A more difficult question is whether the national security exception to the duty of *non-refoulement* can be invoked in order to avoid the risk of retaliation by those who would persecute a refugee. The US Board of Immigration Appeals has emphatically asserted that such exclusion is not lawful:

> The immigration judge did not find that the applicant himself would seek to undermine the security of the United States. Instead, she found that the decision of the United States to offer [asylum to] the applicant, a high profile person involved in a violent political crisis ... might involve the United States in that crisis or cause this country to become the target of violent conflict. If our country shelters him, foreign violent opponents of his may well consider our territory an appropriate battleground ...
>
> We conclude that the immigration judge's interpretation ... is flawed. The case law establishes that an alien would properly be considered a danger to the security of the United States when the alien himself poses the danger ... We have found no authority to support the immigration judge's interpretation ... that an alien would properly be considered a danger to the security of the United States when the decision of the United States to grant the alien asylum might encourage others to commit violence against the United States in retaliation for that decision. The purpose of asylum is to protect an individual who is in danger based on, among other things, his political opinion. This purpose would be severely undermined if we denied asylum because some third party who opposed the alien's political opinion contemplated violence against the United States (or the alien himself) in retaliation for granting him the protective relief of asylum.[308]

While clearly a highly principled position, this view takes an overly narrow view of the notion of national security. For purposes of Art. 33(2), the question ought to be whether there genuinely is a real chance of retaliation; and if so, whether the nature of the retaliation poses a risk of substantial harm to the host state's most basic interests – such as an armed attack on its territory or its citizens, or the destruction of its democratic institutions. If these strict criteria are satisfied, the national security exception to the duty of *non-refoulement* may legitimately be invoked, and the refugee required to leave the host state. Art. 33 should, however, be read in consonance with Arts. 31 and 32 to allow dangerous refugees the opportunity to seek entry into a non-persecutory state, as an alternative to being returned to their home country.[309]

Even where vital interests of this kind are involved, a state seeking to rely on the national security exception to the duty of *non-refoulement* must, of course, undertake a careful assessment of the security threat actually posed by

[308] *In re Anwar Haddam*, 2000 BIA Lexis 20 (US BIA, Dec. 1, 2000).
[309] See Weis, *Travaux*, at 343.

the particular refugee whose *refoulement* is being contemplated.[310] The Art. 33(2) inquiry "requires the person him or herself to constitute a danger to national security. This clearly implies that there must be some element of causation."[311] Thus, as the Supreme Court of Canada has insisted, it cannot be assumed that a person poses a risk to national security based on the fact of group membership, or other affiliation alone – the risk must rather be proved on the basis of fair procedures.[312] This was, in fact, the key problem with New Zealand's peremptory denial of protection to Muslim asylum-seekers during the first Gulf War. By requiring each refugee claimant to rebut a presumption that he or she *was* a security risk legitimately subject to *refoulement*, the government skewed what is intended to be a particularized and highly exceptional form of protection for states. A restrictive approach is clearly called for,[313] with the state asserting the danger posed by the refugee logically expected to establish a case for the refugee to answer.[314]

[310] "Following the events of September 11 ... a number of States have strengthened measures to combat illegal migration and the misuse of asylum systems. While UNHCR supports measures to combat misuse of asylum systems, I am concerned that in some cases indiscriminate measures have led to non-admission, denial of access to asylum procedures, and even incidents of *refoulement*": UNHCR, "Opening Statement of the UN High Commissioner for Refugees, Ruud Lubbers, at the 53rd Session of the Executive Committee of the High Commissioner's Program," Sept. 30, 2002.

[311] *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at para. 148.

[312] In line with the approach of the Supreme Court of Canada, the permissibility of *refoulement* based upon the fact of group membership might be better considered not on the basis of the national security leg of Art. 33(2), but rather on the basis of the other branch of Art. 33(2), which authorizes *refoulement* in the case of persons who are shown to pose a danger to the community of their intended host state, but only after final conviction of a particularly serious crime. "[C]ontrary to the government's submission, [we would] distinguish 'danger to the security of Canada' from 'danger to the public,' although we recognize that the two phrases may overlap. The latter phrase clearly is intended to address threats to individuals in Canada, but its application is restricted by requiring that any individual who is declared to be a 'danger to the public' have been convicted of a serious offence ... The government's suggested reading of 'danger to the security of Canada' effectively does an end-run around the requirements of Article 33(2) of the Refugee Convention that no one may be refouled as a danger to the community of the country unless he has first been convicted by a final judgment of a particularly serious crime": *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002), at para. 84. It would seem to follow that if a state wishes to exclude a refugee from protection against *refoulement* on the basis of his or her membership of a terrorist or other organization, the host state should criminalize that membership, successfully prosecute and convict the alleged member, and show that he or she poses a danger to the security of the country.

[313] See *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at para. 136: "[I]t is clear that the Art. 33(2) exception must be interpreted restrictively. In my view, this means that the danger to security must be serious enough to justify frustrating the whole purpose of the Refugee Convention by sending a person back to persecution."

[314] In *NSH v. Secretary of State for the Home Department*, [1988] Imm AR 410 (Eng. CA, Mar. 23, 1988), the English Court of Appeal held that the grounds for determining an applicant

Beyond concerns of national security, *refoulement* is also allowed in the case of a refugee who has been "convicted by a final judgment of a particularly serious crime," and who is determined to constitute "a danger to the community" of the asylum state. In contrast to Art. 1(F)(b) of the Refugee Convention, the purpose of which is simply to ensure that extraditable criminals cannot avoid prosecution and punishment abroad by claiming refugee status, the criminality exclusion set by Art. 33(2) exists to enable host states to protect the safety of their own communities from criminal refugees who are shown to be dangerous.[315] This right to engage in the *refoulement* of dangerous criminals is, however, carefully constrained.

First, the gravity of criminality which justifies *refoulement* under Art. 33(2) is higher than that which justifies the exclusion of fugitives from justice under Art. 1(F)(b) of the Convention. Art. 1 denies protection to an extraditable criminal who has committed a "serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."[316] "Serious" criminality in this context is normally understood to mean acts that involve violence against persons, such as homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery.[317] The gravity of

to be a risk to the national security of a country must in fact be reasonable before protection against *refoulement* may validly be denied. While the courts cannot expect all evidence to be placed before them, the assertion of risk must be "sufficiently particularized" to substantiate the reasonableness of exclusion. In the view of the New Zealand Court of Appeal, "it is incumbent upon the [state party] to provide as much information as is possible, without risking the disclosure of the classified security information itself": *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at para. 72. In general terms, "[t]he relevant authorities must specifically address the question of whether there is a future risk [to national security]; and their conclusion on the matter must be supported by evidence": Lauterpacht and Bethlehem, "*Non-Refoulement*," at para. 168.

[315] See J. Hathaway and C. Harvey, "Framing Refugee Protection in the New World Disorder," (2001) 34(2) *Cornell International Law Journal* 257. In describing the different functions of Art. 1(F)(b) and Art. 33(2) of the Refugee Convention, Lord Mustill observed that the argument that Art. 1(F)(b) should be used to exclude dangerous refugees "overlooks Article 33(2) of the 1951 Convention ... The state of refuge has sufficient means to protect itself against harbouring dangerous criminals without forcing on an offence, which either is or is not a political crime when and where committed, a different character according to the opinions of those in the receiving state about whether the refugee is an undesirable alien": *T v. Secretary of State for the Home Department*, [1996] 2 All ER 865 (UK HL, May 22, 1996), per Lord Mustill. See also *Pushpanathan v. Minister of Citizenship and Immigration*, 1998 Can. Sup. Ct. Lexis 29 (Can. SC, June 4, 1998), at para. 73.

[316] Refugee Convention, at Art. 1(F)(b). See generally Grahl-Madsen, *Status of Refugees I*, at 289–304; J. Hathaway, *The Law of Refugee Status* (1991) (Hathaway, *Refugee Status*), at 221–226; and Goodwin-Gill, *Refugee in International Law*, at 101–108.

[317] Grahl-Madsen, *Status of Refugees I*, at 297; Hathaway, *Refugee Status*, at 224; Goodwin-Gill, *Refugee in International Law*, at 104–106.

harm necessary to justify the *refoulement* of a person who qualifies for refugee status – expressly framed as a "particularly" serious crime – is clearly higher still, and has been interpreted to require that even when the refugee has committed a serious crime, *refoulement* is only warranted when account has been taken of all mitigating and other circumstances surrounding commission of the offence.[318]

For example, the Australian Full Federal Court was called upon to consider whether Art. 33(2) was appropriately applied in the case of a person who had been detained by Australia for more than two years before his Convention refugee status was confirmed. By reason of his protracted detention, he began to experience severe paranoid delusions. After his release, and while in a delusional state, he went to an acquaintance's home armed with a knife and threatened to kill her. He subsequently made further threats against the woman's life, ultimately resulting in his arrest on one count of aggravated burglary and five counts of threats to kill. He was convicted of those charges, and sentenced to a term of three-and-a-half years' imprisonment. The Court reviewing the decision that *refoulement* was justified held that the offences ought not to have been deemed "particularly serious" without consideration of "the fact that it was the appellant's psychological illness that led to the commission of the offenses. It should have taken into account that the appellant's conduct was directed to a person whom he believed, as a consequence of his psychological illness, had been conspiring to cause him harm. The Tribunal should have considered the extent to which the psychological illness reduced the moral culpability of the appellant in much the same way as his psychological illness was taken into account in sentencing the appellant for having committed those offenses." As a general principle, the Court concluded:

> On its proper construction, Article 33(2) does not contemplate that a crime will be characterized as particularly serious or not particularly serious merely by reference to the nature of the crime that has been committed, although this may suffice in some cases. The reason is that there are very many crimes where it is just not possible to determine whether they are particularly serious without regard to the circumstances surrounding their commission.[319]

Second, while refugee status is to be withheld from persons reasonably suspected of criminal conduct under Art. 1(F)(b), the *refoulement* of refugees is permissible only when there has actually been conviction by a final

[318] *Betkoshabeh v. Minister for Immigration and Multicultural Affairs*, (1998) 157 ALR 95 (Aus. FC, July 29, 1998), at 102, reversed on grounds of mootness at (1999) 55 ALD 609 (Aus. FFC, July 20, 1999).

[319] Ibid.

judgment. Appeal rights should therefore have expired or been exhausted,[320] limiting the risk of *refoulement* strictly to those whose criminality has been definitively established in accordance with accepted, general legal norms.

Third and most important, the nature of the conviction and other circumstances must justify the conclusion that the refugee in fact constitutes a danger to the community[321] from which protection is sought.[322] Because danger follows from the refugee's criminal character, it does not matter whether the crime was committed in the state of origin, an intermediate state, or the asylum state.[323] Nor is it relevant whether the claimant has or has not served a penal sentence or otherwise been punished. In contrast to exclusion from refugee status under Article 1(F)(b) of the Convention, however, particularized *refoulement* cannot be based on the refugee's criminal record *per se* – as seems increasingly to be the practice in the United States, for example.[324]

[320] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 14. See also Lauterpacht and Bethlehem, "*Non-Refoulement*," at para. 188: "'Final judgment' must be construed as meaning a judgment from which there remains no possibility of appeal. It goes without saying that the procedure leading to the conviction must have complied with minimum international standards."

[321] "[I]t is evident that [the word 'community'] is intended as a reference to the safety and well-being of the population in general, in contrast to the national security exception which is focused on the larger interests of the State": Lauterpacht and Bethlehem, "*Non-Refoulement*," at para. 192.

[322] For example, a proposal to authorize the *refoulement* of habitual offenders convicted of a series of less serious crimes was not accepted: Statements of Mr. Theodoli of Italy and Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 16–17.

[323] "Moreover, the possibility of a refugee committing a crime in a country other than his country of origin or his country of asylum could not be ignored. No matter where a crime was committed, it reflected upon the personality of the guilty individual, and the perpetrator was always a criminal ... The President pointed out that paragraph 2 [of Article 33] afforded a safeguard for States, by means of which they could rid themselves of common criminals or persons who had been convicted of particularly serious crimes in other countries": Statements of Mr. Rochefort of France and Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 24. But see Lauterpacht and Bethlehem, "*Non-Refoulement*," at para. 149. Because the authors do not recognize Art. 1(F)(b) as restricted to justiciable criminality, they argue that the need to avoid overlap between Arts. 1(F)(b) and 33(2) compels the conclusion that the latter speaks only to crimes committed *after* admission to a state party as a refugee.

[324] See decision of the US Attorney General overruling the US Board of Immigration Appeals in *In re YL*, 2002 BIA Lexis 4 (US AG, Mar. 5, 2002), in which the Board had found that an aggravated drug trafficking felony did not amount to a "particularly serious crime" based on evidence of cooperation with authorities, a limited criminal record, and the fact that the applicant had been sentenced at the low end of the applicable sentencing guideline range. The Attorney General reversed the decision, and imposed a nearly absolute understanding of a "particularly serious crime": "It is my considered judgment that aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute particularly serious crimes ... Only under the most extenuating circumstances that are both extraordinary and compelling would departure from this

Refoulement is instead authorized only as a "last resort"[325] where there is no alternative mechanism to protect the community in the country of asylum from an unacceptably high risk of harm.[326] The practice of some states to give dangerous refugees the option of indefinite incarceration in the asylum state as an alternative to *refoulement* is therefore one mechanism to be considered, since it protects the host community, yet averts the risk of being persecuted.[327] In the end, however, the Refugee Convention accepts that in extreme and genuinely exceptional cases, the usual considerations of humanity must yield to the critical security interests of the receiving state.[328] Thus, if the demanding criteria of Art. 33(2) are satisfied, an asylum state may, assuming there is no other option, remove a refugee convicted of a particularly serious crime who poses a danger to the host community's safety – even if the only option is to send the refugee to his or her country of origin.[329]

interpretation be warranted or permissible ... We find that the crime of trafficking of drugs is inherently a particularly serious crime ... As we find trafficking in drugs to inherently be a particularly serious crime, no further inquiry is required into the nature and circumstances of the respondent's convictions": ibid. The inappropriateness of this approach is clear from the decision of *In re Mengisteab Bahta*, 2000 BIA Lexis 16 (US BIA, Oct. 4, 2000) in which a refugee from Ethiopia was ordered to be removed back to his country on the grounds that he had been convicted (under a plea bargain) of the offense of attempted possession of stolen property. Despite the nature of the offense and the fact that he had received only a thirty-six-month suspended sentence, the classification of his crime as an aggravated felony under US law was deemed by the majority sufficient to justify his removal.

[325] *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at para. 139.

[326] Thus, "the danger involved is not a present or future danger that a person may commit a crime as that can be dealt with by the ordinary criminal law": ibid. at para. 167. This is in line with the view of the drafters of the Refugee Convention. For example, "the Swiss Government wished to reserve the right in quite exceptional circumstances to expel an undesirable alien, even if he was unable to proceed to a country other than the one from which he had fled, since the Federal Government might easily find itself so placed that there was no other means of getting rid of an alien who had seriously compromised himself": Statement of Mr. Schurch of Switzerland, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 32.

[327] The drafters of the Convention, however, assumed this option to be no better than *refoulement*. "To condemn such persons to lifelong imprisonment, even if that were a practicable course, would be no better solution": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 8. In line with this concern, it has been determined in the United States – based not only on domestic law, but also on its understanding of international law – that indefinite detention is not a lawful option: *Kim Ho Ma v. Attorney General*, 208 F 3d 951 (US CA9, Apr. 10, 2000).

[328] "A State would always be in a position to protect itself against refugees who constituted a danger to national security or public order": Statement of Msgr. Comte of the Holy See, UN Doc. E/CONF.2/SR.16, July 11, 1951, at 5.

[329] There must, however, be "the necessity for an appreciable alleviation of the danger to be effected by deportation": *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at para. 25, per Anderson J.

By allowing states to contemplate *refoulement* in only these clear and extreme cases,[330] the drafters conceived a threshold test for permissible *refoulement* which takes real account of both refugee and communal rights. If it is shown either that a refugee is a danger to national security, or that a refugee who is a serious criminal poses a danger to the safety of the community of that country, there is therefore no additional proportionality requirement to be met: by definition, no purely individuated risk of persecution can offset a real threat to such critical security interests of the receiving state. Because the objective of Art. 33(2) is protection of the most fundamental interests of the host state and its community, a clear risk to such collective interests defeats the refugee's right to invoke the duty of *non-refoulement*.

Most writers have taken a contrary position,[331] relying largely on a single comment of the British co-sponsor of the particularized *refoulement* provision.[332] Yet the British reference to the importance of letting states weigh relative risks was actually an answer to a proposal to restrict states' margin of appreciation,[333] not an argument for a super-added proportionality test. Indeed, the British representative associated himself with his French co-sponsor's explanation of the rationale for the particularized *refoulement* clause:

> The French and United Kingdom delegations had submitted their amendment in order to make it possible for states to punish activities ... directed against national security or constituting a danger to the community ... The right of asylum rested on moral and humanitarian considerations which were freely recognised by receiving countries, but it had certain essential limitations. A country could not contract an unconditional obligation towards persons over whom it was difficult to exercise any control, and into the ranks of whom undesirable elements might well infiltrate. The problem was a moral and psychological one, and in order to solve it, it would be necessary to take into account the possible reactions of public opinion.[334]

[330] "The Chairman realized that the presence of particularly intractable refugees might cause certain difficulties in certain reception countries. Nevertheless, it was for the governments of those countries to find the means of making reservations to meet special cases, while accepting the principle, which applied to all civilized nations, of not expelling refugees to territories where they would meet certain death": Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 15.

[331] See Robinson, *History*, at 164 and Weis, *Travaux*, at 342.

[332] "It must be left to States to decide whether the danger entailed to refugees by expulsion outweighed the menace to public security that would arise if they were permitted to stay": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 8.

[333] "What was meant for example by the words 'reasonable grounds'? He considered that the wording: 'may not, however, be claimed by a refugee *who constitutes* a danger to the security of the country' would be preferable [emphasis in original]": Statement of Msgr. Comte of the Holy See, ibid. at 7–8.

[334] Statement of Mr. Rochefort of France, ibid. at 7.

This conviction that the establishment and maintenance of a relatively open refugee protection system requires a strong safeguard of the basic security interests of receiving states was precisely the reason that the Conference of Plenipotentiaries rejected the Ad Hoc Committee's unconditional insistence on strict observance of the duty of *non-refoulement*.[335]

Appearances notwithstanding, insistence that risks to national security or dangers to the host community be "balanced" against the consequences of returning a refugee has in any event actually worked against the interests of many refugees concerned. This is because, in practice, the suggestion that there are some individuated forms of harm that could be more compelling than national security or danger to the community of reception has trivialized the significance of the latter two concepts and justified an unacceptably broad reading of the scope of Art. 33(2). In holding a "balancing test" to be mandated by Art. 33(2), the English Court of Appeal, for example, authorized the government to construe relatively minor concerns as matters of national security or communal danger:

> [T]he Secretary of State argues that on the plain wording of the Article a refugee may be expelled or returned even to a country where his life or freedom would be threatened, and that no balancing exercise is necessary; expulsion or return is permitted even where the threat to life or freedom *is much more serious than* the danger to the security of the country ... Despite the literal meaning of Article 33, it would seem to me quite wrong that *some trivial danger* to national security should allow expulsion or return in a case where there was a present threat to the life of the refugee if that took place [emphasis added].[336]

The very notion that there could be any such thing as a "trivial danger to national security" to be balanced against purely individuated interests is

[335] "The President thought that the Ad Hoc Committee, in drafting article [33], had, perhaps, established a standard which could not be accepted. That Committee, as could be seen from its report on its second session, had felt that the principle inherent in article [33] was fundamental, and that it could not consider any exceptions to the article": Statement of the President, Mr. Larsen of Denmark, ibid. at 13.

[336] *Secretary of State for the Home Department, ex parte Chahal*, [1994] Imm AR 107 (Eng CA, Oct. 22, 1993), per Straughton LJ, violation found in *Chahal v. United Kingdom*, (1996) 23 EHRR 413 (ECHR, Nov. 15, 1996). The decision of the Court of Appeal unfortunately rejected the earlier reasoning of the same court in *NSH v. Secretary of State for the Home Department*, [1988] Imm AR 410 (Eng. CA, Mar. 23, 1988): "It may be that in many cases, particularly where a case is near the borderline, the Secretary of State will weigh in the balance all the compassionate circumstances, including the fact that the person is a refugee. But where national security is concerned I do not see that there is any legal requirement to take this course. Indeed Article 33(2) of the Convention provides that a refugee cannot claim the benefit of Article 33(1) where there are reasonable grounds for regarding him 'as a danger to the security of the country in which he is.'"

disturbing. This decision shows how assertion of the importance of a "balancing test" inadvertently legitimates an unwarranted extension of the scope of the security-based exception to the duty of *non-refoulement*. If, in contrast, national security and danger to the community are more carefully constrained as described here, it is readily apparent that they would always trump purely individuated risks, in consequence of which no super-added balancing test is required or appropriate.[337]

4.1.5 Qualified duty in the case of mass influx

Beyond the possibility of particularized exclusion under Art. 33(2), the intention to establish a broadly applicable duty of *non-refoulement* was qualified during the final phase of the drafting process[338] in order to

[337] These arguments were considered by the New Zealand Court of Appeal, but rejected on the twin grounds that "it is built into the concept of danger to the security of the country that the danger posed by the individual must be serious enough to warrant sending a hypothetical person back to persecution" and that "[t]he weight of authority seems to favour an additional balancing of the consequences for the particular individual if removed or deported against the danger to security": *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at para. 157. The second point is not, of course, substantively persuasive in and of itself. The first point, in contrast, is clearly correct, but is answered by the duty described above to constrain the scope of "national security" grounds to circumstances in which there is an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state's most basic interests: see text above, at pp. 345–346. Nor does the Court address why there is a need for a "balancing requirement" also where *refoulement* is to be authorized for reasons of particular serious criminality, since removal on this basis can in any event only be ordered once mitigating and other surrounding circumstances have been taken into account, and as a true "last resort": see text above, at pp. 349–353.

[338] The Swiss and French delegations to the Conference of Plenipotentiaries appear initially to have argued that *non-refoulement* proscribes the expulsion of refugees from within a state's territory, but not the refusal of admission: Statement of Mr. Zutter of Switzerland, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 6; and Statement of Mr. Rochefort of France, ibid. On closer examination, however, it is clear that their intention was not to endorse the routine *refoulement* of refugees, but rather only to authorize states to defend their frontiers in the event of a threat to their national security engendered by a mass migration of refugees: "The Swiss Government considered that in the present instance the word ['return'] applied solely to refugees who had already entered a country, but were not yet resident there. According to that interpretation, States were not compelled to allow *large groups of persons* claiming refugee status to cross [their] frontiers [emphasis added]": Statement of Mr. Zutter of Switzerland, ibid. See also Statement of Baron van Boetzelaer of the Netherlands, ibid. at 11: "He appreciated the importance of the basic principles underlying article [33] but, as a country bordering on others, was somewhat diffident about assuming unconditional obligations *so far as mass influxes of refugees were concerned* [emphasis added]."

accommodate critical public order and national security concerns which may arise during a "mass influx."[339] The President of the Conference observed that the work of the preparatory Ad Hoc Committee had set perhaps too absolute a standard of respect for *non-refoulement*.[340] The British[341] and Swiss[342] delegates to the Ad Hoc Committee argued that the Convention should recognize the traditional prerogative of states to engage in *refoulement* where required by vital national security interests. In contrast, France[343] and the United States asserted that "it would be highly undesirable to suggest in the text ... that there might be cases, even highly exceptional cases, where a [refugee] might be sent to death or persecution."[344] The latter view prevailed in the Ad Hoc Committee, resulting in a draft article that made no mention of any right to engage in *refoulement* under any circumstances.[345]

At the Conference of Plenipotentiaries, Switzerland and the Netherlands reasserted the customary understanding that a comprehensive and absolute

[339] "[M]ass influx is a phenomenon that has not been defined, but ..., for the purposes of this Conclusion, mass influx situations may, inter alia, have some or all of the following characteristics: (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers": UNHCR Executive Committee Conclusion No. 100, "Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations" (2004), at para. (a), available at www.unhcr.ch (accessed Nov. 20, 2004).

[340] "The President thought that the Ad Hoc Committee, in drafting article [33], had, perhaps, established a standard that could not be accepted. That Committee, as could be seen from its report on its second session, had felt that the principle inherent in article [33] was fundamental, *and that it could not consider any exceptions to the article* [emphasis added]": Statement of Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 13. As is clear from this statement, however, the absolutism of concern to the President was the unwillingness to *consider exceptions* to the duty of *non-refoulement*, as for example were argued to be necessary in the event of mass influx. The President did not take issue with the general scope of the prohibition of *refoulement* as elaborated by the Ad Hoc Committee as including both ejection and non-admittance at the frontier.

[341] "National security was a consideration which should take precedence over all others": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 4. "The United Kingdom Government had no thought of acting harshly in such cases and hoped indeed that the mere existence of the power to expel a man making trouble might serve to keep his behaviour within reasonable bounds": Statement of Sir Leslie Brass, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 30.

[342] Statement of Mr. Schurch of Switzerland, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 32.

[343] "[A]ny possibility, even in exceptional circumstances, of a genuine refugee ... being returned to his country of origin would not only be absolutely inhuman, but was contrary to the very purposes of the Convention": Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 33.

[344] Statement of Mr. Henkin of the United States, ibid. at 31.

[345] UN Doc. E/1850, Aug. 25, 1950, at 25.

duty of *non-refoulement* was untenable in the face of a mass influx.[346] The President agreed, ruling that "the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33."[347] The French term *refoulement* was added to the English text of the article following the word "return" to ensure that the duty of non-return was understood to have "no wider meaning"[348] than the French expression, which was agreed not to apply in the event that national security or public order was genuinely threatened by a mass influx.

There is a logic to this position. In the context of individuated applications for protection, it is feasible for states scrupulously to avoid peremptory acts of *refoulement*. The applicant can be admitted to the state's territory and removed if ultimately adjudged to constitute a serious risk to either national security or the safety of the community.[349] In contrast, it is not usually practical for a country overwhelmed by a mass influx of refugees to engage in this kind of detailed, case-by-case analysis of risks to its own well-being. Governments therefore wanted the assurance that in truly exceptional circumstances, they could engage in peremptory *refoulement* to the extent truly necessary to protect their most critical national interests.

The view that there is an implied limitation on the scope of the duty of *non-refoulement* where a state is at grave risk owing to a mass influx is, however, often resisted.[350] Indeed, Lauterpacht and Bethlehem dismiss this position out of hand:

> Although by reference to passing comments in the *travaux préparatoires* of the 1951 Convention, it has on occasion been argued that the principle does not apply to [mass influx] situations, this is not a view that has any merit. It is neither supported by the text as adopted nor by subsequent practice.[351]

[346] "According to [the Swiss] interpretation, article [33] would not have involved any obligations *in the possible case of mass migrations* across frontiers or of attempted *mass migrations* ... The Netherlands could not accept any legal obligation *in respect of large groups of refugees* seeking access to its territory [emphasis added]": Statement of Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 21.

[347] Statement of Mr. Larsen of Denmark, ibid.

[348] Statement of Mr. Hoare of the United Kingdom, ibid.

[349] Refugee Convention, at Art. 1(F).

[350] Goodwin-Gill does not take a firm position on this question, though he seems inclined to the view taken here that there is no more than a conditional duty of *non-refoulement* in the context of a genuine and truly threatening mass influx. He writes that "[i]t can be argued that a mass influx is not itself sufficient to justify *refoulement*, given the likelihood of an international response to offset any potential threat to national security ... [I]t must be admitted that the prospect of a massive influx of refugees and asylum-seekers exposes the limits of the State's obligation otherwise not to return or refuse admission to refugees": Goodwin-Gill, *Refugee in International Law*, at 141.

[351] Lauterpacht and Bethlehem, "*Non-Refoulement*," at para. 103.

At the level of text, this position ignores the explicit decision to add the French language word "*refoulement*" to the English language version of Art. 33 in order to ensure that the traditional civil law understanding of that term (which did not govern in a mass influx) would be formally recognized.[352] Moreover, most of the "state practice" invoked by these writers against the mass influx exception is not properly considered to be state practice at all.[353]

It is true, though, that relevant conclusions of UNHCR's Executive Committee may appear to argue against recognition of the mass influx exception. Most importantly, Conclusion No. 22 provides that even in situations of mass influx, "the fundamental principle of *non-refoulement* – including non-rejection at the frontier – must be scrupulously observed."[354] As evidence of the subsequent agreement of the parties regarding interpretation of the Refugee Convention,[355] Conclusion No. 22 is an appropriate source of interpretive guidance. But if the Conclusion is read as a whole, it is clear that it argues for a much less one-sided responsibility than is often suggested.[356] The duty of state parties to respect the principle of *non-refoulement* ("at least on a temporary basis") is in fact balanced against a duty of international solidarity owed by other state parties to the receiving country:

> A mass influx may place unduly heavy burdens on certain countries; a satisfactory solution of a problem, international in scope and nature, cannot be achieved without international cooperation. States *shall*, within the framework of international solidarity and burden-sharing, *take all*

[352] See text above, at p. 357.

[353] Various memoranda and position papers authored by regional and international agencies are cobbled together as evidence of state practice in Lauterpacht and Bethlehem, "*Non-Refoulement*," at paras. 108–110. Kälin similarly opines that "[i]t is sometimes argued that the prohibition of *refoulement*, at least regarding rejection at the frontier, does not apply in situations of mass influx. Support for this position can be found, to a certain extent, in the drafting history. *Subsequent and uniform practice* . . . however, prevails over any drafting history, [and] evidences . . . that states regularly admit large numbers of refugees to cross international borders in that in the relatively few cases of push-backs at the border, other states have protested such behaviour [emphasis added]": W. Kälin, "Towards a Concept of 'Temporary Protection': A Study Commissioned by the UNHRC Division of International Protection," unpublished paper, Nov. 12, 1996, at 13–14. But see chapter 1.1.1 above, at pp. 25–26; and, in particular, chapter 1.3.4 above, at pp. 69–72.

[354] UNHCR Executive Committee Conclusion No. 22, "Protection of Asylum-Seekers in Situations of Large-Scale Influx" (1981), at para. II(A)(2), available at www.unhcr.ch (accessed Nov. 20, 2004).

[355] See chapter 1.3.2 above, at pp. 54–55.

[356] See Lauterpacht and Bethlehem, "*Non-Refoulement*," at para. 105, suggesting that by virtue of UNHCR Executive Committee Conclusion No. 22 "[t]he applicability of the principle [of *non-refoulement*] to [mass influx] situations has . . . been affirmed unambiguously by the Executive Committee."

> *necessary measures* to assist, at their request, States which have admitted asylum-seekers in large-scale influx situations [emphasis added].[357]

This approach draws directly on the language of the Preamble to the Refugee Convention, itself a part of the context of the treaty for interpretive purposes.[358] In the result, Executive Committee Conclusion No. 22 actually suggests an understanding of the duty of *non-refoulement* which disallows state parties any prerogative to deny entry to refugees in a mass influx situation *so long as* there is reason to believe that the risk to their critical national interests occasioned by the mass influx will be countered by timely assistance from other states.[359] Much the same conclusion flows from the limited scope of the mass influx exception as conceived by the drafters of the Convention: states are allowed to deny entry to refugees only in truly exceptional circumstances, and only to the extent truly necessary to protect their most critical national interests.[360]

[357] UNHCR Executive Committee Conclusion No. 22, "Protection of Asylum-Seekers in Situations of Large-Scale Influx" (1981), at para. IV(1), available at www.unhcr.ch (accessed Nov. 20, 2004).

[358] "Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation": Refugee Convention, at Preamble. See generally chapter 1.3.2 above, at p. 53, regarding the importance of a treaty's preamble as a reference point for interpretation.

[359] On the other hand, in a general conclusion not addressed to the context of mass influx, the Executive Committee has affirmed the view that "international solidarity and burden-sharing are of direct importance to the satisfactory implementation of refugee protection principles; [but that] ... access to asylum and the meeting by States of their protection obligations should not be dependent on burden-sharing arrangements first being in place, particularly because respect for fundamental human rights and humanitarian principles is an obligation for all members of the international community": UNHCR Executive Committee Conclusion No. 85, "Conclusion on International Protection" (1998), at para. (p), available at www.unhcr.ch (accessed Nov. 20, 2004). Not only is this conclusion not clearly oriented to the mass influx situation, but it also begs the question since – if the duty of *non-refoulement* does not extend to circumstances where fundamental interests are threatened by a genuine mass influx – a call to respect protection obligations even without burden-sharing is not infringed by recognition of the implied exception to the duty of *non-refoulement*. But see Eggli, *Mass Influx*, at 229 in which this Conclusion is said to "underscore[ ] that states should always admit these asylum-seekers, at least on a temporary basis ... in even more explicit and unequivocal terms" than did Conclusion No. 22.

[360] A more recent Conclusion of the Executive Committee which is oriented to the understanding of duties in a mass influx situation seems, however, to take a more absolutist approach, albeit without explicit reference to the duty of *non-refoulement*. "[A]ccess to asylum and the meeting by all States of their international protection obligations should not be dependent on burden and responsibility sharing arrangements first being in place,

Most fundamentally, there can be no question of avoiding the duty of *non-refoulement* under this implied exception where the numbers arriving and the resources of the receiving state are such that security concerns can be addressed under the individuated exceptions set by Art. 33(2).[361] Thus, for example, the American interdiction of the boats of fleeing Haitians was an infringement of the rule against *refoulement*: it simply could not reasonably be said that the circumstances in the country of destination were so fragile, or the number of asylum-seekers so massive in relation to adjudicative and reception resources, that the orderly assessment of claims would have exposed the receiving state to an unacceptable risk. While Nepal's fear of Chinese retaliation may have given it greater reason to fear the security consequences of admitting refugees from Tibet, the number of arrivals was too small to warrant resort to peremptory refusal at the border. Security concerns should rather have been taken into account as part of a post-admission assessment of the threat posed by the refugee.

Even where numbers are significant and the situation of the destination state difficult, the exceptional nature of permissible *refoulement* requires good faith action by the intended state of destination. Derogation from respect for *non-refoulement* is justified in the case of mass influx only where it is the sole realistic option for a state that might otherwise be overwhelmed and unable to protect its most basic national interests.[362] Because it is such an exceptional measure, suspension of protection from *refoulement* must be carried out in a way that is minimally invasive of the human dignity of refugees. While the acute risk to states inherent in particular circumstances will sometimes justify blunt refusals of protection, the limited right of states to engage in *refoulement* should not be interpreted as a form of carte blanche to practice unnecessary harshness. Indeed, the European Union has taken the lead by enacting a Directive on Temporary Protection which eases the procedural expectations of states faced with a mass

particularly because respect for human rights and humanitarian principles is a responsibility for all members of the international community": UNHCR Executive Committee Conclusion No. 100, "Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations" (2004), at Preamble. The same Conclusion moreover "[r]eaffirm[s], in regard to mass influx, the guidance on reinforcing burden and responsibility sharing, including in particular that set out in Conclusion No. 22 (XXXII) of 1981 on the protection of asylum-seekers in situations of large-scale influx": ibid. at Preamble.

361 See chapter 4.1.4 above.

362 "Venezuela had experienced disturbances, accompanied by violence, in which refugees from various countries had taken part; the people of Venezuela had suffered a great deal during and following those upheavals and they would not accept a convention for refugees which contained any provisions that would prevent them from defending their own institutions. It should be possible to expel all aliens, whether refugees or not, from the territory of a State [if] public order in that State was threatened": Statement of Mr. Perez Perozo of Venezuela, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 8.

influx, even as it ensures that *refoulement* is scrupulously avoided and basic rights respected.[363]

Because of the duty to protect the state of arrival's basic interests in the least intrusive way possible, the Thai pushback policy of Vietnamese asylum-seekers was not warranted. Even though more than 500 asylum-seekers were arriving every week, Thailand effectively put itself in a position of administrative incapacity by refusing an offer from the United States to build new facilities to provide for the refugees.[364] The *refoulement* of often desperately dehydrated and starving refugees back to sea was moreover unnecessarily brutal, and appears to have resulted less from specific security concerns than from a simple determination to avoid responsibility for refugees.[365] Nor can there be any excuse for the vigilante-style ejection of Rwandese and Ugandans from Kenya, or for the violent "chasing back" of refugees from Guinea. Objection may also be taken to both the South African electrified fence along its border, and the British–French double fence near Calais: these barriers effected the rejection of refugees in a way that was both too permanent and absolutely unselective, thus failing to meet security concerns in the least rights-intrusive means possible. While no doubt a closer case,[366] Macedonia's 1999 closure of its border to Kosovo Albanian refugees appears to have been less a truly unavoidable act premised on necessity than a bargaining chip to garner increased support from other countries to cope with the refugee flow. As Eggli has concluded, Macedonia was "playing politics with refugees,"[367] making it difficult to see its actions as limited to strictly what was required in order to avoid fundamental risk to its own most basic interests.

[363] Council Directive on minimum standards for giving protection in the event of a mass influx of displaced persons and on the measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Doc. 2001/55/EC (July 20, 2001) (EU Temporary Protection Directive). See generally W. Kälin, "Temporary Protection in the EC: Refugee Law, Human Rights, and the Temptations of Pragmatism," (2001) 44 *German Yearbook of International Law* 221; and J. Hathaway, "What's in a Label?," (2003) 5 *European Journal of Migration and Law* 1 (Hathaway, "Label").

[364] Helton, "Thailand," at 27.

[365] Deputy Interior Minister Somphon Klinphongsa is quoted as having stated that "the Government's policy is . . . [w]e don't want our country regarded as a country of first acceptance because refugees could remain for 10 or even 20 years": ibid.

[366] There is no doubt that the security situation for Macedonia was grave: the number of refugees seeking entry was nearly 20 percent of the host country's population, and would – if admitted more than strictly temporarily – seriously exacerbate an already volatile political situation by fundamentally changing Macedonia's ethnic balance. See M. Barutciski and A. Suhrke, "Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-Sharing," (2001) 14(2) *Journal of Refugee Studies* 95.

[367] Eggli, *Mass Influx*, at 225.

A more compelling case can, however, be made for the legality of the border closings by Zaïre and Tanzania in the face of refugee flows from Rwanda and Burundi. Both states had been overwhelmed by hundreds of thousands of refugees, and were faced by the imminent prospect of additional flows at the time of the border closures. At least in the case of Zaïre, there was also good reason to believe that internal security could be threatened by the entry of refugees, many of whom were suspected of having committed serious criminal offenses. The decisions to suspend border crossings were moreover of limited duration, while efforts to secure international resources to protect refugees were being pursued. The desperate circumstances in Zaïre and Tanzania, and their good faith approach to a context-specific practice of *refoulement*, does not make the results any less tragic for the refugees who were denied access to safety. This situation does, however, provide an example of states confronted by the sort of "prisoner's dilemma" that the drafters of the Convention intended to be resolved in favor of the populations of states of destination.

Clearly, however, reliance on an implied exception to limit the duty of *non-refoulement* where critical interests are at stake in a mass influx is not a happy solution. It is unsatisfactory not only because it leaves refugees without protection, but also because it leaves states with only a very blunt tool to respond to difficult circumstances. UNHCR is moreover right that "[t]he need for greater clarity concerning the scope of international protection in mass influx situations is apparent, not least in view of the varying responses that have been used to address mass displacement."[368] While the agency coyly suggests that "there is nothing inherent in *the provisions of* the 1951 Convention and 1967 Protocol to preclude [them] being applied in mass influx situations [emphasis added],"[369] there is nonetheless value in UNHCR's call to explore the possibility of "another authoritative text, in addition to the 1951 Convention" to address the ways in which refugee law in general – and the duty of *non-refoulement* in particular – should be applied when the arrival of refugees genuinely imperils the most fundamental interests of receiving states.[370] Fairly conceived, an optional protocol or other agreement should bind all state parties to come to the aid of a country experiencing a mass influx by way of both burden *and* responsibility sharing; in return, it should

[368] UNHCR, "Protection of Refugees in Mass Influx Situations: Overall Protection Framework," UN Doc. EC/GC/01/4, Feb. 19, 2001 (UNHCR, "Mass Influx"), at para. 1.

[369] Ibid. at para. 17.

[370] Executive Committee of the High Commissioner's Program, "Agenda for Protection," UN Doc. EC/52/SC/CRP.9/Rev.1, June 26, 2002, at Part III, Goal 1, Point 10. Some general guidance on this point is now afforded by UNHCR Executive Committee Conclusion No. 100, "Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations" (2004), available at www.unhcr.ch (accessed Nov. 20, 2004).

commit the receiving state so aided to respect all applicable refugee and other international human rights.[371] With the benefit of such a system, no state could legitimately invoke the mass influx exception to the duty of *non-refoulement* implicit in Art. 33, since the support received would negate the *in extremis* argument which is an essential condition for its application.

4.1.6 An expanded concept of non-refoulement?

There is insufficient evidence to justify the claim that the duty to avoid the *refoulement* of refugees has evolved at the universal level beyond the scope of Art. 33 of the Refugee Convention. The variants of this position that are relevant to this discussion are the assertion that *non-refoulement* has come to encompass non-rejection at the frontier, and that the principle as a whole is now properly viewed as a matter of universally binding customary international law.[372] There is, of course, no need to assess the first aspect of this alleged evolution, since *non-refoulement* as defined in Art. 33 has always included both ejection from a state and non-admission at the frontier.[373] In contrast, the claim that *non-refoulement* is no longer strictly a matter of conventional law, but is now automatically binding on all states as a matter of custom, is clearly deserving of attention.

In chapter 1 consideration was given to the tendency of some scholars to overlook the requirements of customary international lawmaking when validating the existence of new principles of universal human rights law.[374] The position taken there is that a universally binding norm cannot be brought into existence by simple declaration. Rather, a large and representative part of the community of states must concretize its commitment to a particular principle through its actions. Customary law is not simply a matter of words, wherever spoken and however frequently recited: custom can evolve only through interstate practice in which governments effectively agree to be bound through the medium of their conduct. This standard simply is not yet met in the case of the duty of *non-refoulement*.

[371] See UNHCR, "Mass Influx," at para. 8: "In its Conclusion No. 22 adopted in 1981, the Executive Committee defined minimum standards of immediate treatment in situations of large-scale influx. For UNHCR as well as for affected States, this Conclusion remains an important yardstick against which to measure such treatment in a mass influx of refugees. It is important to note, however, that the Conclusion was never intended as a substitute for standards of protection under the 1951 Convention."

[372] These arguments are advanced in G. Goodwin-Gill, "*Nonrefoulement* and the New Asylum Seekers," in D. Martin ed., *The New Asylum Seekers: Refugee Law in the 1980s* (1986), at 103. The author also advances a third claim, namely that some persons outside the scope of the Convention refugee definition are the beneficiaries of protection against *refoulement*. This last claim is answered in Hathaway, *Refugee Status*, at 24–27.

[373] See chapter 4.1.2 above, at pp. 315–317.

[374] See in particular chapter 1.1 above, at pp. 16–17; and chapter 1.1.1 above, at pp. 25–26.

It is of course true that there are many official pronouncements by UNHCR and others to the effect that *non-refoulement* is part of customary international law.[375] Of perhaps greatest significance, in 2001 the state parties to the Refugee Convention formally acknowledged "the principle of *non-refoulement*, whose applicability is imbedded in customary international law."[376] Yet even the *opinio juris* component of the test for customary status is not clearly satisfied, as most states of Asia and the Near East have routinely refused to be formally bound to avoid *refoulement*.[377] The Chief Justice of India, for example, has affirmed that while courts in his country "have stepped in" on occasion to prevent refugee deportations, "most often these are *ad hoc* orders. And an *ad hoc* order certainly does not advance the law. It does not form part of the law, and it certainly does not make the area clear."[378]

Most fundamentally, however, it is absolutely untenable to suggest that there is anything approaching near-universal respect among states for the principle of *non-refoulement*. To the contrary, as the recounting of state practice at the beginning of this chapter makes depressingly clear, *refoulement* still remains part of the reality for significant numbers of refugees, in most parts of the world. Indeed, the United Nations Commission on Human Rights has formally expressed its "distress" at the "widespread violation of

[375] A typical example is the "San Remo Declaration on the Principle of *Non-Refoulement*," issued by the International Institute of Humanitarian Law in San Remo, Italy. The San Remo Declaration is succinct: "The principle of *non-refoulement* of refugees incorporated in Article 33 of the Convention relating to the Status of Refugees of 28 July 1951 is an integral part of customary international law": ibid. In the accompanying explanatory note, the authors invoke the fact that "in the last half-century, no State has expelled or returned a refugee to the frontiers of a country where his life or freedom would be in danger ... using the argument that *refoulement* is permissible under contemporary international law": ibid. But the absence of an assertion that acts of *refoulement* are justified by legal norms is clearly not the same thing as the existence of state practice which affirms a duty not to send refugees back. The Declaration also invokes the view of the International Court of Justice that a customary norm is not defeated by subsequent inconsistent practice so long as that practice is defended as consistent with the customary norm itself. But this understanding applies only to conduct which occurs after the customary norm comes into existence – the Court did not suggest (as the San Remo Declaration impliedly does) that a customary international norm can be established (rather than not undermined) by inconsistent practice justified by reference to the putative norm.

[376] "Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees," UN Doc. HCR/MMSP/2001/09, Dec. 13, 2001, at para. 4, incorporated in Executive Committee of the High Commissioner's Program, "Agenda for Protection," UN Doc. EC/52/SC/CRP.9/Rev.1, June 26, 2002.

[377] See K. Hailbronner, "*Nonrefoulement* and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?," in D. Martin ed., *The New Asylum Seekers: Refugee Law in the 1980s* (1986), at 128–129.

[378] J. S. Verma, "Inaugural Address," in UNHCR and SAARCLAW, *Seminar Report: Refugees in the SAARC Region: Building a Legal Framework* (1997), at 13–18.

the principle of *non-refoulement* and of the rights of refugees."[379] The effort to disguise this fact by reference to the institutional positions and practices of UNHCR mistakenly assumes that the work of international agencies can *per se* give rise to international law binding on states.

The most recent effort to assert the customary international legal status of the duty of *non-refoulement* suggests that because all but nineteen UN member states "participat[e] in some or other conventional arrangement embodying *non-refoulement*"[380] – that is, they have all agreed to be bound by at least *one of* Art. 33 of the Refugee Convention, Art. 3 of the Torture Convention, Arts. 6 and 7 of the Civil and Political Covenant, or by a comparable provision under a relevant regional treaty – it is now possible to conclude that "*non-refoulement* must be regarded as a principle of customary international law."[381] It is of course true that when a treaty-based norm stimulates a broadly embraced sense of obligation and general practice among states in general (in particular, among non-party states), a cognate customary international legal obligation emerges.[382] But there is no basis to assert that just because most countries have accepted some kind of *non-refoulement* obligation, applying to at least some kinds of cases, and in at least some contexts (many not involving refugees at all), it can now be concluded that there is a universally applicable duty of *non-refoulement* owed to refugees by all states – including the forty-five or so which have opted not to accede to either the Refugee Convention or Protocol.

Moreover, the nature of the various duties of *non-refoulement* relied upon is highly variable, and therefore does not afford the basis for even a common *opinio juris*, much less for general respect of that norm in practice. As such, even if some form of a duty of *non-refoulement* is owed by nearly all states to at least some people, there is no basis to conclude that "[t]he content of the customary principle of *non-refoulement* in a refugee context corresponds largely to ... the interpretation of Article 33 of the Refugee Convention."[383]

The net result of the persistent overstatement of the reach of custom is not, as presumably hoped, the effective incorporation of new standards into a clear and practical system of enforceable duties.[384] For example, the English courts were recently invited by UNHCR to find that the duty of *non-refoulement* should be deemed to have evolved beyond the text of Art. 33 in order to prohibit efforts to stymie the departure from their own countries of would-be refugees. UNHCR frankly acknowledged that its submissions to this

[379] UN Commission on Human Rights, Res. 1997/75.
[380] Lauterpacht and Bethlehem, "*Non-Refoulement*," at para. 210. [381] Ibid. at para. 216.
[382] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 3, at para. 74.
[383] Lauterpacht and Bethlehem, "*Non-Refoulement*," at para. 218.
[384] See chapter 1.1 above, at p. 18.

end did "not turn on the text of the Refugee Convention. Rather, they turn on understanding the international protection regime as a complex of international practice and precepts drawn from refugee law, human rights law, and general principles of international law ... Where, as in the present case, issues arise that strictly do not fall within the Convention's textual scope, its objectives and purposes should act as a reliable guide."[385]

Both the Court of Appeal and House of Lords rejected this argument in clear terms. The Court of Appeal cited with approval the view of the International Court of Justice that "although the principle of good faith is 'one of the most basic principles concerning the creation and performance of legal obligations ... it is not in itself a source of obligation where none would otherwise exist'."[386] The House of Lords was insistent that despite the obvious benefit to at-risk persons of expanding the scope of the duty of non-refoulement beyond what Art. 33 requires, there simply was not sufficient evidence of relatively consistent state practice to substantiate a relevant customary norm.[387] In the words of the High Court of Australia in a decision endorsed by both the English Court of Appeal and House of Lords,

> the Convention, like many international and municipal instruments, does not necessarily pursue its primary purpose at all costs. The purpose of an instrument may instead be pursued in a limited way, reflecting the accommodation of the differing viewpoints, the desire for limited achievement of objectives, or the constraints imposed by limited resources ... It would therefore be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention

[385] *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at para. 28; and *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. 22–23. Importantly, the House of Lords acknowledged the general view that "[t]he existence of the convention is no obstacle in principle to the development of an ancillary or supplementary body of law, more generous than the Convention in its application to those seeking asylum as refugees": ibid. at para. 23.

[386] *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at para. 45, citing the decision on preliminary objections in *Cameroon v. Nigeria*, [1998] ICJ Rep 2, at para. 39. The House of Lords reached the same conclusion: *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. 19, 57–62.

[387] "In considering whether the rule contended for has received the assent of the nations, it is pertinent to recall that the states parties to the 1951 Convention have not, despite much international discussion, agreed to revise its terms or extend its scope at any time since 1967 ... The House was referred to no judicial decision supporting the rule contended for ... Have the states in practice observed such a rule? It seems to me clear that they have not": *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.

> without appreciating the limits which the Convention itself places on the achievement of them.[388]

Not only are courts disinclined to accept policy claims simply because they are advanced as customary legal claims,[389] but there is a real risk that wishful legal thinking about the scope of the duty of *non-refoulement* may send the signal that customary law as a whole is essentially rhetorical, with a resultant dilution of emphasis on the real value of those norms which really have been accepted as binding by a substantial majority of states. There is no doubt that many refugees will benefit from at least one of the various treaty-based duties of *non-refoulement*; it may also be the case that the increasing propensity of states to embrace *non-refoulement* of some kind in their domestic laws[390] may at some point give rise to at least a lowest common denominator claim based on a new general principle of law.[391] But it is simply disingenuous to assert that there is presently a universal duty of *non-refoulement* that is substantively in line with the provisions of Art. 33 and which is owed to all refugees, by all states.

In sum, most threats to the ability of refugees to enter and remain in an asylum state are in fact answered by a good faith interpretation of the Refugee Convention's prohibition of *refoulement*. There are, however, three significant gaps in the protective ambit of Art. 33. First and most fundamentally, the duty of *non-refoulement* does not constrain policies such as visa controls implemented in countries of origin, or interstate agreements to deter migration. Until and unless refugees actually leave their own state, they are not legally entitled to protection against *refoulement*, or to any other refugee rights. Second, individuals who are refugees, but who pose a risk to the national security of the state of reception, or who are particularly serious criminals who endanger its community, cannot claim protection against *refoulement* by virtue of the express exceptions set by Art. 33(2). Third, the duty of *non-refoulement* does not bind a state faced with a mass influx of refugees insofar as the arrival of refugees truly threatens its ability to protect its most basic national interests.

[388] *Applicant "A" and Ano'r v. Minister for Immigration and Multicultural Affairs*, (1997) 190 CLR 225 (Aus. HC, Feb. 24, 1997), per Dawson J, adopted in *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at para. 36.

[389] A notable exception appears to be the New Zealand Court of Appeal, which adopted without independent analysis the view that "[t]he prohibition on refoulement, contained in art. 33(1) of the Refugee Convention, is generally thought to be part of customary international law": *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at paras. 34–36.

[390] See Lauterpacht and Bethlehem, "*Non-Refoulement*," at Annex 2.2, indicating that some 125 states have thus far incorporated some aspect of a duty of *non-refoulement* in their domestic law.

[391] See chapter 1.2.2 above.

The last of these gaps – the implied exception to the duty of *non-refoulement* for refugees arriving as part of a mass influx – could be answered by more effective international burden- and responsibility-sharing arrangements.[392] The alternative of simply expanding the notion of *non-refoulement* to mass influx situations would, in contrast, exact an inappropriately high cost to the collective survival of states of destination that happen to be in the refugees' path of flight. The second concern might similarly be answered by a combination of responsibility sharing to relocate refugees to states in which they do not constitute a security risk, and burden sharing to finance the cost of allowing criminal refugees the option of incarceration or other appropriate custodial arrangements as an alternative to *refoulement*. The first dilemma is, however, the most intractable. So long as states remain adamant that there is no binding duty to allow at-risk persons to seek asylum in other countries,[393] it may be difficult to conceive an adequate international legal response to modes of *non-entrée* that effectively imprison would-be refugees within their own states. Reliance on the right of "everyone to leave any country" set by Art. 12(2) of the Civil and Political Covenant certainly has real potential value. But with the dissipation of the political and economic concerns that once sustained the commitment to refugee protection in the industrialized world, we can unfortunately expect to see an exacerbation of the tendency to endorse visa controls, carrier sanctions, and migration control agreements as exclusionary mechanisms. As a practical matter, only a fundamental recasting of the objectives and modalities of refugee protection has any realistic chance of persuading states to relinquish their tools of refugee deterrence.[394]

While beyond the scope of this book, it should be noted that evolution in treaties outside of international refugee law provides important support to the Refugee Convention's duty of *non-refoulement* as a means of facilitating entry of at least those at-risk persons able to exit their own state.[395] Art. 3(1) of the United Nations Convention against Torture, for example, explicitly prohibits the return of a person to another state where there are substantial

[392] See Epilogue below, at pp. 998–1002.

[393] The continued unwillingness of the community of nations to override sovereign discretion over immigration control even in situations of compelling humanitarian concern is reflected in the purely permissive nature of the "right to seek and enjoy asylum" in the Universal Declaration of Human Rights, in the absence of a duty to grant asylum in the Declaration on Territorial Asylum, and in the complete failure of the 1977 United Nations Conference on Territorial Asylum. See A. Grahl-Madsen, *Territorial Asylum* (1980).

[394] See J. Hathaway and A. Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection," (1997) 10 *Harvard Human Rights Journal* 115; and J. Hathaway ed., *Reconceiving International Refugee Law* (1997).

[395] See Lauterpacht and Bethlehem, "*Non-Refoulement*," at paras. 5–9, 220–253.

grounds to perceive a risk of subjection to torture.[396] Arts. 6 and 7 of the International Covenant on Civil and Political Rights, which respectively require state parties to avert the arbitrary deprivation of life and to ensure that nobody is subject to cruel, inhuman or degrading treatment or punishment, have similarly been interpreted by the Human Rights Committee to prohibit removal of individuals from a state's territory to face a relevant risk:

> [T]he article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.[397]

In addition to a clear duty not to return anyone to face grave risks to their physical security, there is nascent support for the view that state parties to the European Convention on Human Rights and Fundamental Freedoms will not be allowed to remove persons who face the risk of a particularly serious violation of a fairly wide range of human rights.[398] Beyond norms of non-return derived from human rights law, there is tentative judicial authority for the view that international humanitarian law should be construed to preclude the forcible repatriation of aliens who have fled generalized violence or other threats to their security arising out of internal armed conflict in their state of nationality.[399]

For at least some refugees, therefore, the insufficiency of the *non-refoulement* guarantee set by Art. 33 of the Refugee Convention is effectively

[396] "The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that Mr. Khan would be in danger of being subject to torture. In reaching this conclusion, the Committee must take into account all relevant considerations, pursuant to paragraph 2 of article 3, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return ... additional grounds must exist to indicate that the individual concerned would be personally at risk": *Khan v. Canada*, UNCAT Comm. No. 15, UN Doc. CAT/C/13/D/15/1994, decided July 4, 1994, at 10.

[397] 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. 12.

[398] See *R (Ullah) v. Special Adjudicator; Do v. Secretary of State for the Home Department*, [2004] UKHL 26 (UK HL, June 17, 2004).

[399] See e.g. *Orelien v. Canada*, [1992] 1 FC 592 (Can. FCA, Nov. 22, 1991); and *In re Santos*, Dec. No. A29–564–781 (US IC, Aug. 24, 1990).

remedied by the ability to invoke other standards of international law. Courts have moreover appropriately held that where a state is bound by a duty of non-return external to the Refugee Convention, the state concerned may not invoke the flexibility afforded by Art. 33 in order to counter its other legal responsibilities.[400]

4.2 Freedom from arbitrary detention and penalization for illegal entry

The ability simply to enter and remain in an asylum state is cold comfort for many refugees. As UNHCR observes, "it frequently occurs that the necessary distinction is not made either in law or in administrative practice between asylum-seekers and ordinary aliens seeking to enter the territory. The absence of such a distinction may, and in many cases does, lead to asylum-seekers being punished and detained for illegal entry in the same manner as illegal aliens."[401]

[400] See *Chahal v. United Kingdom*, (1996) 23 EHRR 413 (ECHR, Nov. 15, 1996), in which the court rejected the state party's argument that account should be taken of considerations of international security of the kind recognized as valid constraints on *refoulement* under Art. 33 of the Refugee Convention in order to determine obligations under Art. 3 of the European Convention. The argument was also rejected by the Supreme Court of Canada in *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002): "In our view, the prohibition in the Civil and Political Covenant and the [Convention Against Torture] on returning a refugee to face the risk of torture reflects the prevailing international norm. Article 33 of the Refugee Convention protects, in a limited way, refugees from threats to life and freedom from all sources. By contrast, the CAT protects everyone, without derogation, from state-sponsored torture. Moreover, the Refugee Convention itself expresses a 'profound concern for refugees' and its principal purpose is to 'assure refugees the widest possible exercise of . . . fundamental rights and freedoms.' This negates the suggestion that the provisions of the Refugee Convention should be used to deny rights that other legal instruments make universally available to everyone." The UN Human Rights Committee has moreover found even the minimal discretion to remove a person at risk of torture identified by the Supreme Court of Canada in *Suresh* to be viable under Canadian domestic law to be of doubtful legality. "The Committee does however refer, in conclusion, to the Supreme Court's holding in *Suresh* that deportation of an individual where a substantial risk of torture had been found to exist was not necessarily precluded in all circumstances. While it has neither been determined by the State party's domestic courts nor by the Committee that a substantial risk of torture did exist in the author's case, the Committee expresses no further view on this issue other than to note that the prohibition on torture, including as expressed in article 7 of the Covenant, is an absolute one that is not subject to countervailing considerations": *Ahani v. Canada*, UNHRC Comm. No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002, decided Mar. 29, 2004, at para. 10.10.

[401] UNHCR, "Note on Accession to International Instruments and the Detention of Refugees and Asylum Seekers," UN Doc. EC/SCP/44, Aug. 19, 1986 (UNHCR, "Detention Note"), at para. 33.

In some cases, there has simply been no effort to enact specific protections for refugees. In Thailand, for example, refugees without valid passports and visas are not distinguished from other illegal immigrants under the Immigration Act, and are therefore subject to arrest and deportation absent an exercise of ministerial discretion.[402] Gambia has charged asylum-seekers from Senegal with the offense of entering the country without a residence permit, and expelled them without trial.[403] The UNHCR intervened in 2001 to prevent Malawi from refusing to protect refugees from the Democratic Republic of Congo on the grounds that they did not have the required documentation to enter the country.[404] In Kenya, even refugees who had been issued UNHCR documentation were arrested and detained unless able to pay a bribe to officials.[405] Zambian officials have arrested and detained refugees as "illegal immigrants."[406] Zimbabwe arrested refugees from Rwanda for "flouting immigration laws," specifically because they crossed the border at illegal entry points.[407]

Even in states with refugee-specific legislation, the laws may not clearly preempt inconsistent immigration laws. Thus, many asylum-seekers are in practice subject to the same penalties for illegal entry as other aliens in

[402] "The declared policy of the Thai government since 1993 has been to force a 'crackdown' on 'illegal immigrants' within the country. Thailand does have large numbers of 'illegal immigrants,' many of whom come to the Kingdom in search of work. However, a proportion of people who enter the country 'illegally,' without documentation, are asylum-seekers and refugees, fleeing from human rights violations in their own countries. The current policy of the Thai government does not make any allowance for the special situation of those who are asylum-seekers or refugees, and the majority of those arrested without adequate documentation are prosecuted and detained for 'illegal immigration' regardless of their reason for being in the country. Once an asylum-seeker or refugee is arrested and found not to be in possession of appropriate documentation, the prosecution and detention for 'illegal immigration' follows automatically, even if this person is a UNHCR-registered 'person of concern'": Amnesty International, "Thailand: Burmese and Other Asylum-Seekers at Risk" (1994), at 3. This policy is of long-standing duration: see Lawyers' Committee for Human Rights, *Uncertain Haven* (1991), at 32–39; and T. Banbury, "Kampuchean Displaced Persons in Thailand: Between the Devil and the Deep Blue Sea," unpublished manuscript authored for the Harvard Law School Human Rights Program (1988) (Banbury, "Kampuchean Displaced Persons in Thailand").

[403] Amnesty International, "The Gambia: Forcible Expulsion (*Refoulement*) of Senegalese Asylum Seekers" (1990), at 1.

[404] "[T]he UNHCR chief in Malawi, Michael Owor, accused the government of flouting international conventions on refugees ... 'Refugees don't need papers. What sort of papers do they want?,' he said": *SAPA-SFP* (Blantyre), Apr. 17, 2001.

[405] G. Verdirame, "Human Rights and Refugees: The Case of Kenya," (1999) 12(1) *Journal of Refugee Studies* 54 (Verdirame, "Kenya"), at 59–61.

[406] In May 2000, UNHCR was able successfully to secure the release of refugees arrested for illegal presence in Zambia: *Post of Zambia*, May 29, 2000.

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

Bulgaria[408] and in Russia.[409] South African police have rounded up and detained asylum-seekers – including many with valid documents – as part of general operations to catch illegal immigrants and suspected criminals.[410] New Zealand law authorizes the prosecution of refugee claimants who seek protection there in reliance on false identity documents;[411] in the United Kingdom, even refugees in transit to a third state may be subject to criminal penalties for producing a non-genuine travel document.[412]

Illegal entry may also entail negative consequences for refugees short of prosecution under criminal or immigration laws. For example, the Illegal

[408] "Routinely confused with illegal migrants, asylum-seekers are frequently subject to measures restricting their freedom of movement, which amount to detention. This is particularly true at Sofia international airport, where there are numerous cases of foreigners being held (detained) in the transit zone until deportation is feasible, without any opportunity to submit an asylum application, without the length of their detention being regulated, and under inappropriate conditions – nowhere to sleep, or wash, no privacy, etc.": F. Liebaut, *Legal and Social Conditions for Asylum Seekers and Refugees in Central and Eastern European Countries* (1999) (Liebaut, *Conditions 1999*), at 9, available at www.flygtning.dk (accessed Dec. 12, 2003).

[409] "Because most far-abroad asylum-seekers, including those registered with UNHCR, never receive refugee status, Russian authorities consider them to be illegal migrants. Without legal status, they are denied most rights, including the right to work, receive social services and non-emergency medical care, and even to register marriages and births. Many schools do not accept the children of far-abroad asylum-seekers because of their illegal status": US Committee for Refugees, *World Refugee Survey 2002* (2002), at 238. To make matters worse, "[t]here continues to be widespread ignorance of refugee law ... on the part of [Russian] officials": UK Home Office, Immigration and Nationality Directorate, "Russian Federation Country Assessment" (2002), at para. 6.58.

[410] "In March 2000, during a highly publicized crackdown on crime, many refugees and asylum-seekers were illegally arrested, and [Jesuit Refugee Service] staff worked long hours each day to get some detainees out of Lindela [Repatriation Centre]": (2000) 84 *JRS Dispatches* (Dec. 18, 2000); see also (2000) 68 *JRS Dispatches* (Apr. 1, 2000) and Human Rights Watch, "South Africa Immigration Crackdown – Human Rights Groups Condemn Abuse of Refugees, Asylum-Seekers, and South Africans," May 11, 2000.

[411] In New Zealand, persons who present false documents when they arrive to seek protection, and who assume the fraudulent identity in order to secure an entry permit, may be prosecuted under s. 142(1) of the Immigration Act 1987, s. 31 of the Passports Act 1997, and/or ss. 233 and 266(1)(a) of the Crimes Act 1961. In practice, however, where prosecution occurs the case is normally adjourned pending the determination of refugee status; if refugee status is recognized, the charge is likely to be withdrawn: R. Haines, *International Academy of Comparative Law National Report for New Zealand* (1994), at 49; and R. Haines, personal communication, Sept. 9. 2003.

[412] The United Kingdom has prosecuted even asylum-seekers transiting through that country en route to North America: Amnesty International, "Cell Culture: The Detention and Imprisonment of Asylum Seekers in the United Kingdom" (1996), at 26–37; and Amnesty International, "Dead Starlings: An Update to the Amnesty International UK Report 'Cell Culture: The Detention and Imprisonment of Asylum Seekers in the United Kingdom'" (1997), at 8.

Immigration Reform and Immigrant Responsibility Act of 1996[413] provides that persons arriving in the United States without proper and valid immigration documentation are to be summarily removed from the country.[414] While not exempted from the general rule requiring summary expulsion for entry without valid documentation, refugee claimants are referred to a summary hearing to determine whether they have a "credible fear" of persecution in their country of origin.[415] If successful at this inquiry, asylum-seekers are allowed to remain in the country pending the assessment of their claims to protection and are not prosecuted for their illegal entry.[416] But unlike refugees who arrive with valid documentation, undocumented asylum-seekers are denied the right to appeal a negative assessment reached under the expedited removal process.[417] A proposal advanced by the United Kingdom in 2003 would have gone farther still: refugees arriving without documentation in a European Union state would have been required to make their case for protection under a rudimentary procedure conducted in an external processing center, rather than being admitted to a domestic asylum system.[418]

Even more seriously, some countries impose deadlines for the receipt of an application for protection as a refugee. Immediately after acceding to the Refugee Convention in 2000, for example, Mexico passed regulations under which it generally refuses to consider claims lodged more than fifteen days after the refugee's arrival in the country.[419] Poland implemented a similar regime, giving refugees only fourteen days within which to seek protection absent extenuating circumstances based on risks to life or health, or because the claim is based on facts which arose after entry.[420] Turkey imposed a five-day filing deadline (subsequently extended to ten days) – but these rules were later struck down by courts.[421]

[413] Pub. L. No. 104–208, 110 Stat. 3009 (1996), enacted as Division C of the Omnibus Appropriations Act of 1996, now codified in the Immigration and Nationality Act, 8 USCA § 1225.

[414] Immigration and Nationality Act, 8 USCA § 1225(b)(1)(A)(I).

[415] Ibid. at § 1225(b)(1)(B)(v). [416] Ibid. at § 1225(b)(1)(A)(ii), b(1)(C).

[417] See generally K. Musalo, "Report on the First Three Years of Implementation of Expedited Removal," (2000) 15 *Notre Dame Journal of Law, Ethics & Public Policy* 1.

[418] "The lack of proper documentation is unrelated to protection need – a person arriving without passport and visa can obviously have valid reasons for seeking asylum. Channelling such persons into [transit processing centers] providing decreased procedural and material protection for deterrent reasons might raise issues under Article 31 of the 1951 Refugee Convention, prohibiting the imposition of penalties": Noll, "Transit Processing," at 330.

[419] Under Art. 166(VII)(a) of the Regulations of the General Law on Population, a waiver of the deadline is possible in the case of persons who become refugees *sur place*: G. Kuhner, "Detention of Asylum Seekers in Mexico," (2002) 20(3) *Refuge* 58, at 59.

[420] (1998) 5/6 *ECRE Documentation Service*.

[421] K. Kirisci, "UNHCR and Turkey: Nudging towards a Better Implementation of the 1951 Convention on the Status of Refugees" (2001), at 11–12.

By far the most common consequence of a refugee's unauthorized arrival in an asylum country is that he or she will be detained or otherwise denied internal freedom of movement.[422] In January 2001, India began detaining refugees coming from Sri Lanka in order to deter further arrivals.[423] Refugees from Pakistan arriving in Swaziland have been taken to Sidwashini Prison for having "trespassed" on Swazi territory.[424] Namibian immigration officials threatened to prosecute any citizen who failed to report an Angolan refugee in the country without authorization; once located, the refugees were forcibly transported to camps hundreds of kilometers away from the towns and villages where they had taken shelter.[425] Burmese refugees allowed to remain in Thailand after recognition of their status by UNHCR were told by the government that they would have to live in camps on the Thai–Burmese border – but were provided no assistance to travel there, and were not even guaranteed admission upon arrival at the camps.[426]

The detention of refugees is often the result of the application of general laws which authorize the detention without charge of any unauthorized migrant. In Belgium, this automatic right of detention may last for two months,[427] in

[422] "Although State Members of the Executive Committee adopted [Conclusion No. 44 (XXXVII)] by consensus, the recommendations contained therein appear to have had very little impact on the practice of a number of states as regards detention of refugees and asylum-seekers. On the contrary, detention under harsh conditions, for long periods and without justifiable cause has recently increased": UNHCR, "Note on International Protection," UN Doc. A/AC.96/713, Aug. 15, 1988, at para. 21. See also UNHCR, "Opening Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees," Sept. 30, 2002: "I am particularly concerned about the problem of detention of asylum-seekers. While many States have been able to manage their asylum systems without detentions, a more general trend towards increased use of detention – often on a discriminatory basis – is worrying."

[423] "In another attempt to deter refugees coming from the island's war zones in the north, the Indian government is detaining new arrivals in an area in the transit camp, which has been converted into a mini-jail. Conditions are appalling, as men, women and children are holed up in this overcrowded space": (2001) 85 *JRS Dispatches* (Jan. 17. 2001).

[424] "Over 12 Pakistani refugees kept at Sidwashini Prison," *Times of Swaziland*, Oct. 16, 2002.

[425] "Namibia Citizens Who Help Non-Citizens to be Dealt with Severely," *Nampa/MFAIB*, Apr. 18, 2001.

[426] (2000) 67 *JRS Dispatches* (Mar. 15, 2000).

[427] "[B]order asylum-seekers who are undocumented or whose identity cannot be established can be detained ... during the processing of their claim under the admissibility procedure. In-country applicants who entered the country illegally may also be detained during this period, but this is rather exceptional. The detention lasts until a decision on admissibility is made, though no longer than two months ... However, the two-month detention period can be renewed by the Minister ... The maximum period of detention – including the detention which occurred during the processing of the claim – was initially eight months, but this was reduced to five months in 1998": F. Liebaut ed., *Legal and Social Conditions for Asylum Seekers in Western European Countries* (2000) (Liebaut, *Conditions 2000*), at 31–32.

Switzerland for three months,[428] and in Austria for six months.[429] In Malta, African refugees have been detained in miserable conditions for several months with no information about when they would be released, or their asylum applications considered.[430] Under Australian law, refugees are subject to general rules providing for the indefinite detention of non-citizens arriving without authorization:[431] discretionary release from detention is possible (though not guaranteed) only for the very young and very old, for victims of torture and others with special health needs, and for those who have remained in custody for more than six months.[432] The routine resort to the detention of persons seeking refugee status is officially justified in order "to ensure that they do not enter the Australian community until their claims to do so have been properly assessed and found to justify entry."[433] Others, however, suggest that the real motive is to

[428] "The detention period is limited to a maximum of three months during the asylum determination process, and for an additional maximum period of nine months if the asylum-seeker has already received a negative first instance decision and deportation proceedings have started": European Council on Refugees and Exiles, *Legal and Social Conditions for Asylum Seekers in Western European Countries, 2003* (2003) (ECRE, *Conditions 2003*).

[429] "Those applying at the airport can be held in the airport's transit zone whilst awaiting the decision of the Federal Asylum Office on whether their application is inadmissible or manifestly unfounded ... In addition, asylum-seekers may also be subject to detention measures during the asylum procedure – in particular if they have entered the country illegally and/or do not have any provisional right of residence ... Such detention must not exceed a total period of six months": ibid. at 15.

[430] (2003) 132 *JRS Dispatches* (May 15, 2003). "Migrants in detention are held in conditions which are an affront to human dignity ... People have been sleeping for months in tents, in bitter cold and flooding when it rains. Most of those with a roof over their head are severely overcrowded, like 35 people in one room. Some are not even allowed in the open air for one hour each day": (2003) 125 *JRS Dispatches* (Jan. 17, 2003).

[431] "According to the Migration Act, Division 7, Section 189, an officer must detain a person in the 'migration zone' if the officer knows or reasonably suspects that the person is an 'unlawful non-citizen' ... Detention is also mandated for a person who is unable to supply proper documentation or tries to avoid showing proper documentation that they are a lawful non-citizen ... Under the law, the period of detention is indeterminate": Motta, "Rock", at 16.

[432] "Under Australia's Migration Act, all non-citizens who unlawfully enter Australia, including those seeking asylum, are placed in detention. In rare circumstances, they may be released from detention if they meet certain criteria, such as old age, ill health, or having suffered torture or other trauma. However, the majority of asylum-seekers are detained for the duration of the asylum adjudication process, which often takes months or even years": US Committee for Refugees, *World Refugee Survey 2002* (2002), at 114. See also Motta, "Rock," at 16: "In reality ... bridging visas are rarely granted. [The Human Rights and Equal Opportunity Commission] reported in 1998 that only 2 children arriving as boat people or born in detention have been released out of a possible 581 since 1 September 1994."

[433] "Response of the Australian Government to the Views of the [UN Human Rights] Committee in Communication No. 560/1993, *A v. Australia*," June 25, 1998, at para. 5,

deter refugees and others from traveling to Australia, and to win favor with an increasingly xenophobic electorate.[434]

Even in countries where the detention of refugees is in principle more selective, it may in practice be quite routine. For example, unauthorized asylum-seekers have commonly been detained in the United States since the early 1980s.[435] Despite provision to release refugees who pass the "credible fear" pre-screening process, there is nonetheless a strong regulatory and administrative bias towards continued detention while awaiting a final adjudication of the protection claim.[436] More recently, the United States invoked

accessed at www.aph.gov.au/library (visited Nov. 19, 2004). The Immigration Minister stated that he was committed to a policy of detaining persons seeking refugee status "because no-one had invented an alternative monitoring system that worked ... 'From our point of view, our system ensures that people are available for processing and removal if required,' he said": *Canberra Times*, Jan. 26, 2002, at C-1, quoting Immigration Minister Philip Ruddock.

434 The Prime Minister suggested a deterrent motive, observing that "[m]andatory detention is part of the process of sending a signal to the world that you cannot come to this country illegally": P. Barkham, "PM calls asylum protest blackmail," *Guardian*, Jan. 26, 2002, at 18, quoting Prime Minister John Howard. More generally, "[i]t is said that one of the reasons why the minister is attempting to make Australia a fresh hell for those who have fled from intolerable oppression in Iraq and Afghanistan is so as to send a message to people huddling in appalling conditions in countries neighboring them that it is not worthwhile to 'jump the queue' and come to Australia by boat ... Indeed, some suspect that the tough talk, and a sequence of mean-spirited actions, is designed as much for domestic consumption as it is to send a message abroad ... '[I]nvasions' by boat people raise a host of ... worries among Australians, not least about the inviolability of our borders. Add in some resentments about the activities of lawyers, and about the multicultural industry, and one might think that [the Immigration Minister] could not more perfectly construct a policy calculated to appeal to rednecks": "Shame of Ruddock's gulags," *Canberra Times*, June 12, 2000, at A-10.

435 While historically refugee claimants were not detained, the practice of the Immigration and Naturalization Service from 1982 has been to detain all asylum-seekers arriving without proper documentation pending status verification. Release or "parole" is granted only in exceptional cases, such as medical emergencies or where detention is not deemed to be in the public interest: see M. Taylor, "The 1996 Immigration Act: The Detention Provisions," (1997) 74(5) *Interpreter Releases* 209. In the result, "[a]n average of 20,000 individuals were in Immigration and Naturalization Service custody each day ... including 3,000 asylum-seekers": US Committee for Refugees, *World Refugee Survey 2002* (2002), at 279. See generally A. Helton, "Reforming Alien Detention Policy in the United States," in M. Crock ed., *Protection or Punishment: The Detention of Asylum Seekers in Australia* (1993), at 104; P. Morante, "Detention of Asylum Seekers: The United States Perspective," in J. Hughes and F. Liebaut eds., *Detention of Asylum Seekers in Europe: Analysis and Perspectives* (1998), at 85–87; and E. Acer, "Living up to America's Values: Reforming the US Detention System for Asylum Seekers," (2002) 20(3) *Refuge* 44.

436 An asylum-seeker who is not "clearly and beyond a doubt entitled to be admitted shall be detained for a [removal] proceeding": Immigration and Nationality Act, s. 235(b)(2)(A). Undocumented aliens who apply for asylum may be released from detention only "to

national security concerns to justify the routine detention of all persons seeking protection arriving from any of thirty-three countries and two territories, most of them predominantly Muslim.[437]

At least until and unless provisions of the 2002 immigration law reform are implemented,[438] the detention of asylum-seekers in the United Kingdom remains in principle exceptional, based on a showing of good cause. Yet detention may be ordered on the basis of disregard for immigration laws, including clandestine entry, the presentation of false identity documents, or even because the refugee claimant has no personal ties to the United Kingdom.[439] There is no maximum period of detention in the United Kingdom, which may continue until a decision is made to give or to refuse leave to enter the country.[440] Short-term detention may moreover be required in the case of persons adjudged to present a "straightforward asylum claim," defined as a case which appears "to be one in which a quick decision can be reached."[441] The reason for detention in

meet a medical emergency or [when release] is necessary for a legitimate law enforcement activity": ibid. at s. 235.3(b)(4). Asylum-seekers who have passed the credible fear screening interview are eligible for release from detention "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit": ibid. at s. 212(d)(5). Moreover, "[t]he decision to keep an asylum-seeker in detention is now entrusted to the Department of Homeland Security and cannot be appealed to an independent judge": Human Rights First, *In Liberty's Shadow: US Detention of Asylum Seekers in the Era of Homeland Security* (2004) (Human Rights First, *Liberty's Shadow*), at 2.

437 "The new policy [is] part of 'Operation Liberty Shield' announced by Homeland Security Secretary Tom Ridge on March 18 ... Many of these countries have well-documented records of human rights abuse that prompt men, women and children to seek refuge in the United States ... Under the new policy, asylum-seekers could face months and even years behind bars before the immigration bureaucracy finally makes a decision on their claim. Mr. Ridge has stated that asylum-seekers will be detained throughout the time that their cases are processed": Human Rights Watch, "US 'Operation Liberty Shield' Undermines Asylum Seekers' Rights," Mar. 27, 2003.

438 Persons subject to entrance controls may, under these reforms, be required to reside in an "accommodation center" as a condition of release from detention: Nationality, Immigration and Asylum Act 2002, c. 41 (2002), at Part 2. "The Home Office says the new accommodation centres, which will not be locked, will provide full health care and legal and education facilities, including interpreters": M. White and A. Travis, "Immigration debate," *Guardian*, Apr. 25, 2002, at 4.

439 UNHCR, *Detention of Asylum Seekers in Europe* (1995) (UNHCR, *Detention in Europe*), at 208–209.

440 "During the substantive consideration of a claim for asylum, a port applicant may be detained pending an interview with an immigration officer or pending a decision by the Home Office on the asylum application ... There is no limit in law to the length of time a person may be held in these circumstances, except that if someone is held for the purpose of removal, the courts may order release if there is little or no prospect of removal being carried out soon": Liebaut, *Conditions 2000*, at 311.

441 UK Home Office Operational Enforcement Manual, Dec. 21, 2000, at para. 38.1, cited in *R (Saadi) v. Secretary of State for the Home Department*, [2002] UKHL 41 (UK HL, Oct. 31, 2002), at para. 15.

such cases is not fear of absconding or to protect the safety of the host community, but rather that "it is in the interests of speedily and effectively dealing with asylum claims, to facilitate the entry into the United Kingdom of those who were entitled to do so and the removal from the United Kingdom of those who are not."[442]

In contrast, detention in other states is both substantively and procedurally more circumscribed. Under Italy's 2002 immigration reform, for example, undocumented non-citizens are detained only until their identity is established – normally for hours or days, but subject to a maximum period of twenty to thirty days.[443] In Canada, refugees and other unauthorized entrants may be detained only if their identity cannot be established, they are judged likely to abscond or to pose a danger to the public, they are suspected of having violated fundamental human rights, or where necessary for an examination to be completed. An initial detention decision must be reviewed by an immigration adjudicator within forty-eight hours and, if a decision is made to continue the detention, that determination is reviewed seven days later, and every thirty days thereafter.[444]

Other countries avoid the generalized detention of refugees in jails or prisons, but routinely assign unauthorized refugees to live in reception centers, where housing and other basic needs are met. In Denmark, for example, stay in a reception center can be compulsory.[445] Under German law, all refugee applicants are assigned to live in one of thirty-four federal reception centers based upon a distribution quota agreed to by the federal and *Länder* governments. Even if the

[442] *R (Saadi) v. Secretary of State for the Home Department*, [2002] UKHL 41 (UK HL, Oct. 31, 2002), at para. 18, citing testimony of Mr. Ian Martin, Oakington Detention Centre Project Manager.

[443] Lawyers' Committee for Human Rights, "Review of States' Procedures and Practices relating to Detention of Asylum Seekers," Sept. 2002 (LCHR, "Detention Practices"), at 55–56.

[444] Immigration and Refugee Protection Act 2001, at ss. 55–57. These new provisions, which entered into force in 2002, have nonetheless been criticized *inter alia* on the grounds that "it is no longer left to the adjudicator to decide whether identity has been satisfactorily established or whether it can be. There is ... no independent oversight of an immigration officer's decision that the person's identity has not been established": Canadian Council for Refugees, "Bill C-11 Brief" (2001), at 43. More generally, there has been a long-standing concern that because few asylum-seekers in detention have access to legal advice, the periodic reviews are substantively inadequate. See Canadian Council for Refugees, "Refugee Detention in Canada" (1994), and L. Sarick, "Refugee groups, detainees rap Canada," *Globe and Mail* (Toronto), Oct. 23, 1997, at A5.

[445] "Immediately after entry, the asylum-seeker will be taken to a registration centre at Sandholm or Avnstrup ... If the person can establish his/her identity and travel route, he/she will be transferred to the Red Cross reception camp. If there is insufficient information ... the asylum-seeker can be detained in the prison section of Sandholm Camp (under the responsibility of the Ministry of Justice) until the information can be satisfactorily established": Liebaut, *Conditions 2000*, at 46.

refugee already has family living in Germany, he or she must stay in the assigned reception center – in principle for up to three months – before being assigned to a regional asylum center, where he or she must remain for the duration of the status verification procedure.[446] Since April 2000, persons seeking recognition of refugee status in Ireland no longer have the option to choose independent living arrangements, but are rather dispersed to hostels across the country.[447] In Switzerland, stay in a "registration center" is compulsory for all but lawfully resident minors during the time it takes to assess their application for protection.[448] Other countries, such as Norway, do not require refugee claimants to reside in a reception center, but deny state welfare benefits to asylum-seekers who choose to live elsewhere.[449] Similarly, Austria denies federal care to any refugee who abandons his or her designated accommodation for more than three days.[450] In contrast, most refugees who arrive in Sweden are housed for a few days in one of three transit centers while their claim is registered and practical needs met; but they are immediately free to arrange their own accommodation outside the centers, with no penalty in terms of their access to public support.[451]

Even in states where there is no general commitment to the detention of all asylum-seekers, detention may be routine for a subset of refugees, defined by the place or manner of entry into the asylum country. Asylum-seekers who arrive at Russian airports are prevented from submitting an application for refugee status, and are held in detention indefinitely until deportation to the country of origin can be arranged.[452] In France, asylum-seekers who apply at ports, airports, or railway stations in *zones d'attente* are also routinely

[446] European Council on Refugees and Exiles, "Setting Limits" (2002) (ECRE, "Limits"), at 12–13.

[447] ECRE, *Conditions 2003*. [448] Ibid.

[449] "Accommodation in ... transit centres is compulsory for all asylum-seekers until [police interviews and health screening] can take place, although in practice exceptions are made for asylum-seekers who already have other housing and who wish to stay there. As long as the applicant stays outside of the designated transit reception centres, he/she does not enjoy the right to any financial benefits": Liebaut, *Conditions 2000*, at 232.

[450] ECRE, *Conditions 2003*, at 19.

[451] ECRE, "Limits," at 28; LCHR, "Detention Practices," at 106–107.

[452] UNHCR, *Detention in Europe*, at 177. "Under Russian law, the government's 'Points of Immigration Control' (PIC) offices handle asylum requests at ports of entry and along Russia's vast borders, although in practice no PIC has ever accepted an asylum applicant. One of the most active of the country's 114 PIC offices is housed at Moscow's Sheremetevo-II Airport, which receives a large number of African and Asian asylum-seekers. No effective refugee screening exists at the airport": US Committee for Refugees, *World Refugee Survey 2002* (2002), at 239. While the asylum-seeker is held in the transit zone, the airline is responsible for providing him or her with food. As a result, deportations often occur at the behest of the airline itself in order to avoid this liability. It is reported that Aeroflot allows asylum-seekers to remain "for one week, but not longer; it is expensive to feed them": Amnesty International, "Russian Federation: Failure to Protect Asylum Seekers" (1997), at 12.

detained, though only pending a decision on whether their claim to be a refugee is manifestly unfounded.[453] The United States has established a new class of persons subject to its expedited removal process (and hence to routine detention[454]) consisting of persons who entered the country without authorization by sea – a rule unabashedly aimed at Haitian "boat people."[455]

The most common situation-specific reason for ordering the detention of refugees, particularly in the less developed world, is the existence of a "mass influx" of asylum-seekers.[456] Uganda confined Rwandan and Sudanese refugee populations in closed camps in Kyaka and the Masindi District respectively, and persists in a general policy of isolating larger refugee populations.[457] Kenya responded to the arrival of Ethiopian and Somali refugees by establishing closed camps, to which asylum-seekers were forcibly

[453] "[A]sylum seekers may be detained in waiting zones in ports, airports, and railway stations for the time 'necessary to determine whether the application is manifestly unfounded or not,' but with a maximum period of 20 days": Liebaut, *Conditions 2000*, at 85. See also US Committee for Refugees, *World Refugee Survey 2002* (2002), at 212.

[454] See text above, at pp. 372–373.

[455] Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, INS Order No. 2243–02, Nov. 13, 2002, published as 67 FR 68924. As published in the Federal Register, ibid., the Notice states it was issued "in direct response to the recent arrival of hundreds of Haitian refugees off of the coast of South Florida." Moreover, the discriminatory nature of the Notice is clear from clause 5, which provides that "[e]xpedited removal proceedings will not be initiated against Cuban citizens or nationals who arrive by sea." A year prior to the issuance of the Notice, Acting Deputy Immigration and Naturalization Service Commissioner Michael Beycraft issued instructions for the routine detention of Haitians arriving in the United States, even though most had been able to demonstrate a credible fear of being persecuted: Lutheran Immigration and Refugee Service, "Detained Asylum Seekers in Miami – Urgent Action," May 16, 2002.

[456] "Problems relating to detention have also arisen in large-scale influx situations where States frequently find it necessary to place asylum-seekers in camps or reception centres due to concerns for community welfare, national security and the need to provide accommodation to large numbers of persons. In certain instances, however, asylum-seekers have been placed in 'closed camps' for unduly long periods under harsh conditions as part of a policy of 'humane deterrence' adopted as a result of a decline in resettlement prospects. In such cases refugees are required to remain in closed camps indefinitely without any immediate prospect of a solution": UNHCR, "Detention Note," at para. 39.

[457] E. Khiddu-Makubuya, *International Academy of Comparative Law National Report for Uganda* (1994), at 12. "The [Government of Uganda]/UNHCR policy is to confine refugees in camps and settlements until such a time when they can finally return home. The argument put forward is that this is the explicitly preferred 'durable' solution [because it promotes] ... economic self-sufficiency through agricultural production. On the contrary, the location of refugee camps is on waterlogged, infertile and barren land": D. Lwanga, "Refugees in Detention: A Critique of the Limitations to Justice in Uganda," paper presented at the 7th International Association for the Study of Forced Migration Conference, Johannesburg, South Africa, Jan. 8–11, 2001.

and sometimes violently transported.[458] Thailand imposed a strict policy on Cambodian refugees of detention in closed camps, reportedly enforced by the extrajudicial execution of persons discovered outside the camp boundaries.[459] UNHCR has regularly assisted in the establishment and administration of temporary holding areas for refugees arriving in a mass influx situation,[460] including for example those for Rwandan and Burundian refugees in Tanzania in 1996.[461] Perhaps most notoriously, it collaborated in the detention of Vietnamese asylum-seekers arriving in Hong Kong after 1982. Persons seeking protection were held in prison-like conditions, most for more than two years, pending a determination of their claims to refugee status under UNHCR auspices. Hong Kong's Secretary of State proclaimed that "[t]his move should make Hong Kong less attractive for refugees. When the message gets back to Vietnam, it should help to deter people from setting out ... It is urgent that word gets back to Vietnam at once that those who come will be greeted by closed camps."[462]

The conditions in which refugees are detained are often appalling. For example, in Hong Kong's Whitehead Detention Center, which held up to 25,000 people,

> each section of 2,500 people is locked 24 hours a day so that residents are confined in their own small cement section. Each hut contains at least 100 people, each of whom is allotted a space just large enough in which to lie

[458] African Rights, *The Nightmare Continues ... Abuses Against Somali Refugees in Kenya* (1993), at 7. More recently, it was reported that "[r]efugees living in Nairobi ... suffered from human rights abuses, many of which were linked to the Kenyan government's insistence that they reside in camps and not in urban areas": Human Rights Watch, *World Report 2003* (2003).

[459] Amnesty International, "Thailand: Extrajudicial Execution of Kampuchean Refugees" (1988). More generally, "[a]sylum seekers outside of refugee camps are considered by the Thai government to be illegal immigrants and are at risk of arrest and detention": Amnesty International, "Thailand: Widespread Abuses in the Administration of Justice" (2002), at 2.

[460] "There is a trend towards camp-like solutions on the part of UNHCR in the Horn of Africa ... The increasing permanence of UNHCR's camp operations in locations like Dadaab, however, where UNHCR protects over 100,000 mostly Somali refugees, is problematic. UNHCR tends to maintain refugees in camps, at the Kenyan government's insistence, at the expense of basic human rights including freedom of movement and the right to employment": J. Hyndman and B. Nylund, "UNHCR and the Status of Prima Facie Refugees in Kenya," (1998) 10(3) *International Journal of Refugee Law* 21, at 45–46.

[461] Information provided by UNHCR Ngara, Feb. 6, 1996; personal interview with Mr. Jean-Marc Mangin of CARE USA, Sept. 12, 1996. Even at the end of 2000, "approximately 490,000 refugees ... remained under the responsibility of UNHCR": S. van Hoyweghen, "Mobility, Territoriality and Sovereignty in Post-Colonial Tanzania," (2002) 21(1–2) *Refugee Survey Quarterly* 300, at 300.

[462] Cited in Amnesty International, "Hong Kong: Arbitrary Detention of Vietnamese Asylum Seekers" (1994), at 1.

> down. Bunks are stacked three high and families are separated from other families by a sheet. The ratio of people to toilets is 50 to 1 (UNHCR recommended 20 to 1). Uniformed guards patrol the facility. The sound of unlocking and locking of gates resonates through the camp.[463]

While perhaps an extreme example, the bleak conditions faced by refugees detained in Hong Kong are not unique.[464] Detention facilities for refugees in South Korea, for example, were reported to lack heat and other necessities; conditions of detention there were moreover not subject to independent judicial or administrative review.[465] Spain came under attack from human rights groups in 2002 for detaining asylum-seekers arriving in the Canary Islands "in two extremely overcrowded old airport facilities ... At times, more than 500 migrants [were] kept in a space that the Spanish Red Cross [had] determined to be fit for fifty people."[466] The refugee detention facility in Mexico City similarly held two to three times its capacity during 2001.[467] Human rights investigators visiting a detention center in Athens in November 2000 found "150 detainees in a space ... designed for half that number. Most detainees had been held at the centre, which was filthy and roach-infested, for months; one man had been there for a full year."[468] In the United States, refugees may be detained in jails and in facilities contracted through private security firms, including in institutions built to house criminals.[469] Conditions in Australia's remote refugee detention camps are so dismal that they have been condemned by a bipartisan parliamentary

[463] Lawyers' Committee for Human Rights, *Uncertain Haven: Refugee Protection on the Fortieth Anniversary of the 1951 United Nations Refugee Convention* (1991), at 13–14.

[464] In general, the UN Special Rapporteur on the Rights of Non-Citizens has observed that "[a]sylum seekers, including children, pregnant women, and elderly people, have been held in detention centers without adequate health and mental health care, education, and recreation facilities": "Final Report of the Special Rapporteur of the Rights of Non-Citizens: Addendum: Examples of Practice in Regard to Non-Citizens," UN Doc. E/CN.4/Sub.2/2003/23/Add.3, May 26, 2003, at para. 14.

[465] US Committee for Refugees, *World Refugee Survey 2002* (2002), at 137.

[466] Human Rights Watch, "Spain: Migrants' Rights Violated on Canary Islands," Feb. 21, 2002.

[467] US Committee for Refugees, *World Refugee Survey 2002* (2002), at 273.

[468] Human Rights Watch, "Appalling Detention Conditions for Foreigners in Greece Says Rights Group," press release issued Dec. 20, 2000, available at www.hrw.org (accessed Dec. 13, 2003).

[469] "The Department of Homeland Security ... also rents space in state prisons and local jails around the country in order to detain asylum-seekers ... While some of these facilities are euphemistically referred to as 'detention facilities,' for those being held there, they are essentially prisons. Asylum seekers are stripped of their clothing, requiring to wear prison uniforms, transported in handcuffs and shackles, not allowed to have contact visits with family, and treated like prisoners. In some detention facilities ... detainees live in warehouse buildings and their 'outdoor' time consists of a visit to a room in the building that has a chain mesh ceiling which allows some fresh

committee, by the national ombudsman, and by United Nations inspectors.[470] As the Jesuit Refugee Service reported,

> The asylum-seekers are treated far worse than prisoners are in the prison system. Communication has been stymied, clothing provided is inadequate, and food provided is below standard. Medical and dental treatment at Woomera is also below standard. People with tooth problems have only two choices, pull the tooth or leave it. For medical complaints, water is the usual cure offered. Hunger strikes and suicide attempts are all too common at Woomera. Asylum-seekers suffer depression and anxiety. All mirrors have been removed to prevent suicide and self-mutilation ... Woomera is a miserable place to be.[471]

Of particular concern, children – both the dependants of adults seeking protection, and child refugees themselves – may not be exempted from detention regimes. At the beginning of 2003, for example, more than 300 refugee children were being detained by Australia, with some having been in custody for more than three years.[472] It was discovered in 2002 that Belgian authorities were

air to come in the room. For activity, detainees in some facilities are allowed to work in facility upkeep and paid one dollar per day for their labor": Human Rights First, *Liberty's Shadow*, at 35. "In 2001, more than half of all Immigration and Naturalization Service detainees were held in prisons or local jails intended for criminal inmates, exposing them to treatment and conditions inappropriate to their administrative detainee status": Human Rights Watch, *World Report 2002* (2002).

470 "Detention is the first stop for those seeking asylum," *Toronto Star*, May 27, 2001; K. Lawson, "MPs 'shocked' by detention centres," *Canberra Times*, June 19, 2001, at A-3; "Centres 'like Nazi Germany,'" *Canberra Times*, May 9, 2002. Relying only on information provided by government sources, Human Rights Commissioner Chris Sidoti determined that at least one detainee "had been handcuffed for 8 hours, shackled for 7 hours, and kept in a windowless and constantly lit room for six days ...": G. Lombard, "Setting it all to rights," *Canberra Times*, July 22, 2000. Indeed, even a study commissioned by the Immigration Minister himself found that "staff at Woomera intimidated and verbally abused detainees": P. Barkham, "Aussie rules bring despair to refugees," *Guardian*, July 27, 2001, at 16. The Western Australia Prisons Ombudsman observed, "We do not have riots in our detention centres because we have a riotous group of refugees. We have them because we run appalling systems": (2001) 103 *JRS Dispatches* (Dec. 3, 2001), quoting Western Australia Prisons Ombudsman Richard Harding.

471 (2001) 86 *JRS Dispatches* (Feb. 3, 2001). It was reported in 2003 that detainees in some facilities could not visit friends without permission, and only then after a full-body search; that closed circuit cameras are ever-present to monitor movements; that timely medical care is not provided; and that some persons have been stripped, blindfolded, and put into solitary confinement as punishment for protesting their conditions: P. Griffiths, "The detainees have good cause to rebel," *Canberra Times*, Jan. 3, 2003, at A-11. The Woomera detention center was closed down by the government in 2003: (2003) 132 *JRS Dispatches* (May 15, 2003).

472 These included 33 children detained at Villawood; 49 in Baxter; 3 in Maribyrnong, 20 in Port Hedland, 6 at Woomera, 169 on Nauru, and 38 on Manus: (2003) 126 *JRS Dispatches* (Feb. 13, 2003). The Immigration Minister is reported to have stated that "detaining children did not put Australia in breach of its international obligations ... [Persons

holding unaccompanied minor refugee claimants in closed "transit centers" at airports for months on end while their claims were being considered.[473] The United Kingdom even entered a reservation to the Convention on the Rights of the Child to safeguard its authority to detain refugee children[474] – an approach markedly in contrast to its general instructions to local authorities to impose secure detention on even criminal children only as a "last resort."[475]

Beyond penalties imposed directly on refugees themselves, many countries also impose criminal or other sanctions on persons or organizations responsible for assisting them to seek protection. It is now common practice for destination countries to impose sanctions against airlines and other common carriers that transport undocumented refugees to asylum states.[476] In Australia, the cost of detaining refugee claimants may be passed on to the owner of the vessel on which they arrived.[477] Under Canadian law, any person or organization transporting a non-citizen contrary to visa requirements is liable to prosecution under the Immigration and Refugee Protection Act (though in practice the government rarely prosecutes those who assist the arrival of refugees).[478] Some European countries have formalized the relaxation of such rules, to at least some extent, where refugees are involved. In

seeking protection as refugees] should not bring their children to Australia, he said": R. Peake, "Pressure on to free children from detention," *Canberra Times*, Aug. 2, 2002, at A-3.

473 (2002) 121 *JRS Dispatches* (Nov. 4, 2002).

474 L. Back et al., "Letter: Repellent views swamp the system," *Guardian*, Apr. 25, 2002, at 21.

475 "The decision to detain children flies in the face of the government's own guidance to local authorities about the detention in secure units of children who have committed a crime or are beyond parental control. In that context, it must be a 'last resort,' with all possible alternatives having first been comprehensively considered and rejected": R. Scannell, "Letter: Plight of asylum children," *Guardian*, Aug. 2, 2002, at 21. See also R. Prasad, "Toddlers behind the razor wire," *Guardian*, July 30, 2002, at 14: "Whitehall now incarcerates children seeking asylum for unprecedented lengths of time in numbers hitherto unthought of. By expanding the use of detention, ministers shrink the rights of the child. This runs counter to Labour's social justice message: it is prepared to use the language of social inclusion for British kids, but systematically excludes foreign children seeking asylum here ... How can the government justify imprisoning minors who have not committed any offence? Seeking asylum in Britain is not a crime, even if false papers are sometimes the only way of getting here."

476 A detailed account of the ways in which carrier sanctions operate to prevent access to asylum is found in Amnesty International, "Cell Culture: The Detention and Imprisonment of Asylum-Seekers in the United Kingdom" (1996), at 26–37.

477 Migration Act, s. 213. This general provision does not appear to exempt those persons who are later found to be genuine refugees or who are granted a substantive visa: see A. North and P. Decle, "Courts and Immigration Detention: 'Once a Jolly Swagman Camped by a Billabong,'" (2002) 10(1) *Australian Journal of Administrative Law* 5.

478 "No person shall knowingly organize, induce, aid or abet the coming to Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act": Immigration and Refugee Protection Act 2001, at s. 117(1). Fines of up to $1,000,000 and/or life imprisonment are possible for breach of the law: ibid. at s. 117(3). There is no exemption from this provision if the persons transported are genuine

Belgium, France, and Luxembourg, carriers are exempted from penalties if an asylum claim is deemed admissible. In Finland and Germany, on the other hand, no relief from penalization is available unless the asylum claim is ultimately determined to be well founded.[479] In 2003, the Irish Justice Minister refused to consider an exemption from fines of up to €3,000 per immigrant in the case of persons seeking refugee protection.[480] But under recent reforms, European Union countries – while obliged to impose fines on common carriers that bring inadequately documented aliens to Europe – are nonetheless encouraged not to penalize carriers where the person transported makes an application for protection in Europe.[481]

Refugee Convention, Art. 31 Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

refugees; such factors as motive and profit are relevant only to the penalty to be imposed: ibid. at s. 121. The refugees themselves, however, may claim the benefit of s. 133 of the Act, which provides that "[a] person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence ... in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred."

[479] European Council on Refugees and Exiles, "Legislation on carriers' liability," ECRE Information Service Bulletin No. 2, June 1999.

[480] "He said that the UNHCR's suggestion to exempt carriers from fines where the person brought to the State without proper documentation is an asylum-seeker would 'make the proposed controls unworkable and encourage the making of false asylum claims at an even higher rate than, sadly, exists in Ireland at present'": *Irish Times*, Mar. 31, 2003, quoting Justice Minister McDowell.

[481] EU Council Directive 2001/51/EC (June 28, 2001), supplementing the provisions of Art. 26 of the Convention implementing the Schengen Agreement of June 14, 1985, at Arts. 4(2) and 3. The expectation of exemption from prosecution where the person transported applies for asylum is set by the Preamble, rather than codified in an express requirement.

Civil and Political Covenant, Art. 9(1)
Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Civil and Political Covenant, Art. 10(1)
All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Perhaps the most important innovation of the 1951 Refugee Convention is its commitment to the protection of refugees who travel to a state party without authorization. For the first time, the duty of *non-refoulement* was conceived as the entitlement of all refugees, including those who arrive without permission to enter the territory of an asylum country.[482] This decision to grant protection against *refoulement* to all refugees, whether authorized or unauthorized, closed the most critical protection gap that had initially prompted the drafting of a specific duty of non-penalization.[483] Because even "irregular" refugees are now shielded from return in any manner whatsoever to a place in which they are at risk, Art. 33 can be relied upon to counter penalties which raise this prospect.[484]

[482] See chapter 4.1.1 above, at pp. 302–303.

[483] The initial drafts of the Refugee Convention were unclear in their commitment to grant protection against *refoulement* to refugees who arrived without authorization. The Secretary-General's draft Art. 24(1) would have guaranteed that refugees "who have been authorized to reside [in the asylum country] regularly" would benefit from a guarantee that states would "not . . . remove or keep [them] from [their] territory, by application of police measures, such as expulsions or non-admittance at the frontier (refoulement)": United Nations, "Draft Convention", at 46. Draft Art. 19(1) of the French draft was essentially the same, though an exception was included to protect the right to take measures "dictated by reasons of national security": France, "Draft Convention," at 9. The language of the more general obligation, not textually restricted to authorized refugees, was less explicit. Draft Art. 24(3) provided that "[e]ach of the High Contracting Parties undertakes 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 on account of their race, religion, nationality or political opinion": United Nations, "Draft Convention," at 45 (draft Art. 24(3)). The French draft was identical, but added a qualification regarding the permissible scope of relevant political opinions ("provided these opinions are not contrary to the principles of the United Nations as set forth in the Preamble to the United Nations Charter"): France, "Draft Convention," at 9 (draft Art. 19(3)).

[484] See UNHCR Executive Committee Conclusion No. 15, "Refugees Without an Asylum Country" (1979), available at www.unhcr.ch (accessed Nov. 20, 2004), at para. (i): "While asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration."

Thus, for example, the decisions by Gambia, Malawi, and Thailand simply to arrest and deport refugees on the same terms as other illegal entrants raise the spectre of *refoulement*. The same is true of Russia's practice of expelling refugees who enter its territory at airports, and of the efforts by such countries as Mexico, Poland, and Turkey to refuse even to consider claims to refugee status which are not lodged within a fixed timeframe after arrival. Laws that subject refugees who arrive without valid documents or by passage through non-persecutory states to truncated status assessment procedures – including those in both Europe and the United States – may also result in the failure to identify and protect genuine refugees. To the extent such practices expose persons who are in fact refugees (whether or not recognized as such) to the risk of return to persecution, they violate the duty of *non-refoulement*.[485]

Yet if only penalties that force refugees back to the risk of persecution were prohibited, there would still be a risk of unfairness since refugees often have few options but to enter an asylum country without valid documentation or otherwise in breach of its migration laws.[486] As Lord Justice Simon Brown observed in the *Adimi* case,

> The need for Article 31 has not diminished. Quite the contrary. 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 . . .

[485] Persons are refugees when they meet the requirements of the refugee definition in fact, not simply when they are recognized as such: UNHCR, *Handbook*, at para. 28. See chapter 3.1 above, at pp. 158–160.

[486] Courts have taken the view that Art. 31 is a response to "the difficulty of gaining access to a friendly shore. Escapes from persecution have long been characterized by subterfuge and false papers . . . Thus it was that Article 31(1) found its way into the 1951 UN Convention": *R v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520 (Eng. HC, July 29, 1999), per Simon Brown LJ, at 523. See also *Attorney General v. Refugee Council of New Zealand Inc.*, [2003] 2 NZLR 577 (NZ CA, Apr. 16, 2003), at para. 6: "In practice, refugee status claimants often arrive at a border without appropriate documentation or with documentation which appears to be false. This may be because they have fled without papers, or are travelling on forged documents, or have destroyed their travel documents when approaching the border in order to impede their being removed on arrival"; and *Akinmade v. Immigration and Naturalization Service*, 196 F 3d 951 (US CA9, Nov. 5, 1999), finding that "we recognize that a genuine refugee escaping persecution may lie about his citizenship to immigration officials in order to flee his place of persecution or secure entry into the United States." The court adopted a helpful distinction between the (inappropriate and illegal) use of false documents falsely to secure recognition of refugee status, and the (understandable and lawful) use of false documents to escape danger or enter an asylum country: ibid.

> Self-evidently, [the purpose of Art. 31] was to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law.[487]

It must, however, be acknowledged that the principled concern not to penalize refugees for explicable and often necessary breaches of migration control laws was implemented in a highly instrumentalist way. The drafters were keenly aware that without protection against penalization for unlawful entry, many refugees would opt for an "illegal existence" rather than make themselves known to authorities. They valued an orderly system for the processing of refugee claims, and realized that the threat of prosecution and punishment for the breach of general immigration laws would undoubtedly deter many unauthorized refugees from seeking to regularize their status. As observed in the Secretary-General's background study,

> In actual fact, the [refugee], since he cannot enter the territory of a State lawfully, often does so clandestinely. He will then lead an illegal existence, avoiding all contact with the authorities and living under the constant threat of discovery and expulsion. The disadvantages of this state of affairs, both for himself and for the country on whose territory he happens to be, are obvious.[488]

The drafters were of the view that "[i]t would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the border clandestinely, presents himself as soon as possible to the authorities of the country and is recognized as a *bona fide* refugee."[489] The underlying principled concern of Art. 31 to exempt refugees from being penalized for having entered an asylum state without authorization is therefore tempered in a critical way: only refugees who come forward to regularize their status with authorities of the host country are entitled to this immunity.

4.2.1 Beneficiaries of protection

Art. 31 does not prohibit the imposition of immigration penalties on all refugees. Because of the drafters' instrumentalist orientation, protection against penalization for illegal entry or presence is only granted to those refugees who take affirmative steps to make themselves known to officials of

[487] *R v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520 (Eng. HC, July 29, 1999), per Simon Brown LJ at 523, 527.

[488] United Nations Department of Social Affairs, "A Study of Statelessness," UN Doc. E/1112, Feb. 1, 1949 (United Nations, "Statelessness"), at 20.

[489] United Nations, "Memorandum by the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems," UN Doc. E/AC.32/2, Jan. 3, 1950 (Secretary-General, "Memorandum"), at 46.

the asylum country, who do so within a reasonable period of time, and who satisfy authorities that their breach of immigration laws was necessitated by their search for protection. If any of these three requirements is not met, there is no exemption from forms of penalization that fall short of *refoulement*.[490]

Because no more than physical presence is required to invoke Art. 31, the provisional benefit of this right must be granted to all persons who claim refugee status, until and unless they are finally determined not to be Convention refugees:[491]

> That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt.[492]

[490] Even permissible penalization must not cause refugees to be "pushed back into the arms of their persecutors": see chapter 4.1.2 above, at pp. 318–322. The three provisos stipulated in Art. 31(1) also govern entitlement to freedom from general norms of detention for unauthorized entry, set by Art. 31(2). This is clear from the literal meaning of the reference to "such refugees" found twice in Art. 31(2). While it is true that Art. 31(2) achieved its final form before the Conference of Plenipotentiaries adopted the references in Art. 31(1) to refugees "coming directly from a territory where their life or freedom was threatened in the sense of Article 1," it is clear that the Ad Hoc Committee intended a comparable restriction of entitlement to Art. 31(2) rights. Under the joint Belgian–American redrafting of Art. 31 considered by the Ad Hoc Committee, UN Doc. E/AC.32/L.25, Feb. 2, 1950, the relevant text read: "Provided that such refugees present themselves without delay to the authorities and show good cause for their entry, the High Contracting Parties shall not impose penalties on them on account of their illegal entry or presence. The High Contracting Parties nonetheless reserve the right to apply *to such refugees* necessary police measures regarding their accommodation, residence, and movement in the territory until such time as it is possible to take a decision regarding their legal admission to the country of reception or their admission to another country [emphasis added]." The draft adopted by the Ad Hoc Committee on the same day (UN Doc. E/AC.32/L.26, Feb. 2, 1950) split this formulation into two paragraphs, retaining the reference in the second paragraph (governing restrictions on movement) to "such refugees." In the result, only refugees who satisfy the three provisos set by Art. 31(1) are entitled to invoke Art. 31(2) to contest detention which is not strictly provisional and "necessary."

[491] "Admittedly there may be an interim period between the claim to refugee status and recognition as a refugee when it may beg the question to say that the claimant is entitled to be treated as a refugee. Equally, however, it will not be possible during this period to say that the claimant is not entitled to be treated as a refugee. In those circumstances the risk of an undeserved penalty cannot be disregarded": *Attorney General v. E*, [2000] 3 NZLR 257 (NZ CA, July 11, 2000, appeal to PC refused at [2000] 3 NZLR 637). There was clearly confusion during debate regarding the moment at which refugees would be entitled to freedom of movement under Art. 31(2), but not as regards the timing of immunity from immigration penalties. See generally chapter 3.1.2 above, and text below, at pp. 390–391.

[492] *R v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520 (Eng. HC, July 29, 1999), per Simon Brown LJ at 527. See also *Khaboka v. Secretary of State for the Home Department*, [1993] Imm AR 484 (Eng. CA, Mar. 25, 1993), at 489.

Indeed, the English High Court of Justice has determined that states must put in place procedures to ensure that Art. 31 protection is afforded even to "travellers recognizable as refugees, whether or not they have actually claimed asylum."[493] Only those ultimately found not to be refugees may be prosecuted for illegal entry or presence in the usual way.[494]

The first requirement to benefit from Art. 31 is that the asylum-seeker must "present [herself or himself] ... to the authorities." As suggested above, the goal of this clause is to provide an incentive for unauthorized entrants to regularize their status with officials of the asylum state. Only refugees who come forward of their own initiative, thereby demonstrating their good faith, are immune from penalization for breach of immigration laws. Exemption from penalization should not, of course, be denied to a refugee who mistakenly reports to officials of the wrong level or branch of government. For example, an asylum-seeker who advises officials of the city where he is staying of his situation has discharged his duty to present himself to "the authorities," even if only national authorities have jurisdiction to regulate immigration or refugee protection.[495]

On the other hand, the duty to present oneself to authorities in order to claim Art. 31 protection is not usually met by an individual who claims refugee status only after being apprehended or detained by authorities,[496] as there would

[493] *R v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520 (Eng. HC, July 29, 1999), per Simon Brown LJ at 533.

[494] Not only does a non-refugee have no right to the benefit of Art. 31, but it has also been suggested once refugee status is denied, the individual may no longer be able to show "good cause" for his or her illegal entry or presence. "[T]his condition has only a limited role in the Article. It would be satisfied by *a genuine refugee* showing that he was reasonably travelling on false papers [emphasis added]": ibid., per Simon Brown LJ at 529. The "good cause" requirement was more explicitly invoked by the New Zealand High Court to find that the benefit of Art. 31(1) accrues only to refugees who are ultimately able to prove their claim to Convention refugee status: *Jiao v. Refugee Status Appeals Authority*, [2002] NZAR 845 (NZ HC, July 29, 2002).

[495] Indeed, the Belgian representative clearly considered that local authorities were the officials who ought logically to be approached by refugees who had entered without authorization: Statement of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 6.

[496] At the second session of the Ad Hoc Committee, the Belgian representative voiced his concern about the logic of exemption from immigration penalties in the case of a refugee who "[t]he moment he was discovered ... could present himself to the local authorities, explaining the reasons he had taken refuge in that territory": Statement of Mr. Herment of Belgium, ibid. The French representative replied that "in the case mentioned by the Belgian representative, the act was no longer voluntary, since the refugee who had entered illegally had been brought before the authorities by the police who discovered him. The refugee could therefore no longer benefit by the provisions of article [31]": Statement of Mr. Juvigny of France, ibid. at 7. See also Statement of Mr. Henkin of the United States, ibid.

in such a case be no genuine exercise of free will on the part of the refugee.[497] An exception to this rule is required in circumstances where a refugee is arrested or detained before he or she could reasonably have been expected to seek regularization of status. The benefit of Art. 31 should not be denied in such cases, at least so long as there is no evidence of bad faith on the part of the refugee.[498] Because refugees are only required to present themselves "without delay" in order to benefit from Art. 31, it would make no sense to deny that protection simply because apprehension by authorities was nearly immediate.

The second obligation under Art. 31 is that the voluntary reporting to authorities must occur "without delay." While it is clear that refugees who have "been in the territory a long time"[499] before presenting themselves to authorities fail this requirement, there is no duty to claim refugee status immediately upon arrival in order to benefit from Art. 31.[500] Most critically, the language of the Convention requires a non-mechanistic assessment of *bona fides*.[501] The standard will necessarily vary from person to person. A more generous interpretation is appropriate in the case of, for example, refugees who face linguistic or cultural barriers, who are uncertain about how best to seek protection, or who are traumatized or otherwise not in a position

[497] Exemption from penalties was said to be contingent upon "a voluntary act. A person who presented himself to the authorities of a country after crossing its frontiers without authorization was performing a voluntary act": Statement of Mr. Juvigny of France, ibid. at 7. See also Statement of Mr. Winter of Canada, ibid.: "If a refugee presented himself to the authorities involuntarily, namely, only when he had been detained, he would naturally come under the law of the country."

[498] See *R v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520 (Eng. HC, July 29, 1999), per Simon Brown LJ at 528–529, indicating that the requirement of a "voluntary exonerating act" ought not to be applied in order to deny the protection of Art. 31 to a person whose "intention was to claim asylum within a short time of his arrival," but who was detained by authorities virtually as soon as he arrived in the asylum state. As Grahl-Madsen suggests, there is logically a certain interrelationship between the temporal and volitional requirements of Article 31: Grahl-Madsen, *Commentary*, at 176.

[499] Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 5.

[500] It has been suggested that there is simply a duty to present onself "within a short time of [one's] arrival" in order to benefit from Art. 31 protection: see *R v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520 (Eng. HC, July 29, 1999), at 529. This test has specifically been determined not to require a refugee to claim protection "while clearing immigration controls at the port of entry": UK Soc. Sec. Comm. Dec. No. CIS/4439/1998 (Nov. 25, 1999).

[501] While the Belgian representative initially suggested that this clause contemplated "an unauthorized stay of three or four days," even he subsequently agreed that only situations of "prolonged illegal presence" were clearly excluded: Statements of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 4–6. The American delegate was the only representative who took the view that the "without delay" requirement imposes a duty to seek protection "immediately on entry into a country": Statement of Mr. Henkin, ibid. at 7.

immediately to make their need for protection known.[502] Because the objective of this clause is simply to ensure that asylum-seekers regularize their status "as soon as possible,"[503] it cannot be relied upon to impose arbitrary deadlines for an asylum claim to be lodged.[504] The firm deadlines to seek refugee status set by Mexico and Poland are therefore not in compliance with Art. 31; indeed, the comparable rule imposed by Turkey was found to breach the European Convention on Human Rights, precisely because of its inflexibility.[505] While the short deadlines (five to fifteen days) set by these states made their practices particularly problematic, even a less exigent deadline within which to seek protection without being subjected to migration penalties will breach Art. 31, if it is mechanistically applied. Any deadline for reporting must be administered with flexibility to take account of relevant claimant-specific circumstances.[506]

Third, the duty of non-penalization is owed only to refugees who are "coming directly from a territory where their life or freedom was threatened in the sense of Article 1" and who are able to "show good cause for their illegal entry or presence." The underlying premise of the "good cause" requirement is that exemption from immigration penalties should be reserved for refugees

[502] "No strict time limit can be applied to the concept 'coming directly' and each case must be judged on its merits. Similarly, given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum-seeker to another, there is no time limit which can be mechanically applied or associated with the expression 'without delay'": UNHCR, "Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers," Feb. 1999 (UNHCR, "Detention Guidelines"), at para. 4.

[503] Secretary-General, "Memorandum," at 46.

[504] See UNHCR Executive Committee Conclusion No. 15, "Refugees Without an Asylum Country" (1979), at para. (i), available at www.unhcr.ch (accessed Nov. 20, 2004): "While asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration."

[505] "In the Court's opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental values embodied in Article 3 of the [European] Convention": *Jabari v. Turkey*, [2000] ECHR 368 (ECHR, July 11, 2000). Two Turkish administrative courts (*idari mahkeme*) issued rulings calling for consideration of the actual circumstances of cases before relying on the deadline for filing of a claim; the Council of State refused an appeal by the government against one of these decisions in 2000: K. Kirisci, "UNHCR and Turkey: Nudging towards a Better Implementation of the 1951 Convention on the Status of Refugees" (2001), at 11–12.

[506] The Swiss Federal Court has, however, determined that a refugee who waited only three days before reporting to the aliens police had failed to present himself "without delay" to authorities: Decision No. ASYL 1989/1, at 13 (Sw. FC, Dec. 14, 1988).

whose illegal entry is the result of some form of compulsion.[507] The drafters expected refugees to present evidence that "owing to outside pressure, [they] had been obliged to enter or re-enter particular countries illegally."[508] Clearly, "[t]he fact that a refugee was fleeing from persecution was [in and of itself] good cause,"[509] as refugees seeking to escape the risk of persecution[510] cannot be expected to satisfy immigration formalities before fleeing to safety.[511] But good cause is not limited to flight from persecution. For example, the Swiss Federal Court has determined that fear of summary rejection at the Swiss border also constitutes good cause for illegal entry into that country, entitling the asylum-seeker to benefit from Art. 31.[512]

The more contentious aspect of this clause is the "coming directly" requirement, which might be thought to pose a barrier to the eligibility for exemption from penalization of refugees who move onward after failing to secure asylum in their initial state of refuge, or who have spent some period of time in a third state before arriving to seek protection. As regards secondary movement, consideration was given to two situations: refugees might move

[507] While the requirement to show "good cause" was at one stage omitted from the draft of Art. 31 (see UN Doc. E/AC.32/L.26, Feb. 2, 1950), its importance was repeatedly asserted by delegates. See Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 25; Statement of Mr. Weis of the IRO, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 7 (proposing the language "and producing valid reasons to justify their illegal entry"); and Statement of Mr. Winter of Canada, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 5.

[508] Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 6.

[509] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 7. See also Statement of Mr. van Heuven Goedhart of UNHCR, ibid. at 5. In contrast, the representative of the Netherlands suggested that the "good cause" language would deny exemption from penalization to a refugee who entered without authorization to visit a sick relative: Statement of Baron van Boetzelaer of the Netherlands, ibid. at 8.

[510] The French representative to the Conference of Plenipotentiaries proposed at one point that Art. 31 protection be restricted to persons in flight from a "country in which he *is* persecuted [emphasis added]": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 18. The British delegate successfully opposed this language, arguing that "[h]e could not vote for the French amendment, because the Conference had already accepted the definition of the term 'refugee' given in article 1. There might, too, be cases where a refugee left a country after narrowly escaping persecution but without having actually been persecuted. Such a case would not be covered by the new French amendment": Statement of Mr. Hoare of the United Kingdom, ibid. at 19. The language as adopted therefore referred to persons "coming directly from a territory where their life or freedom was *threatened* [emphasis added]": ibid. at 19.

[511] "Nor is it said that they had committed unlawful activities in other countries, even though they had arrived in this country concealed in the back of a lorry, a course understandable in view of the conditions and the risk of persecution under which some would-be asylum-seekers lived": *R (Saadi) v. Secretary of State for the Home Department*, [2002] UKHL 41 (UK HL, Oct. 31, 2002), at para. 21.

[512] Dec. *6S.737/1998/bue*, ASYL 99/2, at 21 (Sw. FC, Mar. 17, 1999).

onward because they had been refused the right to settle in their original country of refuge, or because a risk of being persecuted had emerged there.[513] The consensus reached was that the first category of secondary movers – refugees who fail to find a permanent home in their country of first refuge – must comply with immigration laws if they wish to enter another asylum country without penalization. Those whose onward movement is compelled by the risk of being persecuted, in contrast, are entitled to the benefit of Art. 31. On the more general question of the eligibility for Art. 31 protection of refugees who travel through other countries, there was agreement that the "coming directly" language does not authorize penalization on the basis of relatively brief periods of time spent in other safe countries before arrival in a state party.[514]

By way of explanation, it is important to appreciate that the "coming directly" requirement was included in Art. 31 to respond to France's view that because a right to asylum is implicit in the Refugee Convention,[515] refugees not assimilated in their first asylum country might assert the right to enter another state without authorization. France felt that only refugees in flight from the risk of being persecuted should be exempt from immigration penalties,[516] and therefore proposed an amendment that would restrict Art. 31 protection to refugees "coming direct[ly] from their country of origin."[517] While other countries did not share France's understanding that the Refugee Convention implied a right to asylum,[518] they were persuaded

[513] Statement of Mr. van Heuven Goedhart of UNHCR, UN Doc. A.CONF.2/SR.14, July 10, 1951, at 4–5.

[514] "The expression 'coming directly' in Article 31(1), covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there": UNHCR, "Detention Guidelines," at para. 4.

[515] Statement of Mr. Colemar of France, UN Doc. A/CONF.2/SR.13, July 10, 1951, at 13.

[516] "[W]hile his delegation felt that it was right to exempt from any penalties imposed for illegal crossing of the frontier refugees coming directly from their countries of origin, it did not see any justification for granting them similar exemption in respect of their subsequent movements. The initial exemption was the direct corollary of the right of asylum, but once a refugee had found asylum, article [31] in its present form would allow him to move freely from one country to another without having to comply with frontier formalities. Actually, however, there was no major reason why a refugee should not comply with those formalities": Statement of Mr. Colemar of France, ibid.

[517] UN Doc. A/CONF.2/62.

[518] "The right to asylum ... was only a right, belonging to the State, to grant or refuse asylum, not a right belonging to the individual and entitling him to insist on its being extended to him. Article [31] therefore had nothing to do with the question of the right to asylum": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.13, July 10, 1951, at 14. See also Statements of Mr. Herment of Belgium and Mr. Giraldo-Jaramillo of Colombia, ibid.

that Art. 31 protection should ordinarily obtain only in the country of first refuge.[519]

A proposal from the UNHCR that would also have granted exemption from penalization to refugees unable to find a permanent home in their first country of refuge was therefore not taken up.[520] Instead, the version of Art. 31 approved at first reading by the Conference of Plenipotentiaries explicitly limited the beneficiary class to refugees who were "unable to find asylum even temporarily."[521] This decision is consistent with the general approach of the Refugee Convention, which does not guarantee a right to permanent admission to any asylum country, but only to protection for the duration of risk.[522] Refugees granted temporary protection cannot therefore invoke a breach of legal obligation by the state of first refuge as grounds for entering another country. It is also a logical limitation on Art. 31 protection, since exemption from penalization is granted because of the urgency of the refugee's need to flee. A refugee denied assimilation in the country of first asylum, but who faces no real risk of persecution there, is not imminently at risk.[523] He or she therefore can and should comply with immigration formalities before relocating.[524] If the refugee opts simply to enter another country without authorization, there is no good reason not to impose immigration penalties on him or her, so long as the penalties do not result in *refoulement* directly or indirectly to the country in which persecution is feared.[525]

[519] "[A]n exception from the consequences of irregular entry should only be considered in the case of the first receiving country": Statement of Mr. Del Drago of Italy, UN Doc. A/CONF.2/SR.13, July 10, 1951, at 13. See also Statement of Mr. von Trutzschler of the Federal Republic of Germany, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 7.

[520] "Such refugees might possibly be covered if the words 'and shows good cause' were amended to read 'or shows other good causes'": Statement of Mr. van Heuven Goedhart of UNHCR, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 5.

[521] Ibid. at 13.

[522] J. Hathaway, "The Meaning of Repatriation," (1997) 9(4) *International Journal of Refugee Law* 551. See generally chapter 7.1 below.

[523] A contrary view was taken by the representative of Greece, who "thought that there could be no doubt that the case where a country prescribed temporary residence for a refugee and thus deprived him of his freedom of residence did constitute a case where no penalty could be imposed on him by another country into whose territory he had illegally entered or in which he was illegally present": Statement of Mr. Philon of Greece, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 12.

[524] "To admit without any reservation that a refugee who had settled temporarily in a receiving country was free to enter another, would be to grant him a right of immigration which might be exercised for reasons of mere personal convenience. It was normal in such cases that he should apply for a visa to the authorities of the country in question": Statement of Mr. Colemar of France, ibid. at 10.

[525] "In order to illustrate his own point, [the French representative] would give a concrete example – that of a refugee who, having found asylum in France, tried to make his way unlawfully into Belgium. It was obviously impossible for the Belgian government to

Despite the exclusion from Art. 31 protection of refugees who enter a state unlawfully simply because they have been unable to find a permanent home in the country of first asylum, the "coming directly" language does not disfranchise two other categories of refugee. First, representatives agreed that a refugee could be said to be "coming directly" to a country of asylum even if he or she had passed through, or even been provisionally admitted to, another country. Second, it was decided that immunity from immigration penalization would be granted to the second category of secondary movers – that is, to those compelled to leave a country of asylum due to a risk of being persecuted there.

Debate on the issue of whether Art. 31 could be claimed by persons who had spent time in an intermediate country was provoked by a Belgian observation that the "coming directly" language might be inappropriately relied upon to impose penalties against "a refugee who had stayed in another country for a week or a fortnight, and had then been obliged to seek asylum in the territory of the Contracting State in question."[526] He convinced his colleagues[527] that it was important not to "exclude from the benefit of [Art. 31] any refugee who had managed to find a few days' asylum in any country through which he had passed."[528] In the result, the French proposed wording "having been unable to find" temporary asylum was replaced by a formulation in the present tense, "*being* unable to find asylum even temporarily [emphasis added]."[529] Refugees therefore "come directly" so long as they have spent no more than reasonably short periods of time in one or more other countries. The Swiss Federal Court has held, for example, that an Afghan asylum-seeker who spent one month in Pakistan and two days in Italy before arriving in Switzerland had nonetheless come "directly" to Switzerland.[530]

While the Belgian amendment ensured that refugees who had spent short periods of time in other countries without being admitted to durable protection there would not be subject to immigration penalties, it was recognized that the revised wording might inadvertently give rise to a different problem. As noted by the British representative, the new phrase "being unable to find

acquiesce in that illegal entry, since the life and liberty of the refugee would be in no way in danger at the time": Statement of Mr. Colemar of France, UN Doc. A/CONF.2/SR.13, July 10, 1951, at 14–15.

[526] Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 12.

[527] See e.g. Statement of Mr. Philon of Greece, ibid.; and report of consensus reached, ibid. at 13.

[528] Statement of Mr. Herment of Belgium, ibid. at 12.

[529] Ibid. at 13.

[530] Dec. *6S.737/1998/bue*, ASYL 99/2 (Sw. FC, Mar. 17, 1999). In contrast, Art. 31 does not generally inhere where the stays en route are prolonged. Absent evidence of extenuating circumstances, there is no reason to question the decision of the New Zealand High Court that a refugee from Ghana was not "coming directly" to New Zealand because she had spent two weeks in Swaziland, and ten months in South Africa: *Abu v. Superintendent of Mount Eden Women's Prison*, 199 NZAR Lexis 58 (NZ HC, Dec. 24, 1999).

asylum even temporarily" might be taken to mean that "a refugee would have to establish not merely his refugee status, but also that he was unable to find asylum in any country other than the one in which he applied to settle. Thus the onus of proving a negative would be placed on the refugee himself."[531] The United Kingdom sponsored a UNHCR proposal to delete the reference to inability to find even temporary asylum[532] in order to "relieve the refugee of the onus of proving that he was unable to enter any other country where he would not be persecuted. The refugee would still have to show good cause to justify his illegal entry or presence."[533] But there could be no question of insisting that refugees demonstrate their inability to secure asylum elsewhere as a condition of immunity from immigration penalties.[534]

It follows that even though prior presence in third countries does not mean that a refugee is not "coming directly" to the asylum state, authorities in the asylum state may nonetheless take account of the circumstances of the refugee's presence in third countries in order to assess whether he or she is able to "show good cause" for illegal entry or presence.[535] In earlier debates,

[531] UN Doc. A/CONF.2/SR.14, July 10, 1951, at 11.

[532] The language proposed by UNHCR was: "The Contracting States shall not impose penalties, on account of his illegal entry or presence, on a refugee who enters or who is present in their territory without authorization, provided he presents himself without delay to the authorities and shows good cause for believing that his illegal entry or presence is due to the fact that his life or freedom would otherwise be threatened": UN Doc. A/CONF.2/SR.35, July 25, 1951, at 11–12.

[533] Statement of Mr. van Heuven Goedhart of UNHCR, ibid. at 12. According to Grahl-Madsen, "the main objective of the 'good cause' proviso [is] to prevent ... the obligation to exempt refugees from penalties [from being] extended to such 'refugees who wished to change their country of asylum for purely personal reasons.' However, the requirement to 'show good cause for their illegal entry or presence' cannot wholly be ignored. It seems that in view of the wording chosen, a refugee may be obliged to explain – not why he has chosen any particular country – but why his entry or presence was illegal and not regularized beforehand. Thus the requirement to show 'good cause' in the present text is closely related to the requirement of presenting oneself without delay": Grahl-Madsen, *Commentary*, at 178–179.

[534] UNHCR convinced representatives that Article 31 should not be framed in a way that "would place on refugees the very unfair onus of proving that [they] were unable to find even temporary asylum anywhere outside the country or countries in which [their] life or freedom was threatened. As there were some eighty States in the world, the difficulty of such a task required no emphasis": Statement of Mr. van Heuven Goedhart of UNHCR, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 10–11.

[535] "The term 'coming directly' refers, of course, to persons who have come directly from their country of origin or a country where their life or freedom was threatened, but also to persons who have been in an intermediary country for a short time without having received asylum there": Weis, *Travaux*, at 302. A misreading of the drafting history of the Refugee Convention led an American court to precisely the opposite conclusion. The case involved the claims of Afghan Mujahedin or "freedom fighters," who initially fled Afghanistan to Pakistan and India, where they were threatened and attacked by agents

the duty to show good cause was said to "oblige the refugee to show why he had failed to secure asylum in a country adjacent to his country of origin."[536] Thus, asylum-seekers who have spent time in safe states before arriving at the asylum country have an obligation to explain their inability or reluctance to seek recognition of their refugee status in those intermediate countries.[537] Courts have, for example, accepted as reasonable the decision not to seek asylum in intermediate states which were not clearly secure, where basic human rights were not respected, which were culturally or linguistically foreign to the refugee, or in which the individual had few or no social or family connections.[538] Absent plausible reasons of this kind, however, refugees who fail to take advantage of opportunities for real protection en route

of the Afghan government and Pakistani Communists. The Afghans then traveled to the United States; some came directly from India and Pakistan, others traveled via England, Holland, and Romania. Rather than inquiring into the reasons that prompted the asylum-seekers to continue onward to the United States, and indeed with no concern for the purely transitory presence of the Afghans in countries where they were not clearly at risk, the court asserted that "petitioners may not invoke Article 31 of the Protocol because it applies only to 'refugees who come directly from a territory where their life or freedom was threatened.' In this case, all petitioners came to the United States from various countries. Not one came directly from Afghanistan ... The debates at the United Nations General Assembly Conference on the Status of Refugees and Stateless Persons that drafted the Convention indicate that exemption from the consequences of an illegal entry should be considered only in the case of the first receiving country": *Singh v. Nelson*, 623 F Supp 545 (US DCSDNY, Dec. 12, 1985), at 42. Austrian jurisprudence is equally inattentive to the contextualized meaning of "coming directly." The Austrian High Court has ruled Art. 31 inapplicable to any refugee who has even transited through another country en route to Austria. "The argument put forward in the complaint is that 'direct' entry should be interpreted as meaning that mere transit through another country, even if that country is a contracting state of the Geneva Convention, should not prevent direct entry. This does not correspond to the clearly defined provisions of Article 31 of the Convention": *VwGH 91/19/0187* (Au. HC, Nov. 25, 1991), unofficial translation by E. Wiederin, *International Academy of Comparative Law National Report for Austria* (1994), at 5.

536 Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 11. See also Statement of Mr. Zutter of Switzerland, ibid. The other concerns initially understood by the Ad Hoc Committee to be within the scope of "showing good cause," including flight from the risk of persecution, were made textually explicit by the Conference of Plenipotentiaries.

537 See comments of the representatives of the United Kingdom, Switzerland, Australia, and Belgium at UN Doc. A/CONF.2/SR.14, July 10, 1951, at 7–10.

538 Hathaway, *Refugee Status*, at 46–50. Such an approach is consonant with UNHCR Executive Committee Conclusion No. 15 which provides that "[t]he intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account. Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another state": 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).

to the asylum country may validly be subjected to immigration penalties, so long as these do not give rise to the risk of *refoulement*.[539]

Beyond clarifying that Art. 31 could be invoked by refugees arriving after having spent brief periods in safe third countries, the drafters also determined that immunity from immigration penalties should not be limited to refugees coming directly "from their country of origin." A refugee who confronts a risk of persecution in a country of asylum would, like a refugee coming from his or her state of origin, not be able safely to delay departure until immigration formalities had been completed. Just as in the case of refugees coming directly from their country of origin, the need to escape logically trumps the usual duty to respect immigration laws. The President of the Conference of Plenipotentiaries therefore suggested that the Convention should exempt from penalties any refugee "coming direct[ly] from a territory where his life or freedom was threatened,"[540] an approach initially embraced as a friendly amendment by France.[541] No state opposed the extension of Art. 31 protection to refugees in secondary flight from the risk of persecution.[542] On reflection, however, the French delegate expressed concern that the precise language proposed by the President ("coming direct[ly] from a country

[539] See also Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.13, July 10, 1951, at 14: "The purpose ... was to exempt refugees from the application of the penalties imposable for the unlawful crossing of a frontier, provided they presented themselves of their own free will to the authorities *and explained their case to them* [emphasis added]." In *R v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520 (Eng. HC, July 29, 1999), at 528, the court opined that to determine whether a stay in an intermediate state was a basis for denying eligibility for Art. 31 protection, account should be taken of duration of stay, reasons for delay in departing the intermediate country, and whether or not protection had been sought or found. For reasons described above such matters should not (as the court assumed) determine whether the refugee was "coming directly" to the asylum state; these factors are nonetheless sensibly understood to be part of the inquiry into whether the refugee has "good cause" for illegal entry or presence.

[540] "A refugee in a particular country of asylum, for example, a Hungarian refugee living in Germany, might, without actually being persecuted, feel obliged to seek refuge in another country; if he then entered Denmark illegally, it was reasonable to expect that the Danish authorities would not inflict penalties on him for such illegal entry, provided he could show good cause for it": Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.13, July 10, 1951, at 15.

[541] Statement of Mr. Colemar of France, ibid. See also Statement of Mr. van Heuven Goedhart of UNHCR, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 5.

[542] "[H]e thought there had been no objection to the High Commissioner's interpretation, namely, that the refugee's illegal entry or presence must be proved to be due to the fact that his life or freedom would otherwise have been threatened. He (the President) considered that the French point of view should be acceptable to the other delegations, and that there need be no difference of opinion on that question": Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 13. No special significance should be attributed to the language requiring a threat to "life or freedom," instead of to a "well-founded fear of being persecuted."

where his life or freedom was threatened") might undermine the finite obligation of states originally secured by the Convention's January 1, 1951 cut-off date.[543] While a refugee whose initial flight was due to post-1951 causes would not be entitled to protection, there would be no way to predict how many refugees would need to move due to risks of persecution in asylum states that might arise only after 1951.[544]

The goal of the ensuing discussion at the Conference of Plenipotentiaries was therefore to find a means to grant exemption from penalization to refugees in secondary flight from persecution that would respect the Convention's temporal limitation. The French representative felt that this goal could be achieved by "wording, which would be in accordance with Article 1."[545] His favored formulation, "coming directly from a territory in which his life or freedom would be threatened within the meaning of article 1, paragraph A, of this Convention"[546] derived from a determination to limit Art. 31 protection to persons in flight from a pre-1951 phenomenon.[547] The text as finally adopted was intended to achieve precisely this goal.[548] But with the Refugee Protocol's prospective abolition of the

[543] This dateline has been prospectively eliminated by the adoption of the 1967 Protocol relating to the Status of Refugees: see chapter 2.5.1 above, at pp. 110–111. The French concern therefore has no contemporary relevance for the overwhelming majority of state parties to the Convention, which are also parties to the Protocol.

[544] "As he understood the present text, a person who was the victim of events occurring in a neighbouring country after [January 1, 1951] would not come within the terms of the Convention if he crossed the border into France, whereas those who had already been authorized to take refuge in the neighbouring country as a result of events occurring before 1 January 1951 would be able to claim the benefit of the present provision. Thus there might easily be an influx of refugees who had been authorized to stay in a neighbouring country, but who, because their lives were threatened as a result of events occurring *in that country* after 1 January 1951, would be entitled to avail themselves of the clause to move into France. Thus the ceiling on commitments provided by the date of 1 January 1951 would be largely nullified [emphasis added]": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 14.

[545] Ibid. at 15–16. [546] Ibid. at 17.

[547] The British representative "felt that the time factor was already covered by the definition of the term 'refugee' in article 1. Article 31 could not therefore relate to any refugee fleeing from a country as a result of events occurring after 1 January, 1951": Statement of Mr. Hoare of the United Kingdom, ibid. at 17. The French representative insisted on the need for an additional qualification in Art. 31 "since a refugee might be a refugee under the terms of the Statute of the High Commissioner's Office [and also that] [t]he definition in article 1 did not cover conditions of admission, but only the rights to be accorded refugees": Statement of Mr. Rochefort of France, ibid.

[548] A competing British amendment was withdrawn because "the French representative found it unacceptable": Statement of Mr. Hoare of the United Kingdom, ibid. at 19. Immediately prior to the 20–0 (2 abstentions) vote to approve the final text, the French representative reiterated that the reason for the reference to Art. 1 of the Convention in the text of Art. 31 was that France, "[a]s a country of second reception . . . could not bind itself to accept refugees from all other European countries of first reception. There had to

January 1, 1951 cut-off date for refugee status,[549] the original basis for inserting the reference to persons whose life or freedom was threatened "in the sense of Article 1" has now been rendered largely moot. Because state parties to the Protocol are required to apply the Convention refugee definition without reference to the temporal limitation,[550] all refugees whose illegal entry or presence is due to the risk of being persecuted in a country of asylum are today entitled to exemption from immigration penalties.[551]

The argument has, however, been advanced that the comments of two delegates to the Conference of Plenipotentiaries suggest that the phrase "in the sense of Article 1" may also restrict access to Art. 31 protection on the grounds that it requires a refugee in secondary flight to show that the risk of persecution in the country from which secondary flight originated is on account of "race, religion, nationality, membership of a particular social group, or political opinion," meaning that Art. 31 protection would not inhere where departure is the result of a generalized risk of being persecuted there.[552] Taken in context,

be some limit, such as that of events occurring before 1 January 1951": Statement of Mr. Rochefort of France, ibid. at 19.

549 See chapter 2.5.1 above, at pp. 110–111.

550 Protocol relating to the Status of Refugees, 606 UNTS 8791, done Jan. 31, 1967, entered into force Oct. 4, 1967 (Refugee Protocol), at Art. I(2).

551 There is no basis for an argument that the risk faced must be other than a risk of being persecuted. "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)": Weis, *Travaux*, at 303.

552 Statements of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 14–15; and of the President, Mr. Larsen of Denmark, ibid. at 18: "It might also happen, as the Swedish representative had indicated, that a refugee, as defined in article 1, escaped to a second country where his life or liberty was again in danger, but not for the reasons specified in article 1, and that for those irrelevant reasons he fled to a third country. The French representative was, presumably, concerned with the possibility of such cases coming within the terms of Article 31." In fact, as described above, this was not the concern of the French delegate. Yet the language adopted ("in the sense of Article 1") is certainly broad enough to encompass this requirement. It was also likely in the minds of the drafters, given this statement by the President just prior to the final vote on the text of Art. 31. The implications of this requirement are, however, unclear. Since the original recognition of refugee status was premised on a nexus to one of the five Convention grounds, it might reasonably be said that "but for" that initial, nexus-defined flight the refugee would not have been compelled to seek secondary protection. That is, he or she is only exposed to the risk of persecution in the asylum country because of an initial flight prompted by race, religion, nationality, membership of a particular social group, or political opinion.

however, the better view is that these interventions at the Conference were intended simply to ensure that Art. 31 protection is limited to persons whose secondary movement is motivated by a need for protection.[553] Nor should any special significance be attached to the reference to refugees coming from a "territory" (as opposed to a "country") in which they face a risk of being persecuted. The French delegate did not explain his choice of language, though it is likely that it was simply intended to track the formulation of Art. 33's duty of *non-refoulement*.[554]

A final question is whether Art. 31 can be invoked by persons or organizations that assist refugees in flight from the risk of persecution to enter an asylum country without authorization. The importance of such protection was voiced by the Swiss representative to the Ad Hoc Committee:

> Swiss federal law did not regard any person assisting [a refugee] as liable to punishment, provided his motives were above board. The provision was of some importance for voluntary organizations for aid to refugees. Article [31] did not include any such provision, and he thought the omission should be made good. It was quite possible that in domestic law, assistance to a foreigner crossing a frontier illegally might be regarded as a separate offence punishable even if the refugee was not.[555]

There was general agreement that "a refugee organization should not be penalized for having helped a refugee applying to it. That was an obvious humanitarian duty."[556] Yet no state endorsed the Swiss proposal to amend the Convention to provide for such an exemption. Concern was expressed that any such amendment might encourage organizations actually to organize or promote the illegal entry of refugees (rather than simply to respond to

[553] The basis for the Swedish representative's allusion to the importance of restricting the benefit of Art. 31 to persons able to show the risk of persecution for an enumerated ground was that "otherwise a refugee who had committed a theft might maintain that his freedom was in danger": Statement of Mr. Petren of Sweden, ibid. at 14–15. In other words, Art. 31 ought not to apply to persons whose illegal entry or presence was unconnected to their refugee status. This broader reading is in keeping with the more general concern to limit Art. 31 protection to refugees whose secondary movement was prompted by the need for protection. "What France wished to avoid was having to accept any refugee from a neighbouring country who *voluntarily* decided to move into France, perhaps *on the pretext* that the neighbouring country would no longer give him permission to reside there [emphasis added]": Statement of Mr. Rochefort of France, ibid. at 11.

[554] UNHCR had earlier suggested that the language of Art. 31 should mirror the duty of *non-refoulement*, which refers to "territories" where life or freedom would be threatened: Statement of Mr. van Heuven Goedhart of UNHCR, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 5.

[555] Statement of Mr. Schurch of Switzerland, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 8.

[556] Statement of Mr. Juvigny of France, ibid. at 9. See also Statements of Mr. Henkin of the United States, Mr. Perez-Perozo of Venezuela, and the Chairman, Mr. Larsen of Denmark, ibid. at 8–9.

requests for assistance). Indeed, the French representative successfully urged his colleagues to leave states the freedom to penalize "corporate bodies" that might exploit asylum-seekers.[557] The final consensus was that "it would be sufficient to make mention of the problem in the summary record of the meeting, in the hope that Governments would take note of the very liberal outlook embodied in the Swiss federal laws and follow that example."[558]

This discussion confirms that there is no legal obligation to exempt even individuals or organizations with purely humanitarian motives from penalties for assisting refugees to cross frontiers without authorization. As the text of Art. 31 makes clear, the duty of states is simply to avoid the imposition of penalties "on refugees." Yet the conceptual incongruity of penalizing individuals, organizations, or corporations for facilitating precisely the irregular entry that Art. 31 allows is surely self-evident. Recognizing that the drafters' reluctance to amend the text of Art. 31 stemmed from concern to avoid the exploitation of refugees, asylum countries should be slow to impose immigration-related penalties on innocent agents of entry.[559]

[557] "But assistance to refugees might go beyond the national territory, and in certain circumstances refugee organizations might literally become organizations for the illegal crossing of frontiers. He wondered whether it would be in the interests of refugees themselves that organizations of this kind, whose activities were likely to come under very much more general laws, should exist inside national territories": Statement of Mr. Juvigny of France, ibid. at 9.

[558] Statement of Mr. Juvigny of France, ibid. at 9. See also Statement of Mr. Henkin of the United States, ibid. at 8; and Statement of the Chairman, Mr. Larsen of Denmark, ibid. at 9.

[559] The English Court of Appeal found that rules which imposed a mandatory £2,000 fine on truck drivers and others for each unauthorized entrant brought to the United Kingdom by them as the result of either intent or negligence were in breach of the requirements of the European Convention on Human Rights. "[E]ven assuming, as I do, that the scheme is directed towards punishing carriers for some fault, it cannot to my mind be right to impose so high a fixed penalty without possibility of mitigation. The hallowed principle that the punishment must fit the crime is irreconcilable with the notion of a substantial fixed penalty. It is essentially, therefore, on this account rather than because of the reversed burden of proof that I would regard the scheme as incompatible with Article 6. What in particular it offends is the carrier's right to have his penalty determined by an independent tribunal. To my mind there surely is such a right ... if ... contrary to my belief, the scale and inflexibility of the penalty, taken in conjunction with the other features of this scheme, are not such as to deprive the carriers of a fair trial under Article 6, then I would hold them instead to impose an excessive burden on the carriers such as to violate Article 1. Even acknowledging, as I do, the great importance of the social goal which the scheme seeks to promote, there are nevertheless limits to how far the state is entitled to go in imposing obligations of vigilance on drivers (and vicarious liability on employers and hirers) to achieve it and in penalising any breach. Obviously, were the penalty heavier still and the discouragement of carelessness correspondingly greater, the scheme would be yet more effective and the policy objective fulfilled to an even higher

Thus, despite the risk that policies such as Australia's assignment of detention costs to carriers and Ireland's refusal to exempt carriers transporting refugees from sanctions will have a chilling effect on the willingness of airlines and others to allow refugees to travel, such penalties cannot be said to breach Art. 31. The same is true of the Canadian laws which authorize the criminal prosecution of persons who assist unauthorized entrants (including refugee claimants) to arrive at its territory. Importantly, however, Canada's reluctance to impose those penalties in practice against persons transporting refugee claimants in other than egregious cases is very much in line with the expectations of the Convention's drafters. Perhaps ironically, the more formalized dispensations from penalties applied in some European countries – for example, in Belgium, Finland, France, Germany, and Luxembourg – may actually be less in keeping with the goals of the drafters. Because the real basis for the drafters' reluctance to vary the text of Art. 31 was concern to punish those who are effectively "trafficking" in asylum-seekers,[560] it makes little sense to refrain from imposing carrier sanctions only where an asylum claim is ultimately found to be legally admissible, or to be substantively well founded.[561] This approach implies a duty on the part of transportation companies accurately to assess the refugee status of their passengers, and imposes liability in circumstances that are in no sense indicative of any intention to exploit. The recent move of the European Union to promote a policy of not pursuing carrier sanctions when the person transported makes a claim to refugee protection is, like the Canadian practice, more clearly in keeping with the goals of Art. 31.

degree. There comes a point, however, when what is achieved is achieved only at the cost of basic fairness. The price in Convention terms becomes just too high. That in my judgment is the position here": *Secretary of State for the Home Department v. International Transport Roth GmbH*, [2002] 1 CMLR 52 (Eng. CA, Feb. 22, 2002), at paras. 47, 53, per Simon Brown LJ. Interestingly, neither the issue of the impact on refugees nor the possible relevance of Art. 31 of the Refugee Convention seems to have been argued.

[560] Trafficking is defined as "the recruitment, transportation, transfer, harboring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation": Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, UNGA Res. 55/25, Annex II, 55 UNGAOR Supp. (No. 49) at 65, UN Doc. A/45/49, vol. I (2001), adopted Nov. 15, 2000, entered into force Dec. 25, 2003, at Art. 3.

[561] But see G. Goodwin-Gill, "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention, and Protection," in E. Feller et al. eds., *Refugee Protection in International Law* 185 (2003) (Goodwin-Gill, "Article 31"), at 219: "As a matter of principle ... a carrier should not be penalized for bringing in an 'undocumented' passenger, *where that person is subsequently determined to be in need of international protection* [emphasis added]."

To summarize, a refugee in flight from the risk of being persecuted may invoke Art. 31 to avoid penalties for illegal entry or presence so long as he or she voluntarily reports to asylum state authorities within a reasonable time after crossing the frontier. The refugee must show "good cause" for illegal entry or presence, a requirement which will always be met where the breach of migration control laws is the result of flight from a risk of being persecuted. The risk of persecution may exist, however, either in the refugee's country of origin, or in a state in which protection was previously afforded. If the refugee has passed through, or spent time in, one or more non-persecutory states, he or she may be expected to provide a plausible explanation for the failure to seek protection in the intermediate states as a condition for exemption from immigration penalties, though such presence does not automatically exclude the refugee from entitlement to Art. 31 protection. Because the Convention provides protection from penalization only for refugees themselves, those who transport or otherwise assist refugees to enter asylum states without authorization are not protected from amenability to the usual regulatory or criminal penalties for such actions. The drafters assumed, however, that governments would not exercise their authority to penalize those assisting refugees to enter an asylum country absent evidence that they had acted in an exploitative way, or otherwise in bad faith.

4.2.2 Non-penalization

The substance of the duty of non-penalization was not extensively discussed by the drafters of the Refugee Convention. The core concern is to exempt refugees fleeing persecution from sanctions that might ordinarily be imposed[562] for breach of the asylum state's general migration control laws.[563] The Secretary-General's background study, for example, observed

[562] "The Belgian representative had urged that the penalties mentioned in the article ... should be confined to judicial penalties only. Surely that was precisely what the article stated. A judicial penalty, at least as interpreted in the code law of the Latin countries, was a penalty pronounced by the courts, not an administrative penalty": Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 5. Because the goal of the French position was to ensure that purely administrative actions were not subject to Art. 31, Grahl-Madsen logically suggests that "[t]he term 'penalties' includes imprisonment and fines, meted out as punishment by a judicial or semi-judicial body": Grahl-Madsen, *Commentary*, at 169.

[563] "The meaning of 'illegal entry or presence' has not generally raised any difficult issue of interpretation. The former would include arriving or securing entry through the use of false or falsified documents, the use of other methods of deception, clandestine entry (for example, as a stowaway), and entry into State territory with the assistance of smugglers or traffickers ... 'Illegal presence' would cover unlawful arriving and remaining, for instance, after the elapse of a short, permitted period of stay": Goodwin-Gill, "Article 31," at 196.

that while countries commonly require non-citizens to present a valid passport and visa to be legally admitted, a refugee "is rarely in a position to comply with the requirements for legal entry."[564] Equally apparent is the need of many refugees to cross borders clandestinely in order to access protection. So long as a refugee's failure to present valid travel documents or to comply with the usual immigration formalities is purely incidental to his or her flight from the risk of being persecuted, he or she should not be sanctioned "on a charge of illegal entry."[565] There is therefore no basis in international law for the practice in Russia and Bulgaria of subjecting refugees to the usual penalties for illegal entry, nor for the arrest by Zambia and Zimbabwe of refugee claimants for having entered their territory illegally. Nor may South Africa rely on its right to arrest illegal entrants to penalize refugees caught up in its more general efforts. Where efforts to penalize refugees for illegal entry are more informal, as in Kenya, the government has a duty to ensure that its officials do not take action against refugees in the hope of extracting bribes or other benefits. Nor does international law sanction the United Kingdom's policy of pursuing criminal charges against refugees found to have used false documents to pass through its territory. As an English court has observed, the right of refugees to breach migration control laws in search of protection means that the propriety of prosecution for such matters by a transit state is particularly doubtful.[566]

Interestingly, Art. 31 does not require state parties formally to incorporate an exemption for refugees from general immigration penalties. Indeed, there is not even a duty to refrain from launching a prosecution against refugees for

[564] Secretary-General, "Memorandum," at 46.

[565] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.13, July 10, 1951, at 14. See also Statements of Mr. Colemar of France, ibid. at 13 ("any penalties imposed for illegal crossing of the frontier"); Mr. Del Drago of Italy, ibid. at 13 ("from the consequences of irregular entry"); Mr. Herment of Belgium, ibid. at 14 ("penalties imposable for the unlawful crossing of a frontier"); the President, Mr. Larsen of Denmark, ibid. at 15 ("penalties . . . for such illegal entry"); and Mr. van Heuven Goedhart of UNHCR, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 12 ("punished for such illegal entry").

[566] "[T]he [government] will surely wish to reflect upon the wisdom of prosecuting and imprisoning refugees for the use of false travel documents. Is this really a just and sensible policy? . . . In any event, the [government's] argument provides no justification whatever for prosecuting refugees in transit": *R v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520 (Eng. HC, July 29, 1999), at 534. See also Goodwin-Gill, "Article 31," at 216–217: "If a State initiates action within its territory, for example, to deal with the use of false travel documents, then that State, rather than the State of intended destination, assumes the responsibility of ensuring that the refugee/asylum seeker benefits at least from those provisions of the 1951 Convention, such as Articles 31 and 33 . . . which are not dependent upon lawful presence or residence."

breach of immigration laws.[567] As much was arguably evident even in the original formulation of Art. 31, which would have required states not to "apply" penalties against refugees.[568] But the final language, in which the only obligation is not to "impose" such penalties,[569] makes this point quite clearly. Indeed, the Belgian representative to the Ad Hoc Committee observed that the immunity of a particular refugee from immigration penalties is a question to be submitted to the courts, implying the ability to lay charges in the first place.[570] It is therefore lawful for a government to charge an asylum-seeker with an immigration offense, and even to commence a prosecution, so long as no conviction is entered until and unless a determination is made that the individual is not in fact a Convention refugee.[571] The practice in New Zealand of allowing prosecutions against asylum-seekers for reliance on false travel documents to proceed pending completion of the usual refugee status verification procedures is not therefore a breach of Art. 31, so long as a verdict is not rendered pending results of the refugee inquiry.[572]

[567] See *R v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520 (Eng. HC, July 29, 1999), at 533: "[I]t would seem to me clearly preferable if possible to avoid any prosecution at all rather merely than look to the remedy of a stay once it appears that immunity may arise under art. 31. I do not go so far as to say that the very fact of prosecution must itself be regarded as a penalty under art. 31 ... But there is not the least doubt that a conviction constitutes a penalty and that art. 31 impunity is not afforded ... by granting an absolute discharge ... Provided that the [government] henceforth recognizes the true reach of art. 31 as we are declaring it to be, and puts in place procedures that those entitled to its protection ... are not prosecuted, *at any rate to conviction*, ... I am inclined to conclude that ... the abuse of due process jurisdiction is able to provide a sufficient safety net for those wrongly prosecuted [emphasis added]."

[568] Secretary-General, "Memorandum," at 45.

[569] This shift of language can be traced to a joint proposal of Belgium and the United States, UN Doc. E/AC.32/L.25, Feb. 2, 1950. To "impose" is to "enforce compliance with": *Concise Oxford Dictionary* 682 (9th edn, 1995).

[570] Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 10.

[571] "If proceedings should have been instituted against a refugee, and it becomes clear that his case [falls] under the provisions of Article 31(1), the public prosecutor will be duty bound to withdraw the case or else see to it that the refugee is acquitted. In no case may a judgment be executed, if the offence is one to which Article 31(1) applies": Grahl-Madsen, *Commentary*, at 170. See also Weis, *Travaux*, at 303: "In the case of asylum-seekers, proceedings on account of illegal entry or presence should be suspended pending examination of their request."

[572] In considering the circumstances of an Iranian refugee claimant who was charged with possession of a fraudulent French passport, the New Zealand High Court observed "[i]f it is, indeed, the case that he is found to be a true refugee then the probabilities are that the charge will be withdrawn. In any event, his *claim to refugee status* may well result in a reasonable excuse defence being successful if the case proceeds to trial [emphasis added]": *AHK v. Police*, [2002] NZAR 531 (NZ HC, Dec. 11, 2001), at para. 12. The French Conseil d'Etat has held that immigration penalties may only be applied to an asylum-seeker if and when his request for recognition of refugee status is denied: *AJDA 1977.515, Revue de droit administratif* 1977.481 (Fr. CE, May 22, 1977).

Increasingly, the penalty imposed on account of unlawful entry or presence may consist of the denial of procedural rights in the context of the refugee status determination procedure. In the United States, for example, refugees and others arriving without proper documents are diverted into an "expedited removal" process in which they enjoy significantly reduced due process rights, and no appeal rights. While persons able to show a "credible fear" of being persecuted are in principle exempted from the expedited removal system, in practice the procedure to assess exemption from this penalty is subject to myriad deficiencies.[573] In the result, refugees arriving without valid documents are not dependably safeguarded from the severe truncation of their due process rights.[574] The proposal advanced by the United Kingdom in 2003 to subject all refugees arriving without valid travel documents to an abbreviated, offshore procedure raises the same concerns in an even more obvious way: in contrast to even the American system, it was specifically and directly targeted at refugees arriving *inter alia* without valid documentation.

The case is strong that the assignment of refugees who arrive without proper documentation to abbreviated procedures is in essence a penalty inflicted for irregular entry. When a summary procedure is resorted to not on the grounds of the substantive insufficiency of a claim,[575] but rather to sanction a refugee for his or her mode of entry, such procedures take on a decidedly punitive character. Because the essential purpose of Art. 31 is to insulate refugees from penalties for the act of crossing a border without authorization, a refugee may not lawfully be denied access to ordinary legal entitlements to a complete refugee status inquiry simply because he or she has used false documents to enter the country, or otherwise contravened migration control laws. In contrast to the highly problematic American approach, however, a breach of Art. 31 may be avoided where, as under new European Union rules, the nature of the abbreviated procedure to which persons using false documents are subjected[576] is required to meet all of the usual procedural

[573] "Difficulties were experienced in the process with translation, with access to detainees, and with notification of material developments in the cases. These cases suggest that such problems can impact the substantive determinations made during the credible fear process": Hastings College of the Law Center for Human Rights and International Justice, "Report on the Second Year of Implementation of Expedited Removal" (1999), at 120.

[574] Ironically, if the nature of the penalty imposed by the United States for illegal entry is defined by reference to the result of the denial of due process rights – that is, expulsion – it would follow that the American law does not contravene Art. 31: see chapter 4.2.3 below, at pp. 412–413.

[575] Summary procedures are allowable under international law in the case of persons who, for example, make no arguable claim to refugee status: UNHCR Executive Committee Conclusion No. 30, "The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum" (1983), at para. (d), available at www.unhcr.ch (accessed Nov. 20, 2004).

[576] EU Procedures Directive, at Art. 23(4)(d), (f).

requirements for the fair assessment of a claim to refugee status.[577] Indeed, even under earlier European practice only refugee claimants who continued to insist on the validity of the false documentation used to secure entry, and who actually based their claims on the false identity, could be assigned to an abbreviated procedure.[578] As such, the penalty was in essence imposed for deliberate and calculated deception after arrival, not on account of illegal entry or presence.[579]

It might, however, be objected that the notion of "penalties" in Art. 31 ought to be confined to the usual sanctions imposed on persons who cross a border without permission, and not encompass, for example, the truncation of due process rights as implemented by the United States or proposed by the United Kingdom. But despite the fact that at the time of the Convention's drafting the only penalties which refugees faced on account of unauthorized entry or presence were traditional migration penalties that applied to all irregular entrants, there are nonetheless good reasons to argue that a broader range of penalties (including those imposed specifically on refugees) is in fact proscribed by Art. 31.

It is true that the original draft of Art. 31 would have supported a narrow construction of the notion of relevant "penalties." The Secretary-General's proposed wording called on states not to apply to refugees "[t]he penalties enacted against foreigners entering the territory of the Contracting Party without permission."[580] Clearly only one kind of penalty was contemplated, namely general sanctions for having entered the territory unlawfully.[581] Simultaneously on the table at the first session of the Ad Hoc Committee, however, was a joint Belgian–American proposal for Art. 31. It prefaced its requirement that states "shall not impose penalties on [refugees] on account of their illegal entry or residence" with the affirmation of a duty to afford irregularly entering refugees "treatment compatible, from both the moral and material point of view, with human dignity."[582] While the language that would have ensured that refugees could "lead as normal a life as possible"[583]

[577] "Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of chapter II including where the application is likely to be well-founded or where the applicant has special needs": ibid. at Art. 23(3).

[578] *Resolution on Manifestly Unfounded Applications for Asylum*, Doc. COM(2002) 326, at para. 9(a).

[579] Ibid. at para. 9(b) and (f). This conclusion is reinforced by the fact that refugees who arrived legally could also be relegated to a truncated procedure if they deliberately made false representations, or otherwise failed to comply with their substantive legal obligations.

[580] Secretary-General, "Memorandum," at 45.

[581] See chapter 4.2 above, at pp. 382–388; and text above at pp. 405–406.

[582] UN Doc. E/AC.32/L.25, Feb. 2, 1950, at 1.

[583] Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 25.

was dropped because it was deemed "too ambitious,"[584] the Belgian–American approach nonetheless inspired a subtle, but important, reframing of Art. 31.

Specifically, the Chairman of the Ad Hoc Committee recommended that "the article should be re-drafted to read: 'The High Contracting Parties undertake not to impose penalties on refugees who enter or are present in their territory without prior or legal authorization.'"[585] That is, instead of prohibiting the imposition of a particular *kind of penalty* as had earlier formulations ("the penalties applied against foreigners entering the territory ... without prior permission"), Art. 31 would instead prohibit simply "penalties" *imposed on a particular group of persons*, namely "refugees who enter or are present in their territory without prior or legal authorization." As adopted by the Ad Hoc Committee, the text provided that:

> The Contracting States shall not impose penalties, on account of his illegal entry or presence, on a refugee.[586]

By moving the reference to "illegal entry or presence" into a subordinate clause, the spirit of the Chairman's proposal was maintained, and the textual meaning of Art. 31 changed from that first proposed by the Secretary-General. Instead of immunizing refugees from a particular kind of penalty, the purport of Art. 31 is that penalties (in general) are prohibited if imposed *in a particular context*, namely as the result of unlawful entry or presence. In the French language formulation as well, the reference to irregular entry or presence defines the reason or context for the imposition of penalties, not their substance.[587] Taking into account the plain meaning[588] of a "penalty" as a loss inflicted for violation of a law,[589] Art. 31 denies governments the right to subject refugees to any detriment for reasons of their unauthorized entry or

[584] Statement of the Chairman, Mr. Chance of Canada, ibid. The general spirit of the Belgian–American amendment was adopted in what became Art. 31(2), expressly addressing the circumstances in which freedom of movement may be lawfully denied to irregularly entering refugees.

[585] Statement of the Chairman, Mr. Chance of Canada, ibid.

[586] "Report of the Ad Hoc Committee on Statelessness and Related Problems," UN Doc. E/1618, Feb. 17, 1950 (Ad Hoc Committee, "First Session Report"), at 7.

[587] "Les Etats contractants n'appliqueront pas de sanctions pénales, *du fait de* leur entrée ou de leur séjour irréguliers, aux réfugiés qui, arrivant directement du territoire où leur vie ou leur liberté était menacée au sens prévu par l'article premier, entrent ou se trouvent sur leur territoire sans autorisation, sous la réserve qu'ils se présentent sans délai aux autorités et leur exposent des raisons reconnues valables de leur entrée ou présence irrégulières [emphasis added]": Refugee Convention, at Art. 31(1).

[588] See Vienna Convention on the Law of Treaties, 1155 UNTS 331, done May 23, 1969, entered into force Jan. 27, 1980 (Vienna Convention), at Art. 31(1).

[589] A penalty is "a punishment ... for a breach of a law, contract, etc." Punishment, in turn, is "the loss or suffering inflicted in the act or an instance of punishing": *Concise Oxford Dictionary* 1010, 1111 (9th edn, 1995).

presence in the asylum country. This approach is in line with the tenor of a recent administrative decision in the United Kingdom:

> In *Adimi*, it was unsurprisingly held that convictions by criminal courts were penalties under Article 31. [Counsel for the government] did not dispute that civil penalties would also fall within Article 31, but he submitted that a penalty involved a removal of a right that a person previously had. [Counsel for the claimant], on the other hand, submitted that any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty within Article 31 unless objectively justifiable on administrative grounds. I prefer [the claimant's] submission. It seems to me that [the government's] approach puts form above substance and would enable contracting states to evade Article 31 by the use of one form of words in domestic legislation rather than another.[590]

On the facts of the case, it was determined that unless the statutory requirement to seek protection "on his arrival" was construed to include applications made subsequent to the initial clearing of immigration control, the denial of income support benefits on that ground would amount to a penalty imposed for reasons of illegal entry, contrary to Art. 31 of the Refugee Convention.[591]

Despite the logic of seeing a reasonably broad range of practices resulting in a loss as "penalties" as that term is commonly understood, objection may be taken to such a broad reading on the grounds that it is at odds with the equally authoritative French language text of Art. 31 which provides for immunity only from "sanctions pénales" – thus seeming to restrict the ambit of Art. 31 to penalties understood in the narrower, criminal law sense. To counter this interpretation, Goodwin-Gill rightly points to the fact that the Human Rights Committee has refused to restrict the notion of a "penalty" in the Civil and Political Covenant's prohibition of *ex post facto* criminality in such a narrow way – even though this is a provision with a decidedly criminal law orientation.[592] Instead, the Committee has

[590] UK Soc. Sec. Comm. Dec. No. CIS/4439/1998 (Nov. 25, 1999), at para. 16.

[591] "Article 31 does not prohibit the imposition of such a penalty on a refugee who enters the United Kingdom illegally and then fails to present himself to authorities 'without delay.' If, therefore, the phrase 'on his arrival' in regulation 70(3A)(a) is construed in a manner which gives it the same effect as the phrase 'without delay' in Article 31, there is no conflict between the provisions. Construing the former phrase as meaning 'while clearing immigration control at the port of entry' is clearly not consistent with the construction of the latter phrase . . . I therefore accept . . . that Article 31 provides an additional reason for not construing 'on . . . arrival' . . . narrowly": ibid. at para. 18.

[592] "In seeking the most appropriate interpretation, the deliberations of the Human Rights Committee or scholars relating to the interpretation of the term 'penalty' in Article 15(1) of the Civil and Political Covenant can be of assistance": Goodwin-Gill, "Article 31," at 194. The propriety of referencing the authoritative interpretation of similar terms under cognate treaties is discussed in chapter 1.3.3 above, at pp. 64–68.

determined that "[w]hether the word 'penalty' ... should be interpreted narrowly or widely, and whether it applies to different kinds of penalties, 'criminal' and 'administrative,' ... must depend on other factors. Apart from the text ... regard must be had, *inter alia*, to its object and purpose."[593] Taking account of the decision recounted above explicitly to conceive Art. 31 not as a prohibition of a particular *kind of penalty*, but instead as a prohibition of penalties *imposed on a particular group of persons*, namely "refugees who enter or are present in their territory without prior or legal authorization," there is no sound basis to interpret the notion of a "penalty" narrowly.

4.2.3 Expulsion

There are two exceptions to the general rule that Art. 31 bars the imposition of penalties on refugees for illegal entry or presence. First, Art. 31 in no way constrains a state's prerogative to expel an unauthorized refugee from its territory. And second, as discussed below,[594] some restrictions on the freedom of movement of irregularly entering asylum-seekers are allowed pending regularization of status.

It may seem ironic that an asylum country which is generally prohibited from imposing penalties on refugees may nonetheless expel them. The drafters were, however, unambiguous on this point,[595] with Colombia going so far as to suggest an amendment that would have formally disavowed any duty to grant territorial asylum to refugees.[596] The Canadian representative successfully argued that no modification of the text was required, since "the consensus of opinion was that the right [to expel refugees who illegally enter a state's territory] would not be prejudiced by adoption of Article [31]."[597] His suggestion that "he would even regard silence on the part of the Conference as endorsement of his point of view"[598] led Colombia to withdraw its amendment.[599] Indeed, the Netherlands

[593] *Van Duzen v. Canada*, UNHRC Comm. No. 50/1979, decided Apr. 7, 1982, at para. 10.2. See also M. Nowak, *UN Covenant on Civil and Political Rights* (1993) (Nowak, *ICCPR Commentary*), at 278: "[E]very sanction that has not only a preventive but also a retributive and/or deterrent character is ... to be termed a penalty, regardless of its severity or the formal qualification by law and by the organ imposing it."

[594] See chapter 4.2.4 below, at pp. 420–424.

[595] See e.g. Statement of Mr. Fritzler of Austria, UN Doc. A/CONF.2/SR.13, July 10, 1951, at 12; and Statement of Mr. Herment of Belgium, ibid. at 14.

[596] UN Doc. A/CONF.2/55. "[T]erritorial asylum could not be regarded as a duty incumbent on states": Statement of Mr. Giraldo-Jaramillo of Colombia, UN Doc. A/CONF.2/SR.13, July 10, 1951, at 12.

[597] Statement of Mr. Chance of Canada, UN Doc. A/CONF.2/SR.13, July 10, 1951, at 12–13.

[598] Ibid. at 13.

[599] "[I]n the light of the foregoing discussion, the Colombian delegation would not oppose paragraph 1 of Article [31] ... Since it seemed to be the general feeling of all delegations that the granting of asylum remained a matter for the discretion of individual States, the

representative remarked that "in view of the Canadian representative's statement ... that he would interpret the silence of representatives as tacit approval of the Canadian Government's interpretation of article [31], he would remain silent."[600] Thus, even the mechanistic application of a "first country of arrival" rule cannot be successfully attacked under Art. 31, as the sanction imposed under such systems is precisely expulsion to another state.

The potentially devastating impact of the clear decision not to preclude expulsion under Art. 31 is mitigated by two key factors. First, whatever right governments have to expel refugees is constrained by Art. 33's duty of *non-refoulement*.[601] Any expulsion of a refugee must therefore not expose the refugee, directly or indirectly, to a risk of being persecuted.

Second, in contrast to the situation in 1951, the laws of many countries today explicitly or implicitly authorize refugees in flight from persecution to enter their territory in search of protection. Asylum-seekers present in such states are "lawfully in" their territory,[602] and accordingly benefit from Art. 32's constraints on expulsion. As described below,[603] this means that states must invoke national security or public order grounds to expel a refugee, and that any decision to expel must be reached on the basis of a fair determination process. Thus, even expulsion practices immune from scrutiny under Art. 31 will often contravene Art. 32 where domestic law authorizes refugees arriving at its territory to seek protection.

4.2.4 Provisional detention and other restrictions on freedom of movement

Because the right of expulsion under Art. 31 is constrained by the additional guarantees of Art. 33 and, in many cases, of Art. 32, it is a prerogative that is only rarely a viable option for states.[604] The second and more frequently invoked exception to the duty of non-penalization is therefore the right to detain refugees who arrive unlawfully, pursuant to Art. 31(2).[605]

Art. 31(2) is one of two provisions of the Convention that defines the nature of a refugee's freedom of movement within an asylum country. The more generally applicable rule is set by Art. 26, which disallows restrictions on

Colombian delegation, which shared that view, would not press its amendment": Statement of Mr. Giraldo-Jaramillo of Colombia, ibid. at 14.

600 Statement of Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 8.

601 See chapter 4.1 above, at pp. 300–301.

602 See chapter 3.1.3 above, at pp. 175–183.

603 See chapter 5.1 below.

604 See chapter 4.2.3 above, at p. 413.

605 UNHCR defines detention as "confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory": UNHCR, "Detention Guidelines," at Guideline 1.

refugees other than those enforced against aliens in general.[606] The Art. 26 right to freedom of movement accrues once a refugee is "lawfully in" the territory of a state party. As discussed in chapter 3, a refugee is lawfully present once formally admitted to the asylum state's refugee status verification procedure, or otherwise expressly or impliedly authorized to remain at least temporarily in that state's territory.[607] The drafters of the Convention recognized, however, that governments might require a more ample freedom to detain unauthorized refugees "before they had reached an understanding with the authorities of the recipient countries."[608] This right is, however, strictly provisional. The explicit language of Art. 31(2) requires an end to special restrictions on the movement of unauthorized refugees at such time as the refugee's status is "regularized" or he or she "obtain[s] admission into another country."

In the case of refugees not being considered for a more durable status in the asylum country, but who have instead applied to travel to some other state, Art. 31(2) authorizes detention up to the time of departure for that other state. At the urging of the Danish representative, the Ad Hoc Committee amended the applicable part of Art. 31(2) to allow detention to continue until refugees "obtain admission into another country." It was felt that the phrasing in an earlier draft, "until such time as it is possible to make a decision regarding their legal admission to ... another country,"[609] could have been misinterpreted to require release once formal permission to travel onward had been received. The concern was that release pending removal to the other state might have allowed refugees the opportunity to abscond.[610] In principle, then, the initial decision to detain Vietnamese refugees in Hong Kong pending their relocation to other states under the Comprehensive Plan of Action was justified by Art. 31(2). But when it became clear that Hong Kong was using detention not simply as a practical means to implement the overseas relocation of refugees, but rather as an explicit mechanism of deterrence, the legality of detention came to an end. This is because the right to detain refugees under Art. 31(2) is situation specific. In this context, it authorizes only those restrictions on freedom of movement "necessary" to achieve the goal of external relocation.[611]

[606] See generally chapter 5.2 below. [607] See generally chapter 3.1.3 above.

[608] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 15.

[609] UN Doc. E/AC.32/L.26, Feb. 2, 1950, at 2.

[610] "He wondered whether ... a country would be obliged to release the refugees as soon as they had obtained entry visas to another country. Some refugees might possibly use such an opportunity to remain in the country illegally": Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 6.

[611] The meaning of "necessary" restrictions is discussed below, at pp. 423–431. The question of the *prima facie* lawfulness of detention should not, however, be confused with the lawfulness of the conditions of detention. Where, for example, the circumstances of detention amount to a form of cruel, inhuman, or degrading treatment, continued detention is rights-violative under general norms of international human rights law.

The more controversial question is when the power of detention under Art. 31(2) ceases in relation to refugees who wish to remain in the asylum country, but whose claims to refugee status have not yet been verified. On the basis of only the record of the Conference of Plenipotentiaries, the conclusion could be reached that the termination point for special detention rules, "regularization," occurs when "after examining the appropriate files, [the government] recognize[s] him as a *bona fide* refugee."[612] Under this understanding, particularized detention measures could continue until and unless the irregular entrant is accepted "for permanent settlement."[613] Read in context, however, such a restrictive approach is not consistent with either the real intentions of the drafters or the object and purpose of the provision.

The relevant exchange at the Conference of Plenipotentiaries occurred in response to an effort by Sweden to amend Art. 31(2) to prolong the right to impose refugee-specific detention rules beyond "regularization" where needed to meet national security interests.[614] The Swedish representative was concerned that it might sometimes be necessary to detain asylum-seekers being processed for refugee status, and that the proposed cut-off point for refugee-specific detention of "regularization" would prohibit this.[615] The President, however, responded that Art. 31(2) as proposed already authorized the maintenance of security-based restrictions on movement *until a decision was reached* on the asylum-seeker's claim to refugee status.[616] More explicitly, the British representative assured the Conference that "[t]he Swedish representative had understood something different to what had been intended by the Ad Hoc Committee by the use of the words 'until his status in the country is *regularized*.' Surely, for the Ad Hoc Committee that phrase had meant the acceptance by a country of refuge for permanent settlement, and not the mere issue of documents prior to a final decision as to the duration of his stay."[617] On the basis of this interpretation, Sweden withdrew its proposed amendment.

[612] Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 15.

[613] Statement of Mr. Hoare of the United Kingdom, ibid. at 16.

[614] "The Contracting States shall not apply to such refugees restrictions on movement other than those which are necessary and, except for reasons of national security, such restrictions shall only be applied until his status in the country is regularized": Proposal of Sweden, UN Doc. A/CONF.2/65.

[615] "[T]here was a category of refugee intermediate between those lawfully resident and those unlawfully resident in the territory of a State. The category of refugee could be tolerated by a State in its territory. There was a definite contradiction between the wording of articles [26] and [31] of the draft Convention, and the discrepancy should be brought to the notice of the Style Committee": Statement of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 16.

[616] Statement of the President, Mr. Larsen of Denmark, ibid. at 15.

[617] Statement of Mr. Hoare of the United Kingdom, ibid. at 16.

Contrary to the assumptions at the Conference, however, the Ad Hoc Committee had actually endorsed an interpretation of "regularization" which requires only that the asylum-seeker make an application to authorities for recognition of refugee status. In response to a French proposal to regulate the freedom of movement of refugees "authorized to reside within a territory"[618] (which became Art. 26), the American representative proposed that the Refugee Convention also include a specific provision to regulate the right to detain refugees "who had not yet been regularly admitted into a country"[619] (which became Art. 31(2)). This led the British representative to inquire how "regularly admitted" should be interpreted.[620] The French delegate answered him by giving a detailed description of the French asylum system, under which an immediate but provisional (and sometimes geographically limited) right to remain in France was granted to asylum-seekers.[621] Clearly concerned to maximize the protection of refugees admitted to systems of this kind that bestow rights on refugees only incrementally, the representative of the United States asserted "that persons subject to these restrictions should nevertheless be considered, for purposes of the future convention, to have been regularly admitted."[622] Critically, the French delegate agreed, noting that "[a]ny person in possession of a residence permit was in a regular position. In fact, the same was true of a person who was not yet in possession of a residence permit but who had applied for it and had the receipt for that application. *Only those persons who had not applied, or whose applications had been refused, were in an irregular position* [emphasis added]."[623]

In the view of the Ad Hoc Committee, then, "regularization" under Art. 31(2) was *not* predicated on formal recognition as a refugee. At one point, the Committee provisionally adopted language for Art. 31(2) that would have allowed refugee-specific detention to continue until a decision was reached on refugee status.[624] But the very next day, the Chairman successfully proposed a version of Art. 31(2) that restored the original reference to "regularization."[625] Even the British representative, who had earlier voiced concern

[618] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 17.
[619] Statement of Mr. Henkin of the United States, ibid. at 18.
[620] Statement of Sir Leslie Brass of the United Kingdom, ibid. at 18.
[621] Statement of Mr. Rain of France, ibid. at 18.
[622] Statement of Mr. Henkin of the United States, ibid. at 20.
[623] Statement of Mr. Rain of France, ibid. at 20.
[624] "The High Contracting Parties nevertheless reserve the right to apply to such refugees necessary police measures . . . until such time as it is possible to take a decision regarding their legal admission to the country of reception": UN Doc. E/AC.32/L.25, Feb. 2, 1950, at 2. This language was proposed jointly by Belgium and the United States. It was provisionally adopted on February 2, 1950: UN Doc. E/AC.32/L.26, Feb. 2, 1950, at 2.
[625] Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 6.

about this language, expressly "accepted that form of words."[626] All in all, the historical record is simply too ambiguous to justify the conclusion that "regularization" must be equated with formal recognition of refugee status.

To the contrary, a focus on the purpose and context of Art. 31(2) suggests that "regularization" of status occurs when a refugee has met the host state's requirements to have his or her entitlement to protection evaluated.[627] As previously discussed, the basic goal of Art. 31 is to provide refugees with an incentive to comply with the asylum laws of host states, rather than avoid contact with authorities.[628] That critical objective is achieved when the asylum-seeker submits to the laws of the host state, not simply when his or her claim is finally adjudicated. Equally important, an effort should be made to read Art. 31(2) in a way that avoids conflict with the other Convention rule on freedom of movement, Art. 26.[629] The general right to freedom of movement under Art. 26 inheres in refugees "lawfully in" an asylum state. It has earlier been explained why a refugee is "lawfully in" a state (as opposed to "lawfully staying" there) *inter alia* once admitted to an asylum procedure.[630] Thus, there is a general right to freedom of movement in the host state once the asylum claim is formally lodged. An interpretation that equates "regularization" with a decision on refugee status would bring the two articles into conflict, as the termination point for Art. 31(2) restrictions would be set at a higher level than that established for access to Art. 26 rights. Art. 26 would set

[626] Statement of Sir Leslie Brass of the United Kingdom, ibid.

[627] But see *R (Saadi) v. Secretary of State for the Home Department*, [2002] UKHL 41 (UK HL, Oct. 31, 2002), at para. 34, in which the House of Lords – apparently without the benefit of argument based on the requirements of the Refugee Convention – determined that "until the state has 'authorized' entry, the entry is unauthorized. The state has the power to detain . . . until the application has been considered and the entry 'authorized.'" But see chapter 3.1.3 above, at pp. 175–183.

[628] See chapter 4.2 above, at p. 388.

[629] See Vienna Convention, at Art. 31(3)(c).

[630] See chapter 3.1.3 above, at pp. 175–183. This interpretation follows not only from plain language and context, but is necessitated if "lawfully in" is to be meaningfully distinguished from the higher level of attachment, "lawfully staying." The drafters agreed that a refugee is "lawfully staying" in a country when he or she benefits from officially sanctioned, ongoing presence there, whether or not there has been a formal declaration of refugee status, grant of the right of permanent residence, or establishment of domicile: see chapter 3.1.4 above, at pp. 189–190. The phrase "lawfully staying" was selected as the most accurate rendering of the French language concept of "résidant régulièrement." The original French language notion was, however, agreed to be controlling. "The Committee experienced some difficulty with the phrases 'lawfully in the territory' in English and 'résidant régulièrement' in French. It decided however that the latter phrase in French should be rendered in English by 'lawfully staying in the territory'": "Report of the Style Committee," UN Doc. A/CONF.2/102, July 24, 1951. This decision was reached *after* the discussion of "regularization" in the context of Art. 31(2), and should therefore be seen more accurately to reflect the final interpretation reached at the Conference of Plenipotentiaries.

a presumption against detention once the asylum procedure is underway, yet Art. 31(2) would authorize refugee-specific detention until the claim is adjudicated.

This conflict is readily avoided by adopting the understanding of "regularization" embraced by the Ad Hoc Committee and which advances the general purpose of Art. 31, namely that "regularization" occurs when the asylum-seeker satisfies all legal formalities requisite to refugee-status verification.[631] Under this approach, Art. 31(2) and Art. 26 play complementary, but distinct, roles in regulating the right to detain refugees. There is a clear and workable delineation of the kind intended by the drafters between situations in which freedom of movement is governed by Art. 31(2), and those in which Art. 26 applies.[632]

Thus, a refugee who enters an asylum country unlawfully, and who does not meet the requirements of Art. 31, is entitled to no immediate exemption from detention under international refugee law.[633] Once the refugee voluntarily and without delay reports to authorities, and demonstrates that his or her unauthorized entry or presence was on account of a search for

[631] This approach to interpretation of "regularization" would moreover be in consonance with the approach of the United Nations Human Rights Committee in interpretation of the Civil and Political Covenant. In determining that "an alien who entered the State illegally, but whose status *has been regularized*, must be considered to be lawfully within the territory [emphasis added]," the Committee cited as authority its finding that a rejected refugee claimant against whom an expulsion order had been issued but who was allowed to remain in a state party's territory on humanitarian grounds met the definition of "lawful presence": 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. 4, citing the decision in *Celepli v. Sweden*, UNHRC Comm. No. 456/1991, UN Doc. CCPR/C/51/D/456/1991, decided Mar. 19, 1993. If a state's decision to authorize continued presence despite the issuance of a valid expulsion order amounts to regularization of status, there can surely be little doubt that authorization to remain in a state's territory for the duration of a refugee status verification procedure also amounts to a form of regularization of status giving rise to lawful, if provisional, presence in that country.

[632] The decision to draft what became Art. 31(2) derived from the conviction that "certain provisions should also be included for refugees who had not yet been regularly admitted into a country": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 18.

[633] Even a purely unauthorized entrant is, however, entitled to the protection against arbitrary detention established under international human rights law. Because of the evolution of this body of law since adoption of the Refugee Convention in 1951, less significance presently follows from eligibility for Art. 31 protection against restrictions on freedom of movement. Whether or not the criteria of Art. 31 are met (voluntary reporting within a reasonable time, demonstration that breach of immigration laws was attributable to flight from a risk of persecution), the right of the asylum country to detain is subject to significant limitations. See text below, at pp. 424–425.

protection,[634] Art. 31(2) governs. The refugee is now subject only to restrictions "which are necessary." As described below,[635] this interim authority was intended to allow authorities to detain refugees while satisfying themselves of such matters as the asylum-seeker's identity, and whether or not he or she presents a security risk to the asylum state.

If the asylum country elects not to expel the refugee, but instead provisionally to allow him or her to remain in its territory (for example, while undergoing refugee-status determination), Art. 26 becomes the applicable standard for restrictions on internal movement. The refugee must, of course, submit to all necessary investigations of his or her claim to protection, and file whatever documentation or statements are reasonably required to verify the claim to refugee status. But once any such prerequisite obligations have been discharged, the refugee's presence has been regularized in the receiving state, and refugee-specific restrictions on freedom of movement must come to an end. In the result, neither the prolonged detention by Malta of African refugees nor Swaziland's imprisonment of Pakistani refugee claimants for having "trespassed" was in accordance with Art. 31(2). Much less was there any lawful basis for the decisions of Namibia and Thailand to force refugees to live on an ongoing basis only in designated camps.

Importantly, neither of the key reasons advanced to justify the drafting of Art. 31(2) can logically be invoked in support of ongoing detention while awaiting a final decision on status verification. The primary concern of the drafters was to have some means, short of expulsion, to respond to the arrival of a mass influx of refugees. As stated by the Danish representative,

> A country which was receiving large numbers of refugees could not contemplate making them re-cross the frontier or handing them over to the authorities which had persecuted them. Such refugees were often placed in camps, but it would be desirable to ensure them more normal and humane living conditions, for which purpose a certain number of fairly simple rules for the treatment of refugees not yet authorized to reside in a country should be drawn up.[636]

Art. 31(2) is therefore addressed to the rights of "refugees admitted provisionally as an emergency measure."[637] In recognition of the "real danger, on

[634] The nature of each of these provisos for entitlement to Art. 31 protection is discussed at chapter 4.2.1 above, at pp. 390–400.

[635] See text below, at pp. 420–421.

[636] Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 22. Mr. Larsen's reference to refugees not yet authorized to "reside" in the asylum country should be understood in the context of his earlier remarks, in which persons admitted provisionally to Denmark were nonetheless said to "reside" in that country: ibid. at 16–17.

[637] Statement of Mr. Weis of the IRO, UN Doc. E/AC.32.SR.21, Feb. 2, 1950, at 3.

both economic and security grounds,"[638] posed by "a great and sudden influx of refugees,"[639] Art. 31(2) affords governments some breathing space to determine how best to minimize the risks associated with their arrival.[640] As the French representative to the Ad Hoc Committee explained,

> The Secretariat had in mind the case of the Spanish refugees who had presented themselves in large numbers at the French frontier towards the end of the Spanish Civil War and for whom it had been necessary to set up reception camps to meet their immediate needs before regularizing their position and arranging for their dispersal throughout the country. The obligation to remain in those camps was clearly a considerable limitation of the right of movement ... Such a practice might, however, prove essential in certain circumstances.[641]

Thus, objection cannot ordinarily be taken to the provisional detention of refugees arriving in the context of a mass influx until more durable arrangements can be made. On the other hand, detention even in the context of a mass influx cannot continue once the refugees' presence has been rendered lawful by passage of time.[642] This was the problem with justification for Uganda's long-term detention of Rwandan and Sudanese refugees. Where a country, like Uganda, opts neither to expel refugees nor to authenticate their Convention refugee status, it must be taken to have acquiesced in the asylum-seekers' assertion of entitlement to refugee rights after a reasonable period of time has passed, in consequence of which they enjoy the presumptive right to freedom of internal movement under Art. 26 of the Convention.[643] Nor can Art. 31(2) be looked to as legal support for Kenyan or Thai use of violence to enforce detention in response to a mass influx of refugees. As discussed below,[644] restrictions on freedom of movement, even in the context of a mass influx, must be "necessary," and may not infringe other norms of international human rights law. Brutality to impose or to enforce detention fails both tests.

Beyond enabling governments to cope with a mass influx, the second and more general objective of Art. 31(2) is to allow host states time to complete a basic inquiry into the identity and circumstances of unauthorized asylum-

[638] Statement of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 4.
[639] Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 16.
[640] "If there are few illegal entrants, strict measures such as detention will be less easily justified than in the case of a mass influx, in which case the task of authorities may become overwhelming and necessitate a special *ad hoc* screening procedure": A. Grahl-Madsen, *The Status of Refugees in International Law* (vol. II, 1972) (Grahl-Madsen, *Status of Refugees II*), at 419.
[641] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 14.
[642] See chapter 3.1.3 above, at pp. 183–185.
[643] See chapter 3.1.3 above, at pp. 183–184.
[644] See text below, at pp. 423–431.

seekers before releasing them into the community. At the Conference of Plenipotentiaries, Sweden and Greece asserted the importance of allowing governments to satisfy themselves that an unauthorized entrant does not pose a threat to their national security.[645] France expressed a more general concern to be in a position to investigate the identity of irregularly arriving refugees. It argued that governments should be allowed to detain asylum-seekers "for a few days, to obtain information on them. The French Government's aim in the question under discussion was that their authorities should be able to detain for a few days completely unknown persons unattached to any territory."[646] Britain also thought that Art. 31(2) should be understood to authorize "provisional detention that might be necessary to investigate the circumstances in which a refugee had entered a country."[647] This led the President of the Conference to conclude that "there was general agreement with the French representative's point of view that every State was fully entitled to investigate the case of each refugee who clandestinely crossed its frontier, and to ascertain whether he met the necessary entry requirements."[648]

This exchange makes clear that Art. 31(2) establishes only a "provisional" right of detention "for a few days," while the government of the asylum country completes a basic investigation of the asylum-seeker's identity and circumstances.[649] After that point, any ongoing detention will have to meet

[645] Statements of Mr. Petren of Sweden and of Mr. Philon of Greece, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 15–16. The Swedish delegate had earlier tabled an amendment that would expressly authorize refugee-specific detention on national security grounds pending a formal decision on refugee status: UN Doc. A/CONF.2/65. See also Statement of Mr. van Heuven Goedhart of UNHCR, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 13: "Each State was, of course, entitled to make the investigations necessary to safeguard its security."

[646] Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 11.

[647] Statement of Mr. Hoare of the United Kingdom, ibid. at 12.

[648] Statement of the President, Mr. Larsen of Denmark, ibid. at 13.

[649] "The detention of asylum-seekers who come 'directly' in an irregular manner should ... not be automatic, or unduly prolonged": UNHCR, "Detention Guidelines." In *Singh v. Nelson*, 623 F Supp 545 (US DCSDNY, Dec. 12, 1985), the US District Court failed to recognize the need strictly to limit the duration of the right to detain refugees under Art. 31(2). Noting simply that "[i]t was also contemplated that in aid of its efforts to investigate the circumstances in which a refugee had entered a country, the government could detain and keep him in custody," the Court refused to deem the incarceration of Afghan claimants for more than a year to be outside the scope of Art. 31(2). In contrast, the finding of the English Court of Appeal that objection to the UK policy from 1998 to 2000 of detaining refugee claimants for the time needed to clarify their identity and the nature of their claim would have given rise to "an unanswerable claim" is curious: *R (Saadi) v. Secretary of State for the Home Department*, [2001] EWCA Civ 1512 (Eng. CA, Oct. 19, 2001), at para. 17; appeal to the House of Lords dismissed at *R (Saadi) v. Secretary of State for the Home Department*, [2002] UKHL 41 (UK HL, Oct. 31, 2002).

the requirements of Art. 26, which authorizes the detention of refugees only on the same grounds as are applied to aliens generally.[650] Because Art. 31(2) authorizes provisional detention as a necessary complement to preliminary investigation of identity and circumstances of entry, it cannot be relied upon to justify punitive detention designed to deter the arrival of other refugees of the kind that was engaged in by India against Sri Lankan refugees in 2001.[651] This prohibition of detention as a deterrent mechanism seems clearly to have been overlooked by the Attorney General of the United States who advanced precisely this ground as one of his reasons for routinely detaining Haitian claimants arriving by boat:

> [T]here is a concern that the release of aliens ... would tend to encourage further surges of mass migrations from Haiti by sea, with attendant strains on national and homeland security resources ...
>
> Encouraging such unlawful mass migrations is inconsistent with immigration policy ... While the expedited removal policy may reduce the incidence of sea-going Haitian migrants being released on bond pending removal, it hardly provides airtight assurances against future successful migrants through legal and extra-legal maneuvers, or the encouragement of additional maritime migrations likely to arise from such entries.[652]

[650] "[A]sylum-seekers may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim. This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim": UNHCR, "Detention Guidelines," at Guideline 3(ii). The only situation in which provisional detention may continue is that set by Art. 9 of the Convention. Where the asylum country faces a "war or other grave and exceptional circumstances," provisional detention may be continued right up to the point of status verification in the case of an asylum-seeker found to present a risk to national security: see chapter 3.5.1 above. Any generally applicable rules on the detention of aliens who pose a threat to national security may, of course, be applied in relation to refugees in conformity with Art. 26.

[651] "Detention should not have the 'punitive' character associated with detention or imprisonment in connection with criminal offences": UNHCR, "Detention Note," at para. 47. See also UNHCR, "Detention Guidelines," at Guideline 3(iv): "Detention of asylum-seekers ... as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law."

[652] *In re DJ*, 2003 BIA Lexis 3 (US AG, Apr. 17, 2003). Almost as a footnote, the Attorney General observed that because the Refugee Protocol "is not self-executing," it "does not afford respondent any rights beyond what he is afforded under the federal immigration laws": ibid. Yet the Attorney General failed to acknowledge that the government of the United States is bound by Art. 31 of the Refugee Convention. His decision here to deem the reversal of the Board of Immigration Appeals' decision a "precedent binding in all future cases" therefore amounts to a clear refusal of the United States to abide by its international legal obligations.

A different problem arises in states, such as Austria, Belgium, and Switzerland, which subject unauthorized refugees to automatic periods of detention for two to six months on the basis of laws applicable to all unauthorized entrants. Because the basis for detention is not a refugee-specific law, it might be argued that automatically detaining refugees for a period of months meets the requirements of Art. 26, in that refugees are detained only in the same circumstances as other aliens. The better view, however, is that the combination of Arts. 31(2) and 26 requires governments to justify a decision to detain an asylum-seeker who arrives without authorization.[653] After all, the basic purpose of Art. 31 is to ensure that refugees are not exposed to the same penalties for unauthorized arrival as are applied to other unauthorized aliens. Read together with Art. 26, it cannot have been the intention of the drafters to authorize more stringent constraints on freedom of movement once a refugee becomes lawfully present in the host country. Thus, while restrictions on the movement of aliens that are not related to unauthorized entry or presence may validly be applied to refugees as well, the prohibition of other than minimalist detention to verify identity and circumstances of arrival for irregularly arriving refugees under Art. 31(2) should be read to enjoin governments from detaining refugees on the basis of general rules that authorize prolonged detention as a response to unauthorized entry.

In any event, the automatic prerogative to detain unauthorized entrants exemplified by the Austrian, Belgian, and Swiss rules may also run afoul of the stipulation in Art. 31(2) that the exercise of the right of provisional detention must be demonstrably "necessary." In the original draft submitted by the Secretary-General, a state was authorized to apply such measures "as *it may deem* necessary [emphasis added]."[654] The final language, which authorizes only restrictions on freedom movement "which *are* necessary [emphasis added]" was adopted to embrace the spirit of a joint Belgian–American proposal to allow states provisionally to take only "necessary police measures regarding their accommodation, residence and movement in their territory."[655] The importance of a broad but purposive understanding of the right of provisional detention was emphasized by the President of the Conference of Plenipotentiaries, who asserted that "by inserting the words 'other than those which are necessary' ... the Ad Hoc Committee had

[653] As described below, the detention of aliens in general without a clear reason is today contrary to international human rights law. See text below, at pp. 424–425.

[654] Secretary-General, "Memorandum," at 45. The French proposal used the same expression: France, "Draft Convention," at 9.

[655] UN Doc. E/AC.32/L.25, Feb. 2, 1950, at 2. The American representative observed that "although the substance of the ... article was satisfactory, its form left much to be desired": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 25. This led the Danish delegate, Mr. Larsen, to propose the language upon which the present formulation of Art. 31(2) is based: ibid.

intended to cover considerations of security, special circumstances, such as a great and sudden influx of refugees, or any other reasons which might necessitate restrictions of their movement."[656] Thus, UNHCR's Executive Committee has determined that

> in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum;[657] or to protect national security or public order.[658]

The notion that any form of detention requires justification is, in any event, now firmly established in international human rights law. Under Art. 9(1) of the Civil and Political Covenant, no person – including an individual subject to immigration control[659] – may be deprived of his or her liberty "except on such grounds and in accordance with such procedures as are established by law."[660] The Full Federal Court of Australia has interpreted the Covenant's obligations in the context of the detention of refugee claimants to mean that not only must detention be authorized by law, but it must

[656] Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 16.

[657] "What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. As regards asylum-seekers using fraudulent documents or travelling with no documents at all, detention is only permissible when there is an intention to mislead, or a refusal to cooperate with the authorities": UNHCR, "Detention Guidelines," at Guideline 3(iii).

[658] UNHCR Executive Committee Conclusion No. 44, "Detention of Refugees and Asylum-Seekers" (1986), at para. (b), available at www.unhcr.ch (accessed Nov. 20, 2004).

[659] "The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, . . . immigration control": UN Human Rights Committee, "General Comment No. 8: Right to liberty and security of persons" (1982), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 130, para. 1. See "Report of the Special Rapporteur, submitted pursuant to Commission on Human Rights resolution 2002/62," UN Doc. E/CN.4/2003/85 (Dec. 30, 2002) for a detailed examination of the various ways in which non-citizens are subjected to detention.

[660] Civil and Political Covenant, at Art. 9(1). See also UNHCR, "Detention Guidelines," at Guideline 3: "The permissible exceptions to the general rule that detention should normally be avoided must be prescribed by law." In the opinion of a respected commentator, "the formulation 'established by law' . . . requires[s] that the national legislature itself set down in statute all permissible restrictions. The term 'law' is to be understood here in the strict sense of a general-abstract, parliamentary statute or an equivalent, unwritten norm of common law accessible to all individuals subject to the relevant jurisdiction. Administrative provisions are thus not sufficient": Nowak, *ICCPR Commentary*, at 171.

also be subject to the claimant's right "not to be detained in circumstances which, in the individual case, are 'unproportional' or unjust."[661] More specifically, the United Nations Human Rights Committee has determined that persons who claim refugee status may not be detained "beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual such as the likelihood of absconding and lack of cooperation which may justify detention for a period."[662] Where such grounds exist,[663] the detained person must nonetheless have the ability "to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[664]

[661] *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Masri*, (2003) 197 ALR 241 (Aus. FFC, Apr. 15, 2003).

[662] *A v. Australia*, UNHRC Comm. No. 560/1993, UN Doc. CCPR/C/59/D/560/1993, decided April 30, 1997, at para. 9.4. The government of Australia did not, however, accept the Committee's findings, arguing that the lawfulness of detention was to be determined by reference to domestic, not international standards: "Response of the Australian Government to the Views of the Human Rights Committee," (1997) 9(4) *International Journal of Refugee Law* 674. The Human Rights Committee's reference to the propriety of detention to prevent a refugee from absconding is, of course, based upon the requirements of the Civil and Political Covenant rather than the Refugee Convention. A similar approach has been taken under the European Convention on Human Rights. In *Amuur v. France*, [1996] ECHR 25 (ECHR, June 25, 1996), the European Court of Human Rights determined that "[h]olding aliens in the international zone does indeed involve a restriction upon liberty ... Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions": ibid. at para. 43.

[663] The range of reasons which the Committee is prepared to consider in the assessment of reasonableness is, however, apparently open-ended. In *Bakhtiyari v. Australia*, UNHRC Comm. No. 1069/2002, UN Doc. CCPR/C/79/D/1069/2002, decided Oct. 29, 2003, the Committee determined that "in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification. In the present case, Mr Bakhtiyari arrived by boat, without dependents, with his identity in doubt and claiming to be from a State suffering serious internal disorder. In light of these factors and the fact that he was granted a protection visa and released two months after he had filed an application (some seven months after his arrival), the Committee is unable to conclude that, while the length of his first detention may have been undesirable, it was also arbitrary and in breach of article 9, paragraph 1": ibid. at para. 9.2.

[664] Civil and Political Covenant, at Art. 9(4). As the Human Rights Committee determined in the context of a review of the detention of asylum-seekers, this requirement is only met where the court review "is, in its effects, real and not merely formal." In particular, the court's authority "must include the possibility of ordering release, [and not be] limited to

The requirement that provisional detention be shown to be "necessary" in the sense that the state party is able to provide "appropriate justification" for it provides a particularly useful bulwark against overly broad assertions of a right to detain for national security reasons.[665] In addition to his determination to use detention as a means of deterring the arrival of Haitians, the US Attorney General invoked national security concerns to justify his policy of routinely detaining Haitians seeking protection in the United States:

> The Department of Defense, which is also involved in efforts to contain such overseas migrations, also asserts that the demands of mass migrations from Haiti "would create a drain on scarce assets that are being used in or supporting operations elsewhere" . . .
>
> The declarations submitted by the Immigration and Naturalization Service also substantiate a national security concern raised by the prospect of undocumented aliens from Haiti being released within the United States without adequate verification of their background, associations, and objectives.[666]

Yet the first concern expressed is so vaguely related to any meaningful understanding of a risk to national security that it could not possibly meet the test of necessity set by Art. 31(2) or international human rights law; indeed, the United States did not even attempt to demonstrate the proportionality of routine detention of all Haitians to the national security concern invoked. The second argument – the need to investigate risks presented by refugee claimants – is, of course, well within the usual ambit of reasons to undertake provisional detention under Art. 31(2). While it could therefore readily justify detention required to complete the requisite investigations of particular persons, it is difficult to imagine how it could be said to require the

[consideration of] mere compliance with domestic law": *A v. Australia*, UNHRC Comm. No. 560/1993, UN Doc. CCPR/C/59/D/560/1993, decided April 30, 1997, at para. 9.5. More recently, the Human Rights Committee has noted that in the case of Australia's detention system, "[j]udicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant. Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1": *Baban v. Australia*, UNHRC Comm. No. 1014/2001, UN Doc. CCPR/C/78/D/1014/2001, decided Aug. 6, 2003, at para. 7.2.

[665] "Detention as a mechanism which seeks to address the particular concerns of States related to illegal entry requires the exercise of great caution in its use to ensure that it does not serve to undermine the fundamental principles upon which the regime of international protection is based": UNHCR, "Detention Guidelines."

[666] *In re DJ*, 2003 BIA Lexis 3 (US AG, Apr. 17, 2003).

routine detention of all persons arriving from a given country.[667] The more recent US decision to require the detention of all persons seeking refugee status from a list of mainly Muslim countries and territories on grounds of national security is not only grossly over-broad, but is likely in breach of the duty of non-discrimination.[668] The recent admonition of the Supreme Court of New Zealand is clearly appropriate:

> Article 31(2) of the Refugee Convention requires Contracting States not to apply to the movement of certain refugees restrictions other than those which are necessary. That provision ... plainly contemplates that individuals who are detained should be entitled to challenge their detention. The Solicitor-General said that national security reasons could be one reason for detention. No doubt that is so, but such reasons have to be tested in the particular case. Security cannot provide a basis for a blanket exclusion of such cases.[669]

Even assuming recognition of the importance of a particularized inquiry, the meaning of "necessary" restrictions on freedom of movement can still be difficult to discern. As noted above, the traditional approach of UNHCR has been to deem only certain *reasons* for detention to meet the necessity criterion – specifically, to deal with issues of identity, elements of the claim, document destruction, national security, or public order.[670] This was essentially the approach endorsed by the High Court of New Zealand in a thorough and broad-ranging analysis of the requirements of Art. 31 in the decision of *Refugee Council of New Zealand and D v. Attorney General*.[671] In the Court of Appeal, however, two opinions suggest the need for a more open-ended and flexible approach to assessing whether detention is necessary.[672] The

[667] "In assessing whether detention of asylum-seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary it should only be imposed in a non-discriminatory manner for a minimal period": UNHCR, "Detention Guidelines," at Guideline 3.

[668] See chapters 2.5.5 and 3.4 above.

[669] *Zaoui v. Attorney General*, Dec. SC CIV 13/2004 (NZ SC, Nov. 25, 2004), at para. 44.

[670] See UNHCR, "Detention Guidelines," at Guideline 3. A similar reason-based approach to the interpretation of "necessary" detention seems to be preferred as well by the Human Rights Committee. In assessing whether the UK "fast track" processing system for refugees was in compliance with the Civil and Political Covenant, the Committee observed that it "is concerned that asylum-seekers have been detained in various facilities on grounds other than those legitimate under the Covenant, including reasons of administrative convenience": "Concluding Observations of the Human Rights Committee: United Kingdom," UN Doc. CCPR/CO/73, Dec. 6, 2001, at para. 16.

[671] In the High Court, Mr. Justice Baragwanath determined that provisional detention could only be ordered for reasons of administrative functionality, to preclude criminal activity, or to avoid real risk of absconding: *Refugee Council of New Zealand et al. and "D" v. Attorney General*, [2002] NZAR 717 (NZ HC, May 31, 2002).

[672] The lead judgment, authored by Mr. Justice Tipping on behalf of himself and Justices Blanchard and Anderson, does not move beyond a rather general understanding of this

reasons of Justice McGrath affirm that automatic detention clearly cannot be justified under Art. 31(2);[673] he is equally clear that "detention for the purposes of deterrence is impermissible."[674] But he is insistent that the grounds for provisional detention must not be treated as finite, but should rather "reflect the margin of appreciation that the parties to the Convention had in mind could properly be exercised."[675] Agreeing that some flexibility of this kind is required, the reasons of Justice Glazebrook suggest an approach to the determination of a "necessary" provisional constraint on a refugee's freedom of movement that takes account of both "the extent of any restrictions imposed and the reasons for such restrictions":[676]

> It is implicit ... that restrictions on freedom of movement that are less restrictive than detention should be able to be imposed more freely ... [T]he necessity standard is variable depending on the nature of the restriction on freedom of movement to be applied ...
>
> ... [T]he greater restriction there is to be on a claimant's freedom of movement, the more scrutiny should be given to the reasons for detention ... Where there is to be a major restriction on the freedom of movement through detention ... the factors discussed in [UNHCR] Guideline 3 that can point to detention being necessary [e.g. unwillingness of the claimant to cooperate in verification of identity; existence of criminal antecedents likely to jeopardize national security or public order] appear to require an element of "fault" on the part of the claimant.[677]

This is a very helpful framework within which to determine whether detention or other limits on freedom of movement are appropriately adjudged necessary. It effectively compels states to give primary consideration to constraints on freedom of movement short of detention, since such less intrusive measures will be much more readily deemed justified.[678] While there can be no question of even routine resort to such measures as residence

question: *Attorney General v. Refugee Council of New Zealand Inc.*, [2003] 2 NZLR 577 (NZ CA, Apr. 16, 2003), at para. 28.

673 "The starting point is that New Zealand's obligations under the Refugee Convention ... include a duty to ensure that detention is not automatic for arriving persons claiming the status of refugees [citing the court's earlier decision in *Attorney General v. E*, [2000] 3 NZLR 257 (NZ CA, July 11, 2000, appeal to PC refused at [2000] 3 NZLR 637)": *Attorney General v. Refugee Council of New Zealand Inc.*, [2003] 2 NZLR 577 (NZ CA, Apr. 16, 2003), at para. 97.

674 *Attorney General v. Refugee Council of New Zealand Inc.*, [2003] 2 NZLR 577 (NZ CA, Apr. 16, 2003), at para. 101.

675 Ibid. at para. 102. A comparably flexible approach has recently been taken by the UN Human Rights Committee.

676 Ibid. at para. 257. 677 Ibid. at paras. 265, 275.

678 In a decision successfully appealed to the Court of Appeal, the New Zealand High Court determined that "[d]etention is warranted only where 'necessary.' I would have thought that the possibility of lesser forms of control would need to be addressed before the more drastic steps of full detention could be justified ... Open centers may or may not be

restrictions or reporting requirements,[679] the view that detention should ordinarily be contemplated as a last resort[680] and normally where there is some evidence of *mala fides* or risk associated with the liberty of the refugee claimant is a sound point of departure.[681] It drives governments meaningfully to honor the presumptive right of refugees to enjoy freedom of movement, even as it affords them a flexible framework within which to justify a potentially broad range of restrictions for an open-ended set of reasons.[682]

The duty to rely on less intrusive restrictions on freedom of movement unless detention is clearly required[683] is very much in line with the intentions of the Convention's drafters. For example, the representative of the International Refugee Organization observed that the reference to

available in New Zealand at present. However, it is certainly commonplace in the analogous system of criminal prosecutions that persons on remand are granted bail subject to stringent conditions including daily reporting requirements, residence at a nominated address, geographical limitations upon movement, surrender of passports, curfews, and other restrictions of that nature": *E v. Attorney General*, [2000] NZAR 354 (NZ HC, Nov. 29, 1999), appeal allowed in *Attorney General v. E*, [2000] 3 NZLR 257 (NZ CA, July 11, 2000, appeal to PC refused at [2000] 3 NZLR 637).

679 "It is significant that Article 31(2) applies to restrictions on freedom of movement generally, and not just to detention": *Attorney General v. Refugee Council of New Zealand Inc.*, [2003] 2 NZLR 577 (NZ CA, Apr. 16, 2003), at para. 259.

680 "[T]here should be a strong, although rebuttable, presumption in favor of granting temporary permits to refugee claimants pending the determination of their refugee status": *E v. Attorney General*, [2000] NZAR 354 (NZ HC, Nov. 29, 1999), appeal allowed in *Attorney General v. E*, [2000] 3 NZLR 257 (NZ CA, July 11, 2000, appeal to PC refused at [2000] 3 NZLR 637).

681 See e.g. *Jalloh v. Netherlands*, UNHRC Comm. No. 794/1998, UN Doc. CCPR/C/74/D/794/1998, decided Mar. 26, 2002, at para. 8.2: "[T]he author had his detention reviewed by the courts on two occasions, once twelve days after the beginning of his detention, and again two months later. On both occasions, the Court found that the author's continued detention was lawful, because he had evaded expulsion before, because there were doubts as to his identity, and because there were reasonable prospects for expulsion, as an identity investigation was still ongoing. The question remains therefore as to whether his detention was arbitrary. Recalling its previous jurisprudence the Committee notes that 'arbitrariness' must be interpreted more broadly than 'against the law' to include elements of unreasonableness. *Considering the author's flight from the open facility at which he was accommodated from the time of his arrival for around 11 months, the Committee considers that it was not unreasonable* to have detained the author for a limited time until the administrative procedure relating to his case was completed [emphasis added]."

682 "The word 'necessary' limits both the extent of any restrictions imposed and the reasons for such restrictions": *Attorney General v. Refugee Council of New Zealand Inc.*, [2003] 2 NZLR 577 (NZ CA, Apr. 16, 2003), at para. 259.

683 "If a less severe restriction, such as ordering the person in question to stay in a particular town or within a limited area, can be considered sufficient, the authorities are [prohibited] from applying more severe measures, such as [requiring] the refugee to stay in a certain house or in a camp, or outright detaining him": Grahl-Madsen, *Commentary*, at 182.

"necessary" measures "implied that the refugee should not be subjected to irksome restrictions, that he should be permitted to move outside the reception camp to the greatest extent possible, and that he should lead as normal a life as possible."[684] UNHCR's detention guidelines amplify this view, suggesting that "[w]here there are monitoring mechanisms which can be employed as viable alternatives to detention ... these should be applied *first* unless there is evidence to suggest that such an alternative will not be effective in the individual case."[685] Among the alternative approaches suggested are monitoring requirements, the provision of a guarantor or surety, release on bail, and requiring refugees to reside in particular regions, or in open reception centers.[686] Neither a presumption in favor of detaining refugees of the kind employed (formally) by Australia and (de facto) by the United States, nor the relegation of refugees to closed camps in Hong Kong, Thailand, Uganda, and Kenya can be reconciled to this duty minimally to impair freedom of movement in pursuit of even legitimate investigatory goals. This duty of minimal impairment has been clearly endorsed by the Human Rights Committee in the context of a complaint of arbitrary detention made by an Afghan refugee woman and her five young children:

> Concerning Mrs Bakhtiyari and her children, the Committee observes that Mrs Bakhtiyari has been detained in immigration detention for two years and ten months, and continues to be detained, while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period.
>
> Taking into account in particular the composition of the Bakhtiyari family, the State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for Mrs Bakhtiyari and her children for the length of time described above, without appropriate justification, was arbitrary and contrary to article 9, paragraph 1, of the Covenant.[687]

[684] Statement of Mr. Weis of the IRO, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 24–25.

[685] UNHCR, "Detention Guidelines," at Guideline 3. See also Executive Committee of the High Commissioner's Program, "Agenda for Protection," UN Doc. EC/52/SC/CRP.9/Rev.1, June 26, 2002, at Part III, Goal 1, Point 9: "States more concertedly to explore alternatives to the detention of asylum-seekers and refugees."

[686] UNHCR, "Detention Guidelines," at Guideline 4.

[687] *Bakhtiyari v. Australia*, UNHRC Comm. No. 1069/2002, UN Doc. CCPR/C/79/D/1069/2002, decided Oct. 29, 2003, at para. 9.3. See also *C v. Australia*, UNHRC Comm. No. 900/1999, UN Doc. CCPR/C/76/D/900/1999, decided Oct. 28, 2002, at para. 8.2.

A note of caution is warranted, however, before rushing to endorse various constraints on freedom of movement as alternatives to the detention of persons seeking recognition of refugee status.[688] Art. 31(2) is not only a limitation on detention, but on all measures which infringe a refugee's freedom of movement. Thus, not even a limitation on freedom of movement short of detention may be imposed without a valid justification of the kind contemplated by Art. 31(2). Equally important, no refugee-specific limitation on freedom of movement may be more than strictly provisional. The restrictions must come to an end once reasons which make it necessary come to an end – for example, when the response to the mass influx has been organized, or the preliminary assessment of identity and circumstances of entry is completed.[689] Any other or continuing constraints must be generally applicable to non-citizens in the host country, and not be imposed on account of irregular entry or presence.[690] Thus, when asylum-seekers are required to live on an ongoing basis in a reception center or hostel, as may be the case, for example, in Denmark, Germany, and Ireland, Art. 31(2) is contravened.

But what of practices such as those of Austria and Norway which allow refugee claimants to live outside the reception center only if they are prepared to give up state welfare benefits? In pith and substance, such policies seem less a constraint on freedom of movement which might raise a concern under Art. 31(2) than a restriction on access to public benefits. This restriction is in most cases lawful since, at least until and unless an issue of denial of access to the

[688] UNHCR clearly feels that it is waging an uphill battle against the detention of refugees. After states agreed in 1986 that detention should normally be avoided, and may legally be resorted to only for the reasons contemplated by Art. 31(2) (see UNHCR Executive Committee Conclusion No. 44, "Detention of Refugees and Asylum-Seekers" (1979)), UNHCR bluntly announced just two years later that "[a]lthough States Members of the Executive Committee adopted the Conclusion by consensus, the recommendations contained therein appear to have had very little impact on the practice of a number of states as regards detention of refugees and asylum-seekers. On the contrary, detention under harsh conditions, for long periods and without justifiable cause has recently increased": UNHCR, "Note on International Protection," UN Doc. A/AC.96/713, Aug. 15, 1988, at para. 21. The unfortunate result of this struggle to hold states to their freely assumed obligations has been a nearly exclusive concern to constrain resort to detention, even at the cost of an expansion of other restrictions on the freedom of movement of refugees. Thus, the UNHCR detention guidelines expressly posit that "[t]here is a qualitative difference between detention and other restrictions on freedom of movement. Persons who are subjected to limitations on domicile and residency are not generally considered to be in detention." Indeed, the guidelines seem almost to advocate lesser restrictions, suggesting that these constraints on freedom of movement are "options which provide State authorities with a degree of control over the whereabouts of asylum-seekers while allowing asylum-seekers basic freedom of movement": UNHCR, "Detention Guidelines," at Guidelines 1 and 4.

[689] See text above, at pp. 419–422. [690] See text above, at pp. 421–422.

necessities of life arises,[691] states are under a duty to grant refugees access to public relief systems only once the refugee establishes an ongoing presence in the asylum country (whether or not there has been a formal declaration of refugee status, grant of the right of permanent residence, or establishment of domicile there).[692] As such, a decision to condition earlier access to welfare benefits on residence in a reception center is effectively a constraint on access to a privilege, which a refugee may choose to accept or not. The issue of whether the policy amounts to a necessary constraint on freedom of internal movement therefore does not arise.

However, once a refugee is in an asylum country on an ongoing basis, including once admitted to a temporary protection regime in the asylum state, there is a duty to assimilate him or her to nationals for the purpose of access to public relief.[693] If in such circumstances a state party persists in a policy of denying welfare benefits to refugees who refuse to reside in a reception center, its actions more clearly amount to a denial of freedom of internal movement (since the choice being offered amounts to losing one right, or losing another). The state would then be required to justify its policy by reference to Art. 26 of the Refugee Convention and, more generally, to meet the requirements of Art. 9 of the Civil and Political Covenant.[694]

Another issue of real contemporary concern is whether provisional detention can be adjudged "necessary" where it is imposed in order to ensure the efficient assessment of claims to refugee status. While not included in UNHCR's "list" of approved reasons for provisional detention,[695] courts have taken the view that short-term detention dictated by important administrative reasons may be allowed under the terms of Art. 31.[696] For example, the House of Lords gave consideration in *Saadi*[697] to the legality of the detention of refugee claimants adjudged to have "straightforward asylum claims" for seven to ten days, allowing their claims quickly to be adjudicated. Their Lordships took real account of both the practical need to deal expeditiously with a mounting volume of claims,[698] and of the quality of the

[691] States are obliged under international human rights law to ensure the necessities of life to persons under their jurisdiction: see chapter 4.4 below.

[692] See chapter 6.3 below. [693] See chapter 3.1.4 above.

[694] See chapter 5.2 below. [695] UNHCR, "Detention Guidelines," at Guideline 3.

[696] The New Zealand High Court, for example, determined that detention might be necessary "to allow the [government] to be able to perform their functions": *Refugee Council of New Zealand et al. and "D" v. Attorney General*, [2002] NZAR 717 (NZ HC, May 31, 2002).

[697] *R (Saadi) v. Secretary of State for the Home Department*, [2002] UKHL 41 (UK HL, Oct. 31, 2002).

[698] "The number of persons arriving in the United Kingdom and seeking asylum has grown considerably in recent years. Thus your Lordships were told that from July to September

detention (which included, for example, access to legal advice)[699] to arrive at the decision that detention for a few days could be ruled necessary:

> There is obviously force in the argument ... that if there is no suggestion that [the claimants] might run away, then it cannot be strictly necessary to detain them as opposed to requiring them to comply with the fixed regime enabling detailed examinations to take place. This, however, ignores the reality – large numbers of applications have to be considered intensively in a short period. If people failed to arrive on time or at all the Programme would be disrupted and delays caused not only to the individual case, but to dealing with the whole problem. If conditions in the centre were less acceptable than they are taken to be, there might be more room for doubt, but it seems to me that the need for speed justifies detention for a short period in acceptable physical conditions as being reasonably necessary.[700]

Thus, very much in line with the approach of Justice Glazebrook in the New Zealand Court of Appeal, the House of Lords adopted a flexible approach to the question of necessity, with a focus on the questions of both the reasons for detention, and the nature of the restrictions imposed. The clear implication of the judgment is that the restriction on freedom of movement would not have been deemed necessary if its duration were not so short and finite, or if the conditions of detention were less clearly rights-regarding. On balance, this seems a fair construction of the notion of "necessary" constraints, very much in line with the intention of the drafters to afford host states time to complete a basic inquiry into the identity and circumstances of unauthorized asylum-seekers before releasing them into the community.

Despite the value of a flexible approach to the assessment of whether constraints on freedom of movement are necessary, there are clearly some situations in which detention will be extraordinarily difficult to justify. In particular, it is clear that children may be lawfully detained only as a "measure of last resort."[701] A heavy onus should also rest on states that intend to detain

1999 the average number of applications was 7,000 a month, a 60% increase on the previous year ... This obviously placed a considerable strain on the immigration services": ibid. at para. 10.

699 "There is obviously a deprivation of liberty in detaining people at Oakington. They cannot leave the centre, they must conform to the rules as to meal times and to being in their rooms at night. On the other hand, it is not suggested that the physical conditions – the state of the rooms, sanitation, meals – are in themselves open to criticism. Moreover, there are provisions not only for legal advice, but for medical advice, for recreation and for religious practice": ibid. at para. 17.

700 Ibid. at para. 24.

701 "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be

other vulnerable persons, including unaccompanied elderly persons, torture or trauma victims, and persons with a mental or physical disability.[702] The Australian and Belgian practices of detaining refugee children on a fairly routine basis are therefore unlikely to meet the requirements of Art. 31(2), or the Civil and Political Covenant. The Swiss exception for children who are "lawfully resident" is half-hearted, since international human rights law requires that the right to freedom from deprivation of liberty be implemented without discrimination of any kind.[703] And while the United Kingdom's reservation to the Convention on the Rights of the Child insulates it from responsibility under that treaty for the detention of refugee children, it remains independently accountable under the Refugee Convention and Civil and Political Covenant to overcome the presumption against the necessity of such measures.[704]

used only as a measure of last resort and for the shortest appropriate period of time": Convention on the Rights of the Child, UNGA Res. 44/25, adopted Nov. 20, 1989, entered into force Sept. 2, 1990 (Rights of the Child Convention), at Art. 37(b). "Unaccompanied minors should not, as a general rule, be detained. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision. Residential homes or foster care placements may provide the necessary facilities to ensure their proper development (both physical and mental) is catered for while longer term solutions are being considered. All appropriate alternatives to detention should be considered in the case of children accompanying their parents. Children and their primary caregivers should not be detained unless this is the only means of maintaining family unity. If none of the alternatives can be applied and States do detain children, this should, in accordance with Article 37 of the Convention on the Rights of the Child, be as a measure of last resort, and for the shortest period of time": UNHCR, "Detention Guidelines," at Guideline 6. See also Executive Committee of the High Commissioner's Program, "Agenda for Protection," UN Doc. EC/52/SC/CRP.9/Rev.1, June 26, 2002, at Part III, Goal 1, Point 9: "States ... to abstain, in principle, from detaining children."

[702] "In the event that individuals falling within these categories are detained, it is advisable that this should only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well being. In addition there must be regular follow up and support by a relevant skilled professional. They must also have access to services, hospitalisation, medication counselling etc. should it become necessary": UNHCR, "Detention Guidelines," at Guideline 7.

[703] Rights of the Child Convention, at Art. 2(1). It is, of course, true that the margin of appreciation afforded states on the question of "reasonable" differences of treatment is a problematic aspect of contemporary non-discrimination jurisprudence: see chapter 2.5.5 above, at pp. 139–145.

[704] While strongly insisting on the duty to consider alternatives to detention of children, the UN Human Rights Committee has not taken the view that their detention is in all cases rights-violative. "The Committee considers that the ability for a court to order a child's release if considered in its best interests ... is sufficient review of the substantive

More generally, because generic detention regimes – such as those of Austria, Belgium, and Switzerland – are routinely applied to all unauthorized non-citizens (without requiring the state to advance specific justifications for detention), they fail even to engage with the requirement of the Refugee Convention's Art. 31(2) and of Art. 9(1) of the Civil and Political Covenant that provisional detention be demonstrably "necessary." The detention regime in the United Kingdom, in contrast, is appropriately predicated on the government adducing evidence of a need for investigation of identity or circumstances of entry; its weakness is that detention is not conceived as a strictly provisional measure.[705] The Italian detention system, on the other hand, appears more closely to conform to the requirements of both Article 31(2) and the Civil and Political Covenant, in that it is substantively circumscribed, and clearly provisional; yet even this relatively good regime fails to incorporate a requirement for routine review by an adjudicator, a critical safeguard which exists, for example, in the Canadian and French systems.[706]

While the Refugee Convention does not set standards for the conditions of detention, Art. 10 of the Civil and Political Covenant requires that all detained persons "be treated with humanity and with respect for the inherent dignity of the human person." This duty extends to any person "deprived of liberty under the laws and authority of the State."[707] Art. 10 requires states to meet a higher standard than simply the avoidance of the "cruel and inhuman" treatment prohibited by Art. 7 of the Civil and Political Covenant.[708] The Human Rights Committee has determined, for example, that Art. 10 was breached when an individual was returned to immigration detention contrary to expert medical advice.[709] It has also found a violation where a detained person was forced to sleep on the floor of a small cell without

justification of detention to satisfy the requirements of article 9, paragraph 4, of the Covenant ... Concerning the claim under article 24, the Committee considers that the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection": *Bakhtiyari v. Australia*, UNHRC Comm. No. 1069/2002, UN Doc. CCPR/C/79/D/1069/2002, decided Oct. 29, 2003, at paras. 9.5, 9.7.

[705] Similar concerns have been expressed by the United Nations Working Group on Arbitrary Detention: UN Doc. E/CN.4/1999/63/Add.4.

[706] Moreover, as the Canadian Federal Court of Appeal has observed, "[t]he onus is always on the Minister to demonstrate that there are reasons which warrant detention or continued detention ... [O]nce the Minister has made out a prima facie case for continued detention, the individual must lead some evidence or risk continued detention": *Canada v. Thanabalasingham*, [2004] FCA 4 (Can. FCA, Jan. 9, 2004), at para. 16.

[707] UN Human Rights Committee, "General Comment No. 21: Humane treatment of persons deprived of their liberty" (1992), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 153, para. 2.

[708] Nowak, *ICCPR Commentary*, at 186–187.

[709] "[T]his form of detention was contrary to the advice of various doctors and psychiatrists, consulted by the State party, who all advised that a further period of placement in an

medical attention or family contact,[710] as well as in the case of a detainee given only five minutes per day for personal hygiene and five minutes per day of outside exercise.[711] The severe and prolonged overcrowding experienced by refugees detained in, for example, Greece, Hong Kong, Mexico, and the Spanish Canary Islands is clearly at odds with this obligation. The relatively detailed attention to specific conditions of detention follows logically from the fact that persons detained by a government are essentially at the complete mercy of the state. Because their vulnerability to harm results specifically from an official decision to detain them, the state responsible for the detention owes detainees a "positive obligation" of care.[712] In particular, a state that elects to detain an individual may not invoke resource insufficiency as a reason for failure to meet the standards of Art. 10.[713] If, for whatever reason, a government is not in a position to ensure that persons denied their liberty are treated with humanity and respect for their inherent dignity, then it may not lawfully order their detention.

In keeping with this affirmative obligation to ensure the protection of detainees, UNHCR's Executive Committee has determined that "refugees and asylum-seekers shall, whenever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered"[714] – a standard that calls into question the American practice of detaining refugees in ordinary jails in

immigration detention centre would risk further deterioration of Mr. Madafferi's mental health. Against the backdrop of such advice and given the eventual involuntary admission of Mr. Madafferi to a psychiatric hospital, the Committee finds that the State party's decision to return Mr. Madafferi to Maribyrnong and the manner in which that transfer was [e]ffected was not based on a proper assessment of the circumstances of the case but was, as such, disproportionate. Consequently, the Committee finds that this decision and the resulting detention was in violation of article 10, paragraph 1, of the Covenant": *Madafferi v. Australia*, UNHRC Comm. No. 1011/2001, UN Doc. CCPR/C/81/D/1011/2001, decided July 26, 2004, at para. 9.3.

710 *Luyeye v. Zaïre*, UNHRC Comm. No. 90/1981, decided July 21, 1983.

711 *Párkányi v. Hungary*, UNHRC Comm. No. 410/1990, UN Doc. CCPR/C/41/D/410/1990, decided Mar. 22, 1991.

712 UN Human Rights Committee, "General Comment No. 21: Humane treatment of persons deprived of their liberty" (1992), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 153, para. 3.

713 Art. 10 is "a fundamental and universally applicable rule ... [T]he application of this rule, as a minimum, cannot be dependent on the material resources available in the State party": ibid. at 153, para. 4.

714 UNHCR Executive Committee Conclusion No. 44, "Detention of Refugees and Asylum-Seekers" (1986), at para. (f), available at www.unhcr.ch (accessed Nov. 20, 2004). See also UNHCR Executive Committee Conclusion No. 85, "Conclusion on International Protection" (1998), at para. (ee), available at www.unhcr.ch (accessed Nov. 20, 2004), in which the Executive Committee "[n]ote[d] with concern that asylum-seekers detained only because of their illegal entry or presence are often held together with persons

which some facilities are shared by refugees and criminals.[715] More generally, the Executive Committee has concluded that "conditions of detention of refugees and asylum-seekers must be humane."[716] UNHCR's guidelines on the detention of asylum-seekers posit a number of specific standards to govern provisional detention,[717] largely derived from the jurisprudence under Art. 10(1) of the Civil and Political Covenant,[718] and from the United Nations' Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[719] Taken together, these standards require that detained refugees have the right to be in regular contact with

detained as common criminals, and reiterate[d] that this is undesirable and must be avoided whenever possible, and that asylum-seekers shall not be located in areas where their physical safety is in danger"; and UNHCR, "Detention Guidelines," at Guideline 10(iii): "Separate detention facilities should be used to accommodate asylum-seekers. The use of prisons should be avoided. If separate detention facilities are not used, asylum-seekers should be accommodated separately from convicted criminals or prisoners on remand. There should be no co-mingling of the two groups."

715 Indeed, under the Civil and Political Covenant, not even accused criminals may lawfully be detained together with convicted criminals: Civil and Political Covenant, at Art. 10(2)(a). See also Report of the United Nations Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63, Dec. 18, 1998: "Custody of [refugees and asylum-seekers shall be] effected in public premises intended for this purpose; otherwise, the individual in custody shall be separated from persons imprisoned under criminal law."

716 UNHCR Executive Committee Conclusion No. 44, "Detention of Refugees and Asylum-Seekers" (1986), at para. (f), available at www.unhcr.ch (accessed Nov. 20, 2004).

717 UNHCR, "Detention Guidelines," at Guideline 10.

718 "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person": Civil and Political Covenant, at Art. 10(1). As affirmed by the Human Rights Committee, "Article 10, paragraph 1 ... applies to anyone deprived of liberty under the laws and authority of the State who is held in prisons, hospitals – particularly psychiatric hospitals – detention camps or correctional institutions or elsewhere. State parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held": UN Human Rights Committee, "General Comment No. 21: Humane treatment of persons deprived of their liberty" (1992), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 153, para. 2. Nowak summarizes the Human Rights Committee's jurisprudence on Art. 10(1) as establishing "*positive State duties to ensure* certain conduct. Regardless of economic difficulties, the State must establish a minimum standard for humane conditions or detention ... In other words, it must provide detainees and prisoners with a minimum of services to satisfy their basic needs (food, clothing, medical care, sanitary facilities, communication, light, opportunity to move about, privacy, etc.)": Nowak, *ICCPR Commentary*, at 188–189.

719 UNGA Res. 47/173, Dec. 9, 1988, Annex (UN Detention Principles). In 1997, the UN Commission on Human Rights specifically enlarged the mandate of its Working Group on Arbitrary Detention to direct it to report on "the situation of immigrants and asylum-seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy": "Question of arbitrary detention," UNCHR Res. 1997/50, UN Doc. E/CN.4/1997/50 (1997), at para. 4.

persons outside the detention facility;[720] to consult with legal counsel;[721] to receive basic medical care and other necessities of life (a standard not respected when, for example, South Korea failed to provide heating in refugee detention facilities);[722] to benefit from opportunities for exercise and recreation;[723] to enjoy religious freedom;[724] to access education, culture, and information;[725] and to be assured of assistance to dependent family

[720] "A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations": UN Detention Principles, at Principle No. 19. See also Principles Nos. 15 and 16, ibid. The UNHCR elaborates that "[f]acilities should be made available to enable such visits. Where possible such visits should take place in private unless there are compelling reasons to warrant the contrary": UNHCR, "Detention Guidelines," at Guideline 10(iv).

[721] "A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it ... If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay": UN Detention Principles, at Principle No. 17. Furthermore, "[a] detained or imprisoned person shall be entitled to communicate and consult with his legal counsel ... A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel ... The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order": UN Detention Principles, at Principle No. 18. See also UNHCR, "Detention Guidelines," at Guideline 10(iv).

[722] "A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge": UN Detention Principles, at Principle No. 24. See also Principles Nos. 25 and 26: ibid. In addition, "[a]sylum-seekers should have the opportunity to have access to basic necessities, i.e., beds, shower facilities, basic toiletries, etc.": UNHCR, "Detention Guidelines," at Guideline 10(ix).

[723] "Asylum seekers should have the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities": UNHCR, "Detention Guidelines," at Guideline 10(vi).

[724] "Asylum seekers should have the opportunity to exercise their religion in practice, worship, and observance, and to receive a diet in keeping with their religion": ibid. at Guideline 10(viii).

[725] "A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment": UN Detention Principles, at Principle No. 28.

members.[726] These basic qualitative standards must, of course, be interpreted with due regard to the particular needs of children, women, and others who may be particularly vulnerable to harm while in detention.[727]

4.3 Physical security

Those who enjoyed relative privilege and safety before becoming refugees usually find their security diminished as a result of the refugee experience itself. This being said, persons who were already vulnerable – typically women, children, older persons, the disabled, and the poor – may on occasion find that becoming a refugee is a source of enhanced protection, particularly where they are received in a society that is more socially inclusive.[728] More commonly, however, refugeehood simply exposes the already disfranchised to even greater risks of physical harm. As Human Rights Watch observed, "[w]omen refugees are raped because they are refugees, because of their actual or perceived political or ethnic affiliations, and because they are women."[729]

Physical security is frequently jeopardized during the process of flight to an asylum country. The Sudanese government, for example, ordered bombing attacks on refugees attempting to flee to Ethiopia.[730] Rohingya women and girls were gang-raped by Burmese security forces as they fled the country.[731]

[726] "The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision": ibid. at Principle No. 31.

[727] UNHCR, "Detention Guidelines," at Guidelines 6, 7, and 8.

[728] It may also be the case that the actual conditions of life for asylum-seekers may result in a revaluation of the relative importance of the skills and abilities of traditionally marginalized groups. For example, success in coping with camp life frequently puts a premium on activities within the traditional realm of "women's work," such as food-gathering, cooking, and the establishment and maintenance of living quarters. In such circumstances, women refugees have reported that the relative insecurity of life as an asylum-seeker has, perhaps ironically, been a source of personal empowerment for them. See e.g. G. Garcia Hernandez and N. Garcia, "Mama Maquin Refugee Women: Participation and Organization," in W. Giles et al. eds., *Development and Diaspora: Gender and the Refugee Experience* 258 (1996), at 262.

[729] Human Rights Watch, *Human Rights Watch Global Report on Women's Human Rights* (1995), at 101. The same report notes that "[s]trong cultural stigma attached to rape further intensifies the rape victims' physical and psychological trauma. Women in refugee and displaced persons camps who acknowledge being raped may be ostracized, or even punished, by their families": ibid. at 103.

[730] D. Baligh, "International Relief Operation Saves Victims of Famine, Drought," *Associated Press*, June 9, 1991.

[731] T. Khandker and Z. Haider, "Protection [of] Refugees: Case of Rohingya Women," paper presented at the National Seminar on Refugees, Migrants, and Stateless Persons: In Search of a National Consensus, Dhaka, Dec. 29, 1997, at 5.

Many Central American refugees traveling overland to North America were subjected to extortion, kidnaping, and physical abuse in transit countries, particularly in Honduras.[732] An especially notorious case was the series of attacks between 1980 and 1984 perpetrated by Thai pirates on Vietnamese "boat people" attempting to pass through the Gulf of Thailand and South China Sea en route to Hong Kong, the Philippines, and other asylum countries. In the words of one eyewitness,

> While all the men were confined to the hold of the refugee boat ... some, if not all of the approximately 15–20 women and young girls who were kept in the cabin of the boat were raped. The youngest of these girls was around 12 years old. Soon afterwards, the pirates set the boat on fire with all the Vietnamese on board. In the ensuing panic, the Vietnamese grabbed buoys, cans and floats, and plunged into the sea. The crews of the pirate boats then used sticks to prevent them from clinging to floating objects.[733]

Because refugees often cannot plan their escapes, travel routes and methods may be simply the most accessible, rather than the safest, way of leaving.

Even refugees who manage to reach the border of an asylum country are not immune from physical abuse.[734] Sometimes border guards take advantage of the refugees' predicament and vulnerability.[735] For example, Rwandan refugees were robbed by the predatory Zaïrian army as they entered the country in 1994,[736] and continued to be subject to attacks and looting in the camps.[737] In South Africa, refugees waiting to register at the

[732] See e.g. Immigration and Refugee Board of Canada, "Honduras: Persecution by Contras in Honduras, particularly in the areas bordering Nicaragua and in the city of La Ceiba, Dec. 1987 – Nov. 1988," May 1, 1989.

[733] "A Tale of Horror," (1989) 65 *Refugees* 25.

[734] The United Nations Special Rapporteur on the Rights of Non-Citizens has determined that "[t]here are reliable reports of ... police violence, intimidation, and bullying of asylum-seekers": "Final Report of the Special Rapporteur of the Rights of Non-Citizens: Addendum: Examples of Practice in Regard to Non-Citizens," UN Doc. E/CN.4/Sub.2/2003/23/Add.3, May 26, 2003, at para. 10.

[735] As UNHCR has observed, women and girls are particularly at risk in these circumstances. "Border guards in some countries have detained refugee women or girls for weeks for their sexual use. Women have been raped by soldiers while crossing a border, and in some cases abducted and prostituted by them ... Unaccompanied women asylum-seekers arriving by air in a country of asylum, forced to spend extended periods of time in the holding area of an airport before being transferred to a hotel where they were guarded around the clock, have been raped by their guards while the authorities were deciding to which country to expel them": UNHCR, "Note on Certain Aspects of Violence Against Women," UN Doc. A/AC.96/822, Oct. 12, 1993, at 7.

[736] African Rights, *Rwanda: Death, Despair and Defiance* (1994) (African Rights, *Rwanda*), at 661.

[737] In November 1994, for example, "Zairian soldiers searching for Rwandans accused of stealing opened fire on some refugees, killing and wounding more than a hundred in and

Braamfontein refugee office were reported to have been whipped and beaten by officials.[738] Malawi officials shot and killed a refugee from Eritrea while trying to force him onto a flight bound for Ethiopia,[739] while Austrian officials bound and gagged a Nigerian refugee claimant in an effort to deport him to Bulgaria, where he was pronounced dead on arrival.[740] To avoid detection by Chinese authorities intent on removing them without consideration of their protection needs, North Korean refugees are often forced to secure private protection by becoming slave laborers or prostitutes.[741]

Yet the evidence suggests that the greatest risk of physical abuse arises once refugees actually reach the camps where they are in principle to be protected. Sometimes camp officials or employees are directly responsible. For example, Iraqi refugees admitted to "temporary shelter" in Saudi Arabia during and after the Gulf War were arbitrarily detained, tortured, and even extrajudicially executed.[742] Dozens of refugees were killed by Kenyan security forces or "forcibly disappeared."[743] Many Cambodian refugees in camps along the Thai–Cambodian border were tortured and killed with impunity by Thai military officers or the Khmer Rouge officials to whom the Thais entrusted responsibility for running some camps.[744] In five extrajudicial killings of

near Katale camp, about 30 miles northeast of Goma": D. Lorch, "Pressed by Zairian troops, Rwandans flee camps," *New York Times*, Dec. 2, 1994, at A6.

738 "On Thursday officials at the Braamfontein refugee office in Johannesburg allegedly beat approximately a thousand refugees with chains and sjamboks. A woman whose leg was fractured has been sent to hospital. Abeda Bhamjee of the Wits Law Clinic says: 'On several occasions we have noted sjambokkings as a form of crowd control, including within Home Affairs buildings'": "No place for refugees fleeing Africa's tyrants," *Sunday Independent*, Oct. 27, 2002.

739 *Agence France Presse*, Sept. 1, 1999.

740 "Rampant racism in Austrian police exposed," *Guardian*, Mar. 25, 2000.

741 "There are between 10,000 and 300,000 refugees hiding in China, and monitors for Human Rights Watch found those they spoke to were resigned to a sub-human existence in China. Many fear they will be captured and sent home to serve a life sentence in one of North Korea's notorious prison camps, where inmates are reportedly experimented on with chemicals, starved or shot": J. Palmer, "Starving refugees sold as sex slaves to Chinese men," *Independent*, Nov. 19, 2002, at 13.

742 Amnesty International, "Saudi Arabia: Unwelcome 'Guests': The Plight of Iraqi Refugees" (1994), at 1.

743 "Police and army patrols routinely pick up refugee men, and either beat them to death or shoot them. In many cases, the bodies are then burned. Sometimes, they are demanding bribes for release, sometimes the killings are in the course of sweeps ostensibly directed against bandits ... Innumerable refugees, both women and men, have been beaten or tortured by security forces. This is common in Nairobi as well as the camps. Some have died as a consequence": African Rights, "The Nightmare Continues ... Abuses Against Somali Refugees in Kenya" (1993), at ii.

744 "Many of the human rights abuses that characterized the population removals appear to be regular occurrences inside the refugee camps administered by the Khmer Rouge: forced labor, denial of medical care, denial of food as a means of coercion, use of civilians against their will for military purposes, and harsh penalties, including execution, for

refugees reported by Amnesty International in 1988, "the victims were apparently executed ... simply because they were found outside the camp boundaries where they had gone to collect food, firewood or building materials, or to engage in barter with Thai farmers or merchants for needed commodities."[745] Kosovar refugees taking shelter in Sarajevo were attacked by Bosnian police, who rushed into their camp at midnight and beat them indiscriminately.[746] And in Australia, an expert reported that "coercive management strategies" were employed by the officials administering refugee camps, including "teargas, room-trashings, [and] children being put into solitary confinement."[747]

Perhaps the most prevalent form of abuse by officials administering refugee camps is rape and sexual assault. For example,

> Thousands of refugee women have been raped in Kenya. While the majority of rapes are committed by shifta (armed bandits), many are also committed by policemen and soldiers, in both the camps and Nairobi ... Most are gang rapes. Some of the women have had to endure the added trauma and indignity of being raped along with their daughters, including girls as young as thirteen ... A Somali woman who has been raped is the victim of the attack itself and a victim of a set of social values that condemn a raped woman to lifelong shame and ostracism.[748]

Similarly, the United Nations has reported the rape of Tibetan refugee women by Nepalese police.[749] Sexual abuse has also occurred at the hands of relief workers. For example, two senior officials of a Catholic church agency working at the Tongogara refugee camp in Zimbabwe were fired for demanding sexual favors from refugees in return for items such as sanitary towels and blankets.[750] At the Osire refugee camp in Namibia, as many as sixty teachers

those who disobey orders": Asia Watch, "Khmer Rouge Abuses Along the Thai–Cambodian Border" (1989), at 23.

745 Amnesty International, "Thailand: Extrajudicial Executions of Kampuchean Refugees" (1988), at 1. See also Banbury, "Kampuchean Displaced Persons in Thailand," at 27, in which the author details murders, rapes, robberies, and beatings carried out by both the Khmer Rouge forces in charge of some of the refugee camps, and by the Thai military forces.

746 (1999) 44 *JRS Dispatches* (Mar. 1, 1999).

747 K. Lawson, "Ruddock warns rights officials," *Canberra Times*, Jan. 23, 2002, at A-1, quoting the report of Dr. Michael Dudley, chairman of Suicide Prevention Australia and Head of Faculty of Child and Adolescent Psychiatry at the Royal Australian College of Psychiatry. The government "strongly refuted the claims": ibid.

748 African Rights, "The Nightmare Continues ... Abuses Against Somali Refugees in Kenya" (1993), at 13.

749 (1988) 41/42 *Human Rights Monitor* 68, reporting the observations of the Special Rapporteur on Violence Against Women, Mrs. Coomaraswamy.

750 "Catholic refugee camp officials sacked for sex abuses," *Mail and Guardian* (Harare), July 11, 2002; "Steps taken to protect women refugees against abuse," *UN Integrated Regional Information Networks*, Dec. 2, 2002.

in the employ of the Ministry of Basic Education forced students as young as fourteen years old to have sex with them.[751] In February 2002, UNHCR and Save the Children (UK) released a report documenting patterns of sexual exploitation of refugee women and children throughout Western Africa by humanitarian workers. The workers were able to abuse their power in large measure because of the endemic scarcity of food and other resources that characterizes life in so many refugee camps.[752]

Yet much of the danger within refugee camps emanates not from authorities, but from fellow camp residents. One of the most horrifying examples was the reign of terror that persisted for Rwandan refugees inside Zaïre (now the Democratic Republic of Congo), where armed refugees continued their violence and extermination of Tutsis and moderate Hutus from within the borders of the camps themselves.[753] More recently, violence broke out among Burundian refugees at a camp in northern Mozambique based on the same ethnic tensions.[754] Risks to physical security can also be the by-product of conditions of confinement. Frequent overcrowding, failure to treat refugees with dignity, and the absence of meaningful opportunities to work, study, or otherwise occupy time set the stage for violence. For example, refugee gang violence was endemic in Hong Kong detention centers, with police failing adequately to protect refugees from the violent minority.[755]

Faulty design and management of the camps can exacerbate protection problems. There is increased likelihood of attack where communal latrines

[751] "Teen pregnancies soar at Osire Refugee Camp," *Namibian*, June 25, 2001; "Sexual abuse reported at Osire Refugee Camp," *Namibian*, July 5, 2001.

[752] UNHCR and Save the Children (UK), "Note for Implementing and Operational Partners on Sexual Violence and Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone based on Initial Findings and Recommendations from Assessment Mission, 22 October – 30 November 2001," Feb. 2002.

[753] African Rights, *Rwanda*, at 656–657.

[754] "One refugee from Burundi's civil war ... said his hut was burned down by another Burundian because he is a Tutsi. 'I was beaten up and my hut burned down because they hate me'": "Burundian refugees clash at camp in Mozambique," *SAPA-AFP*, Sept. 25, 2002. Hatred between Hutus and Tutsis was also responsible for violence in a refugee camp in Zimbabwe: "Refugees clash at camp," *Daily News*, Apr. 12, 2003.

[755] Weil, Gothal, and Manges, "Submission to the United Nations Working Group on Arbitrary Detention by the Lawyers Committee for Human Rights and the Women's Commission for Refugee Women and Children on behalf of approximately 40,000 Vietnamese detainees, including the families of Pham Ngoc Lam, Vuong Son Bach, and Cam Gia Ninh" (1989), at 12. "The Hong Kong Government have not done much to prevent the stress, anxiety, and fear of sexual attack and gang fights Vietnamese women and children suffer from": Hong Kong Human Rights Commission, "Report to the United Nations Committee Against Torture on the Initial Report by Hong Kong under Article 19 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (Nov. 1995), available at www.hkhrc.org.hk (accessed Aug. 9, 2003).

are sited far from living quarters, where there is poor lighting, and where night patrols are inadequate.[756] The decision of Indian camp authorities to require Chakma refugee women to search for firewood in nearby forests "exposed them to sexual assaults – seven to eight cases are said to be reported each year. The culprits have rarely been apprehended."[757] Somali refugee women in search of firewood near three UN refugee camps in Kenya were also routinely raped, resulting in a sexual assault rate seventy-five times higher than would be expected in a community of comparable population.[758] Closed detention facilities are particularly likely to give rise to risks to physical security, with women and children the least protected and most vulnerable portion of the population.[759] As Susan Forbes Martin explains, "[t]here is evidence that psychological strains for husbands unable to assume normal cultural, social and economic roles can result in aggressive behavior towards wives and children. The enforced idleness, boredom and despair that permeate many camps are natural breeding grounds for such violence."[760] In Tanzania, for example, 95 percent of the cases of refugees seeking protection inside the Ngara camp related to domestic violence.[761]

Beyond physical security risks from officials and fellow refugees, refugees living in camps are frequently "sitting ducks" for attacks. The risk of attack may come from bandits or armed bands, particularly where refugees are located in remote areas.[762] The Ugandan rebel group "Lord's Resistance Army" has massacred Sudanese refugees in northern Uganda.[763] Bandits

[756] S. Forbes Martin, *Refugee Women* (1991) (Forbes Martin, *Refugee Women*), at 21.

[757] B. S. Chimni, *International Academy of Comparative Law National Report for India* (1994), at 27.

[758] K. Vick, "For Somali refugees, no safe haven: fear of rape grips women in camps," *Washington Post*, June 3, 1999, at A-19.

[759] Lawyers' Committee for Human Rights, *Inhumane Deterrence: The Treatment of Vietnamese Boat People in Hong Kong* (1989), at 14–18.

[760] Forbes Martin, *Refugee Women*, at 21. See also Helton, "Thailand," at 33: "Overcrowding, shortages of food and water, stress and the constant fear of harassment of resistance elements within the camp, have created a deteriorating social situation. Incidents of domestic violence and suicide attempts have risen dramatically."

[761] "Due to the situation in the camps, husbands are not able to afford food for their families, or clothing. They are also idle all day, and drink local brews. And their poor economic status leads to lots of violence": "Focus on sexual violence among refugees," *UN Integrated Regional Information Networks*, May 7, 2002.

[762] UNHCR, "Note on Certain Aspects of Violence Against Refugee Women," UN Doc. A/AC.96/822, Oct. 12, 1993, at 8.

[763] "At Achol Pii, home to more than 16,000 people fleeing the war zones of southern Sudan, refugees were shot at point-blank range or cruelly hacked to death with machetes. Food was looted and more than 300 huts burned down": Amnesty International, "Sudan: Amnesty International Condemns 'Callous and Calculated' Killings by Ugandan Rebels," July 18, 1996. Such attacks continue; for example "[i]n early July [2003], LRA forces

attacked Burundian refugees at the Mtabila refugee camp in Tanzania. They targeted both the Tanzanian police working there and the refugees responsible for security, as well as their family members.[764]

Armed attacks by agents of the refugees' country of origin are also frequent, and occur most commonly when refugee camps are located near insecure border areas.[765] Perhaps most notoriously, refugee camps and settlements across Southern Africa were often attacked by agents of the *apartheid*-era South African government. Between 1974 and 1986, more than 5,000 refugees from South Africa were systematically killed in camps inside Mozambique and Zambia, as well as in their homes in Botswana, Lesotho, Swaziland, and Zimbabwe.[766] Guatemalan refugees in Mexican camps in the Lacandón area, and at the Las Vétices, La Sombra, La Hamaca, and El Chupadero camps were repeatedly attacked by Guatemalan armed forces during the 1980s. The Guatemalan military government accused the refugees of being rebel sympathizers, and continued the attacks until Mexico agreed to move the camps away from the border area.[767] An Anotov plane from Sudan bombed the Olua refugee settlement camp in northern Uganda.[768] Somali refugees forced to live at a camp just 500 meters from Kenya's border with Somalia were often killed in cross-border fighting.[769] Rebels fighting the Liberian government attacked Liberian refugees left unprotected just inside

attacked a refugee camp in Adjumani, killing six refugees, and causing over half of the twelve thousand inhabitants to flee. On August 5, an LRA raid on the Achol Pii settlement in Pader district resulted in the deaths of about sixty people. The rebels looted all the recently-delivered food, and burned what they could not carry. They forced the camp's twenty-four thousand refugees and relief staff to flee the site": Human Rights Watch, *World Report 2003* (2003), at 89.

764 "Curfew continues at refugee camps," *UN Integrated Regional Information Networks*, Apr. 3, 2003. Similar concerns arose at refugee camps in the Kakuma area: (2003) 127 *JRS Dispatches* (Feb. 28, 2003).

765 R. Gorman, *Mitigating Misery* (1993), at 173–174.

766 E. Mtango, "Military and Armed Attacks on Refugee Camps," in G. Loescher and L. Monahan eds., *Refugees and International Relations* 92 (1990) (Mtango, "Armed Attacks"), at 93.

767 J. Simon and B. Manz, "Representation, Organization, and Human Rights Among Guatemalan Refugees in Mexico – 1980–1992," (1992) 5 *Harvard Human Rights Journal* 95, at 108–109. Sadly, however, when Mexico decided to move the Guatemalan refugees from self-settled camps near the border to interior locations in order to avoid attacks on the refugees by the Guatemalan military, authorities resorted to flagrant human rights violations, including the burning of settlements, cutting off of food supplies, and forced evictions to achieve their goal: ibid. at 109–110.

768 (2001) 88 *JRS Dispatches* (Mar. 7, 2001).

769 "These refugees fled inter-claim fighting in Bulo Hawa just across the border in Somalia in April and have since been living in a temporary location called Border Point 1 ... A UNHCR statement issued in May said that the proximity of Border Point 1 to the border exposed it to danger": (2002) 114 *JRS Dispatches* (June 28, 2002).

the border of Côte d'Ivoire.[770] Hundreds of thousands of refugees from Sierra Leone were required to live in isolated camps in Guinea near the border with their country of origin. Beginning in March 1999, those camps frequently came under attack in cross-border excursions by rebels and government-sponsored militias,[771] forcing the UN drastically to cut back the delivery of vital supplies. As one refugee remarked, "It is better to die at home than die in Guinea ... We are caught in a death trap here. Both sides use us as human shields. We are surrounded by guns."[772]

While refugee camps, particularly those located near insecure borders, present the greatest risk to the physical security of refugees, even refugees allowed to move freely within asylum countries often remain at risk of physical attack. Refugees in Russia, particularly those with non-Slavic features, have been regularly beaten by police.[773] There have been numerous reports of the rape of Somali refugee women in Kenya by local police and military.[774] Egyptian police beat and jailed refugees and other non-citizens in "Operation Track Down Blacks" during 2002 and 2003; disregarding even official UNHCR refugee status documentation, the police held the refugees at

[770] "In June 1995, the worst single cross-border attack took place at Guiglo, where 32 people died ... UNHCR appears to have made no effort to persuade the Ivoirian authorities that border settlements are unsafe for refugees, and apparently supports the policy that they should not receive assistance outside the border *zone d'accueil*": Lawyers' Committee for Human Rights, *African Exodus* (1995), at 75. Renewed fighting has since led to comparable concerns. "Liberian refugees are being indiscriminately associated with the armed opposition in Côte d'Ivoire ... They are being killed both by Ivorian security forces and groups of civilians, some of them armed by the government ...": Amnesty International, "Côte d'Ivoire: Liberian refugees at imminent risk," Feb. 20, 2003, available at http://web.amnesty.org/library (accessed Aug. 9, 2003).

[771] (1999) 50 *JRS Dispatches* (May 31, 1999).

[772] D. Farah, "For refugees, hazardous haven in Guinea," *Washington Post*, Nov. 6, 2000, quoting Ibrahim Suri Jollah, who had lived at Kaliah II camp for three years.

[773] More than 400 incidents of police harassment of refugees were recorded during the first half of 1994, with some refugees reporting several beatings in a single day: Lawyers' Committee for Human Rights, "Commitments without Compliance: Refugees in the Russian Federation" (1996), at 16. "Xenophobia and racism in Russia are increasing rapidly. In many cases, the police are more sympathetic to extremist youth groups (skinheads) which commit crimes against Chechens or Africans than to the victims. Often, the authorities do not want to prosecute these cases at all. If a case does go to court, the authorities do their best to get reduced sentences and decrease the time of imprisonment or the level of punishment": ACCORD/UNHCR, "Eighth European Country of Origin Information Seminar, Vienna, 28–29 June 2002 – Final Report: Russian Federation" (2002), at 216.

[774] Africa Watch Women's Rights Project, "Seeking Refuge, Finding Terror: The Widespread Rape of Somali Women in North Eastern Kenya," Oct. 4, 1993, at 3; F. Musse, "Women Victims of Violence: Rape in Kenya's Refugee Camps," (1994) 16 *Refugee Participation Network* 17, at 17–20.