

**THE  
REFUGEE  
IN  
INTERNATIONAL  
LAW**

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## Chapter 4

### *NON-REFOULEMENT*

The principle of *non-refoulement* prescribes, broadly, that no refugee should be returned to any country where he or she is likely to face persecution or torture. In this chapter, the scope of the principle is examined against the background of a number of recurring issues: the question of 'risk'; the personal scope of the principle, including its application to certain categories of asylum seekers such as stowaways or those arriving directly by boat; exceptions to the principle; extraterritorial application; extradition; and the 'contingent' application of the principle in situations of mass influx. The possible application of *non-refoulement* or an analogous principle of refuge to those outside the 1951 Convention/1967 Protocol is also considered, as is the relationship between *non-refoulement* and asylum. The analysis takes account of the increasing number of references to *non-refoulement* in nominally non-refugee instruments, as well as the emerging jurisprudence of non-return in treaty-monitoring bodies such as the Committee against Torture, the Human Rights Committee and their regional counterparts.

#### 1. Evolution of the principle

The term *non-refoulement* derives from the French *refouler*, which means to drive back or to repel, as of an enemy who fails to breach one's defences. In the context of immigration control in continental Europe, *refoulement* is a term of art covering, in particular, summary reconduction to the frontier of those discovered to have entered illegally and summary refusal of admission of those without valid papers.<sup>1</sup> *Refoulement* is thus to be distinguished from expulsion or deportation, the more formal process whereby a lawfully resident alien may be required to leave a State, or be forcibly removed.

The idea that a State ought not to return persons to other States in certain circumstances is of comparatively recent origin. Common in the past were formal agreements between sovereigns for the reciprocal surrender of subversives, dissidents, and traitors.<sup>2</sup> Only in the early- to mid-nineteenth century do the concept of asylum and the principle of non-extradition of political offenders

<sup>1</sup> Historically, many bilateral agreements have institutionalized the practice; see the '*conventions de prise en charge à la frontière*' discussed in Batiffol and Lagarde, *Droit international privé* (5th ed., 1970) i. 198; and the '*Übernahme-*' or '*Schubabkommen*' discussed in Schiedermaier, *Handbuch des Ausländerrechts der Bundesrepublik Deutschland*, 178, 227-30 (1968). For their more modern counterparts, see UNHCR, 'Overview of Re-Admission Agreements in Central Europe', (Sept. 1993); also Inter-Governmental Consultations, 'Working Paper on Readmission Agreements', (Aug. 1994).

<sup>2</sup> Goodwin-Gill, G. S., *International Law and the Movement of Persons between States*, (1978), 143, n. 2.

begin to concretize, in the sense of that protection which the territorial sovereign can, and perhaps should, accord. At that time, the principle of non-extradition reflected popular sentiment that those fleeing their own, generally despotic governments, were worthy of protection.<sup>3</sup> It was a period of political turmoil in Europe and South America, as well as of mass movements of populations occasioned by pogroms against Jewish and Christian minorities in Russia and the Ottoman Empire.

A sense of the need to protect the persecuted can be gathered from the United Kingdom's 1905 Aliens Act, where section 1 made an exception to refusal of entry for want of means in respect of those 'seeking to avoid prosecution or punishment on religious or political grounds or for an offence of a political character, or persecution involving danger of imprisonment or danger to life or limb on account of religious belief'. Not until after the First World War, however, did international practice begin to accept the notion of non-return, and only in 1933 does the first reference to the principle that refugees should not be returned to their country of origin occur in an international instrument.<sup>4</sup> In article 3 of the 1933 Convention relating to the International Status of Refugees, the contracting parties undertook not to remove resident refugees or keep them from their territory, 'by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*) unless dictated by national security or public order.<sup>5</sup> Each State undertook, 'in any case not to refuse entry to refugees at the frontiers of their countries of origin'. Only eight States ratified this Convention, however; three of them, by reservations and declarations, emphasized their retention of sovereign competence in the matter of expulsion, while the United Kingdom expressly objected to the principle of non-rejection at the frontier.

Agreements regarding refugees from Germany in 1936 and 1938 also contained some limitation on expulsion or return.<sup>6</sup> They varied slightly: broadly, refugees required to leave a contracting State were to be allowed a suitable period to make arrangements; lawfully resident refugees were not to be expelled or sent back across the frontier<sup>7</sup> save 'for reasons of national security or public order'; and even in such cases, governments undertook not to return refugees to

<sup>3</sup> See, for example, 6 *British Digest of International Law*, 53-4, 64—5.

<sup>4</sup> Under a 1928 arrangement (89 *LNTS* No. 2005), States had adopted a recommendation (no. 7), 'that measures for expelling foreigners or for taking such other action against them be avoided or suspended in regard to Russian and Armenian refugees in cases where the person concerned is not in a position to enter a neighbouring country in a regular manner'. The recommendation was not to apply to a refugee who had entered a State in intentional violation of national law.

<sup>5</sup> 159 *LNTS* No. 3663; official text in French.

<sup>6</sup> Art. 4, Provisional Arrangement concerning the Status of Refugees coming from Germany, 1936: 171 *LNTS* No. 3952; official text in English and French. The arrangement was signed by seven States; the UK excluded refugees subject to extradition proceedings from the ambit of art. 4, and likewise, for most purposes, refugees admitted for a temporary visit or purpose. See also art. 5, Convention concerning the Status of Refugees coming from Germany, 1938: 192 *LNTS* No. 4461; official texts in English and French. The Convention was ratified by only three States; the UK repeated its 1936 reservations.

<sup>7</sup> The 1938 Convention substituted 'measures of expulsion or reconduction ...'

the German Reich,<sup>8</sup> ‘unless they have been warned and have refused to make the necessary arrangements to proceed to another country or to take advantage of the arrangements made for them with that object’.

Action in the inter-war period focused principally on improving administrative arrangements to facilitate resettlement and relieve the burden on countries of first asylum. The need for protective principles for refugees began to emerge, but limited ratifications of instruments containing equivocal and much qualified provisions effectively prevented the consolidation of a formal principle of *non-refoulement*. Nevertheless, the period was also remarkable for the very large numbers of refugees not in fact sent back to their countries of origin, whether they fled Russia after the revolution, Spain, Germany, or the Ottoman Empire.<sup>9</sup>

Following the Second World War, a new era began. In February 1946, the United Nations expressly accepted that ‘refugees or displaced persons’ who have expressed ‘valid objections’ to returning to their country of origin should not be compelled to do so.<sup>10</sup> The International Refugee Organization was established the same year, charged with resolving the problems of displacement left over from the war; some 1,620,000 refugees were assisted with resettlement and integration, while many others fleeing political developments in Eastern Europe were readily admitted to Western countries.<sup>11</sup>

In 1949, the United Nations Economic and Social Council (ECOSOC) appointed an *Ad hoc* committee to ‘consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and, if they consider such a course desirable, draft the text of such a convention’.<sup>12</sup> The *Ad hoc* committee on Statelessness and Related Problems met twice in New York in January-February and August 1950,<sup>13</sup> and

<sup>8</sup> The 1936 arrangement read: ‘refugees shall not be sent back across the frontier of the Reich’; the 1938 Convention provided that States parties ‘undertake’ not to reconduct refugees to German territory.

<sup>9</sup> Kiss notes, for example, that in 1939 France admitted 400,000 refugees from Spain in just ten days: *Répertoire de la pratique française en droit international public*, (1966), vol. 4, 433-5.

<sup>10</sup> UNGA res. 8(1), 12 Feb. 1946, para. (c)(ii).

<sup>11</sup> On IRO and post Second World War practice, see Marrus, M., *The Unwanted: European Refugees in the Twentieth Century*, (1985); Rystad, G., ed., *The Uprooted: Forced Migration as an International Problem in the Post-War Era*, (1990); Skran, C., *Refugees in Inter-War Europe: The Emergence of a Regime*, (1995). State practice of the immediate post-war period, however, is regrettably inconclusive. Writing in 1954, Weis found that *refoulement* was rare, save ‘in the case of some Russians and Ukrainians covered by certain wartime agreements’: Weis, P., ‘The International Protection of Refugees’, 48 *AJIL* 193 at 196 (1954). The release of relevant documents to public scrutiny thirty years later showed the full extent of a forcible repatriation policy which meant death or horrific treatment for well over two million, by no means all of them covered by those wartime agreements: see Tolstoy, N., *Victims of Yalta* (1977, rev. ed. 1979); Bethell, N., *The Last Secret* (1974).

<sup>12</sup> ECOSOC res. 248(IX)B, 8 Aug. 1949.

<sup>13</sup> The Committee decided to focus on the refugee, and duly produced a draft convention. In August 1950, ECOSOC returned the draft for further review, before consideration by the General Assembly, and finalized the Preamble and refugee definition. In Dec. 1950, the General Assembly decided to convene a Conference of Plenipotentiaries to complete the draft: UNGA res. 429(V), 14 Dec. 1950. See generally *Report of the Ad hoc Committee on Refugees and Stateless Persons*, Second Session: UN doc. E/1850. The Committee had been renamed in the interim. The

drew up the following provision, considered so fundamental that no exceptions were proposed:

No contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or political opinion.<sup>14</sup>

During this same period, however, States resisted inclusion of a right to be granted asylum, both in the 1948 Universal Declaration of Human Rights and in the 1951 Convention. The 1951 Conference of Plenipotentiaries also had concerns regarding the absoluteness of *non-refoulement*, adding the following paragraph to what was to become article 33:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.<sup>15</sup>

Apart from certain situations of exception, the drafters of the 1951 Convention clearly intended that refugees not be returned, either to their country of origin or to other countries in which they would be at risk.<sup>16</sup>

most important United Nations documents from this period are usefully collected in Takkenberg, A. and Tahbaz, C. C., *The Collected Travaux Préparatoires of the 1951 Convention relating to the Status of Refugees*, 3 volumes, Dutch Refugee Council/European Legal Network on Asylum, Amsterdam, 1988.

<sup>14</sup> UN doc. E/1850, para. 30. Cf. Louis Henkin, US delegation: 'Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same ... Whatever the case might be ... he must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp': *Ad hoc* Committee on Statelessness and Related Problems: UN doc. E/AC.32/SR.20, paras. 54-5 (1950). The Israeli delegate reiterated that the prohibition on return 'must, in fact, apply to all refugees, whether or not they were admitted to residence; it must deal with both expulsion and non-admittance'; he concluded that '[t]he Committee had already settled the humanitarian question of sending any refugee whatever back to a territory where his life or liberty might be in danger.' *Ibid.*, paras. 60-1 - The British delegate also concluded from the discussion that the notion of *refoulement* 'could apply to ... refugees seeking admission': UN doc. E/AC.32/SR.21, para. 16.

<sup>15</sup> The change in the international situation between the meeting of the *Ad Hoc* Committee in Aug. 1950 and the Conference in July 1951 is usually cited as the reason for the introduction of exceptions; see UN doc. A/CONF.2/SR.16, 8 (views of the UK).

<sup>16</sup> The *Ad hoc* Committee reported in its comments that the draft article referred 'not only to the country of origin but also to other countries where the life or freedom of the refugee would be threatened': see UN doc. E/AC.32/SR.20, p. 3, for the UK's proposal and views; UN doc. E/1618, E/AC.32/5, p. 61, for the *Ad hoc* Committee comment. Sweden proposed a more specific rule against the return of a refugee to a country 'where he would be exposed to the risk of being sent to a territory where his life or freedom' would be threatened, for example, by extradition or expulsion: see UN docs. A/CONF.2/70, A/CONF.2/SR.16, p. 9. This was withdrawn, on the assumption that art. 33 covered at least some of the ground. The Danish representative noted that a government expelling a refugee to an intermediate country could not foresee how that State might act. But if expulsion presented a threat of subsequent forcible return to the country of origin, then the life or liberty of the refugee would be endangered, contrary to the principle of *non-refoulement*. see UN doc. A/CONF.2/SR. 16, p. 9f. In *Re Musisi* [1987] 2 WLR 606, at 620, the UK House of Lords

As expressed in article 33, the principle of *non-refoulement* raises questions as to its personal scope and relation to the issues of admission and non-rejection at the frontier. It is a rule clearly designed to benefit the refugee, the person who in the sense of article 1 of the Convention, has a well-founded fear of being persecuted on grounds of race, religion, nationality, membership of a particular social group, or political opinion. In principle, its benefit ought not to be predicated upon formal recognition of refugee status which, indeed, may be impractical in the absence of effective procedures or in the case of a mass influx.<sup>17</sup> Likewise, it would scarcely be consonant with considerations of good faith for a State to seek to avoid the principle of *non-refoulement* by declining to make a determination of status.

From the point of general, as opposed to treaty-based international law, the issue is rendered more problematic by developments in the refugee definition, as well as by doubts as to the scope and standing of *non-refoulement* outside the relevant international instruments. Recent extensions of UNHCR's mandate might be purely functional, in that they authorize the channelling of material assistance but do not justify the exercise of protection. States have in turn argued that, in regard to the expanded class, their obligations are humanitarian rather than legal.<sup>18</sup> As shown below, however, State practice in cases of mass influx offers some support for the view that *non-refoulement*, or an analogous principle of refuge, applies both to the individual refugee with a well-founded fear of persecution, and to the frequently large groups of persons who do not in fact enjoy the protection of the government of their country of origin in certain fairly well-defined circumstances.

## 2. Relation of the principle of *non-refoulement* to particular issues

### 2.1 ADMISSION AND NON-REJECTION AT THE FRONTIER

Those who argue in favour of the restrictive view of the obligations of States under article 33 sometimes rely on comments made by the Swiss and Dutch delegates to the Conference of Plenipotentiaries in 1951. The Swiss interpretation of *non-refoulement* would have limited its application to those who have already entered State territory, but they spoke *only* about mass migrations, saying

struck down a decision to deny asylum to a Ugandan refugee and return him to Kenya, his country of first refuge. The reasons given by the Secretary of State indicated that he had failed to take into account, or to give sufficient weight to, a relevant consideration, namely, that on a number of occasions Kenya had handed over Ugandan refugees to the Ugandan authorities.

<sup>17</sup> Executive Committee Conclusion No. 6 (1977) reaffirms the principle of *non-refoulement*, irrespective of formal recognition of refugee status: para. (c). The 1979 Arusha Conference on the Situation of Refugees in Africa observed, among others, that refugee status procedures might be impractical in the case of large-scale movements of asylum seekers in Africa, and that special arrangements might be necessary. As a minimum, however, the conference recommended that the protection of individuals by virtue of the principle of *non-refoulement* be ensured: UN doc. A/AC.96/INF. 158 at 9.

<sup>18</sup> See above, Ch. 1, s. 7.

nothing about the non-applicability of article 33 outside that context.<sup>19</sup> The Dutch delegate considered that the word ‘return’ related only to refugees already within the territory, and that mass migrations were not covered.<sup>20</sup> This narrow view did not fully square with the meaning of *refoulement* in European immigration law or with the letter of article 3 of the 1933 Convention, at least in their individual dimension. The words ‘expel or return’ in the English version of article 33 also have no precise meaning in general international law. The former may describe any measure, judicial, administrative, or police, which secures the departure of an alien, although article 32 possibly implies that measures of expulsion are reserved for lawfully resident aliens. The word ‘return’ is even vaguer; to the Danish representative it suggested such action as a State might take in response to a request for extradition.<sup>21</sup> The Dutch delegate’s comments, however, primarily reflected concern that the draft article would require his government to grant *entry* in the case of a mass migration.<sup>22</sup>

Probably the most accurate assessment of States’ views in 1951 is that there was no unanimity, perhaps deliberately so. At the same time, however, States were not prepared to include in the Convention any article on admission of refugees; *non-refoulement* in the sense of even a limited obligation to allow entry may well have been seen as coming too close to the unwished-for duty to grant asylum.

The views of commentators on the scope of article 33 have varied,<sup>23</sup> and lit-

<sup>19</sup> UN doc. A/CONF.2/SR.16, p. 6; see also Weis, P., ‘Legal Aspects of the Convention of 28 July 1951 relating to the Status of Refugees,’ 30 *BYIL* 478, at 482 (1953).

<sup>20</sup> See below, n. 22.

<sup>21</sup> UN doc. A/CONF.2/SR.16, p. 10. On extradition and *non-refoulement*, see below, s. 3.3.3.

<sup>22</sup> For the Dutch delegate’s comments, see UN doc. A/CONF.2/SR.35 at 21: Baron van Boetzelaer of the Netherlands, ‘recalled that at the first reading the Swiss representative had expressed the opinion that the word “expulsion” related to a refugee already admitted into a country, whereas the word “return” (“refoulement”) related to a refugee already within the territory but not yet resident there ... At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation ... In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33 . . . There being no objection, the PRESIDENT ruled that the interpretation given by the Netherlands representative should be *placed on the record*.’ (Emphasis added). Earlier, the Dutch delegate explained that his concern was that of ‘a country bordering on others . . . about assuming unconditional obligations as far as mass influxes of refugees were concerned . . . unless international collaboration was sufficiently organized to deal with such a situation’: UN doc. A/CONF.2/SR.16 at 11 (emphasis added). The Dutch comments are thus neither an ‘official’ interpretation of the Convention, nor a binding limitation on the plain language.

<sup>23</sup> Cf. Robinson: *Commentary*, (1953), 163—art. 33 ‘concerns refugees who have gained entry into the territory of a contracting State, legally or illegally, but not refugees who seek entrance into this territory’; Weis: 30 *BYIL* (1953) at 482-3—*non-refoulement* ‘leads the way to the adoption of the principle that a State shall not refuse admission to a refugee, i.e. it shall grant him at least temporary asylum ... if non-admission is tantamount to surrender to the country of persecution’; (High Commissioner for Refugees) Schnyder, F., ‘Les aspects juridiques actuels du problème des réfugiés’, Hague *Recueil* (1965-1) 339, at 381—the principles of non-rejection and temporary asylum are becoming more and more recognized; (High Commissioner for Refugees) Sadruddin Aga Khan,

tie is to be gained today by further analysis of the motives of States or the meaning of words in 1951. likewise, it is fruitless to pay too much attention to moments of entry or presence, legal or physical. As a matter of fact, anyone presenting themselves at a frontier post, port, or airport will already be within State territory and jurisdiction; for this reason, and the better to retain sovereign control, States have devised fictions to keep even the physically present alien technically, legally, unadmitted.<sup>24</sup> Similarly, no consequence of significance can be derived from repeated reliance on the proposition that States have no duty to admit refugees, or indeed, any other aliens. 'No duty to admit' begs many questions; in particular, whether States are obliged to protect refugees to the extent of not adopting measures which will result in their persecution or exposure to danger. State practice in fact attributes little weight to the precise issue of admission, but far more to the necessity for *non-refoulement* through time, pending the obtaining of durable solutions.

Let it be assumed that, in 1951, the principle of *non-refoulement* was binding solely on the conventional level, and that it did not encompass non-rejection at the frontier. Analysis today requires full account of State practice since that date,<sup>25</sup> as well as that of international organizations. Over the last forty-five or so years, the broader interpretation of *non-refoulement* has established itself. States have allowed large numbers of asylum seekers not only to cross their frontiers, for example, in Africa, Europe and South East Asia, but also to remain pending a solution.<sup>26</sup> State practice, individually and within international organizations, has contributed to further progressive development of the law. By and large, States in their practice and in their recorded views, have recognized that

'Legal problems relating to refugees and displaced persons', Hague *Recueil* (1976-1) 287, at 318-22—concluding that States do not accept the rule of non-rejection. See also Weis, P., 'Territorial Asylum', 6 *Indian Journal of International Law* (1966) 173, at 183—arguing for extension of the principle to non-rejection at the frontier, otherwise protection becomes dependent on 'the fortuitous circumstance' that the refugee has successfully entered State territory. Grahl-Madsen consistently argued that art. 33 is limited to those present, lawfully or unlawfully, in the territory of contracting States, that protection depends upon having 'set foot' in that territory: *The Status of Refugees in International Law*, (1966), vol. 2, 94-9; *Territorial Asylum*, (1980), 40ff.

<sup>24</sup> See, for example, the elaborations of Lord Denning in *R. v. Governor of Brixton Prison, ex parte Soblen* [1963] 2 QB 243; also the US decisions cited by Pugash, 'The Dilemma of the Sea Refugee: Rescue without Refuge,' 18 *Haw. ILJ* (1977) 577, at 592ff; *A Study on Statelessness* (UN doc. E/1112 and Add. 1, 1949, at 60) defines *reconduction* as 'the mere physical act of ejecting from the national territory a person who has gained entry or is residing therein irregularly' and *expulsion* as 'the juridical decision taken by the judicial or administrative authorities whereby an individual is ordered to leave the territory of the country'. The study observes that terminology varies, but for its purposes the term *refoulement* (reconduction) was not used to signify the act of preventing a foreigner present at the frontier from entering the national territory.

<sup>25</sup> Note Vienna Convention on the Law of Treaties, art. 31(1), (2) and further below, Ch. 9, s. 3.3.

<sup>26</sup> In 1953 the French Minister of the Interior, advising the Parliament that asylum seekers from Spain were still arriving, gave assurances that none was refused admission; all were allowed to remain pending determination of refugee status, when those not recognized were invited to return to their country: Kiss, *Repertoire de la pratique française*, vol. 4, 434—5. In 1956, following the Hungarian crisis, some 180,000 were granted immediate first asylum in Austria, and a further 20,000 in Yugoslavia: UNHCR, *A Mandate to Protect and Assist Refugees*, (1971), 67-77.



*non-refoulement* applies to the moment at which asylum seekers present themselves for entry. Certain factual elements may be necessary (such as human rights violations in the country of origin) before the principle is triggered, but the concept now encompasses both non-return and non-rejection. A realistic appraisal of the normative aspect of *non-refoulement* in turn requires that the rule be examined not in isolation, but in its dynamic sense and in relation to the concept of asylum and the pursuit of durable solutions.

## 2.2 CONVENTIONS AND AGREEMENTS

In addition to the 1951 Convention/1967 Protocol, the principle of *non-refoulement* is powerfully expressed in article 3 of the 1984 UN Convention against Torture:

1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

International humanitarian law provides additional support. The 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War define 'protected persons' as 'those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.<sup>27</sup> Article 45 provides in part:

Protected persons shall not be transferred to a Power which is not a party to the Convention ... In no circumstances shall a protected person be transferred to a country *where he or she may have reason to fear persecution for his or her political opinions or religious beliefs*. (Emphasis added).

*Non-refoulement* is also embodied in regional instruments. Article 11(3) of the 1969 OAU Convention Governing the Specific Aspects of Refugees Problems in Africa<sup>28</sup> declares that,

[n]o person shall be subjected ... to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened.

Article 12(3) of the 1981 African [Banjul] Charter of Human and Peoples' Rights focuses specifically on asylum:

<sup>27</sup> Art. 4, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Convention of 12 Aug. 1949).

<sup>28</sup> 1001 UNIS 45; below Annexe 2, No. 1.

Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

The central features of *non-refoulement* are present in article 22(8) the 1969 American Convention on Human Rights:

In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.<sup>29</sup>

In the Americas, regional protection of asylees goes back to the 1889 Montevideo Treaty on International Penal Law;<sup>30</sup> article 16 proclaims that 'Political refugees shall be afforded an inviolable asylum', and article 20 excludes extradition for political crimes.<sup>31</sup> Each of these regional instruments has been widely accepted, with no reservations recorded or attempted with respect to the basic principle of non-return.

*Non-refoulement* is covered, at least in part, by article 3 of the 1950 European Convention on Human Rights, prohibiting torture, or cruel, inhuman or degrading treatment or punishment. In the view of the European Commission on Human Rights,

If conditions in a country are such that the risk of serious treatment and the severity of that treatment fall within the scope of article 3, a decision to deport, extradite or expel an individual to face such conditions incurs the responsibility ... of the contracting State which so decides.<sup>32</sup>

This illustrates the general issue of State responsibility in regard to the removal of persons from State territory, and is founded on the unqualified terms of article 3, read in conjunction with article 1, requiring Contracting States to protect everyone within their jurisdiction from the real risk of such treatment, in the light of its irremediable nature.<sup>33</sup>

<sup>29</sup> *OAS Official Records*, OEA/Ser.K/XVI/1.1.

<sup>30</sup> *OAS Official Records*, OEA/Ser.X/1. Treaty Series 34. See also art. 20, 1940 Montevideo Treaty on International Penal Law; art. 3, 1954 Caracas Convention on Territorial Asylum ('No State is under the obligation to surrender to another State, or to expel from its own territory, persons persecuted for political reasons or offenses'); below, Annexe 2, No. 3.

<sup>31</sup> Other relevant provisions include art. 4(5), 1981 Inter-American Convention on Extradition; art. 3(2), 1957 European Convention on Extradition; below, Annexe 2, No. 10.

<sup>32</sup> *Kirkwood v. United Kingdom* (10479/83), 37 D & R 158; *The Chahal Family v. United Kingdom* (22414/93), 27 June 1995: according to the European Commission on Human Rights, art. 3 guarantees 'are of an absolute character, permitting no exception', and '[t]o this extent the Convention provides wider guarantees than Articles 32 and 33' of the 1951 Convention (paras. 103-4). See further below, Ch. 8, s. 2.2.1, for an assessment of the practical protection that may, or may not, be due under the regional system.

<sup>33</sup> Art. 3 of the European Convention has been interpreted as an obligation to afford humanitarian assistance in cases of gross violation of human rights by other States, although it has been argued that this gives rise to no general right of 'temporary refuge', and that the article's focus on conduct of particular gravity attracts a heavy evidential burden ('substantial grounds to fear', 'actual concrete danger'): Hailbronner, K., *Non-refoulement* and "Humanitarian" Refugees: Customary

### 2.3 DECLARATIONS AND RESOLUTIONS

Besides the range of obligations formally undertaken by States, the standing of the principle of *non-refoulement* in international law must also be assessed by reference to formally non-binding declarations and resolutions. States are able to express their views and policies in a variety of international fora; if their practice in turn conforms to such statements, this may give further support to the concretization of a norm of customary international law.

Thus, the 1967 Declaration on Territorial Asylum, adopted unanimously by the General Assembly, recommends that States be guided by the principle that no one entitled to seek asylum 'shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution'.<sup>34</sup>

Very similar language was used in article 111(3) of the Principles concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee in Bangkok in 1966.<sup>35</sup> A resolution adopted by the Committee of Ministers of the Council of Europe the following year acknowledged that member States should 'ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution ..'.<sup>36</sup> The Committee of Ministers reiterated this principle in 1984, 'regardless of whether [the] person has been recognized as a refugee ..'.<sup>37</sup> The 1984 Cartagena Declaration is yet more categorical, not only endorsing a broader, regional-specific refugee definition, but also reiterating the importance of *non-refoulement* and non-rejection at the frontier as a 'corner-stone' of international protection, having the status of *jus cogens*?<sup>38</sup>

The United Nations has lately recognized the relationship between *non-refoulement* and the protection of human rights. For example, the Principles on

International Law or Wishful Legal Thinking? 26 *VirgJIL* 857 (1986); also published in Martin, D., *The New Asylum-Seekers*, (1988). So far as this is indeed borne out by the case law, art. 3 may fail to offer any *additional* protection to the refugee, while it nevertheless strengthens the basic principle of non-return to certain specifically threatening situations. See further below.

<sup>34</sup> Art. 3(1); below, Annexe 1, No. 6. Note that art. 3(2) provides that an exception may be made to the basic principle, 'only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons'. In such circumstances, the State contemplating such exception, 'shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State': art. 3(3).

<sup>35</sup> *Report of the Eighth Session of the Asian-African Legal Consultative Committee*, Bangkok, 8-17 Aug. 1966, 355; below, Annexe 4, No. 8. The Bangkok Principles also make provision for provisional asylum in cases of exception; see art. 111(4).

<sup>36</sup> Res. (67) 14 on Asylum to Persons in Danger of Persecution, adopted 29 June 1967; below, Annexe 4, No. 5. Compare the formulation adopted in art. 11(3) of the 1969 OAU Convention.

<sup>37</sup> Rec. No. R (84) 1, Recommendation on the Protection of Persons satisfying the Criteria in the Geneva Convention who are not Formally Recognized as Refugees.

<sup>38</sup> Cartagena Declaration, Conclusions and Recommendations, III, 5; below, Annexe 2, No. 7.

the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, endorsed by the General Assembly in 1989, provide that ‘no one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country’.<sup>39</sup> In 1992, the General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance, article 8(1) of which declares that ‘No State shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance’.<sup>40</sup> Both of these provisions contribute to and confirm the meaning of persecution, and even if they do not expand the substantive scope of protection, nevertheless consolidate the legal standing of the principle of *non-refoulement* in general international law.

#### 2.4 THE UNHCR EXECUTIVE COMMITTEE CONCLUSIONS ON INTERNATIONAL PROTECTION

The UNHCR Executive Committee<sup>41</sup> has consistently endorsed the fundamental character of the principle of *non-refoulement*, in its annual general and specific conclusions. In 1977, for example, the Executive Committee noted that the principle was ‘generally accepted by States’, expressed concern at its disregard in certain cases, and reaffirmed,

the fundamental importance of the observance of the principle of *non-refoulement*—both at the border and within the territory of a State—of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.<sup>42</sup>

*Non-refoulement* as a paramount consideration has also been reiterated in specific contexts. For example, ‘in the case of large-scale influx, persons seeking asylum should always receive at least temporary refuge’;<sup>43</sup> similarly, ‘in situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge ... In all cases the fundamental principle of *non-refoulement*—including non-rejection at the frontier—must be scrupulously observed’.<sup>44</sup>

In its 1982 general conclusion on protection, the Executive Committee expressed the view that the principle ‘was progressively acquiring the character of a preemptory rule of international law’.<sup>45</sup> Reported instances of breach of the

<sup>39</sup> UNGA res. 44/162, 15 Dec. 1989, para. 5; below, Annexe 4, No. 3. See also ECOSOC res. 1989/65, 24 May 1989, recommending that the principles annexed to the resolution be taken into account and respected by governments.

<sup>40</sup> UNGA res. 47/133, 18 Dec. 1992, adopted without a vote; below, Annexe 4, No. 4. Art. 8(2) reproduces art 3(2), 1984 Convention Against Torture.

<sup>41</sup> On which see further below, Ch. 6, s. 1.1.1.

<sup>42</sup> Executive Committee Conclusion No. 6 (1977).

<sup>43</sup> Executive Committee Conclusion No. 19 (1980).

<sup>44</sup> Executive Committee Conclusion No. 22 (1981).

<sup>45</sup> *Report of the 33rd Session*: UN doc. A/AC.96/614, para. 70.

principle have been consistently deplored,<sup>46</sup> and in 1989, after the matter was raised expressly by UNHCR in its annual *Note on International Protection*,<sup>47</sup> the Executive Committee expressed its deep concern 'that refugee protection is seriously jeopardized in some States by expulsion and *refoulement* of refugees or by measures which do not recognize the special situation of refugees'.<sup>48</sup> The same year, when dealing with the problem of irregular movements, the Executive Committee affirmed that 'refugees and asylum seekers [who] move in an irregular manner from a country where they have already found protection . . . may be returned to that country if . . . they are protected there against *refoulement* . . .'; but if, in exceptional circumstances, the physical safety or freedom of such refugee or asylum seeker may be at risk, or he or she has good reason to fear persecution there, then their cases should be considered favourably.<sup>49</sup>

Similar language occurs in later conclusions. In 1991, the Executive Committee emphasized 'the primary importance of *non-refoulement* and asylum as cardinal principles of refugee protection', while indirectly stressing the protective purpose of the principle by reference to the need for refugees to be able to 'return in safety and dignity to their homes without harassment, arbitrary detention or physical threats during or after return'.<sup>50</sup>

In 1992, the Executive Committee maintained this traditional language, but emphasized also that UNHCR's involvement with internally displaced persons and related approaches, 'should not undermine the institution of asylum, as well as other basic protection principles, notably the principle of *non-refoulement*'<sup>51</sup>

The conclusions adopted by the UNHCR Executive Committee do not have force of law and do not, of themselves, create binding obligations. They may contribute, however, to the formulation of *opinio juris*—the sense of legal obligation with which States may or may not approach the problems of refugees. Some conclusions seek to lay down standards of treatment, or to resolve differences of interpretation between States or between States and UNHCR, while others are more hortatory, repeating and reaffirming basic principles without seeking either to expand their field of application.<sup>52</sup> They must therefore be reviewed in

<sup>46</sup> See, for example, Executive Committee Conclusions No. 46 (1987), *Report of the 38th Session*: UN doc. A/AC.96/702, para. 204; No. 50 (1988), *Report of the 39th Session*: UN doc. A/AC.96/721, para. 23.

<sup>47</sup> UN doc. A/AC.96/728 (2 Aug. 1989), para. 19.

<sup>48</sup> Executive Committee Conclusion No. 55, *Report of the 40th Session*: UN doc. A/AC.96/737 (19 Oct. 1989), para. 22(d).

<sup>49</sup> Executive Committee Conclusion No. 58 (1989), paras. (f), (g).

<sup>50</sup> Executive Committee Conclusion No. 65 (1991), *Report of the 42nd Session*: UN doc. A/AC.96/783 (21 Oct. 1991), para. 21(c), (j).

<sup>51</sup> Executive Committee Conclusion No. 68 (1992), *Report of the 43rd Session*: UN doc. A/AC.96/804, (15 Oct. 1992), para. 21(e), (f), (r). See also Executive Committee Conclusions No. 71 (1993); No. 74 (1994), *Report of the 45th Session*: UN doc. A/AC.96/839, para. 19; No. 77, *Report of the 46th Session*: UN doc. A/AC.96/860, para. 19 (1995).

<sup>52</sup> See Sztucki, J., 'The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme', 1 *LJRL* 285 (1989).

the context of States' expressed opinions, and in light of what they do in practice.

## 2.5 STATE VIEWS AND STATE PRACTICE

### 2.5.1 State views

The views and comments of States in the Executive Committee fall into two broad categories: first, general endorsements of the principle of *non-refoulement*, which usually say little about content or scope; and secondly, more focused comments, by which States seek to show where, in their opinion or practice, the limits to obligation lie.

One of the clearest general statements in support of the principle of *non-refoulement* was made by Ambassador Jonathan Moore, United States Co-ordinator for Refugee Affairs, at the Executive Committee in 1987.

Forced repatriation had occurred in almost every region of the world during the past year, resulting in death, serious injury and imprisonment. Considering that the most important element of a refugee's protection was the obligation of *non-refoulement*, it was tragic that refugees had been forced to return to their countries against their will and without assurances that they would not face persecution on their return, especially when such violations were committed by, or with the concurrence of, States parties to international instruments prohibiting such acts. The threat to a country posed by influxes of economic migrants should not serve as an excuse for refusing asylum.<sup>53</sup>

Other comments in the years since 1987 have ranged from support for the idea that *non-refoulement* was a rule of *jus cogens*,<sup>54</sup> to regret at reported instances of non-observance of fundamental obligations,<sup>55</sup> to concern at current challenges to the related 'principle of first asylum',<sup>56</sup> to the need, before implementing any form of compulsory return, to define objective criteria 'to determine whether security concerns had been fully met', and further, with respect to the cessation clauses, 'to ensure that refugees were not forced to return to unsafe countries'.<sup>57</sup>

More focused comments have raised issues of specific application. In 1987, the Turkish representative raised a particularly serious question:

The principle of *non-refoulement* . . . had to be scrupulously observed. Nevertheless, . . . countries of first asylum or transit . . . , faced with the difficulties of repatriation and the progressively more restrictive practices of host countries, might find themselves unable to continue bearing the burden and, for want of any other solution, come to regard *refoulement* as the only possible way out. If that should occur, they would not be

<sup>53</sup> UN doc. A/AC.96/SR.415, para. 16 (1987).

<sup>54</sup> Mr Mponda (Observer for Malawi): UN doc. A/AC.96/SR.431, para. 32 (1988).

<sup>55</sup> 'The *refoulement* of refugees must not be allowed to occur under any circumstances.' Mr Ceska (Austria): UN doc. A/AC.96/SR.439, para. 9 (1989).

<sup>56</sup> Mrs Lafontant (USA): UN doc. A/AC.96/SR.437, para. 49 (1989). Mrs Lafontant had succeeded Jonathan Moore, and was Ambassador-at-Large and US Co-ordinator for Refugee Affairs.

<sup>57</sup> Mr de Sa Barbuda (Brazil): UN doc. A/AC.96/SR.475, para. 83 (1992), commenting on temporary protection and its eventual termination as a possible alternative to the right of asylum in mass influx situations.

the only ones at fault, since the responsibility for ensuring the conditions necessary for observance of the *non-refoulement* principle rested with the international community as a whole.<sup>58</sup>

This precise point emerged again in 1989, when the Turkish representative remarked that the refugee problem, 'was such that it was no longer possible to disassociate international protection from international co-operation and assistance'.<sup>59</sup> Commenting on developments in Iraq in April 1991 and the arrival on the border of some half million Kurdish asylum seekers, the Turkish representative noted that while his country had tried to meet the needs of those concerned, '[t]he scale of the operation had . . . been prohibitive, and Turkey had been compelled to call for urgent international assistance . . . As a result of the subsequent international co-operation, virtually all those displaced persons had now been resettled in the security zone established in the north of Iraq.'<sup>60</sup> If the reference to 'security' can be taken as controlling, then the rather unique situation of the Kurdish people in search of refuge might still be interpreted consistently with a variant of *non-refoulement* that permits only limited exceptions, conditioning return or rejection in situations of mass influx on the availability of alternative forms of safety. This is not particularly persuasive, but the 'solution' imposed on northern Iraq remains unique.<sup>61</sup> In cases not involving 'mass migrations', no such exception could apply.<sup>62</sup>

Since 1985, a number of States have stressed that *non-refoulement* does not apply to non-Convention refugees, although many accept that protection needs are involved. In 1988, the Swiss representative was apprehensive that the 'dilution' of the refugee concept 'would . . . weaken the basic principle of *non-refoulement*'. While others might be allowed to remain for humanitarian reasons, this would not be based on a Convention obligation, so much as on 'considerations of humanitarian law or international solidarity, in other words, on a free decision by the State concerned'.<sup>63</sup> In 1990, several States called attention to the fact that they were parties to the 1984 United Nations Convention against Torture, and consequently also bound by that treaty's provision prohibiting return to situations of torture even of persons not technically within the refugee definition.

<sup>58</sup> Mr Yavuzalp (Turkey): UN doc. A/AC.96/SR.418, para. 74 (1987).

<sup>59</sup> Mr Demiralp (Turkey): UN doc. A/AC.96/SR.442, para. 92 (1989); see also Mr Gem Duna (Turkey): UN doc. A/AC.96/SR.456, para. 7 (1991). On several occasions, the Turkish representatives have both upheld the fundamental character of *non-refoulement* while simultaneously supporting the right of the asylum seeker to choose in which country to seek asylum, thereby staking a claim for a form of 'natural' burden-sharing. See further below, s. 3.2 on mass influx as exception.

<sup>60</sup> Mr Atkan (Turkey): UN doc. A/AC.96/SR.468, para. 18 (1991).

<sup>61</sup> See generally, Adelman, H., 'Humanitarian Intervention: The Case of the Kurds', 4 *LRL* 4 (1992).

<sup>62</sup> Although Turkey's formal reservations have focused on mass influx, its record on individual cases has not always been perfect; see Amnesty International, 'Turkey: Selective Protection. Discriminatory treatment of non-European refugees and asylum seekers' (1994); Kirişçi, K., 'Asylum seekers and Human Rights in Turkey', 10 *Neth. Q.H.R.* 447 (1992). Note however that Turkey maintains the geographical limitation to its obligations under the 1951 Convention/1967 Protocol.

<sup>63</sup> Mr Hadom (Switzerland): UN doc. A/AC.96/SR.430, para. 42, (1988).

Two delegations commented that ‘any responsibility not to return non-refugees was far less clear-cut in situations that do not involve torture.’<sup>64</sup>

In the Sub-Committee of the Whole on International Protection in 1992, a number of delegations warned against ‘borrowing terminology and approaches from the Convention for new refugee situations, to which these instruments were not intended to apply’. Several also did not accept that there was ‘a legal right of *non-refoulement* for non-1951 Convention refugees’; nevertheless, ‘minimum standards of protection’ were due, ‘including non-discrimination and other fair and humane treatment, as well as respect for the integrity of the family unit’.<sup>65</sup> While the ‘central importance’ of basic principles such as *non-refoulement* was reaffirmed, one delegation stated its belief that there was no ‘rule of customary international law preventing repatriation because of generalized conditions of unrest or violence’.<sup>66</sup> The year before, on the other hand, the Swedish representative, while conscious that legal solutions did not suffice and that prevention must also be considered, was of the view that protection should be extended not only to Convention refugees, ‘but also to people fleeing ... armed conflict or other forms of violence and to victims of natural or ecological disasters and extreme poverty. It was often far from easy to differentiate between such categories and asylum seekers motivated by purely economic considerations’.<sup>67</sup>

On other occasions, States have described practices which, in their view, did not amount to *refoulement*, such as normal immigration controls, visa policies and carrier sanctions. In 1988 again, the United Kingdom representative declared his country’s intention to abide fully by the principle, but this did not prevent the return of ‘failed asylum seekers’, or returns to ‘safe third countries’.<sup>68</sup> The representative for Argentina, on the other hand, was careful to stress that practices such as ‘the refusal of admission at a border for purely administrative reasons vitiated the principle of *non-refoulement*’.<sup>69</sup>

Discussion of the ‘safe country/safe country of asylum’ question has also led States to consider its relation to *non-refoulement*, with several delegations emphasizing that ‘the fundamental criterion when considering resort to the notion, was protection against *refoulement*’.<sup>70</sup> Similarly, only a change of circumstances ‘of a fundamental character’ in the country of origin would justify the termination of protection against *refoulement*.<sup>71</sup>

<sup>64</sup> Report of the Sub-Committee of the Whole on International Protection: UN doc. A/AC.96/758, 2 Oct. 1990, para. 29.

<sup>65</sup> Report of the Sub-Committee: UN doc. A/AC.96/802, 6 Oct. 1992, paras. 16-17.

<sup>66</sup> Ibid., para. 17.

<sup>67</sup> Mr Willen (Sweden): UN doc. A/AC.96/SR.464, para. 31 (1991).

<sup>68</sup> Mr Wrench (UK): UN doc. A/AC.96/SR.430, para. 53, (1988). This interpretation was reiterated the following year; see UN doc. A/AC.96/SR.442, para. 51 (1989).

<sup>69</sup> Mr Strassera (Argentina): UN doc. A/AC.96/SR. 442, para. 46 (1989).

<sup>70</sup> Report of the Sub-Committee of the Whole on International Protection: UN doc. A/AC.96/781, 9 Oct 1991, para. 34.

<sup>71</sup> Report of the Inter-Sessional Meeting of the Sub-Committee of the Whole on International Protection (23 Jan. 1992): UN doc. EC/SCP/70, 7 Jul. 1992.



Perhaps the most significant attack on the principle occurred in the Sub-Committee of the Whole on International Protection in 1989, when the United States representative attempted to establish some of the groundwork for its domestic litigation strategy in support of Haitian interdiction. Despite earlier US declarations of support for the principle of 'first asylum',<sup>72</sup> the United States delegate sought to distinguish between legally binding obligations and non-binding 'generally-accepted moral and political principles of refugee protection'.<sup>73</sup> The United States, he said, did not believe that States were under a legal obligation 'to admit persons seeking asylum':

As a matter of practice, the United States authorities did not return persons who were likely to be persecuted in their countries of origin . . . That was the practice, and . . . the policy of the United States, and not a principle of international law with which it conformed . . . It did not consider that the *non-refoulement* obligation under article 33 of the Convention included an obligation to admit an asylum seeker. The obligation . . . pertained only to persons already in the country and not to those who arrived at the frontier or who were travelling with the intention of entering the country but had not yet arrived at their destination. Furthermore, there was nothing to suggest that an obligation to admit asylum seekers had ripened into a rule of customary international law.<sup>74</sup>

The intervention, which attracted no support or comment from other States, was clearly drafted with the Haitian interdiction programme in mind; equally clearly, it failed to notice that *non-refoulement* is not so much about *admission* to a State, as about not returning refugees to where their lives or freedom may be endangered. It was also inconsistent with US support for the principle of first asylum, declared earlier in the same session, and even repeated in the same intervention.<sup>75</sup> Ultimately, however, this strategic departure from the accepted meaning of *non-refoulement* came too late to alter the obligations of the United States under international law.<sup>76</sup>

### 2.5.2 *State practice: some aspects*

The views of States and to some extent their practice also indicate a contingent dimension to the principle of *non-refoulement*. Reservations with respect to the security aspects of mass influxes have not died away since they were formally recognized in the 1967 UN Declaration on Territorial Asylum. On the contrary, they continue to surface in the discourse of many 'frontline' States, such as Turkey, Thailand, Zaire, or Tanzania. Clearly, from 1979 onwards resettlement guarantees and substantial financial contributions were a major factor in preserving the so-called principle of first asylum. In October 1979, for example,

<sup>72</sup> See above, n. 56 and text. US concern to defend the principle of first asylum was motivated in particular by practices in South East Asia, where Indo-Chinese boat people were not infrequently denied access to coastal States, placed back on board ships returning to their *country* of origin, or towed out to sea, often with resulting loss of life.

<sup>73</sup> Mr Kelley (USA): UN doc. A/AC.96/SR.442, paras. 78-9 (1989).

<sup>74</sup> *Ibid.*, paras. 80, 82.

<sup>75</sup> *Ibid.*, para. 81.

<sup>76</sup> See further below, s. 3.2.1.

Thailand announced the reversal of a policy which had earlier led to the forcible return of some 40,000 Kampuchean; henceforth, all asylum seekers were to be allowed to enter.<sup>77</sup> Likewise, the unnerving prospect of a repeat operation on behalf of Kurdish refugees imminently leaving northern Iraq for Turkey was a factor in the decision to establish a security zone, thereby removing or attenuating the factor of risk that would otherwise have triggered the principle of *non-refoulement*, if not its application in the particular circumstances.<sup>78</sup>

It is therefore important to distinguish carefully between situations of mass influx and other situations where the failure to apply the principle has led to protest. For example, bilateral agreements between East African States which led to *refoulement* and a mutual exchange of refugees were the subject of protest in 1983-4, followed by appeals for clemency on behalf of those tried and sentenced to death.<sup>79</sup> In 1987, the United States and UNHCR also protested the action of the Singapore authorities in placing two Vietnamese stowaways back on board a ship returning to Vietnam, despite the offer of resettlement guarantees. In another case in 1988, the High Commissioner intervened directly with the Prime Minister of Singapore, and the stowaways were allowed to disembark from the vessel on condition that they went straight to the airport and left Singapore.

In 1989, UNHCR welcomed the inclusion of *non-refoulement* in a new Italian decree, particularly given its broadening of criteria to cover those who could be persecuted for reasons of sex, language, personal or social conditions, or who risked being returned to another country in which they might run such risk. It expressed concern, however, at the limitation of protection to expulsion proceedings, so that rejection at the frontier was not covered. When the decree was 'converted' to a law the following year, protection was also extended to certain categories of asylum seekers, although the risk of frontier rejections and possible *refoulement* was increased, as in other European countries, by summary exclusions based on assumptions of 'protection elsewhere'. In June 1991, the Italian authorities sent back some 800-1,000 Albanian 'boat people', against guarantees from the country of origin. The non-penalization of the group led the authorities summarily to reject all of the 18,000 or so Albanians who arrived in early August that year. UNHCR did not intervene, on the basis that the Albanians were not of concern to the Office. Those fleeing the conflict in former Yugoslavia were admitted and protected during the same period, however.

Also in 1991, the United States revised its policy and practice with respect to Haitians intercepted on the high seas, electing to abandon the procedure of

<sup>77</sup> See *Report of the Secretary-General*; UN doc. A/34/627, para. 48; annex 1, para. 8.

<sup>78</sup> Both art. 11(4), 1969 OAU Convention and paras. 3 and 4 of Council of Europe Resolution 67 (14) acknowledge that States may have difficulty in fulfilling their obligations without international co-operation. Cf. Fonteyne, J.-P., 'Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees', 8 *Aust. TB Int'l Law* 162 (1983).

<sup>79</sup> See *Report of the 35th Session of the Executive Committee* (1984); UN docs. A/AC. 96/651, para. 24; A/AC.96/SR.369, para. 60 (The Netherlands).

screening for ‘colorable claims’ to asylum that had been applied over the previous ten years. The legality of this action is considered in more detail below.

The recent practice of States has frequently included the protection of persons fleeing situations of grave and urgent necessity, even as States resist formally classifying such persons as *refugees* when outside the terms of the 1951 Convention/1967 Protocol, and do not accept any obligation to grant them asylum or provide any particular durable solution.<sup>80</sup> The practice shows that States commonly accord refuge in such cases, and thereby confirm essential humanitarian principles deriving from a variety of sources, including the duties owed to the victims of armed conflict and to civilians caught up in or fleeing war; the obligation to protect those in danger of torture, as required by customary international law, now re-stated in article 3 of the 1984 United Nations Convention; and even the traditional practice whereby ships under *force majeure* or stress of weather are considered immune from the exercise of jurisdiction when entering a State, on the basis of urgent distress and grave necessity.

## 2.6 THE PRINCIPLE AND THE COMMENTATORS

While there is little difficulty in showing the extent of *treaty* obligations of *non-refoulement*, establishing the status of the principle in general on customary international law presents greater problems. In 1954, twenty-seven States participating in the UN Conference on the Status of Stateless Persons unanimously expressed the view that the *non-refoulement* provision of the 1951 Refugee Convention was ‘an expression of the generally accepted principle’ of non-return; for that reason, it was considered unnecessary to include an equivalent article for stateless persons.<sup>81</sup> That assessment was premature, but, as shown above, the principle of *non-refoulement* has since been reiterated and refined, included in a range of regional refugee, human rights and extradition treaties, repeatedly endorsed in a variety of international fora, and its violation protested by UNHCR and States.

Both article 33 of the 1951 Convention and article 3 of the 1984 Convention against Torture are of a ‘fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law’, as that phrase was used by the International Court of Justice in the *North Sea Continental Shelf* cases.<sup>82</sup> So far as both Convention provisions are formally addressed to the contracting Parties, the universality of the principle of *non-refoulement* has nevertheless been a constant emphasis of other instruments, including declarations, recommendations and resolutions at both international and regional levels. The proof of international customary law requires consistency and generality of practice, but

<sup>80</sup> A cogent account and analysis of State practice is given in Perluss, D. and Hartman, J., ‘Temporary Refuge: Emergence of a Customary International Norm/ 26 *Virg. JIL* 551 (1986); see also Meron, T., *Human Rights and Humanitarian Norms as Customary Law*, (1989); Goodwin-Gill, G. S., *Non-refoulement and the New Asylum-Seekers/ 26 Virg. JIL* 897 (1986).

<sup>81</sup> Final Act, UN Conference on the Status of Stateless Persons: 360 UNTS 117.

<sup>82</sup> ICJ *Rep.*, 1969, 3 at 42.

no particular duration; universality and complete uniformity are not required, but the practice must be accepted as law. In many cases, this *opinio juris* may be inferred from the evidence of a general practice, or a consensus in the literature.<sup>83</sup>

Writing separately in 1982, Feliciano, Hyndman and Kälin all expressed degrees of cautious reservation with respect to the scope of any customary international law rule prohibiting the return of refugees to countries in which they might be persecuted. Feliciano considered that, with one material qualification, 'the *non-refoulement* principle may properly be regarded as having matured into a norm of customary international law'. That qualification concerned the position of the 'socialist' countries: '[t]hus it appears that *non-refoulement* is a principle not of *general* customary law but of *regional* or *hemispherical* customary law, being widely or generally acknowledged in the non-socialist part of the globe'.<sup>84</sup>

Hyndman also thought that a good case could be made for a customary rule, but recognized that many States had reservations in the case of threats to national security, or in situations of mass influx: '\ . . the oft-repeated . . . exceptions cannot be ignored and may be indicative that if *non-refoulement* has become a binding principle it has become so with these limitations'.<sup>85</sup> Kälin was of the view that while the principle was customary law in the making, it was acknowledged as regional custom only in Europe, the Americas and Africa. In particular, he found significant the fact that in discussions on the UN Declaration on Territorial Asylum in the Sixth (Legal) Committee of the General Assembly, 'the great majority of delegations stressed that the draft... was not intended to propound legal norms, but to lay down broad humanitarian and moral principles upon which States might rely in seeking to unify their practices relating to asylum'.<sup>86</sup> Kälin was also concerned by the inconsistency and divergencies in State practice, including application of the refugee definition and its exceptions, which further narrowed the reach of the principle itself.<sup>87</sup>

A monograph on non-expulsion and *non-refoulement* published in 1989 took

<sup>83</sup> See Brownlie, I., *Principles of Public International Law*, (4th ed., 1990), 4—11.

<sup>84</sup> Feliciano, F. P., 'The Principle of *Non-Refoulement* A Note on International Legal Protection of Refugees and Displaced Persons,' 57 *Philippine LJ* 598, 608-9 (1982). (Emphasis in original).

<sup>85</sup> Hyndman, P., 'Asylum and *Non-Refoulement*—Are these Obligations owed to Refugees under International Law?' 57 *Philippine LJ* 43, 68-9 (1982). Grahl-Madsen thought the exception relating to mass influx 'may be acceptable': *Territorial Asylum*, (1980), 65-6. See also Martin, D. A., 'Large Scale Migrations of Asylum Seekers,' 76 *AJIL* 598 (1982).

<sup>86</sup> UN doc. A/6912, para. 13, quoted in Kälin, W., *Das Prinzip des Non-Refoulement*, (1982), 71. Grahl-Madsen, writing in 1980, commented that by 'being adopted by the General Assembly ... the principle of *non-refoulement* has most certainly acquired a high degree of general acceptance,' but he accorded it no greater legal status: *Territorial Asylum*, (1980), 42.

<sup>87</sup> 'Zusammenfassend ist festzustellen, dass das refoulement-Verbot heute noch nicht den Rang von universellem Völkergewohnheitsrecht erlangt hat, dass aber eine deutliche Entwicklung in diese Richtung besteht. Insofer lässt sich sagen, das non-refoulement-Prinzip sei in Entstehung begriffenes universelles Völkergewohnheitsrecht . . . Die Bedeutung dieser Aussage darf nicht überschätzt werden. Ein Blick auf die heutige Staatenpraxis zeigt nämlich, dass der Inhalt und die Tragweite eines solchen gewohnheitsrechtlichen Rückschiebungsverbotese sehr begrenzt wären.' Kälin, W., *Das Prinzip des Non-Refoulement*, (1982), 80-1.

issue with Kalin's thesis of lack of generality of practice sufficient to found a rule of customary international law. Stenberg argued that 'there is at least persuasive evidence that Article 33 . . . satisfies the criterion of generality. Moreover, the weightiest reason for the "persistent objection" by the South East Asian States does not seem to stem from a disregard of the principle of *non-refoulement* as such, but from the fear that these States may be left ... with a large backlog of persons who they feel they cannot admit on a permanent basis because of dangerous political, economic and social strains'.<sup>88</sup> Kälin also seems to have moved in the direction of customary international law, both as regards *non-refoulement* in its narrow, Convention-refugee sense,<sup>89</sup> and as a concept that includes protection against torture, inhuman treatment or other serious violations of human rights.<sup>90</sup>

Where those in flight have 'valid reasons' to seek refuge, but do not otherwise fall within the terms of the 1951 Convention/1967 Protocol, the responsibilities of States in general international law remain controversial. Differing approaches are evident in the UNHCR Executive Committee, with some States concerned to emphasize protection needs, and others to stress their sovereign discretion. In a 1986 paper somewhat ill-advisedly titled '*Non-refoulement and the new asylum seekers*', the present writer argued that while customary international law had incorporated the core meaning of article 33, it had also 'extend[ed] the principle of *non-refoulement* to include displaced persons who do not enjoy the protection of the government of their country of origin'.<sup>91</sup> Although framed with specific reference to danger caused by civil disorder, internal conflicts or human rights violations, the argument in terms of *non-refoulement* was not well chosen, particularly given States' perceptions linking the principle closely to Convention refugees and asylum. Rather, the impact on State competence of the broader developments relating to human rights and displacement would have been better served by characterizing State responsibilities in terms of a general principle of *refugee*.

Hailbronner has criticized the arguments for extended application of the *non-refoulement* principle as 'wishful legal thinking'.<sup>92</sup> His critique focuses on article 3 of the European Convention on Human Rights, rather than on international responses to a somewhat loosely defined category of 'humanitarian refugees'.

<sup>88</sup> Stenberg, G., *Non-expulsion and Non-Refoulement*, (1989), 275; on uniformity and consistency of practice and *opinio juris*, see also at 275-9.

<sup>89</sup> Kälin, W., *Grundriss des Asylverfahrens*, (1990), 210-11: 'Das Prinzip des non-refoulement im engeren Sinn ist ein Institut des Flüchtlingsrechtes'. Es schützt Flüchtlinge vor Rückschiebung in einen Staat, in welchen ihnen Verfolgung im flüchtlingsrechtlichen Sinn droht. Dieses Prinzip gilt nicht nur kraft Vertragsrecht, sondern . . . auch kraft Völkergewohnheitsrecht<sup>5</sup> (Footnotes omitted).

<sup>90</sup> 'Das Prinzip des non-refoulement bezeichnet das Verbot, Personen zwangsweise in einen Staat zurückzuschieben, in welchem sie in flüchtlingsrechtlich relevanter Weise verfolgt oder Folter, unmenschlicher Behandlung oder anderen besonders schwerwiegenden Menschenrechtsverletzungen ausgesetzt würden': *ibid.*, 210.

<sup>91</sup> Goodwin-Guil, G. S., '*Non-Refoulement and the New Asylum-Seekers*', 26 *Virg. JIL* 897, 902.

<sup>92</sup> Hailbronner, K., '*Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*' 26 *Virg. JIL* 857 (1986).

Hailbronner accepts that article 3 has been interpreted as an obligation to afford humanitarian assistance in cases of gross violation of human rights by other States, but concludes that neither this nor State practice at large gives rise to a general right of 'temporary refuge'.<sup>93</sup> Such a reverse individualistic approach to international obligations, which is also common to States<sup>94</sup> and in the works of a number of commentators, unfortunately diverts attention from the human rights dimension: so far as a State's actions may expose an individual to risk of violation of fundamental human rights, its responsibility is duty-driven, rather than strictly correlative to any individual 'right'.<sup>95</sup>

### 3. The scope of the principle of *non-refoulement*

#### 3.1 PERSONAL SCOPE

The principle of *non-refoulement*, as it appears in article 33 of the 1951 Convention, applies clearly and categorically to refugees within the meaning of article 1. It also applies to *asylum seekers*, at least during an initial period and in appropriate circumstances, for otherwise there would be no effective protection. Those with a presumptive or prima facie claim to refugee status are therefore entitled to protection, as the UNHCR Executive Committee has stressed, for example, in Conclusion No. 6 (1977), reaffirming 'the fundamental importance of the principle of *non-refoulement* . . . irrespective of whether or not individuals have been formally recognized as refugees'.

Equally irrelevant is the legal or migration status of the asylum seeker. It does not matter *how* the asylum seeker comes within the territory or jurisdiction of the State; what counts is what results from the actions of State agents. If the asylum seeker is forcibly repatriated to a country in which he or she has a well-founded fear of persecution or faces a substantial risk of torture, then that is *refoulement* contrary to international law.

The status or personal circumstances of the asylum seeker, however, may control the options open to the receiving State. In the case of a stowaway asylum seeker, for example, the port of call State may require the ship's master to keep him or her on board and travel on to the next port of call; or it may call upon the flag State to assume responsibility where the next port of call is unaccept-

<sup>93</sup> Ibid., 875f. Hailbronner rightly notes that art. 3 focuses on conduct of particular gravity and that this has attracted a heavy evidential burden ('substantial grounds to fear', 'actual concrete danger'); the victims of generalized violence or terror which is not specifically directed at them are thus unable to invoke its protection. For an alternative view, see Einarsen, T., 'The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum,' 2 *IJRL* 361 (1990); and for an assessment, see further below, Ch. 8, s. 2.2.1.

<sup>94</sup> See above, n. 72-6 and accompanying text, remarking the confusion between 'admission' and not returning a refugee to persecution.

See also Kälin, W., *Grundriss des Asylverfahrens*, (1990), 211: 'In seinem weiteren, menschenrechtlichen Sinn schützt [das Prinzip des non-refoulement] vor Aushändigung an einen Staat, welcher aus irgend welchen Motiven den betroffenen Ausländer Fester oder bestimmten anderen schwerwiegenden Menschenrechtsverletzungen aussetzen würde.'

able; or it may allow temporary disembarkation pending resettlement elsewhere. Thus, by itself, a categorical refusal of disembarkation can only be equated with *refoulement*, if it actually results in the return of refugees to persecution. Similar considerations apply also to rescue at sea cases seeking disembarkation, and even to boats of asylum seekers arriving directly. From a practical perspective, however, a refusal to take account of their claims to be refugees would not suffice to avoid liability for breach of the principle of *non-refoulement*,<sup>96</sup>

### 3. 1.1 *The question of risk*

The legal, and to some extent logical, relationship between article 33(1) and article 1 of the 1951 Convention/1967 Protocol is evident in the correlation established in State practice, where entitlement to the protection of *non-refoulement* is conditioned simply upon satisfying the well-founded fear criterion. So far as the drafters of the 1951 Convention were aware of a divergence between the words defining refugee status and those requiring *non-refoulement*., they gave little thought to the consequences. Mr Rochefort, the French representative, suggested that article 1 referred to examination at the frontier of those wishing to enter a contracting State, whereas article 33 was concerned with provisions applicable at a later stage. The co-existence of these two possibilities was perfectly feasible, though he detected a distinct and somewhat uncomfortable inconsistency between article 33(1) and article 1.<sup>97</sup> This related not to the presence of conflicting standards of proof, however, or to issues of extraterritorial application, but to the class and extent of those, principally criminals, who were to be excluded from refugee status and/or denied the benefit of *non-refoulement*.

The intimate link between articles 1 and 33 was nevertheless recognized;<sup>98</sup> in both, the status of 'refugee' was to be governed by the criterion of well-founded fear, and withdrawal of status or *refoulement* would always be exceptional and restricted.<sup>99</sup> The *travaux préparatoires* do not explain the different wording chosen for the formulations respectively of refugee status and *non-refoulement*; but neither do they give any indication that a different standard of proof was intended to be applied in one case, rather than in the other. In practice, the same standard is accepted at both national and international levels, reflecting the sufficiency of serious risk, rather than any more onerous standard of proof, such as the clear probability of persecution.<sup>100</sup>

At the international level, no distinction is recognized between refugee status and entitlement to *non-refoulement*. In only one instance were articles 1 and 33, as a coherent structure of protection, severed by a judicial ruling on literal meaning; and on that occasion, the executive branch of government took steps by

<sup>96</sup> See further below, s. 4.1.

<sup>97</sup> United Nations Conference of Plenipotentiaries, *Summary Records*. UN doc. A/CONF.2/SR.35, p. 23.

<sup>98</sup> UN doc. A/CONF.2/SR.35, p. 22.

<sup>99</sup> UN doc. A/CONF.2/SR.16, pp. 4, 8.

<sup>100</sup> Support for the principle of serious risk as the determinant for refugee status and consequently also for *non-refoulement*, can be found in numerous national decisions; see above, Ch. 2, s. 3.

regulation to bridge the gap between the refugee eligible for the discretionary grant of asylum and the refugee with a right to the benefit of *non-refoulement*.<sup>101</sup> The relation of refugee status and *non-refoulement* was described more coherently by the United Kingdom House of Lords in 1987, in *R v. Secretary of State for the Home Department, ex parte Sivakumaran*:

It is . . . plain, as indeed was reinforced in argument . . . with reference to the travaux préparatoires, that the *non-refoulement* provision in article 33 was intended to apply to all persons determined to be refugees under article 1 of the Convention.<sup>102</sup>

*Non-refoulement* extends in principle, therefore, to every individual who has a well-founded fear of persecution, or where there are substantial grounds for believing that he or she would be in danger of torture if returned to a particular country.

### 3.2 EXCEPTIONS TO THE PRINCIPLE OF NON-REFOULEMENT

The Convention refugee definition is not an absolute guarantee of protection, and *non-refoulement* is not an absolute principle. ‘National security’<sup>5</sup> and ‘public order’, for example, have long been recognized as potential justifications for derogation.<sup>103</sup> Article 33(2) expressly provides that the benefit of *non-refoulement* may not be claimed by a refugee, ‘whom there are reasonable grounds for regarding as a danger to the security of the country ... or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country’. The exceptions to *non-refoulement* are thus framed in terms of the individual, but whether he or she may be considered a security risk appears to be left very much to the judgment of the State authorities.<sup>104</sup> This, at least, was the intention of the British representative at the 1951 Conference, who proposed the inclusion of article 33(2), and such an approach

<sup>101</sup> See the US Supreme Court decisions in *INS v. Stenc*, 467 US 407 (1984) and *INS v. Cardoza-Fonseca* 480 US 421 (1987); for comment, see 2 *JIRL* 461-7 (1990). The remedy was provided by the *Final Rule on Asylum and Withholding of Deportation Procedures*, issued by the US Department of Justice Immigration and Naturalization Service in July 1990.

<sup>102</sup> [1988] 1 All ER 193. UNHCR submitted an intervenor brief.

<sup>103</sup> See, for example, art. 3, 1933 Convention relating to the International Status of Refugees: 159 *LNTS* 199; art. 5(2), 1938 Convention concerning the Status of Refugees coming from Germany: 192 *LNTS* 59. At the first session of the *Ad hoc* Committee, the British delegate suggested that *non-refoulement* should not apply when national security was involved: UN doc. E/AC.32/SR.20, paras. 10-12. The French representative had suggested limiting ‘protected opinions’ to those not contrary to the purposes and principles of the United Nations: *ibid.*, paras. 8, 19. Several States thought this a too drastic qualification: Belgium, Israel and the US: *ibid.*, paras. 13, 15, 16, and generally, while others remained concerned to protect public order, even if the concept were somewhat ambiguous: cf. Venezuela: *ibid.*, paras. 38–43. The concept of public order was discussed further at the second session; see UN doc. E/AC.32/SR.40, pp. 10-30; *Report of the Ad hoc Committee*: UN doc. E/AC.32/8, para. 29; also Goodwin-Gill, below n. 109.

<sup>104</sup> The reference to ‘reasonable grounds’ was interpreted by one representative at the 1951 Conference as allowing States to determine whether there were sufficient grounds for regarding the refugee as a danger and whether the danger likely to be encountered by the refugee on *refoulement* was outweighed by the threat to the community: UN doc. A/CONF.2/SR.16, 8.



to security cases is supported both by article 32(2) of the Convention and by immigration law and practice generally.<sup>105</sup>

It is unclear to what extent, if at all, one convicted of a particularly serious crime must also be shown to constitute a danger to the community. The jurisprudence is relatively sparse and the notion of 'particularly serious crime' is not a term of art,<sup>106</sup> but principles of natural justice and due process of law require something more than mere mechanical application of the exception. An approach in terms of the penalty imposed alone will be somewhat arbitrary, and the application of article 33(2) ought always to involve the question of proportionality, with account taken of the nature of the consequences likely to befall the refugee on return.<sup>107</sup> The offence in question and the perceived threat to the community would need to be extremely grave if danger to the life of the refugee were to be disregarded, although a less serious offence and a lesser threat might justify the return of an individual likely to face only some harassment or discrimination. This approach has not always been understood or endorsed by national tribunals, although practice overall appears compatible with such an interpretation.

In contrast to the 1951 Convention, the 1969 OAU Convention declares the principle of *non-refoulement* without exception. No formal concession is made to overriding considerations of national security, although in cases of difficulty 'in continuing to grant asylum' appeal may be made directly to other member States and through the OAU. Provision is then made for temporary residence pending resettlement, although its grant is not mandatory.<sup>108</sup> The absence of any formal exception is the more remarkable in view of the dimensions of the refugee problems which have faced individual African States.

Article 3 of the Declaration on Territorial Asylum, adopted by the General Assembly only two years before the OAU Convention, not only acknowledges the national security exception, but also appears to authorize further exceptions 'in order to safeguard the population, as in the case of a mass influx of persons'.<sup>109</sup> The latter reappeared at the 1977 Conference on Territorial Asylum

<sup>105</sup> See Goodwin-Gill, *Movement of Persons*, 241-2, 247-50.

<sup>106</sup> With respect to the analogous terms of art. 1F(b), see above Ch. 3, s. 4.2.

<sup>107</sup> See among others, *Toboso-Alfonso*, Board of Immigration Appeals, 12 Mar. 1990—burglary and possession of cocaine not 'particularly serious'; *Hung Duyet*, Board of Immigration Appeals, 30 Dec. 1988—armed robbery a 'particularly serious crime', amounting to criminal behaviour which 'contributes a danger to the community of the United States'; *Ippa v. INS* 868 F.2d 511 (1st Cir. 1989)—possession of cocaine with intent to distribute makes applicant ineligible for asylum; *O. V.*, Federal Council (*Bundesrat*), Switzerland, 23 Aug. 1989; 4 *Asyl* 1—applicant responsible for killing but acquitted by reason of insanity. Notwithstanding absence of conviction 'by a final judgment', not entitled to *non-refoulement* because underlying purpose is to protect community from dangerous refugees.

<sup>108</sup> Art. II.

<sup>109</sup> For criticism of the terms, see Weis, P., 'The United Nations Declaration on Territorial Asylum' 7 *Can. YIL* 92, 113, 142-3 (1969). Weis nevertheless applauds rejection of the 'public order' exception, which he sees as too wide and susceptible of different connotations in civil and common law countries. For an examination of the *ordre public* concept in the context of entry and expulsion generally, see Goodwin-Gill, *Movement of Persons*, 168-9, 229-37, 298-9.

when Turkey, in a prescient move, proposed an amendment whereby *non-refoulement* might not be claimed 'in exceptional cases, by a great number of persons whose massive influx may constitute a serious problem to the security of a Contracting State'.<sup>110</sup> It 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. Turkey's decision to close its border to Kurdish refugees, and the support or non-objection of a substantial number of members of the international community, if it did not breach *non-refoulement* (understood as a general principle of international law that includes the dimension of non-rejection at the frontier), certainly consolidated the exception.<sup>111</sup> In the instant case, the international response was part of the problem, so far as the creation of a safe zone for Kurds in Iraq arguably removed the (legal) basis for departure in search of asylum. The uniqueness of the circumstances, however, might suggest that they have little precedential value, and that the principle of *non-refoulement* has emerged relatively unscathed. Nevertheless, it 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.

### 3.3 TIME AND PLACE, WAYS AND MEANS

The recognition of refugee status under international law is essentially declaratory in nature.<sup>112</sup> The duty to protect refugees arises as soon as the individuals or group concerned satisfy the criteria for refugee status set out in the definition (flight from the State territory for relevant reasons) and come within the territory or jurisdiction of another State, regardless of whether refugee status has been formally determined. Under general principles of international law, State responsibility may arise directly from the acts and omissions of its government officials and agents, or indirectly where the domestic legal and administrative systems fail to enforce or guarantee the observance of international standards.<sup>113</sup> The fact that the harm caused by State action may be inflicted outside the territory of the actor, or in an area identified by municipal law as an international zone, in no way diminishes the responsibility of the State.<sup>114</sup>

#### 3.3.1 *Extraterritorial application*

A State's obligations under international law extend beyond its physical territory. The United Nations Human Rights Committee has held that a State party

<sup>110</sup> UN doc. A/CONF.78/C.1/L.28/Rev. 1, adopted in the committee of the Whole by 24 votes to 20, with 40 abstentions, in a vote to put in context with premature efforts to secure the agreement of States on a 'right to asylum'. See further below, Ch. 5, s. 3.

<sup>111</sup> Turkey maintains the geographical limitation to its obligations under the 1951 Convention, and is thus not bound by treaty towards non-European refugees arriving on its territory or at its borders.

<sup>112</sup> See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, (1979), para. 28.

<sup>113</sup> Brownlie, I., *System of the Law of Nations: State Responsibility, Part 7*, (1983), 150-1.

<sup>114</sup> *Ibid.*, at 135-7, 159-36.

may be accountable under article 2(1) of the 1966 Covenant on Civil and Political Rights for violation of protected rights committed by its agents in the territory of another State, whether or not that State acquiesced. In the view of the Committee, the phrase ‘within its territory *and subject to its jurisdiction*’ refers not to the place where the violation occurred, but to the relationship between the individual and the State concerned.<sup>115</sup> Similarly, the European Commission on Human Rights has taken the position that the obligations of States under the European Convention extend to ‘all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad’.<sup>116</sup> Unlike other provisions in the 1951 Convention, which condition rights and benefits on degrees of presence and lawful residence, article 33(1) contains no such restriction. On the contrary, it prohibits the return of refugees ‘*in any manner whatsoever*’

In domestic litigation arising out of the Haitian interdiction programme, the US government argued that the prohibition against *non-refoulement* applies only to refugees within State territory. Beginning with a September 1981 Presidential Proclamation and Executive Order, the US Coast Guard regularly ‘interdicted’ Haitians and returned them to their country of origin, initially with a form of screening and guarantees for the non-return of those found to be refugees. The US government informed the Haitian government that it would not return any individual whom it determined to qualify for refugee status, and President Reagan’s Executive Order likewise confirmed, ‘that no person who is a refugee will be returned without his consent.’ US officials made similar statements on other occasions in different fora.

Following the September 1991 military coup against the democratically elected government of Haiti and President Jean Bertrand Aristide, repatriations were first suspended but then resumed after some six weeks. In May 1992, President Bush decided to continue interdiction and repatriation, but without offering the possibility of screening in for those who might qualify as refugees.<sup>117</sup> President Clinton elected to maintain the practice, which continued until May 1994 when full refugee status determination interviews on board ships were announced.<sup>118</sup> Local court challenges were commenced, but in its 1993 decision in *Sale, Acting Commissioner, INS v. Haitian Centers Council*, the US Supreme Court ruled that neither domestic law nor article 33 of the 1951 Convention limited

<sup>115</sup> *De Lopez v. Uruguay* (52/1979), HRC, *Selected Decisions under the Optional Protocol*: UN doc. CCPR/C/OR/1 (1985), 88-92, para. 12; *de Casanego v. Uruguay*, *ibid.*, 92-4, para. 10. See also Inter-American Human Rights Commission, *Haitian Refugee Cases*, Case No. 10.675, Inter-Am. C.H.R. 334, OEA/Ser.L/V/II.85, doc. 9 rev (1994)—ruling on the issue of admissibility that US interdiction policies appeared to violate, among others, the American Declaration of Human Rights and the American Convention on Human Rights.

<sup>116</sup> *Cyprus v. Turkey* (6780/74; 6950/75), *Report*, 10 July 1976.

<sup>117</sup> See Executive Order No. 12,807: 57 *Fed. Reg.* 23133,

<sup>118</sup> 16 *Refugee Reports*, 28 Feb. 1995, 11.

the power of the President to order the Coast Guard to repatriate undocumented aliens, including refugees, on the high seas.<sup>119</sup>

The Supreme Court decision, by an 8-1 majority, held first that domestic law provisions applied only in immigration proceedings for exclusion or deportation. As such proceedings do not operate outside the US, neither the President nor the Coast Guard were under any statutory limitation in dealing with those, such as Haitians, found on the high seas while in flight from persecution. The international law dimensions to the interdiction practice, not surprisingly, received little substantive attention. Although the Court made passing reference to the *travaux préparatoires* of the 1951 Convention, its essentially *policy* decision to deny a remedy to individuals beyond territorial jurisdiction relied mostly on the language of 'congressional intent' at the time of enactment.<sup>120</sup>

The judgment of the Supreme Court attempts to confer domestic 'legality' on a practice of returning individuals to their country of origin, irrespective of claims to have a well founded fear of persecution. That decision could not and did not alter the State's international obligations.<sup>121</sup> The principle of *non-refoulement* has crystallized into a rule of customary international law, the core element of which is the prohibition of *return in any manner whatsoever* of refugees to countries where they may face persecution. The scope and application of the rule are determined by this essential purpose, thus regulating State action *wherever* it takes place, whether internally, at the border, or through its agents outside territorial jurisdiction. This development is amply confirmed in instruments subsequent to the 1951 Convention, including declarations in different fora and treaties such as the 1984 UN Convention against Torture, by the will of States expressed in successive resolutions in the UN General Assembly or the Executive Committee of the UNHCR Programme, in the laws and practice of States, and especially in unilateral declarations by the United States government.

During the first ten years of the Haitian interdiction programme, senior United States officials publicly and repeatedly affirmed the principle of *non-refoulement*, not only in the broad general sense,<sup>122</sup> but also in the specific context of Haitian operations. Moreover, the relevant Executive Order stated quite clearly that '[t]he Attorney General shall . . . take whatever steps are necessary to ensure . . . the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland'.<sup>123</sup> In his 16 February 1982 letter to the UNHCR Chief of Mission in Washington, DC, US Attorney

<sup>119</sup> 113 S.Ct 2549 (1993); see also *Haitian Refugee Center v. Christopher*, 5 Jan 1995, in which the Court of Appeals for the 11th Circuit ruled that refugees in safe haven camps outside the US do not enjoy constitutional due process and are not protected by art. 33 or the Immigration and Nationality Act from forced return.

<sup>120</sup> For further views, see the dissenting judgment of Blackmun J. and this author's 'Comment' in 6 *IJRL* 71, 103 (1994).

<sup>121</sup> Cf. UNHCR, Brief *amicus curiae*, 5 *IJRL* 85 (1994).

<sup>122</sup> See above n. 53, 56 and accompanying text.

<sup>123</sup> Executive Order 12324, 29 Sept. 1981, s. 3.

General William French Smith extended unqualified recognition to international obligations.<sup>124</sup>

These substantial undertakings by US government officials were applied in practice for at least ten years, until the President decided to return even Haitians who might have a 'colorable claim' to be refugees. The combination of declarations in the sense of an international obligation with practice confirming that obligation is conclusive evidence of the applicability of the principle of *non-refoulement* to the extraterritorial activities of United States agents. This conclusion is further strengthened by the fact that even though the United States authorities considered that the vast majority of Haitians were leaving for economic reasons, they were still prepared, against interest, to take steps to ensure that no refugees among them were returned contrary to international obligations.

In its judgment in the *Nuclear Tests* Cases, the International Court of Justice observed that,

... declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations . . . [N]othing in the nature of a *quid pro pro* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement of the State was made ...<sup>125</sup>

The Court further emphasized the central value of good faith in this context:

Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.<sup>126</sup>

UNHCR has been entrusted by the United Nations General Assembly with the international protection of refugees, and States in turn have formally undertaken

<sup>124</sup> '... the Administration is firmly committed to the full observance of our international obligations and traditions regarding refugees, including . . . the principle of non-refoulement ... If there were an indication of a colorable claim of asylum, the individual would be brought to the United States where a formal application for asylum would be filed ... these procedures will insure that nobody with a well-founded fear of persecution is mistakenly returned to Haiti.' The relevant correspondence and statements are cited in UNHCR's *amicus curiae* brief: 6 *JRL* 85. See also (1994) Memorandum to all INS employees assigned to duties related to interdiction at sea, revised 26 August 1982 under signature of the INS Associate Commissioner Examinations: 'The only function INS officers are responsible for is to ensure that the United States is in compliance with its obligations regarding actions towards refugees, including the necessity to be keenly attuned ... to any evidence which may reflect an individual's well-founded fear of persecution.' The list of authorities expressly cited for this memorandum included not only the Presidential Proclamation and Executive Order of 29 Sept. 1981, but also art. 33 of the 1951 Convention. INS Acting Commissioner Doris M. Meissner's letter of 29 Dec. 1981 to the UNHCR Chief of Mission: 'These *procedures* fully comply with our responsibilities under the UN Convention and Protocol'. (Emphasis supplied). Similar statements are cited by Blackmun, J., dissenting in *Sale v. Haitian Centers Council, Inc.*: 6 *JRL* 71 (1994)

<sup>125</sup> *Nuclear Tests Case* (Australia v. France), ICJ *Rep.*, 1974, 253 at 267.

<sup>126</sup> *Ibid.*, para. 46.

to co-operate with UNHCR, 'in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions' of the 1951 Convention/1967 Protocol.<sup>127</sup> UNHCR's legal interests are equivalent to those of States in the circumstances described by the International Court of Justice; it was entitled to take notice of and place confidence in the declarations of the United States.

In fact, UNHCR appears to have done just this. At no time did the Office challenge the exercise of jurisdiction on the high seas. Rather, it focused its interventions on the *adequacy* of the on-board procedures, to sift out effectively those Haitians who might have a 'colourable claim' to asylum.<sup>128</sup> The declaration of intent to abide by article 33, substantiated by ten years of practice in which all interdicted Haitians were screened, sufficiently confirms the 'extraterritorial' obligations of the United States, which are implicit in the words of the Convention.

### 3.3.2 'International zones'

Whereas State activities beyond territorial jurisdiction are sometimes said to be outside the scope of the *non-refoulement* obligation, in other circumstances international obligations are claimed to have limited effect even within the State. Any argument for the non-application of international obligations in State territory (for example, in transit or international zones, whether in the matter of refugees, asylum seekers, stowaways or any other subject) faces substantial objections, however. It is a fundamental principle of international law that every State enjoys *prima facie* exclusive authority over its territory and persons within its territory, and with that authority or jurisdiction goes responsibility. Thus, a State could hardly argue that it is not bound by international duties of protection with respect to diplomatic personnel, merely by reason of the fact of their location within an 'international' or transit area of an airport.

Many States, of course, do choose to accord lesser rights in their municipal-law to those awaiting formal admission, than to those who have entered. The United States is a typical example, where *physical* presence is not necessarily synonymous with *legal* presence for the purpose of determining constitutional guarantees. Other States make similar distinctions, for example, in the case of stowaways or illegal entrants, who are often deemed not to have entered the country. The purpose of such provisions is usually to facilitate summary or

<sup>127</sup> Art. 35, 1951 Convention; art. II, 1967 Protocol.

<sup>128</sup> For example, in its *amicus curiae* brief in *Haitian Refugee Center, Inc. v. Gracey*, UNHCR argued that, '[g]iven the applicability of the principle of *non-refoulement* to the broad field of State action or omission, the secondary principle of effectiveness of obligations itself obliges a State to establish procedures adequate and sufficient to ensure fulfilment of the primary duty . . . [W]here . . . a State of its own volition, elects to intercept asylum-seekers on the high seas and outside their own or any State's territory, particularly high standards must apply and be scrupulously implemented'. Motion for Leave to file Brief *Amicus Curiae* and Brief *Amicus Curiae* of the United Nations High Commissioner for Refugees in support of Haitian Refugee Center, Inc., et al, 8 Jul. 1985, Section III, 19-24.

discretionary treatment, but from the perspective of international law, what counts is not the status or non-status conferred by municipal law, but the treatment in fact accorded. For international law purposes, *presence within State territory* is a juridically relevant fact sufficient in most cases to establish the necessary link with the authorities whose actions may be imputable to the State in circumstances giving rise to State responsibility. General principles of State responsibility will govern, flowing from the fact of control over territory including, with respect to human rights, the obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction.<sup>129</sup> Municipal courts, too, have rarely doubted their authority to extend their jurisdiction and protection into so-called international zones.<sup>130</sup>

In examining the legality and implications of such zones, the point of departure is the State's sovereign and *prima facie* exclusive authority or jurisdiction over all its territory, and the concomitant international legal responsibilities flowing from the fact of control and the activities of its agents. This authority or jurisdiction, with its basis in customary international law, is amply confirmed by international treaties, such as the 1944 Chicago Convention and the 1982 Convention on the Law of the Sea. No State, by treaty or practice, appears to have abandoned the territory comprised by its ports of entry; the extent of

<sup>129</sup> See art. 2(1), 1966 Covenant on Civil and Political Rights; art. 1, 1950 European Convention on Human Rights; art. 1, 1969 American Convention on Human Rights. Although the 1966 Covenant employs the phrase, 'and subject to its jurisdiction', the Human Rights Committee has interpreted it to mean, 'or'; see above, n. 115 and text. The judgment of the Supreme Court in *Singh* is premised on the fact that those seeking Charter protection were physically present in Canada, and 'by virtue of that presence, amenable to Canadian law': *Re Singh and Minister of Employment and Immigration* [1985] 1 SCR 177. Cf. *habeas corpus* jurisprudence: *Re Harding* (1929) 63 OLR 518 (Ontario Appeal Division); *Banard v. Ford* [1892] AC 326; Cf. Habeas Corpus Act 1679, s. 10; Habeas Corpus Act 1816, s. 5; Habeas Corpus Act 1862; *The Sitka* (1855), 7 *Opinions of the Attorney General*, 122; *Cabin's Case* (1609) 7 Co. Rep. 1; cited by Sharpe, R. J., *The Law of Habeas Corpus*, (1976), 182. See also *Ramirez v. Weinberger* 745 F. 2d 1500 (DC Cir., 1984), where the court considered that US Constitutional guarantees of due process could be invoked by citizens whose property overseas is affected by US governmental action: 'Where ... the court . . . has personal jurisdiction over the defendants, the extra-territorial nature of the property involved in the litigation is no bar to equitable relief.' So far as the power to expel and deport implicitly authorizes such extra-territorial constraint as is necessary to effect execution: *Attorney-General for Canada v. Cain* [1906] AC 542, 546-7, then the legality of such constraint remains reviewable so long as it continues: Cf. *R. v. Secretary of State, ex p. Greenberg* [1947] 2 All ER 550. Note also s. 6, UK Consular Relations Act 1968, which provides that a crew member on board a ship flying the flag of a designated State who is detained for a disciplinary offence shall not be deemed to be unlawfully detained unless (a) his detention is unlawful under the laws of that State or the conditions of detention are inhumane or unjustifiably severe; or (b) there is reasonable cause to believe that his life or liberty will be endangered for reasons of race, nationality, political opinion or religion, in any country to which the ship is likely to

go.  
<sup>130</sup> See Hamerslag, R. J., 'The Schiphol Refugee Centre Case,' 1 *LJRL* 395 (1989). Earlier cases dealt, for example, with *habeas corpus* and false imprisonment. See *Küchenmeister v. Home Office* [1958] 1 QB 4%, in which a non-citizen in transit at London Airport succeeded in an action for false imprisonment, when immigration officers prevented him from joining his connecting flight after he had been refused permission to enter. On art. 1, European Convention on Human Rights, see further below, Ch. 8, s. 2.2.1.

national control exercised therein sufficiently contradicts any assertion of their purely *international* character.

Obligations relating to *non-refoulement* and the protection of human rights come into play by reason of the juridically relevant facts of presence within State territory and jurisdiction. Whether responsibility for breach of international obligations results will in turn depend upon whether the actions taken with respect to an individual, such as removal, are imputable in the State (more than likely in the case of ‘immigration action’<sup>5</sup>), and whether they result in harm to an internationally protected interest. At the same time, however, the State retains choice of means as to the methods of implementation of these obligations. To apply different procedures and standards in such zones will not necessarily result in the breach of an international obligation. The underlying practical issue is one of monitoring and compliance, but experience unfortunately confirms that errors of *refoulement* are more likely when procedural shortcuts are taken in zones of restricted guarantees and limited access.<sup>131</sup>

### 3.3.3 *Non-refoulement and extradition*

The 1951 Convention says nothing about the extradition of refugees. In principle, *non-refoulement* should also apply in this context, for other provisions of the Convention already recognize the interests of the State of refuge in not committing itself to the reception of serious criminals. In 1951, however, a number of States were of the view that article 33 did not prejudice extradition.<sup>132</sup> One suspected of a serious non-political crime would in any event be excluded from the benefits of refugee status;<sup>133</sup> but one suspected or guilty of a non-serious non-political crime would remain liable to extradition, even to the State in which he or she had a well-founded fear of persecution. Any conflict of treaty obligations might be further dependent upon which obligation was contracted first.

This issue today again requires analysis of State practice since 1951, in light of the object and purpose of the Convention and the principle of *non-refoulement*. If States had reservations about the relationship between extradition and article 33 in 1951, these have been displaced by subsequent regional, bilateral and multilateral State practice. The 1957 European Convention on Extradition, for

<sup>131</sup> Cf. loi no. 92-625, 6 juill. 1992, sur la zone d’attente des ports et des aéroports: *J. O.*, 9 juill. 1992, 9185; Julien-Lafeniere, F., ‘Droit d’asile et politique d’asile en France’, *Asyl*, 1993/4, 75-80—detention after four days can be continued only by decision of the president of the *tribunal de grande instance*, and entry can only be refused if the application is manifestly unfounded. However, a claimant detained in the zone does not have access to OFPRA to lodge application for asylum, so that the holding allows has a filter effect, infringing OFPRA’s exclusive competence (at 78).

<sup>132</sup> See UN doc. A/CONF.2/SR.24, 10 (UK); *ibid.*, SR.35, 21 (France). At the abortive 1977 United Nations Conference on Territorial Asylum, one article proposed would have protected refugees against extradition to a country in which they might face persecution. The German Democratic Republic and the USSR, however, both prepared amendments reiterating the paramountcy of States’ extradition obligations. These conflicting approaches were not resolved at the Conference, but have been overtaken by consolidating State practice.

<sup>133</sup> See above, Ch. 3.



example, prohibits extradition, 'if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of those reasons.'<sup>134</sup> The Committee of Experts of the Council of Europe expanded this article expressly to include the basic elements of the refugee definition, although declining to write in 'membership of a particular social group' on the ground that it might be interpreted too freely. That apart, every indication is that the Committee intended to close the gap between the political offender and the refugee. It further proposed that the transit of those extradited be excluded through any territory where the life or freedom of the person claimed could be threatened for any of the stated reasons, and this was included in article 21.<sup>135</sup>

Article 3 of the European Convention now serves as a model for bilateral treaties and municipal laws.<sup>136</sup> It clearly influenced the Scheme for the Rendition of Fugitive Offenders adopted in 1966 by the Meeting of Commonwealth Law Ministers,<sup>137</sup> and implemented in many Commonwealth countries since then,<sup>138</sup> and is likewise reflected in a number of other multilateral agreements.<sup>139</sup>

<sup>134</sup> Art 3(2), emphasis supplied; *ETS*, No. 24; see below, Annexe 2, No. 10.

<sup>135</sup> See generally *Supplementary Report of the Committee of Experts on Extradition to the Committee of Ministers*, Council of Europe doc. CM(57)52.

<sup>136</sup> See, for example, art. 19, 1979 Austrian Extradition Law (*Auslieferungs und Rechtshilfegesetz: BGBl Nr. 529/1979*), which provides for non-extradition where the proceedings in the requesting State are likely to offend arts. 3 and 6 of the European Convention on Human Rights; where the likely punishment is likely to offend art. 3 of that Convention; or where the requested person may face persecution or other serious consequences on grounds akin to those in art. 1 of the 1951 Convention. Art. 3 of the 1976 Austria-Hungary Extradition Treaty (*BGBl Nr. 340/1976*) likewise provides for non-extradition (1) in respect of political offences; (2) when the person sought enjoys asylum in the requested State; and (3) when it is not in accord with other international obligations of the requested State. Art 4 of the 1980 Austria-Poland Extradition Treaty (*BGBl Nr. 146/1976*) is to similar effect.

<sup>137</sup> Cm. 3008. The UK has not ratified the European Convention on Extradition, but contributed two experts to the discussion described in the text.

<sup>138</sup> For example UK Fugitive Offenders Act 1967, s. 4; Barbados Extradition Act 1979, s. 7; Kenya Extradition (Commonwealth) Countries Act 1968, s. 6; Papua New Guinea Extradition Act 1975, s. 8; Sierra Leone Extradition Act 1974, s. 15; Singapore Extradition Act 1968, ss. 8, 21; Zambia Extradition Act 1968, s. 31.

<sup>139</sup> Cf. art. 4, 1981 Inter-American Convention on Extradition, calling for non-extradition, 'when, from the circumstances of the case, it can be inferred that persecution for reasons of race, religion or nationality is invoked, or that the position of the person sought may be prejudiced for any of these reasons'. See also art. 5, 1977 European Convention on the Suppression of Terrorism, in which non-extradition is optional ('Nothing in this Convention shall be interpreted as imposing an obligation to extradite if . . .'); art 9, 1979 International Convention against the Taking of Hostages: UNGA res. 34/146, 17 Dec. 1979, which employs the 'extradition shall not be granted' formula, includes ethnic origin within the list of relevant grounds, and adds one further likely cause of prejudice: 'the reason that communication with [the person requested] by the appropriate authorities of the State entitled to exercise rights of protection cannot be effected'. Where extradition is not granted, art. 8 provides that the State in which the alleged offender is found 'shall ... be obliged, without exception whatsoever and whether or not the offence was committed in its territory' to submit the case for prosecution.

The inclusion of the principle *aut dedere aut judicare* in instruments aimed at suppressing certain crimes with an international dimension<sup>140</sup> is further acknowledgement that even the serious criminal may deserve protection against persecution or prejudice, while not escaping trial or punishment. Where non-extradition in such cases is prescribed as an *obligation*, the discretion of the State is significantly confined. *Non-refoulement* becomes obligatory<sup>141</sup> in respect of a class of alleged serious offenders, and no less should be required for the non-serious criminal who would otherwise fall within the exception.

The extradition of refugees was examined in 1980 by the Executive Committee, which reaffirmed the fundamental character of the principle of *non-refoulement*, and recognized that 'refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution on the grounds enumerated in Article 1(A)(2) of the 1951 Convention'.<sup>142</sup> Anxious to ensure not only the protection of refugees, but also the prosecution and punishment of serious offences, the Executive Committee stressed 'that protection in regard to extradition applies to persons who fulfil the criteria of the refugee definition and who are not excluded by virtue of Article 1(F)(b)' of the Convention.<sup>143</sup>

Judicial decisions from different jurisdictions support this approach. In the United Kingdom, a serious risk of prejudice has been considered sufficient to justify protection in extradition and refugee cases, certainly since the decision of the House of Lords in *Fernandez v. Government of Singapore*.<sup>144</sup> Courts in other States have also consolidated the basic principle of protection against extradition in favour of the refugee. In *Bereciartua-Echarri*, for example, the French

<sup>140</sup> Art. 16, 1963 Tokyo Convention on Offences and certain Other Acts Committed on board Aircraft; art. 7, 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft; art. 7, 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aircraft; art. 7, 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

<sup>141</sup> Given that the 'obligation' only arises where the State 'has substantial grounds' (that is, it has a discretion), it must be considered imperfect. That *non-refoulement* is obligatory does not entail either a duty to grant asylum or a duty not to expel; see further below, and Ch. 5.

<sup>142</sup> See Executive Committee Conclusion No. 17 (1980)—emphasis supplied; *Report* of the Subcommittee of the Whole on International Protection: UN doc. A/AC.96/586, para. 16. The Subcommittee's recommendations regarding the refugee, recognized in one State» whose extradition is then sought from another State in which he or she is temporarily visiting (UN doc. A/AC.96/586, para. 16, conclusions 8 and 9) were not adopted by the Executive Committee.

<sup>143</sup> As the Argentine delegate reiterated at the Executive Committee in 1989, 'While extradition was a legitimate practice in combating crime, it was inadmissible in international law in the case of a refugee': UN doc. A/AC.96/SR.442, para. 46. Later in the same session, the US delegate appeared to qualify his country's position: 'Concerning the extradition of refugees, the US government reserved its position on the application of the 1951 Convention and the 1967 Protocol to persons against whom extradition proceedings had been initiated until the courts hearing their cases had taken a formal position on them': UN doc. A/AC.96/SR.442, para. 84. Given the ambiguity and general lack of clarity, one cannot be certain whether, in the context of extradition proceedings (which involve both a judicial process and an executive decision), the US will or will not take refugee status into account. If it chooses to ignore status in the case of one who is not excluded or otherwise within the exceptions to *non-refoulement*, then violation of international obligations will result.

<sup>144</sup> [1971] 1 WLR 987.

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*Conseil d'Etat* ruled in 1988 that the appellant could not be extradited so long as he retained the status of refugee, save in the serious cases contemplated by article 33(2) of the Convention. This was part of the general principles of refugee law, and to permit extradition would render the concept of protection ineffective.<sup>145</sup> In a 1990 decision, the *Schweizerisches Bundesgericht* (Swiss Federal Court) also ruled that a refugee could not be returned to his or her country of origin. Most States, said the Court, consider that article 33 is a legal bar to extradition; the article's purpose is to guarantee refugees against the loss of protection in the asylum State, and it would be unjust if a refugee who could not lawfully be expelled to the country of origin, could nevertheless be extradited.<sup>146</sup> In both the French and the Swiss cases it was implicitly accepted that extradition might proceed, once or if asylum or refugee status were revoked in accordance with the Convention.

In the *Altun* case, the European Commission considered that even though extradition for a political offence did not necessarily raise an issue under article 3, the facts might nevertheless oblige it 'to determine whether ... there is a certain risk of prosecution for political reasons which could lead to an unjustified or disproportionate sentence being passed on the applicant and as a result inhuman treatment'. The Commission took account of the applicant's political past, the political background to the extradition request, and occurrences of torture in Turkey. It was unable to rule out 'with sufficient certainty that the criminal proceedings ... had been falsely inspired', or dismiss the fact that the applicant 'is not someone who may be considered protected from all danger'.<sup>147</sup>

State practice, and the greater body of opinion, representing those most active in the protection of refugees and the development of refugee law, regards the principle of *non-refoulement* as likewise protecting the refugee from extradition.<sup>148</sup>

<sup>145</sup> *Bereciartua-Echam*, No. 85.234, *Recueil Lebon*, 1 Apr. 1988; Iogna-Prat, M., 'L'Affaire Bereciartua-Echam,' 1 *JRL* 403 (1989).

<sup>146</sup> *Schweizerisches Bundesgericht*, Ref. 1A.127/1990/tg, 18 Dec. 1990; abstracted as Case Abstract No. *JRL/0152: 5 JRL* 271 (1993). In its 1980 paper on extradition submitted to the Sub-Committee (UN doc. EC/SCP/14, 27 Aug. 1980), UNHCR stressed that the principle of speciality offered no defence against excessive punishment or prejudicial treatment. The Court agreed, and remarked that it was no alternative to protection by non-extradition. The Court further took into account art. 3 of the European Convention on Extradition, which it characterized as the concrete expression of *non-refoulement* in extradition law, additionally capable of protecting persons who had committed serious non-political crimes, and so might be denied protection under the 1951 Convention.

<sup>147</sup> *Altun v. Federal Republic of Germany* (10308/83), 36 *D & R* 201. See also *Kirkwood v. United Kingdom* (10479/83), 37 *D & R* 158; Van den Wyngaert, C., 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' 39 *ICLQ* 757 (1990).

<sup>148</sup> See Recommendation no. R(80)9 of the Committee of Ministers of the Council of Europe to the effect that governments should not allow extradition to States not party to the European Convention on Human Rights where there are substantial grounds to believe that art. 3(2) of the European Convention on Extradition would otherwise be applicable.

<sup>149</sup> Generally on States' power of expulsion, see Goodwin-Gill, *Movement of Persons*, 201-310; and on expulsion to a particular State, 218-28.

### 3.2.4 *Non-refoulement* and expulsion<sup>149</sup>

While States may be bound by the principle of *non-refoulement*, they as yet retain discretion as regards both the grant of 'durable asylum' and the conditions under which it may be enjoyed or terminated. States parties to the Convention and Protocol, however, have acknowledged that the expulsion of refugees raises special problems and under article 32 they undertake not to 'expel a refugee lawfully in their territory save on grounds of national security or public order'<sup>5</sup>. Decisions to expel are further required to be in accordance with due process of law and 'except where compelling reasons of national security otherwise require', refugees shall be accorded the right of appeal.<sup>150</sup> Moreover, refugees under order of expulsion are to be allowed a reasonable period within which to seek legal admission into another country, though States retain discretion to apply 'such internal measures as they may deem necessary'.

The restricted grounds of expulsion have been adopted in the laws of many States,<sup>151</sup> and have been taken into account in a number of judicial decisions.<sup>152</sup> The benefit is limited to refugees who enjoy what might loosely be called 'resident status' in the State in question, and one admitted temporarily remains liable to removal in the same way as any other alien.<sup>153</sup> The permitted power of expulsion, however, does not include the power to return the individual to the country in which his or her life or freedom may be threatened, unless the further exacting provisions which regulate exceptions to the principle of *non-refoulement* are also met.<sup>154</sup>

Article 32 may yet have both advantages and disadvantages for the refugee. Thus, one expelled for the serious reasons stated in article 32(1) is likely to face

<sup>150</sup> See also art. 13, 1966 Covenant on Civil and Political Rights; Clark, T., 'Human Rights and Expulsion: Giving Content to the Concept of Asylum', 4 *JRL* 189 (1992); Tiberghien, F., 'L'expulsion des réfugiés: Problèmes législatifs et jurisprudentiels', *Doc. réf.*, no. 73, 5/14 mars 1989, Suppl., CJ, 1-8.

<sup>151</sup> See, for example, the Aliens Law 1990 of the Federal Republic of Germany (*Ausländergesetz*: *BGBI* I, S. 1354, 9 Juli 1990), art. 48(1): 'Ein Ausländer, der ... 5. als Asylberechtigter anerkannt ist, im Bundesgebiet die Rechtstellung eines ausländischen Flüchtlings genießt oder einen von einer Behörde der Bundesrepublik Deutschland ausgestellten Reiseausweis nach dem Abkommen über die Rechtstellung für Flüchtlinge vom 28. Juli 1951 ... besitzt, kann nur aus schwerwiegenden Gründen der öffentlichen Sicherheit und Ordnung ausgewiesen werden'; Asylum Law 1979 (*loi sur l'asile*) of Switzerland, art. 43(1): 'Un réfugié auquel la Suisse a accordé l'asile ne peut être expulsé que s'il compromet la sûreté intérieure ou extérieure de la Suisse ou s'il a porté gravement atteinte à l'ordre public. (2) L'asile prend fin par l'exécution de l'expulsion administrative ou judiciaire.'

<sup>152</sup> See, for example, *Yugoslav Refugee (Germany)* case: 26 *ILR* 496; *Homeless Alien (Germany)* case: 26 *ILR* 503; *Refugee (Germany)* case: 28 *ILR* 297; *Expulsion of an Alien (Austria)* case: 28 *ILR* 310. But see also Henckaerts, J. -M., *Mass Expulsion in Modern International Law and Practice*, (1995), 99-107.

<sup>153</sup> Robinson, *Commentary*, 157.

<sup>154</sup> In the *Refugee (Germany)* case (above n. 152) the Federal Administrative Court held that a refugee unlawfully in the country could be expelled, provided he or she was not returned to the country in which life or freedom would be threatened. An almost identical conclusion was reached in a 1974 US decision, *Chim Ming v. Marks* 505 F.2d 1170 (2nd Cir.). In the *Expulsion of an Alien (Austria)* case (above n. 152), the Austrian Supreme Court observed when upholding an expulsion order that it merely required a person to leave the State, but did not render him or her liable to be returned to a specific foreign country.

major difficulties in securing admission into any other country. Return to the country of origin being ruled out, the refugee may be exposed to prosecution and detention for failure to depart. As only the State of nationality is obliged to admit the refugee,<sup>155</sup> the expelling country may find itself frustrated in its attempts at removal. For these reasons, in 1977, the Executive Committee recommended that expulsion should be employed only in very exceptional cases. Where execution of the order was impracticable, it further recommended that States consider giving refugee delinquents the same treatment as national delinquents, and that the refugee be detained only if absolutely necessary for reasons of national security or public order.<sup>156</sup>

### 3.2.5 *'Non-refoulement' and illegal entry*

In view of the normative quality of *non-refoulement* in international law, the precise legal status of refugees under the immigration or aliens law of the State of refuge is irrelevant, although a State seeking to avoid responsibility will often classify them as prohibited or illegal immigrants. Refugees who flee frequently have no time for immigration formalities, and allowance for this is contained in article 31 of the Convention, which of all articles comes closest to dealing with the controversial question of admission. This is not formally required, instead, penalties on account of illegal entry or presence shall not be imposed on refugees 'coming directly from a territory where their life or freedom was threatened . . . provided they present themselves without delay . . . and show good cause for their illegal entry or presence'. Refugees are not required to have come directly from their *country of origin*, but other countries or territories passed through should also have constituted actual or potential threats to life or freedom. What remains unclear is whether the refugee is entitled to invoke article 31 when continued flight has been dictated more by the refusal of other countries to grant asylum, or by the operation of exclusionary provisions such as those on safe third country, safe country of origin or time limits. Whether these constitute 'good cause' for illegal entry would seem to rest with the State authorities, subject however to the controlling impact of *non-refoulement*.<sup>157</sup>

At the 1951 Conference, several representatives considered that the undertaking not to impose penalties did not exclude the possibility of resort to expulsion.<sup>158</sup> Article 31 does not require that refugees be permitted to remain, and paragraph 2 emphasizes this point indirectly, by providing:

The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and . . . [they] shall only be applied *until their status*

<sup>155</sup> See Goodwin-Gill, *Movement of Persons*, 20-1, 44-6. 136-7.

<sup>156</sup> Executive Committee Conclusion No. 7 (1977). In France, under art. 28 of the ordinance no. 45-2658 of 2 Nov. 1946, '*assignation a residence*' may be the consequence for the alien who finds it impossible to leave.

<sup>157</sup> See further below Ch. 9, s. 2.1.

<sup>158</sup> UN doc. A/CONF.2/SR. 13, 12-14 (Canada, UK). Cf. art. 5, 1954 Caracas Convention on Territorial Asylum; see below, Annexe 2, No. 3.

*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. (Emphasis supplied)*

Given that the principle of *non-refoulement* remains applicable, the freedom of the State finally to refuse regularization of status can well be circumscribed in practice. As a matter of law, however, the State may continue to keep the unresettled refugee under a regime of restricted movement, either in prison or a refugee camp.<sup>159</sup>

3.2.6 *'Non-refoulement' and the Committee against Torture*<sup>160</sup>

States which have ratified the 1984 UN Convention against Torture may also opt to recognize the right of individual petition. Article 3 thus offers an alternative or additional measure of protection against *refoulement* for individuals facing removal to their own country.

The *Khan* case concerned a citizen of Pakistan of Kashmiri origin, who claimed refugee status in Canada in 1990.<sup>161</sup> His application was rejected by the Immigration and Refugee Board (IRB), and a motion for judicial review was also refused. His claim was based, among others, on political activities and earlier arrest and detention during which he stated that he had been tortured.<sup>162</sup> Following rejection of the refugee claim and various intervening events, a 'post-claim risk-assessment' conducted by the Canadian authorities concluded that he would not face danger to life or inhumane treatment if returned.<sup>163</sup>

Before the Committee, Canada noted that the claimant had made many requests for exceptional grant of residence status on humanitarian and compassionate grounds, but had produced no materials indicating a personal risk of torture until 1994.<sup>164</sup> Canada also called attention to many inconsistencies in the claimant's story, and to the fact that the IRB, after benefit of an oral hearing, had concluded that his testimony was largely fabricated.<sup>165</sup> The Committee, on the other hand, noted that the claimant had presented 'a medical report which

<sup>159</sup> See further below, Ch. 5, ss. 5.1, 5.2, on the implications of *non-refoulement* through time; see also below, Ch. 7, s. 1.1 on detention.

<sup>160</sup> See below, Ch. 8, s. 2.1. Goriick, B., 'Refugee Protection and the Committee against Torture', 7 *JRL* 504 (1995); also Clark, T., 'Human Rights and Expulsion: Giving Content to the Concept of Expulsion', 4 *JRL* 189 (1992).

<sup>161</sup> Committee against Torture, Communication No. 15/1994, *Khan v. Canada*, 15 Nov. 1994: UN doc. CAT/C/13/D/15/1994 (18 Nov. 1994).

<sup>162</sup> *Ibid.*, para. 3.2.

<sup>163</sup> Amendments to the *Immigration Act*, in force 1 Feb. 1993, provide for a post-claim risk-assessment for individuals found not to be Convention refugees but who may face some risk of serious harm if returned to their country of origin. The individual will be allowed to remain if, on removal, he or she would be subjected to an objectively identifiable risk to life, extreme sanctions, or inhumane treatment. Claimants may make submissions in writing, and other material will also be examined, including the immigration file, the refugee division hearing and country-specific information. Negative decisions are subject to judicial review with leave.

<sup>164</sup> *Khan v. Canada*: UN doc. CAT/C/13/D/15/1994 (18 Nov. 1994), para. 7.6.

<sup>165</sup> *Ibid.*, paras. 8.3, 8.4.

does not contradict his allegations', that the late submission of claims and corroboration was 'not uncommon for victims of torture', and concluded that, 'even if there could be some doubts about the facts adduced by the author, it must ensure that his security is not endangered'.<sup>166</sup> It took account of evidence that torture is widely practised in Pakistan against political dissenters as well as against common detainees, but did not find, as it had with respect to Zaire in the case of *Mutombo*,<sup>167</sup> 'a consistent pattern of gross, flagrant or mass violations' of human rights.

The *Khan* case contrasts markedly with that of *Mutombo*, particularly with respect to the evidence and (apparent) standard of proof. In the latter case, a considerable body of cogent evidence of country conditions existed, together with substantial *uncontradicted* elements relating to the claimant's individual circumstances.<sup>168</sup> In both cases, the Committee described its function of determining whether there are substantial grounds for believing that the claimant would be in danger of being subject to torture as follows:

.. . 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. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific circumstances.<sup>169</sup>

It is difficult to infer from the few decisions so far handed down by the Committee against Torture how precisely it interprets the 'substantial grounds' requirement of article 3 of the Convention, especially in relation to the evidence submitted by both claimant and government. In *Mutombo* it placed great reliance on uncontradicted testimony, whereas in *Khan* it did the same with respect to testimony, the truth of which had indeed been disputed.<sup>170</sup> Negative decisions

<sup>166</sup> *Ibid.*, para. 12.3; this phrase was also used in *Mutombo*, below. The Committee also relied on a copy of an arrest warrant and a letter advising against return.

<sup>167</sup> Committee against Torture, Communication No. 13/1993, *Mutombo v. Switzerland* 27 Apr. 1994: UN doc. CAT/C/12/D/13/1993 (27 Apr. 1994); also published in 7 *LJRL* 322 (1995). The claimant here had deserted from the Zaire armed forces, and provided a history of detention and torture.

<sup>168</sup> For example, the government relied on an anonymous informant whose testimony could not be checked, rejected a medical report indicating that the claimant's injuries corresponded with the alleged torture without conducting a re-examination, and did not dispute that he had deserted and left Zaire clandestinely: *ibid.*, paras. 7.3, 7.5, 9.4.

<sup>169</sup> *Mutombo*, para. 9.3; *Khan*, para. 12.2.

<sup>170</sup> In each case also, it stated clearly that it would not allow doubts about the facts to prevent it from ensuring the security of the applicant: *Mutombo*, para. 9.2; *Khan*, para. 12.3.

by the Committee provide little additional help, being confined to a brief account of the facts alleged, followed by the formulaic conclusion that the account 'lacks the minimum substantiation that would render the communication compatible with article 22 of the Convention against Torture . . .'.<sup>171</sup> How the evidence is tested, and against what standards of authority and corroboration, remains unclear, which is likely to be a matter of some concern, especially among States parties that have reasonably well-developed refugee determination procedures.

#### 4. Measures not amounting to *refoulement*

The core of meaning of *non-refoulement* requires States not to return refugees in any manner whatsoever to territories in which they face the possibility of persecution. But States may deny admission in ways not obviously amounting to breach of the principle. For example, stowaways and refugees rescued at sea may be refused entry; refugee boats may be towed back out to sea and advised to sail on; and asylum applicants can be sent back to transit or 'safe third countries'. State authorities can also induce expulsion through various forms of threat and coercion.<sup>172</sup>

##### 4.1 STOWAWAYS

Without breaching the principle of *non-refoulement*, the State where a stowaway asylum seeker arrives may require the ship's master to keep the stowaway on board and travel on to the next port of call; or it may call upon the flag State to assume responsibility where the next port of call is unacceptable; or it may allow temporary disembarkation pending resettlement elsewhere. In the absence of rules regulating the appropriate State to consider the asylum claim, the situation is comparable to that of refugees in orbit, while practical solutions are made more difficult to obtain by the tendency of States' immigration laws to deal summarily with stowaways.<sup>173</sup>

On several occasions during the Indo-China exodus, port of call States sought to make stowaways' disembarkation conditional on guarantees of resettlement

<sup>171</sup> Committee against Torture, Communication No. 17/1994, *X v. Switzerland* 17 Nov. 1994: UN doc. CAT/C/13/D/17/1994, para. 4.2; Communication No. 18/1994, *X v. Switzerland*, 17 Nov. 1994: UN doc. CAT/C/13/D/18/1994, para. 4.2.

<sup>172</sup> In *Orantes-Hernandez v. Meese* 685 F. Supp. 1488 (C.D. Cor. 1988) the court found that substantial numbers of Salvadoran asylum seekers were signing 'voluntary departure' forms under coercion, including threats of detention, deportation, relocation to a remote place and communication of personal details to their government. See also Amnesty International British Section *Playing Human Jintai*, (1995), 59-61 (coercion to effect 'voluntary departure' to 'safe third country').

<sup>173</sup> See, for example, the US Immigration and Nationality Act 1952, 8 USC s. 1182(a) (18).



from flag States, by analogy with the then developing practice for rescue at sea cases in South East Asia.<sup>174</sup>

The issue of stowaway asylum seekers was first briefly examined by an Executive Committee working group during a rescue-at-sea meeting in Geneva in July 1982. While it was agreed that the principle of *non-refoulement* should be maintained, there were widely diverging views on how problems should be solved and the recommendations on stowaways were not adopted.<sup>175</sup> Although there was more success in 1988, the debate was not all plain sailing. Executive Committee Conclusion No. 53 (1988) emphasized that like other asylum seekers, stowaway asylum seekers 'must be protected against forcible return to their country of origin'. Without prejudice to any flag State responsibilities, it also recommended that they 'should, whenever possible, be allowed to disembark at the first port of call', with the opportunity to have their refugee claim determined, 'provided that this does not necessarily imply durable solution in the country of the port of disembarkation'.<sup>176</sup>

State practice has so far given rise to no rule on the treatment of stowaway asylum seekers. In reality, however, the discretion of the coastal State may be limited by the particular facts of the case. If the flag State refuses to accept any responsibility for resettlement and if the ship's next port of call is in a country in which the stowaway asylum seeker's life or freedom may be threatened, then the practical effect of refusing disembarkation is *refoulement*. The nominal authority of the flag State to require diversion to a safe port, which would anyway be controversial where a charter party was involved, can hardly be considered a practical alternative, or 'last opportunity', to avoid *refoulement*. The paramount consideration remains the refugee status of those on board; a refusal to take

<sup>174</sup> As a port-of-call State, Australia had only limited success in arguing for this proviso with respect to flag States Greece, Italy, and Denmark. Most stowaways in the period 1979–82 were ultimately allowed to disembark and to lodge claims for refugee status; a few were resettled with relatives in third States. None of the States involved had ratified the 1957 Brussels Convention on Stowaways, which still awaits entry into force. Art. 5(2) provides that in considering application of the Convention, 'the Master and the appropriate authorities of the port of disembarkation will take into account the reasons which may be put forward by the stowaway for not being disembarked at or returned to' various ports or States. Art. 5(3) declares that 'The provisions of [the] Convention shall not in any way affect the power or obligation [*sic*] of a Contracting State to grant political asylum.' Art. 3 provides, that where a stowaway is otherwise unreturnable to any other State, he may be returned to 'the Contracting State whose flag was flown by the ship in which he was found', unless subject to 'a previous individual order of deportation or prohibition from entry'. For text, see *Conférence diplomatique de droit maritime, 10ème session, Bruxelles, 491-503, (1958)*. Both the UK and the Netherlands opposed these aspects of the Convention on the ground that they made too many inroads on national immigration control: *ibid.*, 200, 436-7, 441-3, and 632-3.

<sup>175</sup> *Report of the Working Group on problems related to the rescue of asylum seekers in distress at sea*: UN doc. EC/SCP/21, (1982) paras. 22ff.

<sup>176</sup> For full text see below, Annexe 3; *Report of the 39th Session*: UN doc. A/AC.96/721 (13 Oct. 1988), para. 25. Greece proposed deletion of the words 'whenever possible', and the phrase beginning, 'provided that this does not necessarily imply . . .': *ibid.*, para. 36.2. See also UNHCR, *Mote on Stowaway Asylum-Seekers*: UN doc. EC/SCP/51 (22 Jul. 1988); *Report of the Sub-Committee of the Whole on International Protection*: UN doc. A/AC.96/717 (3 Oct. 1988), paras. 36-42; Venezuela: UN doc. A/AC.96/SR.431, para. 7; Australia: *ibid.*, para. 9 (1988).

account of their claims, either on the specious basis that they have not 'entered' State territory or on the (disputed) ground that they are the responsibility of the flag or any other State, would not suffice to avoid liability for breach of the principle of *non-refoulement*.<sup>171</sup>

#### 4.2 RESCUE-AT-SEA

Asylum seekers have been escaping by sea for years, only the most recent examples being Cubans, Haitians, and Indo-Chinese. As with stowaways, several options are open to the State where those rescued arrive; it may refuse disembarkation absolutely and require ships' masters to remove them from the jurisdiction, or it may make disembarkation conditional upon satisfactory guarantees as to resettlement, care and maintenance, to be provided by flag or other States, or by international organizations. Once again, a categorical refusal of disembarkation cannot be equated with breach of the principle of *non-refoulement*, even though it may result in serious consequences for asylum seekers.

The duty to rescue those in distress at sea is firmly established in both treaty<sup>178</sup> and general international law.<sup>179</sup> No provision has been made, however, in respect of the rescue of those who do not in fact enjoy the protection of their country of origin.<sup>180</sup> During the Indo-China exodus, given the expense and delay which often resulted from attempting to disembark those rescued at sea, many in distress were ignored by ship's masters and left to their fate. The problem was recognized as early as 1975<sup>181</sup> and the following year the Executive

<sup>177</sup> Cf. *Yiu Sing Chun v. Sava* 708 F.2d 869 (2nd Cir., 1983), holding that under the 1980 US Refugee Act, alien stowaways are entitled to an evidentiary hearing on their asylum applications. Such proceeding is now provided in the asylum regulations: 8 *CFR* 8253.1(F).

<sup>178</sup> See, for example, art. 11, 1910 Brussels International Convention with respect to Assistance and Salvage at Sea: 1 *Bevans* 780 (1968); art. 45 (1), 1929 International Convention on the Safety of Life at Sea: 136 *LNTS* 82; ch. V, Reg. 10a, 1960 International Convention on the Safety of Life at Sea; art. 12, 1958 Convention on the High Seas; art. 98, 1982 Convention on the Law of the Sea.

<sup>179</sup> This view was expressed by the International Law Commission with regard to its proposed draft of art. 12 of the 1958 Convention on the High Seas; see UN doc. A/3179 (1956). ^

<sup>180</sup> See generally, Grant, B., *The Boat People*, (1980), 68-72; Grahl-Madsen, *Status of Refugees*, vol. 2, 271-2; Pugash, J. Z., 'The Dilemma of the Sea Refugee: Rescue without Refuge', 18 *Harv. ILJ* 577 (1977). Art. 11 of the 1951 Convention requires contracting States to give 'sympathetic consideration' to the establishment within their territory of 'refugees regularly serving as crew members' on ships flying their flag. At the 1951 Conference, it was stated that this provision was intended to benefit genuine seamen, not those escaping by sea: UN doc. A/CONF.2/SR.12, p. 5. Likewise, the 1957 agreement relating to refugee seamen (updated by the 1973 protocol thereto) offers little solace to the asylum seeker at sea. Art. 1 defines a 'refugee seaman' as a refugee within the meaning of the Convention and Protocol, who 'is serving as a seafarer in any capacity on a mercantile ship, or habitually earns his living as a seafarer on such ship'. The objective is to determine the links which a refugee seaman may have with contracting States, with a view to establishing entitlement to residence and/or the issue of travel documents. The qualifying links are such as generally to exclude the seafaring asylum seeker; for example, 600 days service under the flag of a contracting State, previous lawful residence in a contracting State, or travel documents previously issued by a contracting State: arts. 2, 3. 'Sympathetic consideration' is to be given to extending the agreement's benefits to those not otherwise a qualifying: art. 5.

<sup>181</sup> *Report of the 26th Session of the Executive Committee*: UN doc. A/AC.96/516/Add.I, para. 92.

Committee stressed the obligations of ships<sup>5</sup> masters and States under the 1910 Brussels and 1958 Geneva Conventions, and called for the grant of first asylum.<sup>182</sup> The situation continued to worsen, and in October 1977 UNHCR appealed jointly with the Inter-governmental Maritime Consultative Organization (IMCO) to the shipping community directly, through the London-based International Chamber of Shipping, requesting owners to instruct ships' masters of the need for scrupulous observance of obligations relating to rescue at sea.<sup>183</sup>

The fears of first-port-of-call countries had also to be allayed by developing the practice of resettlement guarantees. In October 1978, the Executive Committee called for at least temporary admission to be granted, and appealed to the international community to support efforts to obtain the resettlement assurances that would facilitate disembarkation.<sup>184</sup> The general situation regarding Indo-Chinese refugees in South East Asia deteriorated rapidly in the first half of 1979, with the escalation in numbers leading to forcible measures against asylum seekers in various countries. A United Nations meeting convened in Geneva in July resulted in substantially increased resettlement offers, financial aid, and a number of practical proposals regarding rescue at sea.<sup>185</sup> A follow-up meeting of experts<sup>186</sup> in August 1979 took note of the principle of flag State responsibility and also proposed for consideration a further principle of responsibility for nationally-owned vessels sailing under a flag of convenience. A pool of resettlement places was suggested for difficult cases, to be available to UNHCR in its efforts to secure disembarkation where the flag State was unable to provide a guarantee or where it was unreasonable to expect that State to offer resettlement. Practical protection and a realistic appraisal of the various competing interests were combined in a resettlement places scheme known as DISERO (Disembarkation Resettlement Offers), which operated principally in Singapore.<sup>187</sup> By institutionalizing resettlement guarantees and disembarkation procedures (and thus by linking flight to solution), the scheme effectively made international co-operation concrete, and enhanced the protection of those in flight.<sup>188</sup>

<sup>182</sup> *Report of the 27th Session of the Executive Committee*: UN doc. A/AC.96/534, para. 87(f), (g), (h).

<sup>183</sup> Cf. *Report of the 28th Session of the Executive Committee*: UN doc. A/AC.86/549, paras. 21, 36.B(d), (e); also UN doc. E/1978/75, para. 9. The appeal was renewed in Dec. 1978. At the 29th Session, the Executive Committee recommended that UNHCR advise IMCO of the names of ships which ignored distress signals, with a view to their being reported to countries of ownership or registration: UN doc. A/AC.96/559, para. 38.E. IMCO was later renamed the International Maritime Organization (IMO).

<sup>184</sup> *Report of the 29th Session of the Executive Committee*: UN doc. A/AC.96/559, para. 38.E.

<sup>185</sup> See UN doc. A/34/627, paras. 31-6; annexe I.

<sup>186</sup> The meeting was attended by representatives of Australia, Canada, France, Federal Republic of Germany, Italy, Japan, the Netherlands, the UK and the US.

<sup>187</sup> Participating States in 1985 were Australia, Canada, France, Federal Republic of Germany, New Zealand, Sweden, Switzerland and the US: see UN doc. EC/SCP/42 (July 1985), para. 3. Executive Committee Conclusion No. 38 (1985), *Report of the 36th Session*: UN doc. A/AC.96/673, para. 115(3).

<sup>188</sup> UNHCR's *Guidelines for the Disembarkation of Refugees*, (1983), and later development of the RASRO (Rescue at Sea Resettlement Offers) scheme refined and rationalized related aspects of the

Despite the significant numbers rescued and disembarked under this scheme,<sup>189</sup> the principle of flag State responsibility was soon called into question. Doubt as to its general applicability had emerged with the rescue in November 1979 of some 150 Vietnamese by the British registered vessel *Entalina* which was then heading for Darwin. The Australian government requested a resettlement guarantee as a pre-condition to disembarkation, but the British government appears initially to have considered the practice to be geographically limited to South East Asia, where all possibility of local settlement was ruled out; in other cases in other regions the principle of first-port-of-call responsibility should apply. In the event, the British government did accept for ultimate settlement in the United Kingdom any refugees not resettled in other countries. The Australian government in turn announced that it would consider accepting any who met Australian requirements, and who had relatives in the country or other special reasons to support their applications.<sup>190</sup>

At the 1980 Executive Committee Meeting, the United Kingdom representative called for a special approach to the problem of rescue cases.<sup>191</sup> He was supported by the Netherlands representative who pointed out that, while numerous guarantees had been given by his country, the growth in numbers was becoming more difficult to handle. With the overall decline in refugee arrivals, he hoped that first-port-of-call States would reconsider their policy of requiring time-limited guarantees from flag States.<sup>192</sup> The representative for Greece was more direct. In his view, the rescue of refugees at sea should not impose flag State responsibility; that responsibility rested with all signatories of the Convention and Protocol and the problem should be thoroughly re-examined with a view to an equitable sharing of the burden.<sup>193</sup>

basic problem (rescue-disembarkation-solution). In particular, UNHCR developed a scheme for reimbursement of expenses, while States within the RASRO scheme collaborated to share out the rescue caseload more evenly.

<sup>189</sup> In 1979, after rescue by 128 ships, 8,624 individuals known to UNHCR were disembarked, mostly in Hong Kong, the Philippines, Singapore, Thailand, and Japan, most of them against flag-State guarantees. In 1980, the numbers rose to 15,563 from 217 ships, and in 1981 to 14,589 from 213 ships.

<sup>190</sup> Department of Immigration and Ethnic Affairs, Press Releases 173/79(a), 30 Nov. 1979; 176/79, 4 Dec. 1979; 177/79, 5 Dec. 1979; and 180/79, 6 Dec. 1979. In June 1980, Australia announced that it accepted responsibility for some 70 refugees rescued by one of its *naval* vessels, referring to 'accepted international practice': Press Release 64/80, 17 June 1980. The following month the British government gave a further guarantee in respect of 51 Vietnamese rescued by the bulk carrier *Glenpark* Press Release 78/80, 3 July 1980.

<sup>191</sup> UN doc. A/AC.96/SR.317, para. 47.

<sup>192</sup> UN doc. A/AC.96/SR.319, para. 27; see also the views of the Netherlands and others at the July 1982 working group of government representatives on rescue at sea: UN doc. EC/SCP/21, paras. 11, 12, 16.

<sup>193</sup> UN doc. A/AG.96/SR.319, para. 4; the representative cited Colombos, *The International Law of the Sea*, (6th ed., 1967), 285, and Simonet, *La Convention sur la haute mer* (1966), 78, in support of the argument against obligation. In 1979/80, British, Dutch, and Greek ships rescued 6,223 persons, or 27.5% of the total. Representatives of maritime nations reiterated their concern at the 1981 Executive Committee meeting; see UN doc. A/AC.96/SR.322, para. 3; UN doc. A/AC.96/601, para. 52.

A working group on problems related to rescue at sea was duly set up, composed of the representatives of the maritime and coastal States most concerned, of the potential resettlement countries and competent international bodies. It met in July 1982 and its report was considered by the Executive Committee later that year.<sup>194</sup> The fundamental character of the duty to rescue was reiterated and it was generally acknowledged that the problem of refugees at sea entailed a division of responsibilities between flag States, coastal States and resettlement States. The question was how to delimit more precisely their scope and content.

As a matter of law, the responsibilities of flag States *after* disembarkation were also uncertain. Some saw legal responsibility as limited to rescue, with any resettlement obligations thereafter deriving from flag States<sup>5</sup> membership of the international community. The issue of disembarkation was also unclear. The IMO representative observed that there existed no 'formal, multilateral agreement<sup>5</sup> embodying a principle of disembarkation at the next scheduled port of call. Port of call States in the region indicated that they were prepared to continue to allow disembarkation, but only where resettlement guarantees were given and those disembarked were rapidly moved out. The solutions proposed by the Executive Committee in 1982 consequently relied more on practical arrangements than legal norms.<sup>195</sup>

In light of the practice and views summarized above, the principle of flag State responsibility cannot be said to have established itself as 'international custom, as evidence of a general practice accepted as law'. The special circumstances which affected the finding of solutions to the South East Asia refugee problem dictated the emergence of a particular usage, limited also in time and place. In other situations it may be appropriate to emphasize the responsibility of the first port of call, given the inescapable but internationally relevant fact of the refugees<sup>5</sup> presence within the territory of the State. As with stowaways, effective solutions ought in principle to be attainable through a weighing of competing interests, taking account not only of the prospects, if any, of local integration, but also of notions of international solidarity and burden-sharing,<sup>196</sup> as well as the extent to which refusal of disembarkation may lead in fact to *refoulement*, or to other serious harm for the asylum seekers.

<sup>194</sup> See *Report* of the Working Group on problems related to the rescue of asylum-seekers in distress at sea: UN docs. EC/SCP/21 and EC/SCP/24; *Report* of the Meeting of the Sub-Committee of the Whole on International Protection: UN doc. A/AC.96/613, paras. 3-12; *Report* on the 33rd Session of the Executive Committee: UN doc. A/AC.96/614, paras. 61, 70(2).

<sup>195</sup> *Report* on the 33rd Session: UN doc. A/AC.96/614, paras. 61, 70(2). The Working Group suggested further contributions to DISERO, which was generally favoured, as was the idea of expanding the scheme to include a funding element to meet costs related to rescue, disembarkation and temporary admission: UN doc. EC/SGP/21, para. 18.

<sup>196</sup> At the 1981 Executive Committee meeting, one speaker suggested that arrangements relating to rescue and resettlement 'already reflected the principle of burden-sharing between maritime and coastal States and should therefore be maintained': UN doc. A/AC.96/601, para. 52.

#### 4.3 ARRIVAL OF ASYLUM SEEKERS BY BOAT

The arrival of asylum seekers by boat puts at issue not only the interpretation of *non-refoulement*, but also the extent of freedom of navigation and of coastal States' right of police and control. In South East Asia during the Indo-China exodus, States several times prevented boats landing, and towed back to the high seas many which had penetrated the territorial sea and internal waters. In 1981, the United States announced a policy of 'interdiction' on the high seas of boats which were believed to be bringing illegal aliens to the United States.

The high seas,<sup>197</sup> of course, are not subject to the exercise of sovereignty by any State, and ships are liable to the exclusive jurisdiction of the flag State, save in exceptional cases provided for by treaty or under general international law. The freedom of the high seas, however, is generally expressed as a freedom common to States,<sup>198</sup> while the boats of asylum seekers, like their passengers, will most usually be denied flag State protection. Similarly, the right of innocent passage for the purpose of traversing the territorial sea or entering internal waters is framed with normal circumstances in mind. A coastal State may argue, first, that boats of asylum seekers are to be assimilated to ships without nationality<sup>199</sup> and are subject to boarding and other measures on the high seas. Additionally, it may argue that existing exceptions to the principle of freedom of navigation, applying within the territorial sea and the contiguous zone,<sup>200</sup> justify such preventive measures as the coastal State deems necessary to avoid landings on its shores.

Under general international law, ships on the high seas may be boarded only in very limited circumstances, namely, suspicion of piracy or slave trading, where the ship has no nationality or has the same nationality as the warship purporting to exercise authority, and where the ship is engaged in unauthorized broadcasting.<sup>201</sup> Somewhat different considerations arise where, under a bilateral agreement, a flag State agrees to permit the authorities of another State to intercept its vessels. Precedents have existed for many years in regard to

<sup>197</sup> Art. 1, 1958 Geneva Convention on the High Seas; art. 86, 1982 UN Convention on the Law of the Sea.

<sup>198</sup> Art 2, 1958 Geneva Convention; art. 87, 1982 UN Convention.

<sup>199</sup> Art. 6, 1958 Geneva Convention; arts. 91, 92, 1982 UN Convention.

<sup>200</sup> See arts. 14—20, 24, 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone; arts. 17-26, 33, 1982 UN Convention.

<sup>201</sup> Art. 22, 1958 Geneva Convention on the High Seas; art. 110, 1982 UN Convention. Because of doubts as to the obligation, if any, to submit to visit and search, O'Connell suggests that 'the only safe course to assume is that a right of boarding exists only under the law of the flag': O'Connell, D. P., *The International Law of the Sea*, vol. II, 801-2. Cf. *Mohan v. Attorney-General for Palestine* [1948] AC 351, which is some authority for the view that even the 'freedom of the open sea' may be qualified by place or circumstance. In that case, the Privy Council found that no breach of international law resulted when a ship carrying illegal immigrants bound for Palestine was intercepted on the high seas by a British destroyer, and escorted into port where the vessel was forfeited. The Board nevertheless considered relevant the fact that the ship in question flew no flag, and could not therefore claim the protection of any State.

smuggling, slaving, and fisheries conservation. Under the Haitian interdiction programme, the US Coast Guard was instructed to stop and board specified vessels, including those of US nationality, or no nationality, or possessing the nationality of a State which had agreed to such measures. Those on board were to be examined and returned to their country of origin, 'when there is reason to believe that an offence is being committed against the United States immigration laws . . .'.<sup>202</sup>

The lack of nationality perhaps most closely approximates the situation of asylum seekers, but even if their boats are without the effective protection of the country of origin, it is doubtful whether they can be assimilated to ships without nationality. No boat is ever entirely without the protection of the law. Obligations with regard to the rescue of those in distress at sea will circumscribe a State's freedom of action in certain cases. In others, elementary considerations of humanity<sup>203</sup> require that account be taken of the rights to life, liberty, and security of the person, and to freedom from torture, cruel, inhuman, and degrading treatment; with respect to many such rights no derogation is permitted, even in time of public emergency threatening the life of the nation.

In the absence of an armed attack, the use of force against asylum seekers cannot be justified on the ground of self-defence.<sup>204</sup> Notions of necessity<sup>205</sup> or self-preservation,<sup>206</sup> as well as exceptions relating to the 'peace, good order or security' of the coastal State<sup>207</sup> are subject to the limitations just set out. While a State necessarily enjoys a margin of appreciation in determining whether an influx of asylum seekers constitutes a threat, the lawfulness of measures taken to meet it will depend on there being some relationship of proportionality between the means and the end. International procedures for assistance and for finding solutions to refugee problems exist and it is highly doubtful whether the use of such force as is reasonably likely to result in injury or death can ever be justified.<sup>208</sup>

#### 4.3.1 *Internal waters and the territorial sea*

Internal waters, lying behind the baselines used to delimit territorial waters, are completely within the jurisdiction of the State. The territorial sea also is an area

<sup>202</sup> Executive Order no. 12324, *Interdiction of Illegal Aliens*, s. 2(c) (3), which continued: \ . . or appropriate laws of a foreign country [with which an agreement exists]; provided, however, that no person who is a refugee will be returned without his consent'. See further above, s. 3.3.1.

<sup>203</sup> *Corfu Channel* case, *IGJ Rep.*, 1949, 4, at 22; Brownlie, *Principles of Public International Law*, (4th ed., 1990), 28.

<sup>204</sup> Brownlie, I., *International Law and the Use of Force by States*, (1963), 264ff., 278-9. Schwarzenberger, G. and Brown, L., *A Manual of International Law*, (6th ed.), 150. On the distinction between self-defence and self-help, see Bowett, D., *Self-Defence in International Law*, (1958), 11-12.

<sup>205</sup> Brownlie, *Principles*, 465-6.

<sup>206</sup> Cf. Johnson, D. H. N. 'Refugees, Departees and Illegal Migrants' 9 *Sydney LR* 11, at 30-1; Bowett, *Self-Defence*, 22.

<sup>207</sup> See arts. 14, 19 and 24, 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone; arts. 17-20, 27, 33, 1982 UN Convention Brownlie points out, coastal States' powers are essentially powers of police and control: *Principles*, 205

<sup>208</sup> Cf. Johnson, below n. 220 and accompanying text.

over which the coastal State exercises full sovereignty and in which, subject to the requirements of innocent passage, all the laws of the coastal State may be made applicable. The sovereignty here exercised is no different in kind from that over State territory.

Under international law, States are entitled to regulate innocent passage through the territorial sea,<sup>209</sup> for example, to prevent the infringement of immigration provisions. Non-compliance with such regulations may make passage non-innocent. Articles 25 and 19(2)(g) of the 1982 UN Law of the Sea Convention are probably declaratory of customary international law. Article 19(2)(g) provides:

Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State ...

Article 25 of the 1982 Convention, and article 16 of the 1958 Geneva Convention before it, provides expressly that, 'The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent'.

Although the territorial limits of a State run to the boundaries of its territorial sea, it does not follow that entry within the latter constitutes entry within the State, where 'entry' is the juridical fact necessary and sufficient to trigger the application of a particular system of international rules, such as those relating to landings in distress or immunity for illegal entry.<sup>210</sup> States generally apply their immigration laws, not within territorial waters, but within internal waters, even though it may be argued that 'entry' occurs at the moment when the outer limit of the territorial sea is crossed. Under article 31 of the 1951 Convention, refugees who cross into territorial waters and who otherwise satisfy the requirements of that provision, could be said to have entered illegally and to be

<sup>209</sup> 'Regulation' does not necessarily imply the exercise of control; in principle, the law of the flag State governs the internal affairs of a ship, while neither civil nor criminal jurisdiction should be exercised, absent any actions prejudicial to the peace, good order, or security of the coastal State: art. 16, 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone; cf. art. 21, 1982 UN Convention. Moreover, the power to suspend innocent passage temporarily in certain areas is qualified by the requirement that this be essential for the protection of security: art. 16(3), 1958 Geneva Convention; art. 25(3), 1982 UN Convention, and it is arguably not intended to be used against specific vessels, or for unrelated reasons.

<sup>210</sup> O'Connell, D. P., *The International Law of the Sea*, vol. 1, (Shearer, I., ed.), (1982), 80-1, observes that art. 1 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone 'allows for the maximum implications that may be drawn from the concept of sovereignty, but it does not impose those implications on the coastal State; it leaves them to be drawn in municipal law'. He notes further that ratification . . . does not necessarily and automatically have the effect of altering the natural boundary. If that boundary encompasses the territorial sea, the Convention endorsed this by securing the recognition of the maximum implications on the part of all other States. If that boundary does not already encompass it, ratification by itself would not seem to affect the situation



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entitled to exemption from penalties. Entry within territorial waters may be an 'entry'<sup>5</sup> for certain purposes,<sup>211</sup> but it is incorrect to generalize from these particulars. The notion of distress, or *force majeure*, reflects not so much a right of entry, as a limited immunity for having so entered in fairly well-defined circumstances.<sup>212</sup> Similarly, article 31 of the 1951 Convention, within its restricted area of application, operates as a defence to prosecution and penalty, but neither *force majeure* nor article 31 come into operation unless and until a measure of enforcement action is taken.

The coastal State may elect to exercise jurisdiction, and prosecute and punish, or simply prohibit and prevent the passage in question.<sup>213</sup> The fact that a vessel may be carrying refugees or asylum seekers who intend to request the protection of the coastal State arguably removes that vessel from the category of innocent passage, even though the status of the passengers may entitle them to claim immunity from penalties under article 31 of the 1951 Convention. Even if the refugee character of those on board were compatible with innocent passage, this would not alone entail a right of entry into any port, although other rules of international law may affect or control the discretionary decision as to what is to be done with respect to any particular vessel. International law nevertheless allows States to take all reasonable measures in the territorial sea to prevent the entry into port of a vessel carrying illegal immigrants, and to require such vessel to leave the territorial sea.

### 4.3.2 *The contiguous zone*

In the law of the sea, the term 'contiguous zone' describes the area of seas between twelve and twenty-four miles from the baselines employed to delimit the boundaries of the territorial sea.<sup>214</sup> In this zone, or equivalent areas, international law has long limited the range of permissible enforcement measures.<sup>215</sup>

Article 24 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone acknowledges a power of control, 'to prevent infringement within its territory or territorial sea'. O'Connell observes, however:

It is also arguable that necessary power to control does not include the right to arrest, because at this stage (i.e. that of a ship coming into the contiguous zone) the ship cannot have committed an offence. Enforced direction into port may not be arrest, in a techni-

<sup>211</sup> *The Ship 'May'* R. [1931] SCR 374.

<sup>212</sup> O'Connell, *Law of the Sea*, vol. 2, (1984), 853-8, at 856, citing authority for the proposition that if a ship incurs trouble while engaged in an illegal enterprise against the State in whose waters it takes refuge, it cannot claim immunity from the local jurisdiction, even if entry was indeed occasioned by distress.

<sup>213</sup> Arts. 19, 25, 1982 UN Convention; McDougal and Burke, *The Public Order of the Oceans*, (1962), 187-92, 272.

<sup>214</sup> Art. 24, 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, now extended by art. 33, 1982 UN Convention.

<sup>215</sup> In *Croft v. Dupphy* [1933] AC 156, 164-5, for example, the Privy Council, upholding Canadian Customs Act provisions on 'hovering', took account of the fact that they did not apply to foreign vessels in the area of extended jurisdiction.

cal sense, but it is tantamount to it and therefore is in principle excluded. The necessary examination should take place at sea, while the ship to be examined is in the zone.<sup>216</sup>

He further suggests that 'additional powers of seizure for the purpose of punishment'<sup>5</sup> would come into operation where illegal immigrants have been landed, but this would be because the infringement of protected interests has already occurred in national territory.

The contiguous zone exists for the protection of the coastal State's customs, fiscal, sanitation and immigration interests. Even before the crystallization of State competence in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, it was widely recognized that jurisdiction might be exercised beyond the 'exact boundaries' of a State's territory, for law enforcement purposes, or in order to preserve national safety.<sup>217</sup> The question is, whether 'the interest sought to be protected warrants the authority asserted for the time projected in the area specified'.<sup>218</sup> By comparison with those which run in the territorial sea, the special jurisdictional rights which a State can exercise in the adjacent area of the contiguous zone do not clearly include the interception of vessels believed to be carrying asylum seekers.<sup>219</sup> One authority argues that 'such force and only such force may be used as will prevent the attempted incursion of illegal immigrants from becoming a danger to the preservation of the State'.<sup>220</sup> Although the basic principle of control is undisputed, this proposition begs the question, what is permissible in less extreme cases. The degree of force which might be used would need to be determined in light of all the circumstances, in the same way that the initial exercise of discretion would need to take into account the safety of passengers, the status of those on board, and the likely consequences of interdiction.<sup>221</sup>

If there are reasonable and probable grounds to believe that a vessel's intended purpose is to enter the territorial sea in breach of the immigration law,

<sup>216</sup> O'Connell, *Law of the Sea*, vol. 1, (1982), 1058.

<sup>217</sup> See McNair, *International Law Opinions*, vol. 2, (1956), 186 (enforcement of revenue laws in respect to vessels not yet within maritime jurisdiction); Jessup, P., *The Law of Territorial Waters and Maritime Jurisdiction*, (1927), 75-6, 242ff. O'Connell, *Law of the Sea*, vol. 2, (1984), 1045-7, identifying Canada as the first State in modern times to assert a revenue jurisdiction independent of the territorial sea.

<sup>218</sup> McDougal and Burke, *Public Order of the Oceans*, 584, 585 ff. See also O'Connell, *Law of the Sea*, vol. 2, (1984), 1057-61, noting the 'anticipatory' nature of contiguous zone powers.

<sup>219</sup> The powers allowed in the contiguous zone are only those permitted by international law: O'Connell, *Law of the Sea*, vol. 1, (1982) 1058-9; also Morin, 'La zone de pêche exclusive du Canada', 2 *Can. YBL* (1964), 77, 86: 'la notion de zone contigue ... est très stricte et ne comporte aucune extension de la compétence de l'Etat côtier sur les eaux situées au delà de sa mer territoriale . . .' He identifies the contiguous zone as forming part of the high seas, and as defined, 'précisément par l'absence de toute souveraineté étatique. Il n'est pas douteux que, dans la pratique, certains Etats voient dans la zone contigue le prolongement de leur mer territoriale et prétendent y exercer les mêmes compétences douanières ou fiscales, mais nous convenons . . . que ces Etats sont en opposition avec le droit international tel qu'établi par les conventions sur le droit de la mer.'

<sup>220</sup> Johnson, D. H. N., 'Refugees, Departees and Illegal Migrants', 9 *Sydney L.R.* (1979-82), 11, 32.

<sup>221</sup> Some attention would always need to be given to a vessel's next likely port of call, if all information available indicated that refugees, rather than migrants, were on board.

the coastal State may have the right to stop and board the vessel. However, action taken under those powers, including inspection and redirection, might be objected to by flag States.<sup>222</sup> In certain circumstances, the Office of the United Nations High Commissioner for Refugees might be expected to make representations, in the absence of the flag State.<sup>223</sup>

In summary, the exercise and enforcement of jurisdiction over ships in the contiguous zone may violate international law where it is inconsistent with the purposes for which the contiguous zone exists and the limited authority allowed to coastal States; or because the exercise of enforcement powers (surveillance, identification, interception and arrest) exceed what is permissible under that law.<sup>224</sup>

#### 4.3.3 *The consequences of enforcement action*

The simple denial of entry of ships to territorial waters cannot be equated with breach of the principle of *non-refoulement*, which requires that State action have the effect or result of returning refugees to territories where their lives or freedom would be threatened. In its comments in 1950 on the draft convention, the *Ad hoc* Committee observed:

... the obligation not to return a refugee to a country where he was persecuted did not imply an obligation to admit him to the country where he seeks refuge. The return of a refugee-ship, for example, to the high seas could not be construed as a violation of this obligation.<sup>225</sup>

Denial of entry to internal or territorial waters must therefore be distinguished from programmes of interdiction of boats which are accompanied by the actual, physical return of passengers to their country of origin. Even in the latter situation, the principle of *non-refoulement* would come into play only in the presence of certain objective conditions indicating the possibility of danger befalling those returned.<sup>226</sup>

<sup>222</sup> See above, n. 201. Obviously, all will turn on whether the flag State, if any, decides to object. The interdiction programme was based upon the Haitian government's agreement thereto. The US-Great Britain Treaty of 1924 (concluded in the context of prohibition) included express agreement by the British to raise no objections to the boarding of private vessels flying the British flag and outside US territorial waters. Enquiries might be undertaken to determine whether the vessel was endeavouring to violate US laws, and vessels might be seized on reasonable cause: Jessup, *Territorial Waters*, 289-93.

<sup>223</sup> Such representations were indeed made when the use of force (such as towing out to sea at high speed) resulted in sinking and loss of life of asylum seekers arriving directly from Vietnam in Singapore and Malaysia in 1979.

<sup>224</sup> See O'Connell on practical intervention and enforcement problems, which flow from international law restrictions on the use of force, and on the overall requirements of the necessary vessels: *Law of the Sea*, vol. 2, 1064 and n. 25. See also at 107 *ff.* on the degree of force which may be used.

<sup>225</sup> See UN doc. E/AC.32/L.32/Add.1 (10 Feb. 1950), comment on draft article 28 (expulsion to country of persecution).

<sup>226</sup> Goodwin-Gill, G. S., '*Non-refoulement* and the new asylum seekers', 26 *Vrg. JIL* 897, 902 (1986).

It does not follow that States enjoy complete freedom of action over arriving boats, even if they come in substantial numbers and without nationality. The range of permissible measures is limited by obligations relating to rescue at sea and arising from elementary considerations of humanity, while action which would directly effect the return of refugees is prohibited by the principle of *non-refoulement*. Whether on the high seas or in waters subject to the jurisdiction of any State, refugees may also be protected by UNHCR in the exercise of its functional protection role.<sup>227</sup>

5. *Non-refoulement*, access to procedures and 'safe' countries

The practice of restricting access to State territory and/or refugee status procedures through the use of various admissibility thresholds is examined in Chapter 9, s. 2.1, with reference also to the principle of *non-refoulement*.

6. The principle of *non-refoulement* in general international law

The evidence relating to the meaning and scope of *non-refoulement* in its treaty sense also amply supports the conclusion that today the principle forms part of general international law. There is substantial, if not conclusive, authority that the principle is binding on all States, independently of specific assent. State practice before 1951 is, at the least, equivocal as to whether, in that year, article 33 of the Convention reflected or crystallized a rule of customary international law.<sup>228</sup> State practice since then, however, is persuasive evidence of the concretization of a customary rule, even in the absence of any formal judicial pronouncement.<sup>229</sup> In this context, special regard should also be paid to the practice of international organizations, such as the United Nations General Assembly and the United Nations High Commissioner for Refugees. General Assembly resolutions dealing with the report of the High Commissioner and consistently endorsing the principle of *non-refoulement* tend to be adopted by consensus. While consensus decision-making denotes the absence of formal dissent,<sup>230</sup> it still allows

<sup>227</sup> Ibid.

<sup>228</sup> This conclusion represents a modification of views first set out in Goodwin-Gill, *Movement of Persons*, 141.

<sup>229</sup> See *United States Diplomatic and Consular Staff in Tehran*, ICJ Rep., 1980, 3, at 41 (para. 88), in which the Court hints at the 'legal difficulties, in internal and international law' which might have resulted from the United States acceding to Iran's request for the extradition of the former Shah.

<sup>230</sup> The Special Committee on the Rationalization of the Procedures and Organization of the General Assembly concluded that 'the adoption of decisions and resolutions by consensus is desirable when it contributes to the effective and lasting settlement of differences, thus strengthening the authority of the United Nations'. The Committee emphasized, however, 'that the right of every Member State to set forth its views in full must not be prejudiced by this procedure': *Report of the Special Committee*, GAOR, 26th Sess., Supp. no. 26 (A/8426), 1971, paras. 28-9; Rules of Procedure of the General Assembly, A/520/Rev. 12 (1974), annexe V, para. 104. See D'Amato, A., 'On Consensus', 8 *Can. ILL* 104 (1970); Buzan, B., 'Negotiating by Consensus: Developments in Techniques at the United Nations Conference on the Law of the Sea', 75 *AJIL* 324 (1981).

States the opportunity to express opposing views in debate and in summary records.<sup>231</sup> No formal or informal opposition to the principle of *non-refoulement* is to be found, and where objection has been made on occasion to the protection and assistance activities of UNHCR, it has been founded on a challenge to the status as refugees of the individual involved. Moreover, while a number of commentators have disagreed as to the legal inferences to be drawn from the practice of States, none has been able to dispute the factual record.<sup>232</sup>

Article 33 of the 1951 Convention is of a 'fundamentally norm-creating character' in the sense in which that phrase was used by the International Court of Justice in the *North Sea Continental Shelf* cases.<sup>233</sup> That *refoulement* may be permitted in exceptional circumstances does not deny this premise, but rather indicates the boundaries of discretion.<sup>234</sup>

The practice examined hitherto has necessarily been selective and far from embracing the views of all States. The position of certain countries remains ambivalent, even though no State today claims any general right to return refugees or bona fide asylum seekers to a territory in which they may face persecution or danger to life or limb. Where States do claim not to be bound by

<sup>231</sup> On 16 Dec. 1981, the General Assembly adopted without a vote res. 36/148 on International Co-operation to Avert New Flows of Refugees, on the recommendations of the Special Political Committee (*Report*: UN doc. A/36/790). In the course of debate in the Committee, a number of delegates made statements in explanation which included substantial reservations regarding the draft resolution; other delegates expressly stated that they would have abstained, had the draft been put to the vote: UN doc. A/SPC/36/SR.45, paras. 49ff.

<sup>232</sup> For a detailed and cogent account of State practice, see Perluss and Hartman, 'Temporary Refuge: Emergence of a Customary International Norm', 26 *Vrg. JIL* 551 (1986). For an example of failure to address either the facts or the legal issues, see Martin, D. A., 'Effects of International Law on Migration Policy and Practice', 23 *Int. Mig. Rev.* 547 (1989), who asserts (at 567) that Perluss and Hartmann (and the present author) 'essentially' propound the idea, 'hardly credible to the average citizen or to politicians and government officials', that international law forbids return if there is danger in the homeland. Perluss and Hartman and the present author in fact are somewhat more subtle. Martin further asserts (*ibid.*, n. 62) that Hailbronner in 26 *Vrg. JIL* 857 (1986) 'offered a detailed examination of the evidence used', to conclude that practice does not support a norm of customary international law. In fact, Hailbronner scarcely comments at all on the extensive examples offered by Hartman and Perluss, concentrating mostly on *municipal* law, limiting himself to disagreeing with their conclusions while dealing principally with an interesting, but peripheral issue, namely, the extent to which art. 3 of the European Convention on Human Rights has not been of use to refugees; on which, see below, Ch. 8, s. 2.2.1.

<sup>233</sup> ICJ *Rep.*, 1969, 3 at 42. No reservations may be made to art. 33; see art. 42.

<sup>234</sup> In 1984, the Cartagena Declaration included a reference to the actual or imminent *jus cogens* status of the principle of *non-refoulement*, see Conclusions and Recommendations, III, 5; below Annexe 2. In 1985, the High Commissioner observed in his report to the General Assembly that the principle of non-return had crystallized to the status of a peremptory norm of international law, unrestricted by geographical or territorial limitations: *Report of the United Nations High Commissioner for Refugees*: UN E/1985/62 (1985), paras. 22-3. A peremptory norm is one 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character': art. 53, 1969 Vienna Convention on the Law of Treaties. Although a sound case can be made for the customary international law status of the principle of *non-refoulement*, its claim to be part of *jus cogens* is far less certain, and little is likely to be achieved by insisting on its status as such.

any obligation, their arguments either dispute the status of the individuals in question, or invoke exceptions to the principle of *non-refoulement*, particularly on the basis of threats to national security. Such considerations were dominant in the March/April 1995 decision by Tanzania to close its border to Rwandan refugees,<sup>235</sup> in the *refoulement* of Rwandans carried out by Zaire in the following September, and in Turkey's response to Kurdish refugees in the aftermath of the Gulf War.<sup>236</sup> The principle of *non-refoulement* applies to all States, whether or not they have ratified the 1951 Convention or the 1967 Protocol. However, the practice of States indicates that a significant element of *contingency* attaches to the obligation, particularly in cases of mass influx that may constitute a threat to the security of the receiving State.<sup>237</sup>

One further possible objection to including *non-refoulement* within the corpus of general international law lies in the so-called 'right of unilateral qualification'. Article 1(3) of the 1967 Declaration on Territorial Asylum declares that, '[i]t shall rest with the State granting asylum to evaluate the grounds for the grant of asylum'.<sup>238</sup> This provision, which Poland introduced during discussions in the Third Committee, is of uncertain scope. So far as the grant of *asylum* remains discretionary and a manifestation of sovereignty by the territorial State, it is redundant. Some commentators fear, however, that, rather than facilitate liberal policies, such a provision might be invoked to justify decisions to *refoule* refugees.<sup>239</sup> The disparate interpretations of 'political offence' in extradition, and its tendency to become dominated by political considerations, emphasize how, in the absence of directly applicable international standards, States' discretion can remain paramount.

If each State remains absolutely free to determine the status of asylum seekers and either to abide by or ignore the principle of *non-refoulement*, then the refugee's status in international law is denied and the standing, authority, and effectiveness of the principles and institutions of protection are seriously undermined. Despite instances of negative practice, particularly during the 1990s, the weight of the evidence still favours limits to discretion flowing, first, from an international legal definition of the refugee; and secondly, from 'general

<sup>235</sup> Kiley, Sam, 'Tanzania closes border to 100,000 Rwanda refugees', *The Times*, 1 Apr. 1995.

<sup>236</sup> See above, s. 3.2.

<sup>237</sup> The practical necessity for UNHCR to involve other States in the provision of material and political support for countries of first asylum has clear implications for the manner in which UNHCR can seek to uphold the basic principle.

<sup>238</sup> The 1975 Group of Experts' text (UN doc. A/10177) proposed the following article for inclusion in a convention on territorial asylum: 'Qualification of the grounds for granting asylum or applying the provisions of this Convention appertains to the Contracting State whose territory the person concerned has entered or seeks to enter and seeks asylum' (art. 9, emphasis supplied). Various amendments were proposed, including deletion of the article, but none was considered by the Committee of the Whole: UN doc. A/CONF.78/12, 63.

<sup>239</sup> Grahl-Madsen, A., *Territorial Asylum* (1980) 46, 88. See also provisions on the right of qualification in Latin American treaties, for example, art 23, 1889 Montevideo Treaty on International Penal Law, art. 3, 1933 Montevideo Convention on Political Asylum; arts. 20, 23, 1940 Montevideo Treaty on International Penal Law; art. 4, 1954 Caracas Convention on Diplomatic Asylum.

recognition of the principle of *non-refoulement*. Security considerations and the practical dimensions of large-scale movements pose challenges to the continuing vitality of the principle, as well as to its precise scope and content. That certain grey areas continue to persist in the formulation of *non-refoulement* hardly confirms its lack of status in general international law, however. As Brierly noted some fifty-six years ago, ‘the principles of international law are not susceptible of precise formulation . . . [the] rules are . . . constandy changing and modelling themselves on the ever-changing needs of international life.’<sup>240</sup>

#### 6.1 *NON-REFOULEMENT* OR REFUGE BEYOND THE 1951 CONVENTION/1967 PROTOCOL

While the formal requirements of *non-refoulement* may be limited to Convention refugees, the *principle of refuge* is located within the body of general international law. It encompasses those with a well-founded fear of being persecuted, or who face a substantial risk of torture; it equally includes those who would face other ‘relevant harm’. The limited protection due springs from objective conditions, wherever the facts are such as to indicate a serious risk of harm befalling those compelled to flee for *valid reasons* including war, violence, conflict, violations of human rights or other serious disturbance of public order.<sup>241</sup>

The juridically relevant situation of need flows from objectively verifiable evidence confirming the causes for flight, and the circumstance of danger facing specific groups or individuals. This essential factual base makes individualized inquiries into persecution or harm redundant. At the same time, host community interests are protected, within the principle of refuge, by the exclusion of, for example, those who have persecuted others, who are serious criminals or threats to *ordre public*, or who, on their own admission, are motivated by reasons of purely personal convenience.<sup>242</sup>

A combination of legal and humanitarian principle imposes significant limitations on the return of individuals to countries in which they may face inhumane or degrading treatment, or where their readmission is uncertain and their

<sup>240</sup> ‘The Shortcomings of International Law’, in Brierly, *The Basis of Obligation in International Law*, (1958, ed. Lauterpacht and Waldock) 68, 74.

<sup>241</sup> This characterization does not exclude, but neither does it determine, the solution that may be ultimately due. The phrase ‘relevant harm’ is used in this context to signify the validity of the reasons lying behind the claim for protection, and includes but is not limited to the risk of extralegal, arbitrary and summary executions, and to enforced disappearance: above, s. 2.4.

<sup>242</sup> Unlike other responses which generally call for once only determinations and once for all solutions, the principle of refuge permits the reasons for flight and the conditions producing distress to be regularly re-examined. It also allows complementary policies aimed at remedying the situation at source or otherwise promoting solutions to be pursued, through bilateral and multilateral means, and through the United Nations system. The conditions of refuge will require to be moderated and improved over time, however, as other human rights interests begin to predominate, for example, through lapse of time or the establishment of effective links. The western European response to the exodus from former Yugoslavia, though couched in the language of temporary protection (see below, section Ch. 5, s. 5.2), essentially reflected the principle of refuge described here, although not always with adequate reference to other complementary human rights, such as that to family reunion.

security precarious. Notwithstanding some of the rhetoric and recent exceptions, particularly in Europe with regard to asylum seekers from countries beyond the region, such as Iran and Sri Lanka, practice reveals a significant level of general agreement not to return to danger those fleeing severe internal upheavals or armed conflict in their own countries. What is disputed is the extent to which, if at all, any international legal obligation is involved.<sup>243</sup>

Despite the concerns of States and various exceptions in recent years, nearly four decades of practice contain ample recognition of a humanitarian response to refugees falling outside the 1951 Convention. Whether practice has been sufficiently consistent over time, and accompanied by the *opinio juris* essential to the emergence of a customary rule of refuge, is possibly less certain, even at the regional level.

In part, a strictly normative approach<sup>244</sup> is misconceived, for international legal obligations deriving from human rights treaties, among others, have clearly influenced the practice, and have constrained States' freedom of action. In that process, the obligations themselves have developed, even if what emerges at the present time is an incomplete relation of rights and duties. The primary responsibility for the protection of human rights rests on the territorial State; other States do not automatically assume or share in that responsibility when they remove non-nationals to their own country. So far as a State's actions may forcibly return an individual to the risk of violation of basic human rights, however, its responsibility is duty-driven, rather than strictly correlative to any individual 'right'. What exactly this entails in terms of policies, practices, State conduct and international responsibility still needs to be worked out, especially in the relation of States to UNHCR and its institutional role.<sup>245</sup>

<sup>243</sup> See above, Ch. 1, s. 7.

<sup>244</sup> That is, an approach in search of a set of correlative rights and duties.

<sup>245</sup> See further below, Ch. 6.