

## 2.1 The scope and content of the principle of *non-refoulement*: Opinion

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## I. Introduction

1. We have been asked by the Office of the United Nations High Commissioner for Refugees (UNHCR) to examine the scope and content of the principle of *non-refoulement* in international law. We have not been asked to address particular cases or specific circumstances in which the principle has been in issue but rather to comment on the interpretation and application of the principle in general. It goes without saying that the interpretation and application of the principle in specific cases will hinge on the facts involved. The present opinion is limited to a preliminary analysis of the matter.

2. *Non-refoulement* is a concept which prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.

3. The above description is no more than a summary indication of what the concept is about in relation to refugees. There are, in addition, other contexts in which

the concept is relevant, notably in the more general law relating to human rights concerning the prohibition of torture or cruel, inhuman or degrading treatment or punishment.

#### A. Contexts in which *non-refoulement* is relevant

4. The concept of *non-refoulement* is relevant in a number of contexts – principally, but not exclusively, of a treaty nature. Its best known expression for present purposes is in Article 33 of the 1951 Convention Relating to the Status of Refugees:<sup>1</sup>

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

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

5. The principle also appears in varying forms in a number of later instruments: (a) the 1966 Principles Concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee,<sup>2</sup> Article III(3) of which provides:

No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion

1 No. 2545, 189 UNTS 150 (hereinafter ‘1951 Convention’).

2 Report of the Eighth Session of the Asian-African Legal Consultative Committee held in Bangkok, 8–17 Aug. 1966, p. 335 (hereinafter ‘Asian-African Refugee Principles’). Art. III(1) of the as yet unadopted Draft Consolidated Text of these principles revised at a meeting held in New Delhi on 26–27 Feb. 2001 provides as follows:

No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion.

The provision as outlined above may not however be claimed by a person when there are reasonable grounds to believe the person’s presence is a danger to the national security and public order 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.

[**Editorial note:** These Principles were adopted by Resolution 40/3 on 24 June 2001, at a meeting at which the Committee was also renamed the Asian-African Legal Consultative Organization. The text of Article III was not changed.]

which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.

(b) the 1967 Declaration on Territorial Asylum adopted unanimously by the United Nations General Assembly (UNGA) as Resolution 2132 (XXII), 14 December 1967,<sup>3</sup> Article 3 of which provides:

1. No person referred to in article 1, paragraph 1 [seeking asylum from persecution], 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.
2. Exception may be made to the foregoing 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.
3. Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting 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.

(c) the 1969 Organization of Africa Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa,<sup>4</sup> Article II(3) of which provides:

No person shall be subjected by a Member State 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 for the reasons set out in Article I, paragraphs 1 and 2 [concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order].

(d) the 1969 American Convention on Human Rights,<sup>5</sup> Article 22(8) of which provides:

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>3</sup> A/RES/2132 (XXII) of 14 Dec. 1967.

<sup>4</sup> 1001 UNTS 45 (hereinafter 'OAU Refugee Convention').

<sup>5</sup> American Convention on Human Rights or 'Pact of San José, Costa Rica', 1969, Organization of American States (OAS) Treaty Series No. 35, 9 ILM 673.

(e) the 1984 Cartagena Declaration,<sup>6</sup> Section III, paragraph 5 of which reiterates:

the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.

6. The principle of *non-refoulement* is also applied as a component part of the prohibition on torture or cruel, inhuman or degrading treatment or punishment. For example, Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>7</sup> provides:

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.

7. Likewise, Article 7 of the 1966 International Covenant on Civil and Political Rights<sup>8</sup> provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. This obligation has been construed by the UN Human Rights Committee, in its General Comment No. 20 (1992), to include a *non-refoulement* component as follows:

States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.<sup>9</sup>

8. The corresponding provision in Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>10</sup> has similarly been interpreted by the European Court of Human Rights as imposing a prohibition on *non-refoulement*.<sup>11</sup>

6 Cartagena Declaration on Refugees, embodying the Conclusions of the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama held in Cartagena, 19–22 Nov. 1984. See, UNHCR, *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons* (UNHCR, Geneva, 1995), vol. II, pp. 206–11 (hereinafter 'Cartagena Declaration').

7 A/RES/39/46, 10 Dec. 1984 (hereinafter 'Torture Convention').

8 999 UNTS 171, 6 ILM (1967) 368 (hereinafter 'ICCPR').

9 HRI/HEN/1/Rev.1, 28 July 1994, at para. 9.

10 European Treaty Series No. 5 (hereinafter 'European Convention on Human Rights').

11 See *Soering v. United Kingdom* (1989), series A, no. 161, 98 ILR 270, at para. 88; *Cruz Varas v. Sweden* (1991), series A, no. 201; 108 ILR 283, at para. 69; *Vilvarajah v. United Kingdom* (1991), series A, no. 215; 108 ILR 321, at paras. 73–4 and 79–81; *Chahal v. United Kingdom* (1996), *Reports of Judgments*

9. *Non-refoulement* also finds expression in standard-setting conventions concerned with extradition. For example, Article 3(2) of the 1957 European Convention on Extradition precludes 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 these reasons’.<sup>12</sup> Similarly, Article 4(5) of the 1981 Inter-American Convention on Extradition precludes extradition when ‘it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons’.<sup>13</sup>

10. By reference to the 1951 Convention, the Torture Convention and the ICCPR, 169 States, representing the overwhelming majority of the international community, are bound by some or other treaty commitment prohibiting *refoulement*. This number increases when account is taken of other international instruments, including instruments applicable at a regional level. A table showing participation in the key international instruments that include a *non-refoulement* component appears as Annex 2.1 to this chapter.

## B. The interest of UNHCR

11. The interest of UNHCR in *non-refoulement* arises from its special responsibility to provide for the international protection of refugees.

### 1. *The establishment of UNHCR and its mandate*

12. Some consideration of the emergence and structure of UNHCR is required in order to appreciate the significance of a number of later developments in the mandate of UNHCR that have a bearing on the question of *non-refoulement*.

13. In 1946, the UN General Assembly established the International Refugee Organization (IRO) as a Specialized Agency of the United Nations of limited duration. Having regard to the prospective termination of the mandate of the IRO and the continuing concerns over refugees, the UNGA, by Resolution 319 (IV) of 3 December 1949, decided to establish a High Commissioner’s Office for Refugees ‘to discharge the functions enumerated [in the Annex to the Resolution] and such other functions as the General Assembly may from time to time confer upon it’.<sup>14</sup> By Resolution 428 (V) of 14 December 1950, the UNGA adopted the Statute of the Office

*and Decisions* 1996-V; 108 ILR 385, at para. 75; *Ahmed v. Austria* (1997), *Reports of Judgments and Decisions* 1996-VI; 24 EHRR 278, at paras. 39–40; *T.I. v. United Kingdom*, Application No. 43844/98, Decision as to Admissibility, 7 March 2000, [2000] INLR 211.

12 European Treaty Series No. 24. 13 OAS Treaty Series No. 60, p. 45.

14 A/RES/319 (IV), 3 Dec. 1949, at para. 1.

of the United Nations High Commissioner for Refugees.<sup>15</sup> UNHCR was thus established as a subsidiary organ of the UNGA pursuant to Article 22 of the UN Charter.

14. Paragraph 1 of the UNHCR Statute describes the functions of the UNHCR as follows:

The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.

15. Paragraph 6 of the Statute identifies the competence of UNHCR *ratione personae* as extending to any person

who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.<sup>16</sup>

16. Paragraph 7 of the Statute indicates exceptions to the competence of UNHCR including any person in respect of whom

there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.<sup>17</sup>

17. The function and competence of UNHCR is thus determined by reference to the particular circumstances of the persons in need of international protection. It is not determined by reference to the application of any treaty or other instrument or rule of international law, by any temporal, geographic, or jurisdictional consideration, by the agreement or acquiescence of any affected State, or by any other factor.<sup>18</sup>

15 A/RES/428 (V), 14 Dec. 1950 (hereinafter 'the Statute'). 16 UNHCR Statute, at para. 6B.

17 UNHCR Statute, at para. 7(d). Art. 6 of the London Charter refers to crimes against peace, war crimes, and crimes against humanity. Art. 14(2) of the Universal Declaration of Human Rights provides that the right to seek and enjoy asylum 'may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'.

18 The fundamental importance of the UNHCR Statute as a basis for the international protection function of UNHCR, particularly in respect of States that had not acceded to the 1951 Convention or 1967 Protocol, was emphasized by the Executive Committee of the High Commissioner's Programme in Conclusion No. 4 (XXVIII) 1977.



UNHCR's mandate is to provide international protection *inter alia* to persons who are outside their country of origin in consequence of a well-founded fear of persecution and who come within the other requirements of paragraph 6B of the Statute and are not otherwise excluded from UNHCR competence by the terms of paragraph 7 of the Statute.

18. Paragraph 9 of the Statute provides that UNHCR 'shall engage in such additional activities . . . as the General Assembly may determine'. The General Assembly has over the past fifty years extended UNHCR's competence to encompass all categories of persons in need of international protection who may not fall under the Statute definition and has affirmed the breadth of the concept of 'refugee' for these purposes. For example, initially through the notion of UNHCR's good offices but later on a more general basis, refugees fleeing from generalized situations of violence have been included within the competence of the UNHCR.<sup>19</sup>

19. By 1992, a Working Group of the Executive Committee of the High Commissioner's Programme was able to describe UNHCR's mandate in the following terms:

The evolution of UNHCR's role over the last forty years has demonstrated that the mandate is resilient enough to allow, or indeed require, adaptation by UNHCR to new, unprecedented challenges through new approaches, including in the areas of prevention and in-country protection. UNHCR's humanitarian expertise and experience has, in fact, been recognised by the General Assembly as an appropriate basis for undertaking a range of activities not normally viewed as being within the Office's mandate. The Office should continue to seek specific endorsement from the Secretary-General or General Assembly where these activities involve a significant commitment of human, financial and material resources.

The Working Group confirmed the widely recognised understanding that UNHCR's competence for refugees extends to persons forced to leave their countries due to armed conflict, or serious and generalised disorder or violence [even though] these persons may or may not fall within the terms of the 1951 Convention relating to the Status of Refugees (1951 Convention) or its 1967 Protocol. From the examination of the common needs of the various

19 See, for example, A/RES/1499 (XV), 5 Dec. 1960, which invited UN members to consult with UNHCR 'in respect of measures of assistance to groups of refugees who do not come within the competence of the United Nations'; A/RES/1673 (XVI), 18 Dec. 1961, which requested the High Commissioner 'to pursue his activities on behalf of the refugees within his mandate or those for whom he extends his good offices, and to continue to report to the Executive Committee of the High Commissioner's Programme and to abide by directions which that Committee might give him in regard to situations concerning refugees'; A/RES/2039 (XX), 7 Dec. 1965, which requested the High Commissioner 'to pursue his efforts with a view to ensuring an adequate international protection of refugees and to providing satisfactory permanent solutions to the problems affecting the various groups of refugees within his competence'; A/RES/31/35, 30 Nov. 1976, endorsing ECOSOC Resolution 2011 (LXI) of 2 Aug. 1976, which commended UNHCR for its efforts 'on behalf of refugees and displaced persons, victims of man-made disasters, requiring urgent humanitarian assistance' and requested the High Commissioner to continue his activities for 'alleviating the suffering of all those of concern to his Office'.

groups for which the UNHCR is competent, it is clear that, with protection at the core of UNHCR's mandate, displacement, coupled with the need for protection, is the basis of UNHCR's competence for the groups. The character of the displacement, together with the protection need[ed], must also determine the content of UNHCR's involvement.

The Working Group considered that the same reasoning held true for persons displaced within their own country for refugee-like reasons. While the Office does not have any general competence for this group of persons, certain responsibilities may have to be assumed on their behalf, depending on their protection and assistance needs. In this context, UNHCR should indicate its willingness to extend its humanitarian expertise to internally displaced persons, on a case-by-case basis, in response to requests from the Secretary-General or General Assembly.<sup>20</sup>

20. Although UNHCR is accorded a special status as the guardian of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,<sup>21</sup> it is not limited in the exercise of its protective functions to the application of the substantive provisions of these two treaties. UNHCR may therefore rely on whatever instruments and principles of international law may be pertinent and applicable to the situation which it is called upon to address. Thus, for example, in parallel with reliance on *non-refoulement* as expressed in the 1951 Convention and the 1967 Protocol, the circumstances of particular cases may warrant UNHCR pursuing the protection of refugees coming within its mandate by reference to the other treaties mentioned above, as well as other pertinent instruments, including appropriate extradition treaties, or by reference to *non-refoulement* as a principle of customary international law.

## 2. *The Executive Committee of the High Commissioner's Programme*

21. Resolution 319 (IV) of 3 December 1949, by which the UNGA decided to establish UNHCR, provided that UNHCR should '[r]eceive policy directives from the United Nations according to methods to be determined by the General Assembly'.<sup>22</sup> It further indicated that '[m]eans should be provided whereby interested Governments, non-members of the United Nations, may be associated with the work of the High Commissioner's Office'.<sup>23</sup>

20 Note on International Protection, A/AC.96/799, 25 Aug. 1992, at paras. 14–16. This assessment was endorsed by the Executive Committee in Conclusion No. 68 (XLIII) 1992 on International Protection and implicitly by the UNGA in *inter alia* Resolution 47/105 of 16 Dec. 1992 concerning assistance to refugees, returnees, and displaced persons in Africa.

21 1967 Protocol attached to the 1951 Convention Relating to the Status of Refugees, No. 8791, 606 UNTS 267 (hereinafter '1967 Protocol'). As is addressed further below, the essential effect of the 1967 Protocol was to enlarge the scope of application *ratione personae* of the 1951 Convention. In the case of States not otherwise party to the 1951 Convention, the 1967 Protocol gave rise to an independent obligation to apply the terms of the 1951 Convention as amended by the Protocol.

22 A/RES/319 (IV), 3 Dec. 1949, at Annex 1, para. 1(c).

23 A/RES/319 (IV), 3 Dec. 1949, at Annex 1, para. 2.

22. Reflecting these objectives, paragraph 4 of the UNHCR Statute provides:

The Economic and Social Council may decide, after hearing the views of the High Commissioner on the subject, to establish an advisory committee on refugees, which shall consist of representatives of States Members and States non-members of the United Nations, to be selected by the Council on the basis of their demonstrated interest in and devotion to the solution of the refugee problem.

23. Pursuant to this provision, the UN Economic and Social Council (ECOSOC) established an Advisory Committee on Refugees ('Advisory Committee') by Resolution 393 (XIII) B of 10 September 1951. The object of the Advisory Committee was to advise UNHCR at its request on the exercise of its functions.

24. In the light of continuing concerns over the situation of refugees, the UNGA, by Resolution 832 (IX) of 21 October 1954, requested ECOSOC 'either to establish an Executive Committee responsible for giving directives to the High Commissioner in carrying out his programme . . . or to revise the terms of reference and composition of the Advisory Committee in order to enable it to carry out the same duties'.<sup>24</sup> In response, ECOSOC, by Resolution 565 (XIX) of 31 March 1955, reconstituted the Advisory Committee as an Executive Committee, to be known as the United Nations Refugee Fund (UNREF) Executive Committee.

25. Having regard, *inter alia*, to the emergence of 'new refugee situations requiring international assistance', the UNGA, by Resolution 1166 (XII) of 26 November 1957, requested ECOSOC

to establish, not later than at its twenty-sixth session, an Executive Committee of the High Commissioner's Programme to consist of the representatives of from twenty to twenty-five States Members of the United Nations or members of any of the specialised agencies, to be elected by the Council on the widest possible geographical basis from those States with a demonstrated interest in, and devotion to, the solution of the refugee problem, this Committee to take the place of the UNREF Executive Committee and to be entrusted with the terms of reference set forth below:

...

- (b) To advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office;
- (c) To advise the High Commissioner as to whether it is appropriate for international assistance to be provided through his Office in order to help solve specific refugee problems remaining unsolved after 31 December 1958 or arising after that date . . .

...

- (e) To approve projects for assistance to refugees coming within the scope of sub-paragraph (c) above . . .<sup>25</sup>

24 A/RES/832 (IX), 21 Oct. 1954, at para. 4.      25 A/RES/1166 (XII), 26 Nov. 1957, at para. 6.

26. Accordingly, ECOSOC, by Resolution 672 (XXV) of 30 April 1958, established the Executive Committee of the High Commissioner's Programme ('Executive Committee') with a membership of twenty-four States. Resolution 672 (XXV) provided that the Executive Committee shall '[d]etermine the general policies under which the High Commissioner shall plan, develop and administer the programmes and projects required to help solve the problems referred to in resolution 1166 (XII)'.<sup>26</sup> Membership of the Executive Committee, progressively expanded since its establishment, currently stands at fifty-seven States.<sup>27</sup>

27. Participation in Executive Committee meetings is at the level of Permanent Representative to the United Nations Office in Geneva or other high officials (including ministers) of the Member concerned. The Executive Committee holds one annual plenary session, in Geneva, in October, lasting one week. The Executive Committee's subsidiary organ, the Standing Committee, meets several times during the year. The adoption of texts takes place by consensus. In addition to participation in Executive Committee meetings by members of the Committee, a significant number of observers also attend on a regular basis and participate in the deliberations.

28. The Executive Committee was established by ECOSOC at the request of the UNGA. The Committee is thus formally independent of UNHCR and operates as a distinct body of the United Nations. In the exercise of its mandate, the Executive Committee adopts Conclusions on International Protection ('Conclusions') addressing particular aspects of UNHCR's work.

29. While Conclusions of the Executive Committee are not formally binding, regard may properly be had to them as elements relevant to the interpretation of the 1951 Convention.<sup>28</sup>

## **II. The 1951 Convention (as amended by the 1967 Protocol)**

### **A. The origins of the 1951 Convention**

30. The origins of the 1951 Convention are to be found in the work of the Ad Hoc Committee on Statelessness and Related Problems ('Ad Hoc Committee')

<sup>26</sup> E/RES/672 (XXV), 30 April 1958, at para. 2(a).

<sup>27</sup> The current membership of the Executive Committee comprises: Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Canada, Chile, China, Colombia, Côte d'Ivoire, Democratic Republic of Congo, Denmark, Ethiopia, Finland, France, Germany, Greece, the Holy See, Hungary, India, Iran, Ireland, Israel, Italy, Japan, Republic of Korea, Lebanon, Lesotho, Madagascar, Mexico, Morocco, Mozambique, Namibia, the Netherlands, Nicaragua, Nigeria, Norway, Pakistan, the Philippines, Poland, the Russian Federation, Somalia, South Africa, Spain, Sudan, Sweden, Switzerland, Tanzania, Thailand, Tunisia, Turkey, Uganda, the United Kingdom, the United States, and Venezuela.

<sup>28</sup> See further para. 214 below.

appointed by ECOSOC by Resolution 248 (IX) of 8 August 1949 with the mandate 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’. This in turn drew on a Report of the UN Secretary-General prepared at the request of ECOSOC which highlighted various arrangements and initiatives concerning refugees that had operated in the period of the League of Nations.<sup>29</sup> Against the background of these earlier arrangements and initiatives, the Secretary-General submitted for the consideration of the Ad Hoc Committee a preliminary draft convention based on the principles contained in the earlier instruments.<sup>30</sup> The subsequent work of the Ad Hoc Committee on the basis of this proposal culminated in a draft Convention Relating to the Status of Refugees<sup>31</sup> which formed the basis of a Conference of Plenipotentiaries convened by the UNGA from 2 to 25 July 1951.<sup>32</sup> The Conference concluded with the adoption of the Convention Relating to the Status of Refugees dated 28 July 1951.<sup>33</sup> The Convention entered into force on 22 April 1954.

## B. The 1951 Convention

31. As stated in its preambular paragraphs, the object of the 1951 Convention is to endeavour to assure refugees the widest possible exercise of the fundamental rights and freedoms enshrined in the Charter of the United Nations and

29 The institutional initiatives for the protection of refugees of this period operated within a legal framework of various instruments including:

- Arrangements with regard to the issue of certificates of identity to Russian refugees of 5 July 1922 (LNTS, vol. XIII, No. 355);
- Arrangements relating to the issue of identity certificates to Russian and Armenian refugees, supplementing and amending the previous arrangements dated 5 July 1922 and 31 May 1924 of 12 May 1926 (LNTS, vol. LXXXIX, No. 2004);
- Arrangements relating to the legal status of Russian and Armenian refugees of 30 June 1928 (LNTS, vol. LXXXIX, No. 2005);
- Convention Relating to the International Status of Refugees of 28 June 1933 (LNTS, vol. CLIX, No. 3663);
- Provisional arrangement concerning the status of refugees coming from Germany of 4 July 1936 (LNTS, vol. CLXXI, No. 3952);
- Convention Concerning the Status of Refugees Coming from Germany of 10 February 1938 (LNTS, vol. CXCII, No. 4461); and
- Additional Protocol to the 1936 Provisional Arrangement and 1938 Convention Concerning the Status of Refugees Coming from Germany of 14 September 1939 (LNTS, vol. CXCVIII, No. 4634).

30 See the Memorandum by the Secretary-General, E/AC.32/2, 3 Jan. 1950.

31 A/CONF.2/1, 12 March 1951. 32 A/RES/429 (V), 14 Dec. 1950.

33 Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN doc. A/CONF.2/108/Rev.1, 26 Nov. 1952.

the Universal Declaration of Human Rights.<sup>34</sup> For the purposes of the 1951 Convention, the term ‘refugee’ is defined to apply, first, to any person who had been considered a refugee under the earlier arrangements or under the IRO Constitution, and, secondly, to any person who

[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>35</sup>

32. Paragraphs D–F of Article 1 go on to indicate various exclusions to the application of the Convention. In particular, pursuant to Article 1F, the provisions of the Convention shall not apply

to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of his refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

33. The substantive parts of the Convention go on to address such matters as the juridical status of refugees, the respective rights and obligations of refugees and Contracting States, and the provision of administrative assistance to refugees. Articles 31–33 of the Convention set out various safeguards in the following terms:

**Article 31 Refugees unlawfully in the country of refuge**

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

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such

34 Universal Declaration of Human Rights, UNGA Resolution 217 A (III), 10 Dec. 1948 (hereinafter ‘Universal Declaration’) at preambular paras. 1 and 2.

35 1951 Convention, Art. 1A(2).

restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

### **Article 32 Expulsion**

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

### **Article 33 Prohibition of expulsion or return ('refoulement')**

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

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

34. Article 35(1) of the Convention provides that the Contracting States undertake to cooperate with UNHCR in the exercise of its functions, particularly its supervisory responsibility. Of some importance, Article 42(1) precludes the making of reservations in respect *inter alia* of Article 33 concerning *non-refoulement*.

## **C. The 1967 Protocol**

35. In the light of on-going concern over the situation of refugees and the limitation on the personal scope of the 1951 Convention, a Colloquium on the Legal Aspects of Refugee Problems was organized in Bellagio, Italy, in April 1965. The outcome of this meeting was agreement amongst the participants that the 1951 Convention ought to be adapted 'to meet new refugee situations which have arisen, and thereby to overcome the increasing discrepancy between the

Convention and the Statute of the Office of the High Commissioner for Refugees'.<sup>36</sup> The Colloquium further agreed that the most appropriate way of adapting the 1951 Convention would be through the adoption of a Protocol to 'remove the existing dateline (1 January 1951) in Article 1A(2) of the Convention'.<sup>37</sup> A Draft Protocol achieving this end was prepared and annexed to the Report of the Colloquium.

36. The Draft Protocol formed the basis of the 1967 Protocol Relating to the Status of Refugees. As stated in its preambular paragraphs, the objective of the 1967 Protocol was to ensure 'that equal status should be enjoyed by all refugees covered by the definition in the [1951] Convention irrespective of the dateline 1 January 1951'. Article I(1) and (2) of the Protocol accordingly provided:

1. The States Parties to the present Protocol undertake to apply Articles 2 to 34 inclusive of the [1951] Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term 'refugee' shall . . . mean any person within the definition of Article 1 of the [1951] Convention as if the words 'As a result of events occurring before 1 January 1951 and . . .' and the words ' . . . as a result of such events', in Article 1A(2) were omitted.

37. The operative definition of the term 'refugee' for the purposes of both the 1951 Convention and the 1967 Protocol thus reads as follows:

Any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

38. Article II(1) of the 1967 Protocol provides that the States Parties to the Protocol undertake to cooperate with the UNHCR in the exercise of its functions. Article VII reiterates the preclusion on reservations indicated in Article 42(1) of the 1951 Convention. The Protocol entered into force on 4 October 1967.

39. At present, 140 States are party to the 1951 Convention and/or the 1967 Protocol: 133 States<sup>38</sup> are party to both the 1951 Convention and the 1967 Protocol;<sup>39</sup>

36 Colloquium on the Legal Aspects of Refugee Problems, Note by the High Commissioner, A/AC.96/INF.40, 5 May 1965, at para. 2.

37 *Ibid.*, para. 3.

38 This includes the Holy See. [**Editorial note:** By 1 Feb. 2003 three more States – Belarus, the Republic of Moldova and Ukraine – had acceded to both the 1951 Convention and 1967 Protocol, while Saint Kitts and Nevis had acceded to the 1951 Convention alone. This brought the total of States party to both instruments to 136 and the total of those party to one or other instrument to 144.]

39 See Annex 2.1 hereto.



four States are party to the 1951 Convention alone;<sup>40</sup> and three States are party to the 1967 Protocol alone.<sup>41</sup>

#### D. The approach to interpretation

40. As this study is largely concerned with the interpretation of *non-refoulement* as expressed in Article 33 of the 1951 Convention, it will be convenient if we first set out briefly the principal elements in the process of treaty interpretation. The starting point is necessarily Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969,<sup>42</sup> which are generally accepted as being declaratory of customary international law. Those Articles provide as follows:

##### **Article 31 General rule of interpretation**

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

##### **Article 32 Supplementary means of interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in

40 Madagascar, Monaco, Namibia, and Saint Vincent and the Grenadines. [Editorial note: By 1 Feb. 2003, Saint Kitts and Nevis had also acceded to the 1951 Convention alone.]

41 Cape Verde, the United States, and Venezuela.

42 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (hereinafter 'Vienna Convention').

order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

41. While the text of a treaty will be the starting point, the object and purpose of the treaty as well as developments subsequent to its conclusion will also be material. Reference to the object and purpose of a treaty is an essential element of the general rule of interpretation. It will assume particular importance in the case of treaties of a humanitarian character. The matter was addressed by the International Court of Justice (ICJ) in its 1951 Advisory Opinion on *Reservations to the Genocide Convention* in terms that could apply equally to the 1951 Convention as follows:

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilising purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention, the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those higher purposes which are the *raison d'être* of the convention.<sup>43</sup>

42. The relevance of subsequent developments is also explicitly affirmed as part of the general rule of interpretation in Article 31(3) of the Vienna Convention. This requires that any subsequent agreement or practice of the parties regarding the interpretation of a treaty must be taken into account as well as 'any relevant rules of international law applicable in the relations between the parties'.

43. The importance for the purposes of treaty interpretation of subsequent developments in the law was addressed by the ICJ in its 1971 Advisory Opinion in the *Namibia* case, in the context of its interpretation of the League of Nations Covenant over South West Africa, in the following terms:

Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – 'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned – were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions

<sup>43</sup> *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, p. 15, at p. 23.

of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and *its interpretation cannot remain unaffected by the subsequent development of the law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.* In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its function, may not ignore.<sup>44</sup>

44. This analysis is echoed in judicial opinion more broadly. For example, pre-dating the *Namibia* Advisory Opinion, although evidently informing the assessment of the Court in the passage just quoted, Judge Tanaka, in a Dissenting Opinion in the 1966 *South West Africa* case, observed that developments in customary international law were relevant to the interpretation of a treaty concluded forty years previously, particularly in view of the ethical and humanitarian purposes of the instrument in question.<sup>45</sup> This assessment, and the Court's subsequent analysis in the *Namibia* case, was echoed more recently by Judge Weeramantry in the 1997 *Gabcikovo-Nagymaros* case in respect of human rights instruments more generally.<sup>46</sup> Addressing the *raison d'être* of the principle, Judge Weeramantry observed as follows:

Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A Court cannot endorse actions which are a violation of human rights by the standards of the time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights.<sup>47</sup>

45. The point also finds support in the jurisprudence of other international tribunals. In respect of the interpretation and application of the European Convention on Human Rights, for example, the European Court of Human Rights has observed that 'the Convention is a living instrument which . . . must be interpreted in the light of present day conditions'.<sup>48</sup>

44 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, at para. 53 (emphasis added).

45 *South West Africa*, Second Phase, Judgment, ICJ Reports 1966, p. 6, at pp. 293–4.

46 *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p. 7, at pp. 114–15.

47 *Ibid.*, p. 114.

48 *Tyler v. United Kingdom*, Judgment of the European Court of Human Rights, 25 April 1978, Series A, No. 26, at para. 31. See also R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9th edn, Longman, Harlow, 1992), at pp. 1274–5; *The Kronprins Gustaf Adolf (1932) Annual*

46. A further element to be borne in mind is the concept of the cross-fertilization of treaties. This is a process which is familiar in the law of international organizations and involves the wording and construction of one treaty influencing the interpretation of another treaty containing similar words or ideas.<sup>49</sup> Its application is not excluded in relation to humanitarian treaties.

47. Article 32 of the Vienna Convention provides that recourse may be had to supplementary means of interpretation, including the *travaux préparatoires* and circumstances of the conclusion of the treaty, to confirm the meaning resulting from the application of the general rule of interpretation or to determine the meaning when the interpretation according to the general rule leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. While reference by international courts and tribunals to the *travaux préparatoires* of a treaty is common, it is a practice that has significant shortcomings particularly in the case of treaties negotiated at a time and in circumstances far distant from the point at which the question of interpretation and application arises.<sup>50</sup> The *travaux préparatoires* of the 1951 Convention must, therefore, for the purposes of the interpretation of the Convention, be approached with care. The world of 1950–51 in which the Convention was negotiated was considerably different from the present day circumstances in which the Convention falls to be applied.

## E. Preliminary observations

48. Before turning to the detail of Article 33, a number of preliminary observations are warranted. First, the 1951 Convention binds only those States that are a party to it. Pursuant to Article I(2) of the 1967 Protocol, a State that is a party to the Protocol though not to the 1951 Convention will also be bound ‘to apply Articles 2 to 34 inclusive of the [1951] Convention’. The *non-refoulement* obligation in Article 33 of the 1951 Convention will only be opposable to States that are a party to one or both of these instruments.

49. Secondly, the 1951 Convention is of an avowedly humanitarian character. This emerges clearly from the preambular paragraphs of the Convention which notes the profound concern expressed by the United Nations for refugees and the objective of assuring to refugees the widest possible exercise of the fundamental

*Digest* (1931–32), No. 205, p. 372, at p. 374; *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 174, at p. 182; *Fubini Claim* (1959), 29 ILR 34, at p. 46.

49 The practice is addressed in E. Lauterpacht, ‘The Development of the Law of International Organizations by the Decisions of International Tribunals’ *Recueil des Cours*, vol. 1976-VI, at pp. 396–402.

50 See also, I. M. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press, 1984), p. 142.

rights and freedoms referred to in the 1948 Universal Declaration of Human Rights. It goes on to record the recognition by all States of ‘the social and humanitarian nature of the problem of refugees’.<sup>51</sup>

50. The humanitarian character of the 1951 Convention also emerges clearly from its origin in the work of the Ad Hoc Committee on Statelessness. It is evident, too, in the very definition of the term ‘refugee’ in Article 1A(2) of the Convention which speaks of persons who ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’ are outside their country of origin. The protection afforded to refugees by Articles 31–33 of the Convention further attests the Convention’s humanitarian character. The humanitarian responsibilities of States towards refugees pursuant to the 1951 Convention have also been repeatedly affirmed in Conclusions of the Executive Committee.

51. Thirdly, within the scheme of the 1951 Convention, the prohibition on *refoulement* in Article 33 holds a special place. This is evident in particular from Article 42(1) of the Convention which precludes reservations *inter alia* to Article 33. The prohibition on *refoulement* in Article 33 is therefore a non-derogable obligation under the 1951 Convention. It embodies the humanitarian essence of the Convention.

52. The non-derogable character of the prohibition on *refoulement* is affirmed in Article VII(1) of the 1967 Protocol. It has also been emphasized both by the Executive Committee and by the UNGA.<sup>52</sup> The Executive Committee, indeed, has gone so far as to observe that ‘the principle of *non-refoulement* . . . was progressively acquiring the character of a peremptory rule of international law’.<sup>53</sup>

53. Fourthly, the fundamental humanitarian character and primary importance of *non-refoulement* as a cardinal principle of refugee protection has also been repeatedly affirmed more generally in Conclusions of the Executive Committee over the past twenty-five years. Thus, for example, in 1980, the Executive Committee ‘[r]eaffirmed the fundamental character of the generally recognized principle of *non-refoulement*’.<sup>54</sup> In 1991, it emphasized ‘the primary importance of *non-refoulement* and asylum as cardinal principles of refugee protection’.<sup>55</sup> In 1996, it again reaffirmed ‘the fundamental importance of the principle of *non-refoulement*’.<sup>56</sup> Numerous other similar statements to this effect are apparent. The fundamental importance of *non-refoulement* within the scheme of refugee protection has also been repeatedly affirmed in resolutions of the General Assembly.<sup>57</sup>

51 At preambular para. 5.

52 Conclusion No. 79 (XLVII) 1996, at para. (i); A/RES/51/75, 12 Feb. 1997, at para. 3.

53 Conclusion No. 25 (XXXIII) 1982, at para. (b).

54 Conclusion No. 17 (XXXI) 1980, at para. (b).

55 Conclusion No. 65 (XLII) 1991, at para. (c).      56 Conclusion No. 79 (XLVII) 1996, at para. (j).

57 See, for example, A/RES/48/116, 24 March 1994, at para. 3; A/RES/49/169, 24 Feb. 1995, at para. 4; A/RES/50/152, 9 Feb. 1996, at para. 3; A/RES/51/75, 12 Feb. 1997, at para. 3.

## F. The interpretation of Article 33(1) of the 1951 Convention

54. The prohibition on *refoulement* is set out in Article 33(1) of the 1951 Convention in the following terms:

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

55. Article 33(2) contains exceptions to the principle. These will be addressed further below.

56. The starting point for the interpretation of this Article must be the words of the provision itself, read in the context of the treaty as a whole. As observed in the course of the preceding remarks on the principles of interpretation relevant to this exercise, the object and purpose of the 1951 Convention – its humanitarian character – as well as subsequent developments in the law and any subsequent agreement and practice of the parties regarding interpretation, will also be material. As the text is the starting point, it will be convenient to proceed by way of an analysis that follows the language of the provision.

### 1. *Who is bound?*

#### (a) The meaning of 'Contracting State'

57. The first question that requires comment is who is bound by the prohibition on *refoulement*, i.e. what is meant by the term 'Contracting State'. A related question concerns the scope of this term *ratione loci*, i.e. what are the territorial limits of the obligation on a 'Contracting State'.

58. The term 'Contracting State' refers to all States party to the 1951 Convention. By operation of Article I(1) of the 1967 Protocol, it also refers to all States party to the 1967 Protocol whether or not they are party to the 1951 Convention.

59. The reference to 'Contracting States' will also include all sub-divisions of the Contracting State, such as provincial or state authorities, and will apply to all the organs of the State or other persons or bodies exercising governmental authority. These aspects are uncontroversial elements of the law on state responsibility expressed most authoritatively in the Articles on State Responsibility adopted by the International Law Commission (ILC) of the United Nations on 31 May 2001 ('State Responsibility Articles') in the following terms:

### **Attributions of conduct to a State**

#### **Article 4 Conduct of organs of a State**

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial

or any functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

An organ includes any person or entity which has that status in accordance with the internal law of the State.

#### **Article 5 Conduct of persons or entities exercising elements of governmental authority**

The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.<sup>58</sup>

60. In accordance with equally uncontroversial principles of state responsibility, the responsibility of 'Contracting States' under Article 33(1) of the 1951 Convention will also extend to:

- (a) the conduct of an organ placed at the disposal of a State by another State if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed;<sup>59</sup>
- (b) the conduct of a person or group of persons in fact acting on the instructions of, or under the direction or control of, the State;<sup>60</sup>
- (c) the conduct of a person or group of persons in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority;<sup>61</sup> and
- (d) conduct which is not otherwise attributable to a State but which has nonetheless been acknowledged and adopted by the State as its own.<sup>62</sup>

61. These principles will be particularly relevant to the determination of the application of the principle of *non-refoulement* in circumstances involving the actions of persons or bodies on behalf of a State or in exercise of governmental authority at points of embarkation, in transit, in international zones, etc. In principle, subject to the particular facts in issue, the prohibition on *refoulement* will therefore apply to circumstances in which organs of other States, private undertakings (such as carriers, agents responsible for checking documentation in transit, etc) or other persons act on behalf of a Contracting State or in exercise of the governmental activity of that State. An act of *refoulement* undertaken by, for example, a private air carrier or

58 International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, A/CN.4/L.602, 31 May 2001.

59 State Responsibility Articles, at Art. 6.

60 Ibid., Art. 8. 61 Ibid., Art. 9. 62 Ibid., Art. 11.

transit official acting pursuant to statutory authority will therefore engage the responsibility of the State concerned.

(b) Is the responsibility of the Contracting State limited to what occurs on its territory?

62. The responsibility of the Contracting State for its own conduct and that of those acting under its umbrella is not limited to conduct occurring within its territory. Such responsibility will ultimately hinge on whether the relevant conduct can be attributed to that State and not whether it occurs within the territory of the State or outside it.

63. As a general proposition States are responsible for conduct in relation to persons 'subject to or within their jurisdiction'. These or similar words appear frequently in treaties on human rights.<sup>63</sup> Whether a person is subject to the jurisdiction of a State will not therefore depend on whether they were within the territory of the State concerned but on whether, in respect of the conduct alleged, they were under the effective control of, or were affected by those acting on behalf of, the State in question.

64. Although focused on treaties other than the 1951 Convention, this matter has been addressed by both the Human Rights Committee and the European Court of Human Rights in terms which are relevant here.

65. For example, in *López Burgos v. Uruguay*, involving the alleged arrest, detention, and mistreatment of López Burgos in Argentina by members of the 'Uruguayan security and intelligence forces', the Human Rights Committee said:

[A]lthough the arrest and initial detention and mistreatment of López Burgos allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol ('... individuals subject to its jurisdiction...') or by virtue of article 2(1) of the Covenant ('... individuals within its territory and subject to its jurisdiction...') from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil.

The reference in article 1 of the Optional Protocol to 'individuals subject to its jurisdiction' does not affect the above conclusions because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occur.

Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights 'to all individuals within its territory and subject

63 See, e.g., Art. 2(1) of the ICCPR, Art. 1 of the 1966 Optional Protocol to the ICCPR, UNGA Res. 2200A (XXI), Art. 1 of the ECHR, and Art. 1(1) of the ACHR.



to its jurisdiction', but *it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit on the territory of another State*, whether with the acquiescence of the Government of that State or in opposition to it . . . .

. . . [I]t would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.<sup>64</sup>

66. The same view has been expressed by the European Court of Human Rights. In *Loizidou v. Turkey*, for example, the question arose as to whether acts by Turkish troops outside Turkey were capable of falling within the jurisdiction of Turkey. Concluding that they could, the European Court of Human Rights said:

[T]he concept of 'jurisdiction' under [article 1 of the European Convention on Human Rights] is not restricted to the national territory of the High Contracting Parties. According to its established case law, for example, the Court has held that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention . . . In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.<sup>65</sup>

67. The reasoning in these cases supports the more general proposition that persons will come within the jurisdiction of a State in circumstances in which they can be said to be under the effective control of that State or are affected by those acting on behalf of the State more generally, wherever this occurs. It follows that the principle of *non-refoulement* will apply to the conduct of State officials or those acting on behalf of the State *wherever this occurs*, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc.

64 Communication No. 52/1979, *López Burgos v. Uruguay*, Views of the Human Rights Committee of 29 July 1981, at paras. 12.1–12.3 (emphasis added). See also Communication No. 56/1979, *de Casariego v. Uruguay*, Views of the Human Rights Committee of 29 July 1981, at paras. 10.1–10.3.

65 *Loizidou v. Turkey (Preliminary Objections)*, European Court of Human Rights, Judgment of 23 Feb. 1995, Series A, No. 310, 103 ILR 622, at paras. 62–3. References in the text have been omitted.

## 2. *Prohibited conduct*

68. Consideration must now be given to the nature of the act prohibited by Article 33(1). What is meant by the phrase ‘expel or return (*‘refouler’*) . . . in any manner whatsoever’?

69. As the words ‘in any manner whatsoever’ indicate, the evident intent was to prohibit any act of removal or rejection that would place the person concerned at risk. The formal description of the act – expulsion, deportation, return, rejection, etc. – is not material.

70. It has sometimes been suggested that *non-refoulement* does not apply to acts of extradition or to non-admittance at the frontier. In support of this suggestion, reference has been made to comments by a number of delegations during the drafting process to the effect that Article 33(1) was without prejudice to extradition.<sup>66</sup> It has also been said that *non-refoulement* cannot be construed so as to create a right to asylum – something that is not granted in the 1951 Convention or in international law more generally.

### (a) *Applicability to extradition*

71. There are several reasons why extradition cannot be viewed as falling outside the scope of Article 33(1). First, the words of Article 33(1) are clear. The phrase ‘in any manner whatsoever’ leaves no room for doubt that the concept of *refoulement* must be construed expansively and without limitation. There is nothing, either in the formulation of the principle in Article 33(1) or in the exceptions indicated in Article 33(2), to the effect that extradition falls outside the scope of its terms.

72. Secondly, that extradition agreements must be read subject to the prohibition on *refoulement* is evident both from the express terms of a number of standard-setting multilateral conventions in the field and from the political offences exception which is a common feature of most bilateral extradition arrangements. Article 3(2) of the 1957 European Convention on Extradition and Article 4(5) of the 1981 Inter-American Convention on Extradition, noted above, support the proposition.

73. Thirdly, such uncertainty as may remain on the point is dispelled by the unambiguous terms of Conclusion No. 17 (XXXI) 1980 of the Executive Committee which reaffirmed the fundamental character of the principle of *non-refoulement*, recognized that refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution, called upon States to ensure that the principle of *non-refoulement* was taken into account in treaties relating to extradition and national legislation on the subject, and expressed the hope that due regard would be had to the principle of *non-refoulement* in the application of existing treaties relating to extradition.<sup>67</sup>

66 See, e.g., the discussion in *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary* by Dr Paul Weis (Cambridge University Press, 1995), pp. 341–2.

67 Conclusion No. 17 (XXXI) 1980, paras. (b)–(e).

74. Fourthly, any exclusion of extradition from the scope of Article 33(1) would significantly undermine the effectiveness of the 1951 Convention in that it would open the way for States to defeat the prohibition on *refoulement* by simply resorting to the device of an extradition request. Such a reading of Article 33 would not be consistent with the humanitarian object of the Convention and cannot be supported.

75. Finally, we would also note that developments in the field of human rights law, at both a conventional and customary level, prohibit, without any exception, exposing individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment *inter alia* by way of their extradition. Although this development is not by itself determinative of the interpretation of Article 33(1) of the 1951 Convention, it is of considerable importance as the law on human rights which has emerged since the conclusion of the 1951 Convention is an essential part of the framework of the legal system that must, by reference to the ICJ's observations in the *Namibia* case, be taken into account for the purposes of interpretation.

#### (b) Rejection at the frontier

76. As regards rejection or non-admittance at the frontier, the 1951 Convention and international law generally do not contain a right to asylum. This does not mean, however, that States are free to reject at the frontier, without constraint, those who have a well-founded fear of persecution. What it does mean is that, where States are not prepared to grant asylum to persons who have a well-founded fear of persecution, they must adopt a course that does not amount to *refoulement*. This may involve removal to a safe third country or some other solution such as temporary protection or refuge. No other analysis, in our view, is consistent with the terms of Article 33(1).

77. A number of considerations support this view. First, key instruments in the field of refugee protection concluded subsequent to 1951 explicitly refer to 'rejection at the frontier' in their recitation of the nature of the act prohibited. This is the case, for example, in the Asian-African Refugee Principles of 1966, the Declaration on Territorial Asylum of 1967 and the OAU Refugee Convention of 1969. While, again, these provisions cannot be regarded as determinative of the meaning of Article 33(1) of the 1951 Convention, they offer useful guidance for the purposes of interpretation – guidance that is all the more weighty for its consistency with the common humanitarian character of all of the instruments concerned.

78. Secondly, as a matter of literal interpretation, the words 'return' and 'refouler' in Article 33(1) of the 1951 Convention may be read as encompassing rejection at the frontier. Indeed, as one commentator has noted, in Belgian and French law, the term '*refoulement*' commonly covers rejection at the frontier.<sup>68</sup> As any ambiguity in the terms must be resolved in favour of an interpretation that is consistent with the humanitarian character of the Convention, and in the light of the qualifying

68 Weis, *The Refugee Convention, 1951*, p. 342.

phrase, we are of the view that the interpretation to be preferred is that which encompasses acts amounting to rejection at the frontier.

79. Thirdly, this analysis is supported by various Conclusions of the Executive Committee. Thus, in Conclusion No. 6 (XXVIII) 1977, the Executive Committee explicitly reaffirmed ‘the fundamental importance of the observance of the principle of *non-refoulement* – both *at the border* and within the territory of a State’.<sup>69</sup> Further support for the proposition comes from Conclusion No. 15 (XXX) 1979 which, in respect of refugees without an asylum country, states as a general principle that:

[a]ction whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the principle of *non-refoulement*.<sup>70</sup>

80. The Executive Committee goes on to note, in terms which are equally germane to the issue at hand, that:

[i]t is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters *and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum*.<sup>71</sup>

81. Additional support also comes from Conclusion No. 53 (XXXIX) 1988 in respect of stowaway asylum seekers which provides *inter alia* that ‘[l]ike other asylum-seekers, stowaway asylum-seekers must be protected against forcible return to their country of origin’.<sup>72</sup>

82. These Conclusions attest to the overriding importance of the principle of *non-refoulement*, even in circumstances in which the asylum seeker first presents himself or herself at the frontier. Rejection at the frontier, as with other forms of pre-admission *refoulement*, would be incompatible with the terms of Article 33(1).

83. Fourthly, this analysis also draws support from the principles of attribution and jurisdiction in the field of state responsibility noted above. Conduct amounting to rejection at the frontier – as also in transit zones or on the high seas – will in all likelihood come within the jurisdiction of the State and would engage its responsibility. As there is nothing in Article 33(1) of the 1951 Convention to suggest that it must be construed subject to any territorial limitation, such conduct as has the effect of placing the person concerned at risk of persecution would be prohibited.

84. It may be noted that Article I(3) of the 1967 Protocol provides *inter alia* that the Protocol ‘shall be applied by States Parties hereto without any geographic limitation’. While this clause was evidently directed towards the references to ‘events occurring in Europe’ in Article 1B(1) of the 1951 Convention, it should also

69 Conclusion No. 6 (XXVIII) 1977, para. (c) (emphasis added).

70 Conclusion No. 15 (XXX) 1979, at para. (b).

71 *Ibid.*, para. (c) (emphasis added). 72 Conclusion No. 53 (XXXIX) 1988, at para. 1.

be read as an indication of a more general intention to the effect that the protective regime of the 1951 Convention and the 1967 Protocol was not to be subject to geographic – or territorial – restriction.

85. Fifthly, this analysis is also supported by the appreciation evident in repeated resolutions of the General Assembly that the principle of *non-refoulement* applies to those seeking asylum just as it does to those who have been granted refugee status. The point is illustrated by UNGA Resolution 55/74 of 12 February 2001 which states *inter alia* as follows:

The General Assembly

...

6. *Reaffirms* that, as set out in article 14 of the Universal Declaration of Human Rights, everyone has the right to seek and enjoy in other countries asylum from persecution, and *calls upon all States to refrain from taking measures that jeopardise the institution of asylum, particularly by returning or expelling refugees or asylum seekers contrary to international standards;*

...

10. *Condemns* all acts that pose a threat to the personal security and well-being of refugees and asylum-seekers, such as *refoulement*...<sup>73</sup>

86. Finally, attention should be drawn to developments in the field of human rights which require that the principle of *non-refoulement* be secured for all persons subject to the jurisdiction of the State concerned. Conduct amounting to rejection at the frontier will normally fall within the jurisdiction of the State for the purposes of the application of human rights norms. These developments are material to the interpretation of the prohibition of *refoulement* under Article 33(1) of the 1951 Convention.

### 3. *Who is protected?*

87. The next question is who is protected by the prohibition on *refoulement*?

88. The language of Article 33(1) is seemingly clear on this point. Protection is to be afforded to ‘a refugee’. Pursuant to Article 1A(2) of the 1951 Convention, as amended by Article I(2) of the 1967 Protocol, the term ‘refugee’ applies to any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

73 A/RES/55/74, 12 Feb. 2001, at paras. 6 and 10 (emphasis added).

(a) *Non-refoulement* is not limited to those formally recognized as refugees

89. The argument is sometimes made that *non-refoulement* only avails those who have been formally recognized as refugees. The basis for this contention is that refugee status is conferred formally as a matter of municipal law once it has been established that an asylum seeker comes within the definition of ‘refugee’ under Article 1A(2) of the 1951 Convention. There are several reasons why this argument is devoid of merit.

90. Article 1A(2) of the 1951 Convention does not define a ‘refugee’ as being a person who has been *formally recognized* as having a well-founded fear of persecution, etc. It simply provides that the term shall apply to any person who ‘owing to well-founded fear of being persecuted . . .’. In other words, for the purposes of the 1951 Convention and the 1967 Protocol, a person who satisfies the conditions of Article 1A(2) is a refugee regardless of whether he or she has been formally recognized as such pursuant to a municipal law process. The matter is addressed authoritatively by the *Handbook on Procedures and Criteria for Determining Refugee Status* prepared by UNHCR as follows:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.<sup>74</sup>

91. Any other approach would significantly undermine the effectiveness and utility of the protective arrangements of the Convention as it would open the door for States to defeat the operation of the Convention simply by refusing to extend to persons meeting the criteria of Article 1A(2) the formal status of refugees.

92. That the protective regime of the 1951 Convention extends to persons who have not yet been formally recognized as refugees is apparent also from the terms of Article 31 of the Convention. This provides, in paragraph 1, that:

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

<sup>74</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992), at para. 28 (hereinafter ‘UNHCR *Handbook*’).

93. Refugees who enter and are present in the territory of a State illegally will, almost inevitably, not have been formally recognized as refugees by the State concerned. Article 31 nevertheless precludes the imposition of penalties on such persons. The only reasonable reading of this provision is that penalties cannot be imposed on those who come within the definition of a refugee in Article 1A(2) regardless of whether they have been formally recognized as such. To the extent that Article 31 applies regardless of whether a person who meets the criteria of a refugee has been formally recognized as such, it follows, *a fortiori*, that the same appreciation must apply to the operation of Article 33(1) of the Convention. The *refoulement* of a refugee would put him or her at much greater risk than would the imposition of penalties for illegal entry. It is inconceivable, therefore, that the Convention should be read as affording greater protection in the latter situation than in the former.

94. This approach has been unambiguously and consistently affirmed by the Executive Committee over a twenty-five-year period. Thus, in Conclusion No. 6 (XXVIII) 1977 the Executive Committee

[r]affirm[ed] 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>75</sup>

95. This was subsequently reaffirmed by the Executive Committee in Conclusion No. 79 (XLVII) 1996 and Conclusion No. 81 (XLVIII) 1997 in substantially the same terms:

The Executive Committee . . . (j) Reaffirms the fundamental importance of the principle of *non-refoulement*, which prohibits expulsion and return of refugees, in any manner whatsoever, to the territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, *whether or not they have been formally granted refugee status*.<sup>76</sup>

96. The same view has been endorsed in UNGA Resolution 52/103 of 9 February 1998, where the General Assembly *inter alia* reaffirmed:

that everyone is entitled to the right to seek and enjoy in other countries asylum from persecution, and, as asylum is an indispensable instrument for the international protection of refugees, calls upon all states to refrain from taking measures that jeopardize the institution of asylum, in particular, by

<sup>75</sup> Executive Committee, Conclusion No. 6, (XXVIII) 1977 at para. (c) (emphasis added).

<sup>76</sup> Conclusion No. 79 (XLVII) 1996, at para. (j) (emphasis added). Para. (i) of Conclusion No. 81 (XLVIII) 1997 is cast in almost identical terms.

returning or expelling refugees or *asylum-seekers* contrary to international human rights and to humanitarian and refugee law.<sup>77</sup>

This has been reiterated by the UNGA in subsequent resolutions.<sup>78</sup>

97. Other instruments express the same approach. The Asian-African Refugee Principles, for example, refer simply to persons 'seeking asylum'. Similarly, the Declaration on Territorial Asylum refers to asylum seekers. The OAU Refugee Convention and the American Convention on Human Rights are cast in broader terms still, providing respectively that '[n]o *person* shall be subjected . . .' and '[i]n no case may an *alien* be . . .'.

98. Developments in the law of human rights more generally preclude *refoulement* in the case of a danger of torture, cruel, inhuman or degrading treatment or punishment without regard to the status of the individual concerned. This approach, which focuses on the risk to the individual, reflects the essentially humanitarian character of the principle of *non-refoulement*. Differences in formulation notwithstanding, the character and object of the principle in a human rights context are the same as those under the 1951 Convention. Both would be undermined by a requirement that, for the principle to protect individuals at risk, they must first have been formally recognized as being of some or other status.

99. In sum, therefore, the subject of the protection afforded by Article 33(1) of the 1951 Convention is a 'refugee' as this term is defined in Article 1A(2) of the Convention, as amended by the 1967 Protocol. As such, the principle of *non-refoulement* will avail such persons irrespective of whether or not they have been formally recognized as refugees. *Non-refoulement* under Article 33(1) of the 1951 Convention will therefore protect both refugees and asylum seekers.

#### (b) Need for individual assessment of each case

100. The implementation of the principle of *non-refoulement* in general requires an examination of the facts of each individual case. In particular a *denial* of protection in the absence of a review of individual circumstances would be inconsistent with the prohibition of *refoulement*.

101. The importance of such a review as a condition precedent to any denial of protection emerges clearly from Conclusion No. 30 (XXXIV) 1983 of the Executive Committee in respect of the problem of manifestly unfounded or abusive applications for refugee status or asylum. Noting the problem caused by such applications and the 'grave consequences for the applicant of an erroneous determination and the resulting need for such a decision to be accompanied by appropriate procedural safeguards', the Executive Committee recommended that:

77 A/RES/52/103, 9 Feb. 1998, at para. 5 (emphasis added).

78 See, e.g., A/RES/53/125, 12 Feb. 1999, at para. 5.



as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status.<sup>79</sup>

102. These guidelines reflect those drawn up earlier by the Executive Committee on the determination of refugee status more generally.<sup>80</sup>

(c) **Mass influx**

103. The requirement to focus on individual circumstances as a condition precedent to a denial of protection under Article 33(1) must not be taken as detracting in any way from the application of the principle of *non-refoulement* in cases of the mass influx of refugees or asylum seekers. Although by reference to passing comments in the *travaux préparatoires* of the 1951 Convention, it has on occasion been argued that the principle does not apply to such situations, this is not a view that has any merit. It is neither supported by the text as adopted nor by subsequent practice.

104. The words of Article 33(1) give no reason to exclude the application of the principle to situations of mass influx. On the contrary, read in the light of the humanitarian object of the treaty and the fundamental character of the principle, the principle must apply unless its application is clearly excluded.

105. The applicability of the principle in such situations has also been affirmed unambiguously by the Executive Committee. The Executive Committee, in Conclusion No. 22 (XXXII) 1981, said:

**I. General**

...

2. Asylum seekers forming part of such large-scale influx situations are often confronted with difficulties in finding durable solutions by way of voluntary repatriation, local settlement or resettlement in a third country. Large-scale influxes frequently create serious problems for States, with the result that certain States, although committed to obtaining durable solutions, have only found it possible to admit asylum seekers without undertaking at the time of admission to provide permanent settlement of such persons within their borders.

3. It is therefore imperative to ensure that asylum seekers are fully protected in large-scale influx situations, to reaffirm the basic minimum standards for their treatment, pending arrangements for a durable solution, and to establish effective arrangements in the context of international solidarity and burden-sharing for assisting countries which receive large numbers of asylum seekers.

<sup>79</sup> Executive Committee, Conclusion No. 30 (XXXIV) 1983, at para. (e)(i).

<sup>80</sup> See Executive Committee, Conclusion No. 8 (XXVIII) 1977.

## II. Measures of protection

### A. Admission and *non-refoulement*

1. In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the principles set out below. They should be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity.

2. In all cases the fundamental principle of *non-refoulement* – including non-rejection at the frontier – must be scrupulously observed.<sup>81</sup>

106. The Executive Committee expressed the same view in response to the humanitarian crisis in the former Yugoslavia in Conclusion No. 74 (XLV) 1994.<sup>82</sup>

107. Other developments in the field of refugee protection also reflect the view of States that *non-refoulement* applies in situations of mass influx. Thus, the application of the principle to such situations is expressly referred to in both the OAU Refugee Convention and the Cartagena Declaration and has been consistently referred to by the UNGA as a fundamental principle of protection for refugees and asylum seekers.

108. More recently, the application of the principle of *non-refoulement* in cases of ‘temporary protection’ – a concept that is designed to address the difficulties posed by mass influx situations – has been clearly accepted. The point is illustrated by the ‘Proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons’ currently in preparation by the Commission of the European Communities.<sup>83</sup> The fundamental character of the principle of *non-refoulement* in circumstances of mass influx is affirmed in the opening sentence of the Commission’s Explanatory Memorandum to this Proposal as follows:

As envisaged by the conclusions of the Presidency at the Tampere European Council in October 1999, a common European asylum system must be based on the full and inclusive application of the Geneva Convention, maintaining the principle of *non-refoulement*.

81 Conclusion No. 22 (XXXII) 1981.      82 Conclusion No. 74 (XLV) 1994, at para. (r).

83 Commission of the European Communities, ‘Proposal for a Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof’, provisional version, May 2000. On the basis of this proposal, a Directive was adopted by the Council at its meeting on 28–29 May 2001. The final text of the Directive has not yet been published. [Editorial note: The final text of the Directive was formally adopted by the Council on 20 July 2001 and published in OJ 2001 No. L212/12. Article 3(2) reaffirms: ‘Member States shall apply temporary protection with due respect for human rights and fundamental freedoms and their obligations regarding *non-refoulement*.’]

109. The draft text then affirms the importance of the principle of *non-refoulement* at a number of points.<sup>84</sup> The matter is, for example, addressed in unambiguous terms in the commentary to Article 6(2) of the draft, defining the circumstances in which temporary protection comes to an end, in the following terms:

This paragraph defines the elements on which the Council decision [governing the expiry of temporary protection] must be based. It must be established that the persons receiving temporary protection must be able to return in safety and dignity in a stable context and in conditions where their life or freedom would not be threatened on account of their race, religion, nationality, membership of a particular social group or political opinions and where they would not be subjected to torture or to inhumane or degrading treatment or punishment. The concepts of safety and dignity in the case of returns imply the cessation of the causes which led to the mass influx, possibly a peace and reconstruction process, conditions guaranteeing respect for human rights and the rule of law.<sup>85</sup>

110. Even more recently, UNHCR, addressing State practice in respect of the protection of refugees in mass influx situations in February 2001, observed as follows:

Group determination [of refugee status] on a prima facie basis means in essence the recognition by a State of refugee status on the basis of the readily apparent, objective circumstances in the country of origin giving rise to the exodus. Its purpose is to ensure admission to safety, protection from *refoulement* and basic humanitarian treatment to those patently in need of it. It is widely applied in Africa and in Latin America, and has in effect been practised in relation to large-scale flows in countries, such as those in Southern Africa, that have no legal framework for dealing with refugees.<sup>86</sup>

111. That is not to say that refugee protection in conditions of mass influx is free from difficulties. It is not. But we have not found any meaningful evidence to suggest that these difficulties exclude the application of the principle of *non-refoulement*. The relevance and applicability of Article 33(1) in situations of mass influx is clear.

#### 4. *The place to which refoulement is prohibited*

##### (a) 'Territories' not 'States'

112. We next consider the identification of the place to which *refoulement* is prohibited, i.e. what is meant by the words 'to the frontiers of territories'.

<sup>84</sup> See draft Arts. 6(2) and 27.

<sup>85</sup> Explanatory Memorandum, at Art. 6(2).

<sup>86</sup> UNHCR, 'Protection of Refugees in Mass Influx Situations: Overall Protection Framework', EC/GC/01/4, 19 Feb. 2001, at para. 6.

113. The first point to note is that this expression does not refer only to the refugee or asylum seeker's country of origin (whether of nationality or former habitual residence), even though the fear of persecution in such territory may well be at the root of that person's claim to protection. The reference is to the frontier of 'territories', in the plural. The evident import of this is that *refoulement* is prohibited to the frontiers of *any* territory in which the person concerned will be at risk – regardless of whether those territories are the country of origin of the person concerned.

114. Secondly, it must be noted that the word used is 'territories' as opposed to 'countries' or 'States'. The implication of this is that the legal status of the place to which the individual may be sent is not material. The relevant issue will be whether it is a place where the person concerned will be at risk. This also has wider significance as it suggests that the principle of *non-refoulement* will apply also in circumstances in which the refugee or asylum seeker is within their country of origin but is nevertheless under the protection of another Contracting State. This may arise, for example, in circumstances in which a refugee or asylum seeker takes refuge in the diplomatic mission of another State or comes under the protection of the armed forces of another State engaged in a peacekeeping or other role in the country of origin. In principle, in such circumstances, the protecting State will be subject to the prohibition on *refoulement* to territory where the person concerned would be at risk.

(b) 'Third countries'

115. The same prohibition also precludes the removal of a refugee or asylum seeker to a third State in circumstances in which there is a risk that he or she might be sent from there to a territory where he or she would be at risk.

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

117. The soundness of this interpretation of Article 33(1) derives support from a number of sources. First, in the context of human rights law, it is clear that *non-refoulement* precludes 'the indirect removal . . . to an intermediary country' in circumstances in which there is a danger of subsequent *refoulement* of the individual to a territory where they would be at risk.<sup>87</sup> The State concerned has a responsibility to ensure that the individual in question is not exposed to such a risk.

118. Secondly, a number of instruments adopted since 1951 in the refugee field are cast in terms that suggest that a State proposing to remove a refugee or asylum seeker must consider whether there is a possibility of his or her subsequent removal

<sup>87</sup> *T.I. v. United Kingdom*, Application No. 43844/98, Decision as to Admissibility, 7 March 2000, [2000] INLR 211 at 228.

to a place of risk. Thus the Asian-African Refugee Principles prohibit measures ‘which would result in compelling [a person seeking asylum] to return to or remain in a territory’ where he or she would be at risk. Similarly, the OAU Refugee Convention prohibits measures ‘which would compel [a person] to return to or remain in a territory’ where they would be at risk. In the light of the common humanitarian character of the 1951 Convention and these later instruments, the broader formulation in these later instruments supports an interpretation of Article 33(1) of the 1951 Convention which precludes removal to a place from which the refugee would be in danger of subsequent removal to a territory of risk.

119. Thirdly, from the information provided by UNHCR, it appears to be well accepted by States operating ‘safe country’ policies that the principle of *non-refoulement* requires such policies to take account of any risk that the individual concerned may face of subsequent removal to a territory of risk. In other words, ‘safe country’ policies appear to be predicated on the appreciation that the safety of the country to which the refugee is initially sent must include safety from subsequent *refoulement* to a place of risk.

120. Fourthly, this view is also expressly stated in Conclusion No. 58 (XL) 1989 of the Executive Committee which, addressing refugees and asylum seekers who move in an irregular manner from a country where they have already found protection, provides that they may be returned to that country ‘if... they are protected there against *refoulement*’.

121. Having regard to these factors, the prohibition of *refoulement* in Article 33(1) of the 1951 Convention must be construed as encompassing the expulsion, return or other transfer of a refugee or asylum seeker both to a territory where he or she may be at risk directly and to a territory where they may be at risk of subsequent expulsion, return, or transfer to another territory where they may be at risk.

## 5. *The threat to life or freedom*

122. We turn next to examine the meaning of the words ‘where his life or freedom would be threatened’.

123. Common sense dictates a measure of equation between the threat which precludes *refoulement* and that which is at the core of the definition of the term ‘refugee’ pursuant to Article 1A(2) of the 1951 Convention, namely, that the person concerned has a well-founded fear of being persecuted. Any other approach would lead to discordance in the operation of the Convention. As a matter of the internal coherence of the Convention, the words ‘where his life or freedom would be threatened’ in Article 33(1) must therefore be read to encompass territories in respect of which a refugee or asylum seeker has a ‘well-founded fear of being persecuted’.

124. This reading of Article 33(1) draws support from the *travaux préparatoires*, and the commentaries thereon, of the Convention. Thus, for example, Dr Paul Weis, former Head of UNHCR’s Legal Division, commented on the use of the phrase in question in both Articles 31(1) and 33(1) of the 1951 Convention as follows:

The words ‘where their life or freedom was threatened’ [in Article 31(1)] may give the impression that another standard is required than for refugee status in Article 1. This is, however, not the case. The Secretariat draft referred to refugees ‘escaping from persecution’ and to the obligation not to turn back refugees ‘to the frontier of their country of origin, or to territories where their life or freedom would be threatened on account of their race, religion, nationality or political opinion’. In the course of drafting these words, ‘country of origin’, ‘territories where their life or freedom was threatened’ and ‘country in which he is persecuted’ were used interchangeably.

...

The words ‘to the frontiers where his life or freedom would be threatened’ [in Article 33(1)] have the same meaning as in Article 31 paragraph 1, that is, the same meaning as ‘well-founded fear of persecution’ in Article 1A(2) of the Convention. It applies to the refugee’s country of origin and any other country where he also has a well-founded fear of persecution or risks being sent to his country of origin.<sup>88</sup>

125. The same conclusion was expressed by Professor Atle Grahl-Madsen in a seminal study on the 1951 Convention in the following terms:

[T]he reference to ‘territories where his life or freedom would be threatened’ does not lend itself to a more restrictive interpretation than the concept of ‘well-founded fear of being persecuted’; that is to say that any kind of persecution which entitles a person to the status of a Convention refugee must be considered a threat to life or freedom as envisaged in Article 33.<sup>89</sup>

126. In the light of these comments, there is little doubt that the words ‘where his life or freedom would be threatened’ must be construed to encompass the well-founded fear of persecution that is cardinal to the definition of ‘refugee’ in Article 1A(2) of the Convention. Article 33(1) thus prohibits *refoulement* to the frontiers of territories in respect of which a refugee has a well-founded fear of being persecuted.

127. This conclusion notwithstanding, the question arises as to whether the threat contemplated by Article 33(1) is not in fact broader than simply the risk of persecution. In particular, to the extent that a threat to life or freedom may arise other than in consequence of persecution, the question is whether this will also preclude *refoulement*.

128. A number of factors suggest that a broad reading of the threat contemplated by Article 33(1) is warranted. First, as has been noted, the UNGA has extended UNHCR’s competence over the past fifty years to include those fleeing from more generalized situations of violence. To the extent that the concept of ‘refugee’ has evolved to include such circumstances, so also must have the scope of Article 33(1).

<sup>88</sup> Weis, *The Refugee Convention*, 1951, pp. 303 and 341.

<sup>89</sup> A. Grahl-Madsen, *Commentary on the Refugee Convention 1951: Articles 2–11, 13–37* (UNHCR Division of International Protection, Geneva, 1997), pp. 231–2.

The Article must therefore be construed to include circumstances of generalized violence which pose a threat to life or freedom whether or not this arises from persecution.

129. Secondly, this broad reading is in fact consistent with the express language of Article 33(1). In keeping with the humanitarian objective of the Convention, the protective regime of Article 33(1) must be construed liberally in a manner that favours the widest possible scope of protection consistent with its terms.

130. Thirdly, this interpretation of Article 33(1) draws support from various Conclusions of the Executive Committee which identify UNHCR's functions, and the scope of *non-refoulement*, in terms of 'measures to ensure the physical safety of refugees and asylum-seekers' and protection from a 'danger of being subjected to torture'.<sup>90</sup>

131. Fourthly, a broad formulation also finds support in the approach adopted in various instruments since 1951. Thus, for example, the American Convention on Human Rights is cast in terms of a danger of violation of the 'right to life or personal freedom'. The Asian-African Refugee Principles and the OAU Refugee Convention both refer to circumstances threatening 'life, physical integrity or liberty'. The Cartagena Declaration is cast in terms of threats to 'lives, safety or freedom'. The Declaration on Territorial Asylum, equally broad but in another dimension, refers simply to a threat of 'persecution', without qualification.

132. Fifthly, developments in human rights law are also relevant. To the extent that, as a matter of human rights law, there is now an absolute prohibition on *refoulement* where there is a real risk that the person concerned may be subjected to torture or cruel, inhuman or degrading treatment or punishment, Article 33(1) must be construed to encompass this element. The words 'where his life or freedom would be threatened' must therefore be read to include circumstances in which there is a real risk of torture or cruel, inhuman or degrading treatment or punishment.

133. In the light of these considerations, the words 'where his life or freedom would be threatened' must be construed to encompass circumstances in which a refugee or asylum seeker (a) has a well-founded fear of being persecuted, (b) faces a real risk of torture or cruel, inhuman or degrading treatment or punishment, or (c) faces other threats to life, physical integrity, or liberty.

134. A further element requires comment, namely, the likelihood of the threat materializing. How probable must the threat be to trigger the operation of the principle of *non-refoulement*? What is the standard of proof to which a refugee or asylum seeker will be held for the purposes of this provision?

135. Drawing on the threshold of proof in respect of the determination of refugee status for the purposes of Article 1A(2), whether a refugee has a well-founded fear of being persecuted or faces a real risk of torture, etc. or of some other threat to life, physical integrity, or liberty, will be something to be established 'to a reasonable

90 See, e.g., Conclusion No. 29 (XXXIV) 1983, para. (b); and Conclusions Nos. 79 (XLVII) 1996 and 81 (XLVIII) 1997, paras. (j) and (i) respectively.

degree' taking account of all the relevant facts.<sup>91</sup> This threshold will require more than mere conjecture concerning a threat but less than proof to a level of probability or certainty. Adopting the language of the Human Rights Committee and the European Court of Human Rights in respect of *non-refoulement* in a human rights context, the appropriate test will be whether it can be shown that the person concerned would be exposed to a 'real risk' of persecution or other pertinent threat.<sup>92</sup>

## 6. *The nature of the threat*

136. The final element of Article 33(1) addresses the nature of the threat to the refugee, characterized as a threat 'on account of his race, religion, nationality, membership of a particular social group or political opinion'.

137. This element, which imports into Article 33(1) the language of the definition of the term 'refugee' in Article 1A(2) of the Convention, operates as a qualification on the threat contemplated in Article 33(1). Thus, on a narrow construction of the Article, a threat to life or freedom would only come within the scope of the provision if it was on account of race, religion, nationality, membership of a particular social group or political opinion.

138. In the light of the conclusions above to the effect that the threat contemplated by Article 33(1) must be construed broadly to include developments in both UNHCR's mandate and the law on human rights more generally, the question arises as to the weight that is now to be given to the qualifying phrase. What if life or freedom is threatened or persecution is foreseen on account of reasons other than those specified? To what extent is it necessary for the refugee to show not only a threat to his or her life or freedom but also that it is threatened on account of one of these specific causes? The problem arises in particular when the flight of the refugee is occasioned by a situation of generalized violence in the country of origin.

139. In such situations it is appropriate to look at the matter more broadly. It is the facts that matter – that the person concerned is facing some objectively discernible threat of persecution or to life or freedom. The precise identification of the cause of that threat is not material. Such an approach follows the extension of UNHCR's mandate as mentioned above – an extension which should not be limited in its effect by rigid insistence on the original words of the 1951 Convention. This approach appears also to have commended itself to the Executive Committee which, in Conclusion No. 6 (XXVIII) 1977, reaffirmed the fundamental importance of the principle of *non-refoulement* in respect simply of 'persons who may be subjected to persecution' without reference to possible reasons. Conclusion No. 15 (XXV) 1979 similarly refers to persecution in unqualified terms, namely:

91 UNHCR *Handbook*, at para. 42. 92 This matter is addressed further below.



Action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the recognized principle of *non-refoulement*.<sup>93</sup>

140. Also relevant is the fact that texts adopted since 1951 set out the threat contemplated without qualification. Thus, for example, both the Asian-African Refugee Principles and the Declaration on Territorial Asylum are cast simply in terms of persecution. The OAU Refugee Convention and the Cartagena Declaration, while including references to persecution subject to the same enumerated formulation as in Article 33(1) of the 1951 Convention, make express provision for persons who have fled from situations of generalized violence seriously disturbing public order.

141. These considerations suggest that too much weight should not be placed on the qualifying phrase in Article 33(1). We are not, however, ultimately troubled by this element as, at least insofar as the threat of persecution is concerned, the consequences of discarding reference to the criteria may not be of great practical significance. There are likely to be few instances of persecution that cannot be addressed by reference to one or more of the criteria enumerated in the qualifying phrase.

142. Two concluding observations may be made. First, we would observe that one reason for the continuing relevance of the qualifying phrase in Article 33(1) is that the same conditions continue to be important for the purposes of determining who is a refugee under Article 1A(2). The authoritative UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, for example, provides that '[i]n order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated'.<sup>94</sup>

143. Secondly, we have not addressed specifically the meaning to be given to the terms 'race', 'religion', 'nationality', 'membership of a particular social group', and 'political opinion' in Article 33(1) of the 1951 Convention. For the reasons just stated, we do not consider them to be of controlling importance. Also, the meaning of these terms in Article 33(1) will be identical to their meaning in Article 1A(2). An examination of the meaning of Article 1A(2) goes beyond the scope of this Opinion. For completeness, we note simply that the meaning of these terms for the purposes of Article 1A(2) is addressed in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*.<sup>95</sup>

## 7. *Conclusions in respect of this subsection*

144. In the light of the preceding analysis, the essential elements of the principle of *non-refoulement* under Article 33(1) of the 1951 Convention can be summarized as follows:

93 Conclusion No. 15 (XXX) 1979, para. (b).

94 *Ibid.*, para. 66.

95 *Ibid.*, paras. 66–86.

- (a) It binds Contracting States to the 1951 Convention and States Parties to the 1967 Protocol, including all subdivisions and organs thereof and other persons or bodies exercising governmental authority.
- (b) The responsibility of States party to these conventions will also extend to:
  - (i) the conduct of an organ placed at the disposal of a State by another State if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed;
  - (ii) the conduct of a person or group of persons in fact acting on the instructions of, or under the direction or control of, the State;
  - (iii) the conduct of a person or group of persons in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority; and
  - (iv) conduct which is not otherwise attributable to a State but which has nonetheless been acknowledged and adopted by the State as its own.
- (c) The responsibility of States party to these conventions will also be engaged in circumstances in which persons come under the effective control of the State or are affected by those acting on behalf of the State more generally.
- (d) It precludes any act of *refoulement*, of whatever form, including non-admittance at the frontier, that would have the effect of exposing refugees or asylum seekers to:
  - (i) a threat of persecution on account of race, religion, nationality, membership of a particular social group or political opinion;
  - (ii) a real risk of torture or cruel, inhuman or degrading treatment or punishment; or
  - (iii) a threat to life, physical integrity or liberty.
- (e) It requires a review of individual circumstances as a condition precedent to any denial of protection.
- (f) It is applicable to situations of mass influx and temporary protection.
- (g) It prohibits *refoulement* to any territory where the refugee or asylum seeker would be at risk, including to a territory where the refugee or asylum seeker may not be at risk directly but from which they would be in danger of being subsequently removed to a territory where they would be at risk.

#### G. Article 33(2): the exceptions

145. Article 33(2) of the 1951 Convention provides:

The benefit of the present provision [prohibiting *refoulement*] 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.

## 1. *General observations*

### (a) Relationship to Article 1F

146. First, although not cast in identical terms, there is an evident overlap between the exceptions in Article 33(2) and the exclusion clause which forms part of the definition of a refugee in Article 1F of the 1951 Convention. This provides:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

147. In an important respect, Article 33(2) indicates a higher threshold than Article 1F insofar as, for the purposes of the former provision, it must be established that the refugee constitutes a danger to the security or to the community of the country of refuge. The provision thus hinges on an appreciation of a *future* threat from the person concerned rather than on the commission of some act in the past. Thus, if the conduct of a refugee is insufficiently grave to exclude him or her from the protection of the 1951 Convention by operation of Article 1F, it is unlikely to satisfy the higher threshold in Article 33(2).

148. Secondly, a comparison of Article 33(2) and Article 1F suggests an important element of the scope of Article 33(2) which is not otherwise readily apparent on the face of the provision. Article 1F(b) provides that the Convention shall not apply to any person with respect to whom there are serious reasons for considering that 'he has committed a serious non-political crime *outside the country of refuge prior to his admission to that country as a refugee*'.<sup>96</sup> In contrast, Article 33(2) provides *inter alia* that *non-refoulement* protection cannot be claimed by a refugee 'who, having been convicted of a particularly serious crime, constitutes a danger to the community of [the] country [in which he is]'. Whereas Article 1F(b) refers to crimes committed *outside the country of refuge prior to admission*, Article 33(2) is silent on the question of where and when the crime in question must have been committed.

96 Emphasis added.

149. A common sense reading of Article 33(2) in the light of Article 1F(b) requires that it be construed so as to address circumstances *not* covered by Article 1F(b). Any other approach would amount to treating the scope of the two provisions as being very largely the same and would raise the question of why Article 33(2) was required at all. In our view, therefore, construed in the context of the 1951 Convention as a whole, Article 33(2) must be read as applying to a conviction for a particularly serious crime committed in the country of refuge, or elsewhere, *subsequent to admission as a refugee*, which leads to the conclusion that the refugee in question is a danger to the community of the country concerned.

150. This reading of Article 33(2) draws some support from the *travaux préparatoires* of and commentaries on the Article. Grahl-Madsen, for example, notes that in the original version of Article 33(2),

it was a condition for expulsion or *refoulement* that the refugee had been 'lawfully convicted in that country', that is to say in the country from which he is to be expelled or returned. The reference to 'that country' was, however, deleted as a result of a Swedish proposal. The Swedish delegate explained that his amendment had been intended 'to cover such cases as, for example, that of a Polish refugee who had been allowed to enter Sweden and who, in passing through Denmark, had committed a crime in that country'.

It will be seen that this contingency is covered by the provision in Article 1F(b), according to which a person who 'has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee', is not entitled to any of the benefits of the Convention. On the other hand, there can be no doubt that the deletion of the words 'in that country' is important in other respects. If the Polish refugee in the Swedish delegate's example already had been admitted to and resided in Sweden, and then went on a visit to Denmark and committed a crime there, the fact that the crime was committed and a final judgment passed outside Sweden would not prevent the Swedish authorities from expelling the refugee by virtue of Article 33(2).<sup>97</sup>

(b) The trend against exceptions to the prohibition of *refoulement*

151. The interpretation of Article 33(2) must also take account of other factors. Particularly important is the trend, evident in other textual formulations of the principle of *non-refoulement* and in practice more generally since 1951, against exceptions to the principle of *non-refoulement*. Thus, although both the Asian-African Refugee Principles and the Declaration on Territorial Asylum allow exceptions for

<sup>97</sup> Grahl-Madsen, *Commentary on the Refugee Convention 1951*, p. 237. See also Weis, *The Refugee Convention, 1951*, p. 343.

‘overriding reasons of national security or in order to safeguard the population’, the Declaration imposes a constraint on *refoulement* in circumstances in which the exceptions apply in the following terms:

Should a State decide in any case that exception to the principle [of *non-refoulement*] stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting 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.<sup>98</sup>

152. Thus, even in cases where a State may, for permitted reasons, expel or reject an asylum seeker, it must consider the possibility of sending him to a safe third State rather than to a State where he would be at risk.

153. Expressions of *non-refoulement* subsequent to the Declaration on Territorial Asylum limit exceptions even further. Thus, although the OAU Refugee Convention indicates various grounds excluding the application of the Convention in general,<sup>99</sup> *non-refoulement* is not subject to exception. Likewise, *non-refoulement* is not subject to exception in either the American Convention on Human Rights or the Cartagena Declaration.

154. Developments in the field of human rights law also exclude exceptions to *non-refoulement*. *Non-refoulement* in a human rights context allows of no limitation or derogation. The principle simply requires that States ‘must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*’.<sup>100</sup>

155. This trend against exceptions to *non-refoulement* outside the framework of the 1951 Convention has been reflected in the approach of the Executive Committee. Thus, although Article 33(2) of the 1951 Convention might be invoked to justify extradition following conviction for a serious crime elsewhere, Conclusion No. 17 (XXXI) 1980 makes it clear that ‘refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution’.<sup>101</sup> Equally, although situations of mass influx might be said to pose a danger to the security of the country of refuge, Conclusion No. 22 (XXXII) 1981 makes it clear that ‘[i]n all cases [of large-scale influx] the fundamental principle of *non-refoulement* – including non-rejection at the frontier – must be scrupulously observed’.<sup>102</sup> The Executive Committee has similarly affirmed the

98 Declaration on Territorial Asylum, Art. 3(3).

99 See Art. I(4)–(5) of the OAU Refugee Convention.

100 As per General Comment No. 20 (1992) of the Human Rights Committee (HRI/HEN/1/Rev.1, 28 July 1994).

101 Conclusion No. 17 (XXXI) 1980, at para. (c).

102 Conclusion No. 22 (XXXII) 1981, at para. II(A)(2).

application of *non-refoulement* in circumstances involving the irregular movement of refugees and asylum seekers notwithstanding the destabilizing effects of such movement.<sup>103</sup>

156. *Guidelines for National Refugee Legislation* adopted by a joint OAU/UNHCR Working Group in December 1980 go further still. In respect of *non-refoulement*, these *Guidelines* provide simply:

No person shall be rejected at the frontier, returned or expelled, or subjected to any other measures that would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons mentioned in paragraph 1(a) and (b) of Section 1 [reflecting the definitions of ‘refugee’ in both the 1951 Convention and the OAU Refugee Convention].<sup>104</sup>

No reference is made here to any permissible exceptions to *non-refoulement*.

157. In so far as these *Guidelines* may be regarded as an authoritative interpretation of the commitments of States under both the 1951 Convention and the OAU Refugee Convention, they suggest that the trend against exceptions since 1951 reflects an evolution in the development of the law concerning *non-refoulement* more generally which would exclude any exceptions to *non-refoulement*. This would be particularly so in circumstances in which the threat of persecution, or the threat to life or freedom, involves a danger of torture or cruel, inhuman or degrading treatment or punishment. It would also apply in circumstances in which the threat would be of such severity that, even though it might not come within the scope of torture or cruel, inhuman or degrading treatment or punishment, it might either be regarded as being on a par with such treatment or would come within the scope of other non-derogable human rights principles.<sup>105</sup> Any other approach would fetter *non-refoulement* under Article 33 of the 1951 Convention to the conceptions of the drafters of the Convention a half-century ago and would leave the principle significantly out of step with more recent developments in the law. This would amount to a retrogressive approach to the construction of a principle that, given its humanitarian character, would ordinarily warrant precisely the opposite approach.

158. This notwithstanding, we are not ultimately persuaded that there is a sufficiently clear consensus opposed to exceptions to *non-refoulement* to warrant reading the 1951 Convention without them. There remains an evident appreciation

103 Conclusion No. 58 (XL) 1989, at para. (f).

104 UNHCR, *Guidelines for National Refugee Legislation*, 9 Dec. 1980, at section 6(2).

105 These would include, for example, the prohibitions on the arbitrary deprivation of life and on slavery and servitude (see, e.g., ICCPR, Arts. 4(2), 6(1), and 8(1) and (2); ECHR, Arts. 2, 4(1), and 15(2); and ACHR, Arts. 4(1), 5(1), and 27(2)).

amongst States,<sup>106</sup> within UNHCR,<sup>107</sup> and amongst commentators<sup>108</sup> that there may be some circumstances of overriding importance that would, within the framework of that Convention, legitimately allow the removal or rejection of individual refugees or asylum seekers. We are, therefore, of the view that the exceptions to the prohibition of *refoulement* pursuant to Article 33(2) of the 1951 Convention subsist but must be read subject to very clear limitations.

(c) Limitations on the interpretation and application of the exceptions in Article 33(2)

159. These limitations are as follows:

- (i) The national security and public safety exceptions indicated in Article 33(2) constitute the only permissible exceptions to *non-refoulement* under the 1951 Convention.
- (ii) The application of these exceptions is subject to the caveat that they will not apply in circumstances in which the threat constitutes, or may be regarded as being on a par with, a danger of torture or cruel, inhuman or degrading treatment or punishment or would come within the scope of other non-derogable human rights principles.
- (iii) Given the humanitarian character of *non-refoulement* and the serious consequences to a refugee or asylum seeker of being returned to a country where

106 A review of municipal measures incorporating *non-refoulement* indicates a range of exceptions to the principle often, though not always, reflecting the formulation in Art. 33(2) of the 1951 Convention. While such measures support the view that some exceptions to *non-refoulement* subsist as a matter of custom, we have been hesitant for a number of reasons to rely on this practice as evidence of the current state of customary international law more generally. First, much of this legislation is dated. Secondly, to the extent that municipal measures depart from the terms of applicable international instruments or other principles of international law they suggest that the State concerned is in breach of its international obligations. Thirdly, municipal measures in this field exhibit little uniformity in approach. It is virtually impossible, therefore, to draw any coherent guidance threads from such practice for purposes of customary international law. For example, while some States have enacted exceptions to *non-refoulement*, very many others which have expressly incorporated the principle have not done so. Others preclude expulsion to States where there would be a threat of persecution. Fourthly, to the extent that there may be a difference between State practice in the municipal sphere and State practice in international fora involving, for example, the adoption and interpretation of international instruments, we have preferred the latter practice on the ground that this better reflects *opinio juris*.

107 See, e.g., UNHCR's 'Note on the Principle of *Non-Refoulement*', Nov. 1997, prepared in the context of a Nov. 1997 European Union seminar on the implementation of the 1995 EU Resolution on minimum guarantees for asylum procedures. For the latter, see OJ 1996 C274/13. Addressing the issue of exceptions to *non-refoulement*, UNHCR notes that "[w]hile the principle of *non-refoulement* is basic, it is recognised that there may be certain legitimate exceptions to the principle" (at section F).

108 Goodwin-Gill, for example, comments as follows: '*non-refoulement* is not an absolute principle. "National security" and "public order", for example, have long been recognized as potential justifications for derogation.' G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon, Oxford, 1998), p. 139.

he or she is in danger, the exceptions to *non-refoulement* must be interpreted restrictively and applied with particular caution.<sup>109</sup>

- (iv) The exceptions under Article 33(2) may only be applied in strict compliance with due process of law. Compliance with due process is expressly required by Article 32(2) of the 1951 Convention in respect of expulsion. To the extent that *refoulement* would pose a potentially greater threat to a refugee or asylum seeker than expulsion, we are of the view that, at the very least, the due process safeguards applicable to expulsion must be read into the application of the exceptions to *refoulement*. The strict observance of due process safeguards would also be required by general principles of human rights law.
- (v) In any case in which a State seeks to apply the exceptions to the principle of *non-refoulement*, the State should first take all reasonable steps to secure the admission of the individual concerned to a safe third country.

## 2. *Specific observations*

160. Turning to the terms of Article 33(2), three aspects require specific comment: its scope of application *ratione personae*; the interpretation and application of the national security exception; and the interpretation and application of the danger to the community exception.

### (a) The scope of Article 33(2) *ratione personae*

161. In the earlier discussion of the scope of application of Article 33(1), the point was made that the prohibition of *refoulement* pursuant to this provision protects both refugees and asylum seekers irrespective of any formal determination of status. In the absence of compelling reasons to the contrary, the personal scope of Article 33(2) must be read as corresponding to that of the primary rule to which it is an exception. The term ‘refugee’ in Article 33(2) therefore encompasses refugees and asylum seekers irrespective of any formal determination of status.

### (b) The interpretation and application of the national security exception

162. Article 33(2) provides that the prohibition of *refoulement* cannot 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’.

163. A number of elements of this exception require comment.

109 In this regard, we agree with the view expressed by UNHCR in its ‘Note on the Principle of *Non-Refoulement*’ of Nov. 1997, referred to above, that, ‘in view of the serious consequences to a refugee of being returned to a country where he or she is in danger of persecution, the exception provided for in Article 33(2) should be applied with the greatest caution. It is necessary to take fully into account all the circumstances of the case and, where the refugee has been convicted of a serious criminal offence, any mitigating factors and the possibilities of rehabilitation and reintegration within society’ (at section F).



(i) *The prospective nature of the danger*

164. Simply as a matter of textual interpretation, the exception is clearly prospective in its application. In other words, it is concerned with danger to the security of the country in the future, not in the past. While past conduct may be relevant to an assessment of whether there are reasonable grounds for regarding the refugee to be a danger to the country in the future, the material consideration is whether there is a prospective danger to the security of the country.

(ii) *The danger must be to the country of refuge*

165. Also evident on its face, the exception addresses circumstances in which there is a prospect of danger to the security of the country of refuge. It does not address circumstances in which there is a possibility of danger to the security of other countries or to the international community more generally. While there is nothing in the 1951 Convention which limits a State from taking measures to control activity within its territory or persons subject to its jurisdiction that may pose a danger to the security of other States or of the international community, they cannot do so, in the case of refugees or asylum seekers, by way of *refoulement*. The exceptions in Article 33(2) evidently amount to a compromise between the danger to a refugee from *refoulement* and the danger to the security of his or her country of refuge from their conduct. A broadening of the scope of the exception to allow a country of refuge to remove a refugee to a territory of risk on grounds of possible danger to other countries or to the international community would, in our view, be inconsistent with the nature of this compromise and with the humanitarian and fundamental character of the prohibition of *refoulement*.

166. This assessment draws support from developments in the field of human rights which preclude *refoulement* where this would expose the individual concerned to the danger of torture or cruel, inhuman or degrading treatment or punishment notwithstanding circumstances of public emergency and irrespective of the conduct of the individual concerned.<sup>110</sup>

(iii) *A State's margin of appreciation and the seriousness of the risk*

167. Article 33(2) does not identify the kinds of acts that will trigger the application of the national security exception. Nor does it indicate what will amount to sufficient proof of a danger to the security of the country. This is an area in which States generally possess a margin of appreciation.

168. This margin of appreciation is, however, limited in scope. In the first place, there must be 'reasonable grounds' for regarding a refugee as a danger to the security of the country in which he is. The State concerned cannot, therefore, act either arbitrarily or capriciously. The relevant authorities must specifically address the question of whether there is a future risk; and their conclusion on the matter must be supported by evidence.

110 See, e.g., *Chahal v. United Kingdom* (1997) 108 ILR 385, at paras. 74–81.

169. Secondly, the fundamental character of the prohibition of *refoulement*, and the humanitarian character of the 1951 Convention more generally, must be taken as establishing a high threshold for the operation of exceptions to the Convention. This is particularly so given the serious consequences for the individual of *refoulement*. The danger to the security of the country in contemplation in Article 33(2) must therefore be taken to be very serious danger rather than danger of some lesser order.

170. This assessment draws support from the terms of Article 1F which excludes the application of the Convention where there are serious reasons for considering that the person concerned has *inter alia* committed a crime against peace, a war crime or a crime against humanity, a serious non-political crime, or acts contrary to the purposes and principles of the United Nations. These are all acts of a particularly grave nature. As the threshold of prospective danger in Article 33(2) is higher than that in Article 1F, it would hardly be consistent with the scheme of the Convention more generally to read the term ‘danger’ in Article 33(2) as referring to anything less than very serious danger.

171. The same conclusion is confirmed by the *travaux préparatoires* of the Convention and the commentaries thereon. Thus, for example, Grahl-Madsen notes the statement of the United Kingdom delegate to the drafting conference that ‘[a]mong the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against the country of their asylum’. Grahl-Madsen goes on to suggest:

If a person is engaged in activities aiming at facilitating the conquest of the country where he is staying or a part of the country, by another State, he is threatening the security of the former country. The same applies if he works for the overthrow of the Government of his country of residence by force or other illegal means (e.g. falsification of election results, coercion of voters, etc.), or if he engages in activities which are directed against a foreign Government, which as a result threaten the Government of the country of residence with repercussions of a serious nature. Espionage, sabotage of military installations and terrorist activities are among acts which customarily are labelled as threats to national security.<sup>111</sup>

172. He also mentions acts ‘endangering directly or indirectly the constitution (Government), the territorial integrity, the independence or the external peace of the country concerned’.<sup>112</sup>

(iv) *The assessment of risk requires consideration of individual circumstances*

173. It has already been emphasized that a *denial* of protection in the absence of a review of individual circumstances would be inconsistent with the prohibition of *refoulement*. This view is supported by the language of Article 33 which refers to ‘a

111 Grahl-Madsen, *Commentary on the Refugee Convention 1951*, pp. 235–6.

112 Ibid.

refugee'. It is also supported by the scheme and character of the principle of *non-refoulement* which is essentially designed to protect each individual refugee or asylum seeker from *refoulement*. The emphasis by the Executive Committee on the need for a personal interview even in the case of manifestly unfounded or abusive applications further supports this view.

174. It is the danger posed by the individual in question that must be assessed. It will not satisfy the requirement that there be 'reasonable grounds' for regarding a refugee as a danger to the security of the country for such an assessment to be reached without consideration of his or her individual circumstances.

175. The requirement of individual assessment is also important from another perspective. In the light of the limitations on the application of the exceptions in Article 33(2) mentioned above, the State proposing to remove a refugee or asylum seeker to his or her country of origin must give specific consideration to the nature of the risk faced by the individual concerned. This is because exposure to some forms of risk will preclude *refoulement* absolutely and without exception. This applies notably to circumstances in which there is a danger of torture or cruel, inhuman or degrading treatment or punishment. Before a State can rely on an exception in Article 33(2), it must therefore take all reasonable steps to satisfy itself that the person concerned would not be exposed to such danger or some other comparable danger as discussed above.

176. The requirement that there should be an individual assessment goes additionally to the point that there must be a real connection between the individual in question, the prospective danger to the security of the country of refuge and the significant alleviation of that danger consequent upon the *refoulement* of that individual. If the removal of the individual would not achieve this end, the *refoulement* would not be justifiable.

(v) *The requirement of proportionality*

177. Referring to the discussions in the drafting conference, Weis put the matter in the following terms:

The principle of proportionality has to be observed, that is, in the words of the UK representative at the Conference, whether the danger entailed to the refugee by expulsion or return outweighs the menace to public security that would arise if he were permitted to stay.<sup>113</sup>

178. The requirement of proportionality will necessitate that consideration be given to factors such as:

- (a) the seriousness of the danger posed to the security of the country;
- (b) the likelihood of that danger being realized and its imminence;
- (c) whether the danger to the security of the country would be eliminated or significantly alleviated by the removal of the individual concerned;

113 Weis, *The Refugee Convention, 1951*, p. 342.

- (d) the nature and seriousness of the risk to the individual from *refoulement*;
- (e) whether other avenues consistent with the prohibition of *refoulement* are available and could be followed, whether in the country of refuge or by the removal of the individual concerned to a safe third country.

179. It must be reiterated that a State will not be entitled to rely on the national security exception if to do so would expose the individual concerned to a danger of torture or cruel, inhuman or degrading treatment or punishment or a risk coming within the scope of other non-derogable principles of human rights. Where the exception does operate, its application must be subject to strict compliance with principles of due process of law.

(c) The interpretation and application of the ‘danger to the community’ exception

180. Article 33(2) provides that the prohibition of *refoulement* cannot be claimed by a refugee ‘who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country’.

181. Many of the elements considered above in respect of the interpretation of the national security exception will apply *mutatis mutandis* to the interpretation and application of the ‘danger to the community’ exception. It, too, is clearly prospective in nature. While past conduct will be relevant to this assessment, the material consideration will be whether there is a danger to the community in the future.

182. Similarly, the danger posed must be to the community *of the country of refuge*. This follows simply from the words of the clause. The issue is not whether the refugee poses a threat to some community elsewhere. Such a threat may be addressed through normal criminal or other procedures. It is only where the potential danger is to the community *of the country of refuge* that the exception will operate.

183. Other elements discussed above in respect of the national security exception that will also apply to the ‘danger to the community’ exception include the requirement to consider individual circumstances and the requirement of proportionality and the balancing of the interests of the State and the individual concerned. Equally, while the assessment of the danger to the community allows the State of refuge some margin of appreciation, there are limits to its discretion. Indeed, these are more specific than in the case of the national security exception. In particular, the operation of the danger to the community exception requires that the refugee must have been (a) convicted by a final judgment, (b) of a particularly serious crime. Absent these factors, the issue of whether that person poses a future risk to the community of the country concerned does not even arise for consideration.

184. A number of elements specific to the exception require further comment.

(i) *Relationship to Article 1F*

185. The relationship between Article 33(2) and the exclusion clauses in Article 1F has already been considered. It nevertheless bears repetition that the ‘danger to the community’ exception can only apply to a conviction by a final judgment in respect of a particularly serious crime committed in the country of refuge, or elsewhere, *subsequent to admission as a refugee*. This flows from the scope of Article 1F(b) of the Convention. The significant factor is that a State cannot rely on the exception to justify *refoulement* in circumstances in which the refugee in question had been convicted of a crime in his or her country of origin, or elsewhere, *prior to admission to the country of refuge as a refugee*.

(ii) *‘Particularly serious crime’*

186. The text of Article 33(2) makes it clear that it is only convictions for crimes of a particularly serious nature that will come within the purview of the exception. This double qualification – *particularly* and *serious* – is consistent with the restrictive scope of the exception and emphasizes that *refoulement* may be contemplated pursuant to this provision only in the most exceptional of circumstances. Commentators have suggested that the kinds of crimes that will come within the purview of the exception will include crimes such as murder, rape, armed robbery, arson, etc.<sup>114</sup>

187. However, the critical factor here is not the crimes that come within the scope of the clause but whether, in the light of the crime and conviction, the refugee constitutes a danger to the community of the country concerned. The commission of, and conviction for, a particularly serious crime therefore constitutes a threshold requirement for the operation of the exception. Otherwise the question of whether the person concerned constitutes a danger to the community will not arise for consideration.

(iii) *‘Conviction by a final judgment’*

188. The importance of the requirement of a conviction by a final judgment is that the exception cannot be relied upon in the face of mere suspicion. Only a conviction based on a criminal standard of proof will suffice. ‘Final judgment’ must be construed as meaning a judgment from which there remains no possibility of appeal. It goes without saying that the procedure leading to the conviction must have complied with minimum international standards.

189. In the light of this element, where a question of the application of the exception arises, the conduct of the proceedings leading to the underlying conviction will also require consideration.

<sup>114</sup> See, for example, Weis, *The Refugee Convention, 1951*, p. 342.

*(iv) 'Danger to the community'*

190. The essential condition of the 'danger to the community' exception is that there must be a sound basis for the assessment that the refugee concerned constitutes a danger to the community of the country of refuge. Two elements require comment: the meaning of the word 'danger' and the meaning of the word 'community'.

191. Regarding the word 'danger', as with the national security exception, this must be construed to mean very serious danger. This requirement is not met simply by reason of the fact that the person concerned has been convicted of a particularly serious crime. An additional assessment is called for which will hinge on an appreciation of issues of fact such as the nature and circumstances of the particularly serious crime for which the individual was convicted, when the crime in question was committed, evidence of recidivism or likely recidivism, etc. Thus, it is unlikely that a conviction for a crime committed in the distant past, where there may have been important mitigatory circumstances, and where there is no evidence of recidivism could justify recourse to the exception.

192. As to the meaning of the word 'community', it is evident that this is intended as a reference to the safety and well-being of the population in general, in contrast to the national security exception which is focused on the larger interests of the State. This notion of the safety and well-being of the population appears in other expressions of the principle of *non-refoulement* subsequent to 1951. The Asian-African Refugee Principles, for example, refer to 'overriding reasons . . . safeguarding populations'. The Declaration on Territorial Asylum refers similarly to 'overriding reasons . . . in order to safeguard the population'.

### III. The role and content of customary international law

#### A. The role of customary international law

193. Although there may be some inclination to regard the 1951 Convention and the other relevant treaties as an exhaustive statement of the law relating to the matters covered by them, it must be recalled that there remain some aspects of relations between States on the subject of refugees and *non-refoulement* that are not covered by such treaties.

194. For one thing, there are still some fifty States that are not parties to the 1951 Convention and the 1967 Protocol. Such States are therefore not formally bound by the Convention and, in particular, the provision relating to *non-refoulement*. Are such States free, therefore, of any obligations relating to the treatment of refugees? This question can only be answered in the negative. All States will be bound by such customary international legal obligations as exist in respect of refugees.

195. There are other contexts in which the customary international law of *non-refoulement* are relevant. Within even those States that are parties to the 1951 Convention or other pertinent texts and have adopted the necessary legislation to enable domestic effect to be given to the treaties, there may well be some need to supplement the legislation by reference to the customary international law position. *A fortiori*, the same is true when there is no legislation but when the national courts are able to treat customary international law as part of the law of the land. In short, the evolution of customary international law rules in the area is important and must be acknowledged. Indeed, it may well be that the relevant rules amount to *jus cogens* of a kind that no State practice and no treaty can set aside. That the principle of *non-refoulement* amounts to a rule of *jus cogens* was suggested by the Executive Committee as early as 1982.<sup>115</sup> Subsequent comments to this effect are to be found in the Cartagena Declaration of 1984 and in the views of the Swiss Government.<sup>116</sup>

## B. The sources of the customary international law on *non-refoulement*: the role of treaties

196. Having regard to the fact that it is from treaties – and the application thereof – that the practice of States relevant to the determination of the content of customary international law in this field is principally to be derived, there is a preliminary question that must be answered at the outset. Is it acceptable to use treaties and treaty practice as a source of customary international law? There is cogent authority for an affirmative reply to this question.

### 1. General

197. It is well established that conventional principles can, and frequently do, exist side-by-side with customary principles of similar content. In the *Nicaragua* case, for example, the ICJ accepted that the prohibition on the threat or use of force in Article 2(4) of the UN Charter also applied as a principle of customary international law. The fact that the customary principle was embodied in a multilateral convention did not mean that it ceased to exist as a principle of customary law, even as regards States that were parties to the convention.<sup>117</sup> This conclusion is consistent

115 Executive Committee, Conclusion No. 25 (XXXIII) 1982, at para. (b). In Conclusion No. 79 (XLVII) 1996, the Executive Committee emphasized that the principle of *non-refoulement* was not subject to derogation.

116 The Cartagena Declaration on Refugees of 1984 concluded *inter alia* that the principle of *non-refoulement* 'is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*' (at section III, para. 5). On the views of the Swiss Government, see FFE/BBI, 1994 III, at pp. 1486–7.

117 *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392, at para. 73, Merits, Judgment, ICJ Reports 1986, p. 14, at paras. 174–9.

with the Court's earlier jurisprudence in the *North Sea Continental Shelf* cases in which it had accepted that largely identical rules of customary law and treaty law on the delimitation of the continental shelf could exist side-by-side.<sup>118</sup>

198. The existence of a conventional principle not only does not preclude the existence of a customary principle of similar content; it may influence the creation of such a rule of custom. In the *North Sea Continental Shelf* cases, for example, the ICJ examined the contention of Denmark and the Netherlands that a customary rule may be generated by State practice in compliance with a conventional rule. The ICJ said:

The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention [of 1958 on the Continental Shelf] no rule of customary international law in favour of the equidistance principle, and no such rule was crystallised in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice – and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognised methods by which new rules of customary international law may be formed . . .<sup>119</sup>

199. While the Court went on to note that such a process should not lightly be regarded as having occurred, the underlying principle that conventional rules can be regarded 'as reflecting, or as crystallising, received or at least emergent rules of customary international law' was not disputed.<sup>120</sup> The same analysis is reflected in the Court's judgment in the *Nicaragua* case.<sup>121</sup>

200. In the *North Sea Continental Shelf* case, the Court identified three elements that will be material to any determination of whether such a process of crystallization

118 *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p. 3, at paras. 64 and, 70–4.

119 *Ibid.*, p. 3, at paras. 70 and 71. 120 *Ibid.*, p. 3, at para. 63.

121 *Merits*, Judgment, ICJ Reports 1986, p. 14, at para. 183.



has occurred. First, the conventional rule ‘should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law’.<sup>122</sup> Secondly, ‘even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected’.<sup>123</sup> Thirdly, within whatever period has passed since the first expression of the conventional rule,

State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.<sup>124</sup>

#### (a) Fundamentally norm-creating character

201. The conventional expressions of the principle of *non-refoulement* in instruments such as the 1951 Convention, the OAU Refugee Convention, the American Convention on Human Rights, and the Torture Convention are of a norm-creating character, as opposed to the mere expression of contractual obligations, and have been widely accepted as such. This view has been expressed in the context of refugees, for example, in successive Conclusions of the Executive Committee. For example, in Conclusion No. 6 (XXVIII) 1977, the Executive Committee observed that ‘the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States’.

202. In Conclusion No. 17 (XXXI) 1980, the Executive Committee ‘[r]eaffirmed the fundamental character of the generally recognized principle of *non-refoulement*’. The point was expressed more forcefully still in Conclusion No. 25 (XXXIII) 1982 in which the Executive Committee ‘[r]eaffirmed the importance of the basic principles

122 *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p. 3, at para. 72.

123 *Ibid.*, p. 3, at para. 73.

124 *Ibid.*, p. 3, at para. 74. This element embodies the twin requirements for the creation of custom independently of any conventional rule, namely, a settled practice by States and *opinio juris* or belief that the practice in question is rendered obligatory by the existence of a rule of law requiring it. See further the judgment of the Court at para. 77. In the *Nicaragua* case, the Court added to its earlier analysis as follows:

It is not to be expected that in the practice of States the application of the [rule] in question should have been perfect . . . The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

See *Merits*, Judgment, ICJ Reports 1986, p. 14, at para. 186.

of international protection and in particular the principle of *non-refoulement* which was progressively acquiring the character of a peremptory rule of international law'. Similar statements are to be found in more recent Conclusions of the Executive Committee.<sup>125</sup>

203. In addition to the normative character of the principle of *non-refoulement* in various treaties, the principle is also reflected in a number of important non-binding international texts either expressed in normative terms or affirming the normative character of the principle. A particularly important example is the Declaration on Territorial Asylum adopted by the UNGA unanimously on 14 December 1967. Other instruments of a similar character include the Asian-African Refugee Principles, the Cartagena Declaration, and various expressions of the principle by the Council of Europe.<sup>126</sup>

204. The interpretation of the prohibition of torture or cruel, inhuman or degrading treatment or punishment contained in Article 3 of the European Convention on Human Rights, Article 7 of the ICCPR, and Article 5 of the Banjul Charter<sup>127</sup> as including an essential *non-refoulement* component further confirms the normative and fundamental character of the principle, particularly as the relevant texts make no explicit reference to *non-refoulement*.

205. The matter was addressed in some detail by the European Court of Human Rights in the *Soering* case in the context of extradition in the following terms:

Article 3 [of the European Convention on Human Rights] makes no provision for exceptions and no derogation from it is permissible . . . This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard.

The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3. That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading

125 See, e.g., Conclusion No. 79 (XLVII) 1996, at para. (j), and Conclusion No. 81 (XLVIII) 1997, at para. (i).

126 See, e.g., Recommendation No. R (1984) 1 of 25 Jan. 1984 on the 'Protection of Persons Satisfying the Criteria in the Geneva Convention Who are Not Formally Recognised as Refugees', adopted by the Committee of Ministers of the Council of Europe, which '[considers] that the principle of *non-refoulement* has been recognised as a general principle applicable to all persons'.

127 1981 Banjul Charter or African Charter on Human and Peoples' Rights, 21 ILM (1982) 58 (hereinafter 'Banjul Charter').

Treatment or Punishment, which provides that ‘no State Party shall . . . extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture’. The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that ‘common heritage of political traditions, ideals, freedoms and the rule of law’ to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment [*sic*] of the Article, and in the Court’s view, this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article.<sup>128</sup>

206. This reasoning has subsequently been adopted by the European Court of Human Rights in cases concerning expulsion and *refoulement*.<sup>129</sup> This was recently expressed in the judgment of the Court on admissibility of 7 March 2000 in *T.I. v. United Kingdom* in the following terms:

It is . . . well-established in [the Court’s] case-law that the fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3, read in conjunction with Article 1 of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention’, imposes an obligation on Contracting States not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3 (see, amongst other authorities, the *Ahmed v. Austria* judgment of 17 December 1996, *Reports* 1996-VI, p. 2206, §§ 39–40).<sup>130</sup>

207. The approach of the European Court has paralleled that of the Human Rights Committee in respect of the interpretation of Article 7 of the ICCPR. Thus, in General Comment No. 20 (1992) on the interpretation of Article 7 of the ICCPR prohibiting torture or cruel or inhuman or degrading treatment or punishment, the Human Rights Committee stated *inter alia* as follows:

128 *Soering v. United Kingdom*, 98 ILR 270, at para. 88.

129 See, e.g., *Cruz Varas v. Sweden*, 108 ILR 283, at para. 69; *Vilvarajah v. United Kingdom*, 108 ILR 321, at paras. 102–3; and *Chahal v. United Kingdom*, 108 ILR 385, at paras. 73–4 and 79–81.

130 *T.I. v. United Kingdom*, Application No. 43844/98, Decision as to Admissibility, 7 March 2000, [2000] INLR 211 at 228.

2. The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity . . .

3. The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.

...

8. The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.

9. In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*. States parties should indicate in their reports what measures they have adopted to that end.<sup>131</sup>

208. The same analysis is also evident in decisions of the African Commission on Human and Peoples' Rights ('African Commission on Human Rights') established under the Banjul Charter.<sup>132</sup>

(b) Widespread and representative State support, including those whose interests are specially affected

209. Turning to the requirement that there should be widespread and representative participation in the conventions said to embody the putative customary rule, including the participation of States whose interests are specially affected, the extent of State participation in the 1951 Convention, the 1967 Protocol, the Torture

131 Human Rights Committee, General Comment No. 20 (1992), HRI/HEN/1/Rev.1, 28 July 1994.

132 See, e.g., Communication No. 97/1993, *John K. Modise v. Botswana*, cited in E. A. Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures* (Martinus Nijhoff, The Hague, 1996). The Commission found that the deportation of Modise constituted cruel, inhuman, or degrading treatment. [Editorial note: The case, decided at the Commission's 28th session on 23 Oct.–6 Nov. 2000, is available at <http://www1.umn.edu/humanrts/africa/comcases/97-93c.html>. See in particular, para. 91.]

Convention, the ICCPR, and other conventions which embody the principle of *non-refoulement* indicates near universal acceptance of the principle. So, for example, as Annex 2.1 hereto reflects, of 189 members of the UN, 135 are party to the 1951 Convention, 134 are party to the 1967 Protocol (140 being party to one or both of these instruments), 121 are party to the Torture Convention, and 146 are party to the ICCPR.<sup>133</sup> When other instruments – such as the European Convention on Human Rights, the OAU Refugee Convention, the American Convention on Human Rights, and the Banjul Charter – are taken into account, 170 of the 189 members of the UN, or around 90 per cent of the membership, are party to one or more conventions which include *non-refoulement* as an essential component. Of the nineteen UN members that are not party to any of these agreements, seven were members of the UN on 14 December 1967 when the Declaration on Territorial Asylum was unanimously adopted by the General Assembly. Particularly in the absence of any indication of opposition to the principle of *non-refoulement* as reflected in the Declaration, they may be taken to have consented to the principle. Of the remaining twelve UN members – Bhutan, Brunei Darussalam, Kiribati, the Federated States of Micronesia, Nauru, Oman, Palau, Saint Kitts and Nevis, Saint Lucia, the United Arab Emirates, and Vanuatu – there is no suggestion from any of them of opposition to the principle.

210. As these figures indicate, participation in some or other conventional arrangement embodying *non-refoulement* is more than simply ‘widespread and representative’. It is near universal, including by States whose interests are specially affected.

### (c) Consistent practice and general recognition of the rule

211. Turning to the question of consistent practice and general recognition of the rule, the ICJ, in the *Nicaragua* case, looked for evidence of State practice and *opinio juris* in State participation in treaties embodying the rule, in other instances in which States had expressed recognition of the rule and in the work of international bodies.

212. The near universal participation by States in one or more treaty regimes embodying as an essential element the principle of *non-refoulement* has already been noted. Following the methodology of the ICJ, support for the existence of a rule of custom of similar content can be deduced from such practice. Also important is the wide recognition of the principle in instruments such as the Declaration on Territorial Asylum, the Asian-African Refugee Principles and the Cartagena

133 Note, these figures do not include the participation of non-members of the UN in various of these conventions, notably Switzerland, which is a party to the 1951 Convention, the 1967 Protocol, the ECHR, the ICCPR, and the Torture Convention, and the Holy See, which is a party to the 1951 Convention and 1967 Protocol. [Editorial note: By 1 Feb. 2003, 141 States were party to the 1951 Convention, 139 were party to the 1967 Protocol, 132 were party to the Torture Convention, and 149 were party to the ICCPR.]

Declaration. Although non-binding in character, the State practice and *opinio juris* which these instruments reflect support the existence of a customary principle of *non-refoulement*.

213. To this practice may also be added the widespread practice by States of either expressly incorporating treaties embodying *non-refoulement* into their internal legal order or enacting more specific legislation reflecting the principle directly. Around eighty States have either enacted specific legislation on *non-refoulement* or have expressly incorporated the 1951 Convention or 1967 Protocol into their internal law. As Annex 2.2 below illustrates, this figure increases to some 125 States when account is taken of municipal measures giving effect to other treaties embodying the principle. The widespread incorporation of this principle into the internal legal order of States can be taken as evidence of State practice and *opinio juris* in support of a customary principle of *non-refoulement*.

214. Of particular importance under this heading also are the Conclusions of the Executive Committee. As previously noted, the Executive Committee is a body composed of the representatives of States having 'a demonstrated interest in, and devotion to, the solution of the refugee problem'. Adopting the language of the ICJ in its *North Sea Continental Shelf* judgment, the Executive Committee is thus composed of representatives of States 'whose interests are specially affected' by issues concerning refugees. With a membership of fifty-seven States having a declared interest in the area, Conclusions of the Executive Committee can, in our view, be taken as expressions of opinion which are broadly representative of the views of the international community. This is particularly the case as participation in meetings of the Executive Committee is not limited to, and typically exceeds, its membership. The specialist knowledge of the Committee and the fact that its decisions are taken by consensus add further weight to its Conclusions.

215. As far back as 1977, the Executive Committee commented upon the fundamental humanitarian character of the principle of *non-refoulement* and its general acceptance by States.<sup>134</sup> This has been reaffirmed subsequently.<sup>135</sup> The importance of the principle has been emphasized recently in Conclusions Nos. 79 (XLVII) 1996 and 81 (XVVIII) 1997 in substantially the same terms as follows:

The Executive Committee,

...

Reaffirms the fundamental importance of the principle of *non-refoulement*, which prohibits expulsion and return of refugees, in any manner whatsoever, to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have formally been granted refugee status, or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to

134 Conclusion No. 6 (XXVIII) 1977.

135 Conclusion No. 25 (XXXIII) 1982. See also Conclusion No. 17 (XXXI) 1980.

torture, as set forth in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>136</sup>

(d) Conclusions in respect of this subsection

216. The view has been expressed, for example in the *Encyclopaedia of Public International Law*, that 'the principle of *non-refoulement* of refugees is now widely recognised as a general principle of international law'.<sup>137</sup> In the light of the factors mentioned above, and in view also of the evident lack of expressed objection by any State to the normative character of the principle of *non-refoulement*, we consider that *non-refoulement* must be regarded as a principle of customary international law.

C. The content of the principle of *non-refoulement* in customary international law

217. We turn now to examine the content of the principle of *non-refoulement* in customary international law. For these purposes, it will be appropriate to distinguish between the customary principle as it has developed in the two distinct contexts of refugees and of human rights more generally.

1. *In the context of refugees*

218. The content of the customary principle of *non-refoulement* in a refugee context corresponds largely to that set out above concerning the interpretation of Article 33 of the 1951 Convention. There is no need to revisit this analysis for present purposes. The reasoning in the preceding part and, in particular, the references to other international texts supporting that reasoning, will apply *mutatis mutandis* to the present part. It will suffice therefore simply to identify the main elements of the customary international law principle of *non-refoulement* in a refugee context. These are as follows:

- (a) The principle binds all States, including all subdivisions and organs thereof and other persons exercising governmental authority and will engage the responsibility of States in circumstances in which the conduct in question is attributable to the State wherever this occurs.
- (b) It precludes any act of *refoulement*, of whatever form, including non-admittance at the frontier, that would have the effect of exposing a refugee or asylum seeker to:

136 Conclusion No. 79 (XLVII) 1996, at para. (j); Conclusion No. 81 (XLVIII) 1997, at para. (i).

137 *Encyclopaedia of Public International Law* (Max Planck Institute for Comparative Public Law and International Law, under the direction of Rudolf Bernhardt, North-Holland Publishing Co., Amsterdam, New York, 1985), vol. 8, p. 456.

- (i) a threat of persecution;
  - (ii) a real risk of torture or cruel, inhuman or degrading treatment or punishment; or
  - (iii) a threat to life, physical integrity, or liberty.
- (c) It prohibits *refoulement* to any territory where the refugee or asylum seeker would be at risk, including to a territory where the refugee or asylum seeker may not be at risk directly but from which they would be in danger of being subsequently removed to a territory where they would be at risk.
- (d) It is subject to exception only on grounds of overriding reasons of national security and public safety, but it is not subject to exception in circumstances in which the risk of persecution equates to or may be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment or would come within the scope of other non-derogable customary principles of human rights.
- (e) In circumstances in which the exceptions apply, they are to be construed restrictively and with caution and subject to strict compliance with principles of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country.

219. Reduced to its essentials, the content of the customary principle of *non-refoulement* in a refugee context may be expressed as follows:

1. No person seeking asylum may be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or to return to a territory where he or she may face a threat of persecution or to life, physical integrity, or liberty. Save as provided in paragraph 2, this principle allows of no limitation or exception.
2. Overriding reasons of national security or public safety will permit a State to derogate from the principle expressed in paragraph 1 in circumstances in which the threat does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on strict compliance with due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country.

2. *In the context of human rights more generally*

220. As with the scope and content of the customary principle of *non-refoulement* in a refugee context, the parameters of the principle *in the context of human rights* must



also reflect the crystallization of State practice and *opinio juris*. The central objective of the exercise is to identify those elements which can be said to reflect a broad consensus across the international community.

221. The content of the principle of *non-refoulement* in a human rights context is relatively easily identified as the principle is in large measure an implied derivation from the commonly formulated prohibition of torture or cruel, inhuman or degrading treatment or punishment. Nevertheless, three elements must be distinguished:

- (a) the scope of the customary prohibition of torture or cruel, inhuman or degrading treatment or punishment;
  - (b) *non-refoulement* as a fundamental component of the customary prohibition of torture or cruel, inhuman or degrading treatment or punishment; and
  - (c) the content of *non-refoulement* as a component of the customary prohibition of torture or cruel, inhuman or degrading treatment or punishment.
- (a) The scope of the customary prohibition of torture and cruel, inhuman or degrading treatment or punishment

222. There is consensus that the prohibition of *torture* constitutes a rule of customary international law.<sup>138</sup> Indeed, it is widely suggested that the prohibition of

138 See, e.g., on this issue the Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in *Filaritiga v. Pena Irala* (1980) 21 ILM 585, at pp. 595–601. [Editorial note: The case is reported at US Court of Appeals (2nd Circuit), 630 F. 2d 876 (1980).] Under the heading ‘Freedom from torture is among the fundamental human rights protected by international law’, the United States noted *inter alia*:

Every multilateral treaty dealing generally with civil and political human rights proscribes torture . . . We do not suggest that every prohibition of these treaties states a binding rule of customary international law. Where reservations have been attached by a significant number of nations to specific provisions or where disagreement with provisions is cited as the ground for a nation’s refusal to become a party, the near-unanimity required for the adoption of a rule of customary international law may be lacking. No such disagreement has been expressed about the provisions forbidding torture . . . International custom also evidences a universal condemnation of torture. While some nations still practice torture, it appears that no State asserts a right to torture its nationals. Rather, nations accused of torture unanimously deny the accusation and make no attempt to justify its use.

See pp. 595–8. The US Court of Appeals in this case addressed the matter in the following terms:

[A]lthough there is no universal agreement as to the precise extent of the ‘human rights and fundamental freedoms’ guaranteed to all by the [UN] Charter, there is at present no dissent from the view that the guarantees include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights.

See (1980) 79 ILR 169, at p. 176.

torture even constitutes a principle of *jus cogens*.<sup>139</sup> The question, for present purposes, is the scope of the customary prohibition concerning acts of this kind. Is it limited to the most egregious of such acts which come within the definition of torture or does it extend more broadly to acts amounting to cruel, inhuman or degrading treatment or punishment? The broader formulation reflects the language of Article 7 of the ICCPR, Article 3 of the European Convention on Human Rights, Article 5 of the Banjul Charter, and Article 5(2) of the American Convention on Human Rights, as well as of other instruments for the protection of human rights. A more restrictive analysis is suggested by the scope of the Torture Convention which, for the purposes of the Convention's enforcement machinery, distinguishes torture from other cruel, inhuman or degrading treatment or punishment.

223. In our view, the evidence points overwhelmingly to a broad formulation of the prohibition as including torture or cruel, inhuman or degrading treatment or punishment. With the exception of the Torture Convention, these elements all appear in human rights instruments of both a binding and a non-binding nature as features of a single prohibition.<sup>140</sup> Support for the customary status of the broader formulation is also evident from other sources, including:

- Article 5 of the Universal Declaration of Human Rights,<sup>141</sup> which provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment';

139 See, e.g., Human Rights Committee, General Comment No. 24 (52) (1994), CCPR/C/21/Rev.1/Add.6, 2 Nov. 1994, at para. 10. See also, L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Finnish Lawyers' Publishing Co., Helsinki, 1988), ch. 10, section G; Y. Dinstein, 'The Right to Life, Physical Integrity, and Liberty', in *International Bill of Rights: The Covenant on Civil and Political Rights* (ed. L. Henkin, Columbia University Press, New York, 1981), at p. 122.

140 The distinction in the Torture Convention between torture, on the one hand, and cruel, inhuman or degrading treatment or punishment, on the other, is explained by the intention of the drafters, at the instance of the former Soviet Union and others, to limit the enforcement machinery of the Convention to the most severe acts only. For a discussion of the drafting process in respect of this element, see A. Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff, The Hague, 1999), pp. 4–8. The distinction for purposes of the Convention machinery notwithstanding, Art. 16(1) of the Convention affirms that '[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture'.

141 General Assembly Resolution 217 (III), International Bill of Human Rights, 10 Dec. 1948, at Part A. Although not a binding instrument (being a resolution of the UNGA), the Universal Declaration is widely regarded as reflecting customary international law, an appreciation implicitly endorsed by the ICJ in the *Tehran Hostages Case (United States Diplomatic and Consular Staff in Tehran)*, ICJ Reports 1980, p. 3, at para. 91. See also Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), at pp. 82–4 (in particular at note 9), which refers to various UN and other commentaries endorsing the customary status of the Universal Declaration. The US *Restatement of the Foreign Relations Law of the United States* ('US Restatement') addresses the matter in the following terms: 'Practice accepted as building customary human rights law includes: virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights, even if only in principle.' *Restatement of the Law Third* (1987), § 701, Reporters' Notes 2, at p. 154.

- the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by consensus by the UNGA in 1975, which, noting that '[t]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment', condemns such acts as 'a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights';<sup>142</sup>
- Article 3 of the European Convention on Human Rights provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment';
- Article 7 of the ICCPR provides *inter alia* that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment';
- Article 5(2) of the American Convention on Human Rights provides *inter alia* that '[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment';
- Article 5 of the Banjul Charter provides *inter alia* that '[a]ll forms of exploitation and degradation of man, particularly slavery, slave trade, torture or cruel, inhuman or degrading punishment and treatment, shall be prohibited'.

224. As these provisions show, torture or cruel, inhuman or degrading treatment or punishment are commonly regarded as components of a single prohibition. While tribunals have in some cases distinguished the various components by reference to the intensity of the suffering inflicted,<sup>143</sup> in no case has there been any suggestion that there is a difference between the legal status of these components. Indeed, addressing Article 7 of the ICCPR, the Human Rights Committee has indicated expressly that it does not 'consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied'.<sup>144</sup>

225. The customary status of both the prohibition of torture and of cruel, inhuman or degrading treatment or punishment is also clear. The Human Rights Committee, for example, explicitly affirmed the customary status of both components in its General Comment No. 24 (52) (1994) in the context of its review of permissible reservations under the ICCPR. Thus, indicating that provisions of the ICCPR 'that represent customary international law (and *a fortiori* when they have the character

142 UNGA Resolution 3452 (XXX), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 Dec. 1975, at Arts. 1 and 2.

143 See, e.g., the Judgment of the European Court of Human Rights in *Ireland v. United Kingdom* (1978), Series A, No. 25, at para. 167.

144 Human Rights Committee, General Comment No. 20 (1992), HRI/GEN/1/Rev.1, 28 July 1994, at para. 4 (emphasis added).

of peremptory norms) may not be the subject of reservations’, the Committee went on to note that ‘[a]ccordingly, a State may not reserve the right to engage in slavery, to torture, [or] to subject persons to cruel, inhuman or degrading treatment or punishment’.<sup>145</sup> The distinct reference to torture and to cruel, inhuman or degrading treatment or punishment leaves no doubt that the Committee considered that both components are prohibited by customary international law.

226. The customary status of the prohibition of cruel, inhuman or degrading treatment or punishment, *independently of the prohibition of torture*, is also affirmed in UNGA Resolution 39/118 of 14 December 1984 on Human Rights in the Administration of Justice. Referring *inter alia* to Article 5 of the Universal Declaration, and noting the need to promote respect for the principles embodied in the Declaration, the UNGA reaffirmed *inter alia* ‘the existing prohibition under international law of every form of cruel, inhuman or degrading treatment or punishment’.<sup>146</sup> The reference here to the *existing* prohibition under international law of cruel, inhuman or degrading treatment or punishment explicitly affirms the appreciation of UN members that this prohibition is part of the existing corpus of customary international law.

227. The customary status of the prohibition of torture and of cruel, inhuman or degrading treatment or punishment is also addressed in other authoritative commentaries.<sup>147</sup> More commonly, the prohibition of cruel, inhuman or degrading treatment or punishment is simply addressed as part of the broader prohibition of torture or cruel, inhuman or degrading treatment or punishment with no doubt being raised about its customary status.

228. An examination of this issue by reference to the criteria relevant to the determination of rules of customary international law also supports the conclusion that the prohibition of cruel, inhuman or degrading treatment or punishment constitutes a principle of customary international law. Thus, in the instruments just mentioned, the prohibition of cruel, inhuman or degrading treatment or punishment is, like the prohibition of torture, evidently treated as having a fundamentally norm creating character. Over 150 States are party to one or more binding international instruments prohibiting such acts. Support for the principle in its conventional form is thus virtually uniform. Nor is there any evident dissent from the principle. While there are some instances of State practice inconsistent with the principle, such practice appears to be regarded as a breach of the law rather than as an indication of the emergence of a rule of different content.<sup>148</sup>

145 Human Rights Committee, General Comment No. 24 (52) (1994), CCPR/C/21/Rev.1/Add.6, 2 Nov. 1994, at para. 8.

146 UNGA Resolution 39/118, ‘Human Rights in the Administration of Justice’, 14 Dec. 1984, at para. 1 (emphasis added).

147 See, e.g., the US *Restatement*, at § 702(d) and Reporters’ Notes 5, at pp. 169–70.

148 See on this point the Memorandum of the US Government in the *Filartiga* case, above n. 138.

229. As all of this shows, the evidence in favour of a broad formulation of the prohibition under discussion to include torture and other cruel, inhuman or degrading treatment or punishment is overwhelming. We have no hesitation therefore in concluding that the scope of the relevant principle under customary international law is broadly formulated to include a prohibition of torture as well as of other cruel, inhuman or degrading treatment or punishment.

(b) *Non-refoulement* as a fundamental component of the customary prohibition of torture and cruel, inhuman or degrading treatment or punishment

230. As regards parties to the Torture Convention, Article 3 of that Convention prohibits *refoulement* where there are substantial grounds for believing that a person would be in danger of being subjected to torture. At present, as a matter of conventional law, this binds over 120 States. The express stipulation of this obligation attests to its central importance within the scheme of the prohibition of torture.

231. This matter was commented upon by the European Court of Human Rights in the *Soering* case in 1989 in terms which have a more general relevance.<sup>149</sup> As was there made plain, the Court was of the view that extradition of a person to a State where there was a real risk of exposure to torture or inhuman or degrading treatment or punishment was precluded by the prohibition of torture or inhuman or degrading treatment or punishment in Article 3 of the European Convention on Human Rights.

232. The reasoning of the Court in this case has subsequently been applied to other forms of expulsion or return in cases in which there is a risk of torture or inhuman or degrading treatment or punishment. The matter was, for example, addressed in 1997 in *Chahal v. United Kingdom*, a case involving the deportation to India of a Sikh separatist on grounds that ‘his continued presence in the United Kingdom was uncondusive to the public good for reasons of national security, including the fight against terrorism’.<sup>150</sup> In the course of its analysis leading to the conclusion that there had been a violation of Article 3 of the European Convention on Human Rights, the Court addressed the issue of expulsion in the following terms:

74. ... [I]t is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country. ...

149 *Soering*, Judgment, para. 88, quoted above at para. 205.

150 *Chahal v. United Kingdom*, 108 ILR 385, at para. 75. See also *Ahmed v. Austria*, (1997) 24 EHRR 278, at paras. 39–40.

75. The Court notes that the deportation against the first applicant was made on the ground that his continued presence in the United Kingdom was unconducive to the public good for reasons of national security, including the fight against terrorism . . .

...

79. Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.

80. The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.

81. Paragraph 88 of the Court's above-mentioned *Soering* judgment, which concerned extradition to the United States, clearly and forcefully expresses the above view. It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the same judgment, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged.<sup>151</sup>

233. As this makes plain, the expulsion or return of a person to a country where there are substantial grounds for believing that they would face a real risk of torture or inhuman or degrading treatment or punishment comes within the purview of the prohibition of such acts. This applies equally to the expulsion or return of a

151 *Chahal*, at paras. 74–5 and 79–81 (footnotes omitted). This analysis has been applied more recently in circumstances concerning the expulsion or *refoulement* of asylum seekers in *T.I. v. United Kingdom*, a case in which the applicant, a Sri Lankan national, claimed that there were substantial grounds for believing that, if removed from the United Kingdom to Germany as was proposed, he would be returned from there to Sri Lanka where he faced a real risk of treatment contrary to Art. 3 of the European Convention on Human Rights (*T.I. v. United Kingdom*, Application No. 43844/98, Decision as to Admissibility, 7 March 2000, [2000] INLR 211 at 228; see above para. 206).

person to a country from which they may subsequently be expelled or returned to a third country where they would face a real risk of such treatment.

234. The conclusions of the European Court on this matter are echoed by the Human Rights Committee in General Comment No. 20 (1992) on the interpretation and application of Article 7 of the ICCPR.<sup>152</sup> The compatibility of expulsion and extradition with the terms of Article 7 of the ICCPR has arisen for consideration by the Committee in a number of cases.<sup>153</sup> While these have largely turned on an appreciation of whether particular criminal penalties, or the likelihood of particular criminal penalties being imposed, raise questions concerning the application of Article 7, the Committee has in each case affirmed that expulsion in circumstances in which there is a real risk of a violation of Article 7 in another jurisdiction comes within the purview of that Article. In *Chitai Ng v. Canada*, for example, a case concerning the extradition of the author of the communication from Canada to the United States on capital charges where he faced the possibility of the death penalty, the Committee observed as follows:

14.1 . . . [W]hat is at issue is not whether Mr Ng's rights have been or are likely to be violated by the United States, which is not a State party to the Optional Protocol, but whether by extraditing Mr Ng to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant . . .

14.2 If a State party extradites a person within its jurisdiction in such circumstances, and if, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.

. . .

16.1 In determining whether, in a particular case, the imposition of capital punishment constitutes a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author, the specific conditions of detention on death row and whether the proposed method of execution is particularly abhorrent . . .

16.4 In the instant case and on the basis of the information before it, the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of 'least possible physical and mental suffering', and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant. Accordingly, Canada, which could reasonably foresee that Mr Ng, if sentenced to death, would be executed in a way that amounts to a violation of article 7, failed to comply with its obligations under the Covenant, by extraditing Mr Ng

152 Human Rights Committee, General Comment No. 20 (1992), HRI/HEN/1/Rev.1, 28 July 1994, extract quoted at para. 207 above.

153 E.g., Communication No. 469/1991, *Chitai Ng v. Canada*; Communication No. 539/1993, *Cox v. Canada*; and Communication No. 706/1996, *G.T. v. Australia*.

without having sought and received assurances that he would not be executed.<sup>154</sup>

235. It follows that a prohibition on expulsion or return in circumstances in which there is a real risk of torture or cruel, inhuman or degrading treatment or punishment is inherent in the prohibition of such acts.

236. The conclusions of the Human Rights Committee and the European Court of Human Rights on this matter are directly relevant to some 150 States party to one or both of the relevant conventions. While the matter has not so far been addressed directly in the context of the interpretation and application of either Article 5(2) of the American Convention on Human Rights or Article 5 of the Banjul Charter, there is no reason to believe that the organs responsible for interpreting these instruments will adopt a different approach. Indeed, the African Commission on Human and Peoples' Rights has signalled its endorsement of the underlying principle in Communication No. 97/93, *Modise v. Botswana*, concluding *inter alia* that the deportation of the applicant to no-man's land between Botswana and South Africa constituted cruel, inhuman or degrading treatment.<sup>155</sup>

237. In the light of the preceding, it is evident that the principle of *non-refoulement* is a fundamental component of the prohibition of torture, etc. in Article 7 of the ICCPR, Article 3 of the European Convention on Human Rights and, by implication, in other conventional expressions of the prohibition. As was shown in the preceding subsection, the prohibition of torture or cruel, inhuman or degrading treatment or punishment is a principle of customary international law. It follows that *non-refoulement* is a fundamental component of the customary prohibition of torture or cruel, inhuman or degrading treatment or punishment.

(c) The content of *non-refoulement* as a component of the customary prohibition of torture and cruel, inhuman or degrading treatment or punishment

238. Apart from the express prohibition of *refoulement* in Article 3 of the Torture Convention, the principle of *non-refoulement* in a human rights context is an *implied* component of the prohibition of torture or cruel, inhuman or degrading treatment or punishment. The content of the principle is therefore very largely to be deduced from the jurisprudence and commentaries noted in the preceding sections of this part. As the relevant material has already been set out in some detail, the matter can be addressed briefly.

(i) *The subject to be protected*

239. As in the case of the principle in a refugee context, the focus of *non-refoulement* in a human rights context is on the individual. This flows from the

154 Communication No. 469/1991, *Chitat Ng v. Canada*, Views of the Human Rights Committee of 5 Nov. 1993.

155 Communication No. 97/1993, *Modise v. Botswana*, above n. 132.



essential character of the underlying prohibition which addresses the protection of individuals. The point is made explicitly by the Human Rights Committee in General Comment No. 20 (1992), namely: '[t]he aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect the dignity and the physical and mental integrity of the individual.'<sup>156</sup>

240. In contrast to the principle in a refugee context which is focused on refugees and asylum seekers, *non-refoulement* in a human rights context is not predicated on any given status of the individual at risk. This follows from the formulation of the underlying prohibition of torture or cruel, inhuman or degrading treatment or punishment which is aimed at protecting 'the dignity and the physical and mental integrity of the individual' regardless of either status or conduct. The issue of status emerges most clearly from the formulation of Article 3 of the Torture Convention which provides simply that no State 'shall expel, return ("*refouler*") or extradite a person . . .'. The issue of conduct was addressed expressly by the European Court of Human Rights in *Chahal v. United Kingdom*.<sup>157</sup>

(ii) *The prohibited act*

241. As in the case of the principle in a refugee context, it is evident that it is the effect of the measure of expulsion rather than its form that is material. The object of the principle is to ensure that States do not 'expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of extradition, expulsion or *refoulement*'.<sup>158</sup> Any measure which has the effect of putting an individual at risk by removing them from a place of safety to a place of threat will thus come within the purview of the principle.

(iii) *The territorial dimension of non-refoulement*

242. The territorial dimension of *non-refoulement* in a human rights context similarly mirrors that in respect of refugees. Quite apart from the scope of application *ratione loci* of treaties such as the European Convention on Human Rights, the ICCPR, and the American Convention on Human Rights,<sup>159</sup> general principles of

156 Human Rights Committee, General Comment No. 20 (1992), HRI/HEN/1/Rev.1, 28 July 1994, at para. 2 (emphasis added).

157 See extract at para. 232 above.

158 Human Rights Committee, General Comment No. 20 (1992), HRI/HEN/1/Rev.1, 28 July 1994, at para. 9.

159 Art. 1 of the ECHR provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention' (emphasis added). This language is mirrored in Art. 1(1) of the ACHR, which provides *inter alia* that '[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms' (emphasis added). As already noted, the European Court of Human Rights has interpreted the concept of 'jurisdiction' to include acts which produce effects outside national boundaries and acts by which the State exercises effective control outside its national territory (see, for example, *Lotzidou*, above n. 65, at para. 66). In respect of the ICCPR, Art. 2(1) provides *inter alia* that '[e]ach State Party to the present Covenant undertakes to respect and to ensure to

international law dictate that the responsibility of a State will be engaged in circumstances in which acts or omissions are attributable to that State wherever these may occur. The relevant issue is not whether the act or omission occurs within the territory of the State, or even whether it is undertaken (or not, as the case may be) by a State official, but whether it can be said to have been carried out (or not) by or on behalf of the State or was subsequently adopted by the State. Similarly, an individual will come within the jurisdiction of a State in circumstances in which they come under the effective control of, or are affected by those acting on behalf of, that State wherever this occurs. The principle of *non-refoulement* will therefore apply in circumstances in which the act in question would be attributable to the State whether this occurs, or would occur, within the territory of the State or elsewhere.

243. As regards the place to which the individual at risk is sent or in which he or she remains, it is plain from the analysis of the European Court of Human Rights in *T.I. v. United Kingdom* that the essential question is whether, in consequence of the removal of an individual, there are substantial grounds for believing that they would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment.<sup>160</sup> The principle of *non-refoulement* thus precludes not only the removal of an individual to a country where they may be at risk directly but also removal to a country from which they may be subsequently removed to a third country where they would face a real risk of torture or cruel, inhuman or degrading treatment or punishment.

(iv) *The nature of the risk*

244. The principal point of distinction between *non-refoulement* in a refugee context and in the context of human rights arises in respect of the nature of the risk. Whereas *non-refoulement* in a refugee context is predicated on a threat of persecution, the essential element of *non-refoulement* in a human rights context is a risk of torture or cruel, inhuman or degrading treatment or punishment. This element flows explicitly from the formulation of the underlying prohibition. While this amounts to a clear distinction between *non-refoulement* in a refugee context and in the context of human rights more generally, in practice the distinction is likely to be more apparent than real given the potential overlap of the two types of risk.

all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant' (emphasis added). Art. 1 of the Optional Protocol to the ICCPR provides, in respect of individual petitions to the Human Rights Committee, that '[a] State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals *subject to its jurisdiction*' (emphasis added). As already noted, the Human Rights Committee has construed the concept of 'jurisdiction' to include circumstances involving 'violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of the State or in opposition to it' (see Communication No. 52/1972, *López Burgos v. Uruguay*, above n. 64, at para. 65, quoting para. 12.3).

<sup>160</sup> See para. 206 above.

(v) *The threshold of the harm threatened*

245. As regards the threshold of the threat of torture or cruel, inhuman or degrading treatment or punishment, although the approach of the Human Rights Committee, the European Court of Human Rights, and under the Torture Convention is not identical, there is broad similarity between them. Thus, General Comment No. 20 (1992) of the Human Rights Committee provides that States ‘must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment’.<sup>161</sup> This formulation has subsequently been recast in cases such as *Chitat Ng v. Canada* to provide that States must not expose individuals ‘to a real risk’ of a violation of their rights under the ICCPR.<sup>162</sup>

246. This ‘real risk’ formulation corresponds, at least in part, to the approach adopted by the European Court of Human Rights. Thus, in *Soering, Chahal, T.I. v. United Kingdom* and others, the Court variously formulated the test in terms of a ‘real risk of exposure to’, or ‘a real risk of being subjected to’, torture, etc.<sup>163</sup> This formulation was, however, supplemented in *Chahal* and *T.I.* by a further element drawing on the formulation in Article 3(1) of the Torture Convention.<sup>164</sup> The threshold under the European Convention on Human Rights thus now appears to be one of ‘where substantial grounds have been shown for believing that [the individual] would face a real risk of being subjected to’ torture, etc.

247. The European Convention on Human Rights test thus appears more elaborate than that adopted under either the ICCPR or the Torture Convention. In practical terms, however, it is not clear whether the differences in the various formulations will be material, particularly as the Human Rights Committee, the European Court of Human Rights, and the Committee Against Torture (established under the Torture Convention)<sup>165</sup> have all indicated in one form or another that, whenever an issue of *refoulement* arises, the circumstances surrounding the case will be subjected to rigorous scrutiny.<sup>166</sup> The Committee Against Torture, in particular, has elaborated a detailed framework for the scrutiny of such claims.<sup>167</sup>

161 Human Rights Committee, General Comment No. 20 (1992), HRI/HEN/1/Rev.1, 28 July 1994, at para. 9 (emphasis added).

162 *Chitat Ng v. Canada*, at para. 14.1, as quoted in para. 234 above.

163 *Soering*, at para. 88; *Chahal*, at paras. 74 and 80; *T.I. v. United Kingdom*, at p. 228.

164 Art. 3(1) of the Torture Convention provides: ‘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’ (emphasis added).

165 The Committee is established under Art. 17 of the Torture Convention for purposes of reviewing *inter alia* communications from individuals alleging torture or, in the context of Art. 3, a risk of torture. See further Art. 22 of the Convention.

166 See, e.g., *T.I. v. United Kingdom*, Application No. 43844/98, Decision as to Admissibility, 7 March 2000, [2000] INLR 211, extract at para. 206 above; *Chitat Ng v. Canada*, para. 234 above, at para. 16.1.

167 See, in particular, General Comment No. 1 (1997), 21 Nov. 1997, of the Committee Against Torture, on the implementation of Art. 3 of the Convention in the context of Art. 22. Also Communication No. 13/1993, *Mutombo v. Switzerland*, Report of 27 April 1994

248. Although it would go too far to suggest that customary international law has absorbed the scrutiny procedures adopted by bodies such as the Human Rights Committee, the European Court of Human Rights, and the Committee Against Torture, the general uniformity of principle underlying these approaches establishes procedural and other guidelines that may usefully be taken into account by tribunals in situations in which customary international law must be applied.

249. In the light of the above, the risk threshold in respect of *non-refoulement* in a human rights context may best be described as *circumstances in which substantial grounds can be shown for believing that the individual would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment*. This reflects the fullest formulation of the threshold articulated in international practice.

(vi) *Exceptions*

250. In contrast to the position regarding refugees, the question of exceptions to *non-refoulement* in a human rights context is straightforward. No exceptions whatever are permitted. This follows both from the uniform approach to the principle in its conventional form and from the unambiguous affirmation of the point by the Human Rights Committee and the European Court of Human Rights.<sup>168</sup> There is nothing to suggest that the principle in its customary form would differ from the principle in its conventional form.

(d) *Conclusions in respect of this subsection*

251. On the basis of the preceding analysis, the salient elements of the customary international law of *non-refoulement* in a human rights context are as follows:

- (a) *Non-refoulement* is a fundamental component of the customary international law prohibition of torture or cruel, inhuman or degrading treatment or punishment.
- (b) It is focused on individuals, regardless of either status or conduct, in respect of whom substantial grounds can be shown for believing that they

(CAT/C/12/D/13/1993); Communication No. 15/1994, *Khan v. Canada*, Report of 15 Nov. 1994; Communication No. 39/1996, *Paez v. Sweden*, Report of 28 April 1997 (CAT/C/18/D/39/1996); Communication No. 28/1995, *E.A. v. Switzerland*, Report of 10 Nov. 1997; Communication No. 65/1997, *I.A.O. v. Sweden*, Report of 6 May 1998; Communication No. 94/1997, *K.N. v. Switzerland*, Report of 19 May 1998; Communication No. 90/1997, *A.L.N. v. Switzerland*, Report of 19 May 1998; Communication No. 88/1997, *Korban v. Sweden*, Report of 16 Nov. 1998; Communication No. 83/1997, *G.R.B. v. Sweden*, Report of 15 May 1998; Communication No. 112/1998, *H.D. v. Switzerland*, Report of 30 April 1999; Communication No. 103/1998, *S.M.R. and M.M.R. v. Sweden*, Report of 5 May 1999; Communication No. 106/1998, *N.P. v. Australia*, Report of 6 May 1999; Communication No. 120/1998, *Elmi v. Australia*, Report of 14 May 1999.

<sup>168</sup> See, e.g., Arts. 4(2) and 5(1), ICCPR, General Comment No. 20 (1992) and General Comment No. 24 (52)(1994); Art. 15(2) and 17 of the European Convention on Human Rights and *Chahal v. United Kingdom*, at para. 79; Art. 27 of the American Convention on Human Rights; and Art. 2(2) of the Torture Convention. The Banjul Charter makes no provision for derogations.

would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment.

- (c) It precludes any measure, regardless of form, which would have the effect of putting an individual at risk by removing them from a place of safety to a place of threat.
- (d) It precludes all such measures taken by or on behalf of a State, whether the measures are taken within the territory of that State or elsewhere, in circumstances in which the measures are or would be attributable to the State.
- (e) It precludes the expulsion, return, or other transfer of an individual both to a territory where they may be at risk directly or to a territory from which they may be subsequently removed to a third territory where they would be at risk.
- (f) It is not subject to exception or limitation for any reason whatever.

252. In short, the scope and content of the customary principle of *non-refoulement* in the context of human rights may be expressed as follows.

No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.

### 3. *Non-refoulement at customary law*

253. On the basis of the expressions of *non-refoulement* identified in the preceding subsections, the essential content of the principle of *non-refoulement* at customary law may be stated as follows:

- (a) No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.
- (b) In circumstances which do not come within the scope of paragraph 1, no person seeking asylum may be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or to return to a territory where he or she may face a threat of persecution or a threat to life, physical integrity, or liberty. Save as provided in paragraph 3, this principle allows of no limitation or exception.
- (c) Overriding reasons of national security or public safety will permit a State to derogate from the principle expressed in paragraph 2 in circumstances

in which the threat of persecution does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights. The application of these exceptions is conditional on the strict compliance with principles of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country.

## Annex 2.1 Status of ratifications of key international instruments which include a *non-refoulement* component

*Note 1:* UN membership is stated as of 18 December 2000; ratification of the 1951 Convention and 1967 Protocol as of 15 February 2001; of the ECHR, ICCPR and CAT as of 7 May 2001; of the ARC and ACHR as of 4 June 2000; and of the Banjul Charter as of 1 January 2000.

*Note 2:* The 'Declaration on Territorial Asylum' (GA Res. 2132 (XXII) of 14 December 1967) was adopted unanimously at the 1,631st plenary meeting of the UNGA on the report of the Sixth Committee. All States which were members of the UN at the time may therefore be said to have supported the principles expressed therein.

**[Editorial note:** Since the preparation of this Legal Opinion in June 2001 several States have acceded to the instruments referred to in this table. As of 1 Feb. 2003, the following accessions should be noted: *1951 Convention and 1967 Protocol*, Belarus (23 Aug. 2001), Moldova (31 Jan. 2002), and Ukraine (10 June 2002 and 4 April 2002 respectively), with Saint Kitts and Nevis acceding to the 1951 Convention alone (1 Feb. 2002); *ICCPR*, Djibouti (5 Nov. 2002), Eritrea (22 Jan. 2002), Andorra (signed 5 Aug. 2002), and Nauru (signed 12 Nov. 2001); *Torture Convention*, Djibouti (5 Nov. 2002), Equatorial Guinea (8 Oct. 2002), Holy See (26 June 2002), Ireland (11 April 2002), Lesotho (12 Nov. 2001), Mongolia (24 Jan. 2002), Nigeria (28 June 2001), Saint Vincent and the Grenadines (1 Aug. 2001), Andorra (signed 5 Aug. 2002), Madagascar (signed 1 Oct. 2001), Nauru (signed 12 Nov. 2001), and San Marino (signed 18 Sept. 2002); *European Convention on Human Rights*, Armenia (26 April 2002), Azerbaijan (15 April 2002), Bosnia and Herzegovina (12 July 2002). In addition, Switzerland joined the United Nations on 10 Sept. 2002, and Timor-Leste on 27 Sept. 2002, bringing the number of UN member States to 191. Total ratifications were as follows: 1951 Convention 141; 1967 Protocol 139; ICCPR 149; CAT 132.]

## Abbreviations

1951 Convention 1967 Protocol	Geneva Convention Relating to the Status of Refugees, 1951 Protocol to the 1951 Convention Relating to the Status of Refugees, 1967
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
ICCPR	International Covenant on Civil and Political Rights, 1966
ARC	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969
ACHR	American Convention on Human Rights, 1969
Banjul	African Charter on Human and Peoples' Rights, 1981
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

State	UN member	1951 Convention	1967 Protocol	ICCPR	CAT	Other conventions
Afghanistan	19-Nov-46			24-Jan-83 <sup>a</sup>	01-Apr-87	
Albania	14-Dec-55	18-Aug-92 <sup>a</sup>	18-Aug-92 <sup>a</sup>	04-Oct-91 <sup>a</sup>	11-May-94 <sup>a</sup>	ECHR 1996
Algeria	08-Oct-62	21-Feb-63 <sup>c</sup>	08-Nov-67 <sup>a</sup>	12-Sep-89	12-Sep-89 <sup>a</sup>	Banjul 1987, ARC 1974
Andorra	28-Jul-93					ECHR 1996
Angola	01-Dec-76	23-Jun-81 <sup>a</sup>	23-Jun-81 <sup>a</sup>	10-Jan-92 <sup>a</sup>		Banjul 1990, ARC 1981
Antigua and Barbuda	11-Nov-81	07-Sep-95 <sup>a</sup>	07-Sep-95 <sup>a</sup>		19-Jul-93 <sup>a</sup>	
Argentina	24-Oct-45	15-Nov-61 <sup>a</sup>	06-Dec-67 <sup>a</sup>	08-Aug-86	24-Sep-86 <sup>*</sup>	ACHR 1984
Armenia	02-Mar-92	06-Jul-93 <sup>a</sup>	06-Jul-93 <sup>a</sup>	23-Jun-93 <sup>a</sup>	13-Sep-93	s: ECHR 2001
Australia	01-Nov-45	22-Jan-54 <sup>a</sup>	13-Dec-73 <sup>a</sup>	13-Aug-80	08-Aug-89 <sup>*</sup>	
Austria	14-Dec-55	01-Nov-54	05-Sep-73 <sup>a</sup>	10-Sep-78	29-Jul-87 <sup>*</sup>	ECHR 1958
Azerbaijan	09-Mar-92	12-Feb-93 <sup>a</sup>	12-Feb-93 <sup>a</sup>	13-Aug-92 <sup>a</sup>	16-Aug-96 <sup>a</sup>	s: ECHR 2001
Bahamas	18-Sep-73	15-Sep-93 <sup>a</sup>	15-Sep-93 <sup>a</sup>			
Bahrain	21-Sep-71				06-Mar-98 <sup>a</sup>	
Bangladesh	17-Sep-74			06-Sep-00 <sup>a</sup>	05-Oct-98 <sup>a</sup>	
Barbados	09-Dec-66			05-Jan-73 <sup>a</sup>		ACHR 1982
Belarus	24-Oct-45			12-Nov-73	13-Mar-87	
Belgium	27-Dec-45	22-Jul-53	08-Apr-69 <sup>a</sup>	21-Apr-83	25-Jun-99 <sup>*</sup>	ECHR 1955
Belize	25-Sep-81	27-Jun-90 <sup>a</sup>	27-Jun-90 <sup>a</sup>	10-Jun-96 <sup>a</sup>	17-Mar-86 <sup>a</sup>	
Benin	20-Sep-60	04-Apr-62 <sup>c</sup>	06-Jul-70 <sup>a</sup>	12-Mar-92 <sup>a</sup>	12-Mar-92 <sup>a</sup>	Banjul 1986 ARC 1973
Bhutan	21-Sep-71					
Bolivia	14-Nov-45	09-Feb-82 <sup>a</sup>	09-Feb-82 <sup>a</sup>	12-Aug-82 <sup>a</sup>	12-Apr-99	ACHR 1979
Bosnia and Herzegovina	22-May-92	01-Sep-93 <sup>c</sup>	01-Sep-93 <sup>c</sup>	01-Sep-93 <sup>c</sup>	01-Sep-93 <sup>a</sup>	
Botswana	17-Oct-66	06-Jan-69 <sup>a</sup>	06-Jan-69 <sup>a</sup>	08-Sep-00	08-Sep-00	Banjul 1986 ARC 1995
Brazil	24-Oct-45	16-Nov-60	07-Apr-72 <sup>a</sup>	24-Jan-92 <sup>a</sup>	28-Sep-89	ACHR 1992
Brunei Darussalam	21-Sep-84					
Bulgaria	14-Dec-55	12-May-93 <sup>a</sup>	12-May-93 <sup>a</sup>	21-Sep-70	16-Dec-86 <sup>*</sup>	ECHR 1992

(Cont.)

State	UN member	1951 Convention	1967 Protocol	ICCPR	CAT	Other conventions
Burkina Faso	20-Sep-60	18-Jun-80 <sup>a</sup>	18-Jun-80 <sup>a</sup>	04-Jan-99 <sup>a</sup>	04-Jan-99 <sup>a</sup>	Banjul 1984 ARC 1974
Burundi	18-Sep-62	19-Jul-63 <sup>a</sup>	15-Mar-71 <sup>a</sup>	09-May-90 <sup>a</sup>	18-Feb-93 <sup>a</sup>	Banjul 1989 ARC 1975
Cambodia	14-Dec-55	15-Oct-92 <sup>a</sup>	15-Oct-92 <sup>a</sup>	26-May-92 <sup>a</sup>	15-Oct-92 <sup>a</sup>	
Cameroon	20-Sep-60	23-Oct-61 <sup>c</sup>	19-Sep-67 <sup>a</sup>	27-Jun-84 <sup>a</sup>	19-Dec-86 <sup>a</sup>	Banjul 1989 ARC 1985
Canada	09-Nov-45	04-Jun-69 <sup>a</sup>	04-Jun-69 <sup>a</sup>	19-May-76 <sup>a</sup>	24-Jun-87 <sup>*</sup>	
Cape Verde	16-Sep-75		09-Jul-87 <sup>a</sup>	06-Aug-93 <sup>a</sup>	04-Jun-92 <sup>a</sup>	Banjul 1987 ARC 1989
Central African Republic	20-Sep-60	04-Sep-62 <sup>c</sup>	30-Aug-67 <sup>a</sup>	08-May-81 <sup>a</sup>		Banjul 1986 ARC 1970
Chad	20-Sep-60	19-Aug-81 <sup>a</sup>	19-Aug-81 <sup>a</sup>	09-Jun-95 <sup>a</sup>	09-Jun-95 <sup>a</sup>	Banjul 1986 ARC 1981
Chile	24-Oct-45	28-Jan-72 <sup>a</sup>	27-Apr-72 <sup>a</sup>	10-Feb-72	30-Sep-88	ACHR 1990
China	24-Oct-45	24-Sep-82 <sup>a</sup>	24-Sep-82 <sup>a</sup>	s: 05-Oct-98	04-Oct-88	
Colombia	05-Nov-45	10-Oct-61	04-Mar-80 <sup>a</sup>	29-Oct-69	08-Dec-87	ACHR 1973
Comoros	12-Nov-75				s: 22-Sep-00	Banjul 1986
Congo	20-Sep-60	15-Oct-62 <sup>c</sup>	10-Jul-70 <sup>a</sup>	05-Oct-83 <sup>a</sup>		Banjul 1981 ARC 1971
Congo (Republic of)						
Congo (Democratic Republic)	20-Sep-60	19-Jul-65 <sup>a</sup>	13-Jan-75 <sup>a</sup>	01-Nov-76 <sup>a</sup>	18-Mar-96	Banjul 1987 ARC 1973
Costa Rica	02-Nov-45	28-Mar-78 <sup>a</sup>	28-Mar-78 <sup>a</sup>	29-Nov-68	11-Nov-93	ACHR 1970
Côte d'Ivoire	20-Sep-60	08-Dec-61 <sup>c</sup>	16-Feb-70 <sup>a</sup>	26-Mar-92 <sup>a</sup>	18-Dec-95 <sup>a</sup>	Banjul 1992 ARC 1998
Croatia	22-May-92	12-Oct-92 <sup>c</sup>	12-Oct-92 <sup>c</sup>	12-Oct-92 <sup>c</sup>	12-Oct-92 <sup>*c</sup>	ECHR 1997
Cuba	24-Oct-45				17-May-95	
Cyprus	20-Sep-60	16-May-63 <sup>c</sup>	09-Jul-68 <sup>a</sup>	02-Apr-69	18-Jul-91 <sup>a</sup>	ECHR 1962
Czech Republic	19-Jan-93	01-Jan-93 <sup>c</sup>	01-Jan-93 <sup>c</sup>	22-Feb-93 <sup>c</sup>	01-Jan-93 <sup>*c</sup>	ECHR 1992
Denmark	24-Oct-45	04-Dec-52	29-Jan-68 <sup>a</sup>	06-Jan-72	27-May-87 <sup>*</sup>	ECHR 1953
Djibouti	20-Sep-77	09-Aug-77 <sup>c</sup>	09-Aug-77 <sup>c</sup>			Banjul 1991
Dominica	18-Dec-78	17-Feb-94 <sup>a</sup>	17-Feb-94 <sup>a</sup>	17-Jun-93 <sup>a</sup>		ACHR 1993
Dominican Republic	24-Oct-45	04-Jan-78 <sup>a</sup>	04-Jan-78 <sup>a</sup>	04-Jan-78 <sup>a</sup>	s: 04-Feb-85	ACHR 1978
Ecuador	21-Dec-45	17-Aug-55 <sup>a</sup>	06-Mar-69 <sup>a</sup>	06-Mar-69	30-Mar-88 <sup>*</sup>	ACHR 1977
Egypt	24-Oct-45	22-May-81 <sup>a</sup>	22-May-81 <sup>a</sup>	14-Jan-82	25-Jun-86 <sup>a</sup>	Banjul 1981 ARC 1980
El Salvador	24-Oct-45	28-Apr-83 <sup>a</sup>	28-Apr-83 <sup>a</sup>	30-Nov-79	17-Jun-96 <sup>a</sup>	ACHR 1978
Equatorial Guinea	12-Nov-68	07-Feb-86 <sup>a</sup>	07-Feb-86 <sup>a</sup>	25-Sep-87 <sup>a</sup>		Banjul 1986 ARC 1980
Eritrea	28-May-93					Banjul 1999
Estonia	17-Sep-91	10-Apr-97 <sup>a</sup>	10-Apr-97 <sup>a</sup>	21-Oct-91 <sup>a</sup>	21-Oct-91 <sup>a</sup>	ECHR 1996
Ethiopia	13-Nov-45	10-Nov-69 <sup>a</sup>	10-Nov-69 <sup>a</sup>	11-Jun-93 <sup>a</sup>	13-Mar-94 <sup>a</sup>	Banjul 1998 ARC 1973
Fiji	13-Oct-70	12-Jun-72 <sup>c</sup>	12-Jun-72 <sup>c</sup>			
Finland	14-Dec-55	10-Oct-68 <sup>a</sup>	10-Oct-68 <sup>a</sup>	19-Aug-75	30-Aug-89 <sup>*</sup>	ECHR 1990
France	24-Oct-45	23-Jun-54	03-Feb-71 <sup>a</sup>	04-Nov-80 <sup>a</sup>	18-Feb-86 <sup>*</sup>	ECHR 1974
Gabon	20-Sep-60	27-Apr-64 <sup>a</sup>	28-Aug-73 <sup>a</sup>	21-Jan-83 <sup>a</sup>	08-Sep-00	Banjul 1986 ARC 1986
Gambia	21-Sep-65	07-Sep-66 <sup>c</sup>	29-Sep-67 <sup>a</sup>	22-Mar-79 <sup>a</sup>	s: 23-Oct-85	Banjul 1983 ARC 1980
Georgia	31-Jul-92	09-Aug-99 <sup>a</sup>	09-Aug-99 <sup>a</sup>	03-May-94 <sup>a</sup>	26-Oct-94 <sup>a</sup>	ECHR 1999
Germany	18-Sep-73	01-Dec-53	05-Nov-69 <sup>a</sup>	17-Dec-73	01-Oct-90	ECHR 1953
Ghana	08-Mar-57	18-Mar-63 <sup>a</sup>	30-Oct-68 <sup>a</sup>	07-Sep-00	07-Sep-00	Banjul 1989 ARC 1975
Greece	24-Oct-45	05-Apr-60	07-Aug-68 <sup>a</sup>	05-May-97 <sup>a</sup>	06-Oct-88 <sup>*</sup>	ECHR 1974
Grenada	17-Sep-74			06-Sep-91 <sup>a</sup>		ACHR 1978
Guatemala	21-Nov-45	22-Sep-83 <sup>a</sup>	22-Sep-83 <sup>a</sup>	06-May-92 <sup>a</sup>	05-Jan-90 <sup>a</sup>	ACHR 1978



State	UN member	1951 Convention	1967 Protocol	ICCPR	CAT	Other conventions
Guinea	12-Dec-58	28-Dec-65 <sup>c</sup>	16-May-68 <sup>a</sup>	24-Jan-78	10-Oct-89	Banjul 1982 ARC 1972
Guinea-Bissau	17-Sep-74	11-Feb-76 <sup>a</sup>	11-Feb-76 <sup>a</sup>	s: 12-Sep-00	s: 12-Sep-00	Banjul 1986 ARC 1989
Guyana	20-Sep-66			15-Feb-77	19-May-88	
Haiti	24-Oct-45	25-Sep-84 <sup>a</sup>	25-Sep-84 <sup>a</sup>	06-Feb-91 <sup>a</sup>		ACHR 1977
Honduras	17-Dec-45	23-Mar-92 <sup>a</sup>	23-Mar-92 <sup>a</sup>	25-Aug-97	05-Dec-96 <sup>a</sup>	ACHR 1977
Hungary	14-Dec-55	14-Mar-89 <sup>a</sup>	14-Mar-89 <sup>a</sup>	17-Jan-74	15-Apr-87 <sup>a</sup>	ECHR 1992
Iceland	19-Nov-46	30-Nov-55 <sup>a</sup>	26-Apr-68 <sup>a</sup>	22-Aug-79	23-Oct-96 <sup>*</sup>	ECHR 1953
India	30-Oct-45			10-Apr-79 <sup>a</sup>	s: 14-Oct-97	
Indonesia	28-Sep-50				28-Oct-98	
Iran (Islamic Republic of)	24-Oct-45	28-Jul-76 <sup>a</sup>	28-Jul-76 <sup>a</sup>	24-Jun-75		
Iraq	21-Dec-45			25-Jan-71		
Ireland	14-Dec-55	29-Nov-56 <sup>a</sup>	06-Nov-68 <sup>a</sup>	08-Dec-89	s: 28-Sep-92	ECHR 1953
Israel	11-May-49	01-Oct-54	14-Jun-68 <sup>a</sup>	03-Oct-91	03-Oct-91	
Italy	14-Dec-55	15-Nov-54	26-Jan-72 <sup>a</sup>	15-Sep-78	12-Jan-89 <sup>*</sup>	ECHR 1955
Jamaica	18-Sep-62	30-Jul-64 <sup>c</sup>	30-Oct-80 <sup>a</sup>	03-Oct-75		ACHR 1978
Japan	18-Dec-56	03-Oct-81 <sup>a</sup>	01-Jan-82 <sup>a</sup>	21-Jun-79	29-Jun-99 <sup>a</sup>	
Jordan	14-Dec-55			28-May-75	13-Nov-91	
Kazakhstan	02-Mar-92	15-Jan-99 <sup>a</sup>	15-Jan-99 <sup>a</sup>		26-Aug-98 <sup>a</sup>	
Kenya	16-Dec-63	16-May-66 <sup>a</sup>	13-Nov-81 <sup>a</sup>	01-May-72 <sup>a</sup>	21-Feb-97 <sup>a</sup>	Banjul 1992 ARC 1992
Kiribati	14-Sep-99					
Korea (Democratic People's Republic of)	17-Sep-91			14-Sep-81 <sup>a</sup>		
Korea (Republic of)	17-Sep-91	03-Dec-92 <sup>a</sup>	03-Dec-92 <sup>a</sup>	10-Apr-90 <sup>a</sup>	09-Jan-95 <sup>a</sup>	
Kuwait	14-May-63			21-May-96 <sup>a</sup>	08-Mar-96 <sup>a</sup>	
Kyrgyzstan	02-Mar-92	08-Oct-96 <sup>a</sup>	08-Oct-96 <sup>a</sup>	07-Oct-94 <sup>a</sup>	05-Sep-97 <sup>a</sup>	
Lao People's Democratic Republic	14-Dec-55			s: 07-Dec-00		
Latvia	17-Sep-91	31-Jul-97 <sup>a</sup>	31-Jul-97 <sup>a</sup>	14-Apr-92 <sup>a</sup>	14-Apr-92 <sup>a</sup>	ECHR 1997
Lebanon	24-Oct-45			03-Nov-72 <sup>a</sup>	05-Oct-00 <sup>a</sup>	
Lesotho	17-Oct-66	14-May-81 <sup>a</sup>	14-May-81 <sup>a</sup>	09-Sep-92 <sup>a</sup>		Banjul 1992 ARC 1988
Liberia	02-Nov-45	15-Oct-64 <sup>a</sup>	27-Feb-80 <sup>a</sup>	s: 18-Apr-67		Banjul 1982 ARC 1971
Libyan Arab Jamahiriya	14-Dec-55			15-May-70 <sup>a</sup>	16-May-89 <sup>a</sup>	Banjul 1987 ARC 1981
Liechtenstein	18-Sep-90	08-Mar-57	20-May-68 <sup>a</sup>	10-Dec-98 <sup>a</sup>	02-Nov-90 <sup>*</sup>	ECHR 1982
Lithuania	17-Sep-91	28-Apr-97 <sup>a</sup>	28-Apr-97	20-Nov-91 <sup>a</sup>	01-Feb-96	ECHR 1995
Luxembourg	24-Oct-45	23-Jul-53	22-Apr-71 <sup>a</sup>	18-Aug-83	29-Sep-87 <sup>*</sup>	ECHR 1953
Macedonia (Former Yugoslav Republic of)	08-Apr-93	18-Jan-94 <sup>c</sup>	18-Jan-94 <sup>c</sup>	18-Jan-94 <sup>c</sup>	12-Dec-94 <sup>c</sup>	ECHR 1997
Madagascar	20-Sep-60	18-Dec-67 <sup>a</sup>		21-Jun-71		Banjul 1992 s: ARC 1969
Malawi	01-Dec-64	10-Dec-87 <sup>a</sup>	10-Dec-87 <sup>a</sup>	22-Dec-93 <sup>a</sup>	11-Jun-96 <sup>a</sup>	Banjul 1990 ARC 1987
Malaysia	17-Sep-57					
Maldives	21-Sep-65					
Mali	28-Sep-60	02-Feb-73 <sup>c</sup>	02-Feb-73 <sup>a</sup>	16-Jul-74 <sup>a</sup>	26-Feb-99 <sup>a</sup>	Banjul 1981 ARC 1981

(Cont.)

State	UN member	1951 Convention	1967 Protocol	ICCPR	CAT	Other conventions
Malta	01-Dec-64	17-Jun-71 <sup>a</sup>	15-Sep-71 <sup>a</sup>	13-Sep-90 <sup>a</sup>	13-Sep-90 <sup>a</sup>	ECHR 1967
Marshall Islands	17-Sep-91					
Mauritania	07-Oct-61	05-May-87 <sup>a</sup>	05-May-87 <sup>a</sup>			Banjul 1986 ARC 1972
Mauritius	24-Apr-68			12-Dec-73 <sup>a</sup>	09-Dec-92 <sup>a</sup>	Banjul 1992 s: ARC 1969
Mexico	07-Nov-45	07-Jun-00 <sup>a</sup>	07-Jun-00 <sup>a</sup>	23-Mar-81 <sup>a</sup>	23-Jan-86	ACHR 1982
Micronesia (Federated States of)	17-Sep-91					
Moldova	02-Mar-92			26-Jan-93 <sup>a</sup>	28-Nov-95	ECHR 1997
Monaco	28-May-93	18-May-54		28-Aug-97	06-Dec-91 <sup>*,a</sup>	
Mongolia	27-Oct-61			18-Nov-74		
Morocco	12-Nov-56	07-Nov-56 <sup>c</sup>	20-Apr-71 <sup>a</sup>	03-May-79	21-Jun-93	
Mozambique	16-Sep-75	16-Dec-83 <sup>a</sup>	01-May-89 <sup>a</sup>	21-Jul-93 <sup>a</sup>	14-Sep-99 <sup>a</sup>	Banjul 1990 ARC 1989
Myanmar	19-Apr-48					
Namibia	23-Apr-90	17-Feb-95 <sup>a</sup>		28-Nov-94 <sup>a</sup>	28-Nov-94 <sup>a</sup>	Banjul 1992
Nauru	14-Sep-99					
Nepal	14-Dec-55			14-May-91 <sup>a</sup>	14-May-91 <sup>a</sup>	
Netherlands	10-Dec-45	03-May-56	29-Nov-68 <sup>a</sup>	11-Dec-78	21-Dec-88 <sup>*</sup>	ECHR 1954
New Zealand	24-Oct-45	30-Jun-60 <sup>a</sup>	06-Aug-73 <sup>a</sup>	28-Dec-78	10-Dec-89 <sup>*</sup>	
Nicaragua	24-Oct-45	28-Mar-80 <sup>a</sup>	28-Mar-80 <sup>a</sup>	12-Mar-80 <sup>a</sup>	s: 15-Apr-85	ACHR 1979
Niger	20-Sep-60	25-Aug-61 <sup>c</sup>	02-Feb-70 <sup>a</sup>	07-Mar-86 <sup>a</sup>	05-Oct-98 <sup>a</sup>	Banjul 1986 ARC 1971
Nigeria	07-Oct-60	23-Oct-67 <sup>a</sup>	02-May-68 <sup>a</sup>	29-Jul-93 <sup>a</sup>	s: 28-Jul-88	Banjul 1983 ARC 1986
Norway	27-Nov-45	23-Mar-53	28-Nov-67 <sup>a</sup>	13-Sep-72	09-Jul-86 <sup>*</sup>	ECHR 1952
Oman	07-Oct-71					
Pakistan	30-Sep-47					
Palau	15-Dec-94					
Panama	13-Nov-45	02-Aug-78 <sup>a</sup>	02-Aug-78 <sup>a</sup>	08-Mar-77	24-Aug-87	ACHR 1978
Papua New Guinea	10-Oct-75	17-Jul-86 <sup>a</sup>	17-Jul-86 <sup>a</sup>			
Paraguay	24-Oct-45	01-Apr-70 <sup>a</sup>	01-Apr-70 <sup>a</sup>	10-Jun-92	12-Mar-90	ACHR 1989
Peru	31-Oct-45	21-Dec-64 <sup>a</sup>	15-Sep-83 <sup>a</sup>	28-Apr-78	07-Jul-88	ACHR 1978
Philippines	24-Oct-45	22-Jul-81 <sup>a</sup>	22-Jul-81 <sup>a</sup>	23-Oct-86	18-Jun-86 <sup>a</sup>	
Poland	24-Oct-45	27-Sep-91 <sup>a</sup>	27-Sep-91 <sup>a</sup>	18-Mar-77	26-Jul-89 <sup>*</sup>	ECHR 1993
Portugal	14-Dec-55	22-Dec-60 <sup>a</sup>	13-Jul-76 <sup>a</sup>	15-Jun-78	09-Feb-89 <sup>*</sup>	ECHR 1978
Qatar	21-Sep-71				11-Jan-00 <sup>a</sup>	
Romania	14-Dec-55	07-Aug-91 <sup>a</sup>	07-Aug-91 <sup>a</sup>	09-Dec-74	18-Dec-90 <sup>a</sup>	ECHR 1993
Russian Federation	24-Oct-45	02-Feb-93 <sup>a</sup>	02-Feb-93 <sup>a</sup>	16-Oct-73	03-Mar-87 <sup>*</sup>	ECHR 1998
Rwanda	18-Sep-62	03-Jan-80 <sup>a</sup>	03-Jan-80 <sup>a</sup>	16-Apr-75 <sup>a</sup>		Banjul 1981 ARC 1979
Saint Kitts and Nevis	23-Sep-83					
Saint Lucia	18-Sep-79					
Saint Vincent and the Grenadines	16-Sep-80	03-Nov-93 <sup>a</sup>		09-Nov-81 <sup>a</sup>		
Samoa	15-Dec-76	21-Sep-88 <sup>a</sup>	29-Nov-94 <sup>a</sup>			
San Marino	02-Mar-92			18-Oct-85 <sup>a</sup>		ECHR 1989
São Tomé and Príncipe	16-Sep-75	01-Feb-78 <sup>a</sup>	01-Feb-78 <sup>a</sup>	s: 31-Oct-95	s: 06-Sep-00	Banjul 1986
Saudi Arabia	24-Oct-45				23-Sep-97 <sup>a</sup>	
Senegal	28-Sep-60	02-May-63 <sup>a</sup>	03-Oct-67 <sup>a</sup>	13-Feb-78	21-Aug-86 <sup>*</sup>	Banjul 1981 ARC 1971

State	UN member	1951 Convention	1967 Protocol	ICCPR	CAT	Other conventions
Seychelles	21-Sep-76	23-Apr-80 <sup>a</sup>	23-Apr-80 <sup>a</sup>	05-May-92 <sup>a</sup>	05-May-92 <sup>a</sup>	Banjul 1992 ARC 1980
Sierra Leone	27-Sep-61	22-May-81 <sup>a</sup>	22-May-81 <sup>a</sup>	23-Aug-96 <sup>a</sup>	25-Apr-01	Banjul 1981 ARC 1987
Singapore	21-Sep-65					
Slovakia	19-Jan-93	04-Feb-93 <sup>c</sup>	04-Feb-93 <sup>c</sup>	28-May-93 <sup>c</sup>	28-May-93 <sup>*c</sup>	ECHR 1992
Slovenia	22-May-92	06-Jul-92 <sup>c</sup>	06-Jul-92 <sup>c</sup>	06-Jul-92 <sup>c</sup>	16-Jul-93 <sup>*a</sup>	ECHR 1994
Solomon Islands	19-Sep-78	28-Feb-95 <sup>a</sup>	12-Apr-95 <sup>a</sup>			
Somalia	20-Sep-60	10-Oct-78 <sup>a</sup>	10-Oct-78 <sup>a</sup>	24-Jan-90 <sup>a</sup>	24-Jan-90 <sup>a</sup>	Banjul 1982 s: ARC 1969
South Africa	07-Nov-45	12-Jan-96 <sup>a</sup>	12-Jan-96 <sup>a</sup>	10-Dec-98	10-Dec-98 <sup>*</sup>	Banjul 1996 ARC 1995
Spain	14-Dec-55	14-Aug-78 <sup>a</sup>	14-Aug-78 <sup>a</sup>	27-Apr-77	21-Oct-87 <sup>*</sup>	ECHR 1979
Sri Lanka	14-Dec-55			11-Jun-80	03-Jan-94 <sup>a</sup>	
Sudan	12-Nov-56	22-Feb-74 <sup>a</sup>	23-May-74 <sup>a</sup>	18-Mar-76 <sup>a</sup>	s: 04-Jun-86	Banjul 1982 ARC 1972
Suriname	04-Dec-75	29-Nov-78 <sup>c</sup>	29-Nov-78 <sup>c</sup>	28-Dec-76 <sup>a</sup>		ACHR 1987
Swaziland	24-Sep-68	14-Feb-00 <sup>a</sup>	28-Jan-69 <sup>a</sup>			Banjul 1995 ARC 1989
Sweden	19-Nov-46	26-Oct-54	04-Oct-67 <sup>a</sup>	06-Dec-71	08-Jan-86 <sup>*</sup>	ECHR 1952
Syrian Arab Republic	24-Oct-45			21-Apr-69 <sup>a</sup>		
Tajikistan	02-Mar-92	07-Dec-93 <sup>a</sup>	07-Dec-93 <sup>a</sup>	04-Jan-99 <sup>a</sup>	11-Jan-95 <sup>a</sup>	
Tanzania	14-Dec-61	12-May-64 <sup>a</sup>	04-Sep-68 <sup>a</sup>	11-Jun-76 <sup>a</sup>		Banjul 1982 ARC 1975
Thailand	16-Dec-46			29-Oct-96 <sup>a</sup>		
Togo	20-Sep-60	27-Feb-62 <sup>c</sup>	01-Dec-69 <sup>a</sup>	24-May-84 <sup>a</sup>	18-Nov-87 <sup>*</sup>	Banjul 1982 ARC 1970
Tonga	14-Sep-99					
Trinidad and Tobago	18-Sep-62	10-Nov-00 <sup>a</sup>	10-Nov-00 <sup>a</sup>	21-Dec-78 <sup>a</sup>		
Tunisia	12-Nov-56	24-Oct-57 <sup>c</sup>	16-Oct-68 <sup>a</sup>	18-Mar-69	23-Sep-88 <sup>*</sup>	Banjul 1983 ARC 1989
Turkey	24-Oct-45	30-Mar-62	31-Jul-68 <sup>a</sup>	s: 15-Aug-00	02-Aug-88 <sup>*</sup>	ECHR 1950
Turkmenistan	02-Mar-92	02-Mar-98 <sup>a</sup>	02-Mar-98	01-May-97 <sup>a</sup>	25-Jun-99 <sup>a</sup>	
Tuvalu	05-Sep-00	07-Mar-86 <sup>c</sup>	07-Mar-86 <sup>c</sup>			
Uganda	25-Oct-62	27-Sep-76 <sup>a</sup>	27-Sep-76 <sup>a</sup>	21-Jun-95 <sup>a</sup>	03-Nov-86 <sup>a</sup>	Banjul 1986 ARC 1987
Ukraine	24-Oct-45			12-Nov-73	24-Feb-87	ECHR 1997
United Arab Emirates	09-Dec-71					
United Kingdom of Great Britain & Northern Ireland	24-Oct-45	11-Mar-54	04-Sep-68 <sup>a</sup>	20-May-76	08-Dec-88	ECHR 1951
United States of America	24-Oct-45		01-Nov-68 <sup>a</sup>	08-Jun-92	21-Oct-94	s: ACHR 1977
Uruguay	18-Dec-45	22-Sep-70 <sup>a</sup>	22-Sep-70 <sup>a</sup>	01-Apr-70	24-Oct-86 <sup>*</sup>	ACHR 1985
Uzbekistan	02-Mar-92			28-Sep-95 <sup>a</sup>	28-Sep-95 <sup>a</sup>	
Vanuatu	15-Sep-81					
Venezuela	15-Nov-45		19-Sep-86 <sup>a</sup>	10-May-78	29-Jul-91 <sup>*</sup>	ACHR 1977
Viet Nam	20-Sep-77			24-Sep-82 <sup>a</sup>		
Yemen	30-Sep-47	18-Jan-80 <sup>a</sup>	18-Jan-80 <sup>a</sup>	09-Feb-87 <sup>a</sup>	05-Nov-91 <sup>a</sup>	
Yugoslavia	01-Nov-00	15-Dec-59	15-Jan-68 <sup>a</sup>	02-Jun-71	10-Sep-91 <sup>*</sup>	
Zambia	01-Dec-64	24-Sep-69 <sup>c</sup>	24-Sep-69 <sup>a</sup>	10-Apr-84 <sup>a</sup>	07-Oct-98 <sup>a</sup>	Banjul 1983 ARC 1973
Zimbabwe	25-Aug-80	25-Aug-81 <sup>a</sup>	25-Aug-81 <sup>a</sup>	13-May-91 <sup>a</sup>		Banjul 1986 ARC 1985

(Cont.)

State	UN member	1951 Convention	1967 Protocol	ICCPR	CAT	Other conventions
Non-members of the UN						
Holy See		15-Mar-56	08-Jun-67 <sup>a</sup>			
Switzerland		21-Jan-55	20-May-68 <sup>a</sup>	18-Jun-92 <sup>a</sup>	02-Dec-86*	ECHR 1974
<b>Total (191)</b>	<b>189</b>	<b>137</b>	<b>136</b>	<b>147</b>	<b>124</b>	
<b>Signatories</b>				<b>5</b>	<b>10</b>	

*Notes*<sup>a</sup> Accession<sup>c</sup> Succession

s: Indicates that the State has signed but not ratified the instrument.

\* Indicates that the party has recognized the competence to receive and process individual communications of the Committee Against Torture under Article 22 of the CAT (total 41 States Parties).

[**Editorial note:** Accession dates for Yugoslavia refer to the former Yugoslavia. The Federal Republic of Yugoslavia formally succeeded to the 1951 Convention and 1967 Protocol, the ICCPR, and the CAT on 12 March 2001, and renamed itself Serbia and Montenegro on 4 Feb. 2003.]

The following States are not party to any of the listed agreements

State	Date of UN membership
Bhutan	(21-Sep-71)
Brunei Darussalam	(21-Sep-84)
Kiribati	(14-Sep-99)
Lao People's Democratic Republic	(14-Dec-55)
Malaysia	(17-Sep-57)
Maldives	(21-Sep-65)
Marshall Islands	(17-Sep-91)
Micronesia (Federated States of)	(17-Sep-91)
Myanmar	(19-Apr-48)
Nauru	(14-Sep-99)
Oman	(07-Oct-71)
Pakistan	(30-Sep-47)
Palau	(15-Dec-94)
Saint Kitts and Nevis	(23-Sep-83)
Saint Lucia	(18-Sep-79)
Singapore	(21-Sep-65)
Tonga	(14-Sep-99)
United Arab Emirates	(09-Dec-71)
Vanuatu	(15-Sep-81)

## Annex 2.2 Constitutional and legislative provisions importing the principle of *non-refoulement* into municipal law

The table identifies constitutional and/or legislative provisions that import the principle of *non-refoulement* into municipal law either directly, through the express incorporation of the principle in some or other form, or indirectly, by way of the application of treaties in the municipal sphere. The principal treaties which include a *non-refoulement* component to which the State concerned is a party are listed in column two of the table.

While every effort has been made to verify the accuracy and currency of the municipal provisions cited, this has not always been possible. The provisions referred to should not be taken as excluding the application of other municipal measures that may also be relevant to the application of the principle of *non-refoulement* in the municipal sphere.

**[Editorial note:** For accessions to these instruments since the preparation of this Legal Opinion *see* Editorial note at start of Annex 2.1.]

### Abbreviations

ACHR	American Convention on Human Rights, 1969
ARC	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969
Banjul	African Charter on Human and Peoples' Rights, 1981
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
ICCPR	International Covenant on Civil and Political Rights, 1966
P	Protocol to the Convention Relating to the Status of Refugees, 1967
RC	Convention Relating to the Status of Refugees, 1951

State	UN member	Treaties	Constitutional and/or legislative provisions
Afghanistan	19-Nov-46	CAT, ICCPR	
Albania	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1976) Art. 5; Law on Asylum (1998) Art. 7
Algeria	08-Oct-62	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1996) s. 123; Décret No. 1963-274
Andorra	28-Jul-93	ECHR	Constitution (1993) Art. 3(3), (4)

(Cont.)

State	UN member	Treaties	Constitutional and/or legislative provisions
Angola	01-Dec-76	RC and P, Banjul, ARC, ICCPR	Law on the Amendment of the Constitution, No. 23 (1992) Art. 21(3), Art. 26; Law No. 8 (1990) Art. 4, Art. 21
Antigua and Barbuda	11-Nov-81	RC and P, CAT	
Argentina	24-Oct-45	RC and P, ACHR, CAT, ICCPR	Constitution (1994) Art. 31; Decreto No. 1023 (1994) Art. 171
Armenia	02-Mar-92	RC and P, CAT, ICCPR	Law on Refugees (1999) Art. 19
Australia	01-Nov-45	RC and P, CAT, ICCPR	Migration Act (1958) s. 36
Austria	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Aliens Act (1997) Art. 57(1), (2); Asylum Act (1997) Art. 21
Azerbaijan	09-Mar-92	RC and P, CAT, ICCPR	Constitution (1995) Arts. 69, 70
Bahamas	18-Sep-73	RC and P	
Bahrain	21-Sep-71	CAT	Constitution (1973) Art. 37
Bangladesh	17-Sep-74	CAT, ICCPR	
Barbados	09-Dec-66	ACHR, ICCPR	
Belarus	24-Oct-45	CAT, ICCPR	Constitution (1994) Art. 8; Law on Aliens (1999) Art. 29; Law on Refugees (1995) Arts. 8, 15, 17
Belgium	27-Dec-45	RC and P, ECHR, CAT, ICCPR	Loi sur l'accès des étrangers (1980) Arts. 7, 56
Belize	25-Sep-81	RC and P, CAT, ICCPR	Refugees Act (1991) Arts. 3, 14
Benin	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1990) Art. 147; Ordonnance No. 1975-41 Art. 4
Bhutan	21-Sep-71		
Bolivia	14-Nov-45	RC and P, ACHR, CAT, ICCPR	Decreto Supremo No. 19640 (1983) Art. 5
Bosnia and Herzegovina	22-May-92	RC and P, CAT, ICCPR	Constitution (1994) Ch. VII Art. 3, Annex; Law on Immigration and Asylum (1999) Art. 34
Botswana	17-Oct-66	RC and P, Banjul, ARC, CAT, ICCPR	Refugees Act (1968) s. 9(1)
Brazil	24-Oct-45	RC and P, ACHR, CAT, ICCPR	Lei No. 9.474 (1997) Arts. 36, 37
Brunei Darussalam	21-Sep-84		
Bulgaria	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1991) Art. 5; Law on Refugees (1999) s. 6
Burkina Faso	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Décret No. 1994-055/PRES/REX Art. 11; Zatu No. AN V-0028/FP/PRES (1988) Art. 4
Burundi	18-Sep-62	RC and P, Banjul, ARC, CAT, ICCPR	
Cambodia	14-Dec-55	RC and P, CAT, ICCPR	Law on Immigration (1994) Art. 3
Cameroon	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1996) Art. 45
Canada	09-Nov-45	RC and P, CAT, ICCPR	Immigration Act (1976) s. 53
Cape Verde	16-Sep-75	P, Banjul, ARC, CAT, ICCPR	Constitution (1992) Arts. 7, 11
Central African Republic	20-Sep-60	RC and P, Banjul, ARC, ICCPR	Constitution (1990) Art. 69
Chad	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	
Chile	24-Oct-45	RC and P, ACHR, CAT, ICCPR	Decreto-Ley No. 1094 (1975) Art. 39
China	24-Oct-45	RC and P, CAT	Civil Law (1986) Art. 142
Colombia	05-Nov-45	RC and P, ACHR, CAT, ICCPR	Constitution (1991) Art. 93; Decreto No. 1598 (1995) Art. 17
Comoros	12-Nov-75	Banjul	
Congo (Republic of)	20-Sep-60	RC and P, Banjul, ARC, ICCPR	Acte Fondamentale (1997) Art. 81; Décret No. 1978-266 Art. 4
Congo (Democratic Republic)	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Ordonnance-loi No. 1983-033 Art. 2

State	UN member	Treaties	Constitutional and/or legislative provisions
Costa Rica	02-Nov-45	RC and P, ACHR, CAT, ICCPR	Ley general de migración y extranjería (1986) Art. 64; Decreto ejecutivo No. 14845-G (1983) Arts. 17, 18
Côte d'Ivoire	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	
Croatia	22-May-92	RC and P, ECHR, CAT, ICCPR	Constitutional Law of Human Rights and Freedoms (1992) Art. 1, 2(m); Constitution (1990) Arts. 33, 134
Cuba	24-Oct-45	CAT	
Cyprus	20-Sep-60	RC and P, ECHR, CAT, ICCPR	Constitution (1960) Arts. 32, 169
Czech Republic	19-Jan-93	RC and P, ECHR, CAT, ICCPR	Act No. 325 on Asylum ... (1999) s. 91
Denmark	24-Oct-45	RC and P, ECHR, CAT, ICCPR	Aliens Act (1997) Arts. 31, 48a
Djibouti	20-Sep-77	RC and P, Banjul	Ordonnance No. 77053/P. R. /A. E (1977) Art. 4
Dominica	18-Dec-78	RC and P, ACHR, ICCPR	
Dominican Republic	24-Oct-45	RC and P, ACHR, ICCPR	Decreto presidencial No. 2330 (1984) Arts. 12, 13
Ecuador	21-Dec-45	RC and P, ACHR, CAT, ICCPR	Decreto No. 3301 (1992) Arts. 27, 34
Egypt	24-Oct-45	RC and P, Banjul, ARC, CAT, ICCPR	
El Salvador	24-Oct-45	RC and P, ACHR, CAT, ICCPR	Constitution (1983) Art. 144
Equatorial Guinea	12-Nov-68	RC and P, Banjul, ARC, ICCPR	Fundamental Law Art. 18
Eritrea	28-May-93	Banjul	
Estonia	17-Sep-91	RC and P, ECHR, CAT, ICCPR	Law on Refugees (1997) Arts. 7, 21
Ethiopia	13-Nov-45	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1995) Art. 9
Fiji	13-Oct-70	RC and P	Constitution Amendment Act (1997) Arts. 34(5), 43
Finland	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1919, as amended 1995) s. 7; Aliens' Act (1991) Arts. 38, 41
France	24-Oct-45	RC and P, ECHR, CAT, ICCPR	Constitution (1958) Art. 55; Ordonnance No. 1945-2658 Art. 27bis
Gabon	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Ordonnance No. 64/1976 Art. 2
Gambia	21-Sep-65	RC and P, Banjul, ARC, ICCPR	
Georgia	31-Jul-92	RC and P, ECHR, CAT, ICCPR	Law on Refugees (1998) Art. 82
Germany	18-Sep-73	RC and P, ECHR, CAT, ICCPR	Basic Law (1949, as amended 1998) Art. 25; Asylum Procedure Act (1992) s. 2; Aliens Act (1991) Arts. 48, 51, 53(1), 53(6)
Ghana	08-Mar-57	RC and P, Banjul, ARC, CAT, ICCPR	Refugee Law (1992) Arts. 1, 11
Greece	24-Oct-45	RC and P, ECHR, CAT, ICCPR	Presidential Decree No. 61 (1999) Art. 1; Inter-Ministerial Decree No. 4803/7A (1992) Art. 7; Law No. 1975 (1991) Art. 24
Grenada	17-Sep-74	ACHR, ICCPR	
Guatemala	21-Nov-45	RC and P, ACHR, CAT, ICCPR	Constitution (1985) Arts. 27, 46; Ley No. 22 (1986) Art. 26
Guinea	12-Dec-58	RC and P, Banjul, ARC, CAT, ICCPR	
Guinea-Bissau	17-Sep-74	RC and P, Banjul, ARC	
Guyana	20-Sep-66	CAT, ICCPR	
Haiti	24-Oct-45	RC and P, ACHR, ICCPR	Constitution (1987) Art. 276-2
Honduras	17-Dec-45	RC and P, ACHR, CAT, ICCPR	Constitution (1982) Art. 18
Hungary	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1990) Art. 7; Act LXXXVI (1993) s. 32, as amended by Act CXXXIX (1997) Art. 61
Iceland	19-Nov-46	RC and P, ECHR, CAT, ICCPR	

(Cont.)

State	UN member	Treaties	Constitutional and/or legislative provisions
India	30-Oct-45	ICCPR	
Indonesia	28-Sep-50	CAT	Circular Letter of the Prime Minister No. 11/R. I/1956 Art. 1
Iran (Islamic Republic of)	24-Oct-45	RC and P, ICCPR	Ordinance Relating to Refugees (1963) Art. 12
Iraq	21-Dec-45	ICCPR	Loi sur les réfugiés politiques No. 51 (1971), Art. 4
Ireland	14-Dec-55	RC and P, ECHR, ICCPR	Immigration Act (1999) s. 3; Refugee Act (1996) Art. 5
Israel	11-May-49	RC and P, CAT, ICCPR	
Italy	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1947) Art. 10; Decree Law No. 416 (1989) Art. 7
Jamaica	18-Sep-62	RC and P, ACHR, ICCPR	
Japan	18-Dec-56	RC and P, CAT, ICCPR	Immigration, Control and Refugee Recognition Act (1951) Art. 53
Jordan	14-Dec-55	CAT, ICCPR	
Kazakhstan	02-Mar-92	RC and P, CAT	Constitution (1995) Arts. 4, 12(4); Presidential Decree No. 3419; Presidential Decree, 15 July 1996
Kenya	16-Dec-63	RC and P, Banjul, ARC, CAT, ICCPR	
Kiribati	14-Sep-99		
Korea (Democratic People's Republic of)	17-Sep-91	ICCPR	
Korea (Republic of)	17-Sep-91	RC and P, CAT, ICCPR	
Kuwait	14-May-63	CAT, ICCPR	
Kyrgyzstan	02-Mar-92	RC and P, CAT, ICCPR	Constitution (1996) Arts. 12, 14, 16; Resolution No. 340 (1996) s. 22
Lao People's Democratic Republic	14-Dec-55		
Latvia	17-Sep-91	RC and P, ECHR, CAT, ICCPR	Law on Asylum Seekers and Refugees (1998) Arts. 22(2), 30; Law on the Entry and Residence of ... Stateless Persons (1992) Art. 60; Regulations on the Procedure of Temporary Residence for Persons Who Have Been Detained for Illegal Residence (1992) s. 6.3
Lebanon	24-Oct-45	CAT, ICCPR	Loi réglementant l'entrée et le séjour des étrangers au Liban (1962) Art. 31
Lesotho	17-Oct-66	RC and P, Banjul, ARC, ICCPR	Refugee Act (1983) Arts. 11, 12, 13
Liberia	02-Nov-45	RC and P, Banjul, ARC	Refugee Act (1993) ss. 12(1), 13
Libyan Arab Jamahiriya	14-Dec-55	Banjul, ARC, CAT, ICCPR	Constitution (1951) Art. 191
Liechtenstein	18-Sep-90	RC and P, ECHR, CAT, ICCPR	Constitution (1862) Art. 31
Lithuania	17-Sep-91	RC and P, ECHR, CAT, ICCPR	Law on Refugee Status (1995) Art. 9
Luxembourg	24-Oct-45	RC and P, ECHR, CAT, ICCPR	
Macedonia (Former Yugoslav Republic of)	08-Apr-93	RC and P, ECHR, CAT, ICCPR	Constitution (1992) Art. 118; Act on Movement and Residence of Aliens (1992) Art. 39
Madagascar	20-Sep-60	RC, Banjul, ICCPR	Décret No. 1994-652 Art. 38; Décret No. 1962-006 Art. 2; Loi No. 1962-00 Arts. 1, 2
Malawi	01-Dec-64	RC and P, Banjul, ARC, CAT, ICCPR	Refugee Act (1989) Art. 10
Malaysia	17-Sep-57		
Maldives	21-Sep-65		
Mali	28-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1992) Art. 116; Loi No. 1998-40 Arts. 8, 9, 10
Malta	01-Dec-64	RC and P, ECHR, CAT, ICCPR	



State	UN member	Treaties	Constitutional and/or legislative provisions
Marshall Islands	17-Sep-91		
Mauritania	07-Oct-61	RC and P, Banjul, ARC	Constitution (1991) Art. 80
Mauritius	24-Apr-68	Banjul, CAT, ICCPR	
Mexico	07-Nov-45	RC and P, ACHR, CAT, ICCPR	Ley General de Polación (1974) Art. 42(VI)
Micronesia (Federated States of)	17-Sep-91		
Moldova	02-Mar-92	ECHR, CAT, ICCPR	Law on Legal Status of Foreign Citizens and Apatrides (1994, as amended 1999) Arts. 29, 32
Monaco	28-May-93	RC, CAT, ICCPR	
Mongolia	27-Oct-61	ICCPR	Constitution (1992) Art. 10, 18
Morocco	12-Nov-56	RC and P, CAT, ICCPR	Décret No. 2-57-1256 du 2 safar 1377 (1957) Art. 1, 5
Mozambique	16-Sep-75	RC and P, Banjul, ARC, CAT, ICCPR	Refugee Act (1991) Arts. 13, 14
Myanmar	19-Apr-48		
Namibia	23-Apr-90	RC, Banjul, CAT, ICCPR	Constitution (1990) Art. 144; Refugees (Recognition and Control) Act (1999) Art. 26
Nauru	14-Sep-99		
Nepal	14-Dec-55	CAT, ICCPR	Nepal Treaty Act (1990) Art. 9
Netherlands	10-Dec-45	RC and P, ECHR, CAT, ICCPR	Constitution (1995) s. 93
New Zealand	24-Oct-45	RC and P, CAT, ICCPR	Crimes of Torture Act (1989); Immigration Act (1987) s. 129(X)
Nicaragua	24-Oct-45	RC and P, ACHR, ICCPR	Constitution (1995) Art. 42
Niger	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	
Nigeria	07-Oct-60	RC and P, Banjul, ARC, ICCPR	National Commission for Refugees, etc. Decree (1989) Art. 1
Norway	27-Nov-45	RC and P, ECHR, CAT, ICCPR	Immigration Act (1991) ss. 4, 15, 16
Oman	07-Oct-71		
Pakistan	30-Sep-47		
Palau	15-Dec-94		
Panama	13-Nov-45	RC and P, ACHR, CAT, ICCPR	Decreto Ejecutivo No. 23 (1998) Arts. 53, 73
Papua New Guinea	10-Oct-75	RC and P	
Paraguay	24-Oct-45	RC and P, ACHR, CAT, ICCPR	Ley No. 470 (1975) Art. 141
Peru	31-Oct-45	RC and P, ACHR, CAT, ICCPR	Constitution (1993) Art. 36 Decreto presidencial No. 1 (1985) Arts. 1, 2
Philippines	24-Oct-45	RC and P, CAT, ICCPR	
Poland	24-Oct-45	RC and P, ECHR, CAT, ICCPR	Constitution (1997) s. 56, 91; Act on Aliens (1997) s. 53
Portugal	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1976) Art. 8; Law No. 15 (1998) Arts. 1, 6; Decree-law No. 59 (1993) Arts. 67, 72
Qatar	21-Sep-71	CAT	
Romania	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1991) Arts. 11, 18; Ordinance on the Status and Regime of Refugees (2000) Art. 23(m)
Russian Federation	24-Oct-45	RC and P, ECHR, CAT, ICCPR	Constitution (1993) Arts. 15(4), 63; Law on Amendments and Additions to the Law on Refugees (1997) Arts. 10(1), 12(4); Law on Refugees (1997) Arts. 8, 18
Rwanda	18-Sep-62	RC and P, Banjul, ARC, ICCPR	Loi sur les conditions d'entrée et de séjour des étrangers (1963) Art. 1

(Cont.)

State	UN member	Treaties	Constitutional and/or legislative provisions
Saint Kitts and Nevis	23-Sep-83		
Saint Lucia	18-Sep-79		
Saint Vincent and the Grenadines	16-Sep-80	RC, ICCPR	
Samoa	15-Dec-76	RC and P	
San Marino	02-Mar-92	ICCPR, ECHR	
São Tomé and Príncipe	16-Sep-75	RC and P, Banjul	
Saudi Arabia	24-Oct-45	CAT	
Senegal	28-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Décret No. 1978-484 Arts. 3, 4, 5, 6
Seychelles	21-Sep-76	RC and P, Banjul, ARC, CAT, ICCPR	
Sierra Leone	27-Sep-61	RC and P, Banjul, ARC, CAT, ICCPR	Non-Citizens (Registration, Immigration and Expulsion) Act (1965) Art. 4(f)
Singapore	21-Sep-65		
Slovakia	19-Jan-93	RC and P, ECHR, CAT, ICCPR	Constitution (1992) Arts. 11, 153; Act No. 283 (1995) Art. 4; Law on Stay of Foreigners (1995) Art. 15
Slovenia	22-May-92	RC and P, ECHR, CAT, ICCPR	Constitution (1991) Arts. 8, 153; Law on Asylum (1999) Arts. 1, 6, 7; Aliens Act (1999) Art. 51; Foreigners Act (1991) Art. 33
Solomon Islands	19-Sep-78	RC and P	
Somalia	20-Sep-60	RC and P, Banjul, CAT, ICCPR	Presidential Decree No. 25 (1984) Art. 6(3)
South Africa	07-Nov-45	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1996) ss. 231, 232; Refugees Act (1998) Arts. 2, 28
Spain	14-Dec-55	RC and P, ECHR, CAT, ICCPR	Constitution (1978) Art. 96; Constitutional Law on the Rights and Freedoms of Aliens in Spain ... (2000); Art. 3 Real decreto 203 (1995) Art. 12; Ley 5 (1984) Art. 19
Sri Lanka	14-Dec-55	CAT, ICCPR	
Sudan	12-Nov-56	RC and P, Banjul, ARC, ICCPR	Regulation of Asylum Act (1974) Arts. 6, 7
Suriname	04-Dec-75	RC and P, ACHR, ICCPR	Aliens Act (1991) Arts. 8, 16(3)
Swaziland	24-Sep-68	RC and P, Banjul, ARC	Refugees Control Order (1978) Art. 10(4)
Sweden	19-Nov-46	RC and P, ECHR, CAT, ICCPR	Aliens Act (1989) 529 Ch. 8(1)
Syrian Arab Republic	24-Oct-45	ICCPR	Legislative Decree No. 29, Entry and Exit of Aliens (1970) Art. 29(E)
Tajikistan	02-Mar-92	RC and P, CAT, ICCPR	Law on Refugees (1994) Art. 10
Tanzania	14-Dec-61	RC and P, Banjul, ARC, ICCPR	Refugees Act (1998) Art. 28(4)
Thailand	16-Dec-46	ICCPR	
Togo	20-Sep-60	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1992) Art. 140
Tonga	14-Sep-99		
Trinidad and Tobago	18-Sep-62	RC and P, ICCPR	
Tunisia	12-Nov-56	RC and P, Banjul, ARC, CAT, ICCPR	Constitution (1959) Art. 32
Turkey	24-Oct-45	RC and P, ECHR, CAT	Constitution (1982) Art. 90
Turkmenistan	02-Mar-92	RC and P, CAT, ICCPR	Law on Refugees (1997) Arts. 2, 3
Tuvalu	05-Sep-00	RC and P	
Uganda	25-Oct-62	RC and P, Banjul, ARC, CAT, ICCPR	Control of Alien Refugees Act (1960) Arts. 6, 20(3)
Ukraine	24-Oct-45	ECHR, CAT, ICCPR	Constitution (1996) Arts. 9, 26; Law No. 38118-XII (1994) Art. 14
United Arab Emirates	09-Dec-71		

State	UN member	Treaties	Constitutional and/or legislative provisions
United Kingdom of Great Britain and Northern Ireland	24-Oct-45	RC and P, ECHR, CAT, ICCPR	Immigration and Asylum Act (1999) ss. 11, 12, 15, 71; Immigration Rules (1994) s. 329
United States of America	24-Oct-45	P, CAT, ICCPR	Immigration and Nationality Act (1952, as amended in 1965 and 1999) s. 1231(b)(3); US Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture (1998)
Uruguay	18-Dec-45	RC and P, ACHR, CAT, ICCPR	Decreto legislativo sobre refugiados políticos (1956) Art. 4; Ley 13.777 (1969), Estatuto de los Refugiados Constitution (1992) Art. 23
Uzbekistan	02-Mar-92	CAT, ICCPR	
Vanuatu	15-Sep-81		
Venezuela	15-Nov-45	P, ACHR, CAT, ICCPR	Constitution (1961) Art. 116
Viet Nam	20-Sep-77	ICCPR	Ordinance on Entry ... of Foreigners ... (1992) Art. 2(1), (3)
Yemen	30-Sep-47	RC and P, CAT, ICCPR	Law No. 47 (1991) s. 38(5)
Yugoslavia	01-Nov-00	RC and P, CAT, ICCPR	Constitution (1992) Arts. 16, 66
Zambia	01-Dec-64	RC and P, Banjul, ARC, CAT, ICCPR	Refugee (Contract) Act (1970) Arts. 10(4), 11(2)
Zimbabwe	25-Aug-80	RC and P, Banjul, ARC, ICCPR	Refugee Act (1983) Art. 13
Non-members of the UN			
Holy See		RC and P	
Switzerland		RC and P, ECHR, CAT, ICCPR	Constitution (1999) Art. 25(2), (3); Loi sur l'asile (1998) Art. 5
<b>Total (191)</b>	<b>189</b>	<b>170*</b>	<b>125**</b>

## Notes

\* The number of States party to at least one of the treaties including a *non-refoulement* component.

\*\* The number of States that have constitutional and/or legislative provisions that import the principle of *non-refoulement* into municipal law either directly or by way of the application of one or more treaties to which the State is a party.