in-country interdiction

may amount to a breach of the Refugee Convention's Art. 31, which prohibits the imposition of penalties on refugees for illegal entry or presence: see chapter 4.2 below. This possibility was raised by the English High Court in relation to refugees interdicted in the United Kingdom because they did not have the required Canadian visas for onward travel. In *R v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520 (Eng. HC, July 29, 1999), Simon Brown LJ observed, "If I am right in saying that refugees are ordinarily entitled to choose where to claim asylum and that a short stopover en route in a country where a traveller's status is in no way regularized will not break the requisite directness of flight, then it must follow that these applicants would have been entitled to the benefit of Article 31 had they reached Canada and made their asylum claims there. If Article 31 would have availed them in Canada, then logically its protection cannot be denied to them [in the United Kingdom] merely because they have been apprehended en route." Indeed, on the basis of this argument, it might even be possible to find the state which established the visa controls to be liable for breach of Art. 31 where it exercises shared jurisdiction with the transit state – for example, by staffing or overseeing the personnel who enforce the visa controls. The real difficulty in relying on Art. 31 as an alternative to the (substantively inadequate) Art. 33, however, is that it does not prohibit the classic result of a visa control, namely return to the country of origin. As is detailed below, the drafters were clear that expulsion or return are not to be considered "penalties" for the purposes of Art. 31 protection: see chapter 4.2.3 below, at pp. 412–413.

[171] UN Human Rights Committee, "General Comment No. 27: Freedom of movement" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 173, para. 10.

scheme, it is not clear that the state which sets the visa controls is in any sense exercising (even shared) jurisdiction over the place of departure. While the Human Rights Committee has a long-standing practice of holding states liable for the extraterritorial actions of their agents,[172] the International Court of Justice has recently affirmed the jurisdictional foundation of such liability, noting that "the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory":[173]

> The *travaux préparatoires* of the Covenant confirm the [UN Human Rights] Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.[174]

In essence, liability for extraterritorial actions follows where a state party exercises "effective jurisdiction."[175] While this will be a question of fact in each case, it is far from clear that a state can be said to exercise jurisdiction by the simple issuance of policies intended to apply extraterritorially, but which are wholly implemented by third parties operating inside the sovereign territory of another state.[176]

[172] See e.g. *Casariego v. Uruguay*, UNHRC Comm. No. 56/1979, decided July 29, 1981, at paras. 10.1–10.3: "Article 2(1) of the Covenant places an obligation upon a state party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction,' but it does not imply that the state party concerned cannot be held accountable for violation of rights under the Covenant which its agents commit upon the territory of another state, whether with the acquiescence of the government of that state or in opposition to it ... [I]t would be unconscionable to so interpret the responsibility under Article 2 of the Covenant, as to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory."

[173] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, decided July 9, 2004, at para. 111.

[174] Ibid. at para. 109. [175] Ibid. at para. 110.

[176] In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ibid., for example, the analysis of the International Court of Justice seems to have given real weight to the Israeli physical presence in the Occupied Territories. "The [Human Rights] Committee, in its concluding observations after examination of the report, expressed concern at Israel's attitude and pointed 'to the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein' (CCPR/C/79/Add.93, para. 10). In 2003 in face of Israel's consistent position, to the effect that 'the Covenant does not apply beyond its own territory, notably in the West Bank and

The weakness of the duty of *non-refoulement* as an answer to measures that trap would-be refugees inside their own countries aside, Art. 33 is otherwise quite a robust form of protection. In particular, the duty of *non-refoulement* has ordinarily been understood to constrain not simply ejection from within a state's territory, but also non-admittance at its frontiers.[177] Indeed, the 1933 Convention – from which the present duty of *non-refoulement* was derived – explicitly codified non-admittance as an aspect of *refoulement*.[178] This comprehensive definition corresponds to the authority enjoyed by police in some states summarily to remove aliens or to refuse them entry (*refoulement*) under a process distinct from expulsion authorized by judicial authority.[179] It was clear to the drafters that summary refusals (*refoulement*) and formally sanctioned removals (expulsion or deportation) could equally undermine the sheltering of refugees from forcible return.

The original purpose of the prohibition of *refoulement* was therefore to ensure that those states in which summary removal or denial of access was authorized by law not be allowed to rely on such provisions to subvert the

Gaza . . . ', the Committee reached the following conclusion: 'in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law' (CCPR/CO/78/ISR, para. 11). In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory": ibid. at paras. 110–111.

177 See e.g. UNHCR Executive Committee Conclusion No. 6, "Non-Refoulement" (1977), at para. (c), available at www.unhcr.ch (accessed Nov. 20, 2004), acknowledging "the fundamental importance of the observance of the principle of *non-refoulement* – both at the border and within the territory of a State." "Today, there appears to be ample support for the conclusion that Article 33(1) of the Refugee Convention is applicable to rejection at the frontier of a potential host state": G. Noll et al., "Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure" (2002), at 36. See generally P. Mathew, "Australian Refugee Protection in the Wake of the *Tampa*," (2002) 96(3) *American Journal of International Law* 661 (Mathew, "*Tampa*"), at 667, drawing support for this proposition from the General Assembly's Declaration on Territorial Asylum; and Lauterpacht and Bethlehem, "*Non-Refoulement*," at paras. 76–86.

178 1933 Refugee Convention, at Art. 3.

179 "[T]he term 'expulsion' was used when the refugee concerned had committed some criminal offence, whereas the term '*refoulement*' was used in cases when the refugee was deported or refused admittance because his presence in the country was considered undesirable": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 5. See also G. Goodwin-Gill, *The Refugee in International Law* (1996) (Goodwin-Gill, *Refugee in International Law*), at 117: "In the context of immigration control in continental Europe, *refoulement* is a term of art covering, in particular, summary reconduction to the frontier of those discovered to have entered illegally, and summary refusal of admission to those without valid papers."

general limitations on the expulsion of refugees.[180] If the minority of countries that practiced *refoulement* were required to temper the application of such systems in relation to refugees, all governments would face comparable obligations: refugees would be able to access the state's territory, and their removal could only be effected in accordance with the general rules governing the expulsion or deportation of refugees.[181]

The debates of the Ad Hoc Committee on Statelessness and Related Problems show a clear commitment to this basic understanding that peremptory non-admittance or ejection is normally impermissible. The United States vigorously argued that

> [w]hether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom could be threatened.[182]

While the English translation of *non-refoulement* varied from "undertakes not to turn back" to "undertakes not to expel or turn back,"[183] and ultimately to "undertakes not to expel or return," the intention to proscribe both non-admittance and ejection from within a state's territory was constant.[184] Indeed,

[180] "Sir Leslie Brass (United Kingdom) concluded from the discussion that the notion of *refoulement* could apply to (a) refugees seeking admission, (b) refugees illegally present in a country, and (c) refugees admitted temporarily or conditionally. Referring to the practice followed in his own country, Sir Leslie stated that refugees who had been allowed to enter the United Kingdom could be sent out of the country only by expulsion or deportation. There was no concept in these cases corresponding to that of *refoulement* . . . Mr. Ordonneau (France) considered that the inclusion in the draft convention of a reference to the concept of *refoulement* would not in any way interfere with the administrative practices of countries such as the United Kingdom, which did not employ it, but that its exclusion from the draft convention would place countries like France and Belgium in a very difficult position": UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 5.

[181] "The Chairman suspended the discussion, observing that it had indicated agreement on the principle that refugees fleeing from persecution . . . should not be pushed back to the arms of their persecutors": Statement of Mr. Chance of Canada, ibid. at 7. See generally chapter 5.1 below on the question of the prohibition of formal expulsion or deportation of refugees.

[182] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 11–12. See also Statement of Mr. Robinson of Israel, ibid. at 12–13: "The article must, in fact, apply to all refugees, whether or not they were admitted to residence; it must deal with both expulsion and non-admittance."

[183] Ibid. at 12.

[184] The substitution of "return" for "turn back" was intended to be a matter of style only: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 20.

the Belgian co-sponsor of the text adopted by the Committee emphasized that the duty had been expanded to an undertaking "not to expel *or in any way* [return] refugees [emphasis added]"[185] precisely to ensure that it was understood that the article "referred to various methods by which refugees could be expelled, refused admittance or removed."[186] Because of the comprehensive nature of the duty of *non-refoulement*, Nepal's refusal of entry to Tibetans, Guinea's blocking of access to refugees from Sierra Leone, Namibia's order indiscriminately to shoot anyone using the only escape route open to Angolan refugees from Cuando Cuban Province, and Jordan's denial of entry to most refugees who could no longer safely remain in Iraq were no less rights-violative than the ejection of a refugee from within their territory.

Perhaps most clearly, the duty of *non-refoulement* is infringed by the actions of government officials intended to force refugees back to their country of origin. The enforced removal of refugees may occur under formally sanctioned programs of the kind implemented by Zambia against refugees from the Democratic Republic of Congo, by Iran against Afghan refugees, and by Thailand in relation to ethnic Burmese refugees. It may also be implemented with less publicity, as when Cambodia returned the Montagnard refugees to Vietnam; when India sent Tamil refugees back to Sri Lanka despite the persistence of conflict there; when Pakistani police summarily expelled undocumented Afghan refugees across the border; and when Venezuelan army patrols forced Colombian refugees home. In all of these cases, the duty of *non-refoulement* was directly and unambiguously breached.

Nor is a government insulated from liability when, rather than taking action through its own officials, it encourages non-state actors to drive refugees back to their countries of origin. Because governments are liable for the actions they promote and support, Art. 33 was clearly infringed by Kenyan President Moi's incitement to remove Ugandan and other refugees, as well as by Guinean President Conte's encouragement of his citizens to form militia groups to force refugees from Liberia and Sierra Leone to go home. More generally, as the Supreme Court of India has affirmed, governments have an affirmative duty to take such action as is necessary to avoid the *refoulement* of refugees instigated and carried out by third parties. Faced with a complaint that Chakma refugees were being subjected to an economic blockade by a student vigilante group intended to drive them out, the Court issued an unambiguous and comprehensive order to both state and

[185] UN Doc. E/AC.32/L.25, Feb. 2, 1950, at 1. In the draft convention finalized by the Working Group, the undertaking was rephrased to require states not to "expel or return, *in any manner whatsoever*, a refugee to the frontiers of territories where his life or freedom would be threatened [emphasis added]": UN Doc. E/AC.32/L.32, Feb. 9, 1950, at 12.

[186] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 20.

national authorities to take whatever action was required to bring the student actions to an end.[187]

To this point, consideration has been given to the ways in which the duty of *non-refoulement* may be infringed by actions specifically intended either to block the arrival, or to bring about the return, of refugees. *Refoulement* may also be effected by a very wide range of actions taken by, or with the acquiescence of, a state party. This point was made during the drafting of the Convention by the American representative, who emphasized that "[Art. 33's] sole purpose was to preclude the forcible return of a refugee to a country in which he feared both the persecution from which he had fled and reprisals for his attempted escape."[188] This makes clear that the duty under Art. 33 is to avoid certain *consequences* (namely, return to the risk of being persecuted), whatever the nature of the actions which lead to that result.[189]

Of particular concern, *refoulement* in practice frequently arises when refugees are coerced to accept "voluntary" repatriation. At least where refugees are left with no real option but to leave, de facto enforced departure is a form of *refoulement*. For example, Art. 33 was not respected when Turkey, Rwanda, Uganda, and India withheld food, water, and other essentials from refugees in order to induce them "voluntarily" to repatriate. Pakistan's refusal to allow foreign aid agencies to provide essentials to refugees in the Jalozai camp was simply a less direct means of achieving the same rights-violative end. Macedonia's denial to refugees of sanitary facilities may have been a less egregious effort to force refugees to leave, but it still proved sufficient in practice to drive refugees back to Kosovo. The fact that Tanzania's efforts to force Rwandan refugees to return home were implemented by means of a deadline to accept "voluntary" repatriation, and even that they were implemented under an

[187] While India is not a party to the Refugee Convention or Protocol, the Court relied on Art. 21 of the Indian Constitution which establishes a guarantee of life and personal liberty for all. Its order was that "the State of Arunachal Pradesh shall ensure that the life and personal liberty of each and every Chakma residing within the State shall be protected and any attempt to forcibly evict or drive them out of the State by organised groups, such as the [student vigilante group], shall be repelled, if necessary by requisitioning the service of paramilitary or police force, and if additional forces are considered necessary to carry out this direction, the [State] will request the ... Union of India to provide such additional force, and [the national government] shall provide such additional force as is necessary to protect the lives and liberty of the Chakmas": *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 83 AIR 1234 (India SC, Jan. 9, 1996), at para. 21.

[188] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 20.

[189] See *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002), per Lord Hope at para. 47. Thus, for example, the right of a state to effect the extradition of a refugee is subject to compliance with the duty of *non-refoulement*: Lauterpacht and Bethlehem, "*Non-Refoulement*," at paras. 71–75.

agreement with UNHCR, takes nothing away from their fundamentally rights-violative character. As courts in the United States held in enjoining American threats and subterfuge undertaken to force Salvadoran refugees to go home, the formal and legalized nature of acts which are in substance coercive does not in any sense render them lawful.[190] On the other hand, Australia was, at least initially, not acting contrary to Art. 33 when it offered Afghan families the option to abandon their refugee claims in exchange for substantial cash payments. Despite the resemblance to blackmail, the voluntary character of the program was really only clearly compromised when authorities made clear that the refugees would inevitably be forced to return home, whether or not they accepted the cash payment.

Art. 33 may be infringed by fairly blunt measures of the kind considered to this point, but may also be breached by "any measure, whether judicial or administrative, which secures the departure of an alien."[191] Most obviously, this will be the case where, as in Austria and South Africa, responsibility to protect refugees is entrusted to officials such as border guards or detention center officers who do not reliably carry out those responsibilities.[192] The duty of *non-refoulement* can also be infringed by the refusal to consider a claim to refugee status, knowing that such a refusal leaves the refugee exposed to removal on general immigration grounds.[193] As such, when countries such as China, Japan,

[190] In *Orantes-Hernandez v. Meese*, (1988) 685 F Supp 1488 (US DCCa, Apr. 29, 1988), affirmed as *Orantes-Hernandez v. Thornburgh*, (1990) 919 F 2d 549 (US CA9, Nov. 29, 1990), the Immigration and Naturalization Service was found to have engaged in a persistent pattern of illegal conduct and enjoined from further harassment of Salvadoran refugees.

[191] Goodwin-Gill, *Refugee in International Law*, at 122, adopted in *Re S*, [2002] EWCA Civ 843 (Eng. CA, May 28, 2002).

[192] The risk of *refoulement* in such circumstances will continue to exist under recently proposed EU rules which authorize the continuation of existing procedures at borders which do not meet all procedural requirements ordinarily governing the assessment of claims to refugee protection. "Member States may provide for procedures, in accordance with the basic principles and guarantees of chapter II, in order to decide, at the border or transit zones of the Member State, on the applications made at such locations ... However, when procedures as set out in paragraph 1 do not exist, Member States may maintain, subject to the provisions of this Article and in accordance with the laws or regulations in force at the time of the adoption of this Directive, procedures derogating from the basic principles and guarantees described in chapter II, in order to decide, at the border or in transit zones, on the permission to enter their territory of applicants for asylum who have arrived and made an application for asylum at such locations": EU Procedures Directive, at Art. 35.

[193] See e.g. UNHCR Executive Committee Conclusion No. 6, "Non-Refoulement" (1977), available at www.unhcr.ch (accessed Nov. 20, 2004), at para. (c): "The Executive Committee ... [r]eaffirms the fundamental importance of the observance of the principle of *non-refoulement* ... of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized

Malaysia, Namibia, Pakistan, Thailand, and Zimbabwe denied persons claiming to be refugees access to any procedure to verify their status – and then removed them from their territory on the grounds of their illegal presence – they acted in breach of the duty of *non-refoulement*.[194] There is also no basis for a bar on considering the refugee claims made by children of the kind often applied in Europe, and advocated as a general standard by Australia. To the contrary, as the English Court of Appeal has observed, the duty to protect refugees – including children who are refugees – may well trump other considerations, including the enforcement of child custody orders.[195] And while the failure to establish an appeal or review of a negative refugee status determination does not necessarily infringe Art. 33, the fact that the duty of *non-refoulement* is binding right up to the actual moment of return[196] requires that the system have the capacity to take

as refugees." See also UNHCR Executive Committee Conclusions Nos. 79, "General Conclusion on International Protection" (1996), at para. (j), and 81, "General Conclusion on International Protection" (1997), at para. (i), both available at www.unhcr.ch (accessed Nov. 20, 2004), insisting that the duty of *non-refoulement* inheres "whether or not they have been formally granted refugee status." The notion that access to Art. 33 could be limited to persons formally recognized as refugees has been described simply as "devoid of merit": Lauterpacht and Bethlehem, "*Non-Refoulement*," at para. 89.

194 In response to China's refusal to address the refugee claims of North Koreans, the United States Senate passed a resolution in which it called upon China to make "genuine efforts to identify and protect the refugees among the North Korean migrants encountered by Chinese authorities, including providing the refugees with a reasonable opportunity to petition for asylum": S. Con. Res. 114, 107th Congress (2002), at para. 1(A), cited in S. Murphy, "Contemporary Practice of the United States relating to International Law," (2002) 96(3) *American Journal of International Law* 706.

195 "Having regard to the rule as to the paramountcy of the child's interests ... I would respectfully suppose that a family judge would at the very least pay very careful attention to any credible suggestion that a child might be persecuted if he were returned to his country of origin or habitual residence before making any order that such a return should be effected": *Re S*, [2002] EWCA Civ 843 (Eng. CA, May 28, 2002). To similar effect, UNHCR is of the view that "[t]he child should not be refused entry or returned at the point of entry ... As soon as a separated child is identified, a suitably qualified guardian or adviser should be appointed to assist him/her at all stages. Interviews should be carried out by specially trained personnel": UNHCR, "Asylum Processes," UN Doc. EC/GC/01/12, May 31, 2001 (UNHCR, "Asylum Processes"), at para. 46. See generally Convention on the Rights of the Child, UNGA Res. 44/25, adopted Nov. 20, 1989, entered into force Sept. 2, 1990, at Art. 22(1): "States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights."

196 The duty of *non-refoulement* "continues so long as a refugee (defined by reference to a well-founded fear of being persecuted for a reason specified in the Convention) is in the United Kingdom. If a claim for asylum is made by a person, that is to say a claim that it would be contrary to the United Kingdom's obligations for him to be removed from or required to

account of new or previously unrecognized facts[197] before return is effected.[198] It was thus inappropriate for the United Kingdom to persist in the removal of refugee claimants from Zimbabwe, even as its own Foreign Office warned of emerging risks there.

Art. 33 may also be breached when a state creates a legal ruse in order to avoid formal acknowledgment of the arrival of a refugee.[199] For example, the designation by France of part of its territory as an "international zone" in which it exercised authority but assumed no protection responsibility was legally untenable, as was affirmed by the European Court of Human Rights.[200] The same is clearly true of Australia's refusal to consider the refugee status of persons present in islands or other parts of its territory, even if that country's domestic law deems that territory to have been "excised" or otherwise rendered "foreign." All such places – and indeed the

leave the United Kingdom, that person cannot be removed from or required to leave the United Kingdom pending a decision on his claim, and, even if his asylum claim is refused, so long as an appeal is being pursued": *R (Senkoy) v. Secretary of State for the Home Department*, [2001] EWCA Civ 328 (Eng. CA, Mar. 2, 2001), at para. 15.

197 "The obligation of the United Kingdom under the Convention is not to return a refugee ... to a country where his life or freedom would be threatened for any reason specified in the Convention. That obligation remains binding until the moment of return ... It would in my judgment undermine the beneficial object of the Convention and the measures giving effect to it in this country if the making of an unsuccessful application for asylum were to be treated as modifying the obligation of the United Kingdom or depriving a person of the right to make a fresh claim for asylum ... Any other consideration would in my view be offensive to common sense. However rarely they may arise in practice, it is not hard to imagine cases in which an initial claim for asylum might be made on insubstantial, or even bogus, grounds, and be rightly rejected, but in which circumstances would arise or come to light showing a clear and serious threat of a kind recognised by the Convention ... A scheme of legal protection which could not accommodate that possibility would in my view be seriously defective": *R v. Secretary of State for the Home Department, ex parte Onibiyo*, [1996] QB 768 (Eng. QBD, Mar. 5, 1996), cited with approval in *R v. Secretary of State for the Home Department, ex parte Nassir*, *The Times* (Dec. 11, 1998) (Eng. CA, Nov. 23, 1998).

198 In considering a change of rules pursuant to which persons assigned to the UK's "fast track" system would be able to pursue an appeal from outside the country, the Court of Appeal noted that "[i]t is the prospect of removal that is [the refugees'] principal concern. If their fears are well-founded, the fact that they can appeal after they have been returned to the country where they fear persecution is scant consolation": *R (L) v. Secretary of State for the Home Department*, [2003] EWCA Civ 25 (Eng. CA, Jan. 24, 2003), at para. 54.

199 "As a matter of fact, anyone presenting themselves at a frontier post, port, or airport will already be within State territory and jurisdiction; for this reason, and the better to retain sovereign control, States have devised fictions to keep even the physically present alien technically, legally, unadmitted": Goodwin-Gill, *Refugee in International Law*, at 123.

200 "The Court notes that even though the applicants were not in France within the meaning of the Ordinance of 2 November 1945, holding them in the international zone of Paris-Orly Airport made them subject to French law. Despite its name, the international zone does not have extraterritorial status": *Amuur v. France*, 1996 ECHR 25 (ECHR, June 25, 1996), at para. 52.

state's territorial sea – are clearly part of its territory.[201] No form of words, and no domestic law, can change that fact. There is thus no international legal difference between opting not to consider the refugee status of persons present in "international zones" or "excised territory" and refusing to consider the refugee status of persons clearly acknowledged to be on the state's territory. Where the refusal to process a refugee claim results, directly or indirectly, in the refugee's removal to face the risk of being persecuted, Art. 33 has been contravened.

Beyond such blunt notions as "excision" and the proclamation of "international zones," *refoulement* may also result from the application of the "first country of arrival" and related rules relied upon by many states to implement the evolving network of so-called "harmonization agreements." These accords constrain the traditional prerogative of refugees to decide where they wish to seek protection.[202] A single state within a group of contracting states is designated as the sole government to which a request for recognition of refugee status may be addressed, whatever the particular circumstances or preferences of the refugee.

Interestingly, the risk inherent in such measures was explicitly considered by the drafters of the Convention. At the Conference of Plenipotentiaries, the Swedish representative introduced a proposal to frame the duty of *non-refoulement* in a way that would "cover cases where refugees were expelled to a country where their life would not be directly threatened, but where they would be threatened by further expulsion to a country where they would be in danger."[203] A consensus evolved in opposition to the proposal, for two basic reasons.

First, states rejected the Swedish initiative because they wanted to remain free to expel refugees to countries in which there was no danger of being persecuted,[204] at least insofar as the state to which removal would be effected

[201] See chapter 3.1.2 above, at p. 172.

[202] See e.g. UNHCR Executive Committee Conclusions Nos. 15, "Refugees Without an Asylum Country" (1979), and 58, "Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection" (1989), both available at www.unhcr.ch (accessed Nov. 20, 2004).

[203] Statement of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 4. Specifically, the proposal was that "[n]o Contracting States shall expel or return 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, *or where he would be exposed to the risk of being sent to a territory where his life or freedom would thereby be endangered* [emphasis added]": UN Doc. A/CONF.2/70, July 11, 1951.

[204] "It should, however, be pointed out that the paragraph was concerned with a special case, namely the expulsion or turning back into a territory where the refugee's life or liberty was in danger. The general case was that of expulsion to any country other than that in which the refugee would be threatened": Statement of Mr. Ordonneau of France, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 13.

had adhered to the Convention.[205] But second, they felt that the Swedish amendment was not necessary, since "if such expulsion presented a threat of subsequent forcible return to the country of origin, the life and liberty of the refugee in question were endangered" by the removal to the intermediate state. The relevant issue was said to be the *foreseeability* of the ultimate consequences of the initial expulsion.[206] This clear prohibition of indirect *refoulement* has been neatly explained by the House of Lords:

> Suppose it is well-known that country A, although a signatory to the Convention, regularly sends back to its totalitarian and oppressive neighbour, country B, those opponents of the regime in country B who are apprehended in country A following the escape across the border. Against that background, if a person arriving in [a state party] from country A sought asylum as a refugee from country B, assuming he could establish his well-founded fear of persecution there, it would, it seems to me, be as much a breach of Article 33 of the Convention to return him to country A as to country B. The one course would effect indirectly, the other directly, the prohibited result, i.e. his return "to the frontiers of territories where his life or freedom would be threatened."[207]

Taking account of these understandings, application of the so-called "first country of arrival" principle, while not anchored in the requirements of the Refugee Convention,[208] is also not necessarily in breach of it.[209] States declined to assume particularized responsibility for all who arrive at their borders, and insisted that they retain the liberty to send refugees onward to a

[205] "The Swedish amendment did not state that it related to countries which did not grant the right of asylum. Such countries were not necessarily those in which persecution occurred. If the States in question were signatories to the Convention, the question would not arise, because refugees would not be returned to countries where they risked being persecuted": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 10.

[206] Statement of Mr. Larsen of Denmark, ibid. at 9–10. This is consistent with the concern of the French delegation to avoid the imposition of an unduly subjective duty on states: ibid. at 4.

[207] *R v. Secretary of State for the Home Department, ex parte Bugdaycay*, [1987] AC 514 (UK HL, Feb. 19, 1987), per Lord Bridge of Harwich at 532D. This approach has been affirmed in *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002).

[208] UNHCR, "Summary Conclusions on the Concept of 'Effective Protection' in the Context of Secondary Movements of Refugees and Asylum-Seekers," Lisbon, Dec. 9–10, 2002, at para. 11, available at www.unhcr.ch (accessed Nov. 19, 2004).

[209] As observed in the House of Lords, the Refugee Convention "did not lay down any rules as to which State ought to provide protection": *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002), per Lord Hope at para. 22.

country in which there is no threat of being persecuted.[210] While UNHCR once took the view that "[t]he intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account,"[211] and most specifically "that asylum should not be refused solely on the ground that it could be sought from another State,"[212] even this institutional position has been softened over the years.[213] Indeed, UNHCR now actively encourages governments to give "consideration ... to the possibility of concluding other multilateral or bilateral Dublin-type agreements," arguing that "[s]uch agreements would serve to enhance predictability, and address concerns regarding unilateral returns."[214]

[210] "Article 33(1) cannot ... be read as precluding removal to a 'safe' third country, i.e. one in which there is no danger ... The prohibition of *refoulement* applies only in respect of territories where the refugee or asylum-seeker would be at risk, not more generally. It does, however, require that a State proposing to remove a refugee or asylum-seeker undertake a proper assessment as to whether the third country concerned is indeed safe": Lauterpacht and Bethlehem, "*Non-Refoulement*," at para. 116.

[211] UNHCR Executive Committee Conclusion No. 15, "Refugees Without an Asylum Country" (1979), at para. (h)(iii), available at www.unhcr.ch (accessed Nov. 20, 2004).

[212] Ibid. at para. (h)(iv).

[213] See UNHCR Executive Committee Conclusion No. 58, "Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Have Already Found Protection" (1989), available at www.unhcr.ch (accessed Nov. 20, 2004), making an exception to the general right of refugees to choose where to seek protection where they have already found protection in some other state; UNHCR Executive Committee Conclusion No. 71, "General Conclusion on International Protection" (1993), available at www.unhcr.ch (accessed Nov. 20, 2004), acknowledging the value of designated states of protection where needed to avoid "refugee in orbit" situations; and, in particular, UNHCR Executive Committee Conclusion No. 74, "General Conclusion on International Protection" (1994), at para. (p), available at www.unhcr.ch (accessed Nov. 20, 2004), which "[a]cknowledges the value of regional harmonization of national policies to ensure that persons who are in need of international protection actually receive it."

[214] UNHCR, "Asylum Processes," at para. 18. There is reason to believe, however, that there is a less-than-unanimous consensus favoring this shift. The conclusions of one of UNHCR's Global Consultations expert roundtables, for example, posit that "[t]here is no obligation under international law for a person to seek international protection at the first effective opportunity. On the other hand, asylum-seekers and refugees do not have an unfettered right to choose the country that will determine their asylum claim in substance and provide asylum. Their intentions, however, ought to be taken into account": UNHCR, "Summary Conclusions on the Concept of 'Effective Protection' in the Context of Secondary Movements of Refugees and Asylum-Seekers," Dec. 10, 2002, at para. 11. This Conclusion cites UNHCR Executive Committee Conclusion No. 15, ibid., in support; it makes no reference to UNHCR Executive Committee Conclusions Nos. 58, "Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Have Already Found Protection" (1989); 71, "General Conclusion on International Protection" (1993); or 74, "General Conclusion on International Protection" (1994), all available at www.unhcr.ch (accessed Nov. 20, 2004).

The concern, however, is that the consonance of collectivized protection regimes and the duty of *non-refoulement* set by Art. 33 can too easily be compromised by risks arising from the relatively mechanical way in which shared responsibility tends to be implemented.[215] Since the accords drafted to date authorize the removal of a refugee simply because he or she is admissible to a partner state, governments tend not to inquire whether indirect *refoulement* is a foreseeable risk of sending the refugee to the designated state (as the drafters assumed they would). While Art. 33 does not require a state to guarantee a refugee's well-being before expelling him to a non-persecutory country, neither does it authorize wilful blindness in the face of a readily ascertainable risk of subsequent *refoulement*. As the Supreme Court of Canada has affirmed,

> At least where Canada's participation is a necessary precondition for the deprivation, and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid [responsibility] because the deprivation in question would be effected by someone else's hand ... [W]e cannot pretend that Canada is merely a passive participant.[216]

Courts have become increasingly attentive to the risks inherent in shared responsibility systems predicated on the "first country of arrival" rule. While they have taken the view that governments may legitimately begin from the position that partner states will carry out their responsibilities in good faith,[217] this prerogative is balanced against the clear duty of the sending state to refuse removal where there is a "real risk"[218] that the partner state will not itself grant protection where warranted. This might be because there is a risk of being persecuted in the partner state itself. More commonly, the sending state would breach Art. 33 if there is a real chance that the partner state may remove the refugee claimant to another state in which the risk of *refoulement* exists. In these circumstances, there can be no question of the first state avoiding responsibility for a breach of Art. 33 simply because it does not itself directly effect the removal to the place of risk:

[215] See e.g. E. Guild, "Asylum and refugees in the EU: A practitioner's view of developments," *European Information Service* (Dec. 2000), at 215, cited with approval by Lord Hope in *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002).

[216] *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002). While the focus of the court's analysis here was the indirect breach of the domestic duty to guarantee fundamental justice, the analysis is helpful in understanding a broader range of indirect risks initiated by the sending away of an individual from a state's territory.

[217] "[T]he Home Secretary and the courts should not readily infer that a friendly sovereign state which is a party to the Geneva Convention will not perform the obligations it has solemnly undertaken": *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002).

[218] Ibid.

> [F]or a country to return a refugee to a state from which he will then be returned by the government of that state to a territory where his life or freedom will be threatened will be as much a breach of Article 33 as if the first country had itself returned him there direct. This is the effect of Article 33.[219]

Third, there is also a risk of *refoulement* arising from application of the "first country of arrival" rule where there is reason to believe that the laws or practices of the partner state cannot be relied upon accurately to recognize the refugee status of persons who are in fact Convention refugees. Thus, the House of Lords disallowed automatic reliance on the Dublin Convention's "first country of arrival" rule to remove refugees fleeing non-state agents of persecution to France and Germany, reasoning that the understanding of the refugee definition then embraced in those two states (which excluded such cases) did not meet the requirements of international law.[220] While minor differences of interpretation are not such as to give rise to the risk of indirect *refoulement*,[221] state parties are bound – precisely in line with the intentions of the Convention's drafters – to engage in a "rigorous examination" of the laws and practices of the proposed destination state, with "anxious scrutiny" of their duty of *non-refoulement*.[222] If it is known (or could reasonably become known) that the status determination procedure or understanding of the Convention refugee definition in the "country of first arrival" or other designated state is deficient – in consequence of which there is a real chance of eventual *refoulement* – it follows that sending a refugee to that country is a breach of the duty to avoid the *refoulement* of a refugee "in any manner whatsoever." This duty cannot be avoided simply by asserting the existence of a responsibility-sharing agreement or the fact that the destination state is itself bound to honor duties under the Refugee Convention, as was made clear by the European Court of Human Rights:

> Nor can [a state] rely automatically ... on the arrangement made in the Dublin Convention concerning attribution of responsibility between

[219] *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer*, [2001] 2 WLR 143 (UK HL, Dec. 19, 2000), per Lord Hobhouse.

[220] "[T]he enquiry must be into the meaning of the Refugee Convention approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It is necessary to determine the autonomous meaning of the relevant treaty provision": ibid., per Lord Steyn.

[221] Lord Bingham noted that only "significant differences" of interpretation would make removal unlawful because of the importance of what he defined as "the humane objective of the Convention ... to establish an orderly and internationally agreed regime for handling asylum applications": *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002).

[222] Ibid., per Lord Hutton at para. 74; and at para. 58 per Lord Hope, citing to the holding of Lord Bridge of Harwich in *R v. Secretary of State for the Home Department, ex parte Bugdaycay*, [1987] AC 514 (UK HL, Feb. 19, 1987).

> European countries for deciding asylum claims. Where states establish international organizations, or *mutatis mutandis* international agreements, to pursue cooperation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if contracting states were thereby absolved from their responsibility under the Convention ...
>
> The Court notes the comments of the UNHCR that, while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered.[223]

Thus, for example, Canada may not lawfully force all refugees back to the United States under its harmonization agreement with that country. At least in the cases of refugees who will not be protected from *refoulement* under US law because they are deemed "only" to satisfy the refugee definition set by Art. 1, and not the "higher standard" of Art. 33; of refugees who will be excluded from protection under American laws that do not comport with Art. 1(F) or Art. 33(2) of the Convention; or of refugees who face the risk of being persecuted for a Convention reason, even if not motivated by explicit intent (which cases are rejected under US law), return to the United States would be an act of indirect *refoulement* by Canada.[224]

Even more caution is required, however, when one moves beyond simple "first country of arrival" rules to consider the broader range of returns to a "safe third country." This includes, for example, the European Union regime which allows even the "first country of arrival" or other designated state to send the applicant away to any country through which he or she has passed, so long as that country will consider the applicant's refugee claim and avoid persecution, torture or related treatment, and *refoulement*. The Australian unilateral variant is even more aggressive, since it allows an applicant to be removed whether or not the destination country will actually consider the claim to refugee protection.

The "safe third country" notion thus raises at least three important questions. First, can return be lawfully effected to a state party which is not itself a party to the Refugee Convention? Neither the European Union nor Australian approach makes this a condition precedent to application of the norm. Second and related,

[223] *TI v. United Kingdom*, [2000] INLR 211 (ECHR, Mar. 7, 2000). See also *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002), per Lord Hutton, observing that the duty under Art. 33 to avoid the risk of indirect return to the risk of being persecuted "is applicable ... notwithstanding that the person is removed from the United Kingdom to another country pursuant to the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims."

[224] The risks inherent in this collectivized system are described in J. Hathaway and A. Neve, "Fundamental Justice and the Deflection of Refugees from Canada," (1997) 34(2) *Osgoode Hall Law Journal* 213.

is it enough that the destination state will not itself persecute the refugee (or subject him or her to related ill-treatment) or engage in *refoulement*? None of the "safe third country" rules now in place requires the destination state to respect even the rights of all refugees as established by the Convention itself, including for example to freedom of internal movement, to freedom of thought and conscience, or even to have access to the necessities of life. Third, can governments make blanket determinations of safety without examination of individuated circumstances, as is the case under the European Union's "super safe third country" notion and its rule excluding nearly all nationals of member states from eligibility for refugee status?

On the first question, it will be recalled that one of the reasons the drafters rejected the Swedish proposal expressly to address the question of indirect *refoulement* in the text of Art. 33 was a belief that *state parties to the Convention* should be free to share out the duty to protect refugees. For example, the French representative observed that "[t]he Swedish amendment did not state that it related to countries which did not grant the right of asylum ... If the States in question were signatories to the Convention, the question would not arise, because refugees would not be returned to countries where they risked being persecuted."[225] The assumption, then, was that whatever allocation of responsibility might occur would be as among countries all bound by international refugee law, and would lead to full protection of refugee rights in the destination country.

Despite the contrary assumptions of the Convention's drafters, courts have not found fault with rules (such as those applied in Australia and the European Union) that transfer responsibility for protection to countries which are outside the international refugee law regime. The Australian Full Federal Court has, for example, flatly stated that "it is not necessary to show that ... the third country is a party to the Convention."[226] Indeed, courts have at times suggested that little weight should be placed on whether a country is bound by international refugee law or not:

> [T]here can be a real chance of lack of effective protection notwithstanding that the third country in question is also a party to the Convention ... It is a sad reality of modern times that countries do not always honour human rights, whether enshrined in domestic constitutions or in international treaties to which they are parties. To treat the fact of a country being party to the Convention as conclusive would be a distortion of the Convention's language and subversive of its underlying purpose ... As a matter of fact, [refugees] may have better effective protection in

[225] Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 10. See text above, at pp. 322–323.

[226] *S115/00A v. Minister for Immigration and Multicultural Affairs*, [2001] FCA 540 (Aus. FFC, May 10, 2001).

> some countries which are not parties to the Convention ... than in many which are.[227]

This understanding is closely connected to the approach taken by courts to the second question of just what is meant by "effective protection" in the destination state. Despite the fact that refugees under the Convention are entitled immediately to receive a small number of core rights,[228] and to benefit over time from the full range of rights set by Arts. 2–34 of the Refugee Convention,[229] judicial commentary on qualification as a "safe third country" has thus far been fairly strictly limited to determining whether the "safe third country" will respect the duty of *non-refoulement*, referred to by one court as "the engine room of the Convention."[230] The House of Lords, for example, has observed that

> [T]he Convention is directed to a very important but very simple and very practical end, preventing the return of applicants to places where they will or may suffer persecution. Legal niceties and refinements should not be allowed to obstruct that purpose. It can never, save in extreme circumstances, be appropriate to compare an applicant's living conditions in different countries if, in each of them, he will be safe from persecution or the risk of it.[231]

Because of the narrowness of the inquiry as presently conceived, it is perhaps unsurprising that courts do not insist on an inquiry into an individual's refugee status before he or she is returned to a "safe third country": where there is no risk of being persecuted there, or forced out of that state, "the question of whether a person has refugee status is simply irrelevant."[232]

[227] *Minister for Immigration and Multicultural Affairs v. Al-Sallal*, Dec. No. BC9907140 (Aus. FFC, Oct. 29, 1999). Yet the court ultimately concludes that "[t]he question whether [the destination state] is a party to the Convention is relevant, but not determinative either way": ibid. See *Rajendran v. Minister for Immigration and Multicultural Affairs*, (1998) 166 ALR 619 (Aus. FFC, Sept. 4, 1998), in which the court approved of the fact that the trial judge "advert[ed] to the responsibility [the destination state] had as a signatory to the Convention, and to assume that it would honour its obligations thereunder including its Article 33 obligation."

[228] See chapters 3.1.1 and 3.1.2 above.

[229] See chapter 3.1 above, at pp. 156–157.

[230] *Minister for Immigration and Multicultural Affairs v. Al-Sallal*, Dec. No. BC9907140 (Aus. FFC, Oct. 29, 1999).

[231] *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002).

[232] *Nguyen Tuan Cuong v. Director of Immigration*, [1997] 1 WLR 68 (HK PC, Nov. 21, 1996), cited with approval in *Odhiambo v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 194 (Aus. FFC, June 20, 2002). See also *Minister for Immigration and Multicultural Affairs v. Applicant "C,"* [2001] FCA 1332 (Aus. FFC, Sept. 18, 2001): "The decision maker is not required ... to decide if the applicant is a refugee before addressing the question of effective protection in a third country."

The nature of the inquiry into the risk of *refoulement* is moreover routinely said to be fundamentally pragmatic:

> [T]he focus ... is on the end result rather than the precise procedures by which the result was achieved. The question is whether the government of the third country "would not" send the person to another country or territory otherwise than in accordance with the Geneva Convention. The concern is essentially a practical one rather than one which is theoretical.[233]

In line with this purely practical orientation, courts have insisted that there be a clear ability lawfully to enter the destination state[234] – not just "a practical capacity to bring about a lawful permission to enter and reside legally in the relevant country."[235] But there is generally no inquiry into the quality of protection available there.[236]

[233] *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002), per Lord Hope.

[234] This requirement may be satisfied "if the person has a legally enforceable right to enter that territory ... Likewise, if the person in fact is permitted to enter, then the principle of international comity, whether or not actually infringed, is not material and could be taken to be waived at least once entry is permitted. When these matters are put together with Article 33, it can be concluded that Australia would have no protection obligations where the safe third country consents to admit the refugee, where the refugee has a legally enforceable right to enter the safe third country, or where as a matter of fact the safe third country ... admits the refugee": *V872/00A v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 185 (Aus. FFC, June 18, 2002). But "the Tribunal must consider whether it is satisfied that the third country will permit entry so that the applicant will not be left at the border and denied admission. In deciding whether it is satisfied the Tribunal will take into account the important matters of international obligation and comity ... as well as the significance of the decision to the individual whose life or liberty may be at risk. Where there is doubt, that doubt should be resolved in favour of the applicant": ibid. For example, the court observed in *Tharmalingam v. Minister for Immigration and Multicultural Affairs*, Dec. No. BC9905456 (Aus. FFC, Aug. 26, 1999) that "the material in the present case does indicate that the appellant now faces a risk of *refoulement* to Sri Lanka because he can apparently no longer return to France as of right."

[235] *Minister for Immigration and Multicultural Affairs v. Applicant "C,"* [2001] FCA 1332 (Aus. FFC, Sept. 18, 2001).

[236] There is even a lack of clarity regarding just how durable the right to remain in the destination state must be. In early decisions, Australian courts treated a right of residence as a requirement: *Tharmalingam v. Minister for Immigration and Multicultural Affairs*, Dec. No. BC9905456 (Aus. FFC, Aug. 26, 1999), citing to the leading precedent of *Minister for Immigration and Multicultural Affairs v. Thiyagarajah*, (1997) 80 FCR 543 (Aus. FFC, Dec. 19, 1997). But in *S115/00A v. Minister for Immigration and Multicultural Affairs*, [2001] FCA 540 (Aus. FFC, May 10, 2001), the court rejected the notion that a right of residence was required. Indeed, the Australian Full Federal Court determined that not even the risk of summary ejection from Syria for commission of a minor criminal offence would compromise that country's status as a "safe third country" for Iraqi refugees. "[A]ny chance that he would commit a criminal offense or become a security risk on return [to Syria] was both remote and insubstantial. There was therefore no real

Assuming the same concerns previously identified with regard to application of the "first country of arrival" principle – that is, that account is taken of the real risk of direct persecution and of *refoulement*, whether by intent or as the result of laws or practices which are insufficient accurately to identify genuine refugees[237] – there is little doubt that the very practical way in which "safe third country" inquiries are conceived by courts can adequately guard against the breach of Art. 33 itself, even if the refugee applicants are being sent to a state which is not formally bound by international refugee law. But the narrowness of the inquiry posited nonetheless raises a fundamental concern. Even if the state of destination will neither persecute a refugee nor send him or her elsewhere, it may nonetheless be the case that sending a refugee to a "safe third country" will result in a divestiture of Convention rights.

Under Australia's "Pacific Solution," for example, refugees removed from Australia to Nauru – which is not a party to the Refugee Convention – effectively lost the rights which they had acquired by virtue of their former presence in areas under the jurisdiction of (and subsequently, within the territory of) Australia,[238] a state party to the Convention.[239] This is a very practical concern, as the *Tampa* refugees admitted to Nauru were in fact denied the right to engage in any constructive work, remunerated or not, and were forced to live in a fenced compound under constant guard.[240] More generally, whatever protection they enjoyed de facto in Nauru was entirely vulnerable to the exercise of political discretion in a way that would not be true in a state party to the Convention.

The concern may be succinctly framed as focused on the deprivation of acquired rights. First, because the decision about whether a destination country is "safe" generally takes account of no refugee rights other than Art. 33, reliance on the "safe third country" rule as now adumbrated can

chance that the appellant would face deportation for either reason": *Al Toubi v. Minister for Immigration and Multicultural Affairs*, [2001] FCA 1381 (Aus. FFC, Sept. 28, 2001).

237 See text above, at pp. 325–327.

238 These refugees were entitled to protection against discrimination (Art. 3); to religious freedom (Art. 4); to respect for their property rights (Art. 13); to access to the courts (Art. 16(1)); to the benefit of rationing systems (Art. 20); to basic education (Art. 22); to receive identity papers (Art. 27); to equal treatment under tax laws (Art. 29); to protection against penalization for illegal entry or presence (Art. 31(1)); to be subject only to such restrictions on internal movement as are shown to be necessary, and only pending regularization of their status in the host state (Art. 31(2)); to protection against *refoulement* (Art. 33); and to be considered by the state for naturalization (Art. 34): Refugee Convention. See chapters 3.1.1 and 3.1.2 above.

239 Moreover, if rather than being sent to Nauru the refugees had been allowed to remain in Australia for a period of "temporary" protection (even if denied access to the formal status determination procedure), they would thereby have gone on to acquire additional rights under the Refugee Convention, namely to engage in self-employment, to enjoy a broader right of internal freedom of movement, and to be protected against expulsion. See chapter 3.1.3 above.

240 P. Barkham, "Paradise lost awaits asylum-seekers," *Guardian*, Sept. 11, 2001, at 3.

lead to a situation where refugees are routinely denied access to the very rights which the Convention was designed to ensure. Second, because the "safe third country" designation is not limited to countries which are parties to the Convention or Protocol, forcing refugees to go to such a state may amount, in practice, to a deprivation of a remedy for denial of whatever rights are in fact provided there. Rather than being treated as rights holders in line with Convention norms, refugees become little more than the objects of discretion. Yet because most refugees subject to "safe third country" removal have, in fact, already come under the jurisdiction of a state party and hence acquired at least a number of core rights, including to access a remedy for breach of their rights,[241] the deprivation is both real and important.

One answer is that the flexibility which inheres in states by virtue of the limited applicability of Art. 32 of the Convention[242] suggests that there is no clear legal basis to contest this deprivation of rights. At least when refugees are removed under "safe third country" rules *before* they become lawfully present on a state's territory (including in its territorial waters), sending them onward to a non-state party is within the bounds of the Refugee Convention so long as there is no foreseeable risk of direct or indirect *refoulement*. On the other hand, this technically plausible approach is extremely difficult to reconcile to the context, object, and purpose of the Refugee Convention itself – clearly a critical consideration in arriving at an authentic understanding of the duty of *non-refoulement*.[243] Specifically, while the drafters did not conceive Art. 33 as tantamount to a duty to grant asylum, they did opt to extend the personal scope of Art. 33 to include refugees not pre-authorized to come to their territory[244] and more generally to grant a number of basic Convention rights even before an individual is admitted to a refugee status determination procedure.[245] Perhaps most fundamentally, the Refugee Convention is not simply a treaty by which states obligate themselves to avoid *refoulement*: its scope is much broader than that, in line with the purpose set out in its Preamble of "revis[ing] and consolidat[ing] previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement" in order to "assure refugees the widest possible exercise of [their] fundamental rights and freedoms."[246] Could an interpretation of Art. 33 which effectively nullifies the ability of refugees to claim all but one of their Convention rights possibly be consistent with these clear intentions?

On balance, it is suggested here that a fair interpretation of Art. 33 would condition the right of states to remove refugees on a determination that "effective protection" worthy of the name is in fact available in the destination

[241] See chapter 4.10 below. [242] See chapter 5.1 below. [243] See chapter 1.3.3 above.
[244] See chapter 4.1.1 above, at pp. 302–303. [245] See chapters 3.1.1 and 3.1.2 above.
[246] Refugee Convention, at Preamble, paras. 2–3.

country. Ideally, this would mean that the refugee is being sent to a state that is a party to the Refugee Convention or Protocol, and which would in fact assess his or her status and honor all relevant Convention and other rights. But not even a carefully contextualized reading of the Convention can honestly be said to require this much. On the other hand, it seems reasonable to insist that, at a minimum, a country be deemed a "safe third country" only if it will respect in practice whatever Convention rights the refugee has already acquired by virtue of having come under the jurisdiction[247] or entered the territory[248] of a state party to the Refugee Convention, as well as any other international legal rights thereby acquired; and further that there be a judicial or comparable mechanism in place to enable the refugee to insist upon real accountability by the host state to implement those rights.[249]

Under such an understanding of the "safe third country" principle, states would continue to enjoy the freedom to share out responsibility for refugee protection, including with countries that are not yet formally bound by refugee law. But they would not be able to do so in ways that are less a sharing of the responsibility to protect than an effort to deter the search for the protection to which refugees are entitled. Refugees would not be stripped of the rights which they have already acquired, even though they may have to be exercised in a country not of their choosing. This approach respects the admonition of courts that the focus of analysis should be practical and result-oriented, yet does not allow refugees to be warehoused in conditions at odds with the basic standards agreed to in the Convention. Not only is it an appropriate litmus test for particularized application of "safe third country" rules, but it sets a principled, yet practical, baseline standard for the lawful implementation of a more collectivized protection system along the general lines of those proposed by the United Kingdom, UNHCR, and the Intergovernmental Consultations.

A final *non-entrée* mechanism which must be considered is the designation of whole countries as "safe countries of origin" – essentially signaling that persons from such states are to be assumed not to be Convention refugees. In principle, this approach conflicts with the highly individuated focus required by the Convention: even if nearly all persons from a given country cannot qualify for refugee status, this fact ought not to impede recognition of refugee status to the small minority who are in fact Convention refugees. An

[247] See chapter 3.1.1 above. [248] See chapter 3.1.2 above.

[249] The UN Human Rights Committee has insisted that a state party must "maintain its practice and tradition of observance of the principle of non-refoulement. When a State party expels a person to another State on the basis of assurances as to that person's treatment by the receiving State, it must institute credible mechanisms for ensuring compliance by the receiving State with these assurances from the moment of expulsion": UN Human Rights Committee, "Concluding Observations: Sweden," UN Doc. A/57/40, vol. I (2002) 57, at para. 79(12)(b).

assessment of the legality of designating "safe countries of origin" therefore hinges on whether it can dependably ensure the protection of genuine refugees coming from those states.

Most clearly, there can be no question of automatically refusing all claims from any country: an approach of this kind will inevitably force away at least some refugees.[250] Nor is it an answer to this concern to suggest that only countries which adhere to the Refugee Convention or other human rights instruments will be designated as "safe countries of origin." Sadly, even countries considered model democracies and defenders of human rights have generated – at some times, and in some circumstances – persons who are in fact Convention refugees.[251] At least where the "safe country of origin" notion is treated as a firm bar to substantive consideration of a claim to refugee status – as is effectively the case under the European Union's "super safe country" rules, and its bar on the reception of refugee claims from European Union citizens – states will not be in a position to honor their duties under Art. 33.

More commonly, however, designation of a country of origin as "safe" operates not as a bar on seeking protection as such, but rather as a procedural device which requires an applicant to establish his or her refugee status under an accelerated or otherwise truncated procedure, often with the requirement to rebut a presumption against recognition of refugee status.[252] In a particularly helpful judgment, the English Court of Appeal has insisted that such a procedure can be operated without breach of the duty of *non-refoulement* so long as it delivers a "fair hearing," including access to legal counsel.[253] The procedure may begin from a presumption of safety in the country of origin,

[250] UNHCR takes an equivocal position on the legality of designating whole countries of origin as presumptively safe, noting without comment that "[s]ome states have drawn up extensive lists of such countries, sometimes applying them as an automatic bar to access to the asylum procedures": UNHCR, "Asylum Processes," at para. 38. The agency seems to be willing to tolerate such an approach so long as care is taken in drawing up the list of "safe countries of origin." UNHCR refers to the need to give attention to individuated concerns as "best state practice," rather than a clear duty: ibid. at para. 39.

[251] For example, in *Roszkowski v. Special Adjudicator*, [2001] EWCA Civ 650 (Eng. CA, May 9, 2001), the court did not question the designation of Poland as a safe country of origin despite the fact that the Special Adjudicator had accepted that the Polish Roma applicants had experienced not only demands for money and beatings, but had been subjected to attacks by anti-Roma vigilantes on their apartment – including physical assaults – on three separate occasions.

[252] UNHCR offers some support for this approach, suggesting that "a proper designation of a country as a 'safe country of origin' does not, by that fact alone, serve as a declaration of cessation of refugee status in regard to refugees from that country. It should serve merely as a procedural tool to expedite processing of refugee claims": UNHCR, "Note on the Cessation Clauses," UN Doc. EC/47/SC/CRP.30 (1997) (UNHCR, "Cessation"), at para. 7.

[253] *R (L) v. Secretary of State for the Home Department*, [2003] EWCA Civ 25 (Eng. CA, Jan. 24, 2003), at paras. 30, 38.

but must give "careful consideration to the facts of the individual case."[254] Thus, it must be possible, for example, for an applicant to adduce expert medical evidence where relevant.[255] Perhaps most critically, where it becomes clear that credibility is at the heart of the case, refugee status should not ordinarily be refused without access to a more traditional refugee status inquiry.[256]

Yet even if procedural safeguards of this kind avert most risks of a breach of the duty of *non-refoulement*, there is surely still a principled objection to deeming countries in which real risks of persecution exist to be "safe countries of origin." For example, the decision of the United Kingdom to designate Pakistan as presumptively safe was characterized by a reviewing court as simply "irrational" in view of the continuing recognition of significant numbers of Pakistanis as genuine refugees and, particularly, taking account of that country's fundamental disfranchisement of its Ahmadi minority.[257] As UNHCR has suggested, account needs to be taken "not simply of international instruments ratified and relevant legislation enacted there, but also of the actual degree of respect for human rights and the rule of law, of the country's record of not producing refugees, of its compliance with human rights instruments, and of its accessibility to national or international organizations for the purpose of verifying human rights issues."[258]

4.1.3 *Extraterritorial* refoulement

Analysis to this point has focused on the implications of *non-refoulement* for refugees at a state's borders or within its territory. Increasingly, however, states are inclined to take action in areas beyond their own territory (including beyond their territorial sea) with a view to forcing refugees back to their place of origin, or at least towards some other state. The operation of interception and related strategies may in fact result in refugees being denied protection. But because these deterrent measures are premised on denial to the refugee of any direct contact with a receiving state, the question arises whether a state party which engages in arms-length actions that lead ultimately to refugees being forced back to their country of origin has breached the duty of *non-refoulement*.

[254] Ibid. at para. 45. [255] Ibid. at para. 49.

[256] "Where an applicant's case does turn on an issue of credibility, the fact that the interviewer does not believe the applicant will not, of itself, justify a finding that the claim is clearly unfounded. In many immigration cases, findings on credibility have been reversed on appeal. Only where the interviewing officer is satisfied that nobody could believe the applicant's story will it be appropriate to certify the claim as clearly unfounded on the ground of lack of credibility alone": ibid. at para. 60.

[257] *R v. Secretary of State for the Home Department, ex parte Javed*, [2001] EWCA Civ 789 (Eng. CA, May 17, 2001).

[258] UNHCR, "Asylum Processes," at para. 39.

The arguments against seeing such actions as contrary to Art. 33 were accepted by the majority of the Supreme Court of the United States in the decision of *Sale v. Haitian Centers Council*,[259] a challenge to the American policy of interdicting Haitians in search of protection in international waters, and returning them to Haiti. The Court observed that "the text and negotiating history of Article 33 ... are both completely silent with respect to the Article's possible application to actions taken by a country outside its own borders."[260] Moreover, it was noted that the original continental European understanding of *refoulement* – which spoke to rejections which occurred at, or from within, a state's borders – was in line with the textual reference in Art. 33 to the duty to avoid "return," said by the Court to denote "a defensive act of resistance or exclusion at a border rather than an act of transporting someone to [their home state, or some other country] ... In the context of the Convention, to 'return' means to 'repulse' rather than to 'reinstate.'"[261] Indeed, it was determined by the Court that only a territory-based understanding would allow the primary duty set by Art. 33(1) to be read in consonance with the right of states under Art. 33(2) to deny protection against *refoulement* to persons who pose a danger to the security "of the country *in which he is* [emphasis added]." In the view of the American Supreme Court, reading Art. 33(1) to apply to extraterritorial deterrence "would create an absurd anomaly: dangerous aliens on the high seas would be entitled to the benefits of Art. 33(1) while those residing in the country that sought to expel them would not. It seems more reasonable to assume that the coverage of Art. 33(2) was limited to those already in the country because it was understood that Art. 33(1) obligated the signatory states only with respect to aliens within its territory."[262] Thus, the prohibition against *refoulement* was determined to accrue to the benefit only of persons "on the threshold of initial entry."[263]

These arguments have little substance. Perhaps most spurious is the construction of Art. 33(1) based on the need for consistency with Art. 33(2). Since a refugee can be ejected on national security grounds only where his or her presence or actions give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions,[264] it is difficult to conceive of a situation in which a refugee not yet at or within a state's territory could be subject to such exclusion. It is thus perfectly logical that this very limited prerogative to avoid the fundamental duty of *non-refoulement* would be textually constrained

[259] *Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc., et al.*, 509 US 155 (US SC, Jan. 12, 1993).
[260] Ibid. at 178. [261] Ibid. at 182. [262] Ibid. at 180. [263] Ibid. at 187.
[264] See chapter 4.1.4 below, at pp. 345–346.

to situations in which a clear and critical risk could, in fact, arise. As Justice Blackmun noted in his dissenting opinion in *Sale*, "[t]he tautological observation that only a refugee already in a country can pose a danger to the country 'in which he is' proves nothing."[265]

Second, the fact that the drafters assumed that *refoulement* was likely to occur at, or from within, a state's borders – and therefore did not expressly proscribe extraterritorial acts which lead to a refugee's return to be persecuted – simply reflects the empirical reality that when the Convention was drafted, no country had ever attempted to deter refugees other than from within, or at, its own borders. As the American representative to the Ad Hoc Committee that prepared the Refugee Convention observed in the aftermath of the *Sale* decision, "[i]t is incredible that states that had agreed not to force any human being back into the hands of his/her oppressors intended to leave themselves – and each other – free to reach out beyond their territory to seize a refugee and to return him/her to the country from which he sought to escape."[266] There is simply no basis whatever to maintain that the drafters envisaged, let alone would have sanctioned, interdiction and return as practiced on the high seas by the United States. There was certainly no historical precedent of a policy of proactive deterrence, encompassing affirmative actions intended specifically to take jurisdiction over refugees (such as forcing them onto US ships and destroying their boats), without a concomitant assumption of responsibility.

This leaves us with the Court's fairly basic literal proposition that because a state cannot "expel or return" someone who has yet to arrive at its territory, the duty to avoid "return" speaks only to "a defensive act of resistance or exclusion at a border," and not to the act of actually sending them home. Of all of the Court's arguments, this is perhaps the most disingenuous. Not only does the word "return" not have the plain meaning attributed to it,[267] but a construction which excludes actions that would actually deliver a refugee back to his or her persecutors – rather than simply resisting or excluding

[265] *Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc., et al.*, 509 US 155 (US SC, Jan. 12, 1993), at 194.

[266] L. Henkin, "Notes from the President," [1993] 5 *American Society of International Law Newsletter* 1.

[267] The definition of "return" is to "come or go back ... [to] bring, put, or send back to the ... place ... where originally belonging": *Concise Oxford Dictionary*, 9th edn (1995), at 1178. Moreover, as UNHCR argued before the Supreme Court, "the definition of '*refouler*' upon which the government relies to render the term 'return' ambiguous simultaneously renders it redundant. Under [the US government's] reading, the phrase 'expel or return' is transformed into 'expel or expel'": UNHCR, "Brief as *Amicus Curiae*," filed Dec. 21, 1992 in *McNary v. Haitian Centers Council Inc.*, Case No. 92–344, at 10 (*Sale v. Haitian Centers Council*, 509 US 155 (US SC, June 21, 1993)), reprinted in (1994) 6(1) *International Journal of Refugee Law* 85.

them – is in fact the plainest and most obvious breach of the duty conceived by the drafters, namely to prohibit measures which would cause refugees to be "pushed back into the arms of their persecutors."[268]

More generally, the US Supreme Court's approach takes no account of the previously noted decision of the drafters to amend Art. 33 in order to stipulate that the duty of *non-refoulement* prohibits return to the risk of being persecuted "in any manner whatsoever,"[269] said to "refer to various methods by which refugees could be expelled, refused admittance or removed."[270] Much less does it give any consideration to the fact that the essential purpose of the Refugee Convention is to provide rights to seriously at-risk persons able to escape from their own countries – a goal which would clearly be fundamentally undermined by an approach to Art. 33 which effectively authorized governments to deny them all rights by forcing them back home, so long as the repulsion occurred before the refugees reached a state party's territory.[271] Equally important is the policy concern expressed by the UNHCR in its *amicus curiae* brief filed in the *Sale* case:

> [The US government's] interpretation of Article 33 ... extinguishes the most basic right enshrined in the treaty – the right of non-return – for an entire class of refugees, those who have fled their own countries but have not yet entered the territory of another State. Under [the US government's] reading, the availability of the most fundamental protection afforded refugees turns not on the refugee's need for protection, but on his or her own ability to enter clandestinely the territory of another country.[272]

[268] Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 7. It is also an interpretation fundamentally at odds with the most central goal of the Refugee Convention itself, namely "to assure refugees the widest possible exercise of ... fundamental rights and freedoms": Refugee Convention, at Preamble, para. 2.

[269] See chapter 4.1.2 above, at pp. 316–317.

[270] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 20.

[271] See UNHCR, "Interception," at para. 23: "The principle of *non-refoulement* does not imply any geographical limitation. In UNHCR's understanding, the resulting obligations extend to all government agents acting in an official capacity, within or outside national territory. Given the practice of States to intercept persons at great distance from their own territory, the international refugee protection regime would be rendered ineffective if States' agents abroad were free to act at variance with obligations under international refugee law and human rights law."

[272] UNHCR, "Brief as *Amicus Curiae*," filed Dec. 21, 1992 in *McNary v. Haitian Centers Council Inc.*, Case No. 92–344 (US SC), at 18, reprinted in (1994) 6(1) *International Journal of Refugee Law* 85. The US Supreme Court invoked arguments by both Robinson and Grahl-Madsen in support of its conclusion that Art. 33 only applies once persons reach a state party's territory. Yet both writers impliedly acknowledge the illogical policy implications of distinguishing between refugees located on either side of a border. Robinson commented that "if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck": N. Robinson, *Convention relating to the Status*

Perhaps most fundamentally, the American Supreme Court's analysis seems erroneously to assume that international rights can apply only in a state's territory: no account whatever was taken of the fact that some Convention rights are explicitly not subject to a territorial or other level of attachment – including, of course, Art. 33's duty of *non-refoulement*. In line with the views of both the European Court of Human Rights and the International Court of Justice, the duty to respect these rights inheres wherever a state exercises effective or de facto jurisdiction outside its own territory, including at a minimum both situations in which a state's consular or other agents take control of persons abroad; and where the state exercises some significant public power in foreign territory which it has occupied, or in which it is present by consent, invitation, or acquiescence. There can therefore be little doubt that interception by United States military vessels in international waters easily qualifies as an exercise of de facto jurisdiction abroad.

Much the same conclusion has recently been reached by the English Court of Appeal. Noting that the Interamerican Commission on Human Rights[273] was "fiercely critical of the majority decision of the Supreme Court,"[274] the Court treated the *Sale* decision as "wrongly decided; it certainly offends one's sense of fairness."[275] It concluded that "it is impermissible to return refugees from the high seas to their country of origin."[276] All in all, the textual and historical arguments for reading Art. 33 in the narrow way posited by the

of Refugees: Its History, Contents and Interpretation (1953) (Robinson, *History*), at 163. Grahl-Madsen posited the scenario of a refugee approaching a frontier post some distance inside the actual frontier, who may be refused permission to proceed farther inland, but must be allowed to stay in the bit of territory situated between the actual frontier line and the control post, because any other course of action would violate Art. 33: Grahl-Madsen, *Commentary*, at 229–230.

[273] *Haitian Centre for Human Rights et al. v. United States*, Case No. 10.675, Report No. 51/96, Inter-AmCHR Doc. OEA/Ser.L/V/II.95 Doc. 7 rev., at 550 (Inter-Am Comm HR, Mar. 13, 1997).

[274] *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at para. 34.

[275] Ibid. In the House of Lords, however, Lord Hope expressed some measure of support for the *Sale* decision, noting that he did "not, with respect, think that the *Sale* case was wrongly decided" since it was based on a determination that "both the text and the negotiating history of article 33 affirmatively indicated that it was not intended to have extraterritorial effect": *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at para. 68. Despite the clear logic of reliance on a provision's text and drafting history, the relevant analysis of the United States Supreme Court on these points was in error for reasons discussed above, at pp. 336–339.

[276] *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at para. 35.

Supreme Court of the United States are simply not compelling. As Justice Blackmun concluded in his dissent,

> Today's majority ... decides that the forced repatriation of the Haitian refugees is perfectly legal because the word "return" does not mean return [and] because the opposite of "within the United States" is not outside the United States ...
>
> The Convention ... was enacted largely in response to the experience of Jewish refugees in Europe during the period of World War II. The tragic consequences of the world's indifference at that time are well known. The resulting ban on *refoulement*, as broad as the humanitarian purpose that inspired it, is easily applicable here, the Court's protestations of impotence and regret notwithstanding.[277]

It is important to signal that the notions of taking control and exercise of public power – that is, the basis for finding an exercise of de facto extra-territorial jurisdiction – should be construed in consonance with accepted principles of state responsibility. Under these rules, governments are responsible *inter alia* for "the conduct of a person or group of persons in fact acting on the instruction of, or under the direction or control of, the State,"[278] as well as for "conduct which is ... acknowledged and adopted by the State as its own."[279] Where these requirements are met, an act which would amount to an exercise of extraterritorial jurisdiction is no less so because it is committed by an entity (for example, a private corporation) under contract with a government than if committed directly by officials of the state party itself.

Perhaps of greatest contemporary relevance, state responsibility may be established by "the conduct of an organ placed at the disposal of a State by another State if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed."[280] Thus, to the extent that officials of a transit country exercise visa control or other authority on behalf of a destination state which results in the (direct or indirect) return of a refugee to his or her country of origin, this is a vicarious exercise of de facto jurisdiction by the destination state which amounts to a breach of the duty of *non-refoulement*.[281] Indeed,

[277] *Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc., et al.*, 509 US 155 (US SC, Jan. 12, 1993), at 207–208.

[278] "Draft Articles on Responsibility of States for Internationally Wrongful Acts," UN Doc. A/56/10, Ch. IV.E.1, adopted Nov. 2001 (International Law Commission, "Draft Articles"), at Art. 8.

[279] Ibid. at Art. 11. [280] Ibid. at Art. 6.

[281] The concerns canvassed earlier where visa controls have effect within the country of origin itself – and hence necessarily impact before the person subject to them has satisfied the alienage criterion of the refugee definition – clearly do not apply once the person has successfully left his or her own country.

where both the transit state and destination state are parties to the Refugee Convention, they may in such circumstances be held jointly liable for the act of *refoulement*.[282]

None of this is to say, of course, that governments may not have legitimate cause to intercept non-citizens in areas beyond their territorial jurisdiction. For example, state parties to the Smuggling Protocol[283] may rely on that treaty to assert this authority in some circumstances:

> A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.[284]

Thus, at least when the vessel in question does not have a flag state,[285] state parties to the Smuggling Protocol enjoy a presumptive right to board and search vessels reasonably suspected of smuggling migrants. But this authority is in no sense at odds with the ability simultaneously to respect obligations under the Refugee Convention, including the duty of *non-refoulement*.[286] To the extent that the actions of the intercepting country are such as to amount to an exercise of de facto jurisdiction over the vessel or those onboard, it must respect Art. 33 of the Refugee Convention (and the other rights which inhere prior to arrival at a state party's territory[287]). This does not mean that all refugees onboard must be

[282] See G. Noll, "Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centers and Protection Zones," (2003) 5(3) *European Journal of Migration Law* 303 (Noll, "Transit Processing"), at 326: "The precise allocation of responsibility cannot be assessed in the abstract, as it would depend on the facts of the case, any agreements concluded, and the degree of control *de facto* and *de jure* of the different states involved in the operation of the scheme."

[283] Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, UNGA Res. 55/25, Annex III, 55 UNGAOR Supp. (No. 49) at 65, UN Doc. A/45/49, vol. I (2001), adopted Nov. 15, 2000, entered into force Jan. 28, 2004 (Smuggling Protocol).

[284] Ibid. at Art. 8(7).

[285] Where the vessel suspected of engaging in people smuggling has a flag state, that country's cooperation is normally to be sought before boarding or searching the vessel: ibid. at Art. 8(2).

[286] "States have a legitimate interest in controlling irregular migration. Unfortunately, existing control tools, such as visa requirements and the imposition of carrier sanctions, as well as interception measures, often do not differentiate between genuine asylum-seekers and economic migrants. National authorities, including immigration and airlines officials posted abroad, are frequently not aware of the paramount distinction between refugees, who are entitled to international protection, and other migrants, who are able to rely on national protection": UNHCR, "Interception," at para. 17.

[287] See chapter 3.1.1 above.

admitted to the territory of the state which undertakes the interception; but it does mean that having opted to take jurisdiction, the state party must not act in contravention of its freely assumed international responsibilities to protect refugees.[288]

4.1.4 Individuated exceptions

States are not bound to honor the duty of *non-refoulement* in the case of persons who are individually determined to pose a fundamental threat to the receiving state.[289] Specifically, particularized *refoulement* is legal on the grounds of compelling reasons of national security, or where a refugee convicted of a particularly serious crime is shown to be a danger to the host community.[290]

There is frequently confusion between the right of a state to expel or return dangerous refugees pursuant to Art. 33(2) and the exclusion of fugitives from justice under Art. 1(F)(b) of the Convention.[291] Art. 1(F)(b), inserted at the insistence of countries which perceived themselves to be vulnerable to large

[288] "Interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law. Intercepted persons found to be in need of international protection should have access to durable solutions": UNHCR Executive Committee Conclusion No. 97, "Conclusion on Protection Safeguards in Interception Measures" (2003), at para. (a)(iv), available at www.unhcr.ch (accessed Nov. 20, 2004).

[289] "The benefit of the present provision may not, however, be claimed by *a refugee* whom there are reasonable grounds for regarding as *a danger* to the security of the country in which *he* is, or who, having been convicted by *a final judgment* of *a particularly serious crime*, constitutes *a danger* to the community of that country [emphasis added]": Refugee Convention, at Art. 33(2).

[290] Lauterpacht and Bethlehem suggest that – the clear language of Art. 33(2) notwithstanding – there is today a basis for understanding the duty of *non-refoulement* to include no exceptions whatever: Lauterpacht and Bethlehem, "*Non-Refoulement*," at paras. 151–158. The argument is based on an unsound construction of Art. 33(2) which draws on a mix of regional norms, norms derived from other instruments, and policy positions of international agencies. While the authors "are not ultimately persuaded that there is a sufficiently clear consensus opposed to exceptions to *non-refoulement* to warrant reading the 1951 Convention without them," they nonetheless insist that the exceptions "must be read subject to very clear limitations": ibid. at para. 158.

[291] See e.g. Immigration and Refugee Board of Canada Decision No. T89–0245, Sept. 12, 1989, in which the Board inappropriately employed the exclusion clause in Art. 1(F)(b) to bar a claimant on the basis of a combination of pre-entry and Canadian criminality for which sentence had been served. This case ought reasonably to have been assessed against the standards of Art. 33(2); if met, the claimant would retain refugee status, but lose the benefit of protection against *refoulement*.

flows of refugees,[292] is designed to afford the possibility of pre-admission exclusion on the basis of a relatively low standard of proof ("serious reasons for considering"),[293] and without recourse to a formal trial to assess the criminal charge. The expediency of this recourse is balanced against its very narrow scope: it applies only to persons believed to have committed serious, pre-entry crimes which remain justiciable. The distinctiveness of Art 1(F)(b) and Art. 33(2) must be recognized, as was pointedly observed by Mr. Justice Bastarache of the Supreme Court of Canada:

> [P]ersons falling within Art. 1(F) of the Convention are automatically excluded from the protections of the [Convention]. Not only may they be returned to the country from which they have sought refuge without any determination ... that they pose a threat to public safety or national security, but their substantive claim to refugee status will not be considered. The practical implications of such an automatic exclusion, relative to the safeguards of the [Art. 33(2)] procedure, are profound.[294]

Art. 33(2) codifies the original[295] and more broadly applicable criminality provision. It provides the means for states to expel or return two categories of refugees. First, it authorizes the *refoulement* of any refugee with respect to whom there are reasonable grounds for regarding him or her as a danger to the security of the asylum country, whether or not there is an allegation of criminality. Second, Art. 33(2) sanctions the removal of refugees adjudged to endanger the safety of the community of the asylum country because of particularly serious crimes committed in the state of refuge or elsewhere, whether or not those crimes remain justiciable.[296]

[292] "France's reason for taking such a firm stand on the subject lay in the fact that she had to administer the right of asylum under much more difficult conditions than did countries which were in a position to screen immigrants carefully at their frontiers": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.24, July 17, 1951, at 13. See also Statement of Mr. Makiedo of Yugoslavia, ibid. at 18. These states were concerned not to undermine the possibilities for resettlement of the refugees admitted: "If refugee status was to be granted to criminals, immigration countries could not fail to question its value": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.19, July 13, 1951, at 7.

[293] A. Grahl-Madsen, *The Status of Refugees in International Law* (vol. I, 1966) (Grahl-Madsen, *Status of Refugees I*), at 289.

[294] *Pushpanathan v. Minister of Citizenship and Immigration*, 1998 Can. Sup. Ct. Lexis 29 (Can. SC, June 4, 1998), at para. 13.

[295] Indeed, it was argued by the United Kingdom that there was no need for a criminality exclusion clause in Art. 1(F) in view of Art. 33(2): Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.24, July 17, 1951, at 4. See also Statement of Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.29, July 19, 1951, at 12: "Common criminals should not enjoy the right of asylum; but that consideration had already been taken care of in article [33] of the draft Convention."

[296] See e.g. *I v. Belgium* (Feb. 13, 1987), (1987) 46 *Revue du droit des étrangers* 200, summarized at (1989) 1(3) *International Journal of Refugee Law* 392, in which Belgium

In cases that fall under Art. 33(2), the asylum country is authorized to expel or return even refugees who face the risk of extremely serious forms of persecution.[297] Its standard of proof, however, is more exacting than that set by Art. 1(F)(b). As described in more detail below, the criminality branch of Art. 33(2) requires conviction by a final judgment of a particularly serious crime, rather than simply "serious reasons for considering" that a person may be a criminal.[298] Also, it is not enough that the crime committed has been "serious," but it must rather be "particularly serious." Beyond this, there must also be a determination that the offender "constitutes a danger to the community."

So construed, Art. 1(F)(b) and Art. 33(2) form a coherent and logical system. A person is denied refugee status under Art. 1(F)(b) if admission as a refugee would result in the protection of an individual who has not expiated serious criminal acts. While this may appear harsh, it is the only means available to ensure that refugee law does not benefit fugitives from justice.[299] Because ordinary crimes cannot normally be prosecuted in other than the country where they were committed, any response short of the exclusion of common law criminals from the refugee protection system (and consequential amenability to deportation) would undermine international comity in the fight against crime.

If, in contrast, the concern is not complicity in the avoidance of criminal responsibility, but instead protection of the core interests of the host state or of its citizenry, there is no need to deny refugee status. Thus, Art. 33(2) does not annul refugee status, but simply authorizes a host government to divest itself of its particularized protective responsibilities.[300] The individual in question remains a refugee, and is therefore entitled both to UNHCR institutional assistance and to the protection of any other state party the safety and security of

relied on Art. 33(2) to expel a refugee sentenced to three years' imprisonment in respect of a major theft in Belgium. It is, however, open to serious question whether theft is appropriately considered to be a "particularly serious crime," since it would not qualify as even a "serious crime" for purposes of exclusion under Art. 1(F)(b).

297 "The exclusion clause now refers to crimes committed 'prior to his (the refugee's) admission to that country (i.e. the country of asylum) as a refugee' while persons who have committed a serious crime in the country of residence remain refugees, but may in certain conditions be denied asylum and returned to their country of origin (Article 33(2) of the Convention)": P. Weis, "The Concept of the Refugee in International Law," (1960) 87 *Journal du droit international* 928, at 984.

298 See text below, at pp. 349–352.

299 Despite the prerogative afforded by Art. 33(2), state parties to other human rights treaties – for example, to the European Convention on Human Rights, to the Convention against Torture, and to the International Covenant on Civil and Political Rights – will be subject to additional constraints on removal as a result of these other treaty obligations: see chapter 4.1.6 below, at pp. 368–370.

300 See e.g. *Moses Allueke*, Dec. No. 188981 (Fr. CE, Nov. 3, 1999), confirming that while criminal convictions registered in France would allow the applicant to be excluded from the benefit of protection against *refoulement*, they were not a basis for the withdrawal of refugee status as such.

which is not infringed by the refugee's presence within its territory. This distinction was clearly understood by the Supreme Court of Canada:

> The purpose of Article 1 is to define who is a refugee. Article 1(F) then establishes categories of persons who are specifically excluded from that definition. The purpose of Article 33 of the Convention, by contrast, is not to define who is and who is not a refugee, but rather to allow for the *refoulement* of a *bona fide* refugee to his or her native country where he or she poses a danger to the security of the country of refuge, or to the safety of the community ... Thus, the general purpose of Article 1(F) is not the protection of the society of refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33 of the Convention.[301]

The first category of persons legitimately subject to *refoulement* comprises those "whom there are reasonable grounds for regarding as a danger to the security of the [reception] country." The notion of "reasonable grounds" has been helpfully defined by Madame Justice Glazebrook of the New Zealand Court of Appeal to require "that the State concerned cannot act either arbitrarily or capriciously and that it must specifically address the question of whether there is a future risk and the conclusion on the matter must be supported by evidence."[302] While national security was not precisely defined in the drafting debates, there are indications that delegates to the Conference of Plenipotentiaries were particularly concerned about the possibility of Communist infiltration.[303] Under the modern

[301] *Pushpanathan v. Minister of Citizenship and Immigration*, 1998 Can. Sup. Ct. Lexis 29 (Can. SC, June 4, 1998), at para. 58. To similar effect, the New Zealand Court of Appeal has determined that "Art. 1(F) is concerned with past acts. Art. 33(2) is only concerned with past acts to the extent that they may serve as an indication of the behaviour one may expect from the refugee in the future. The danger that the refugee constitutes must be a present or future danger": *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at para. 166.

[302] *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at para. 133. In his concurring opinion, Mr. Justice William Young observed that "these words must be interpreted so as to ensure that [the state party] conforms to its obligations under the Refugee Convention and thus in light of the international understanding of what they mean (or imply)": ibid. at para. 198.

[303] "It must be borne in mind that ... each government had become more keenly aware of the current dangers to its national security. Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against the country of their asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 8. See also Statement of Mr. Chance of Canada, ibid.: "In drafting [Art. 33], members of [the Ad Hoc] Committee had kept their eyes on the stars but their feet on the ground. Since that time, however, the international situation had deteriorated, and it must be recognized, albeit with reluctance, that at present many governments would find difficulty in accepting unconditionally the principle [of *non-refoulement*]."

jurisprudential views analyzed earlier, however, invocation of a national security argument is appropriate where a refugee's presence or actions give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions.[304]

Despite the breadth of this modern understanding of national security, it may still be misapplied in practice. It is not appropriate, for example, to assert the importance of safeguarding international relations as the basis for excluding refugees on national security grounds.[305] Nor is there any basis in international law for deeming a refugee to pose a threat to national security because property or economic interests might be adversely impacted by his or her presence.[306] Much less can national security be said to justify the denial of protection in order to discourage the departure of other persons from the refugee's country of origin.[307]

[304] See chapter 3.5.1 above, at pp. 264–266. In contrast, Lauterpacht and Bethlehem assert that an interpretation of this kind would be "inconsistent with the nature of [the] compromise [between state and individual interests], and with the humanitarian and fundamental character of the prohibition of *refoulement*," in consequence of which the national security exemption set by Art. 33(2) "does not address circumstances in which there is a possibility of danger to the security of other countries or to the international community more generally": Lauterpacht and Bethlehem, "*Non-Refoulement*," at para. 165.

[305] "Concerns about New Zealand's reputation can be taken into account [under Art. 33(2)] only if they impinge to such a serious extent on national security that they could fairly be said to constitute a danger to national security": *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at para. 141. But see *Suresh v. Minister of Citizenship and Immigration*, 2000 DLR Lexis 49 (Can. FCA, Jan. 18, 2000), reversed on appeal in *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002). "[T] he 'security of Canada' ... logically extends to situations where the integrity of Canada's international relations and obligations are affected."

[306] Contrary to this understanding, the court in *Cheema v. Immigration and Naturalization Service*, 183 DLR (4th) 629 (US CA9, Dec. 1, 2003), simply adopted without any analysis a nearly unbounded test of "national security" posited by the Board of Appeals, namely that there is a risk to national security where the individual concerned "(1) endangers the lives, *property* or *welfare* of United States citizens; (2) *compromises* the national defense of the United States; or (3) materially damages the *foreign relations or economic interests* of the United States [emphasis added]."

[307] In overruling a decision of the Board of Immigration Appeals that no national security threat had been shown in the case of an unauthorized entrant from Haiti, the Attorney General took the unusual step of issuing a "binding determination," specifically said to be treated as a precedent in future cases, that national security would be compromised by the release on bail of Haitian entrants because this "would tend to encourage further surges of mass migrations from Haiti by sea, with attendant strains on national and homeland security resources": *In re DJ*, 2003 BIA Lexis 3 (US AG, Apr. 17, 2003). Incredibly, the Attorney General explicitly advanced a deterrent rationale for his decision, asserting that "surges in such illegal migration by sea injure national security by diverting valuable Coast Guard and DOD resources from counter-terrorism and homeland security responsibilities": ibid.