3.1 Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection

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* This paper was commissioned by UNHCR as a background paper for an expert roundtable discussion on Art. 31 of the 1951 Convention Relating to the Status of Refugees organized as part of the Global Consultations on International Protection in the context of the fiftieth anniversary of the 1951 Convention. The paper benefited from the discussions held at the expert roundtable in Geneva, Switzerland, on 8–9 Nov. 2001. The author has also greatly benefited from the assistance of Walpurga Englbrecht in producing the final text.

I. Article 31: refugees unlawfully in the country of refuge

A. Introduction

Article 31 of the 1951 Convention Relating to the Status of Refugees[1] 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.

1 189 UNTS 150; and, for the 1967 Protocol to the 1951 Convention Relating to the Status of Refugees, 606 UNTS 267.

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.[2] 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.[3] Several countries have no limit on the maximum period of detention, including Denmark, Finland, the Netherlands, and the United Kingdom, while others provide maximum periods and require release if no decision on admission or removal has been taken.

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 prisons 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.

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.

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.[4]

2 UNHCR, *Reception Standards for Asylum Seekers in the European Union* (Geneva, July 2000).

3 Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Community (Dublin Convention), OJ 1990 L254, 19 Aug. 1997.

4 This duty is recognized in Art. 2(1) of the 1966 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 ('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 Art. 1 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), ETS No. 5 ('The . . . Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'); and in Art. 1 of the 1969 American Convention on Human Rights or 'Pact of San

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.

Nevertheless, increasing demands for control measures over the movements of people have led even to refugees recognized after 'unauthorized' arrival being accorded lesser rights, contrary to the terms of the 1951 Convention and the 1967 Protocol, while elsewhere refugees and asylum seekers are commonly fined or imprisoned.

B. Problems arising and scope of the paper

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. Sections II–V of this paper therefore review mainly the central issues arising out of or relating to 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'). Sections VI and VII examine Article 31(2), with particular reference to restrictions on freedom of movement and the issue of detention (both generally, and in regard to the 'necessary' measures which may be imposed under that provision).

II. Article 31: the origins of the text

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 their context and in the light of its object and purpose'.[5] In the case of the 1951 Convention, this means interpretation by reference to the object and purpose of extending the

José, Costa Rica', Organization of American States (OAS) Treaty Series No. 35 ('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 . . .'). This duty is clearly linked to the matching duty to provide a remedy to those whose rights are infringed, or threatened with violation (Art. 14(1) of the ICCPR; Art. 13 of the European Convention on Human Rights; Art. 25 of the American Convention on Human Rights).

5 1969 Vienna Convention on the Law of Treaties, UN doc. A/CONF.39/27, Art. 31(1); G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon Press, Oxford, 1996), pp. 366–8.

protection of the international community to refugees, and assuring to 'refugees the widest possible exercise of . . . fundamental rights and freedoms', as stated in the preamble. Article 32 of the Vienna Convention provides further:

> 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.

Article 33 of the Vienna Convention clarifies the interpretation of treaties authenticated in two or more languages. The 1951 Convention stipulates in its concluding paragraph that the English and the French texts are equally applicable. In cases where the French and the English texts disclose a difference of meaning, which the application of Articles 31 and 32 of the Vienna Convention does not remove, Article 33(4) states that 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'.[6]

As is shown below, the *travaux préparatoires* confirm the 'ordinary meaning' of Article 31(1) of the 1951 Convention, as applying 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.

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.

The term 'penalties' in Article 31(1) was not extensively discussed during the preparatory work of the treaty. 'Penalties' are sometimes interpreted only as 'criminal penalties' by relying on the French term '*sanctions pénales*'. The broader view of the term 'penalties' takes into account the object and purpose of the treaty, as well as the interpretation of the term 'penalties' incorporated in other human rights treaties.[7]

6 See Vienna Convention, Art. 33(4). 7 See below, section II.C.

A. The Ad Hoc Committee

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.[8] 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 who 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.[9]

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.[10]

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.'[11]

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'.[12] During this meeting, Australia called for a clarification of the term 'penalties', but, apart from suggestions by the French and Belgium representatives that penalties mentioned in the Article should be confined to judicial penalties only, no further clarification was provided.[13] The draft text was thereafter

8 Belgium and the USA, '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 Feb. 1950.

9 '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 Feb. 1950.

10 'Draft Convention Relating to the Status of Refugees, Decisions of the Working Group Taken on 9 February 1950', UN doc. E/AC.32/L.32, 9 Feb. 1950.

11 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 Feb. 1950, Annex I (draft Art. 26); Annex II (comments, p. 57).

12 'Draft Report of the Ad Hoc Committee on Refugees and Stateless Persons', UN doc. E/AC.32.L.43, 24 Aug. 1950, p. 9; cf. the Swiss legislation, at section III.A.1 below.

13 'Summary Record of the Fortieth Meeting of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session', UN doc. E/AC.32/SR.40, 27 Sept. 1950, p. 5.

considered by the 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, which met in Geneva in July 1951.

B. Discussions at the 1951 Conference

Since Article 26 (Article 31 to be) 'trespassed' on the delicate 'sovereign' areas of admission and asylum, France was concerned during the 1951 Geneva Conference 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'.[14] 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 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.'[15]

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 wording 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.[16]

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

14 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records', UN doc. A/CONF.2/SR.13, (M. Colemar, France).

15 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records', UN doc. A/CONF.2/SR.13 (M. Colemar, France).

16 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records', UN doc. A/CONF.2/SR.14 (M. Colemar, France).

replaced by a reference to arrival from any territory in which the refugee's life or freedom was threatened.[17]

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 penalized for not having proceeded directly to the final country of asylum.[18]

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 UK 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).[19]

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 UK's 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.[20]

17 '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 (above n. 3) and Schengen (1990 Schengen Convention Applying the Schengen Agreement of 14 June 1985 on the Gradual Abolition of Checks at Their Common Border, 30 ILM 84 (1991)), 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 and the 1967 Protocol, including the place of Art. 31 in a 'Europe without internal frontiers'; these issues cannot be addressed in the present paper.

18 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records', UN doc. A/CONF.2/SR.14, p. 4.

19 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records', UN doc. A/CONF.2/SR.14, pp. 10–11 and 13.

20 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records', UN doc. A/CONF.2/SR.35 (M. Rochefort, France).

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 in Article 31(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.

Article 31 thus includes threats to life or freedom as possible reasons for illegal entry or presence; specifically refrains from linking such threats 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.

C. The meaning of terms: some preliminary views

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'.

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*,[21] to 'presumptive refugees'. This necessary interpretation, which takes account also of the declaratory nature of refugee status,[22] has obvious implications, not only for the general issue of immunity, but also for the moment at which 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 or, where they are instituted, to ensure that no penalties are in fact imposed for cases falling within Article 31(1). As shown below, many States do not make adequate legislative or administrative provision to ensure delay or postponement in the application of enforcement measures.

21 See section III.B.1 below.

22 See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979), para. 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.

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, for Article 31(1) to apply, 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.

The term 'penalties' is not defined in Article 31 and the question arises whether the term used in this context should only comprise criminal penalties, or whether it should also include administrative penalties (for example, administrative detention). Some argue that the drafters appear to have had in mind measures such as prosecution, fine, and imprisonment, basing this narrow interpretation also on the French version of Article 31(1) which refers to '*sanctions pénales*' and on case law.[23]

By contrast, the English version only uses the term 'penalties', which allows a wider interpretation. As stated above at the beginning of this section, where the French and the English texts of a convention disclose a different meaning which the application of Articles 31 and 32 of the 1969 Vienna Convention does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted. In seeking the most appropriate interpretation, the deliberations of the Human Rights Committee or scholars relating to the interpretation of the term 'penalty' in Article 15(1) of the ICCPR can also be of assistance. The Human Rights Committee notes, in a case concerning Canada,

> that its interpretation and application of the International Covenant on Civil and Political Rights has to be based on the principle that the terms and concepts of the Covenant are independent of any particular national system or law and of all dictionary definitions. Although the terms of the Covenant are derived from long traditions within many nations, the Committee must now regard them as having an autonomous meaning. The parties have made extensive submissions, in particular as regards the meaning of the word 'penalty' and as regards relevant Canadian law and practice. The Committee appreciates their relevance for the light they shed on the nature of the issue in dispute. On the other hand, the meaning of the word 'penalty' in Canadian law is not, as such, decisive. Whether the word 'penalty' in article 15(1) should be interpreted narrowly or widely, and whether it applies to different kinds of penalties, 'criminal' and 'administrative', under the Covenant, must

23 See, e.g., *R. v. Secretary of State for the Home Department, ex parte Makoyi*, English High Court (Queen's Bench Division), No. CO/2372/91, 21 Nov. 1991, unreported, where it was noted that 'a penalty, on the face of it, would appear to involve a criminal sanction . . . [T]he word "penalty" in Article 31 is not apt to cover detention such as exists in the present situation.'

> depend on other factors. Apart from the text of article 15(1), regard must be had, *inter alia*, to its object and purpose.[24]

Nowak, in his commentary on the ICCPR, refers to the term 'criminal offence' in Article 14 of the ICCPR.[25] He argues that 'every sanction that has not only a preventive but also a retributive and/or deterrent character is . . . to be termed a penalty, regardless of its severity or the formal qualification by law and by the organ imposing it'.[26]

Taking the above approach into account, Article 31(1) of the 1951 Convention, and in particular the term 'penalty', could be interpreted as follows: the object and purpose of the protection envisaged by Article 31(1) of the 1951 Convention is the avoidance of penalization on account of illegal entry or illegal presence. An overly formal or restrictive approach to defining this term will not be appropriate, for otherwise the fundamental protection intended may be circumvented and the refugee's rights withdrawn at discretion.

Given the growing practice in some countries of setting up detention or holding centres for those deemed to have moved in an 'irregular' fashion,[27] the question whether such practices amount to a 'penalty' merits examination, taking into account both the discussions on 'detention' at the time this provision was drafted and the terms of Article 31(2). In this context, it is important to recall that it is always possible that some refugees will have justification for undocumented onward travel, if for instance they face threats or insecurity in the first country of refuge. Where Article 31 applies, the indefinite detention of such persons can constitute an unnecessary restriction, contrary to Article 31(2). The Conference records indicate that, apart from a few days for investigation,[28] further detention would be necessary only in cases involving threats to security or a great or sudden influx. Thus, although 'penalties' might not exclude eventual expulsion, prolonged detention of a refugee directly fleeing persecution in the country of origin, or of a refugee with good cause to leave another territory where life or freedom was threatened, requires justification under Article 31(2), or exceptionally on the basis of provisional measures on national security grounds under Article 9. Even where Article 31 does not apply, general principles of law suggest certain inherent limitations on

24 *Van Duzen* v. *Canada*, Communication No. 50/1979, UN doc. CCPR/C/15/D/50/1979, 7 April 1982, para. 10.2.

25 For further analysis of the meaning of 'penalty', see, T. Opsahl and A. de Zayas, 'The Uncertain Scope of Article 15(1) of the International Covenant on Civil and Political Rights', *Canadian Human Rights Yearbook*, 1983, p. 237.

26 M. Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary* (Engel Verlag, Kehl am Rhein, Strasbourg, Arlington, 1993), p. 278.

27 See Executive Committee, Conclusion No. 58 (XL) 1989; and section III.E. below.

28 On detention for 'a few days' to verify identity, etc., see generally UN docs. A/CONF.2/SR.13, pp. 13–15; SR.14, pp. 4 and 10–11; and SR.35, pp. 11–13, 15–16 and 19.

the duration and circumstances of detention.[29] In brief, while administrative detention is allowed under Article 31(2), it is equivalent, from the perspective of international law, to a penal sanction whenever basic safeguards are lacking (review, excessive duration, etc.). In this context, the distinction between criminal and administrative sanctions becomes irrelevant. It is necessary to look beyond the notion of criminal sanction and examine whether the measure is reasonable and necessary, or arbitrary and discriminatory, or in breach of human rights law.

At the 1951 Conference, several representatives considered that the undertaking not to impose penalties did not exclude the possibility of eventual resort to expulsion,[30] 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 subparagraph 2 makes it clear that States may impose 'necessary' restrictions on movement, for example, in special circumstances such as a large influx. Such measures may also come within Article 9 concerning situations of war or other grave exceptional circumstances, and are an exception to the freedom of movement required by Article 26. In such 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 his or her status in the country of refuge is regularized or admission obtained into another country.

Some of the broader issues raised by detention are examined more fully in Section VI below.

The meaning of 'illegal entry or presence' has not generally raised any difficult issue of interpretation. The former would include arriving or securing entry through the use of false or falsified documents, the use of other methods of deception, clandestine entry (for example, as a stowaway), and entry into State territory with the assistance of smugglers or traffickers. 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, for instance, after the elapse of a short, permitted period of stay.

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.

29 See e.g., Art. 32 of the 1951 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'.

30 UN doc. A/CONF.2/SR.13, pp. 12–14 (Canada, UK); cf. Art. 5 of the 1954 Caracas Convention on Territorial Asylum, OAS Treaty Series No. 19.

III. Incorporation of the principle in national law

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 or the 1967 Protocol, by the jurisprudence of the European Court of Human Rights, and in the practice of States at large.

A. National legislation

Examples of legislation on this issue from a range of different countries follow.[31]

1. Switzerland

Particularly striking in the field of national legislation is Swiss law, which extends immunity from penalization also to those who assist refugees entering illegally. Article 23(3) of the Federal Law Concerning the Stay and Establishment of Foreigners reads:

> Whoever takes refuge in Switzerland is not punishable if the manner and the seriousness of the persecution to which he is exposed justifies illegal crossing of the frontier; whoever assists him is equally not punishable if his motives are honourable.[32]

2. United Kingdom

The United Kingdom's approach, adopted after the decision in *Adimi*,[33] is more limited. Section 31 of the Immigration and Asylum Act 1999 reads:

> (1) It is a defence for a refugee charged with an offence to which this section [concerning, among others, deception to gain entry, assisting illegal entry] 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—

31 The legislation cited hereunder is based on primary sources and/or is published (in translation where appropriate) in UNHCR/Centre for Documentation and Research, *RefWorld* (CD-ROM, 8th edn, July 1999). For further details, see Annex 3.1.

32 *Loi fédérale du 26 mars 1931 sur le séjour et l'établissement des étrangers*. The original French text reads: '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.' New formulation according to ch. I of the Federal Law of 9 Oct. 1987, in force since 1 March 1988 (RO 1988 332 333: FF 1986 III 233); cf. developments regarding the use of smugglers, text at n. 61 below.

33 See further section III.B.1 below.

> (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 . . .

3. *United States*

The law of the United States is also clear. A refugee fulfilling the requirements set out in Article 31(1) of the 1951 Convention should not be charged in relation to document fraud committed at the time of entry:

> (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 . . .[34]

4. *Belize*

The Refugees Act 1991 stipulates that refugees should not be penalized for their illegal entry. Section 10(1) of the Act provides:

34 8 Code of Federal Regulations (CFR), part 270, Penalties for Document Fraud, section 270.2, Enforcement procedures, 8 USC 1101, 1103, and 1324c.

> 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.

5. *Finland*

As in Switzerland, Finnish legislation takes into account the motives of the perpetrator and the conditions affecting the security of the person in his country of origin or country of habitual residence when determining whether organized illegal entry should be penalized. The 1991 Aliens Act reads:

> 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 arranging 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.[35]

6. *Ghana*

The Refugee Act 1992 (PNDCL 3305D) contains a specific provision, exempting refugees from being penalized for illegal entry or presence. Section 2 of the Act provides:

> 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.

35 See Aliens Act (378/91), 22 Feb. 1991, as amended, Art. 64b (28.6.1993/639) Arranging of Illegal Entry.

7. Lesotho

The Refugee Act 1983 is another example of national legislation where refugees are not penalized for their illegal entry or presence. Section 9 of the Act provides:

> (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.[36]

8. Malawi

The Refugee Act 1989 in Malawi exempts a refugee from penalization for illegal entry or presence provided he or she presents him- or herself within twenty-four hours of his or her entry or within such longer period as the competent officer may consider acceptable in the circumstances. Section 10(4) of the Act provides:

> 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 a 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.

36 Lesotho, Refugee Act 1983, Gazette No. 58, Supplement No. 6, 9 Dec. 1983.

9. *Mozambique*

Article 11 of the Refugee Act 1991 stipulates that criminal or administrative proceedings related to illegal entry shall be suspended immediately upon submission of a refugee claim:

> 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.[37]

B. National case law

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.[38]

For instance, in *Alimas Khaboka* v. *Secretary of State for the Home Department*,[39] the English 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 Convention.

In *R.* v. *Uxbridge Magistrates' Court and Another, ex parte Adimi*,[40] the Divisional Court in the United Kingdom 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.'

The Regional Superior Court (*Landesgericht*) in Münster, Federal Republic of Germany,[41] found that 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

37 Mozambique, Act No. 21/91, 31 Dec. 1991 (Refugee Act).
38 The decisions cited hereunder include many reported in UNHCR/Centre for Documentation and Research, *RefWorld* (CD-ROM, 8th edn, July 1999).
39 [1993] Imm AR 484.
40 [1999] Imm AR 560. A fuller account of this case appears in section III.B.1 below.
41 Nos. 39 Js 688/86 (108/88), LG Münster, 20 Dec. 1988. An appeal by the Public Prosecutor was rejected on 3 May 1989 by the Appeals Court (*Oberlandesgericht*) in Hamm.

there is no general time limit for determining what constitutes 'without delay', which should be considered on a case-by-case basis.

The *Oberlandesgericht* Celle[42] and the *Landesgericht* Münster,[43] among others, found 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.

On 14 January 2000, the *Oberste Landesgericht* of Bavaria held that Article 31 of the 1951 Convention does not apply where the asylum seeker has benefited from the help of a smuggler (*Schleuser*).[44] Such an interpretation finds no support, in the words of Article 31, or the *travaux préparatoires*[45] or in the practice of States.[46] In addition to directly violating Article 31 of the 1951 Convention, this interpretation also contravenes the letter and the spirit of Article 5 of the Protocol Against the Smuggling of Migrants by Land, Air and Sea. This reads: 'Migrants shall not become liable to criminal proceedings under this Protocol for the fact of having been the object of [smuggling].'[47]

In the case of *Shimon Akram and Others*, the Court of First Instance (Criminal Cases) in Myttilini, Greece,[48] found the defendants – Iraqi citizens of the Catholic faith – to be 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.[49]

The Swiss Federal Court[50] 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. In particular, the Court held that Article 31(1) of the 1951 Convention applies even where an asylum seeker has had the opportunity to file an asylum claim at the border but did not do so because he or she was afraid of not being allowed entry. The case involved the illegal entry of an Afghan refugee into Switzerland from Italy with a false Singaporean passport. The Federal Court said:

42 Decision of 13 Jan. 1987 (1 Ss 545/86), NvwZ 1987, 533 (ZaöRV) 48 [1988], 741.

43 See above n. 41.

44 Decision No. 230/99, *Bayerisches Oberstes Landesgericht*, 14 Jan. 2000. According to UNHCR Germany, the Federal Ministry of Justice considers that the use of a smuggler raised doubt as to whether the asylum seeker could be said to have come 'directly' from the State in which he or she feared persecution.

45 See section II.A–II.C. 46 See section III.D.

47 Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the UN Convention Against Transnational Organized Crime, UN doc. A/55/383, Nov. 2000.

48 *Shimon Akram and Others*, No. 585/1993, Court of First Instance (Criminal Cases), in Myttilini (*Aftoforo Trimeles Plimeliodikeio Myttilinis*), 1993.

49 See also, Decision No. 233/1993 of another Greek court, the Court of First Instance (Criminal Cases), Chios (*Aftoforo Trimeles Plimeliodikeio Chiou*).

50 Federal Cassation Court (*Bundesgericht, Kassationshof*), judgment of 17 March 1999, reported in *Asyl* 2/99, 21–3.

> 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 not met. '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.[51]

1. *The judgment in* Adimi

The decision of the Divisional Court in the United Kingdom case of *R.* v. *Uxbridge Magistrates' Court and Another, ex parte Adimi*[52] is one of the most thorough examinations of the scope of Article 31 and the protection due. Simon Brown LJ 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 should it apply. Simon Brown LJ identified the broad intended purpose as being '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 as much to those using false documents, as to those entering clandestinely.

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':

> [A]ny 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

51 Translation by the writer. The original text reads:

> 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.

52 Above n. 40.

> 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.

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,[53] as it did in considering what was meant by the requirement that the refugee present him- or herself 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.

Such a pragmatic approach to the moment of claim was also adopted in a parallel jurisdiction, namely, in regard to appeals by asylum seekers for 'income support' (a UK social security benefit). 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 a November 1999 case, the Social Security Commissioner 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.[54] 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'.[55]

On the third requirement of 'good cause', all parties in the *Adimi* case 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.

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.

53 UNHCR, 'Revised Guidelines on the Detention of Asylum-Seekers', Feb. 1999.

54 Decision of the Social Security Commissioner in Case No. CIS 4439/98, 25 Nov. 1999, Commissioner Rowland, paras. 10 and 18.

55 Ibid., para. 16. A more restrictive interpretation was applied in *R.* v. *Secretary of State for the Home Department, ex parte Virk*, English High Court of Justice (Queen's Bench Division), [1995] EWJ 707, 18 Aug. 1995, para. 26, according to which it was argued that the word 'penalty' cannot encompass a restriction on obtaining employment.

C. European Court of Human Rights

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.[56]

In view of the internationally recognized immunity from penalty to which persons falling within the scope of Article 31 of the 1951 Convention are entitled, to institute criminal proceedings without regard to their claim to refugee status and/or without allowing an opportunity to make such a claim may be considered to violate human rights.[57] 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 in need of international protection.

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.

D. State practice

This paper has benefited from two studies in areas relating to the subject of illegal entry: a study by UNHCR on the safeguards for asylum seekers and refugees in the context of irregular migration in Europe;[58] and a draft report by the Lawyers Committee for Human Rights on States' procedures and practices relating to the detention of asylum seekers.[59]

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, the Czech Republic, Estonia, France, Georgia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Macedonia, Moldova, the Netherlands, Norway, Poland, Romania, the Russian Federation, the 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, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Lithuania, Luxembourg, Malaysia, Mexico, the Netherlands, Norway, Poland, Portugal, Romania, the

56 *Amuur* v. *France*, European Court of Human Rights, Decision No. 17/1995/523/609, 1996, 24 EHRR, 1996, p. 533 (emphasis added).

57 European Convention on Human Rights, Arts. 6 and 13.

58 UNHCR, *Safeguards for Asylum Seekers and Refugees in the Context of Irregular Migration into and within Europe – A Survey of the Law and Practice of 31 European States* (June 2001).

59 Lawyers Committee for Human Rights, *Preliminary Review of States' Procedures and Practices Relating to Detention of Asylum Seekers* (20 Sept. 2001).

Slovak Republic, South Africa, Spain, Sweden, Switzerland, Thailand, the United Kingdom, and the United States.

The UNHCR study considered, among others, 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 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.

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.

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 and the 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.

For example, the UNHCR study found that some 61 per cent (nineteen out 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 13 per cent will suspend penalties, but not proceedings.

Of States reviewed, 19 per cent 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); a further 29 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 16 per cent of States in practice considered that such use triggered treatment of the application as manifestly unfounded.

Only 29 per cent of States distinguish between trafficking and smuggling, following the terms of the two Protocols to the UN Convention on Transnational Organized Crime.[60] In 45 per cent of States, however, both traffickers and smugglers may be prosecuted for assisting or facilitating illegal entry, among other offences; the penalties imposed may reflect the circumstances of the offence, and

60 See above n. 47 and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime, Nov. 2000, UN doc. A/55/383.

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 lighter.

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 because of illegal entry or presence. Periods of detention also vary from forty-eight hours to eighteen months, and judicial review may or may not be available.

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 length of detention, while twelve had no such limit. 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.

1. *Australia*

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 detention. Further restrictions on judicial review of Department of Immigration decisions have been added over the years. The Human Rights Committee found that the policy and practice of mandatory and non-reviewable detention was arbitrary and a breach of Article 9 of the International Covenant on Civil and Political Rights.[61] The Australian Human Rights and Equal Opportunity Commission reached a similar conclusion in 1998.[62]

61 See further section VI.B.2 below.

62 Human Rights and Equal Opportunity Commission, 'Those who've Come Across the Seas: Detention of Unauthorised Arrivals', Sydney, May 1998, available on http://www.hreoc.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf. In 2002, the UN Working Group on Arbitrary Detention visited Australia at the invitation of the Australian Government. For the findings, see Report of the UN Working Group on Arbitrary Detention, Un doc.E/CN.4/2003/8/Add. The chair of the Working Group expressed concerns relating to the detention of children and vulnerable groups, drew attention to the relationship between the legal conditions of detention and the collective depression syndrome in some detention centres, the implications of detention being managed by a private security company, including the legal basis authorizing the private company to lay down rules and regulations, as well as the legal status of so-called 'unlawful non-citizens' held in State prisons, in particular, those labelled high-risk detainees, who are transferred to State prisons without any decision by a judge.

One of the more far-reaching changes, announced in October 1999, was the introduction of 'temporary protection visas' for unauthorized (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 granted a three-year temporary entry visa, after which they will be required to reapply for refugee status. Under amendments in September 2001, unauthorized (spontaneous) arrivals who have spent at least seven days in a country where they could have sought and obtained effective protection will never become entitled to apply for a permanent protection visa.[63]

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. As noted above, in the United Kingdom 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'.[64] 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.[65]

2. Belgium

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

63 Migration Amendment Regulations 1999 (No. 12) (Statutory Rules 1999 No. 243); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001. See also, Department of Immigration and Multicultural and Indigenous Affairs, Fact Sheets Nos. 64, 65, and 68, on temporary protection visas, new humanitarian visa system, and temporary protection visa holders applying for further protection, respectively, available on http://www.immi.gov.au/facts/index.htm#humanitarian; US Committee for Refugees, *Sea Change: Australia's New Approach to Asylum Seekers* (Feb. 2002), p. 7, available on http://www.refugees.org/pub/australia2.cfm; M. Crick and B. Saul, *Future Seekers: Refugees and the Law in Australia* (Federation Press, Sydney, 2002), pp. 99–116.

64 See Decision of the Social Security Commissioner, above n. 54, para. 16.

65 The applicability of Art. 31 was not considered by the Federal Court of Australia in *Minister for Immigration and Multicultural Affairs v. Vadarlis, Human Rights and Equal Opportunity Commission and Amnesty International*, [2001] FCA 1329,18 Sept. 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.

months;[66] the average length of detention is fourteen 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 so as to transfer an asylum seeker to the State responsible 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, paragraph 3 of the Aliens Act). The initial two-month period can be prolonged by the Minister of the Interior or his or her delegate for additional one-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 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.

An undocumented asylum seeker who has already entered Belgium, or who requested asylum after authorization 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 at a specified location in order to ensure his or 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 forty to fifty such asylum seekers are detained each month. Several provisions of the Aliens Act also provide for detention of asylum seekers for reasons of public order or national security (Articles 63/5 paragraph 3, Article 52*bis*, and Article 54 paragraph 2).

3. *France*

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. 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'.

66 Law of 15 Dec. 1980 on Access to Territory, Stay, Establishment and Removal of Aliens (*loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*) (Aliens Act), consolidated to 1999, Art. 74/5.

4. *Germany*

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 major airports may be subject to the airport procedure, during which they may be restricted to the closed facility at the airport for a maximum of nineteen days before final rejection of their claim as manifestly unfounded. Under German law, this detention is not considered to constitute a deprivation of liberty.[67] Asylum seekers rejected in the airport procedure who cannot be removed may, however, spend months in the closed centre, pending discretionary entry or removal.

The accelerated procedure (section 18a of the 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, or 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.

As a result of the decision of the Federal Constitutional Court of 14 May 1996, asylum seekers at the airport must be provided with free legal counselling. The Court did not consider, however, 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 of the European Convention on Human Rights. 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 zones continues to increase.

5. *Other European States (Greece, Italy, Luxembourg, the Netherlands, Spain, Sweden, and the United Kingdom)*

In Greece, according to the penal law as amended 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

67 See German Federal Constitutional Court, Decision of 14 May 1996, 2 BvR 1938/93 and 2 BvR 2315/93.

deportation of irregular migrants convicted of illegal entry or stay, without regard to their status.

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' applications, 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.

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 State responsible under the Dublin Convention for assessing the claim. 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.

In the Netherlands, according to 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.

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.

In Spain, according to Article 4.1 of Law No. 9/94, the illegal entry of an asylum seeker will not be penalized when the person concerned meets the criteria for recognition of refugee status, provided he or she appears before the competent authorities without delay. The legislation also permits, however, the detention of aliens entering illegally for a maximum period of seventy-two 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.

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-day time 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.

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 for 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 prisons, or police cells.

In the United Kingdom, between 1 and 1.5 per cent of the total number of persons seeking asylum are detained at any given time.[68] 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.

United Kingdom law was amended following the decision of the Divisional Court in the case of *Adimi*.[69] 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 of the 1951 Convention, within certain limitations.[70]

6. United States

Asylum seekers arriving in the United States without proper documents are now subject to 1996 legislation which makes provision for 'expedited removal'. The relevant provisions, which came 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 United States.

68 See 'Report of the Working Group on Arbitrary Detention', UN doc. E/CN.4/1999/63/Add.3, 18 Dec. 1998.

69 See section III.B.1 above. 70 See section III.A.2 above.

If they receive a negative credible fear determination, they may request a review by an immigration judge which must be conducted whenever possible within twenty-four 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 Board of Immigration Appeals and to the federal district.

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.[71]

E. Decisions and recommendations of the UNHCR Executive Committee

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, entitled 'Refugees without an asylum country', includes the following provision:

> 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.[72]

Executive Committee Conclusion No. 58 (XL) 1989, entitled 'The problem of refugees and asylum seekers who move in an irregular manner from a country in which they had already found protection', reads:

> (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 . . .

71 See generally, Lawyers Committee for Human Rights, 'Is This America? The Denial of Due Process to Asylum Seekers in the United States', Oct. 2000.

72 UNHCR, 'Report of the 30th Session of the Executive Committee', UN doc. A/AC.96/572, para. 72(2)(k).

> (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 such compelling circumstances exist, the use of fraudulent documentation is unjustified . . .[73]

In addition, Executive Committee Conclusion No. 22 (XXXII) 1981, entitled 'Protection of asylum seekers in situations of large-scale influx', clearly reaffirms the standards set out in Article 31, as follows:

> B. Treatment of asylum-seekers who have been temporarily admitted to 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;
> . . .
> (h) family unity should be respected . . .[74]

IV. International standards and State responsibility

States party to the 1951 Convention and the 1967 Protocol undertake to accord certain standards of treatment to refugees, and to guarantee to them certain

73 UNHCR, 'Report of the 40th Session of the Executive Committee', UN doc. A/AC.96/737, p. 23 (emphasis added).
74 UNHCR, 'Report of the 32nd Session of the Executive Committee', UN doc. A/AC.96/601, para. 57(2).

rights including the benefit of a non-discriminatory application of the Convention and the 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).

States ratifying the 1951 Convention and/or the 1967 Protocol necessarily undertake to implement those instruments in good faith (the principle of *pacta sunt servanda*).[75] 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.[76]

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 case of 'a radical failure on the part of the legal system to provide a guarantee or service as required by the relevant standard'.[77]

The responsibility of States party to the 1951 Convention and the 1967 Protocol to treat persons entering or seeking to enter their territory irregularly in accordance with Article 31(1) of the 1951 Convention, and specifically to take account of their claim to be a refugee entitled to its benefit, may be engaged either by a 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).[78]

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.

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

75 1969 Vienna Convention, 1155 UNTS 331; I. Brownlie, *Basic Documents in International Law* (5th edn, Clarendon Press, Oxford, 2002), p. 270.

76 G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon Press, Oxford, 1996), pp. 230–41.

77 I. Brownlie, *System of the Law of Nations. State Responsibility (Part 1)* (Clarendon Press, Oxford, 1983), p. 150.

78 For a detailed assessment of the scope of State responsibility in asylum matters, see also the Legal Opinion on the scope and content of the principle of *non-refoulement* by Sir E. Lauterpacht and D. Bethlehem in Part 2.1 of this book.

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 on Human Rights, which are not dependent upon lawful presence or residence.

The above review shows that many States party to the 1951 Convention have no legislative provision implementing the obligations accepted under Article 31 of the 1951 Convention. Instead, compliance is left to be achieved through the (it is hoped) judicious use of executive discretion.

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.

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 Article 31 of the 1951 Convention. 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).

In brief, therefore, Article 31(1) of the 1951 Convention 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
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.[79]

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.

79 See also, UNHCR, 'Revised Guidelines', above n. 53. Given the special situation of asylum seekers, a time limit cannot be mechanically applied or associated with the expression. In particular, the asylum seeker may be suffering from 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.

V. Conclusions regarding Article 31(1)

In summary, the following conclusions regarding Article 31(1) can be drawn:

1. States party to the 1951 Convention and the 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.
2. States have a 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 in 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.
3. 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.
4. 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 mere fact of UNHCR being operational in a certain country cannot be decisive as to the availability of effective protection in that country.[80] The real question is whether effective protection is available for that individual in that country. The drafters only intended that immunity from penalty should not apply to refugees who had settled, temporarily or permanently, in another country.
5. 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 a country via another country or countries in which he or she is at risk or in which generally effective protection is not 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.

80 'Summary Conclusions on Article 31 of the 1951 Convention Relating to the Status of Refugees', 8–9 Nov. 2001, para. 10(c).

6. 'Without delay' is a matter of fact and degree; it depends on the circumstances of the case, including the availability of advice.
7. Although expressed in terms of the 'refugee', Article 31(1) applies also to asylum seekers and 'presumptive refugees'; consequently, such persons are prima facie entitled to receive the provisional benefit of the 'no penalties obligation' in Article 31(1) until they are found not to be in need of international protection in a final decision following a fair procedure.
8. 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,[81] and that circumstances may oblige them to use false documents.
9. The term 'penalties' is not defined in Article 31. It includes but is not necessarily limited to prosecution, fine, and imprisonment.
10. Provisional detention is permitted if necessary for and limited to the purposes of preliminary investigation. While administrative detention is allowed under Article 31(2), it is equivalent, from the perspective of international law, to a penal sanction whenever basic safeguards are lacking (review, excessive duration, etc.).
11. Article 31(1) of the 1951 Convention obliges States Parties specifically to take account of any claim to be a refugee entitled to its benefit. This responsibility can be engaged by a 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).
12. 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.
13. As a matter of principle, it should also follow that a carrier should not be penalized for bringing in an 'undocumented' passenger, where that person is subsequently determined to be in need of international protection.

81 See Executive Committee, Conclusion No. 58, para. g, section III.E above.

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

Several thousand refugees and asylum seekers are currently detained throughout the world[82] or their freedom of movement is restricted. 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.

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 summarized 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.

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.[83] There is a qualitative difference between detention and other restrictions on freedom of movement, even if only a matter of degree and intensity,[84] 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 guarantors, security deposits or bonds, reporting requirements, or open reception

82 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 (1977)', UN doc. A/AC.96/549, para. 53.5.

83 Cf. *Shokuh* v. *The Netherlands*, *Hoge Raad der Nederlanden* (Netherlands Supreme Court), 9 Dec. 1988, 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 Netherlands 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: *Revue du droit des étrangers* (RDDE), No. 52, Jan.–Feb. 1989, p. 16.

84 See section III.C above, European Court of Human Rights, citing para. 43 of the judgment of the European Court of Human Rights in *Amuur* v. *France*.

centres whereby the asylum seeker's movement is restricted to within the bounds of the district in which the centre is located or where absence of more than twenty-four hours must be approved.[85]

In a number of countries facing a mass influx, refugees who have been formally admitted are accommodated in 'settlements' or 'designated areas'. Such arrangements are frequently made in order to provide solutions for rural refugees. Assignment to such settlements is normally accompanied by various restrictions on freedom of movement. Refugees who disregard such restrictions and leave the camp or settlement are often liable to penalties, including detention, or may be refused readmission and be denied any assistance.

A. The scope of protection under the 1951 Convention and generally

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 of the 1951 Convention 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.

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 added).

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 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

85 See Lawyers Committee for Human Rights, *Preliminary Review*, above n. 59. Refugees would be free to come and go during the day, although there could be curfews overnight.

of the 1969 OAU Refugee Convention,[86] and are reflected also in Articles 7 and 8 of the 1954 Caracas Convention on Territorial Asylum.[87]

Article 31(1) of the 1951 Convention 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. States retain considerable discretion, however, 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.

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.[88] From the international law perspective, however, the issue is whether, in the case of refugees and asylum seekers, the power has been exercised lawfully, in light of the standards governing its exercise and duration.

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.

Although State practice recognizes the power to detain in the immigration context, human rights treaties affirm that no one shall be subject to *arbitrary* arrest or detention.[89] 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.[90]

86 1969 Organization of Africa Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45.

87 See above n. 30.

88 See, e.g., *Attorney-General for Canada* v. *Cain*, Judicial Committee of the Privy Council, [1906] AC 542 (PC); *Shaughnessy* v. *United States, ex rel. Mezei*, US Supreme Court, 345 US 206 (1953); and Art. 5 of the European Convention on Human Rights.

89 See, e.g., Art. 9 of the ICCPR; Art. 5 of the European Convention on Human Rights; Art. 2 of the Protocol No. 4 to the European Convention on Human Rights, ETS No. 46; Art. 7 of the American Convention on Human Rights; Art. 6 of the 1981 African Charter on Human and Peoples' Rights, 21 ILM, 1982, 58; also Art. 5 of the 1985 UN 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.

90 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,

Article 12 of the ICCPR applies to any person lawfully within a territory, but the interpretation of the term 'necessary' is also of relevance for the application of Article 31(2) of the 1951 Convention. Article 12(3) of the ICCPR stipulates that freedom of movement 'shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant'. As Manfred Nowak remarks in his commentary to the ICCPR, the requirement of 'necessity' is subject to objective criteria, the decisive criterion for evaluating whether this standard has been observed in a given case being proportionality. Every restriction thus requires a precise balancing between the right to freedom of movement and those interests to be protected by the restriction. Consequently, a restriction is 'necessary' when its severity and intensity are proportional to one of the purposes listed in this Article and when it is related to one of these purposes.[91]

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,[92] and the general recognition given to basic procedural rights and guarantees.[93]

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, it was estimated in 1999 that the costs of detaining some 24,000 individuals (asylum seekers and other immigrants) in the United States in 2001 would be over US$500 million.[94] Absent or inadequate representation can entail further costs for the host State; poor decisions are more likely to be overturned on appeal, while the process of case

paras. 23–30. See now the work of the Commission on Human Rights Working Group on Arbitrary Detention described below.

91 Nowak, *CCPR Commentary*, above n. 26, p. 211.

92 See *D.D. and D.N.* v. *Etat belge, Ministre de l'interieur et Ministre de la santé publique, de l'environnment et de l'intégration sociale*, Tribunal civil (Réf.) Bruxelles, 25 Nov. 1993, No. 56.865, in which the court found the detention of an asylum seeker and her newborn 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, p. 604. See also, 1989 Convention on the Rights of the Child, UNGA Res. 44/25, 20 Dec. 1989.

93 Cf. *United States Diplomatic and Consular Staff in Tehran*, where the International Court of Justice observed that, '[w]rongfully 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 Reports 1980, p. 3 at p. 42, para. 91.

94 Lawyers Committee for Human Rights, 'Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act', Aug. 1999, pp. 1 and 15, at http://www.lchr.org/refugee/behindbars.htm.

management is often needlessly prolonged by unreliable procedures at the front end.[95]

B. International standards

1. *Executive Committee/UNHCR*

The detention of refugees and asylum seekers was fully considered by the UNHCR Executive Committee at its 37th session in 1986. The sessional Working Group reached consensus, and its report and conclusions were presented to and adopted by the Executive Committee.[96] Although not as progressive as some had hoped,[97] 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

> [*i*]*f 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.[98]

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

95 See also Amnesty International, 'United States of America: Lost in the Labyrinth: Detention of Asylum-Seekers', Report, AMR51/51/99, Sept. 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.

96 'Report of the 37th Session (1986)', UN doc. A/AC.96/688, para. 128.

97 See L. Takkenberg, 'Detention and Other Restrictions of the Freedom of Movement of Refugees and Asylum Seekers: The European Perspective', in *Asylum Law and Practice in Europe and North America: A Comparative Analysis* (ed. J. Bhabha and G. Coll, Federal Publications, Washington DC, 1992), pp. 178 and 180–4.

98 Executive Committee Conclusion No. 44 (XXXVII) 1986, para. b (emphasis added). 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 32nd 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.

In 1998, the UNHCR Executive Committee stated that it

> [*d*]*eplores* 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.[99]

The following year, UNHCR issued its 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'.[100] 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.[101] 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.[102]

When detained, asylum seekers should benefit from fundamental procedural safeguards, including: prompt and full advice of the detention decision and the reasons for it, in a language and in terms which they understand; 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

99 Executive Committee, Conclusion No. 85 on International Protection (XLIX) 1998.

100 UNHCR, 'Revised Guidelines', above n. 53.

101 Ibid., Guideline 4: Alternatives to Detention. See also, Amnesty International, 'Alternatives to Mandatory Detention – Refugee Factsheet', July 2001, which points out that alternative models of detention aim to: (1) lower the curbs on personal liberty of asylum seekers; (2) limit the duration in detention; (3) ensure support services to respond to the special needs of asylum seekers; and (4) train government and detention system staff to recognize the problems that asylum seekers face.

102 See A. C. Helton, 'The Detention of Refugees and Asylum-Seekers: A Misguided Threat to Refuge Protection', in *Refugees and International Relations* (eds. G. Loescher and L. Monahan, Oxford University Press, 1989), p. 135 at p. 137: '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.'

constitute an obstacle to the effective pursuit of an application for asylum or refugee status.

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 respectful of the inherent dignity of the person.[103]

As indicated above, 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 entry 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.

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 Convention, under which States Parties undertake to cooperate with UNHCR, only a few countries have any regular procedure for informing the local UNHCR office of cases of detained refugees and asylum seekers.

2. *Further development of international standards*

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.[104] In particular, it emphasized that every detention decision should be open to *periodic review*,

103 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, pp. 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 Jan. 1999.

104 *A.* v. *Australia*, Communication No. 560/1993, Human Rights Committee, 3 April 1997.

so that the *justifying grounds* can be assessed.[105] Detention should not continue beyond the period for which it can be objectively justified. The Committee noted that:

> 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.[106]

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

> [b]y stipulating that the court must have the power to order release 'if the detention is *not lawful*', article 9, paragraph 4, [of the ICCPR] 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*.[107]

The Commission on Human Rights has had the question of detention under review for some years.[108] 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[109] 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'.[110]

105 Cf. *R.* v. *Special Adjudicator, ex parte B.*, Divisional Court, United Kingdom, 17 Sept. 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.

106 *A.* v. *Australia*, above n. 104, para. 9.4 (emphasis added).

107 Ibid., para. 9.5 (emphasis added).

108 The prohibition on the arbitrary arrest or detention of non-nationals has been re-affirmed in Art. 5 of the 1985 UN Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, above n. 89. See also the 'UN Standard Minimum Rules for the Treatment of Prisoners', Economic and Social Council Res. 663 C (XXIV), 31 July 1957 and 2076 (LXII), 13 May 1977; the 'Code of Conduct of Law Enforcement Officials', UNGA Res. 34/169, 17 Dec. 1979; 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', UNGA Res. 37/194, 18 Dec. 1982, all available on http://www.unhchr.ch/html/intlinst.htm.

109 UNGA Res. 217 A (III), 10 Dec. 1948.

110 Commission on Human Rights, UN doc. E/CN.4/RES/1997/50, 15 April 1997. See also, 'Report of the Working Group', UN docs. E/CN.4/1998/44, 19 Dec. 1997; E/CN.4/RES/1998/41, 17 April 1998.

In December 1998, the Working Group set out criteria for determining whether or not custody is arbitrary,[111] and in the following year it adopted Deliberation No. 5, developing those guidelines.[112] 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 characterized 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.

In principle, therefore, the power of the State to detain must be related to a recognized 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.

International law also governs the conditions of detention, and minimum standards have been recommended by the Executive Committee and UNHCR.[113]

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.

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.

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

111 'Report of the Working Group', UN doc. E/CN.4/1999/63, 18 Dec. 1999, para. 69 (fourteen guarantees).

112 UN doc. E/CN.4/2000/4, 28 Dec. 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.

113 See Executive Committee, Conclusion No. 22 (XXXII) 1981, 'Protection of Asylum Seekers in Situations of Large-Scale Influx'; UNHCR, 'Revised Guidelines', above n. 53, Guideline 10, 'Conditions of Detention'. See also Human Rights and Equal Opportunity Commission, Australia, 'Immigration Detention Guidelines', March 2000; European Council on Refugees and Exiles, 'Position Paper on the Detention of Asylum Seekers', April 1996, available on http://www.ecre.org/positions/detain.shtml.

community of States, working together with UNHCR, to contribute to the solution of refugee problems thereby removing any basis for continued detention.

Limitations in respect of detention need not mean that States are therefore powerless to manage population movements, but the possibilities for international cooperation in this field remain relatively unexplored. Repressive measures concentrated on refugees and asylum seekers are generally inappropriate, however, 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 measures concentrated on individuals contribute little if anything to the ultimate objective, which is solutions.

C. Incorporation or adoption of standards in national law

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. 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.

For example, in *Zadvydas* v. *Immigration and Naturalization Service*,[114] the United States 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 happen, 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. 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. In United States constitutional terms, that liberty interest was strong enough to raise a serious constitutional problem with the notion of indefinite detention.

114 US Supreme Court, Case No. 99-7791, 28 June 2001.

In New Zealand, the High Court has addressed the question of the detention of asylum seekers in relation to a 2001 instruction providing for the detention of all unauthorized arrivals. It took the view that in order to conform to Article 31(2), powers to detain refugees must be constrained by what is 'necessary', as set out in that paragraph.[115] Baragwanath J defined such necessity as 'the minimum required, on the facts as they appear to the immigration officer: (1) to allow the Refugee Status Branch to be able to perform their functions; (2) to avoid real risk of criminal offending; (3) to avoid real risk of absconding'. He emphasized, however, that the Refugee Status Branch was required 'to act in a manner that is consistent with New Zealand's obligations under the Refugee Convention' and noted that it 'would therefore be unusual that detention, which by Article 31.2 must be limited to what is "necessary", could be "necessary" to facilitate the work of the Refugee Status Branch'.[116] Discretion to detain, he added, 'is not exercised once and for all but is "iterative": if the decision is to detain, that decision must be kept under constant review with the necessity test continuously reapplied as evidence emerges'.[117]

In *Minister for Immigration and Multicultural Affairs* v. *Vadarlis*,[118] however, a majority of the Federal Court of Australia held that actions of the 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 were 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 those rescued and to determine whether all or any of them were entitled to refugee status.

Applications were filed claiming, among others, that those 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. On appeal, French J held that there was no 'restraint' attributable to the Australian Government 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'.

115 *Refugee Council of New Zealand Inc. and the Human Rights Foundation of Aotearoa New Zealand Inc. and D.* v. *Attorney-General*, Case No. M1881-AS01, interim judgment of 31 May 2002 and supplementary judgment of 27 June 2002.

116 Ibid., supplementary judgment, paras. 125–6.

117 Ibid., supplementary judgment, para. 203.

118 See above n. 65.

> 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.

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). Furthermore, 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). In his opinion, 'viewed as a practical, realistic matter, the rescued people were unable to leave the ship that rescued them' (paragraph 80). Moreover, whether the Australian Government 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'.

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 remained in the custody of the Australian State.

VII. Conclusions regarding Article 31(2)

In summary, the following conclusions regarding Article 31(2) can be drawn:

1. Article 14 of the Universal Declaration of Human Rights declares the right of everyone to seek asylum from persecution, and 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 of imposing 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.

2. For the purposes of Article 31(2), there is no distinction between restrictions on movement ordered or applied administratively, and those ordered or applied judicially. The power of the State to impose a restriction, including detention, must be related to a recognized object or purpose, and there must be a reasonable relationship of proportionality between the end and the means.
3. The purpose of restrictions on freedom of movement in the refugee context may differ, depending on whether States face a mass influx or are dealing with asylum seekers in individual asylum systems. Restrictions on movement must not be imposed unlawfully and arbitrarily, but should be necessary and be applied only on an individual basis on grounds prescribed by law and in accordance with international human rights law.
4. The detention of refugees and asylum seekers is an exceptional measure; as such, it should be applied on an individual basis, where it has been determined by the appropriate authority to be necessary in light of the circumstances of the case, on the basis of criteria established by law, in accordance with international refugee and human rights law.
5. Entry in search of refuge and protection should not be considered an unlawful act; refugees ought not to be penalized solely by reason of such entry, or because, in need of refuge and protection, they remain illegally in a country.
6. 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.
7. The balance of interests requires that alternatives to detention should always 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.
8. In addition, mechanisms including reporting and residency requirements, the provision of a guarantor or security deposits or bonds, community supervision, or open centres with hostel-like accommodation already in use in many States, should be more fully explored, including with the involvement of civil society.
9. Taking account of the principle of the best interests of the child, States should not generally detain asylum-seeking children, since it affects them both emotionally and developmentally. Appropriate alternatives to detention such as guarantor requirements, supervised group accommodation,

or quality extra-familial care services through fostering or residential care arrangements, should be fully explored.

10. Initial periods of administrative detention for the purposes of identifying refugees and asylum seekers and of establishing their claim to asylum should be minimized. In particular, detention should not be extended for the purposes of punishment, or maintained where refugee status procedures are protracted.
11. Apart from such initial periods of detention, refugees and asylum seekers should not be detained unless *necessary* for the reasons outlined in Executive Committee Conclusion No. 44, in particular for the protection of national security and public order (e.g. risk of absconding).
12. The rules and standards of international law and the responsibilities of the State apply also within airports and other international or transit zones.
13. Procedures for the determination of asylum or 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.
14. 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 UNHCR. 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.
15. Any detention should be limited to a period reasonably necessary to bring about the purpose for which the refugee or asylum seeker has been detained, taking into account the State's international legal obligations in regard to standards of treatment, including the prohibition on cruel, inhuman or degrading treatment, the special protection due to the family and to children (e.g. under the Convention on the Rights of the Child), and the general recognition given to basic procedural rights and guarantees.
16. In no case should refugees or asylum seekers be detained for any reason of deterrence.
17. Refugees and asylum seekers should not be detained on the ground of their national, ethnic, racial, or religious origins.
18. 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 or facilities where their physical safety and well-being are endangered; the use of prisons should be

avoided. Civil society should be involved in monitoring the conditions of detention.

19. Minors, women, stateless persons, and other vulnerable groups of refugees and asylum seekers should benefit from the UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers. Families and children, in particular, should be treated in accordance with international standards, and children under eighteen ought never to be detained. Families should in principle not be detained; where this is the case, they should not be separated.
20. 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 cooperation between States and a readiness to share the responsibilities.

Annex 3.1 Incorporation of Article 31 of the 1951 Convention into municipal law: selected legislation[119]

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

119 Sources: UNHCR *RefWorld* (CD-ROM, 8th edn, 1999); and other primary sources.

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 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 [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

Immigration and Refugee Protection Act
Royal Assent: 1 November 2001[120]

Division 6: Detention and release
Immigration Division
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 permanent resident or 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 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

120 Full text available on http://www.parl.gc.ca/PDF/37/1/parlbus/chambus/house/bills/government/C-11.4.pdf.

admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2); 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 permanent resident or 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 permanent resident or the foreign national is inadmissible on grounds of security or for violating human or international rights.

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

Release – Officer

56. An officer may order the release from detention of a permanent resident or 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. The officer may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer considers necessary.

Review of detention

57. (1) Within 48 hours after a permanent resident or 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 permanent resident or the foreign national before the Immigration Division or to a place specified by it.

Release – Immigration Division

58 (1) The Immigration Division shall order the release of a permanent resident or 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, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);

(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 the identity of the foreign national 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 permanent resident or a foreign national if it is satisfied that the permanent resident or the foreign national is the subject of an examination or an admissibility hearing or is subject to a removal order and that the permanent resident or the foreign national is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

(3) If the Immigration Division orders the release of a permanent resident or a foreign national, it may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.

...

Minor children

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 including the best interests of the child.

Regulations

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, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

(2) A person who contravenes subsection (1) with respect to 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) with respect to a group of 10 persons or more 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.

(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 – trafficking in persons

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 their recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons.

Disembarking persons at sea

119. A person 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) 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 part of a pattern of criminal activity planned and 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
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

(a) 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 in association 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.

...

Counselling misrepresentation

126. Every person who knowingly counsels, induces, aids or abets or attempts to counsel, induce, aid or abet any person to 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 is guilty of an offence.

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 person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section[s] 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.

Defence – Incorporation by reference

134. No person may be found guilty of an offence or subjected to a penalty for the contravention of a provision of a regulation that incorporates material by reference, unless it is proved that, at the time of the alleged contravention,

(a) the material was reasonably accessible to the person;
(b) reasonable steps had been taken to ensure that the material was accessible to persons likely to be affected by the regulation; or

(c) the material had been published in the Canada Gazette.

4. Finland

Aliens' Act (378/91)
Date of entry into force: 1 March 1991.
Note: This is an unofficial consolidated translation. The Act, No. 378/1991, was passed in Helsinki on 22 February 1991. The amendments included here are the following Acts on Amending the Aliens' Act, Nos. 639/1993, 28 June 1993; 640/1993, 28 June 1993; 154/1995, 3 February 1995; 606/1997, 19 June 1997; 1183/1997, 31 October 1997; and 1269/1997, 19 December 1997.

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 considered pardonable, taking into account the circumstances leading to the crime and the intent of the perpetrator. In assessing the 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 (PNDCL 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 refugee status.

6. Lesotho

Refugee Act 1983
Date of entry into force: 15 January 1985.
Note: This is the official text as published in Supplement No. 6 to Gazette No. 58, 9 December 1983. The date of entry into force was fixed by the Minister of the Interior in the Refugee Act 1983 (Commencement) Notice, published in Supplement No. 3 to Gazette No. 14, 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 recognised 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: 8 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 a 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.

Directive of 4 December 1986: General principles to be observed in according refugee status
Note: This is an unofficial translation.

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/Law on Asylum
Date of entry into force: 1 March 1988.

Article 23(3)
Whoever takes refuge in Switzerland is not punishable if the manner and the seriousness of the persecution to which he is exposed justifies illegal crossing of the frontier; whoever assists him is equally not punishable if his motives are honourable. [Translation]

12. Turkmenistan

Law on Refugees 1997
Date of entry into force: 6 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 refugee's rights
A refugee is free from the responsibility for the illegal entry or illegal stay in the territory of Turkmenistan, if, on arriving directly 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 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 Asylum Act 1999
Date of enactment: 11 November 1999

Section 31 Defences based on Article 31(1) of the Refugee Convention
(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 [Immigration] 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

8 Code of Federal Regulations[121]
8 USC 1101, 1103, and 1324c; Pub. L. 101-410, 104 Stat. 890, as amended by Pub. L. 104-34, 110 Stat. 1321. Updated to 3 April 2002.

Section 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 [Immigration and Nationality] Act [as amended] may submit a signed, written complaint to the [Immigration and Naturalization] 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

121 Available on http://www.ins.usdoj.gov/graphics/lawsregs/8cfr.htm.

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 USC 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.

(3) 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.