

Article 31 of the 1951 Convention relating to the Status of Refugees:  
Non-penalization, Detention and Protection

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## 1. Article 31: Refugees unlawfully in the country of refuge

### 1.1 Introduction

1. Article 31 of the 1951 Convention relating to the Status of Refugees provides as follows:

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

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

2. Despite this provision, asylum seekers are placed in detention facilities throughout Europe, North America, and Australia, owing to their illegal entry or presence. In its July 2000 review of reception standards for asylum seekers in the European Union, UNHCR found several different types of detention in operation, including detention at border points or in airport transit areas, and that the grounds for detention also vary. For example, refugees and asylum seekers may be detained at the 'pre-admission' phase, because of false documents or lack of proper documentation, or they may be held in anticipation of deportation or transfer to a 'safe third country', for example, under the provisions of the Dublin Convention. Several countries have no limit on the maximum period of detention, including Denmark, Finland, Greece, the Netherlands and the United Kingdom, while others provide maximum periods and require release if no decision on admission or removal has been taken.

3. Increasingly, the practice among receiving countries is to set up special detention or holding centres, for example, in Austria, Belgium, Denmark, France, Germany, Greece, the Netherlands, Spain, Sweden, the United Kingdom, and the United States; such facilities may be open, semi-open or closed. Because of

demand, many States also employ regular jails for the purposes of immigration-related detention; in such cases, asylum seekers are generally subject to the same regime as other prisoners and are not segregated from criminals or other offenders.

4. The 1951 Convention establishes a regime of rights and responsibilities for refugees. In most cases, only if an individual's claim to refugee status is examined *before* he or she is affected by an exercise of State jurisdiction (for example, in regard to penalization for 'illegal' entry), can the State be sure that its international obligations are met. Just as a decision on the merits of a claim to refugee status is generally the only way to ensure that the obligation of *non-refoulement* is observed, so also is such a decision essential to ensure that penalties are not imposed on refugees, contrary to Article 31 of the 1951 Convention.
5. To impose penalties without regard to the merits of an individual's claim to be a refugee will likely also violate the obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction.<sup>1</sup>
6. Such a practice is also wasteful of national resources and an example of bad management. Where the penalty imposed is detention, it imposes significant costs on the receiving State, and inevitably increases delay in national systems, whether at the level of refugee determination or immigration control.
7. Nevertheless, increasing demands for control measures over the movements of people have led even to refugees recognized after 'unauthorised' arrival being accorded lesser rights, contrary to the terms of the 1951 Convention/1967 Protocol, while elsewhere refugees and asylum seekers are commonly fined or imprisoned.

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<sup>1</sup> This duty is recognized in article 2(1) of the 1966 Covenant on Civil and Political Rights ('Each State Party ... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant...'), in article 1 of the 1950 European Convention ('The... Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention'), and in article 1 of the 1969 American Convention ('The... Parties undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction (their) free and full exercise...'). It is clearly linked to the matching duty to provide a remedy to those whose rights are infringed, or threatened with violation (Art. 14(1), 1966 Covenant on Civil and Political Rights; art. 13, 1950 European Convention on Human Rights; art. 25, 1969 American Convention on Human Rights).

## 1.2 Problems arising and scope of the paper

8. In this time of uncertainty, when security concerns are once more high on the agenda and many States seem unable effectively to manage their refugee determination systems effectively and efficaciously, the terms of Article 31 of the 1951 Convention call for close examination and analysis. Parts 2 – 5 of this paper therefore review the central issues arising out of Article 31(1), with particular reference to the scope of protection (who benefits), the conditions of entitlement ('coming directly', 'without delay', 'good cause'), and the precise nature of the immunity ('penalties'). Part 6 examines Article 31(2), with particular reference to restrictions of freedom of movement and the issue of detention (both generally, and in regard to the 'necessary' measures which may be imposed under that provision.

## 2. Article 31: The Origins of the Text

9. The Vienna Convention on the Law of Treaties confirms the principle of general international law, that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose'.<sup>2</sup> In the case of the 1951 Convention, this means interpretation by reference to the object and purpose of extending the protection of the international community to refugees, and assuring to 'refugees the widest possible exercise of... fundamental rights and freedoms'. (1951 Convention, Preamble.)
10. Article 32 of the 1969 Vienna Convention on the Law of Treaties provides further that,

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

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<sup>2</sup> Art. 31(1), 1969 Vienna Convention on the Law of Treaties: UN doc. A/CONF.39/27; Goodwin-Gill, G.S., *The Refugee in International Law*, Clarendon Press, Oxford, 2<sup>nd</sup> ed., 1996, 366-8.

11. As is shown below, the *travaux préparatoires* confirm the ‘ordinary meaning’ of Article 31(1) of the 1951 Convention, which applies to refugees who enter or are present without authorization, whether they have come directly from their country of origin, or from any other territory in which their life or freedom was threatened, provided they show good cause for such entry or presence.
12. So far as the references in Article 31(1) to refugees who ‘come directly’ and show ‘good cause’ may be ambiguous, the *travaux préparatoires* illustrate that these terms were not intended to deny protection to persons in analogous situations. On the contrary, the drafting history of Article 31(1) shows clearly only a small move from an ‘open’ provision on immunity (benefiting the refugee who presents him- or herself without delay and shows ‘good cause’), to one of slightly more limited scope, incorporating references to refugees ‘coming directly from a territory where their life or freedom was threatened’. Moreover, the drafting history shows clearly that this revision was intended specifically to meet one particular concern of the French delegation.

## 2.1 The *Ad hoc* Committee

13. A proposal to exempt illegally entering refugees from penalties was first included in the draft convention prepared by the 1950 *Ad hoc* Committee on Statelessness and Related Problems, meeting at Lake Success, New York, in February 1950.<sup>3</sup> The relevant part of what was then draft Article 24 provided as follows:

1. The High Contracting Parties undertake not to impose penalties, on account of their illegal entry or residence, on refugees who enter or are present in their territory without prior or legal authorization, and who present themselves without delay to the authorities and show good cause for their illegal entry.<sup>4</sup>

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<sup>3</sup> Belgium and the United States of America: Proposed Text for Article 24 of the Draft Convention relating to the Status of Refugees: UN doc. E/AC.32/L.25, 2 Feb. 1950; Decisions of the Committee on Statelessness and Related Problems taken at the meetings of 2 February 1950: UN doc. E/AC.32.L.26, 2 February 1950.

<sup>4</sup> Decisions of the Committee on Statelessness and Related Problems taken at the meetings of 3 February 1950: UN doc. E/AC.32.L.26, 3 February 1950.

14. The text was further refined during later meetings, emerging as draft Article 26:
1. The Contracting States shall not impose penalties, on account of his illegal entry or presence, on a refugee who enters or who is present in their territory without authorization, and who presents himself without delay to the authorities and shows good cause for his illegal entry or presence.
15. As was commented at the time, ‘A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge.’<sup>5</sup>
16. The Committee reconvened in August 1950 (renamed the *Ad hoc* Committee on Refugees and Stateless Persons). No changes were made in the text, although the Committee noted ‘that in some countries freedom from penalties on account of illegal entry is also extended to those who give assistance to such refugees for honourable reasons’.<sup>6</sup> The draft text was thereafter considered by the 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, which met in Geneva in July 1951.

## 2.2 Discussions at the 1951 Conference

17. Because Article 26 (Article 31 to be) ‘trespassed’ on the delicate ‘sovereign’ areas of admission and asylum, during the 1951 Geneva Conference France was concerned that it should not allow those who had already ‘*found asylum...* to move freely from one country to another without having to comply with frontier formalities’.<sup>7</sup>
18. In clarifying his country’s position, the French Delegate gave the example of ‘a refugee who, having found asylum in France, tried to make his way unlawfully

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<sup>5</sup> Draft Report of the *Ad hoc* Committee on Statelessness and Related Problems. Proposed Draft Convention relating to the Status of Refugees: UN doc. E/AC.32.L.38, 15 February 1950, Annex I (draft Article 26); Annex II (comments. p. 57).

<sup>6</sup> Draft Report of the *Ad hoc* Committee on Refugees and Stateless Persons: UN doc. E/AC.32.L.43, 24 August 1950, p. 9. Cf. Swiss Law, below, paragraph 37.

<sup>7</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records: UN doc. A/CONF.2/SR.13, (M. Colemar, France).

into Belgium. It was obviously impossible for the Belgian Government to acquiesce in that illegal entry, since the life and liberty of the refugee would be in no way in danger at the time'.<sup>8</sup>

19. The essential question between France and other participating States was whether the requirement that the refugee should show 'good cause' for entering or being present illegally was adequate, (as the United Kingdom representative, Mr. Hoare, argued), or whether more explicit wording was required, as suggested by the French delegate:

'[I]t was often difficult to define the reasons which could be regarded as constituting good cause for the illegal entry into, or presence in, the territory of a State of refuge. But it was precisely on account of that difficulty that it was necessary to make the working of paragraph 1 more explicit... To admit without any reservation that a refugee who had settled temporarily in a receiving country was free to enter another, would be to grant him a right of immigration which might be exercised for reasons of mere personal convenience.'<sup>9</sup>

20. Other countries, however, recognized that refugees might well have good cause for leaving any first country of refuge. Denmark cited the example of 'a Hungarian refugee living in Germany [who might] without actually being persecuted, feel obliged to seek refuge in another country', and later that of 'a Polish refugee living in Czechoslovakia, whose life or liberty was threatened in that country and who proceeded to another'. It proposed that France's suggested amendment (limiting the benefit of immunity to those arriving directly from their country of origin) be replaced by a reference to arrival from any territory in which the refugee's life or freedom was threatened.<sup>10</sup>

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<sup>8</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records: UN doc. A/CONF.2/SR.13 (M. Colemar, France).

<sup>9</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records: UN doc. A/CONF.2/SR.14 (M. Colemar, France).

<sup>10</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records: UN doc. A/CONF.2/SR.13, p. 15; UN doc. A/CONF.2/SR. 35, p. 18. Conventions such as those concluded at Dublin and Schengen, as well as new political and territorial arrangements emerging in Europe, also raise important questions regarding the territorial scope and application of the 1951 Convention/1967 Protocol, including the place of Article 31 in a 'Europe without internal frontiers'; these issues cannot be addressed in the present paper.

21. During the course of the debate, the United Nations High Commissioner for Refugees, Dr. Van Heuven Goedhart, expressed his concern about ‘necessary transit’ and the difficulties facing a refugee arriving in an ungenerous country. He recalled that he himself had fled the Netherlands in 1944 on account of persecution, had hidden for five days in Belgium and then, because he was also at risk there, had been helped by the Resistance to France, thence to Spain and finally to safety in Gibraltar. It would be unfortunate, he said, if refugees in similar circumstances were penalised for not having proceeded directly to the final country of asylum.<sup>11</sup>
22. The United Kingdom representative, Mr. Hoare, said that fleeing persecution was itself good cause for illegal entry, but there could be other good causes. The French suggested that their proposed amendment be changed so as to exclude refugees, ‘having been unable to find even temporary asylum in a country other than the one in which... life or freedom would be threatened’. This was opposed by the British representative on practical grounds (it would impose on the refugee the impossible burden of proving a negative); and by the Belgian representative on language and drafting grounds (it would exclude from the benefit of the provision any refugee who had managed to find a few days’ asylum in any country through which he had passed).<sup>12</sup>
23. Although draft article 26(1) was initially adopted on the basis of the French amendment as modified by the Belgian proposal, the text as a whole was debated again on the final day of the Conference. The High Commissioner reiterated the British objection, while the specific focus of the French position is evident in the following comment of M. Rochefort:

‘The fact that was causing him concern was that there were large numbers of refugees living in countries bordering on France. If they crossed the French frontier without their lives being in danger, the French Government would be entitled to impose penalties and to send them back to the frontier.’<sup>13</sup>

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<sup>11</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records: UN doc. A/CONF.2/SR.14, p. 4.

<sup>12</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records: UN doc. p. 13; UN doc. A/CONF.2/SR.14, p. 10-11.

<sup>13</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records: UN doc. A/CONF.2/SR.35 (M. Rochefort, France).

24. In the event, the requirement that the refugee should benefit from immunity only if able to prove that he or she had been unable to find even temporary asylum was dropped in favour of the present language:

*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.

25. Article 31 thus includes threats to life or freedom as possible reasons for illegal entry or presence; specifically refrains from linking such threat to the refugee's country of origin; and recognizes that refugees may have 'good cause' for illegal entry other than persecution in their country of origin.

### **2.3 The meaning of terms: Some preliminary views**

26. The benefit of immunity from penalties for illegal entry extends to *refugees*, 'coming directly from a territory where their life or freedom was threatened ... provided they present themselves without delay... and show good cause for their illegal entry or presence'.
27. Although expressed in terms of the 'refugee', this provision would be devoid of all effect unless it also extended, at least over a certain time, to asylum seekers or, in the words of the court in *Adimi* (below, section 3.2.1, paragraphs 42-47), to 'presumptive refugees'. This necessary interpretation, which takes account also of the declaratory nature of refugee status,<sup>14</sup> has obvious implications, not only for the general issue of immunity, but also for the moment at which

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<sup>14</sup> See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1979, paragraph 28: '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.'

proceedings might be commenced or penalties imposed. If Article 31 is to be effectively implemented, clear legislative or administrative action is required to ensure that such proceedings are not begun and that no penalties are in fact imposed. As shown below, many States do not make adequate legislative or administrative provision to ensure delay or postponement in the application of enforcement measures.

28. Refugees are not required to have come *directly* from their country of origin. The intention, reflected in the practice of some States, appears to be that other countries or territories passed through should also have constituted actual or potential threats to life or freedom, or that onward flight may have been dictated by the refusal of other countries to grant protection or asylum, or by the operation of exclusionary provisions, such as those on safe third country, safe country of origin or time limits. The criterion of 'good cause' for illegal entry is clearly flexible enough to allow the elements of individual cases to be taken into account.
29. The term '*penalties*' is not defined in Article 31, but the drafters appear to have had in mind measures such as prosecution, fine and imprisonment; administrative detention, however, is allowed under paragraph 2 (see above). Provisional detention was also not excluded if necessary to investigate the circumstances of entry or to obtain information about completely unknown persons, but an important distinction remained between, on the one hand, detention for the purpose of carrying through an investigation, and, on the other hand, penalties for illegal entry, the latter being prohibited where entry was justified.<sup>15</sup>
30. At the 1951 Conference, several representatives considered that the undertaking not to impose penalties did not exclude the possibility of eventual resort to

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<sup>15</sup> The Department of International Protection has expressed its view as follows: 'The Convention does not specify its understanding of penalties. However, since the object and purpose of the protection envisaged by Article 31(1) is the avoidance of penalisation on account of illegal entry or illegal presence, an overly formal approach to defining this term will not be appropriate. This could otherwise circumvent the fundamental protection foreseen by this norm. Any punitive measure, that is, any unnecessary limitation to the full enjoyment of rights granted to refugees under international refugee law, applied by States against refugees who would fall under the protective clause of Article 31(1) could, arguably, be interpreted as penalty. Such punitive measure could also be the denial of an appropriate standard of treatment under the 1951 Convention if amounting to an arbitrary or discriminatory restriction of rights foreseen under international refugee and human rights law. If, for instance, a State resorted to a different standard of treatment for refugees arriving in a manner covered by Article 31, then Article 31, in combination with Article 3 and those provisions of the Convention linked to lawful stay, would need to be examined with a view to possible violation.' Department of International Protection, internal note, May 2000.

expulsion,<sup>16</sup> although in practice this power is clearly circumscribed by the principle of *non-refoulement*. Article 31 does not require that refugees be permitted to remain indefinitely, and paragraph 2 makes it clear that States may impose ‘necessary’ restrictions on movement, for example, in special circumstances like a large influx. Such measures may also come within Article 9, and are an exception to the freedom of movement called for by Article 26.

31. In both cases, in accordance with general principles of interpretation, restrictions should be narrowly interpreted. In the case of the refugee, they should only be applied until status in the country of refuge is regularized or admission obtained into another country.
32. Problems result from the application of detention policies to all those deemed to have moved in an ‘irregular’ fashion.<sup>17</sup> Overseas resettlement selection, for example, depends on factors additional to refugee status, including quotas, priorities and links. It is always possible that some refugees will have justification for undocumented onward travel, such as threats or insecurity in the country of first refuge. Where Article 31 applies, the indefinite detention of those within its purview can constitute an unnecessary restriction contrary to paragraph 2. The Conference records indicate that apart from a few days for investigation,<sup>18</sup> further detention would be necessary only in cases of threats to security or of a great or sudden influx. Thus, though ‘penalties’ might not exclude eventual expulsion, prolonged detention of a refugee directly fleeing persecution in the country of origin, or of a refugee having good cause to leave another territory where life or freedom was threatened, requires justification as necessary under Article 31(2) or exceptional under Article 9. Even where Article 31 does not apply, general principles of law suggest certain inherent limitations on the duration and circumstances of detention.<sup>19</sup>

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<sup>16</sup> UN doc. A/CONF.2/SR.13, 12-14 (Canada, United Kingdom). Cf. Art. 5, 1954 Caracas Convention on Territorial Asylum.

<sup>17</sup> See EXCOM Conclusion No. 58 and section 3.5, below.

<sup>18</sup> On detention for ‘a few days’ to verify identity, etc., see generally UN docs. A/CONF.2/SR.13, 13-15; SR.14, 4, 10-11; SR.35, 11-13, 15-16, 19.

<sup>19</sup> See, for example, Article 32 of the Convention, limiting the circumstances in which lawfully resident refugees may be expelled to cases of national security or public order. It requires decisions in accordance with due process of law, and some form of appeal. Due process today includes, as a minimum, knowledge of the case against one, an opportunity to be heard and a right of appeal or review. Moreover, refugees under order of expulsion are to be allowed a reasonable period within which to seek legal entry into another country, though States retain discretion in the interim to apply ‘such internal measures as they may deem necessary’.

33. Some of the broader issues raised by detention are examined more fully below in Part 6.
34. The meaning of '*illegal entry or presence*' has not generally raised any difficult issue of interpretation. The former would include arriving or securing entry through the use of false or falsified documents, the use of other deception, clandestine entry, for example, as a stowaway, and entry into State territory with the assistance of smugglers or traffickers. The precise method of entry may nevertheless have certain consequences in practice for the refugee or asylum seeker. '*Illegal presence*' would cover lawful arrival and remaining after the elapse of a short, permitted period of stay (for example, in transit).
35. The notion of '*good cause*' has also not been the source of difficulty; being a refugee with a well-founded fear of persecution is generally accepted as a sufficient good cause, although this criterion is also considered relevant to assessing the validity of the reason why a refugee or asylum seeker might choose to move beyond the first country of refuge or transit.

### 3. Incorporation of the principle in national law

36. The principle of immunity from penalties for refugees entering or present without authorization is confirmed in the national legislation and case law of many States party to the 1951 Convention/1967 Protocol, the jurisprudence of the European Court of Human Rights, and in the practice of States at large.

#### 3.1 National legislation

37. Particularly striking in the field of national legislation is Swiss law, which extends immunity from penalization also to those who assist refugees entering illegally:

**Switzerland:** See Loi fédérale du 26 mars 1931 sur le séjour et l'établissement des étrangers, article 23(3):

Celui qui se réfugie en Suisse n'est pas punissable si le genre et la gravité des poursuites auxquelles il est exposé justifient le passage illégal de la frontière; celui qui lui prête assistance n'est également pas punissable si ses mobiles sont honorables (Whoever takes refuge in Switzerland is not punishable if the manner and the

seriousness of the persecution to which he or she is exposed justifies illegal crossing of the frontier; whoever assists him or her is equally not punishable if their motives are honourable.)<sup>20</sup>

38. The United Kingdom's approach, adopted after the decision in *Adimi* (see further below, section 3.2.1, paragraphs 42-47), is more limited:

**United Kingdom:** Immigration and Asylum Act 1999, section 31:

31. – (1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he –

(a) presented himself to the authorities in the United Kingdom without delay;

(b) showed good cause for his illegal entry or presence; and

(c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.

(2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country...

(5) A refugee who has made a claim for asylum is not entitled to the defence provided by subsection (1) in relation to any offence committed by him after making that claim.

(6) 'Refugee' has the same meaning as it has for the purposes of the Refugee Convention.

(7) If the Secretary of State has refused to grant a claim for asylum made by a person who claims that he has a defence under subsection (1), that person is to be taken not to be a refugee unless he shows that he is...

39. The law of the United States of America is also clear:

**United States of America:** 8 Code of Federal Regulations Part 270 — Penalties for Document Fraud. Sec. 270.2 Enforcement procedures.

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<sup>20</sup> Nouvelle teneur selon le ch. I de la LF du 9 oct. 1987, en vigueur depuis le 1er mars 1988 (RO 1988 332 333: FF 1986 III 233). Cf. Developments regarding the use of smugglers, below, paragraph 59.

(j) Declination to file charges for document fraud committed by refugees at the time of entry. The [Immigration and Naturalization] Service shall not issue a Notice of Intent to Fine for acts of document fraud committed by an alien pursuant to direct departure from a country in which the alien has a well-founded fear of persecution or from which there is a significant danger that the alien would be returned to a country in which the alien would have a well-founded fear of persecution, provided that the alien has presented himself or herself without delay to an INS officer and shown good cause for his or her illegal entry or presence...<sup>21</sup>

40. National legislation provides other useful examples:<sup>22</sup>

**Belize:** Refugees Act 1991

10. Saving in respect of illegal entry by refugees

(1) Notwithstanding the provisions of the Immigration Act, a person or any member of his family shall be deemed not to have committed the offence of illegal entry under that Act or any regulations made thereunder: (a) if such person applies in terms of Section 8 for recognition of his status as a refugee, until a decision has been made on the application and, where appropriate, such person has had an opportunity to exhaust his right of appeal in terms of that section; or (b) if such person has become a recognised refugee.

**Finland:** Aliens Act (378/91); 22 February 1991, as amended.

Article 64b - (28.6.1993/639) Arrangement of Illegal Entry

Whosoever in order to obtain financial benefit for himself or another (1) brings or attempts to bring an alien into Finland, aware that the said alien lacks the passport, visa or residence permit required for entry, (2) arranges or provides transport for the alien referred to in the subparagraph above to Finland or (3) surrenders to another person a false or counterfeit passport, visa or residence permit for use in conjunction with entry, shall be fined or sentenced to imprisonment for a maximum of two years for arrangement of illegal entry. A charge of

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<sup>21</sup> 8 U.S.C. 1101, 1103, and 1324c.

<sup>22</sup> The legislation cited hereunder is also published (in translation where appropriate) in UNHCR/Centre for Documentation and Research, *RefWorld*, CD-ROM, 8<sup>th</sup> edn., July 1999. For further details, see below, Annex 4.

arrangement of illegal entry need not be brought or punishment put into effect if the act may be pardonable; particular attention must be given to the motives of the perpetrator and to the conditions affecting the security of the alien in his country of origin or country of habitual residence.

**Ghana:** Refugee Act 1992 (P.N.D.C.L. 3305D.)

2. Illegal entry or presence in Ghana of a refugee. Notwithstanding any provision of the Aliens Act, 1953 (Act 160) but subject to the provisions of this Law, a person claiming to be a refugee within the meaning of this Law, who illegally enters Ghana or is illegally present in Ghana shall not - (a) be declared a prohibited immigrant; (b) be detained; or (c) be imprisoned or penalised in any other manner merely by reason of his illegal entry or presence pending the determination of his application for a refugee status.

**Lesotho:** Refugee Act 1983

Gazette No. 58, Supplement No. 6, 9 December 1983.

9. Illegal entry or presence

(1) Subject to Section 7, and notwithstanding anything contained in the Aliens Control Act, 1966, a person claiming to be a refugee within the meaning of section 3(1), who has illegally entered or is illegally present in Lesotho shall not, (a) be declared a prohibited immigrant; (b) be detained; or (c) be imprisoned or penalised in any other way, only by reason of his illegal entry or presence pending the determination of his application for recognition as a refugee under Section 7. (2) A person to whom sub-section (1) applies shall report to the nearest immigration officer or other authorised officer within fourteen days from the date of his entry and may apply for recognition as a refugee: Provided that where a person is illegally present in the country by reason of expiry of his visa, he shall not be denied the opportunity to apply for recognition of his refugee status merely on the grounds of his illegal presence. (3) Where a person to whom this section applies, (a) fails to report to the nearest authorised officer in accordance with sub-section (2); and (b) is subsequently recognized as a refugee, his presence in Lesotho shall be lawful, unless there are grounds to warrant his expulsion pursuant to Section 12. (4) Where an application made under sub-section (2) is rejected, the applicant shall be granted reasonable time in which to seek legal admission to another country.

**Malawi:** Refugee Act 1989

10. Prohibition of expulsion or return of refugees.

(4) A person who has illegally entered Malawi for the purpose of seeking asylum as a refugee shall present himself to a competent officer within twenty four hours of his entry or within such longer period as the competent officer may consider acceptable in the circumstances and such person shall not be detained, imprisoned, declared prohibited immigrant or otherwise penalized by reason only of his illegal entry or presence in Malawi unless and until the Committee has considered and made a decision on his application for refugee status.

**Mozambique:** Act No. 21/91 of 31 December 1991 (Refugee Act)

Article 11 (Offences connected with illegal entry)

1. Where any criminal or administrative offence directly connected with illegal entry into the Republic of Mozambique has been committed by the petitioner and his family members and has given rise to criminal or administrative proceedings, any such proceedings shall be suspended immediately upon the submission of the petition. 2. If the ruling is in favour of the grant of asylum, the suspended proceedings shall be filed, provided that the offence or offences committed were determined by the same facts as those which warranted the grant of the petition for asylum.

**3.2 National case law**

41. The principle of immunity from penalty and the protected status of the refugee and asylum seeker have been upheld in a number of municipal court decisions.<sup>23</sup>

*Alimas Khaboka v. Secretary of State for the Home Department* [1993] Imm AR 484, United Kingdom

The Court of Appeal, while finding for the Secretary of State in regard to the appellant's removal to France, considered that the term 'refugee' includes an asylum seeker whose application has not yet been determined, and who is subject to the limitations laid down in article 31 of the 1951 Refugee Convention.

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<sup>23</sup> The decisions cited hereunder include many reported in UNHCR/Centre for Documentation and Research, *RefWorld*, CD-ROM, 8<sup>th</sup> ed., July 1999.

*R v. Uxbridge Magistrates Court, ex parte Adimi* [1999] Imm AR 560, United Kingdom

The Divisional Court observed: 'That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt. Nor is it disputed that Article 31's protection can apply equally to those using false documents as to those (characteristically the refugees of earlier times) who enter a country clandestinely.' A fuller account of this case appears below, at paragraphs 42-47.

*Landgericht (Regional Superior Court), Münster, Federal Republic of Germany*, (Ref: 20 Dec 1988, LG Münster Ns 39 Js 688/86 (108/88)): An asylum seeker who entered illegally and who presented himself to the authorities one week after arrival after looking for advice on the asylum procedure, was not to be penalized for illegal entry. The court observed that there is no general time limit for determining what constitutes 'without delay', which should be considered on a case by case basis. An appeal by the Public Prosecutor was rejected on 3 May 1989 by the Appeals Court (Oberlandesgericht) in Hamm.

*Aftoforo Trimeles Plimeliodikeio Mytilinis=Court of First Instance (Criminal Cases), Mytilini, Greece*, 1993: *Shimon Akram & others*, reference: No. 585/1993): The defendants, Iraqi citizens of the Catholic faith, were found innocent of the crime of illegal entry; referring to Article 31 of the 1951 Convention, among others, the Court concluded that refugee status precludes the imposition of penalties on asylum seekers for illegal entry. See also the decision of another Greek Court (*Aftoforo Trimeles Plimeliodikeio Chiou=Court of First Instance (Criminal Cases), Chios*, reference: No. 233/1993).

*Swiss Federal Court (Bundesgericht, Kasstionshof, Urteil vom 17 März 1999)*, reported in *Asyl* 2/99, 21-23, confirms the above interpretations, and specifically that 'good cause' is not about being at risk in a particular country, but much more about the illegality of entry. The case involved the illegal entry of an Afghan refugee into Switzerland, from Italy with a false Singaporean passport. The Federal Court said:

‘Triftige Gründe für die illegale Einreise hat ein Flüchtling namentlich dann, wenn er ernsthaft befürchten muss, dass er im Falle der ordnungsgemässen Einreichung eines Asylgesuchs an der Schweizer Grenze keine Bewilligung zur Einreise in die Schweiz erhält, weil die in Art. 13c AsylG und Art 4 AsylV 1 genannten Voraussetzungen nicht erfüllt sind. Dem Ausländer, der in dieser begründeten Sorge illegal in die Schweiz einreist, um sein Asylgesuch im Inland... einreichen zu können, sind, wenn er als Flüchtling zu betrachten ist, triftige Gründe zuzubilligen...’

(A refugee has good cause for illegal entry especially when he has serious reason to fear that, in the event of a regular application for asylum at the Swiss frontier, he would not be permitted to enter Switzerland, because the conditions laid down in Article 13c of the Asylum Law and Article 4 of the Asylum Procedure Law are satisfied. ‘Good cause’ is thus to be recognized in regard to the alien who, if he is considered as a refugee, enters Switzerland illegally with such well-founded apprehension, in order to be able to make an asylum application inland...) (Translation by the present writer)

### 3.2.1 *The judgment in Adimi*

42. The decision of the United Kingdom Divisional Court in the case of *R v. Uxbridge Magistrates Court & Another ex parte Adimi* [1999] Imm. AR 560 is one of the most thorough examinations of the scope of Article 31 and the protection due. Lord Justice Simon Brown observed that the need for Article 31 had by no means diminished since it was drafted. ‘The combined effect of visa requirements and carrier’s liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents.’ The question was, when it should apply. Simon Brown LJ identified the broad purpose sought to be achieved as ‘to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law’, adding that it applied as much to refugees as to ‘presumptive refugees’, and to those using false documents, as to those entering clandestinely.
43. The Court examined the three qualifying conditions, taking account first of the Government’s argument that Article 31 allows the refugee no element of choice as to where he or she might claim asylum, and that only ‘considerations of

continuing safety' would justify impunity for onward travel. Simon Brown LJ rejected this argument, and found in favour of 'some element of choice'.

'... any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the Article, and ... the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection de jure or de facto from the persecution they were fleeing.'

44. Newman J also considered that, given the 'distinctive and differing state responses to requests for asylum', there was a 'rational basis for exercising choice where to seek asylum'. The Court relied here also on UNHCR's Guidelines on Detention, as it did in considering what was meant by the requirement that the refugee present themselves without delay. Again, Simon Brown LJ rejected the Government's argument that some sort of 'voluntary exonerating act' was required of the asylum seeker, such as to claim asylum immediately on arrival. It was enough, in the view of the judge, that the claimant had intended to claim asylum within a short time of arrival.
45. Such a pragmatic approach to the moment of claim has also been adopted in a parallel jurisdiction, namely, in regard to appeals by asylum seekers for income support (social security). Under United Kingdom law, entitlement to a certain level of income support depends upon the asylum seeker making a claim for asylum 'on his arrival' in the United Kingdom. In the Decision of the Social Security Commissioner in case number CIS 4439/98, 25 November 1999, Mr Commissioner Rowland expressed the view that 'a more precise term' had not been employed in the regulations, precisely to allow a measure of flexibility, and that the question whether asylum was claimed before or after clearing immigration control was not determinative (paragraphs 10, 18). The Commissioner took account of and was guided by the decision of the Divisional Court in *Adimi*. He also inclined to accept the argument that 'any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty within Article 31 unless objectively justifiable on administrative grounds' (paragraph 16).

46. On the third requirement of ‘good cause’, all parties agreed that it had only a limited role to play, and that it would be satisfied by a genuine refugee showing that he or she was reasonably travelling on false papers.
47. The Court also looked at the administrative processes by which prosecutions are brought. It found that no consideration was given at any time to the refugee elements, but only to the evidential test of realistic prospect of conviction; the ‘public interest’ offered no defence to prosecution, but rather the contrary. Simon Brown LJ also had no doubt that a conviction constituted a penalty within the meaning of Article 31, which could not be remedied by granting an absolute discharge.

### 3.3 European Court of Human Rights

48. The European Court of Human Rights expressly took Article 31 of the 1951 Convention into account in its decision in *Amuur v. France*, when it also considered the general issue of detention:

41... The Court... is aware of the difficulties involved in the reception of asylum seekers at most large European airports and in the processing of their applications... Contracting States have the undeniable sovereign right to control aliens’ entry into and residence in their territory. The Court emphasises, however, that this right must be exercised in accordance with the provisions of the [European] Convention, including Article 5...

43. Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. *Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States’ legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by these conventions.*

Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty – inevitable with a view to organising the practical details of the alien’s repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered – into a deprivation of liberty. In that connection account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.

Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties. *Above all, such confinement must not deprive the asylum seeker of the right to gain effective access to the procedure for determining refugee status...*

50 ... In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. *Quality in this sense implies that where a national law authorises deprivation of liberty - especially in respect of a foreign asylum seeker - it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness. These characteristics are of fundamental importance with regard to asylum seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States’ immigration policies.*

54. The French legal rules in force at the time, as applied in the present case, did not sufficiently guarantee the applicants’ right to liberty.<sup>24</sup>

49. In view of the internationally recognized immunity from penalty to which persons falling within the scope of Article 31 are entitled, to institute criminal proceedings without regard to their claim to refugee status and/or without

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<sup>24</sup> European Court of Human Rights. 1996. *Amuur v. France*. No. 17/1995/523/609 (emphasis supplied).

allowing an opportunity to make such a claim may be considered to violate human rights.<sup>25</sup>

50. As a matter of principle, also, it would follow that a carrier should not be penalized for bringing in an ‘undocumented’ passenger, where that person is subsequently determined to be a refugee.
51. Notwithstanding the formal provisions of the legislation and individual court rulings, the *practice* of States and national administrations does not always conform with the obligations accepted under Article 31.

### 3.4 State practice

52. This paper has benefited from two recent studies in areas relating to the subject of illegal entry: an as yet unpublished study by UNHCR on the safeguards for asylum seekers and refugees in the context of irregular migration in Europe, June 2001; and a draft report by the Lawyers Committee for Human Rights, ‘Preliminary Review of States’ Procedures and Practices relating to Detention of Asylum Seekers’, 20 September 2001.
53. A total of forty-one countries were reviewed in the two surveys, from different but complementary perspectives. The UNHCR study looked at practice in thirty-one countries: Armenia, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, France, Former Yugoslav Republic of Macedonia, Georgia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Moldova (not yet a party to CSR51), the Netherlands, Norway, Poland, Romania, Russian Federation, Slovak Republic, Slovenia, Spain, Switzerland, Turkey, Ukraine, and the United Kingdom. The Lawyers Committee examined practice in thirty-three countries: Australia, Austria, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Lithuania, Luxembourg, Malaysia, Mexico, the Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, South Africa, Spain, Sweden, Switzerland, Thailand, United Kingdom, and the United States of America.
54. Among others, the UNHCR study considered the following issues: (1) the formal exemption of asylum seekers and refugees from sanctions for illegal entry and/or presence; (2) the application in practice of such sanctions; (3) suspension of

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<sup>25</sup> 1950 European Convention on Human Rights, Articles 6, 13.

- proceedings for illegal entry or presence in the case of refugees and asylum seekers; (4) practice in relation specifically to the use of false documents, including non-admission to the asylum procedure and the presumption of a manifestly unfounded claim; (5) trafficking and smuggling; and (6) detention.
55. The Lawyers Committee for Human Rights review considered aspects of detention policy and practice, including (1) the availability of independent review; (2) limits on the permissible period of detention; (3) the availability of periodic review, either substantive or legal; (4) the availability of legal aid; and (5) the uses of alternatives to detention.
  56. Each study provides evidence of wide variations in the practice of States, notwithstanding their common acceptance, for the most part, of the standards laid down in the 1951 Convention/1967 Protocol and in other relevant human rights instruments. The variations extend to different interpretations of international criteria, different approaches to the incorporation of international obligations into national law and practice, and different policy goals in the processes of refugee determination and migration management.
  57. For example, the UNHCR study found that some sixty-one per cent (nineteen of thirty-one) of the States examined made legislative provision for the exemption of refugees and asylum seekers from penalties for illegal entry or presence. When actual practice is taken into account, however, some two thirds of the States reviewed do, either generally or from time to time, apply sanctions to asylum seekers. Thirty-five per cent indicated that they will suspend proceedings if the individual applies for asylum, and that thirteen per cent will suspend penalties, but not proceedings.
  58. Nineteen per cent of States reviewed also provide a legislative exemption for refugees and asylum seekers for the use of false documents (at least where such documents are used at the time of entry), and that a further twenty-nine per cent in practice do not apply sanctions. Only one State appeared to exclude an asylum seeker from the refugee determination process because of use of false documents, but some sixteen per cent of States in practice considered that such use triggered treatment of the application as manifestly unfounded.
  59. Twenty-nine per cent of States distinguish between trafficking and smuggling, following the terms of the two Protocols to the UN Convention on Transnational Organized Crime. In forty-five per cent of States, however, both traffickers and smugglers may be prosecuted for assisting or facilitating illegal entry, among other offences; the penalties imposed, however, may reflect the circumstances of the offence, and whether it was committed for financial gain. The same

number of States also provide for the prosecution of the ‘victims’ of these practices, although the penalties tend to be less.

60. Most States have legislation permitting detention, but its application varies considerably. Detention is sometimes automatic pending a decision on the admissibility of the asylum application, but can also be imposed as a penalty for illegal entry or presence. Periods of detention also vary from 48 hours to eighteen months, and judicial review may or may not be available.
61. The preliminary version of the study prepared by the Lawyers Committee for Human Rights also presents a picture of difference. Of the thirty-three States reviewed, some seventeen provided for independent review of detention decisions, while ten did not (totals less than the sum of States reviewed are due to incomplete information). Twenty States established a maximum period of periods of detention, while twelve had no such limits. Twelve States made provision for periodic review of detention, either substantive or legal, but another twelve made no such provision. Legal aid was available in five States, or on a limited basis in a further seventeen, but not at all in ten States. Finally, most States (twenty-nine) provided opportunities for detention alternatives.

#### 3.4.1 *Specific illustrations of State practice*

62. In recent years, *Australia* has introduced a variety of measures in its attempts to manage, or stop, the arrival of asylum seekers on its territory. In 1992, it introduced ‘mandatory and non-reviewable detention’ on the day before the Federal Court was due to hear an application to release a group of asylum seekers from imprisonment. Further restrictions on judicial review of Department of Immigration decisions have been added over the years. The Committee on Human Rights found that the policy and practice of mandatory and non-reviewable detention was arbitrary and a breach of Article 9 ICCPR<sup>66</sup> (see further below, paragraphs 133-135), and a similar conclusion was reached by the Australian Human Rights and Equal Opportunity Commission in 1998.<sup>26</sup>
63. One of the more far-reaching changes, announced on 13 October 1999, was the introduction of ‘temporary protection visas’ for unauthorised (that is, spontaneous) arrivals who are successful in their applications for refugee status in Australia. They will no longer be granted permanent residence, but will be

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‘Those who’ve come across the seas: Detention of Unauthorised Arrivals’, 1968.

granted a three-year temporary entry visa, after which they will be required to re-apply for refugee status.

64. Although there is no obligation upon the State of refuge to grant permanent residence (and doing so for so long, countries such as Canada and Australia were ahead of the rest of the world), the new visa class will enjoy a significantly lower range of benefits and entitlements. Elsewhere, it has been held that ‘any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty within Article 31 unless objectively justifiable on administrative grounds’. Holders of temporary protection visas will not be eligible for many social programmes, will not be permitted family reunion, and will have no automatic right of return, should they need to travel abroad. Not only do these recognized refugees appear to be penalized by reason of their illegal entry, contrary to Article 31 in many cases, but they would also appear to be denied many of the other rights due under the 1951 Convention, such as a Convention travel document under Article 28 and the enjoyment of Convention rights on a non-discriminatory basis. No objective justification on administrative grounds seems to have been advanced.<sup>27</sup>
65. In *Belgium*, at the admissibility stage, an asylum seeker who arrives without necessary documentation may be detained at a specified location at the border for two months (Article 74/5 of the Aliens Act); the average length of detention is 14 days. There is a special detention centre at Zaventem airport for persons without the necessary documentation for entry into Belgium, or the country of destination, or funds for their intended stay in Belgium. Upon applying for asylum, however, persons are transferred to the detention centre. Detention may also be ordered in order to transfer an asylum seeker to the ‘responsible State’ under the Dublin Convention; such detention period must not exceed two months (Article 51/5, paragraph 3 of the Aliens Act). Where an asylum seeker cannot be transferred for any reason, he or she may be detained until deported (Article 7, alinea 3 of the Aliens Act). The initial two-month period can be prolonged by the Minister of the Interior or his/her delegate for additional two-month periods, up to five months, if: the necessary steps for removal are initiated within seven days of detention; these steps are pursued with due diligence; and timely removal is foreseen. If detention must be prolonged beyond five months due to public

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<sup>27</sup> The applicability of Article 31 was not considered by the Federal Court of Appeal in *Minister for Immigration and Multicultural Affairs v. Vadarlis*, Federal Court of Australia, 18 September 2001, which arose out of the rescue by the Norwegian-registered vessel, the *MV Tampa*, of some 433 asylum seekers in distress at sea. The Court’s approach to detention is examined below.

order or national security considerations, then detention can be extended on a month-to-month basis. The total detention period cannot exceed eight months. Thereafter, the detainee must be released.

66. An undocumented asylum seeker who has already entered Belgium, or who requested asylum after authorisation to remain expired, and whose asylum request is denied during the admissibility stage by the Aliens Office and is likely to be rejected on appeal may be detained. Under Article 74.6 of the Aliens Act, the asylum seeker may be detained in a determined place in order to assure his/her effective expulsion. The measure can be upheld until the asylum seeker's application is determined to be admissible by the General Commission for Refugees and Stateless Persons, or for an initial two-month period. Approximately 40-50 such asylum-seekers are detained each month.
67. Several provisions of the Aliens Act also provide for detention of asylum-seekers for reasons of public order or national security (articles 63.5 alinea 3, article 52 bis, and article 54 paragraph 2).
68. In *France*, asylum seekers are generally not detained solely on the basis of their application for asylum. There are two exceptions to this rule, but in both cases the detention period is short. The first exception relates to asylum seekers in the "waiting zones", who are subject to the admissibility procedure. The second exception is *rétention administrative*, which applies to asylum applicants who have entered the territory and whose claims are considered abusive by the *Préfecture* responsible for granting temporary residence.
69. UNHCR does not have right of access to the detention centres for *rétention administrative*, but UNHCR and certain NGOs do have access to the "waiting zones".
70. In *Germany*, asylum seekers are generally not subject to detention prior to a decision on their application, with the following exceptions. Those who arrive at a major airports may be subject to the airport procedure, during which they may be restricted in fact to the closed facility at the airport for up to a maximum of 19 days before final rejection of their claim as manifestly unfounded. Under German law, this detention is not considered to constitute a deprivation of liberty: German Constitutional Court, Decision of 14 May 1996. However, asylum seekers rejected in the airport procedure who cannot be removed may spend months in the closed centre, pending discretionary entry or removal.
71. The accelerated procedure (Section 18a, Asylum Procedure Act) applies to persons arriving by air from so-called "safe" countries of origin or without a valid passport. Such persons are held in special facilities at the airports and their

applications decided in a speedy procedure before entry to German territory is permitted. The accelerated airport procedure is conducted at the airports in Frankfurt, Munich, Berlin, Düsseldorf and Hamburg, with the majority arriving in Frankfurt. Asylum seekers are allowed to enter the country and the regular procedure if the Federal Office for the Recognition of Foreign Refugees concludes that it cannot decide the case within a short period of time, has not taken a decision on the asylum application within two days of its being filed, or if the court has not taken a decision on an appeal within a period of two weeks.

72. As a result of the decision of Constitutional Court of 14 May 1996, asylum seekers at the airport must be provided with free legal counselling. However, the Court did not consider that holding asylum seekers in closed facilities in the transit zone amounted to either detention or a limitation of freedom, as the individuals were free at any time to leave, for example, to return to their country of origin. If an asylum claim is rejected and the claimant is ordered to be removed, then any further confinement, including in the transit zone, must be ordered judicially, in order to ensure compliance with Article 5 ECHR<sup>50</sup>. In practice, most asylum seekers prefer to remain in the transit zone instead of being sent to prison and therefore sign a form to this effect. The number of long term stays in the transit zone continues to increase.
73. Decisions of German courts in 1987 and 1988, among others, recognized that refugees can claim exemption from penalties for illegal entry, even if they have passed through a third State on their way to Germany from the State of persecution: *Oberlandesgericht Celle*, Urteil vom 13 Januar 1987 (1 Ss 545/86), NvwZ 1987, 533 (ZaöRV 48 [1988], 741; *Landgericht Münster*, Ref: 20 Dec 1988, LG Münster Ns 39 Js 688/86 (108/88), above, paragraph 41. However, on 14 January 2000, the *Bayerische Oberste Landesgericht* held that Article 31 CSR<sup>51</sup> does not apply where the asylum seeker has benefited from the help of a smuggler (*Schleuser*). Such an interpretation finds no support, in the words of Article 31, or the *travaux préparatoires*, or hitherto in the practice of States; see above, paragraphs 13-40. In addition to directly violating Article 31 CSR<sup>51</sup>, this interpretation also contravenes the letter and the spirit of Article 3 *bis* of the Protocol against the Smuggling of Migrants by Land, Air and Sea: ‘Migrants shall not become liable to criminal proceedings under this Protocol for the fact of having been smuggled.’<sup>28</sup>

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<sup>28</sup> According to UNHCR Germany, the Federal Ministry of Justice considers that the use of a smuggler raised doubt, whether the asylum seeker could be said to have come ‘directly’ from the State in which he or she feared persecution.

74. In *Greece*, according to the penal law as amended in 1996 by Law No. 2408/1996 and Law No. 2521/1997, criminal courts may not order the deportation of an alien sentenced to imprisonment, if this is contrary to the provisions of international agreements to which Greece is a party. In practice, however, the courts continue to order the deportation of irregular migrants convicted for illegal entry or stay, without regard to their status.
75. In *Italy*, the law at present does not provide for the detention or restriction of freedom of movement of asylum seekers who are admitted to the procedure. Draft legislation proposes to introduce restrictions on movement during a new 'pre-screening stage' for 'manifestly unfounded', which may last for up to two days. Illegal migrants may be detained in 'temporary holding centres' or in a special zone at the airport for the purpose of verification of identity, and completion of expulsion formalities.
76. Persons in transit at *Luxembourg* airport are detained if they have either false documentation or no documentation at all. Detention may also be employed, in exceptional circumstances, to facilitate the transfer of the asylum seeker to the responsible state under the Dublin Convention. An initial period of one month can be extended, on the authority of the Minister of Justice, for additional one-month periods, but the maximum period is three months. Thereafter, the person must be released. An appeal against the detention measure may also be submitted to the Administrative Tribunal within one month of the notification of the detention decision, and thereafter to the Administrative Court.
77. In the *Netherlands*, according to the article 7(a) of the Aliens Act, aliens who arrive by air or sea without proper documentation and who are refused entry to the territory may be detained, pending removal. If the application is declared 'manifestly unfounded' or inadmissible and the asylum seeker is detained pending removal, he or she can appeal to the District Court. As there is no automatic suspensive effect, a request for a provisional ruling against expulsion must also be made. Time limits apply to such appeals, and the detained asylum seeker should be heard by the Court within two weeks, with a decision to be given within an additional two weeks.
78. The Court will also be notified if an asylum seeker has been in detention for over four weeks without making an appeal. If deportation is impossible, the detention measures will probably be considered unfounded and the asylum seeker will be released. If, within four weeks, it is decided that the asylum application is inadmissible or 'manifestly unfounded', article 18(b) of the Aliens Act permits

detention in order to secure removal. If the decision is not made within four weeks, the person can be detained under article 26.

79. In *Spain*, according to Article 4.1 of Law No. 9/94, the illegal entry of an asylum seeker will not be penalised when the person concerned meets the criteria for recognition of refugee status, provided he or she appears before the competent authorities without delay. However, the legislation also permits the detention of aliens entering illegally for a maximum period of 72 hours without judicial authority. This can be extended to forty days by the court. Administrative detention with judicial supervision guarantees access to the judicial system (Article 24 of the Spanish Constitution), and the alien in administrative detention is kept in an “alien internment” centre, not in a penal institution.
80. An alien detained on grounds of illegal entry or stay who files an application for asylum will remain in detention while the admissibility of the claim is determined within a 60-daytime limit (article 17(2) of the Implementing Decree; in practice, asylum claims by applicants in detention centres are processed urgently). If an asylum seeker is subsequently admitted to the refugee status determination procedure, he or she will be released.
81. In *Sweden*, asylum seekers may be detained if their identity or nationality is in doubt or if they are likely to be rejected and the authorities fear they may evade implementation of a deportation order. Although detention orders are regularly reviewed by the administrative courts, there is no maximum period and individuals often tend to be detained indefinitely, sometimes up to one year or more. Rejected asylum seekers, whose deportation orders cannot be implemented because of the conditions in their country of origin, can also face lengthy detention. Most asylum seekers are housed in purpose-built detention facilities, although some may be detained in regular prisons, remand jails or police cells.
82. In the *United Kingdom*, between one and one and a half per cent of the total number of persons seeking asylum are detained at any given time: see UN doc. E/CN.4/1999/63/Add.3, 18 December 1998, Report of the Working Group on Arbitrary Detention; the Working Group expressed its concern that detention appeared to depend on the availability of space, rather than the elements of the applicant’s case.
83. United Kingdom law was amended following the decision of the Division Court in *R v. Uxbridge Magistrates Court & Another ex parte Adimi* [1999] 4 Imm AR 560; see paragraphs 42-47. Section 28 of the Immigration and Asylum Act 1999 creates the offence of ‘deception’ by non-citizens, including asylum seekers, who try to enter the country with false documents; the offence is punishable with up

to two years imprisonment and/or a fine. Section 31 provides a defence based on Article 31 CSR51, within certain limitations; see above, paragraph 38.

84. Asylum seekers arriving in the *United States of America* without proper documents are now subject to 1996 legislation which makes provision for 'expedited removal'. The relevant provisions, which went into effect on 1 April 1997, permit the immediate removal of non-citizens arriving at ports of entry with false or no documents. If they express a desire to apply for asylum or a fear of persecution in their home countries, they will be detained and referred for an interview with an asylum officer to determine whether they have a 'credible fear' of persecution. If they are found to have a 'credible fear,' they are scheduled for an immigration court hearing and are theoretically eligible for release from detention. A 'credible fear' is defined as a 'significant possibility' that the individual would qualify for asylum in the US.
85. If they receive a negative credible fear determination, they may request a review by an immigration judge which must be conducted whenever possible within 24 hours and in no case no later than seven days after the initial negative credible fear determination by the asylum officer. No further review is available. Under earlier legislation, individuals seeking entry at border points were placed in exclusion proceedings and had access to a hearing before an immigration judge, an appeal to the BIA and to the federal district.
86. In practice, and depending on the availability of detention space and the equities in individual cases, some asylum-seekers are released pending their removal hearings and final decisions. This includes asylum-seekers who have been placed in expedited removal and have been found to have a 'credible fear' of persecution.

### **3.5 Decisions and recommendations of the UNHCR Executive Committee**

87. The Executive Committee of the Programme of the United Nations High Commissioner for Refugees has addressed the phenomenon of 'irregular' movements of refugees and asylum seekers on at least two occasions. On each occasion, while expressing concern in regard to such movements, participating States have acknowledged that refugees may have justifiable reasons for such action.

**Executive Committee Conclusion No. 15 (XXX) — 1979** Refugees without an Asylum Country,

(k) Where a refugee who has already been granted asylum in one country requests asylum in another country on the ground that he has compelling reasons for leaving his present asylum country due to fear of persecution or because his physical safety or freedom are endangered, the authorities of the second country should give favourable consideration to his asylum request...<sup>29</sup>

**Executive Committee Conclusion No. 58 (XL) — 1989**

The Problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in which They had already found Protection:

(f) Where refugees and asylum seekers... move in an irregular manner from a country where they have already found protection, they may be returned to that country if (I) they are protected there against *refoulement* and (ii) they are permitted to remain there and to be treated in accordance with recognized basic human standards until a durable solution is found for them...

(g) *It is recognized that there may be exceptional cases in which a refugee or asylum seeker may justifiably claim that he has reason to fear persecution or that his physical safety or freedom are endangered in a country where he previously found protection. Such cases should be given favourable consideration by the authorities of the State where he requests asylum...*

(I) *It is recognized that circumstances may compel a refugee or asylum seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered. Where no*

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<sup>29</sup> UNHCR, *Report of the 30th Session of the Executive Committee*: UN doc. A/AC.96/572, para. 72(2).

such compelling circumstances exist, the use of fraudulent documentation is unjustified...<sup>30</sup>

#### 4. International Standards and State Responsibility

88. States party to the 1951 Convention/1967 Protocol undertake to accord certain standards of treatment to refugees, and to guarantee to them certain rights including the benefit of non-discriminatory application of the Convention/Protocol (Article 3); non-penalization in case of illegal entry or presence (Article 31); and *non-refoulement* (Article 33—non-return, including non-rejection at the frontier, to a territory in which the refugee’s life or freedom would be threatened for reasons set out in Article 1).
89. States ratifying the 1951 Convention and the 1967 Protocol necessarily undertake to implement those instruments in good faith (the principle *pacta sunt servanda*).<sup>31</sup>
90. The choice of means in implementing most of the provisions is left to the States themselves; they may select legislative incorporation, administrative regulation, informal and *ad hoc* procedures, or a combination thereof. In no case will mere formal compliance itself suffice to discharge a State’s responsibility; the test is whether, in the light of domestic law and practice, including the exercise of administrative discretion, the State has attained the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned.<sup>32</sup>
91. In circumstances in which a breach of duty is said to arise by reason of a general policy, the question will be whether, ‘in the given case the *system* of administration has produced a result which is compatible with the pertinent principle or standard of international law’. Thus, responsibility may result in the

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<sup>30</sup> UNHCR, *Report of the 40th Session of the Executive Committee*: UN doc. A/AC.96/737, p.23 (emphasis supplied).

<sup>31</sup> 1969 Vienna Convention on the Law of Treaties: UN doc. A/CONF.39/27; Brownlie, I., *Basic Documents in International Law*, (4<sup>th</sup> ed., 1995), 388.

<sup>32</sup> Goodwin-Gill, G.S., *The Refugee in International Law*, Clarendon Press, Oxford, 2<sup>nd</sup> ed., 1996, 230-241.

case of ‘a radical failure on the part of the legal system to provide a guarantee or service as required by the relevant standard’.<sup>33</sup>

92. The responsibility of States party to the 1951 Convention/1967 Protocol to treat persons entering or seeking to enter their territory irregularly in accordance with Article 31(1) CSR51, and specifically to take account of their claim to be a refugee entitled to its benefit, may be engaged either by voluntary act of the individual in making a claim for asylum/refugee status, or by an act of the State, for example, in asserting jurisdiction over the individual with a view to enforcing immigration-related measures of control (such as removal or refusal of entry), or instituting immigration-related criminal proceedings (such as prosecution for the use of false travel documents).
93. Although States may and do agree on the allocation of responsibility to determine claims, at the present stage of legal development, no duty is imposed on the asylum seeker travelling irregularly or with false travel documents to lodge an asylum application at any particular stage of the flight from danger.
94. If a State initiates action within its territory, for example, to deal generally or internationally with the use of false travel documents, then that State, rather than the State of intended destination assumes the responsibility of ensuring that the refugee/asylum seeker benefits at least from those provisions of the 1951 Convention, such as Articles 31 and 33, or of applicable international human rights instruments, such as Articles 3, 6 and 13 of the European Convention, which are not dependent upon lawful presence or residence.
95. The above review shows that many States parties to the 1951 Convention have no legislative provision implementing the obligations accepted under Article 31 CSR51. Instead, compliance is left to be achieved through the (hopefully) judicious use of executive discretion.
96. In many instances, States also appear to have a general policy of prosecuting users of false travel documentation without regard to the circumstances of individual cases, and without allowing an opportunity for any claim for refugee status or asylum to be considered by the responsible central authority.
97. A general policy and/or practice of prosecuting users of false travel documentation without regard to the circumstances of individual cases, and without allowing an opportunity for any claim for refugee status or asylum to be considered by the responsible central authority before prosecution is a breach of

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<sup>33</sup> Brownlie, I., *System of the Law of Nations. State Responsibility (Part 1)*, Clarendon Press, Oxford, 1983, 150,

Article 31 CSR51. The intervention and exercise of jurisdiction over such asylum seekers thereafter engages the responsibility of that State to treat them in accordance with the said Article 31(1).

98. In brief, therefore, Article 31(1) CSR51 should be interpreted as follows: (1) 'directly' should not be strictly or literally construed, but depends rather on the facts of the case, including the question of risk at various stages of the journey; (2) 'good cause' is equally a matter of fact, and may be constituted by apprehension on the part of the refugee or asylum seeker, lack of knowledge of procedures, or by actions undertaken on the instructions or advice of a third party; and finally (3) 'without delay' is a matter of fact and degree as well; it depends on the circumstances of the case, including the availability of advice, and whether the State asserting jurisdiction over the refugee or asylum seeker is in effect a transit country.
99. The refusal of the authorities to consider the merits of claims or their inability so to do by reason of a general policy on prosecutions, will almost inevitably lead the State into a breach of its international obligations.

## 5. Summary and tentative conclusions regarding Article 31(1)

100. States party to the 1951 Convention/1967 Protocol undertake to accord certain standards of treatment to refugees, and to guarantee to them certain rights. They necessarily undertake to implement those instruments in good faith.
101. States have choice of means in implementing certain Convention provisions, such as Article 31, and may elect to use legislative incorporation, administrative regulation, informal and *ad hoc* procedures, or a combination thereof. Mere formal compliance is not itself sufficient to discharge a State's responsibility; the test is whether, in the light of domestic law and practice, including the exercise of administrative discretion, the State has attained the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned.
102. Particular attention needs to be paid to situations where the system of administration may produce results incompatible with the applicable principle or standard of international law.
103. Refugees are not required to have come directly from their country of origin. Article 31 was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries, who are unable to find protection

from persecution in the first country or countries to which they flee, or who have ‘good cause’ for not applying in such country or countries. The drafters only intended that immunity from penalty should not apply to refugees who had settled, temporarily or permanently, in another country.

104. To come directly from the country in which the claimant has a well-founded fear of persecution is recognized in itself as ‘good cause’ for illegal entry. To ‘come directly’ from such country via another country or countries in which he or she is at risk or in which generally no protection is available, is also accepted as ‘good cause’ for illegal entry. Other factual circumstances, such as close family links in the country of refuge, may also constitute ‘good cause’. The criterion of ‘good cause’ is flexible enough to allow the elements of individual cases to be taken into account.
105. ‘Without delay’ is a matter of fact and degree as well; it depends on the circumstances of the case, including the availability of advice.
106. Although expressed in terms of the ‘refugee’, Article 31(1) applies also to asylum seekers and ‘presumptive refugees’.
107. The practice of States as evidenced in their laws and in the decisions of tribunals and courts confirms this interpretation of the 1951 Convention. States have also formally acknowledged both that refugees will often have good reason for moving on from countries of first refuge, and that circumstances may oblige them to use false documents.
108. The term ‘*penalties*’ is not defined in Article 31, but includes prosecution, fine, imprisonment, and other restrictions on freedom of movement.
109. Provisional detention is permitted if necessary for and limited to the purposes of preliminary investigation.
110. Article 31(1) CSR51 obliges States parties specifically to take account of any claim to be a refugee entitled to its benefit. This responsibility can be engaged by voluntary act of the individual in making a claim for asylum/refugee status. It may also be engaged by an act of the State, for example, in asserting jurisdiction over the individual with a view to implementing immigration-related measures of control (such as removal or refusal of entry), or instituting immigration-related criminal proceedings (such as prosecution for the use of false travel documents).
111. Where a State leaves compliance with international obligations within the realm of executive discretion, a policy and practice inconsistent with those obligations involves the international responsibility of the State. The policy of prosecuting or otherwise penalizing illegal entrants, those present illegally, or those who use

false travel documentation, without regard to the circumstances of flight in individual cases, and the refusal to consider the merits of an applicant's claim, amount to a breach of a State's obligations in international law.

112. As a matter of principle, also, it should follow that a carrier should not be penalized for bringing in an 'undocumented' passenger, where that person is subsequently determined to be a refugee.

## 6. Restrictions on freedom of movement under Article 31(2), including detention

113. Several thousand refugees and asylum seekers are currently detained throughout the world.<sup>34</sup> Refugees and asylum seekers can find themselves used for political or military purposes and confined in border camps or isolated from international access in 'settlements', for extended periods in conditions of hardship and danger. Some are detained as illegal immigrants, and some among them will be able to obtain their release, once they have shown the *bona fide* character of their asylum claim, or if they can provide sufficient financial or other guarantees. In other cases, however, indefinite and unreviewable detention may follow, irrespective of the well-foundedness of the claim or the fact that illegal entry and presence are due exclusively to the necessity to find refuge.
114. Detention and other restrictions on the freedom of movement of refugees and asylum seekers continue to raise fundamental protection and human rights questions, both for UNHCR and the international community of States at large. In the practice of States, some of which is summarised in this paper, detention is seen as a necessary response to actual or perceived abuses of the asylum process, or to similar threats to the security of the State and the welfare of the community. The practice of detaining refugees and asylum seekers also tends to mirror restrictive tendencies towards refugees, which themselves reflect elements of xenophobia. Often, too, it may result from lacunae in refugee law at the international and national level, such as the absence of rules governing responsibility for determining asylum claims, or a failure to incorporate rules and standards accepted by treaty.

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<sup>34</sup> As long ago as 1977, the Executive Committee expressed its preoccupation with the fact that refugees had been subject to 'unjustified and unduly prolonged measures of detention': *Report of the 28th Session*, UN doc. A/AC.96/549, para. 53.5).

115. For present purposes, the word ‘detention’ is employed to signify confinement in prison, closed camp or other restricted area, such as a ‘reception’ or ‘holding’ centre.<sup>35</sup> There is a qualitative difference between detention and other restrictions on freedom of movement, even if only a matter of degree and intensity,<sup>36</sup> and many States have been able to manage their asylum systems and their immigration programmes without recourse to physical restraint, for example, through the use of bonds and reporting requirements.

### 6.1 The scope of protection under CSR51 and generally

116. The 1951 Convention recognizes that, in certain circumstances, States may impose restrictions on freedom of movement; these provisions very much reflect the circumstances prevailing when the treaty was drafted. Article 8 CSR51 attempts to secure exemption for refugees from exceptional measures which might affect them by reason merely of their nationality, but many States have made reservations to this article, of which some exclude entirely any obligation, some accept the article as a recommendation only, while others expressly retain the right to take measures based on nationality in the interests of national security.
117. Article 9 of the 1951 Convention was drafted specifically to cover situations of war or other grave and exceptional emergency, and reflected the difficulty faced by some States during the Second World War in distinguishing clearly and promptly between refugees and enemy nationals. This provision thus maintains the right of States to take ‘provisional measures’ against a particular person, ‘pending a determination ... that that person is in fact a refugee *and* that the continuance of such measures is necessary... in the interests of national security.’ (emphasis supplied).
118. Article 26 of the 1951 Convention prescribes such freedom of movement for refugees as is accorded to aliens generally in the same circumstances. Eight States have made reservations, six of which expressly retain the right to

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<sup>35</sup> Cf. Hoge Raad der Nederlanden. 9 dec. 1988. *Shokuh c/Pays-Bas*, in which the court held further to Art. 5 of the European Convention on Human Rights that an alien who is not allowed to remain but is nevertheless on Dutch territory may only be detained as provided by law, and that holding in the transit zone of an airport constitutes deprivation of liberty within the meaning of that Article: *RDDE*, No. 52, jan.-fév. 1989, 16.

<sup>36</sup> See above, paragraph 48, citing paragraph 43 of the judgment of the European Court of Human Rights in *Amuur v. France*.

designate places of residence, either generally, or on grounds of national security, public order (*ordre public*) or the public interest. Several African countries have accepted Article 26, provided refugees do not choose to reside in a region bordering their country of origin; and that they refrain in any event, when exercising their right to move freely, from any activity or incursion of a subversive nature with respect to the country of which they are nationals. These reservations are reiterated in Articles II(6) and III of the 1969 OAU Convention, and are reflected also in Articles 7 and 8 of the 1954 Caracas Convention on Territorial Asylum.

119. Article 31 CSR51 has been examined above. One implication of this provision is that, like the landing of those shipwrecked at sea or otherwise victims of *force majeure*, the entry of refugees in flight from persecution ought not to be construed as an unlawful act. However, States retain considerable discretion as to the measures to be applied pending determination of status, and in relation to the treatment of those who, for whatever reason, are considered not to fall within the terms of the article.
120. That States have the competence to detain non-nationals pending removal or pending decisions on their entry is confirmed in judicial decisions and the practice of States.<sup>37</sup> From the international law perspective, however, the issue is whether, in the case of refugees and asylum seekers, the powers has been exercised lawfully, in light of the standards governing its exercise and duration.
121. The 1951 Convention explicitly acknowledges that States retain the power to limit the freedom of movement of refugees, for example, in exceptional circumstances, in the interests of national security, or if necessary after illegal entry. Article 31's non-penalization provision applies in some but not all cases, but Article 31(2) implies that, after any permissible initial period of detention, States may only impose restrictions on movement which are 'necessary', for example, on security grounds or in the special circumstances of a mass influx, although restrictions are generally to be applied only until status is regularized or admission obtained into another country.
122. Although State practice recognizes the power to detain in the immigration context, human rights treaties affirm that no one shall be subject to *arbitrary*

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<sup>37</sup> See, for example, *Attorney-General for Canada v. Cain* [1906] AC 542; *Shaughnessy v. US ex rel. Mezei*, 345 U.S. 206 (1953); Art. 5, 1950 European Convention on Human Rights.

arrest or detention.<sup>38</sup> The first line of protection thus requires that all detention must be in accordance with and authorized by law; the second, that detention should be reviewed as to its legality and necessity, according to the standard of what is reasonable and necessary in a democratic society. Arbitrary embraces not only what is illegal, but also what is unjust.<sup>39</sup>

123. The *conditions* of detention may also put in question a State's compliance with generally accepted standards of treatment, including the prohibition on cruel, inhuman or degrading treatment; the special protection due to the family and to children;<sup>40</sup> and the general recognition given to basic procedural rights and guarantees.<sup>41</sup>
124. Detention will often deprive the asylum seeker of an opportunity to present his or her case, or to have the assistance of counsel; this is especially likely where asylum seekers are held in remote locations, as is the case in Australia and often in the United States. Detention is also expensive; for example, the costs of detaining some 24,000 individuals (asylum seekers and other immigrants) in the United States in 2001 have been estimated at over \$500 million.<sup>42</sup> Absent or inadequate representation can entail further costs for the host State; poor decisions are more likely to be upset on appeal, while the process of case

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<sup>38</sup> See, for example, Art. 9, 1966 Covenant on Civil and Political Rights; Art. 5, 1950 European Convention; Art. 2, Protocol 4, European Convention; Art. 7, 1969 American Convention; Art. 6, 1981 African Charter on Human and Peoples' Rights; also art. 5, 1985 United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live: UNGA res. 40/144, 13 Dec. 1985, Annex.

<sup>39</sup> This interpretation was adopted in the work of the Commission on Human Rights on the right of everyone to be free from arbitrary arrest, detention and exile; see UN doc. E/CN.4/826/Rev.1, paras 23-30. See now the work of the Commission on Human Rights Working Group on Arbitrary Detention described below.

<sup>40</sup> See Tribunal civil (Réf.)-Bruxelles, 25 nov. 1993, No. 56.865, *D.D. & D.N. c/ Etat belge, Min. de l'Interieur et Min. de la santé publique, de l'Environnement et de l'Intégration sociale*, in which the court found the detention of an asylum seeker and her new-born baby to be inhuman and degrading, contrary to Arts. 3 and 8 of the European Convention on Human Rights: *RDDE*, No. 76, nov.-dec. 1993, 604.

<sup>41</sup> Cf. *United States Diplomatic and Consular Staff in Tehran*, where the International Court of Justice observed that, 'Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights': *ICJ Rep.*, 1980, 42, para 91.

<sup>42</sup> Lawyers Committee for Human Rights, 'Refugees behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act', August 1999, 1, 15: <http://www.lchr.org/refugee/behindbars.htm>.

management is often needlessly prolonged by unreliable procedures at the front end.<sup>43</sup>

## 6.2 International standards

125. The detention of refugees and asylum seekers was fully considered by the UNHCR Executive Committee at its 37<sup>th</sup> session in 1986. The sessional Working Group reached consensus, and its report and conclusions were presented to and adopted by the Executive Committee.<sup>44</sup> Although not as progressive as some had hoped for,<sup>45</sup> and by no means as committed to detention as exception which had been UNHCR's goal, the Conclusions nevertheless accept the principle that 'detention should normally be avoided'. The Executive Committee also adopted the language of 'conditional justification', recognizing that,

*if necessary*, detention may be resorted to *only* on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.<sup>46</sup>

126. It noted that 'fair and expeditious procedures' for determining refugee status are an important protection against prolonged detention; and that 'detention

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<sup>43</sup> See also Amnesty International, 'United States of America: Lost in the Labyrinth: Detention of Asylum-Seekers', Report, AMR51/51/99, September 1999; this report identifies numerous problem areas in current US law and practice, including inconsistent application, failure to distinguish between asylum seekers and other migrants, and inappropriate detention facilities.

<sup>44</sup> *Report of the 37th Session (1986)*: UN doc. A/AC.96/688, para. 128.

<sup>45</sup> See Takkenberg, L., 'Detention and other restrictions of the freedom of movement of refugees and asylum seekers: The European perspective', in Bhabha, J. & Coll, G., *Asylum Law and Practice in Europe and North America*, (1992), 178, 180-4.

<sup>46</sup> Executive Committee Conclusion No. 44 (1986), para. (b). In 1981, the Executive Committee, acting on the recommendations of the Sub-Committee of the Whole on International Protection, adopted a series of conclusions on the protection of asylum seekers in situations of mass influx: *Report of the 32<sup>nd</sup> Session*: UN doc. A/AC.96/601, para. 57. These embody some sixteen 'basic human standards', geared in particular to the objective of attaining a lasting solution to the plight of those admitted.

measures taken in respect of refugees and asylum seekers should be subject to judicial or administrative review'. The linkage between deprivation of liberty and an identifiable (and lawful) object and purpose also seek to keep the practice under the rule of law.

127. In 1998, the UNHCR Executive Committee stated that it,

*Deplores* that many countries continue routinely to detain asylum seekers (including minors) on an arbitrary basis, for unduly prolonged periods, and without giving them adequate access to UNHCR and to fair procedures for timely review of their detention status; notes that such detention practices are inconsistent with established human rights standards and urges States to explore more actively all feasible alternatives to detention.<sup>47</sup>

128. The following year UNHCR issued revised 'Guidelines on the Detention of Asylum Seekers', which reaffirm that, 'as a general principle, asylum seekers should not be detained', and that 'the use of detention is, in many instances, contrary to the norms and principles of international law.'<sup>48</sup> UNHCR emphasized the principles endorsed by the Executive Committee (and 'reiterated' also by the UN General Assembly in Resolution 44/147, 15 December 1989), that while detention may be used in exceptional circumstances, consideration should always be given first to all possible alternatives, including reporting and residence requirements, guarantors, bail, and the use of open centres. Thereafter, detention should be used only if it is reasonable and proportional and, above all, *necessary*, to verify identity, to determine the elements on which the asylum claim is based, in cases of destruction of documents or use of false documents with intent to mislead, or to protect national security and public order. The use of detention for the purposes of deterrence is therefore impermissible.<sup>49</sup>
129. If ever detained, asylum seekers should benefit from fundamental procedural safeguards, including prompt and full advice of the detention decision and the

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<sup>47</sup> ExCom Conclusion No. 85 on International Protection (1998).

<sup>48</sup> UNHCR, 'Revised Guidelines on the Detention of Asylum-Seekers', February 1999; see Annex 1, below.

<sup>49</sup> See Helton, A. C., 'Detention of Refugees and Asylum Seekers', in Loescher, G. & Monahan, L., *Refugee Issues in International Relations*, Oxford, 1989: 'Detention for purposes of deterrence is a form of punishment, in that it deprives a person of their liberty for no other reason than their having been forced into exile...'

reasons for it, in a language and in terms which they understood; advice of the right to counsel and free legal assistance, wherever possible; automatic review of the detention decision by a judicial or administrative authority, and periodic reviews thereafter of the continuing necessity, if any, of the detention; an opportunity to challenge the necessity of detention; and the right to contact and to communicate with UNHCR or other local refugee bodies and an advocate. In no case should detention constitute an obstacles to the effective pursuit of an application for asylum or refugee status.

130. The UNHCR Guidelines also draw on general international law in regard to the treatment to be accorded to minors, other vulnerable groups, and women, and to the conditions of detention, which should be humane and with respect shown to the inherent dignity of the person.<sup>50</sup>
131. As indicated above, only a comparatively few States have taken any formal steps to incorporate the exemption from penalties required by Article 31 of the 1951 Convention. Even where legislative provisions exist, however, refugees and asylum seekers can still face loss of liberty. They are subject to the same law as is applied to non-nationals generally, and are thus exposed to prosecution, punishment and/or detention, on account of illegal entry, entry without documents or with falsified documents. Detention may also be used where the applicant for asylum is considered likely to abscond or is viewed as a danger to the public or national security. In some countries, particularly at certain times of national or international tension, a claim to refugee status may make the applicant politically suspect; in others, racial origin, religious conviction or fear of political problems with neighbouring States may be used to justify restrictions on liberty.
132. Where some review of detention is available, the actual powers of the reviewing authority, court or tribunal, may be limited to confirming that the detention is formally lawful, either under the general law or by the terms of emergency legislation. Recourse to appeals and access to legal counsel, even if available in theory, are often inhibited by costs. Release on bail, parole, or guarantee is sometimes available, but is often conditional on unrealistic guarantees, or eligibility for resettlement elsewhere. Despite the terms of Article 35 of the 1951

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<sup>50</sup> On the detention of refugees and asylum seekers in South Africa, see Human Rights Watch/Africa, 'The Human Rights of Undocumented Migrants, Asylum Seekers and Refugees in South Africa', Submission to the Green Paper Task Group, 11 April 1997, 6-8; on migratory pressures, problems and responses, see 'Report by Mr. Glele-Ahanhanzo, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance', UN doc. E/CN.4/1999/15/Add.1, 27 January 1999.

Convention, only a few countries have any regular procedure for informing the local UNHCR Office of cases of detained refugees and asylum seekers.

### 6.2.1 Further development of international standards

133. In its decision in *A v. Australia* in 1997, the Human Rights Committee set out some of the elements which it considered essential to avoid arbitrary detention.<sup>51</sup> In particular, it emphasised that every detention decision should be open to *periodic review*, so that the *justifying grounds* can be assessed.<sup>52</sup> Detention should not continue beyond the period for which it can be objectively justified.

‘the fact of *illegal entry* may indicate a *need for investigation* and there may be other factors particular to the individual, such as the *likelihood of absconding* and *lack of cooperation*, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal...’<sup>53</sup>

134. The Committee also stressed the importance of *effective*, not merely formal review, and that,

‘By stipulating that the court must have the power to order release “if the detention is *not lawful*”, article 9, paragraph 4, requires that the court be empowered to order release, if the detention is *incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant*...’<sup>54</sup>

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<sup>51</sup> Communication No. 560/1993 – *A v Australia*, Human Rights Committee, 3 April 1997.

<sup>52</sup> Cf. *R v Special Adjudicator ex parte B*, Divisional Court, United Kingdom, 17 September 1997, in which the court took account of a change in the circumstances relating to a detained asylum seeker, which swung the balance in favour of release. The Court found that the Secretary of State had failed to follow his own policy, and that continued detention was unjustified, unlawful and irrational.

<sup>53</sup> *Ibid.*, para. 9.4 (emphasis supplied).

<sup>54</sup> *Ibid.*, para. 9.5 (emphasis supplied).

135. The Commission on Human Rights has had the question of detention under review for some years.<sup>55</sup> A Working Group on Arbitrary Detention was established by Resolution 1991/42, and its mandate revised by Resolution 1997/50. Its role now is to investigate cases of deprivation of liberty imposed arbitrarily, provided that no final decision has been taken in such cases by local courts in conformity with domestic law, with the standards set forth in the Universal Declaration of Human Rights and with the relevant international instruments accepted by the States concerned. This same resolution directed the Working Group to give attention to the situation of immigrants and asylum seekers, ‘who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy.’<sup>56</sup>
136. In December 1998, the Working Group set out criteria for determining whether or not custody is arbitrary,<sup>57</sup> and in the following year it adopted Deliberation No. 5, developing those guidelines.<sup>58</sup>
137. The Working Group has approached the notion of ‘arbitrary’ as involving detention which cannot be linked to any legal basis, which is based on facts related to the exercise by the person concerned of his or her fundamental human rights, and which is further based on or characterised by the non-observance of international standards, for example, in relation to due process or the conditions of treatment. The Working Group has also paid particular attention to the need for guarantees as to the competence, impartiality and independence of the ‘judicial or other authority’ ordering or reviewing both the lawfulness and the necessity of detention

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<sup>55</sup> The prohibition on the arbitrary arrest or detention of non-nationals has been re-affirmed in Article 5 of the 1985 United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live: UN General Assembly Resolution 40/144, 13 Dec. 1985, Annex. See also the UN Standard Minimum Rules for the Treatment of Prisoners, the Code of Conduct of Law Enforcement Officials, and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>56</sup> Commission on Human Rights, UN doc. E/CN.4/RES/1997/50, 15 April 1997. See also the *Report of the Working Group*: UN doc. E/CN.4/1998/44, 19 December 1997; E/CN.4/RES/1998/41, 17 April 1998.

<sup>57</sup> *Report of the Working Group*, UN doc. E/CN.4/1999/63, 18 December 1999, paragraph 69 (fourteen guarantees).

<sup>58</sup> UN doc. E/CN.4/2000/4, 28 December 1999, Annex, relating to the situation of immigrants and asylum seekers and guarantees concerning persons held in custody. The Declaration has been noted by the Commission on Human Rights in Resolutions 2001/40, 23 April 2001 and 2000/36, 20 April 2000. For the text of the Declaration, see Annex 3 below.

138. In principle, therefore, the power of the State to detain must be related to a recognised object or purpose, and there must be a reasonable relationship of proportionality between the end and the means. In the context of migration management and refugee status determination, indefinite detention as part of a programme of ‘humane deterrence’ has proven generally inhumane and of little deterrent value.
139. International law also governs the conditions of detention, and minimum standards have been recommended by the Executive Committee and UNHCR.<sup>59</sup>
140. Limitations on rights must not only be prescribed by law (the first line of defence against arbitrary treatment), but must only be such as are *necessary in a democratic society*, to protect national security, public order, and the rights and freedoms of others.
141. Not only must legality be confirmed, but the particular situation of the individual must also be examined in the light of such claim or right as he or she may have. This means determining whether the objective of deterrence is met or promoted by individual measures of detention, or by policies consigning particular groups to deprivation of liberty, or by *a priori* denying their cases consideration on the merits. It means determining whether detention is in fact necessary, for example, to implement deportation or removal, or to protect national security, or to prevent absconding.
142. The balance of interests can require that alternatives to detention be fully explored, such as fair, efficient and expeditious procedures for the resolution of claims. In certain situations, it is also the responsibility of the international community of States, working together with UNHCR, to contribute to the solution of refugee problems, thereby removing any basis for continued detention.
143. Limitations in respect to detention need not mean that States are therefore powerless to manage population movements, but the possibilities for international co-operation in this field remain relatively unexplored. Repressive measures concentrated on refugees and asylum seekers, however, are generally inappropriate, and experience shows that they do not achieve objectives, such as the deterrence of arrivals. They are, moreover, highly likely to violate fundamental human rights; where refugee movements are involved, repressive

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<sup>59</sup> See EXCOM Conclusion No. 22 – 1981, ‘Protection of Asylum Seekers in Situations of Large-Scale Influx’; UNHCR Guideline 10: Conditions of Detention. See also Human Rights and Equal Opportunity Commission, Australia, Immigration Detention Guidelines, March 2000; ECRE, Position paper on the detention of asylum seekers, April 1996: <http://www.ecre.org/positions/detain.shtml>.

measures concentrated on individuals contribute little if anything to the ultimate objective, which is solutions.

### 6.3 Incorporation or adoption of standards in national law

144. Implementation of the international standards described above depends on a number of variables, including the method of ‘reception’ of international law locally, the extent to which national constitutional principles may incorporate, reflect or improve on the rules and standards of international law, the existence and terms of any implementing legislation, and the operation of policy at the executive level.
145. Even in the absence of implementing legislation or adoption, many judgments confirm the importance and applicability of certain basic standards in the application of Article 31 of the 1951 Convention, and also in the regulation of the State’s power to detain.
146. For example, in *Zadvydas v. INS*, the US Supreme Court laid down the principle that the detention of a non-citizen in an immigration and control context should be limited to a period reasonably necessary to bring about the person’s removal from the country, and that indefinite detention was not permitted. The Court noted that a ‘reasonable time’ was to be measured primarily in terms of the US statute’s purpose of assuring the non-citizen’s presence at the moment of removal. If removal is not reasonably foreseeable, and if the individual concerned shows good reason to believe that there is no significant likelihood that it will eventuate, then it falls to the government to rebut the presumption. The Court suggested that six months would be an appropriately reasonable time in many circumstances.
147. The Court also stressed that the ‘liberty-interest’ of non-citizens was *not* diminished by their lack of a legal right to live freely in the country, for there was a choice between imprisonment, on the one hand, and supervision under release conditions, on the other hand. In US constitutional terms, that liberty interest was strong enough to raise a serious constitutional problem with the notion of indefinite detention.
148. In *Minister for Immigration and Multicultural Affairs v. Vadarlis*, 18 September 2001, on the other hand, a majority of the Federal Court of Australia held that actions of the Commonwealth (Australian) Government did not amount to detention, such as to attract the remedy of habeas corpus and an obligation to

land the persons concerned on the Australian mainland. The case arose out of the rescue by the Norwegian-registered vessel, the *MV Tampa*, of some 433 asylum seekers in distress at sea. The rescue was carried out at the request of the Australian coastguard, but admission to the Australian territory of Christmas Island and disembarkation of those rescued was refused. The vessel entered Australian territorial waters and refused to leave because of the condition of the passengers and safety concerns. The Australian government sent troops to take control of the ship and its passengers, and a deal was subsequently struck with Nauru and New Zealand, which undertook to receive the rescued and to determine whether all or any of them were entitled to refugee status.

149. Applications were filed claiming, among others, that the rescued were being unlawfully detained by the Government, and seeking writs of habeas corpus. The writs were granted, release was ordered to the mainland, and the Minister appealed.
150. On appeal, French J. held that there was no ‘restraint’ attributable to the Commonwealth that might be subject to habeas corpus. The actions of the government had been incidental to preventing the rescued from landing on Australian territory, ‘where they had no right to go’.

213. ... Their inability to go elsewhere derived from circumstances which did not come from any action on the part of the Commonwealth. The presence of... troops... did not itself or in combination with other factors constitute a detention. It was incidental to the objective of preventing a landing and maintaining as well the security of the ship. It also served the incidental purpose of providing medicine and food to the rescuees. The Nauru/NZ arrangements of themselves provided the only practical exit from the situation. Those arrangements did not constitute a restraint upon freedom attributable to the Commonwealth given the fact that the Captain of the *Tampa* would not sail out of Australia while the rescuees were on board.

151. Chief Justice Black dissented. On the issue of detention, Black CJ drew on authority to show that ‘actual detention and complete loss of freedom’ is not necessary to found the issue of the writ of habeas corpus (paragraph 69). Moreover, whether a detainee had a right to enter was not relevant to the issue, which was to be answered in light of whether there were reasonable means of

egress open to the rescued people such that detention should not be held to exist (paragraph 79); ‘viewed as a practical, realistic matter, the rescued people were unable to leave the ship that rescued them...’ (paragraph 80). Moreover, whether the Commonwealth was liable required taking account of the fact that ‘the Commonwealth acted within a factual framework that involved the known intention of the captain of the *MV Tampa* to proceed to Christmas Island... and his view that he would not take his ship out of Australian waters while the rescued people were on board.’

152. From an international law perspective, the ship and its crew and passengers were within the jurisdiction of Australia and under the control of agents of the State. The only factor which effectively brought about the end of such control was the offer by Nauru and New Zealand to disembark those rescued, and its subsequent implementation. Absent this or another international solution, those rescued would have likely have remained in the custody of the Australian State.

#### **6.4 Summary and tentative conclusions on the detention of refugees and asylum seekers**

153. Article 14 of the Universal Declaration of Human Rights declares the right of everyone to seek asylum from persecution, the fundamental principle of *non-refoulement* requires that States not return refugees to territories where their lives or freedom may be endangered, yet between asylum and *non-refoulement* stands a continuing practice in many parts of the world to impose restrictions on the freedom of movement of refugees and asylum seekers, often indefinitely and without regard to their special situation or to the need to find durable solutions to their plight.
154. The detention of refugees and asylum seekers is an exceptional measure; as such, it should be applied only on grounds prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
155. Entry in search of refuge and protection should not be considered an unlawful act; refugees ought not to be penalised solely by reason of such entry, or because, in need of refuge and protection, they remain illegally in a country.
156. There is a qualitative difference between detention and other restrictions on freedom of movement, even if only a matter of degree and intensity, and many States have been able to manage their asylum systems and their immigration

programmes without recourse to physical restraint, for example, through the use of bonds and reporting requirements.

157. Initial periods of administrative detention for the purposes of identifying refugees and asylum seekers and of establishing their claim to asylum should be minimised. In particular, detention should not be extended for the purposes of punishment, or maintained where refugee status procedures are protracted.
158. The rules and standards of international law and the responsibilities of the State apply also within airport and other international or transit zones.
159. Apart from such initial periods of detention, refugees and asylum seekers should not be detained unless *necessary*, and where there are no serious reasons indicating criminal association, a threat to the security or welfare of the host community, or the risk of absconding.
160. Procedures for the determination of refugee status, or for determining that effective protection already exists, are an important element in ensuring that refugees are not subject to arbitrary detention. States should use their best endeavours to provide fair and expeditious procedures, and should ensure that the principle of *non-refoulement* is scrupulously observed.
161. In all cases, detained refugees and asylum seekers should be able to obtain review of the legality and the necessity of detention. They should be advised of their legal rights, have access to counsel and to national courts and tribunals and be enabled to contact the Office of the United Nations High Commissioner for Refugees. Appropriate procedures should be instituted to ensure that UNHCR is advised of all cases of detained refugees. Provisional liberty, parole or release on bail or other guarantees should be available, without discrimination by reason of a detainee's status as refugee or asylum seeker.
162. In no case should refugees or asylum seekers be detained for any reason of deterrence.
163. Refugees and asylum seekers should not be detained on the ground of their national, ethnic, racial or religious origins.
164. States should ensure that refugees and asylum seekers who are lawfully detained are treated in accordance with international standards; they should also not be located in areas where their physical safety and well-being are endangered.
165. Minors, women, stateless persons, and other vulnerable groups of refugees and asylum seekers should benefit from the UNHCR Guidelines.
166. Detention is never a solution to the movements of refugees and asylum seekers. It is the responsibility of States and of UNHCR to find permanent solutions to

the problems of refugees; the achievement of this goal requires co-operation between States and on a readiness to share the responsibilities.

OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES,  
GENEVA  
February 1999  
UNHCR Revised Guidelines Applicable Criteria and Standards relating  
to the Detention of Asylum Seekers<sup>60</sup>

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## Introduction

1. The detention of asylum seekers is, in the view of UNHCR inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs. Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law.

2. Of key significance to the issue of detention is Article 31 of the 1951 Convention.<sup>61</sup> Article 31 exempts refugees coming directly from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. The Article also provides that Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary, and that any restrictions shall only be applied until such time as their status is regularised, or they obtain admission into another country.

3. Consistent with this Article, detention should only be resorted to in cases of **necessity**. The detention of asylum seekers who come ‘directly’ in an irregular manner should, therefore, not be automatic, or unduly prolonged. This provision applies not only to recognised refugees but also to asylum seekers pending determination of their status, as recognition of refugee status does not make an individual a refugee but declares him to be one. Conclusion No 44 (XXXVII) of the Executive Committee on the Detention of Refugees and Asylum seekers examines more concretely what is meant by the term ‘**necessary**’. This Conclusion also provides guidelines to States on the use of detention and recommendations as to certain procedural guarantees to which detainees should be entitled.

4. The expression ‘**coming directly**’ in Article 31(1) , covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept ‘coming directly’ and each case must be judged

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<sup>60</sup> These Guidelines address exclusively the detention of asylum seekers. The detention of refugees is generally covered by national law and subject to the principles, norms and standards contained in the 1951 Convention, and the applicable human rights instruments.

<sup>61</sup> The Geneva Convention of 28 July 1951 relating to the Status of Refugees.

on its merits. Similarly, given the special situation of asylum seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum seeker to another, there is no time limit which can be mechanically applied or associated with the expression 'without delay'. The expression '**good cause**', requires a consideration of the circumstances under which the asylum seeker fled. The term 'asylum seeker' in these guidelines applies to those whose claims are being considered under an admissibility or pre-screening procedure as well as those who are being considered under refugee status determination procedures. It also includes those exercising their right to seek judicial and/or administrative review of their asylum request.

5. Asylum seekers are entitled to benefit from the protection afforded by various International and Regional Human Rights instruments which set out the basic standards and norms of treatment. Whereas each State has a right to control those entering into their territory, these rights must be exercised in accordance with a prescribed law which is accessible and formulated with sufficient precision for the regulation of individual conduct. For detention of asylum seekers to be lawful and not arbitrary, it must comply not only with the applicable national law, but with Article 31 of the Convention and international law. It must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary in the circumstances, with the possibility of release where no grounds for its continuation exist.<sup>62</sup>

6. Although these guidelines deal specifically with the detention of asylum seekers the issue of the detention of stateless persons needs to be highlighted.<sup>63</sup> While the majority of stateless persons are not asylum seekers, a paragraph on the detention of stateless persons is included in these guidelines in recognition of UNHCR's formal responsibilities for this group and also because the basic standards and norms of treatment contained in international human rights instruments applicable to detainees generally should be applied to both asylum seekers and stateless persons. The inability of stateless persons who have left their countries of habitual residence to return to them, has been a reason for unduly prolonged or arbitrary detention of these persons in third countries. Similarly, individuals whom the State of nationality refuses to accept back on the basis that nationality was withdrawn or lost while they were out of the country, or who are not acknowledged as nationals without proof of nationality, which in the circumstances is difficult to acquire, have also been held in prolonged or indefinite detention only because the question of where to send them remains unresolved.

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<sup>62</sup> Views of the Human Rights Committee on Communication No. 560/1993, 59<sup>th</sup> Session, UN doc. CCPR/C/D/560/1993.

<sup>63</sup> UNHCR has been requested to provide technical and advisory services to states on nationality legislation or practice resulting in statelessness. EXCOM Conclusion No. 78(XLVI) (1995), General Assembly Resolution 50/152, 1996. See also Guidelines: Field Office Activities Concerning Statelessness.

## **Guideline 1: Scope of the Guidelines**

These guidelines apply to all asylum seekers who are being considered for or who are in, detention or detention-like situations. For the purpose of these guidelines, **UNHCR considers detention as: confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.** There is a qualitative difference between detention and other restrictions on freedom of movement.

Persons who are subject to limitations on domicile and residency are not generally considered to be in detention.

When considering whether an asylum seeker is in detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should also be assessed.

## **Guideline 2: General Principle**

As a general principle asylum seekers should not be detained.

According to Article 14 of the Universal Declaration of Human Rights, the right to seek and enjoy asylum is recognised as a basic human right. In exercising this right asylum seekers are often forced to arrive at, or enter, a territory illegally. However the position of asylum seekers differs fundamentally from that of ordinary immigrants in that they may not be in a position to comply with the legal formalities for entry. This element, as well as the fact that asylum seekers have often had traumatic experiences, should be taken into account in determining any restrictions on freedom of movement based on illegal entry or presence.

## **Guideline 3: Exceptional Grounds for Detention**

Detention of asylum seekers may exceptionally be resorted to for the reasons set out below as long as this is clearly prescribed by a national law which is in conformity with general norms and principles of international human rights law. These are contained in the main human rights instruments.<sup>64</sup>

There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements [see Guideline 4]), these should be applied **first** unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full

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<sup>64</sup> Article 9(1) International Covenant on Civil and Political Rights 1966 (ICCPR66); Article 37(b) UN Convention on the Rights of the Child 1989 (CRC89); Article 5(1) European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR50); Article 7(2) American Convention on Human Rights 1969 (ACHR69); Article 5 African Charter on Human and People's Rights 1981 (ACHPR81).

consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose.

In assessing whether detention of asylum seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved. If judged necessary it should only be imposed in a non discriminatory manner for a minimal period.<sup>65</sup>

The permissible exceptions to the general rule that detention should normally be avoided must be prescribed by law. In conformity with EXCOM Conclusion No 44 (XXXVII) the detention of asylum seekers may only be resorted to, if necessary:

**(I) to verify identity**

This relates to those cases where identity may be undetermined or in dispute.

**(ii) to determine the elements on which the claim for refugee status or asylum is based**

This statement means that the asylum seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim. 7 This would involve obtaining essential facts from the asylum seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

**(iii) in cases where asylum seekers have destroyed their travel and /or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum**

What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. As regards asylum seekers using fraudulent documents or travelling with no documents at all, detention is only permissible when there is an intention to mislead, or a refusal to co-operate with the authorities. Asylum seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason.

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<sup>65</sup> Articles 9(1), 12 ICCPR66; Article 37(b) CRC89; Article 5(1)(f) ECHR50; Article 7(3) ACHR69; Article 6 ACPHR81; Charter. EXCOM Conclusion No. 44(XXXVII).

**(iv) to protect national security and public order**

This relates to cases where there is evidence to show that the asylum seeker has criminal antecedents and/or affiliations which are likely to pose a risk to public order or national security should he/she be allowed entry.

Detention of asylum seekers which is applied for purposes other than those listed above, for example, as part of a policy to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country. Detention should also be avoided for failure to comply with the administrative requirements or other institutional restrictions related residency at reception centres, or refugee camps. Escape from detention should not lead to the automatic discontinuation of the asylum procedure, or to return to the country of origin, having regard to the principle of non-refoulement.<sup>66</sup>

**Guideline 4: Alternatives to Detention**

Alternatives to the detention of an asylum seeker until status is determined should be considered. The choice of an alternative would be influenced by an individual assessment of the personal circumstances of the asylum seeker concerned and prevailing local conditions.

Alternatives to detention which may be considered are as follows:

**(I) Monitoring Requirements**

*Reporting Requirements:* Whether an asylum seeker stays out of detention may be conditional on compliance with periodic reporting requirements during the status determination procedures. Release could be on the asylum seeker's own recognisance, and/or that of a family member, NGO or community group who would be expected to ensure the asylum seeker reports to the authorities periodically, complies with status determination procedures, and appears at hearings and official appointments.

*Residency Requirements:* Asylum seekers would not be detained on condition they reside at a specific address or within a particular administrative region until their status has been determined. Asylum seekers would have to obtain prior approval to change their address or move out of the administrative region. However this would not be unreasonably withheld where the main purpose of the relocation was to facilitate family reunification or closeness to relatives.<sup>67</sup>

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<sup>66</sup> Sub Committee of the Whole of International Protection Note EC/SCP/44 paragraph 51(c).

<sup>67</sup> Articles 16, 12 UDHR48.

**(ii) Provision of a Guarantor/Surety**

Asylum seekers would be required to provide a guarantor who would be responsible for ensuring their attendance at official appointments and hearings, failure of which a penalty most likely the forfeiture of a sum of money, levied against the guarantor.

**(iii) Release on Bail**

This alternative allows for asylum seekers already in detention to apply for release on bail, subject to the provision of recognisance and surety. For this to be genuinely available to asylum seekers they must be informed of its availability and the amount set must not be so high as to be prohibitive.

**(iv) Open Centres**

Asylum seekers may be released on condition that they reside at specific collective accommodation centres where they would be allowed permission to leave and return during stipulated times.

These alternatives are not exhaustive. They identify options which provide State authorities with a degree of control over the whereabouts of asylum seekers while allowing asylum seekers basic freedom of movement.

**Guideline 5: Procedural Safeguards<sup>68</sup>**

If detained, asylum seekers should be entitled to the following minimum procedural guarantees:

- (I) to receive prompt and full communication of any order of detention, together with the reasons for the order and their rights in connection with the order, in a language and in terms which they understand;
- (ii) to be informed of the right to legal counsel. Where possible, they should receive free legal assistance;
- (iii) to have the decision subjected to an automatic review before a judicial or administrative body independent of the detaining authorities. This should be followed by regular periodic reviews of the necessity for the continuation of detention, which the asylum seeker or his representative would have the right to attend;
- (iv) either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any

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<sup>68</sup> Article 9(2), (4) ICCPR66.

findings made. Such a right should extend to all aspects of the case and not simply the executive discretion to detain;

- (v) to contact and be contacted by the local UNHCR Office, available national refugee bodies or other agencies and an advocate. The right to communicate with these representatives in private, and the means to make such contact should be made available.

Detention should not constitute an obstacle to an asylum seekers' possibilities to pursue their asylum application.

### **Guideline 6: Detention of Persons under the Age of 18 years<sup>69</sup>**

In accordance with the general principle stated at Guideline 2 and the UNHCR Guidelines on Refugee Children, **minors who are asylum seekers should not be detained.**

In this respect particular reference is made to the Convention on the Rights of the Child in particular:

- Article 2 which requires that States take all measures appropriate to ensure that children are protected from all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members;
  - Article 3 which provides that in any action taken by States Parties concerning children, the best interests of the child shall be a primary consideration;
  - Article 9 which grants children the right not to be separated from their parents against their will;
  - Article 22 which requires that States Parties take appropriate measures to ensure that minors who are seeking refugee status or who are recognised refugees, whether accompanied or not, receive appropriate protection and assistance;
  - Article 37 by which States Parties are required to ensure that the detention of minors be used only as a measure of last resort and for the shortest appropriate period of time.
- ;

Unaccompanied minors should not, as a general rule, be detained. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements should be made by the competent child care authorities for unaccompanied minors to receive adequate accommodation and appropriate supervision. Residential homes or foster care placements may provide the necessary facilities to ensure their proper development, (both physical and mental), is catered for while longer term solutions are being considered.

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<sup>69</sup> See also UN Rules for the Protection of Juveniles Deprived of their Liberty 1990.

All appropriate alternatives to detention should be considered in the case of children accompanying their parents. Children and their primary caregivers should not be detained unless this is the only means of maintaining family unity.

If none of the alternatives can be applied and States do detain children, this should, in accordance with Article 37 of the Convention on the Rights of the Child, be as a measure of last resort, and for the shortest period of time.

If children who are asylum seekers are detained at airports, immigration-holding centres or prisons, they must not be held under prison- like conditions. All efforts must be made to have them released from detention and placed in other accommodation. If this proves impossible, special arrangements must be made for living quarters which are suitable for children and their families.

During detention, children have a right to education which should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release. Provision should be made for their recreation and play which is essential to a child's mental development and will alleviate stress and trauma.

Children who are detained, benefit from the same minimum procedural guarantees (listed at Guideline 5) as adults. A legal guardian or adviser should be appointed for unaccompanied minors.<sup>70</sup>

### **Guideline 7: Detention of Vulnerable Persons**

Given the very negative effects of detention on the psychological well being of those detained, active consideration of possible alternatives should precede any order to detain asylum seekers falling within the following vulnerable categories:<sup>71</sup>

Unaccompanied elderly persons

Torture or trauma victims

Persons with a mental or physical disability

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

### **Guideline 8: Detention of Women**

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<sup>70</sup> An adult who is familiar with the child's language and culture may also alleviate the stress and trauma of being alone in unfamiliar surroundings.

<sup>71</sup> Although it must be recognised that most individuals will be able to articulate their claims, this may not be the case in those who are victims of trauma. Care must be taken when dealing with these individuals as their particular problems may not be apparent, and it will require care and skill to assess the situation of a person with mental disability or a disoriented older refugee who is alone.

Women asylum seekers and adolescent girls, especially those who arrive unaccompanied, are particularly at risk when compelled to remain in detention centres. As a general rule the detention of pregnant women in their final months and nursing mothers, both of whom may have special needs, should be avoided.

Where women asylum seekers are detained they should be accommodated separately from male asylum seekers, unless these are close family relatives. In order to respect cultural values and improve the physical protection of women in detention centres, the use of female staff is recommended.

Women asylum seekers should be granted access to legal and other services without discrimination as to their gender,<sup>72</sup> and specific services in response to their special needs.<sup>73</sup> In particular they should have access to gynaecological and obstetrical services.

### **Guideline 9: Detention of Stateless Persons**

Everyone has the right to a nationality and the right not to be arbitrarily deprived of their nationality.<sup>74</sup>

Stateless persons, those who are not considered to be nationals by any State under the operation of its law, are entitled to benefit from the same standards of treatment as those in detention generally.<sup>75</sup> Being stateless and therefore not having a country to which automatic claim might be made for the issue of a travel document should not lead to indefinite detention. Statelessness cannot be a bar to release. The detaining authorities should make every effort to resolve such cases in a timely manner, including through practical steps to identify and confirm the individual's nationality status in order to determine which State they may be returned to, or through negotiations with the country of habitual residence to arrange for their re-admission.

In the event of serious difficulties in this regard, UNHCR's technical and advisory service pursuant to its mandated responsibilities for stateless persons may, as appropriate, be sought.

### **Guideline 10: Conditions of Detention<sup>76</sup>**

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<sup>72</sup> See UNHCR Guidelines on The Protection of Refugee Women.

<sup>73</sup> Women particularly those who have travelled alone may have been exposed to violence and exploitation prior to and during their flight and will require counselling.

<sup>74</sup> Article 15 UDHR48. See EXCOM Conclusion No. 78(XLVI).

<sup>75</sup> Article 10(1) ICCPR66.

<sup>76</sup> Article 10(1) ICCPR66; 1988 UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment; 1955 UN Standard Minimum Rules for the Treatment of Prisoners; 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty.

Conditions of detention for asylum seekers should be humane with respect shown for the inherent dignity of the person. They should be prescribed by law.

Reference is made to the applicable norms and principles of international law and standards on the treatment of such persons. Of particular relevance are the 1988 UN Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, 1955 UN Standard Minimum Rules for the Treatment of Prisoners, and the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty.

The following points in particular should be emphasised:

- (I) the initial screening of all asylum seekers at the outset of detention to identify trauma or torture victims, for treatment in accordance with Guideline 7.
- (ii) the segregation within facilities of men and women; children from adults (unless these are relatives);
- (iii) the use of separate detention facilities to accommodate asylum seekers. The use of prisons should be avoided. If separate detention facilities are not used, asylum seekers should be accommodated separately from convicted criminals or prisoners on remand. There should be no comingling of the two groups;
- (iv) the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel. Facilities should be made available to enable such visits. Where possible such visits should take place in private unless there are compelling reasons to warrant the contrary;
- (v) the opportunity to receive appropriate medical treatment, and psychological counselling where appropriate;
- (vi) the opportunity to conduct some form of physical exercise through daily indoor and outdoor recreational activities;
- (vii) the opportunity to continue further education or vocational training;
- (viii) the opportunity to exercise their religion and to receive a diet in keeping with their religion;
- (ix) the opportunity to have access to basic necessities i.e. beds, shower facilities, basic toiletries, etc.;
- (x) access to a complaints mechanism, (grievance procedures) where complaints may be submitted either directly or confidentially to the detaining authority. Procedures for lodging complaints, including time limits and appeal procedures, should be displayed and made available to detainees in different languages.

## **Conclusion**

The increasing use of detention as a restriction on the freedom of movement of asylum seekers on the grounds of their illegal entry is a matter of major concern to UNHCR, NGOs, other agencies as well as Governments. The issue is not a straight-forward one

and these guidelines have addressed the legal standards and norms applicable to the use of detention. Detention as a mechanism which seeks to address the particular concerns of States related to illegal entry requires the exercise of great caution in its use to ensure that it does not serve to undermine the fundamental principles upon which the regime of international protection is based.

## Selected UNHCR Executive Committee Conclusions

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### **No. 15 (XXX) — 1979 : Refugees without an Asylum Country<sup>77</sup>**

*The Executive Committee,*

*Considered* that States should be guided by the following considerations:

#### **General principles**

- (a) States should use their best endeavours to grant asylum to bona fide asylum seekers;
- (b) 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*;
- (c) It 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;
- (d) Decisions by States with regard to the granting of asylum shall be made without discrimination as to race, religion, political opinion, nationality or country of origin;
- (e) In the interest of family reunification and for humanitarian reasons, States should facilitate the admission to their territory of at least the spouse and minor or dependent children of any person to whom temporary refuge or durable asylum has been granted;

#### **Situations involving a large-scale influx of asylum seekers**

- (f) In cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge. States which because of their geographical situation, or otherwise, are faced with a large-scale influx should as necessary and at the request of the State concerned receive immediate assistance from other States in accordance with the principle of equitable burden-sharing. Such States should consult with the Office of the United Nations High Commissioner for Refugees as soon as possible to ensure that the persons involved are fully protected, are given emergency assistance, and that durable solutions are sought;
- (g) Other States should take appropriate measures individually, jointly or through the Office of the United Nations High Commissioner for Refugees or other international bodies to ensure that the burden of the first asylum country is equitably shared;

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<sup>77</sup>

*Report of the 30th Session: UN doc. A/AC.96/572, para. 72(2).*

### Situations involving individual asylum seekers

- (h) An effort should be made to resolve the problem of identifying the country responsible for examining an asylum request by the adoption of common criteria. In elaborating such criteria the following principles should be observed:
- (i) The criteria should make it possible to identify in a positive manner the country which is responsible for examining an asylum request and to whose authorities the asylum seeker should have the possibility of addressing himself;
  - (ii) The criteria should be of such a character as to avoid possible disagreement between States as to which of them should be responsible for examining an asylum request and should take into account the duration and nature of any sojourn of the asylum seeker in other countries;
  - (iii) The intentions of the asylum seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account;
  - (iv) Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State;
  - (v) The establishment of criteria should be accompanied by arrangements for regular consultation between concerned Governments for dealing with cases for which no solution has been found and for consultation with the Office of the United Nations High Commissioner for Refugees as appropriate;
  - (vi) Agreements providing for the return by States of persons who have entered their territory from another contracting State in an unlawful manner should be applied in respect of asylum seekers with due regard to their special situation.
- (i) While asylum seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfilment of other formal requirements, should not lead to an asylum request being excluded from consideration;
- (j) In line with the recommendation adopted by the Executive Committee at its twenty-eighth session (document A/AC.96/549, paragraph 53(6), (E) (i)), where an asylum seeker addresses himself in the first instance to a frontier authority the latter should not reject his application without reference to a central authority;
- (k) Where a refugee who has already been granted asylum in one country requests asylum in another country on the ground that he has compelling reasons for leaving his present asylum country due to fear of persecution or because his physical safety or freedom are endangered, the authorities of the second country should give favourable consideration to his asylum request;
- (l) States should give favourable consideration to accepting, at the request of the Office of the United Nations High Commissioner for Refugees, a limited number of refugees who cannot find asylum in any country;
- (m) States should pay particular attention to the need for avoiding situations in which a refugee loses his right to reside in or to return to his country of asylum without having

acquired the possibility of taking up residence in a country other than one where he may have reasons to fear persecution;

(n) In line with the purpose of paragraphs 6 and 11 of the Schedule to the 1951 Convention, States should continue to extend the validity of or to renew refugee travel documents until the refugee has taken up lawful residence in the territory of another State. A similar practice should as far as possible also be applied in respect of refugees holding a travel document other than that provided for in the 1951 Convention.

**No. 22 (XXXII)— 1981: Protection of Asylum Seekers in Situations of Large-scale Influx**<sup>78</sup>

*The Executive Committee,*

*Noting with appreciation* the report of the Group of Experts on temporary refuge in situations of large-scale influx, which met in Geneva from 21-24 April 1981, adopted the following conclusions in regard to the protection of asylum seekers in situations of large-scale influx.

**I. General**

1. The refugee problem has become particularly acute due to the increasing number of large-scale influx situations in different areas of the world and especially in developing countries. The asylum seekers forming part of these large-scale influxes include persons who are refugees within the meaning of the 1951 United Nations Convention and the 1967 Protocol relating to the Status of Refugees or who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of, or the whole of their country of origin or nationality are compelled to seek refuge outside that country.

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.

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<sup>78</sup>

*Report of the 32nd Session: UN doc. A/AC.96/601, para. 57(2).*

## 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.

### B. Treatment of asylum seekers who have been temporarily admitted to a country pending arrangements for a durable solution

1. Article 31 of the 1951 United Nations Convention relating to the Status of Refugees contains provisions regarding the treatment of refugees who have entered a country without authorization and whose situation in that country has not yet been regularized. The standards defined in this Article do not, however, cover all aspects of the treatment of asylum seekers in large-scale influx situations.
2. It is therefore essential that asylum seekers who have been temporarily admitted pending arrangements for a durable solution should be treated in accordance with the following minimum basic human standards:
  - (a) they should not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful; they should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order;
  - (b) they should enjoy the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights;
  - (c) they should receive all necessary assistance and be provided with the basic necessities of life including food, shelter and basic sanitary and health facilities; in this respect the international community should conform with the principles of international solidarity and burden-sharing;
  - (d) they should be treated as persons whose tragic plight requires special understanding and sympathy. They should not be subjected to cruel, inhuman or degrading treatment;
  - (e) there should be no discrimination on the grounds of race, religion, political opinion, nationality, country of origin or physical incapacity;
  - (f) they are to be considered as persons before the law, enjoying free access to courts of law and other competent administrative authorities;
  - (g) the location of asylum seekers should be determined by their safety and well-being as well as by the security needs of the receiving State. Asylum seekers should, as far as possible, be located at a reasonable distance from the

frontier of their country of origin. They should not become involved in subversive activities against their country of origin or any other State;

- (h) family unity should be respected;
- (i) all possible assistance should be given for the tracing of relatives;
- (j) adequate provision should be made for the protection of minors and unaccompanied children;
- (k) the sending and receiving of mail should be allowed;
- (l) material assistance from friends or relatives should be permitted;
- (m) appropriate arrangements should be made, where possible, for the registration of births, deaths and marriages;
- (n) they should be granted all the necessary facilities to enable them to obtain a satisfactory durable solution;
- (o) they should be permitted to transfer assets which they have brought into a territory to the country where the durable solution is obtained; and
- (p) all steps should be taken to facilitate voluntary repatriation.

### **III. Co-operation with the Office of the United Nations High Commissioner for Refugees**

Asylum seekers shall be entitled to contact the Office of UNHCR. UNHCR shall be given access to asylum seekers. UNHCR shall also be given the possibility of exercising its function of international protection and shall be allowed to supervise the well-being of persons entering reception or other refugee centres.

### **IV. International solidarity, burden-sharing and duties of States**

(1) A mass influx may place unduly heavy burdens on certain countries; a satisfactory solution of a problem, international in scope and nature, cannot be achieved without international co-operation. States shall, within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, States which have admitted asylum seekers in large-scale influx situations.

(2) Such action should be taken bilaterally or multilaterally at the regional or at the universal levels and in co-operation with UNHCR, as appropriate. Primary consideration should be given to the possibility of finding suitable solutions within the regional context.

(3) Action with a view to burden-sharing should be directed towards facilitating voluntary repatriation, promoting local settlement in the receiving country, providing resettlement possibilities in third countries, as appropriate.

(4) The measures to be taken within the context of such burden-sharing arrangements should be adapted to the particular situation. They should include, as necessary, emergency, financial and technical assistance, assistance in kind and advance pledging of further financial or other assistance beyond the emergency phase until durable solutions are found, and where voluntary repatriation or local settlement cannot

be envisaged, the provision for asylum seekers of resettlement possibilities in a cultural environment appropriate for their well-being.

(5) Consideration should be given to the strengthening of existing mechanisms and, if appropriate, the setting up of new arrangements, if possible on a permanent basis, to ensure that the necessary funds and other material and technical assistance are immediately made available.

(6) In a spirit of international solidarity, Governments should also seek to ensure that the causes leading to large-scale influxes of asylum seekers are as far as possible removed and, where such influxes have occurred, that conditions favourable to voluntary repatriation are established.

#### **No. 44 (XXXVII) — 1986 : Detention of Refugees and Asylum Seekers<sup>79</sup>**

*The Executive Committee,*

*Recalling* Article 31 of the 1951 Convention relating to the Status of Refugees, *Recalling* further its Conclusion No. 22 (XXXII) on the treatment of asylum seekers in situations of large-scale influx, as well as Conclusion No. 7 (XXVIII), paragraph (e), on the question of custody or detention in relation to the expulsion of refugees lawfully in a country, and Conclusion No. 8 (XXVIII), paragraph (e), on the determination of refugee status,

*Noting* that the term ‘refugee’ in the present Conclusions has the same meaning as that in the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, and is without prejudice to wider definitions applicable in different regions,

(a) *Noted* with deep concern that large numbers of refugees and asylum seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum, pending resolution of their situation;

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

(c) *Recognized* the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum seekers from unjustified or unduly prolonged detention;

(d) *Stressed* the importance for national legislation and/or administrative practice to make the necessary distinction between the situation of refugees and asylum seekers, and that of other aliens;

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*Report of the 37th Session: UN doc. A/AC.96/688, para. 128.*

- (e) *Recommended* that detention measures taken in respect of refugees and asylum seekers should be subject to judicial or administrative review;
- (f) *Stressed* that conditions of detention of refugees and asylum seekers must be humane. In particular, refugees and asylum seekers shall, whenever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered;
- (g) *Recommended* that refugees and asylum seekers who are detained be provided with the opportunity to contact the Office of the United Nations High Commissioner for Refugees or, in the absence of such office, available national refugee assistance agencies;
- (h) *Reaffirmed* that refugees and asylum seekers have duties to the country in which they find themselves, which require in particular that they conform to its laws and regulations as well as to measures taken for the maintenance of public order;
- (i) *Reaffirmed* the fundamental importance of the observance of the principle of *non-refoulement* and in this context recalled the relevance of Conclusion No. 6 (XXVIII).

**No. 58 (XL) — 1989 : The Problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in which They had already found Protection**<sup>80</sup>

(a) The phenomenon of refugees, whether they have been formally identified as such or not (asylum seekers), who move in an irregular manner from countries in which they have already found protection, in order to seek asylum or permanent resettlement elsewhere, is a matter of growing concern. This concern results from the destabilizing effect which irregular movements of this kind have on structured international efforts to provide appropriate solutions for refugees. Such irregular movements involve entry into

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<sup>80</sup> The following ‘interpretative declarations or reservations’ were made with respect to Conclusion No. 58 (XL) — 1989. See *Report* of the 40th Session of the Executive Committee: UN doc. A/AC.96/737, part N, p.23: The delegation of Australia wishes it to be pointed out that its endorsement of the draft conclusions is subject to it being clearly understood that refugees and asylum seekers should not necessarily be afforded the same treatment. The delegation of China is of the view that paragraph (b) of the draft conclusions is not exhaustive in its listing of the reasons why persons feel impelled to leave when they have already found protection. The delegation of Turkey has requested that it be made clear that in the light of the discussions and the wording of the draft conclusions, and as the then Director of Protection made clear in 1985, these conclusions do not apply to refugees and asylum seekers who are merely in transit in another country. This interpretation is recorded in paragraph 68 of the Report of the Sub-Committee for 1985. The delegation of Italy wishes the following declaration recorded: ‘Without prejudicing in any way the application, in the context of bilateral agreements or multilateral ones within the European Community, of criteria other than those put forth hereunder, the Italian authorities consider that the present Conclusion is only applicable to refugees recognized as such according to the Geneva Convention of 1951 and its 1967 Protocol and in the sphere of application of said Geneva Convention and Protocol, as well as to asylum seekers who have already found protection in the first country of asylum on the basis of the principles of said Convention and Protocol’. The delegation of Tanzania has stated the following: ‘Regarding the issue of irregular movements, Tanzania’s responsibility to protect a refugee ceases the moment he voluntarily leaves Tanzania and Tanzania accepts no obligation to readmit such refugee either from his country of origin or from a third country.’

Thailand wishes it placed on record that in its view paragraph (d) cannot be understood as establishing any hierarchy amongst the durable solutions listed therein, in particular to give priority to local settlement before third country resettlement. As a country of temporary asylum Thailand, with areas of severe poverty, could not be expected to grant local settlement. Local integration may be allowed only where and when local situations permit, after other solutions have been exhausted. The delegation of the Federal Republic of Germany has the following interpretative declaration to make: ‘The Federal Republic of Germany understands that the wording “they are permitted to remain there” (see section (f)) does not prevent repatriation to the country of first asylum even if a formal residence permit is lacking. It interprets the term “recognized basic human standards” (see section (f)) in such a way that this notion does not extend beyond the scope of Article 42 of the Geneva Convention relating to the Status of Refugees. Finally, it interprets the term “physical safety” (see section (g)) in such a way that its scope does not extend beyond the definition of the term “refugee” contained in Article 1 A(2) of the Geneva Convention relating to the Status of Refugees.’ The delegation of Austria has stated that it shares the interpretative statement made by the Federal Republic of Germany.

The delegation of Greece has stated with respect to paragraph (b) that: ‘First asylum countries should bear the burden of refugees on an equitable basis, according to their economic or other potential’; with respect to paragraph (e) it has stated that: ‘The will of a refugee to choose freely the country of his destination should not be overlooked, within the spirit of the Geneva Convention of 1951’; and with respect to paragraph (f) it has stated that: ‘In all instances, sovereignty of the State and its rules and regulations under which entry is allowed cannot be ignored. Other considerations not to be overlooked are the status of the individual, whether he has applied for asylum or not, length of stay in a country when having moved from the first asylum country, etc.’

the territory of another country, without the prior consent of the national authorities or without an entry visa, or with no or insufficient documentation normally required for travel purposes, or with false or fraudulent documentation. Of similar concern is the growing phenomenon of refugees and asylum seekers who wilfully destroy or dispose of their documentation in order to mislead the authorities of the country of arrival;

(b) Irregular movements of refugees and asylum seekers who have already found protection in a country are, to a large extent, composed of persons who feel impelled to leave, due to the absence of educational and employment possibilities and the non-availability of long-term durable solutions by way of voluntary repatriation, local integration and resettlement;

(c) The phenomenon of such irregular movements can only be effectively met through concerted action by governments, in consultation with UNHCR, aimed at

(i) identifying the causes and scope of irregular movements in any given refugee situation,

(ii) removing or mitigating the causes of such irregular movements through the granting and maintenance of asylum and the provision of necessary durable solutions or other appropriate assistance measures,

(iii) encouraging the establishment of appropriate arrangements for the identification of refugees in the countries concerned and,

(iv) ensuring humane treatment for refugees and asylum seekers who, because of the uncertain situation in which they find themselves, feel impelled to move from one country to another in an irregular manner;

(d) Within this framework, governments, in close co-operation with UNHCR, should

(i) seek to promote the establishment of appropriate measures for the care and support of refugees and asylum seekers in countries where they have found protection pending the identification of a durable solution and

(ii) promote appropriate durable solutions with particular emphasis firstly on voluntary repatriation and, when this is not possible, local integration and the provision of adequate resettlement opportunities;

(e) Refugees and asylum seekers, who have found protection in a particular country, should normally not move from that country in an irregular manner in order to find durable solutions elsewhere but should take advantage of durable solutions available in that country through action taken by governments and UNHCR as recommended in paragraphs (c) and (d) above;

(f) Where refugees and asylum seekers nevertheless move in an irregular manner from a country where they have already found protection, they may be returned to that country if (i) they are protected there against *refoulement* and (ii) they are permitted to remain there and to be treated in accordance with recognized basic human standards until a durable solution is found for them. Where such return is envisaged, UNHCR may be requested to assist in arrangements for the re-admission and reception of the persons concerned;

(g) It is recognized that there may be exceptional cases in which a refugee or asylum seeker may justifiably claim that he has reason to fear persecution or that his physical safety or freedom are endangered in a country where he previously found protection.

Such cases should be given favourable consideration by the authorities of the State where he requests asylum;

(h) The problem of irregular movements is compounded by the use, by a growing number of refugees and asylum seekers, of fraudulent documentation and their practice of wilfully destroying or disposing of travel and/or other documents in order to mislead the authorities of their country of arrival. These practices complicate the personal identification of the person concerned and the determination of the country where he stayed prior to arrival, and the nature and duration of his stay in such a country. Practices of this kind are fraudulent and may weaken the case of the person concerned;

(i) It is recognized that circumstances may compel a refugee or asylum seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered. Where no such compelling circumstances exist, the use of fraudulent documentation is unjustified;

(j) The wilful destruction or disposal of travel or other documents by refugees and asylum seekers upon arrival in their country of destination, in order to mislead the national authorities as to their previous stay in another country where they have protection, is unacceptable. Appropriate arrangements should be made by States, either individually or in co-operation with other States, to deal with this growing phenomenon.

Commission on Human Rights  
United Nations Working Group on Arbitrary Detention  
Deliberation No. 5  
Situation regarding immigrants and asylum seekers<sup>81</sup>

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By resolution 1997/50, the Working Group was requested by the Commission to devote all necessary attention to reports concerning the situation of immigrants and asylum seekers who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy.

In the light of the experience gained from its missions carried out in this framework, the Working Group took the initiative to develop criteria for determining whether or not the deprivation of liberty of asylum seekers and immigrants may be arbitrary.

After consultation, in particular with the Office of the United Nations High Commissioner for Refugees, the Working Group, in order to determine whether the above situations of administrative detentions were of an arbitrary nature, adopted the following deliberation:

Deliberation No. 5

For the purposes of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment:

The term "a judicial or other authority" means a judicial or other authority which is duly empowered by law and has a status and length of mandate affording sufficient guarantees of competence, impartiality and independence.

House arrest under the conditions set forth in deliberation No. 1 of the Working Group (E/CN.4/1993/24, para. 20) and confinement on board a ship, aircraft, road vehicle or train are assimilated with custody of immigrants and asylum seekers.

The places of deprivation of liberty concerned by the present principles may be places of custody situated in border areas, on police premises, premises under the authority of a prison administration, ad hoc centres (centres de rétention), so called international or transit zones in ports or international airports, gathering centres or certain hospital premises (see E/CN.4/1998/44, paras. 28-41).

In order to determine the arbitrary character of the custody, the Working Group considers whether or not the alien is enabled to enjoy all or some of the following guarantees:

I. Guarantees Concerning Persons Held in Custody

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<sup>81</sup> UN doc. E/CN.4/2000/4, 28 December 1999, Annex II.

**Principle 1:** Any asylum seeker or immigrant, when held for questioning at the border, or inside national territory in the case of illegal entry, must be informed at least orally, and in a language which he or she understands, of the nature of and grounds for the decision refusing entry at the border, or permission for temporary residence in the territory, that is being contemplated with respect to the person concerned.

**Principle 2:** Any asylum seeker or immigrant must have the possibility, while in custody, of communicating with the outside world, including by telephone, fax or electronic mail, and of contacting a lawyer, a consular representative and relatives.

**Principle 3:** Any asylum seeker or immigrant placed in custody must be brought promptly before a judicial or other authority.

**Principle 4:** Any asylum seeker or immigrant, when placed in custody, must enter his or her signature in a register which is numbered and bound, or affords equivalent guarantees, indicating the person's identity, the grounds for the custody and the competent authority which decided on the measure, as well as the time and date of admission into and release from custody.

**Principle 5:** Any asylum seeker or immigrant, upon admission to a centre for custody, must be informed of the internal regulations and, where appropriate, of the applicable disciplinary rules and any possibility of his or her being held incommunicado, as well as of the guarantees accompanying such a measure.

## II. Guarantees Concerning Detention

**Principle 6:** The decision must be taken by a duly empowered authority with a sufficient level of responsibility and must be founded on criteria of legality established by the law.

**Principle 7:** A maximum period should be set by law and the custody may in no case be unlimited or of excessive length.

**Principle 8:** Notification of the custodial measure must be given in writing, in a language understood by the asylum seeker or immigrant, stating the grounds for the measure; it shall set out the conditions under which the asylum seeker or immigrant must be able to apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned.

**Principle 9:** Custody must be effected in a public establishment specifically intended for this purpose; when, for practical reasons, this is not the case, the asylum seeker or immigrant must be placed in premises separate from those for persons imprisoned under criminal law.

**Principle 10:** The Office of the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC) and, where appropriate, duly authorized non-governmental organizations must be allowed access to the places of custody.

## Incorporation of Article 31 CSR51 into municipal law

### Selected legislation<sup>82</sup>

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#### 1. Austria

##### **Federal Law Concerning the Granting of Asylum (1997 Asylum Act)**

Date of entry into force: 1 January 1998

#### Section 3 – Entry and residence of aliens seeking protection

##### Article 17 – Entry

(1) Aliens arriving via an airport or arriving directly (article 31 of the Geneva Convention on Refugees) from their country of origin who file an asylum application or an asylum extension application at the time of the border control carried out at a frontier crossing point shall be brought before the Federal Asylum Agency unless they possess authorization to reside or their application is to be rejected by reason of *res judicata*.

(2) Aliens who otherwise file an asylum application or an asylum extension application at the time of a border control carried out at a frontier crossing point shall (unless their entry is permissible under Section 2 of the Aliens Act) be refused entry and informed that they have the possibility either of seeking protection from persecution in the country in which they are currently resident or of filing an application for asylum with the competent Austrian diplomatic or consular authority. If, however, such aliens request that their application for asylum be filed at the frontier, they shall be notified that in such event the asylum authorities will be involved in the decision concerning their entry and that they will be required to await the decision abroad. For the purpose of making an asylum application in such cases, they shall be provided by the border control authority with an application form and questionnaire drawn up in a language understandable to them (article 16, paragraph (2)).

(3) Aliens who subsequently file an application for asylum with the border control authority by means of an application form and questionnaire shall be furnished with a certification of their application, which shall be worded in such a way that it can be used in the country in which they currently reside as proof of the decision which is still pending concerning their entry. Moreover, the border control authority shall make a written record of the content of the documents submitted to it and shall notify the alien of the date fixed for the final border control. The asylum application shall be forwarded to the Federal Asylum Agency without delay.

(4) Aliens who have filed an application for asylum in accordance with paragraph (3) above shall be permitted to enter Austria if the Federal Asylum Agency has informed the border control authorities that it is not unlikely that they will be granted asylum, in particular owing to the fact that their application is not to be rejected as being

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<sup>82</sup> Sources: UNHCR *RefWorld CD-Rom*, 8<sup>th</sup> edn., 1999; and primary sources.

inadmissible or dismissed as being manifestly unfounded. If these requirements are not met, the border control authority shall notify the asylum-seeker accordingly and shall inform him that he may request that his case be re-examined by the independent Federal Asylum Review Board (Unabhängiger Bundesasylsenat); in such event, the Federal Asylum Review Board shall take the final decision concerning the asylum-seeker's entry. If the asylum-seeker's entry is not permitted, he shall be denied admittance.

(5) Decisions pursuant to paragraph (4) above shall be rendered within five working days following submission of the asylum application. Aliens who file an application for asylum may be denied admittance only after the matter has been dealt with by the Federal Asylum Agency, unless it is clear that their application is to be rejected by reason of *res judicata*.

...

#### Article 19 – Provisional right of residence

(1) Asylum-seekers who are in the federal territory, even if in connection with their appearance before the Federal Asylum Agency after arriving via an airport or after arriving directly from their country of origin (article 17, paragraph (1)), shall be provisionally entitled to reside unless their application is to be rejected by reason of *res judicata*. Asylum-seekers brought before the Federal Asylum Agency may, however, be required, as an expulsion security measure, to remain at a specific place in the border control area or within the area of the Federal Asylum Agency during the week following the border control; such asylum-seekers shall nevertheless be entitled to leave the country at any time.

## 2. Belize

### **Refugees Act, 1991**

Date of entry into force: 24 August 1991

[NOTE: This is the official text.]

#### 10. Saving in respect of illegal entry by refugees

(1) Notwithstanding the provisions of the Immigration Act, a person or any member of his family shall be deemed not to have committed the offence of illegal entry under that Act or any regulations made thereunder:

- (a) if such person applies in terms of Section 8 for recognition of his status as a refugee, until a decision has been made on the application and, where appropriate, such person has had an opportunity to exhaust his right of appeal in terms of that section; or
- (b) if such person has become a recognised refugee.

(2) An immigration officer or a police officer who is apprised of facts indicating that a person in Belize may be eligible, and intends to apply, for recognition of his status as a refugee pursuant to Section 8 shall refer that person to the Refugees Office.

**3. Canada**  
**Bill C-11 (2001 – before Parliament)**

Canada – Bill C11  
Grounds for Detention

DETENTION AND RELEASE

54. The Immigration Division is the competent Division of the Board with respect to the review of reasons for detention under this Division.

Arrest and detention with warrant

55. (1) An officer may issue a warrant for the arrest and detention of a foreign national who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

(2) An officer may, without a warrant, arrest and detain a foreign national, other than a permanent resident or a protected person,

(a) who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada; or

(b) if the officer is not satisfied of the identity of the foreign national in the course of any procedure under this Act.

(3) A foreign national may, on entry into Canada, be detained if an officer

(a) considers it necessary to do so in order for the examination to be completed; or

(b) has reasonable grounds to suspect that the foreign national is inadmissible on grounds of security or for violating human or international rights.

(4) If a foreign national is taken into detention, an officer shall without delay give notice to the Immigration Division.

56. An officer may order the release from detention of a foreign national before the first detention review by the Immigration Division if the officer is of the opinion that the reasons for the detention no longer exist.

57. (1) Within 48 hours after a foreign national is taken into detention, or without delay afterward, the Immigration Division must review the reasons for the continued detention.

(2) At least once during the seven days following the review under subsection (1), and at least once during each 30-day period following each previous review, the Immigration Division must review the reasons for the continued detention.

(3) In a review under subsection (1) or (2), an officer shall bring the foreign national before the Immigration Division or to a place specified by it.

58. (1) The Immigration Division shall order the release of a foreign national unless it is satisfied, taking into account prescribed factors, that

- (a) they are a danger to the public;
- (b) they are unlikely to appear for examination, an admissibility hearing or removal from Canada;
- (c) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights; or
- (d) the Minister is of the opinion that their identity has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity.

(2) The Immigration Division may order the detention of a foreign national if it is satisfied that the foreign national is the object of an admissibility hearing or is subject to a removal order and that the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

...

60. For the purposes of this Division, it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria.

61. The regulations may provide for the application of this Division, and may include provisions respecting

- (a) grounds for and conditions and criteria with respect to the release of persons from detention;
- (b) factors to be considered by an officer or the Immigration Division; and
- (c) special considerations that may apply in relation to the detention of minor children.

...

### PART 3 – ENFORCEMENT

#### Human Smuggling and Trafficking

#### Organizing entry into Canada

117. (1) No person shall knowingly organize the coming into Canada of one or more Canada persons who are not in possession of a visa, or other document required by this Act.

(2) A person who contravenes subsection (1) by organizing the coming into Canada of fewer than 10 persons is guilty of an offence and liable (a) on conviction on indictment

- (i) for a first offence, to a fine of not more than \$500,000 or to a term of imprisonment of not more than 10 years, or to both, or
- (ii) for a subsequent offence, to a fine of not more than \$1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and

(b) on summary conviction, to a fine of not more than \$100,000 or to a term of imprisonment of not more than two years, or to both.

(3) A person who contravenes subsection (1) by organizing the coming into Canada of a group of 10 persons or more is guilty of an offence and liable to a fine of not more than \$1,000,000 or to life imprisonment, or to both.

(4) No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.

#### Offence

118. (1) No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion.

(2) For the purpose of subsection (1), “organize”, with respect to persons, includes recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons.

#### Disembarking persons at sea

119. A person in charge of a ship or a member of the crew shall not disembark a person or group of persons at sea for the purpose of inducing, aiding or abetting them to come into Canada in contravention of this Act.

#### Penalties

120. A person who contravenes section 118 or 119 is guilty of an offence and liable on conviction by way of indictment to a fine of not more than \$1,000,000 or to life imprisonment, or to both.

#### Aggravating factors

121. (1) The court, in determining the penalty to be imposed under subsection 117(2) or (3) or section 120, shall take into account whether

(a) grievous bodily harm or death occurred during the commission of the offence;  
(b) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;  
(c) the commission of the offence was for profit, whether or not any profit was realized; and (d) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.

(2) For the purposes of paragraph (1)(b), “criminal organization” means an organization that is believed on reasonable grounds to be or to have been engaged in activity that is of a pattern of criminal activity planned or organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of

Parliament by way of indictment or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence.

#### Offences Related to Documents

122. (1) No person shall, in order to contravene this Act,
- (a) possess a passport, visa or other document, of Canadian or foreign origin, that purports to establish or that could be used to establish a person's identity;
  - (b) use such a document, including for the purpose of entering or remaining in Canada;
- or
- (c) import, export or deal in such a document.
- (2) Proof of the matters referred to in subsection (1) in relation to a forged document or a document that is blank, incomplete, altered or not genuine is, in the absence of evidence to the contrary, proof that the person intends to contravene this Act.

#### Penalty

123. (1) Every person who contravenes paragraph 122(1)(a) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to five years; and
- (b) paragraph 122(1)(b) or (c) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to 14 years.
- (2) The court, in determining the penalty to be imposed, shall take into account whether
- (a) the commission of the offence was for the benefit of, at the direction of or with a criminal organization as defined in subsection 121(2); and
  - (b) the commission of the offence was for profit, whether or not any profit was realized.

...

#### Misrepresentation

127. No person shall knowingly :
- (a) directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;
  - (b) communicate, directly or indirectly, by any means, false or misleading information or declarations with intent to induce or deter immigration to Canada; or
  - (c) refuse to be sworn or to affirm or declare, as the case may be, or to answer a question put to the person at an examination or at a proceeding held under this Act.

...

#### Prosecution of Offences – Deferral

133. A foreign national who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the Criminal Code, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.

#### **4. Finland**

##### **Aliens' Act (378/91)**

Date of entry into force: 22 February 1991

This legislation includes amendments up to and including: 01 March 1995

[NOTE: This is an unofficial translation published by the Directorate of Immigration in 1996. This document includes the following amendments: 639/93 (passed on 28 June 1993), 640/93 (passed on 28 June 1993) and 154/95 (passed on 3 February 1995).]

#### Article 64b - (28.6.1993/639) Arrangement of Illegal Entry

Whosoever in order to obtain financial benefit for himself or another

1. brings or attempts to bring an alien into Finland, aware that the said alien lacks the passport, visa or residence permit required for entry,
2. arranges or provides transport for the alien referred to in the subparagraph above to Finland or
3. surrenders to another person a false or counterfeit passport, visa or residence permit for use in conjunction with entry,

shall be fined or sentenced to imprisonment for a maximum of two years for arrangement of illegal entry.

A charge of arrangement of illegal entry need not be brought or punishment put into effect if the act may be pardonability of the crime, particular attention must be given to the motives of the perpetrator and to the conditions affecting the security of the alien in his country of origin or country of habitual residence.

#### **5. Ghana**

##### **Refugee Law, 1992 (P.N.D.C.L. 3305D.)**

Date of entry into force: 1992

[NOTE: This is the official text.]

2. Illegal entry or presence in Ghana of a refugee

Notwithstanding any provision of the Aliens Act, 1953 (Act 160) but subject to the provisions of this Law, a person claiming to be a refugee within the meaning of this Law, who illegally enters Ghana or is illegally present in Ghana shall not –

- (a) be declared a prohibited immigrant;

- (b) be detained; or
- (c) be imprisoned or penalised in any other manner merely by reason of his illegal entry or presence pending the determination of his application for a refugee status.

## 6. Lesotho

### Refugee Act 1983

Date of entry into force: 15 January 1985

[NOTE: This is the official text as published in the Supplement No. 6 to Gazette No. 58 dated 9 December 1983. The date of entry into force was fixed by the Minister of Interior in the Refugee Act 1983 (Commencement) Notice, 1985 published in the Supplement No. 3 to Gazette No. 14 dated 8 March 1984.]

## 9. Illegal entry or presence

(1) Subject to Section 7, and notwithstanding anything contained in the Aliens Control Act, 1966, a person claiming to be a refugee within the meaning of section 3(1), who has illegally entered or is illegally present in Lesotho shall not,

- (a) be declared a prohibited immigrant;
- (b) be detained; or
- (c) be imprisoned or penalised in any other way,

only by reason of his illegal entry or presence pending the determination of his application for recognition as a refugee under Section 7.

(2) A person to whom sub-section (1) applies shall report to the nearest immigration officer or other authorised officer within fourteen days from the date of his entry and may apply for recognition as a refugee: Provided that where a person is illegally present in the country by reason of expiry of his visa, he shall not be denied the opportunity to apply for recognition of his refugee status merely on the grounds of his illegal presence.

(3) Where a person to whom this section applies,

- (a) fails to report to the nearest authorised officer in accordance with sub-section (2); and
- (b) is subsequently recognized as a refugee,

his presence in Lesotho shall be lawful, unless there are grounds to warrant his expulsion pursuant to Section 12.

(4) Where an application made under sub-section (2) is rejected, the applicant shall be granted reasonable time in which to seek legal admission to another country.

## 7. Liberia

### Refugee Act 1993

Date of entry into force: 19 January 1994

[NOTE: This is the official text. This Act was approved on 1 November 1993.]

Section 9: Cessation or Stay of Proceedings in Respect of Illegal Entry by Refugees and Protected Persons.

Notwithstanding the provisions of the immigration Act, or any other relevant law, no proceedings shall be instituted or continued against any person or any member of his family in respect of his unlawful entry into or unlawful presence within Liberia

- (a) if such person applies in terms of section seven for recognition of his status as a refugee, until a decision has been made on the application and such person has had an opportunity to exhaust his right of appeal in terms of that section; or
- (b) if such person has become a recognized refugee.

**8. Malawi**

**Refugee Act 1989**

Date of entry into force: 08 May 1989

[NOTE: This is the official text.]

10. Prohibition of expulsion on return of refugees

(1) A refugee shall not be expelled or returned to the borders of a country where his life or freedom will be threatened on account of -

- (a) his race, religion, nationality or membership of a particular social group or political opinion; or
- (b) external aggression, occupation, foreign domination or events seriously disturbing the public order in either part or the whole of that country.

(2) A person claiming to be a refugee shall be permitted to enter and remain in Malawi for such period as the Committee may require to process his application for refugee status.

(3) A person who presents himself to a competent officer at a border and applies for admission into Malawi for the purpose of proceeding to another country where he intends to seek asylum as a refugee shall be permitted entry in Malawi upon such conditions as may be determined by the Committee either generally or specially.

(4) A person who has illegally entered Malawi for the purpose of seeking asylum as a refugee shall present himself to a competent officer within twenty four hours of his entry or within such longer period as the competent officer may consider acceptable in the circumstances and such person shall not be detained, imprisoned, declared prohibited immigrant or otherwise penalized by reason only of his illegal entry or presence in Malawi unless and until the Committee has considered and made a decision on his application for refugee status.

(5) A person who has legally entered Malawi and wishes to remain in Malawi on the ground that he is a refugee shall not be deported from Malawi unless and until he has found a third country of refuge willing to admit him.

(6) The benefit of this section shall not be claimable by a person in respect of whom there are reasonable grounds for regarding him or any aspect of the matter as a danger

to the security of Malawi or who, having been convicted of a serious crime, constitutes a real danger to the community of Malawi.

## 9. Mozambique

### **Act No. 21/91 of 31 December 1991 (Refugee Act)**

Date of entry into force: 31 December 1991

[NOTE: This is an unofficial translation.]

#### Article 11 (Offences connected with illegal entry)

1. Where any criminal or administrative offence directly connected with illegal entry into the Republic of Mozambique has been committed by the petitioner and his family members and has given rise to criminal or administrative proceedings, any such proceedings shall be suspended immediately upon the submission of the petition.
2. If the ruling is in favour of the grant of asylum, the suspended proceedings shall be filed, provided that the offence or offences committed were determined by the same facts as those which warranted the grant of the petition for asylum.

#### Offences arising in connection with illegal entry.

- (a) Where criminal or administrative offences related to illegal entry into the People's Republic of Mozambique may have been committed by the applicant and members of his family and criminal or administrative proceedings have been instituted, the proceedings shall be suspended when the application is submitted, particularly in regard to the absence of identification documents for the applicant and the members of his family;
- (b) If asylum is granted, the proceedings shall be set aside on the grounds that the offence or offences committed are the consequence of the circumstances justifying the granting of asylum;
- (c) For the purposes of the preceding sub-paragraph, the Director of the National Directorate of Migration shall without delay inform the body or bodies which instituted the criminal or other proceedings of the granting of asylum.

## 10. Nigeria

### **National Commission for Refugees, Etc. Decree 1989**

Date of entry into force: 29 December 1989

[NOTE: This is the official text as published in the Official Gazette, no 75, vol. 76, 29 December 1989.]

10. Cessation of stay of proceedings in respect of illegal entry by refugees and protected persons

Notwithstanding the provisions of the Customs and Excise Management Act 1958, as amended, no proceedings shall be instituted or continued against any person or any member of his family in respect of his unlawful entry into or unlawful presence within Nigeria-

- (a) if such person applies under section 8 of this Decree for the grant of a refugee status, until a decision has been made on the application and, where appropriate, until such person has had an opportunity of exhausting his right of appeal under that section; or
- (b) if such person has been granted refugee status.

## **11. Switzerland**

### **Loi sur l'asile**

Loi fédérale du 26 mars 1931 sur le séjour et l'établissement des étrangers

Nouvelle teneur selon le ch. I de la LF du 9 oct. 1987, en vigueur depuis le 1er mars 1988 (RO 1988 332 333; FF 1986 III 233).

Article 23(3):

Celui qui se réfugie en Suisse n'est pas punissable si le genre et la gravité des poursuites auxquelles il est exposé justifient le passage illégal de la frontière; celui qui lui prête assistance n'est également pas punissable si ses mobiles sont honorables (Whoever takes refuge in Switzerland is not punishable if the manner and the seriousness of the persecution to which he or she is exposed justifies illegal crossing of the frontier; whoever assists him or her is equally not punishable if their motives are honourable.)

## **12. Turkmenistan**

### **Law on Refugees 1997**

Date of entry into force: 06 July 1997

[NOTE: This is an unofficial translation. The original Law was adopted on 12 June 1997 and published in the Official Gazette on 26 June 1997.]

Article 3 Guarantees of a refugees' rights.

A refugee is free from the responsibility for the illegal entry or illegal stay in the territory of Turkmenistan, if, on arriving right from the territory where his life or freedom was threatened by danger, specified in Article 1 of this Law, he himself comes immediately to the representatives of the government bodies of Turkmenistan.

A refugee cannot be returned against his will to the country he left for the reasons in Article 1 of this Law.

Decisions and actions of the government and administration bodies, the institutions of the local self-government and the officials infringing upon a refugee's rights established by the legislation of Turkmenistan may be appealed against to the higher bodies or the court.

### **13. United Kingdom**

#### **Immigration and Refugee Act 1999**

31. (1) It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he –

- (a) presented himself to the authorities in the United Kingdom without delay;
- (b) showed good cause for his illegal entry or presence; and
- (c) made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.

(2) If, in coming from the country where his life or freedom was threatened, the refugee stopped in another country outside the United Kingdom, subsection (1) applies only if he shows that he could not reasonably have expected to be given protection under the Refugee Convention in that other country.

(3) In England and Wales and Northern Ireland the offences to which this section applies are any offence, and any attempt to commit an offence, under-

- (a) Part I of the Forgery and Counterfeiting Act 1981 (forgery and connected offences);
- (b) section 24A of the 1971 Act (deception); or
- (c) section 26(1)(d) of the 1971 Act (falsification of documents).

(4) In Scotland, the offences to which this section applies are those-

- (a) of fraud,
- (b) of uttering a forged document,
- (c) under section 24A of the 1971 Act (deception), or
- (d) under section 26(1)(d) of the 1971 Act (falsification of documents), and any attempt to commit any of those offences.

(5) A refugee who has made a claim for asylum is not entitled to the defence provided by subsection (1) in relation to any offence committed by him after making that claim.

(6) "Refugee" has the same meaning as it has for the purposes of the Refugee Convention.

(7) If the Secretary of State has refused to grant a claim for asylum made by a person who claims that he has a defence under subsection (1), that person is to be taken not to be a refugee unless he shows that he is.

(8) A person who-

- (a) was convicted in England and Wales or Northern Ireland of an offence to which this section applies before the commencement of this section, but
- (b) at no time during the proceedings for that offence argued that he had a defence based on Article 31(1), may apply to the Criminal Cases Review Commission with a view to his case being referred to the Court of Appeal by the Commission on the ground that he would have had a defence under this section had it been in force at the material time.

(9) A person who –

- (a) was convicted in Scotland of an offence to which this section applies before the commencement of this section, but

(b) at no time during the proceedings for that offence argued that he had a defence based on Article 31(1), may apply to the Scottish Criminal Cases Review Commission with a view to his case being referred to the High Court of Justiciary by the Commission on the ground that he would have had a defence under this section had it been in force at the material time.

(10) The Secretary of State may by order amend (a) subsection (3), or (b) subsection (4), by adding offences to those for the time being listed there.

(11) Before making an order under subsection (10)(b), the Secretary of State must consult the Scottish Ministers.

#### **14. United States of America**

##### **8 Code of Federal Regulations**

#### 270.2 Enforcement procedures.

(a) Procedures for the filing of complaints. Any person or entity having knowledge of a violation or potential violation of section 274C of the Act may submit a signed, written complaint to the Service office having jurisdiction over the business or residence of the potential violator or the location where the violation occurred. The signed, written complaint must contain sufficient information to identify both the complainant and the alleged violator, including their names and addresses. The complaint should also contain detailed factual allegations relating to the potential violation including the date, time and place of the alleged violation and the specific act or conduct alleged to constitute a violation of the Act. Written complaints may be delivered either by mail to the appropriate Service office or by personally appearing before any immigration officer at a Service office.

(b) Investigation. When the Service receives complaints from a third party in accordance with paragraph (a) of this section, it shall investigate only those complaints which, on their face, have a substantial probability of validity. The Service may also conduct investigations for violations on its own initiative, and without having received a written complaint. If it is determined after investigation that the person or entity has violated section 274C of the Act, the Service may issue and serve upon the alleged violator a Notice of Intent to Fine.

c) Issuance of a subpoena. Service officers shall have reasonable access to examine any relevant evidence of any person or entity being investigated. The Service may issue subpoenas pursuant to its authority under sections 235(a) and 287 of the Act, in accordance with the procedures set forth in § 287.4 of this chapter.

(d) Notice of Intent to Fine. The proceeding to assess administrative penalties under section 274C of the Act is commenced when the Service issues a Notice of Intent to Fine. Service of this notice shall be accomplished by personal service pursuant to § 103.5a(a)(2) of this chapter. Service is effective upon receipt, as evidenced by the certificate of service or the certified mail return receipt. The person or entity identified in the Notice of Intent to Fine shall be known as the respondent. The Notice of Intent to Fine may be issued by an officer defined in § 242.1 of this chapter or by an INS port director designated by his or her district director.

(e) Contents of the Notice of Intent to Fine.

(1) The Notice of Intent to Fine shall contain the basis for the charge(s) against the respondent, the statutory provisions alleged to have been violated, and the monetary amount of the penalty the Service intends to impose.

(2) The Notice of Intent to Fine shall provide the following advisals to the respondent:

(i) That the person or entity has the right to representation by counsel of his or her own choice at no expense to the government;

(ii) That any statement given may be used against the person or entity;

(iii) That the person or entity has the right to request a hearing before an administrative law judge pursuant to 5 U.S.C. 554 - 557, and that such request must be filed with INS within 60 days from the service of the Notice of Intent to Fine; and

(iv) That if a written request for a hearing is not timely filed, the Service will issue a final order from which there is no appeal.

(f) Request for hearing before an administrative law judge.

If a respondent contests the issuance of a Notice of Intent to Fine, the respondent must file with the INS, within 60 days of the Notice of Intent to Fine, a written request for a hearing before an administrative law judge. Any written request for a hearing submitted in a foreign language must be accompanied by an English language translation. A request for hearing is deemed filed when it is either received by the Service office designated in the Notice of Intent to Fine, or addressed to such office, stamped with the proper postage, and postmarked within the 60-day period. In computing the 60-day period prescribed by this section, the day of service of the Notice of Intent to Fine shall not be included. In the request for a hearing, the respondent may, but is not required to, respond to each allegation listed in the Notice of Intent to Fine. A respondent may waive the 60-day period in which to request a hearing before an administrative law judge and ask that the INS issue a final order from which there is no appeal. Prior to execution of the waiver, a respondent who is not a United States citizen will be advised that a waiver of a section 274C hearing will result in the issuance of a final order and that the respondent will be excludable and/or deportable from the United States pursuant to the Act.

(g) Failure to file a request for hearing. If the respondent does not file a written request for a hearing within 60 days of service of the Notice of Intent to Fine, the INS shall issue a final order from which there shall be no appeal.

(h) Issuance of the final order. A final order may be issued

by an officer defined in § 242.1 of this chapter, by an INS port director designated by his or her district director, or by the Director of the INS National Fines Office.

(i) Service of the final order.

(1) Generally. Service of the final order shall be accomplished by personal service pursuant to section 103.5a(a)(2) of this chapter. Service is effective upon receipt, as evidenced by the certificate of service or the certified mail return receipt.

(2) Alternative provisions for service in a foreign country. When service is to be effected upon a party in a foreign country, it is sufficient if service of the final order is made:

(i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

- (ii) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice;
- or (iii) when applicable, pursuant to § 103.5a(a)(2) of this chapter.

Service is effective upon receipt of the final order. Proof of service may be made as prescribed by the law of the foreign country, or, when service is pursuant to § 103.5a(a)(2) of this chapter, as evidenced by the certificate of service or the certified mail return receipt.

- (j) Declination to file charges for document fraud committed by refugees at the time of entry. The Service shall not issue a Notice of Intent to Fine for acts of document fraud committed by an alien pursuant to direct departure from a country in which the alien has a well-founded fear of persecution or from which there is a significant danger that the alien would be returned to a country in which the alien would have a well-founded fear of persecution, provided that the alien has presented himself or herself without delay to an INS officer and shown good cause for his or her illegal entry or presence. Other acts of document fraud committed by such an alien may result in the issuance of a Notice of Intent to Fine and the imposition of civil money penalties.

## **15. Zimbabwe**

### **Refugee Act, 1983**

Date of entry into force: 1983

[NOTE: This is the official text. This document includes only selected provisions.]

- 9. Cessation or stay of proceedings in respect of illegal entry by refugees and protected persons

Notwithstanding the provisions of the Immigration Act, 1979 (No.18 of 1979), or section 16, subsection (1) of section 22, subsection (1) of section 23, subsection (1) of section 24 or subsection (1) of section 25 of the Customs and Excise Act [Chapter 177], no proceedings shall be instituted or continued against any person or any member of his family in respect of his unlawful entry into or unlawful presence within Zimbabwe -

- (a) if such person applies in terms of section seven for recognition of his status as a refugee, until a decision has been made on the application and, where appropriate, such person has had an opportunity to exhaust his right of appeal in terms of that section; or
- (b) if such person has become a recognized refugee.

## **16. OAU Guidelines for National Refugee Legislation and Commentary**

Adopted by OAU/UNHCR Working Group on Arusha Follow-up Second Meetings, Geneva, 4 - 5 December 1980

### **Part IV: Prohibition of declaration of prohibited immigrant**

- 1. No person who has illegally entered or is illegally present in the country in which he seeks asylum as a refugee shall be declared a prohibited immigrant, detained,

imprisoned or penalized in any other way merely by reason of his illegal entry or presence, pending an examination of his application for refugee status.

2. A person who has illegally entered or is illegally present in the country in which he seeks asylum as a refugee shall present himself to the competent authorities without undue delay.