4

Rights of Refugees Physically Present

This chapter addresses those rights that follow automatically and immediately from the simple fact of being a Convention refugee within the effective jurisdiction of a state party. These primary protection rights must continue to be respected throughout the duration of refugee status, with additional rights accruing once the asylum-seeker's presence is regularized, and again when a refugee is allowed to stay or reside in the asylum country.

Convention rights can obviously not be claimed until all the requirements of the Convention refugee definition are satisfied, including departure from one's own state.[1] But since refugee rights are defined to inhere by virtue of refugee status alone, they must be respected by state parties until and unless a negative determination of the refugee's claim to protection is rendered. This is because refugee status under the Convention arises from the nature of one's predicament rather than from a formal determination of status.[2] Refugee rights, however, remain inchoate until the refugee comes under the de jure or de facto jurisdiction of a state party to the Convention since the Convention binds particular state parties, each of which is required to meet obligations only within its own sphere of authority.[3]

Assuming that these two conditions are met, what rights ought refugees to be able to invoke as matters of basic entitlement, whether or not their status has

[1] "For the purposes of the present Convention, the term 'refugee' shall apply to any person who . . . *is outside the country of his nationality* and is unable or . . . is unwilling to avail himself of the protection of that country; or who, not having a nationality and *being outside the country of his former habitual residence* . . . is unable or . . . unwilling to return to it [emphasis added]": Convention relating to the Status of Refugees, 189 UNTS 2545 (UNTS 2545), done July 28, 1951, entered into force Apr. 22, 1954 (Refugee Convention), at Art. 1(A)(2). See generally J. Hathaway and M. Foster, *The Law of Refugee Status* (2014) (Hathaway and Foster, *Refugee Status*), at 17–90.

[2] "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": UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, re-issued 1992 and 2019) (UNHCR, *Handbook*), at 9. See Chapter 3.1 at note 28 ff.

[3] See Chapter 3.1.1 at note 56.

been formally assessed? While the extension of some rights can logically be delayed until a refugee's status has been regularized, for example by admission to a procedure for verification of refugee status, which refugee interests should be immediately and unconditionally recognized?

Six categories of rights inhere immediately upon accessing a state party's jurisdiction. First, persons who claim to be refugees are generally entitled to enter and remain in the territory of a state party until and unless they are found not to be Convention refugees. Second, they should not be arbitrarily detained or otherwise penalized for seeking protection. Third, it should be possible to meet essential security and economic subsistence needs while the host state takes whatever measures it deems necessary to verify their claim to Convention refugee status. Fourth, basic human dignity is to be respected, including by acknowledging property and related rights, preserving family unity, honoring freedom of thought, conscience, and religion, and providing primary education to refugee children. Fifth, authoritative documentation of identity and status in the host state should be made available. Sixth, asylum-seekers must have access to a meaningful remedy to enforce their rights, including to seek a remedy for breach of any of these primary protection rights.

4.1 Right to Enter and Remain in an Asylum State (*Non-refoulement*)

The most urgent need of refugees is to secure entry into a territory in which they are sheltered from the risk of being persecuted. This fundamental concern must somehow be reconciled to the fact that nearly all of the earth's territory is controlled or claimed by governments which, to a greater or lesser extent, restrict access by non-citizens. This clash of priorities has led to proposals to lease[4] or purchase[5] land from states on which to shelter refugees. There have even been attempts to establish internationally supervised sanctuaries for would-be refugees within the territory of their home states including, for example, a plea from Bangladesh in 2017 that the international community establish a "safe zone" for at-risk Rohingya inside Burma.[6] To date, however, limited international authority and resources have prevented these options from replacing entry into a foreign state as the most logical means to access

[4] E. Burton, "Leasing Rights: A New International Instrument for Protecting Refugees and Compensating Host Countries," (1987) 19(1) *Columbia Human Rights Law Review* 307.

[5] In 2015, two wealthy individuals proposed purchasing islands on which refugees could live: A. Taylor, "A Silicon Valley Mogul Wants to Solve the Global Refugee Crisis by Creating a New Country," *Washington Post*, July 23, 2015; CNN, "Egyptian Billionaire Offers to Buy Island for Refugees," Sept. 10, 2015.

[6] "The Solution Lies in Myanmar: Bangladesh Wants 'Safe Zones' set up to Protect Rohingya," *South China Morning Post*, Sept. 8, 2017.

safety.[7] The stakes are high: refugees denied admission to a foreign country are likely either to be returned to the risk of persecution in their home state, or to be thrown into perpetual "orbit" in search of a state willing to authorize entry.[8]

There are many historical cases which illustrate the potentially grave consequences of a failure to recognize this need of refugees to be able to enter another state. A particularly notorious example involved 907 German Jews who fled persecution in their homeland aboard the ocean liner *St. Louis*. After the Cuban government refused to recognize their entrance visas, these refugees were denied permission to land by every country in Latin America. The United States dispatched a gunboat to ensure that the *St. Louis* remained at a distance which prevented its passengers from swimming ashore. Canada argued that the passengers of the *St. Louis* were not a Canadian problem. As Abella and Troper observe, "the Jews of the *St. Louis* returned to Europe, where many would die in the gas chambers and crematoria of the Third Reich."[9]

Modern refugees may similarly face the **complete closure of borders**. In April 1991, Kurdish Iraqis fleeing reprisals following a failed uprising against Saddam Hussein confronted a closed border with Turkey, leaving them stranded and unprotected.[10] Both Zaïre and Tanzania at times simply closed their borders to refugees attempting to flee the brutal conflict for dominance between Hutus and Tutsis in northeastern Africa.[11] Macedonia admitted

[7] These regimes are effectively critiqued in B. Frelick, "Preventive Protection and the Right to Seek Asylum: A Preliminary Look at Bosnia and Croatia," (1992) 4(4) *International Journal of Refugee Law* 439; and A. Shacknove, "From Asylum to Containment," (1993) 5(4) *International Journal of Refugee Law* 516.

[8] See C. Pastore, *Refugees in Orbit: The Problem of Refugees Without a Country of Asylum* (1986).

[9] I. Abella and H. Troper, *None is Too Many: Canada and the Jews in Europe 1933–1948* (1992), at 64.

[10] "The reluctance to accommodate the Kurds was political rather than capacity-based, as evidenced by the willingness of the Turkish state to receive 350,000 Bulgarian Turks for permanent settlement in 1989": K. Long, "No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx," UNHCR Policy Development and Evaluation Service, June 2010 (Long, "Review of UNHCR's Response"), at [103].

[11] On August 19, 1994, Deputy Prime Minister Malumba Mbangula of Zaïre declared that no refugees would be allowed to cross from Rwanda into Zaïre. Immediately prior to his announcement, 120 refugees per minute had been crossing into Zaïre at the frontier post of Bakavu: "Le Zaïre ferme ses frontières aux réfugiés," *Le Monde*, Aug. 22, 1994, at 4. As some 50,000 refugees attempted to flee ethnic clashes in Burundi, the Tanzanian government officially closed its border with Burundi on March 31, 1995: US Agency for International Development, "Rwanda: Civil Strife/Displaced Persons Situation Report No. 4," Apr. 5, 1995, at 4. The Tanzanian Prime Minister told Parliament that "[t]he gravity of the situation, especially for those coming from Burundi and Rwanda, has made it inevitable for Tanzania to take appropriate security measures by closing her border with Burundi and Rwanda": Speech by the Prime Minister to the Parliament of Tanzania, June 15, 1999, at 5, on file at the library of the Oxford University Refugee Studies Centre. Tanzania's Foreign Minister reportedly told his Parliament that "[e]nough is enough. Let us tell the refugees

Kosovar refugees until the end of March 1999, at which time it commenced a policy of deliberately obstructing their entry.[12] Frustrated by international funding shortfalls and the continuing arrival of hundreds of thousands of Afghan refugees, Pakistan and Tajikistan closed their borders to Afghan arrivals in November 2000.[13] Kenya closed its border with Somalia in 2007, citing both national security concerns and the difficulties it faced hosting more than 200,000 refugees already within its territory.[14] Uzbekistan closed its borders after some 100,000 Kyrgyz refugees arrived over a four-day period.[15] Despite providing a haven for many refugees from Syria's civil war, the Jordanian government closed its borders to Palestinian refugees in 2012;[16] Syrian refugees more generally were blocked by Jordan from 2014, and by Lebanon and Turkey starting in 2015.[17] Following the warming of Cuba–United States relations in

that the time has come for them to return home, and no more should come": "Border Closure Triggers Debate," *Guardian*, July 19, 1995. See also Long, "Review of UNHCR's Response," at 25.

[12] Long, "Review of UNHCR's Response," at 33. [13] Ibid. at 43–44.

[14] "Kenyans Close Border with Somalia," *BBC*, Jan. 3, 2007. "Kenya's concerns about an Islamist threat were combined with more general security concerns about the porous nature of the 1,200 kilometre Kenya-Somali border and its effects on organized crime . . . Some observers, however, consider that other factors were also at play . . . Although ethnic Somali citizens constitute only a small percentage of Kenya's population, some observers believe that the concern to halt the flow of Somalis across the border is motivated by a fear of the growing size of the ethnic Somali population in Kenya as a whole": Long, "Review of UNHCR's Response," at [314]–[316].

[15] Stressing the need for humanitarian aid to cope with the numbers arriving, Deputy Prime Minister Abdullah Aripov stated that "[t]oday we will stop accepting refugees from the Kyrgyz side because we have no place to accommodate them and no capacity to cope with them . . . If we have the ability to help them and to treat them of course we will open the border": "Kyrgyzstan Violence: Uzbekistan Closes Border to Refugees," *Telegraph*, June 15, 2010.

[16] "In declaring the policy, Jordanian Prime Minister Abdullah Ensour argued that Palestinians from Syria should be allowed to return to their places of origin in Israel and Palestine . . . The head of Jordan's Royal Hashemite Court told Human Rights Watch in May 2013 that the influx of Palestinians would alter Jordan's demographic balance and potentially lead to instability. In accordance with this policy, Jordanian security forces turn away Palestinians from Syria at Jordan's borders, and seek to detain and deport back to Syria those who enter at unofficial border crossings using forged Syrian identity documents, or those who enter illegally via smuggling networks": Human Rights Watch, "Not Welcome: Jordan's Treatment of Palestinians Escaping Syria," Aug. 7, 2014.

[17] Human Rights Watch, "Jordan: Syrians Blocked, Stranded in Desert," June 3, 2015. Jordan fully closed its last remaining point of entry in June 2016 following a car bombing that killed six in the buffer zone that separated the two countries: R. Sweis, "Jordan Closes Border to Syrian Refugees After Suicide Car Bomb Kills 6," *New York Times*, June 21, 2016. "Lebanon ended its open-door policy for Syrians in January 2015 when it introduced new regulations requiring them to apply for difficult-to-obtain visas or a Lebanese sponsor before being admitted. And then in January 2016, the Turkish government began to require visas for Syrians arriving by land or sea, effectively cutting off Lebanon as a route to Europe. Other options are bleak. The heavily militarised and UN-patrolled border with Israel leads

late 2014,[18] Nicaragua closed its southern border to Cuban refugees traveling north;[19] within months both Costa Rica and Panama followed suit.[20] Macedonia, Serbia, Croatia, and Slovenia similarly closed their borders in a concerted effort to stem the flow of Syrian and other refugees into northern Europe via the "Balkan route."[21]

Barriers to entry can serve much the same end as complete border closures. During the apartheid era, South Africa erected a 3,000 volt electrified, razor-wire fence to prevent the entry of refugees from Mozambique.[22] Increased flows of refugees to Europe in 2016 led to the erection by Hungary of razor-wire fences along its borders, explicitly acknowledged to be a means of preventing the arrival of refugees.[23] France and the United Kingdom have

to the contested Golan Heights. Asylum seekers cannot cross. Iraq, particularly the semi-autonomous Kurdistan region, saw an influx of Syrian refugees in 2013. The borders are now mostly closed to asylum seekers": E. Vio, "No Way Out: How Syrians Are Struggling to Find an Exit," *IRIN News*, Mar. 10, 2016. See also Human Rights Watch, "Iraq/Jordan/Turkey: Syrians Blocked from Fleeing War," July 1, 2013.

[18] See The White House Office of the Press Secretary, Fact Sheet, Charting a New Course on Cuba, Dec. 17, 2014; G. Allen, "Cuban Immigrants Flow into the US, Fearing the Rules Will Change," *National Public Radio*, Dec. 29, 2015.

[19] The measure was reportedly in response to Costa Rica's issuance of transit visas to more than 1,000 Cubans detained at its border with Panama, a decision Nicaragua's government accused of "sparking a 'humanitarian crisis'": O. Rivas, "Nicaragua Closes Border to Cuban Migrants, Rebukes Costa Rica," *Reuters*, Nov. 15, 2015. However, the border closure also prevented the entry of refugees arriving from Africa: R. Reichard, "Nicaragua's Closed-Border Policy Keeps Thousands of African Migrants Stranded," *Latina*, Oct. 13, 2016.

[20] "In November, Nicaragua closed its borders to Cubans, creating a backlog of islanders in neighboring Costa Rica. That country ultimately shut its border to new arrivals in May, creating swelling numbers in Panama. In June, Panama shut down its southern border, forcing Colombia to address the issue": J. Wyss, "Colombia Denies Airlift for Cuban Migrants, to Begin Deportations," *Miami Herald*, Aug. 2, 2016.

[21] P. Kingsley, "Balkan Countries Shut Borders as Attention Turns to New Refugee Routes," *Guardian*, Mar. 9, 2016; see also "Europe Migrant Crisis: Balkans Route Shuts Down as EU–Turkey Deal Fails to Deter Asylum Seekers," *ABC*, Mar. 9, 2016. A year after the closure of the Balkan route, tens of thousands of refugees still traversed this route through Central Europe, and reports claimed that the closure had simply made the journey "more difficult, expensive, and brutal" without truly stemming the flow: A. Dernbach and D. Tagesspiegel, "Balkan Migration Route is 'Not Closed,'" *Euractiv*, Mar. 13, 2017.

[22] As of 1990, official statistics reported that ninety-four refugees had been killed trying to get through the fence: C. Nettleton, "Across the Fence of Fire," (1990) 78 *Refugees* 27, at 27–28. But observers report that the toll was likely much higher. "On the 9th of July 1988, while on a visit to the fence . . . a soldier on the border assured me that while patrolling the fence he used to find between 4–5 bodies per week (in the fence) which, if true, would then mean an average of 200 casualties per year on the southern section of the fence": South African Bishops' Conference, Bureau for Refugees, "The Snake of Fire: Memorandum on the Electric Fence between Mozambique and South Africa" (1989), at 2–3.

[23] Prime Minister Viktor Orbán was unequivocal about the purpose of the razor-wire fences along the border with Serbia, saying "[i]f it doesn't work with nice words, we'll have to stop them with force, and we will do so": "Hungary to Build Second Border Fence to Stop

installed a permanent concrete barrier along the port of Calais to deter asylum-seekers from reaching Britain.[24]

Perhaps most alarmingly, refugees have sometimes been fired upon in order to drive them away. Namibia imposed a dusk-to-dawn curfew – with soldiers being ordered to shoot violators – along a 450 km stretch of the Kavango river in late 2001. This effectively prevented Angolan refugees seeking to escape violence in that country's Cuando Cuban Province from being able to seek asylum, since Angolan government and UNITA patrols could be safely avoided only at night.[25] Syrians seeking protection have been attacked by Turkish border guards,[26] African refugees have been killed by Egyptian security forces as they attempted to cross into Israel,[27] and rubber bullets and five smoke canisters were fired by the Spanish Guardia Civil at refugees swimming to Ceuta from Morocco in 2015.[28]

Interdiction efforts are at times undertaken with a view to driving refugees back to their home country. The United States not only interdicted Haitians fleeing the murderous Cedrás dictatorship on the high seas, but forced the asylum-seekers to board its Coast Guard vessels, destroyed their boats, and delivered the refugee claimants directly into the arms of their

Refugees," *Al Jazeera*, Aug. 26, 2016. Parts of the southern border have been reinforced with electricity: M. Dunai, "Hungary Builds New High-tech Border Fence – With Few Migrants in Sight," *Reuters*, Mar. 2, 2017. The Hungarian action was moreover not firmly condemned by the European Union. In his letter of invitation to discuss the closure in an EU-wide summit, EU Council President Donald Tusk wrote that "[w]e will close the Western Balkans route, which was the main entry point for migrants with 880,000 entering in 2015 alone and 128,000 in the first two months of this year . . . This will mean an end to the so-called wave-through policy of migrants. It will not solve the crisis but it is a necessary pre-condition for a European consensus": E. Zalan, "EU Leaders to Declare Balkan Migrant Route Closed," *EU Observer*, Mar. 7, 2016.

[24] A. Breeden, "Britain and France to Begin Work on Wall Near Calais to Keep Migrants from Channel Tunnel," *New York Times*, Sept. 7, 2016.

[25] "Curfew Could Trap Angolan Refugees, says UNHCR," *UN Integrated Regional Information Networks*, Oct. 30, 2001.

[26] As reported by Human Rights Watch, "between the first week of March and April 17 [2016] . . . Turkish border guards shot dead three asylum seekers (one man, one woman, and a 15-year-old boy) and one smuggler; beat to death one smuggler; shot and injured eight asylum seekers, including three children, aged 3, 5, and 9; and severely assaulted six asylum seekers. Syrians living near the border also described the aftermaths of the shootings and beatings, including Turkish border guards firing at them as they tried to recover bodies at the border wall": Human Rights Watch, "Turkey: Border Guards Kill and Injure Asylum Seekers," May 10, 2016.

[27] Amnesty International, "Egypt: 'Enough is Enough', Says Amnesty on Border Killings," Press Release, Sept. 10, 2009; see also Human Rights Watch, "Sinai Perils: Risks to Migrants, Refugees, and Asylum Seekers in Egypt and Israel," Nov. 2008, at 34–38.

[28] A. Senante, "Spain/Morocco: A Tragedy at the Border," Feb. 6, 2015. The incident resulted in the recovery of "[f]ourteen corpses, . . . five in Spanish waters and nine in Moroccan waters": Human Rights Watch, "Spain: A Year On, No Justice for Migrant Deaths," Feb. 4, 2015.

persecutors.[29] While justified as an effort to counter illegal smuggling,[30] the United States continues to engage in interdiction and forcible repatriation of Haitian, Cuban, and other refugees in international waters,[31] conducting only a cursory review of protection needs onboard the interdicting ship.[32] The Thai, Malaysian, and Indonesian governments similarly used their naval forces to repel Rohingya refugees arriving by boat, many of whom were abandoned without food or water.[33] Australia also turns away refugees in international waters before they can reach its territory, though it does not normally return them directly to their country of origin.[34] It has, however, sometimes paid the crews of intercepted vessels to pilot their ships back to their place of embarkation.[35] Although Australia casts its increasingly

[29] Tang Thanh Trai Le, *International Academy of Comparative Law National Report for the United States* (1994), at 11. This was not the first attempt by the United States to exercise authority over asylum-seekers in international waters. In 1993, three boats carrying 659 Chinese asylum-seekers were intercepted by the United States in international waters off the coast of Mexico. Based on cursory Immigration and Naturalization Service and UNHCR screening, one person was accepted for protection in the United States, while the rest were handed over to Mexico for return to China: ibid. at 13.

[30] "Thousands of people try to enter [the United States] illegally every year by sea, many via highly dangerous and illegal smuggling operations ... The Coast Guard maintains its humanitarian responsibility to prevent the loss of life at sea, since the majority of migrant vessels are dangerously overloaded, unseaworthy or otherwise unsafe": US Coast Guard, "Enforcing Immigration Laws," www.gocoastguard.com/about-the-coast-guard/discover-our-roles-missions/migrant-interdiction, accessed Feb. 5, 2020.

[31] Response of US Coast Guard to Freedom of Information Act (FOIA) Request, June 15, 2017, https://migrantsatsea.files.wordpress.com/2017/06/2017–06-15_uscg-foia-rspns_amio-data-fy-1982_2017–02-01_2017-cgfo-02153.pdf, accessed Feb. 5, 2020.

[32] "The Obama Administration has continued high seas interdictions and cursory shipboard screening. Those found to have 'credible fears' are brought to Guantánamo where they undergo a refugee status determination without the benefit of legal representation. The few who are recognized as refugees are held at Guantánamo pending third country resettlement; they are not considered for resettlement to the United States": B. Frelick et al., "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants," Dec. 6, 2016 (Frelick, "Externalization").

[33] "In Search of a Regional Rohingya Solution," *IRIN News*, July 26, 2013; Human Rights Watch, "Southeast Asia: End Rohingya Boat Pushbacks," May 14, 2015.

[34] It was reported that over a sixteen-year period, "several thousand irregular migrants, mostly asylum seekers from Afghanistan, Iran, Iraq, Pakistan, and Sri Lanka, have arrived in Australia, usually travelling from Indonesia by boat with the aid of migrant smugglers": A. Schloenhardt and C. Craig, "Turning Back the Boats: Australia's Interdiction of Irregular Migrants at Sea," (2015) 27(4) *International Journal of Refugee Law* 536 (Schloenhardt and Craig, "Turning Back the Boats"), at 536. For a detailed description of Australia's turn-back operations, see generally ibid. at 536–558.

[35] "Beginning on 22 May, over the course of about nine days, Australian officials escorted the asylum-seekers' boat to Australian waters, paid the crew 32,000 USD, detained most of the passengers on an Australian ship, transferred all the passengers and crew into two small boats, and directed the crew to bring everyone back to Indonesia. The boat landed in Indonesia on 31 May. Indonesian officials took the asylum-seekers into immigration

militarized operations as life-saving rescue missions,[36] its policies are openly oriented toward the deterrence of those who would seek protection within its territory.[37]

Interdiction increasingly occurs on a bilateral or multilateral basis.[38] Under a series of agreements negotiated with the Gadhafi regime,[39] Italy worked with Libya to return boats to that country despite the well-documented human rights violations there;[40] Spain has concluded similar agreements with Senegal, Cabo Verde, and Mauritania.[41] The United States assists Mexico to intercept refugees traveling through its territory from Central American countries.[42] Funding and training were similarly provided by the US to Honduran law enforcement officials, who began intercepting national citizens attempting to cross the border into Guatemala.[43] The extent of US involvement has been

detention, and confined the crew to police custody": Amnesty International, "By Hook or By Crook: Australia's Abuse of Asylum-Seekers at Sea," Oct. 2015, at 14.

[36] R. Ryan, "Tony Abbott, Scott Morrison Announce New 'Regional Deterrence Framework' to Stop Asylum Seekers," *ABC News*, Aug. 23, 2013.

[37] Deterrence efforts include a government-sponsored video, translated into twelve languages, of the commander of Operation Sovereign Borders warning asylum-seekers that they "will not make Australia home" and that "the Australian government has introduced the toughest border protection measures ever": O. Laughland, "Angus Campbell Warns Asylum Seekers not to Travel to Australia by Boat," *Guardian*, Apr. 11, 2014. It has also published a digital graphic novel depicting refugees suffering medical problems in offshore detention facilities: O. Laughland, "Australian Government Targets Asylum Seekers with Graphic Campaign," *Guardian*, Feb. 11, 2014.

[38] Portions of the analysis that follows are drawn from T. Gammeltoft-Hansen and J. Hathaway, "*Non-refoulement* in a World of Cooperative Deterrence," (2015) 53(2) *Columbia Journal of Transnational Law* 235 (Gammeltoft-Hansen and Hathaway, "Cooperative Deterence"), at 251 ff.

[39] See generally M. Giuffré, "State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?" (2012) 24(4) *International Journal of Refugee Law* 692, at 700–703.

[40] Human Rights Watch, "Pushed Back Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers," Sept. 2009, at 23–26; see also UNHCR, "Press Release: UNHCR Deeply Concerned over Returns from Italy to Libya," May 7, 2009.

[41] N. Klein, "Assessing Australia's Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants," (2014) 15 *Melbourne Journal of International Law* 414, at 424.

[42] "Apprehensions of non-Mexican migrants along the southwestern border fell by 57 percent between October 2014 and April 2015 compared to the same months the previous year, from 162,700 to 70,400. As early as September 2014, when the number of Central Americans appearing at the US border decreased, US Secretary of Homeland Security Jeh Johnson issued a press release showing the statistical drop and saying that the US government is 'pleased that the Mexican government has itself taken a number of important steps to interdict the flow of illegal migrants from Central America bound for the United States'": Frelick, "Externalization."

[43] "In June of 2014, Honduran law enforcement units which had received funding and training from the US State Department's Bureau of International Narcotics and Law Enforcement (INL) 'launched an operation to intercept children and families attempting

substantial, including even the deployment of security officials as part of its effort to stem the flow of refugee children from Central American states.[44] In defending this initiative, Secretary of Homeland Security Jeh Johnson stressed that the "[US] message is clear to those who try to illegally cross our borders: you will be sent back home."[45]

The European Union has been especially active in establishing shared interdiction arrangements, including agreements with key Mediterranean and Eastern European states to combat "irregular" migration by the establishment or intensification of exit controls.[46] On a larger scale, the European Union has sought to deter the arrival of refugees by permitting its Frontex agency to disembark persons intercepted on the high seas in third countries.[47] Indeed, a NATO mission was tasked with "conduct[ing] reconnaissance, monitoring and surveillance of illegal crossings in the Aegean," including taking boats intercepted to Turkey without regard to *non-refoulement* obligations.[48] And under its controversial agreement with Turkey, the European

to cross the border from Honduras into Guatemala'. Three such Honduran units apparently collaborated on two tactical operations, Operation Rescue Angel and Operation Coyote. According to reports, all three units received equipment and special training from US Border Patrol, US Immigration and Customs Enforcement or other US migration control and law enforcement entities": ibid.

[44] "In direct response to the summer 2014 surge in unaccompanied Central Americans arriving at the US border, the US Department of Homeland Security (DHS) launched Operation Coyote, which it said was 'designed to stem the flow of illegal Central American migration.' The operation involved the deployment of DHS investigators to Mexico and Central America 'to share criminal intelligence with foreign partners and build capacity in human smuggling and human trafficking enforcement.' By the end of May 2015, this effort had resulted in 1,037 criminal arrests in Mexico and the region": ibid.

[45] "Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations," DHS Press Release, July 10, 2014.

[46] A. Adepoju et al., "Europe's Migration Agreements with Migrant Sending Countries in the Global South: A Critical Review," (2010) 48(3) *International Migration* 42; D. Lutterbeck, "Policing Migration in the Mediterranean," (2006) 11(1) *Mediterranean Politics* 59; I. Gatev, "Border Security in the Eastern Neighbourhood: Where Biopolitics and Geopolitics Meet," (2008) 13 *European Affairs Review* 97.

[47] See M. den Heijer, "How the Frontex Sea Borders Regulation Avoids the Hot Potatoes," and S. Keller, "New Rules on Frontex Operations at Sea," *LIBE Special*, April 2014 for an extensive critique of the deficiencies of Regulation No. 656/2014, May 15, 2014, intended to implement the standards set by the decision of *Hirsi Jamaa v. Italy*, (2012) 55 EHRR 21 (ECtHR [GC], Feb. 23, 2012) into Frontex operations.

[48] V. Moreno-Lax, "The Interdiction of Asylum Seekers at Sea: Law and (Mal)practice in Europe and Australia," Kaldor Centre for International Refugee Law Policy Brief 4, May 2017, at 3. Despite the Secretary-General's insistence that the mission was "not about stopping or pushing back refugee boats" (North Atlantic Treaty Organization, "NATO Defense Ministers Agree on NATO Support to Assist with the Refugee and Migrant Crisis," Feb. 11, 2016), he later clarified that "[i]n case of rescue at sea of persons coming via Turkey, they will be taken back to Turkey": J. Stoltenberg, "NATO and Europe's Refugee and Migrant Crisis," Feb. 26, 2016. Statements by British and German defense ministers

Union has similarly promised funding and other political concessions in exchange for Turkey's cooperation in preventing the onward transit through its territory of persons who might otherwise seek protection in Europe.[49]

In some cases, the destination country may actually engage in interdiction from within the territory of a cooperating state. Agreements have been signed to transport third-country authorities on European ships so that they can carry out interceptions inside the territorial waters of such states as Libya, Mauritania, and Senegal.[50] Immigration officials of the destination country may be deployed to assist authorities in countries of transit, as evidenced by Australia's network of Airline Immigration Officers (ALOs) in overseas airports.[51] In one extreme case, the United Kingdom actually attempted interdiction from within the state of origin, establishing a pre-clearance procedure at Prague Airport under which its immigration officers screened passengers bound for Britain deemed likely to seek refugee protection there. As was made clear in evidence considered by the House of Lords, a significant number of Roma seeking recognition of their refugee status were in fact deterred by this procedure.[52]

Even those who manage to cross an asylum state's border may still face **summary ejection** by officials. After the Andijan uprising in 2005, Kyrgyzstan

confirm this understanding: E. MacAskill and E. Graham-Harrison, "Nato Launches Naval Patrols to Return Migrants to Turkey," *Guardian*, Feb. 11, 2016.

[49] "Turkey will take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU, and will cooperate with neighbouring states as well as the EU to this effect": EU–Turkey Statement, Mar. 18, 2016, www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/#, accessed Feb. 5, 2020.

[50] T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (2011) (Gammeltoft-Hansen, *Access to Asylum*), at 126; D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (2009) (Guilfoyle, *Shipping Interdiction*), at 218; J. Rijpma, "Building Borders: The Regulatory Framework for the Management of the External Border of the European Union", doctoral dissertation, European University Institute, Florence, 2009. While relevant European Union guidelines make express reference to the importance of respect for the duty of *non-refoulement*, interdicted persons have in practice often been returned without any assessment of their protection needs: Gammeltoft-Hansen, *Access to Asylum*, at 126; see also Guilfoyle, *Shipping Interdiction*, at 218.

[51] "DIMIA has increased its Airline Liaison Officer network to seventeen, located at twelve (12) key hub international airports with direct flights to Australia and/or last ports of embarkation for inadmissible passengers to Australia: Bangkok, Denpasar, Hong Kong, Jakarta, Kuala Lumpur, Manila, Port Moresby, Mumbai, Nadi, Seoul, Singapore, and Taipei . . . The presence of ALOs at last ports of embarkation for travel to Australia deters the activities of people smugglers and persons of concern": Department of Immigration and Multicultural and Indigenous Affairs (Australia), "Submission to the Joint Committee of Public Accounts and Audit Review of Aviation Security in Australia," www.aph.gov.au, accessed Feb. 5, 2020, at [16], [19].

[52] *European Roma Rights Centre v. Immigration Officer at Prague Airport*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at [4], [92].

summarily returned Uzbek refugees, some of whom were previously recognized as refugees by UNHCR;[53] Ukraine followed suit in 2006, refusing to assess the well-documented risk of persecution they might face upon return.[54] Ugandan authorities lured more than 1,700 Rwandans, including refugees, into trucks under the guise of receiving food and information about how to pursue asylum appeals; once inside, the refugees were returned to the Rwandan border.[55] In 2015, Australian naval forces towed a boat carrying asylum-seekers back to Indonesia, despite the fact that the boat was already inside Australian territory near Christmas Island.[56] In the summer of 2017, Greek police intercepted asylum-seeking Turks attempting to escape President Erdoğan's campaign of persecution against critics and opponents. They were turned over to unidentified armed men who forcibly and violently removed them to the Turkish side of the border where the Turkish gendarmerie was waiting for them.[57]

Some such returns are in response to pressure from the country of origin itself. For instance, Tajikistan has requested the extradition of a number of political activists who sought protection in Russia, Moldova, and Belarus.[58]

[53] Organization for Security and Co-operation in Europe, "OSCE Chairman Criticizes Kyrgyzstan for Extraditions, Calls on Russian Authorities Not to Deport Refugees to Uzbekistan," Aug. 10, 2006. "For several years, the Uzbek government has pressured Kyrgyzstan and other countries in the region to force Uzbek refugees and asylum seekers to return to Uzbekistan. In some cases, the other countries have complied with extradition or deportation proceedings. In others . . . refugees are abducted, 'disappear,' and reappear in custody in Uzbekistan": Human Rights Watch, "Uzbekistan: Abducted Refugee on Trial," Feb. 5, 2009.

[54] N. Paton and W. Moscow, "UN Condemns Ukraine's Return of Asylum Seekers," *Guardian*, Feb. 17, 2006. "Uzbek authorities had been pressing the Kiev government for their return, alleging the men were involved in the uprising in Andijan last May in which human rights advocates say hundreds of civilians were killed by Uzbek security forces . . . In a written statement, State Department Deputy Spokesman Adam Ereli said the 10 Uzbeks were returned without passing through the full asylum process under Ukrainian law, including the ability to appeal their status": "US Condemns Ukraine for Returning Uzbek Asylum-Seekers," *Voice of America*, Oct. 31, 2009.

[55] "[W]itnesses to the operation said that no effort was made to distinguish among those forced onto the trucks, and that those sent back included individuals who had gained refugee status. The UN High Commissioner for Refugees issued a statement confirming that 'recognized refugees were among those returned'": Human Rights Watch, "Uganda/Rwanda: Halt Forced Returns of Refugees," July 17, 2010.

[56] M. Safi and B. Doherty, "Asylum Seeker Boat Towed Away After Coming within 200m of Christmas Island," *Guardian*, Nov. 20, 2015.

[57] Stockholm Center for Freedom, "Greece has Adopted Illegal Border Push-Back for Erdoğan Critics," June 4, 2017.

[58] "Tajiks fleeing persecution are wary of seeking protection in Russia and other CIS countries given the precedent of extra-judicial extraditions [and] the close cooperation between Russian and Tajik security services . . . In November 2014, [Tajikistan-born] Maksud Ibragimov – the leader of the Russian-based 'Youth of Tajikistan for Revival' organization – was stabbed outside his Moscow home before being arrested by Russian authorities and subsequently

China has issued a mix of ultimatums and promises to Cambodia, Kazakhstan, and Thailand to force them to repatriate Uighur refugees;[59] similar efforts have resulted in the return to China of Tibetans by Nepal.[60] China has permitted North Korean officials to enter its territory to repatriate refugees it deems "defectors."[61]

smuggled out of the country and back to Dushanbe in the baggage hold of an aircraft": Y. Matusevich, "The Quiet Tajik Refugee Crisis," *Diplomat*, Aug. 11, 2016.

[59] A. Wolman, "Chinese Pressure to Repatriate Asylum Seekers: An International Law Analysis," (2017) 29(1) *International Journal of Refugee Law* 84. For the most part, China relied on diplomatic pressure to procure the forced repatriation of Uighur refugees: M. Schiavenza, "Why Thailand Forced Uighurs to Return to China," *Atlantic*, July 12, 2015. But at least in the case of the repatriations from Cambodia and Thailand, China also sent government officials and charter planes to forcibly transport the refugees back to its territory: "Uighurs 'On Way to Jihad' Returned to China in Hoods," *Reuters*, July 11, 2015. Perhaps the most notorious "smoking gun" of Chinese tactics was the approval by China and Cambodia of fourteen investment deals, estimated at $1.2 billion, only two days after the expulsion of twenty Uighur refugees by the latter state: S. Mydans, "After Expelling Uighurs, Cambodia Approves Chinese Investments," *New York Times*, Dec. 21, 2009. Concessions offered to other allies included trade deals, training and financial assistance, and diplomatic support: "China to Neighbours: Send Us Your Uighurs," *Al Jazeera*, Feb. 16, 2015. Conversely, the decision by Turkey – which shares religious and linguistic ties with the ethnic minority – not to repatriate Uighurs in its territory earned it a rebuke from Beijing: "China Rebukes Turkey for Offer to Shelter Uighur Refugees," *Reuters*, Nov. 28, 2014.

[60] Human Rights Watch, "Under China's Shadow: Mistreatment of Tibetans in Nepal," Apr. 1, 2014, at 35–36. Such efforts are in violation of a decades-old agreement with UNHCR to facilitate the travel of Tibetans through Nepal to India; as communicated in a 2010 US embassy cable published by WikiLeaks, China "rewards [Nepalese forces] by providing financial incentives to officers who hand over Tibetans attempting to exit China." Another cable stated, "Beijing has asked Kathmandu to step up patrols . . . and make it more difficult for Tibetans to enter Nepal": J. Krakauer, "Why is Nepal Cracking Down on Tibetan Refugees?" *New Yorker*, Dec. 28, 2011. These and similar actions led the UN Human Rights Committee to call on Nepal to "guarantee access to its territory to all Tibetans who may have a valid refugee claim and refer them to the Office of the United Nations High Commissioner for Refugees": Human Rights Committee, Concluding Observations on the Second Periodic Report of Nepal, UN Doc. CCPR/C/NPL/CO/2, Apr. 15, 2014, at [14].

[61] "Since 1986, China has had a treaty arrangement with North Korea by which it agrees to return 'defectors'. Although for a number of years China informally tolerated the presence of North Koreans, in 1999 it began returning large numbers of them, claiming that they were not refugees but 'food migrants.' By 2004, China had removed at least 5,000 North Koreans, and was reported as permitting North Korean security forces periodically to enter China to abduct refugees": G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (2007) (Goodwin-Gill and McAdam, *Refugee in International Law*), at 231–232. More recently, "abduction teams consisting of North Korean [Ministry of State Security] agents and some Chinese Public Security officials are conducting large-scale operations in the border areas. The abduction teams are known to be monitoring persons of interest while staying at hotels or restaurants in the border areas and receiving information on the movements of defectors by paying bribes to Chinese Public Security agents": K. Young, "MSS Abduction Units Monitor North Korean Defectors in China," *Daily NK*, July 27,

The ejection of refugees has at times been a matter of formal policy, and truly massive in scope. Following Interior Minister Nduwimana's declaration in 2009 that newly arriving Rwandan nationals be "rapidly expelled" from the country, Burundian officials forcibly returned refugees to the border without regard to their protection claims.[62] When several thousand Tunisian nationals sought protection in Italy in the wake of the Arab Spring, Italian Foreign Minister Franco Frattini reportedly requested the EU's assistance in forming a blockade of Tunisian ports specifically for the purpose of "mobilis[ing] patrols and *refoulement*."[63] The result was joint sea and air patrols with France[64] and a repatriation agreement with Tunisia.[65] In 2015, Niger summarily removed thousands of Nigerian refugees in the wake of an attack on its forces by Boko Haram.[66] Later that year Venezuela's President Maduro declared a state of emergency and returned hundreds of Colombian refugees to their country of origin.[67] The following year, Algerian authorities forced hundreds of sub-Saharan asylum-seekers onto buses for forcible transport across its southern border.[68]

2017; see also D. Hurst, "South Korea Investigating 'Abduction' of North Korean Defector and TV Star," *Guardian*, July 19, 2017.

62 Human Rights Watch reports that some of the returned were falsely informed that UNHCR had determined they were not refugees: Human Rights Watch, "Burundi: Stop Deporting Rwandan Asylum Seekers," Dec. 2, 2009. "An official from Burundi's refugee agency, National Office for the Protection of Refugees and Stateless Persons (ONPRA), told Human Rights Watch that the decision was intended to prevent further influxes of Rwanda's 'peasant masses'": ibid.

63 J. Hooper, "Italy Seeks EU Help to Cope with Tunisian Influx," *Guardian*, Feb. 13, 2011.

64 R. Donadio, "France to Help Italy Block Tunisian Migrants," *New York Times*, Apr. 8, 2011.

65 "On 5 April 2011, Italy signed a technical agreement with Tunisia with the objective of strengthening border controls and facilitating the return of Tunisians who arrived to Italy. The Italian Government issued temporary residence permits for humanitarian reasons and travel documents to persons who arrived in Italy before 5 April 2011. For persons who arrived at Lampedusa after this date, the repatriation process was initiated. It is, however, not clear whether the asylum claims of all Tunisians and Libyans who arrived at Lampedusa after 5 April 2011 were duly considered and processed by the Italian authorities": M. Ineli-Ciger, "Has the Temporary Protection Directive Become Obsolete? An Examination of the Directive and its Lack of Implementation in View of the Recent Asylum Crisis in the Mediterranean," in C. Bauloz et al. eds., *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common Asylum System* 225 (2015), at 238.

66 C. Stein, "UNHCR Concerned as Niger Forces Out Nigerians," *Voice of America*, May 7, 2015; K. Sieff, "They Fled Boko Haram and Famine – And Then They Were Forced Back," *Washington Post*, June 28, 2017.

67 C. Kraul and M. Mogollon, "Venezuela Pushing Resident Colombian Nationals Back Across the Border," *Los Angeles Times*, Sept. 9, 2015. Those who were not deported "were forced to leave after Venezuelan authorities marked their homes with a 'D' for 'demolition'": G. Gupta, "Distraught Colombians Flee Venezuela as Border Dispute Intensifies," *Reuters*, Aug. 26, 2015.

68 Human Rights Watch, "Algeria: Stop Summary Deportations," Dec. 9, 2016. "[T]he authorities did not screen [those detained] to ascertain their situation or refugee status,

Ejections are sometimes carried out by non-state actors with the encouragement or toleration of authorities. One of the most notorious cases was the "push-back" order issued by the Thai Ministry of the Interior in 1988. The government rejected offers of support from the United States to build and operate camps to receive Vietnamese refugees, opting instead to deputize fishermen in Khlong Yai to prevent entry of any boats which might be carrying refugees – an order interpreted by fishermen "as a mandate to abuse defenceless boat people. Smugglers, fearing prosecution or vigilante attack, dumped their human cargo into the gulf."[69] When Liberian and Sierra Leonean refugees fled to Guinea in late 2000, President Lansana Conté encouraged citizens to form militia groups[70] with a view to forcing refugees to "go home."[71] Malaysia deputized a volunteer corps in 2005 to apprehend undocumented persons, with no effort made to distinguish those with claims to protection from migrants generally,[72] while Hungary more recently conscripted over 1,000 "border hunters"[73] specifically for the purpose of turning back refugees arriving at the border.

provide information about their rights, or allow them to contact the United Nations High Commissioner for Refugees or consular representatives of their country of origin": ibid.

69 A. Helton, "Asylum and Refugee Protection in Thailand," (1989) 1(1) *International Journal of Refugee Law* 20 (Helton, "Thailand"), at 27–30.

70 D. Farah, "For Refugees, Hazardous Haven in Guinea," *Washington Post*, Nov. 6, 2000, at A-24.

71 "Over 400 refugees arrived in Monrovia on 12 October following a two-day sea voyage. Many complained of being beaten and raped by Guineans": (2000) 80 *JRS Dispatches* (Oct. 16, 2000).

72 "In 2005, the government transformed a volunteer self-defense corps, created in the 1960s to guard against Communists, into a strike force deputized to hunt down illegal immigrants. This force, called Rela, now numbers nearly half a million mostly untrained volunteers – more than the total number of Malaysia's military and police in this nation of 27 million. Its leaders are armed and have the right to enter a home or search a person on the street without a warrant. By an official count, its uniformed volunteers carry out 30 to 40 raids a night": S. Mydans, "A Growing Source of Fear for Migrants in Malaysia," *New York Times*, Dec. 10, 2007. Human Rights Watch reports that, in carrying out their duties, Rela members "have failed to distinguish or deliberately ignored the distinctions between undocumented migrants, and refugees and asylum seekers": Human Rights Watch, "Malaysia: Disband Abusive Volunteer Corps," May 9, 2007.

73 "Recruits, who must be between 18 and 55 years old, are given training similar to police and learn other skills such as guarding a border fence, detaining large groups of migrants and tracking their paths ... Like police officers, border hunters will carry pistols with live ammunition, batons, pepper spray and handcuffs, and will also be equipped with night-vision goggles if needed": K. Than, "Hungary to Arm New 'Border Hunters' after Six-Month Crash Course," *Reuters*, Mar. 9, 2017. "There is no lack of interest in joining the new 'border-hunters' unit. But police officers admit privately that the name is part of the problem, as it attracts the wrong kind of applicant. Only 1,000 of the 2,700 people who applied from last August to January this year were accepted. Nearly 400 failed the psychology test": N. Thorpe, "Hungary Hits Snags with Squad to Stop Migrants," *BBC*, Feb. 15, 2017.

Beyond rejection at the border or being physically forced back to their country of origin, refugees may be subject to removal when **refused access to a procedure** to verify their refugee status. For example, Japan declined to consider the refugee claims of Chinese pro-democracy dissidents in the immediate post-Tiananmen era, and forced many of them back to China.[74] Malaysian police have waited outside the local UNHCR office to arrest and deport Indonesians waiting to make appointments to have their refugee status claims processed.[75] Spain has summarily classified refugees attempting to enter Ceuta and Melilla as "illegal immigrants" subject to removal, giving them no opportunity to apply for asylum.[76] Saudi Arabia has returned thousands of Somalis without affording them an opportunity to claim refugee status and denies UNHCR access to persons detained.[77] Israel delays the processing of protection claims by Eritrean and Sudanese nationals and recognizes nearly none of them as refugees, hoping effectively to discourage claimants sufficiently that they will leave the country.[78]

Refugees may also face removal because of **practical weaknesses in the operation of asylum systems**. The system itself may simply be unsound, as is the case in the United States where border guards play an often decisive role in the registration and adjudication of Central American asylum claims,[79] or in

[74] Asia Watch, "Japan: Harassment of Chinese Dissidents" (1990), at 1. "In a number of cases, the authorities refused to renew visas which were about to expire and individual Chinese students were told to return home, including some who had played a prominent part in the pro-democracy movement and who were clearly at risk of serious human rights violations in China": Amnesty International, "Japan: Inadequate Protection for Refugees and Asylum Seekers" (1993), at 8.

[75] "The UN High Commissioner for Refugees (UNHCR) has designated all Acehnese in Malaysia as 'persons of concern' and is issuing protection letters for those who are able to register at their Kuala Lumpur office. However, in August 2003 Malaysian police arrested almost 250 asylum seekers, many of them Acehnese, outside the UNHCR office in Kuala Lumpur. Fearing arrest and deportation, Acehnese refugees have since been reluctant to approach the UN agency to make an asylum claim or acquire a protection letter": Human Rights Watch, "Malaysia: Stop Deportations of Acehnese Refugees," Jan. 1, 2004.

[76] "Foreigners detected while 'illegally crossing' the Spanish–Moroccan border . . . may be automatically rejected to prevent their illegal entry into Spain, without going through the legal procedures, thus not being properly identified, not having the right to get legal advice or apply for asylum . . . [I]n practice it is impossible to respect human rights with these so called 'fast-track repatriations' (*devoluciones en caliente*). By not identifying the people crossing the border and proceeding to their rejection and return to Morocco, Spain is failing to fulfill its duties, as these people might be potential asylum applicants, victims of human trafficking or minors, whose lives might be at risk if returned to Morocco": Issues Without Borders, "Summary of the National Legislation on Refugees," Sept. 21, 2015; see also Amnesty International, "Spain: Two-pronged Assault Targets Rights and Freedoms of Spanish Citizens, Migrants and Refugees," Mar. 26, 2015.

[77] Human Rights Watch, "Saudi Arabia: 12,000 Somalis Expelled," Feb. 18, 2014.

[78] I. Lior, "Nearly 15,000 Asylum Requests Still Pending – Israel yet to Approve Single One in 2016," *Haaretz*, July 21, 2016.

[79] C. Long, "The Other Refugee Crisis, from Central America to the US," Sept. 21, 2015.

South Africa where officers sometimes demand bribes in exchange for swifter service or documentation.[80] The risk may also follow from failure of even a carefully designed procedure to take notice of the most accurate human rights data. In January 2002, for example, the UK government summarily deported members of opposition parties to Zimbabwe, relying on dated Home Office risk assessments rather than on updated Foreign Office warnings of a serious deterioration of conditions there.[81]

An especially serious operational risk can occur when refugees are forced to undergo **extraterritorial processing** in countries without the experience or resources reliably to assess refugee status and consequent duties of protection. As practiced by the United States with Jamaica and the Turks and Caicos Islands during the 1990s[82] and more recently by Australia with Nauru and Papua New Guinea,[83] such schemes entail the transfer of refugees to a third state that assumes primary or shared control of the status determination procedure.

Refugees may be forcibly returned even after their status is formally recognized. An especially pernicious tactic is the promotion of "**voluntary repatriation**" in circumstances that amount to a thinly disguised withdrawal of protection from refugees. In August 2002, for example, Rwanda not only allowed members of a Congolese rebel group backed by it to meet with refugees from the Democratic Republic of Congo in order to promote their return home, but advised the refugees that both camp services and the offer of

[80] V. Talane, "Corrupt Officials Make Life Tough for Refugees," *Corruption Watch*, June 27, 2014. "Almost a third of asylum seekers and refugees have to pay bribes for correct documentation violating the Refugees Act that stipulates that they are not required to pay any fees for documentation … Corruption is most pervasive at the office in Marabastad, Pretoria with over two-thirds of applicants experiencing graft. If you cannot pay, rejection is almost guaranteed. Over half of respondents at Marabastad experienced corruption while standing in queues and a third were denied entry to the office because they could not pay bribes": G. Parker, "Corruption Hurts Refugees in South Africa," *Voice of America*, July 28, 2015.

[81] "They were waiting for him at the airport, just as he feared. Gerald Mukwetiwa was still recovering from the eight-hour flight to Harare when British immigration officers handed him over to their Zimbabwean counterparts. But the airport officials were not what they seemed. They were members of Zimbabwe's feared Central Intelligence Organisation … [A]n *Observer* investigation has discovered that scores of members of opposition parties in Zimbabwe face being sent back to President Mugabe's regime with little regard for their safety": P. Harris and M. Bright, "Crisis in Zimbabwe: Special Investigation: They Flee Here for Safety but are Sent Back to Face Death," *Observer* (London), Jan. 13, 2002, at 8.

[82] A. Francis, "Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing," (2008) 20(2) *International Journal of Refugee Law* 273 (Francis, "Bringing Protection Home"), at 285–286.

[83] A. Liguori, "Some Observations on the Legal Responsibility of States and International Organizations in the Extraterritorial Processing of Asylum Claims," (2015) 25 *Italian Yearbook of International Law* 135 (Liguori, "Extraterritorial Processing"), at 153.

transportation home would soon be withdrawn from those who did not choose to repatriate.[84] Roma refugees from Kosovo similarly felt compelled to leave Macedonia after being denied basic sanitary facilities and services there.[85] Refugees International determined that Bangladesh, working in concert with UNHCR, was promoting the repatriation of Rohingya refugees from Bangladesh to Burma by "creat[ing] an environment in which protection for the Rohingya is virtually untenable ... Methods of coercion ... include a reduction in certain basic entitlements, including food, withholding of medical services or pharmaceuticals, forced relocation within camps to poorer housing, beatings, and, most commonly, threats of and actual jail sentences."[86] In seeking to persuade Afghan refugees to return to their country, Pakistani officials restricted the renewal of identification documents, extorted those whose documents had expired,[87] and closed Afghan refugee schools.[88] In 2011, Egyptian guards at the al-Shalal prison "beat 118 men, including 40 who already have refugee status, to force them to sign papers for their 'voluntary' return to Eritrea."[89] At times, the pressure to "choose" to go home may be less blunt, but nonetheless real. UNHCR has, for example, offered a $400 incentive to persuade Afghan refugees to go home from Pakistan.[90] Australia offered Rohingya, Somali, and Sudanese refugees detained at Manus Island the option to return home in exchange for a payment of up to A$10,000 – accompanied by a warning from Papua New

[84] US Committee for Refugees, "The Forced Repatriation of Congolese Refugees Living in Rwanda," Nov. 13, 2002. See also "Opening Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at the Fifty-Third Session of the Executive Committee of the High Commissioner's Programme," Sept. 30, 2002, at 4: "In Rwanda I remain concerned about the imposed return of Congolese refugees, and I have taken this up with the Rwandan government."

[85] (2003) 133 *JRS Dispatches* (May 30, 2003).

[86] Refugees International, "Lack of Protection Plagues Burma's Rohingya Refugees in Bangladesh," May 30, 2003.

[87] Human Rights Watch, "Pakistan Coercion, UN Complicity: The Mass Forced Return of Afghan Refugees," Feb. 13, 2017, at 3–4. "Before 2016, Pakistan renewed Afghans' refugee status for between 18 months and three years at a time. By extending refugee status for only 12 months or less after that time, and by refusing to re-issue refugees' expired cards after December 2015, Pakistani authorities increased the pressure to return ... Almost every Afghan interviewed for this report described how beginning in July 2016, Pakistani police repeatedly stopped and extorted from them between 100 and 3,000 rupees [US$1–US$30] each time. In many cases the police used the fact that refugees' Proof of Registration (PoR) cards had expired at the end of December 2015 as an excuse to demand money and threatened to confiscate their cards or deport them if they didn't pay": ibid. at 4, 15.

[88] Ibid. at 24–25.

[89] Human Rights Watch, "Egypt: Don't Deport Eritreans," Nov. 15, 2011.

[90] "For many, the June 2016 decision of UNHCR – under significant pressure from Pakistan seeking increased repatriation rates – to double its cash grant to returnees from US$200 to US $400 per person was a critical factor in persuading them to escape Pakistan's abuses": ibid. at 4.

Guinea that "police would be called in to force 'the movement of those who refuse to cooperate.'"[91]

The most sophisticated means of denying protection, however, is to avoid the arrival of refugees altogether by the adoption of relatively invisible ***non-entrée* policies**.[92] In essence, the goal of these mechanisms is to implement legal norms which have the effect of preventing refugees from even reaching the point of being able to present their case for protection to asylum state authorities.

The classic mechanism of *non-entrée* is to impose a **visa requirement** on the nationals of genuine refugee-producing countries, enforced by sanctions against any carrier that agrees to transport a person without a visa. Nationals of countries likely to produce refugees have long been required to obtain a visa before boarding a plane or otherwise coming to Canada.[93] Because a visa will not be issued for the purpose of seeking refugee protection, only those who lie about their intentions or secure forged documentation are able successfully to satisfy the inquiries of the transportation company employees who effectively administer Canadian law abroad.[94] In 2015, Ecuador reversed its policy of not requiring visas from Cuban nationals "in order to discourage the flow of people seeking to reach the United States."[95] Lebanon similarly sought to deter the arrival of Syrians by imposing a visa requirement, albeit only after it became host to more than 1

[91] B. Doherty, "'It's Simply Coercion': Manus Island, Immigration Policy and the Men with no Future," *Guardian*, Sept. 28, 2016. Incredibly, Australia repeated the offer to Rohingya refugees in September 2017 in the midst of a widely reported series of attacks on the Rohingya by Burmese authorities: O. Holmes and B. Doherty, "Australia Offers to Pay Rohingya Refugees to Return to Myanmar," *Guardian*, Sept. 18, 2017.

[92] *Non-entrée* is a term coined to describe the array of legalized policies adopted by states to stymie access by refugees to their territories. See J. Hathaway, "The Emerging Politics of *Non-entrée*," (1992) 91 *Refugees* 40 (Hathaway, "*Non-entrée*").

[93] "Imposing visa requirements on countries that generate refugees often results in substantial drops in asylum claims. In July 2009, for example, the Canadian government imposed visa requirements on Mexico and the Czech Republic, and was candid in its position that imposing such requirements would help stem refugee flows from these source countries. This move was widely criticized as an attempt to create 'obstacles in the path of people who genuinely have a fear of persecution in their country of origin.' Canada's imposition of visa requirements on the Czech Republic was also criticized as an attempt to dissuade Roma peoples of Czech nationality from seeking asylum in Canada, despite evidence of anti-Roma persecution in the Czech Republic. These 2009 visa requirements triggered a sharp decline in the number of asylum claims made from Mexico and the Czech Republic, so much so that Canada dropped in UNHCR's ranking of top refugee receiving countries": E. Arbel and A. Brenner, "Bordering on Failure: Canada–US Border Policy and the Politics of Refugee Exclusion," Nov. 2013, at 40–41.

[94] See generally E. Feller, "Carrier Sanctions and International Law," (1989) 1(1) *International Journal of Refugee Law* 48 (Feller, "Sanctions"); and Danish Refugee Council and Danish Center of Human Rights, "The Effect of Carrier Sanctions on the Asylum System" (1991).

[95] J. Hamre, "Cubans Protest New Ecuador Visa Regulation," *Reuters*, Nov. 27, 2015.

million Syrian refugees.[96] The European Union has adopted a sweeping visa control policy, with member states required to impose visas on the nationals of over 100 countries – including, for example, such refugee-producing countries as Afghanistan, Iraq, Somalia, Sudan, and Syria.[97]

A second mechanism of *non-entrée* is the deportation chain that can be set in motion by interstate arrangements to share responsibility for refugee protection. The "**first country of arrival**" principle purports to collectivize responsibility to protect refugees among a select group of participating states. The most important harmonization regime thus far established – that predicated on the Dublin Regulation in Europe[98] – generally assigns protective responsibility to the first partner state in which a given refugee arrives,[99] as does the agreement between the United States and Canada.[100] The risk of *refoulement* arises because these agreements assume, rather than require an investigation of, the partner state's ability and willingness to protect refugees.[101] While the Court of Justice of the European Union has recently insisted that refugees may not be returned to a foreseeable risk of *refoulement*,[102] its foundational jurisprudence requires evidence of a "systemic deficiency"[103] to forestall removal – clearly leaving open the risk of

[96] According to a spokesman for the General Security Directorate, the new rules were intended as "enhanced measures to exert 'control over Syrian refugee activities in Lebanon'": H. Haylor and S. Haidamous, "Syrian Refugees become Less Welcome in Lebanon, as New Entry Rules take Effect," *Washington Post*, Jan. 5, 2015.

[97] EU Reg. 2018/1806 of the European Parliament and of the Council listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Nov. 14, 2018), at Annex I.

[98] European Council Reg. EC 604/2013, June 26, 2013 (Dublin Regulation (recast)).

[99] This is subject to several criteria, such as prior authorization to travel or issues of family unity, provided for in the Regulation: Dublin Regulation (recast), at Arts. 7–15.

[100] Agreement between the Government of Canada and the Government of the United States for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, adopted Dec. 5, 2002, entered into force Dec. 29, 2004, US State Dept. No. 05-35, 2004 WL 3269854.

[101] The Inter-American Commission on Human Rights found Canada to be in breach of the duty of *non-refoulement* for having enacted a "direct back" process requiring asylum applicants entering Canada via the United States to go back to the United States to await refugee hearings in Canada. The Commission found that the process impermissibly presumed safety in the United States rather than being based on an individualized risk assessment: *John Doe et al. v. Canada*, Case 712.586, Report 78/11 (IAComHR, July 21, 2011).

[102] *CK et al. v. Republic of Slovenia*, Dec. No. C-578/16 PPU (CJEU, Feb. 16, 2017), at [44].

[103] *NS v. Secretary of State for the Home Department*, Dec. No. C-411/10 (CJEU, Dec. 21, 2011). In this decision, the Court observed – seemingly contrary to its own position taken in *CK et al. v. Republic of Slovenia*, Dec. No. C-578/16 PPU (CJEU, Feb. 16, 2017), at [44] – that "[t]he . . . argument that . . . only the existence of systemic flaws in the Member State responsible is capable of affecting the obligation to transfer an asylum seeker to that Member State is unfounded": ibid. at [91]. These cases are discussed in more detail at note 314.

individuated *refoulement.*[104] Worse still, the Canadian Federal Court of Appeal refused to invalidate the partnership agreement with the United States despite the fact that multiple breaches of international law, including several posing the risk of *refoulement*, had been identified at the trial court level.[105]

The "first country of arrival" principle has sometimes been informally invoked even in the less developed world. For example, persons seeking asylum in Kenya were told by UNHCR to go back to Uganda or Tanzania, through which some had already passed.[106] Ugandan officials, in turn, refused to consider the claims of Rwandan refugees previously present in Tanzania, even as Tanzania was threatening the refugees with forced repatriation to Rwanda.[107] South Africa ordered its border officials to turn back or detain refugees who traveled to that country via safe neighboring countries. Though

[104] As the UK Supreme Court pointedly observed, "[t]he presumption [of partner state respect for refugee rights] should not operate to stifle the presentation and consideration of evidence ... [regarding] the consequences of enforced return. Nor should it be required that, in order to rebut it, it must be shown, as a first and indispensable requirement, that there is a systemic deficiency in the procedure and reception conditions provided for the asylum seeker": *R (EM, Eritrea) v. Secretary of State for the Home Department*, [2014] UKSC 12 (UK SC, Feb. 19, 2014), at [41].

[105] *The Queen v. Canadian Council for Refugees*, [2008] FCA 229 (Can. FCA, June 27, 2008), reversing *Canadian Council for Refugees et al. v. The Queen*, [2007] FC 1262 (Can. FC, Nov. 29, 2007). The Federal Court of Appeal avoided substantive engagement with the allegations, basing its decision on the language of the enabling statute that required only that the Canadian government have considered the risk of *refoulement* before designating a state as a partner state, not that it have satisfied itself that in fact there was not a risk of *refoulement*. The US "asylum" system unlawfully circumscribes the beneficiary class by *inter alia* imposing a one-year cutoff for protection, barring recognition of those deemed to have failed to avail themselves of a protection opportunity before arriving in the US, requiring evidence of direct intent to persecute, and setting a sweeping category of excluded persons (beyond what Art. 1(F) of the Convention authorizes). The US "withholding" system does not respect the "well-founded fear" test for refugee status, but requires instead evidence of a "clear probability" of persecution. In the result, even the combination of the two systems does not comply with US responsibilities to grant all persons who are in fact Convention refugees protection against *refoulement* (much less the full range of rights set by Arts. 2–34 of the Convention). See generally D. Anker, *The Law of Asylum in the United States* (2018).

[106] (1999) 53 *JRS Dispatches* (July 16, 1999).

[107] "Ethnic Rwandese asylum-seekers entering [Uganda] from Tanzania are no longer recognised by this government, Minister for Disaster Preparedness Brg. Moses Ali has said. 'On advice of UNHCR, the government stopped recognising Rwandese asylum-seekers from Tanzania since they were already accessing international protection,' Ali said": "Government No Longer Recognises Rwanda Asylum-Seekers," *Monitor* (Kampala), Oct. 7, 2002.

that policy was ordered withdrawn when challenged in the High Court,[108] it has continued to be applied in practice.[109]

A related concept is the notion of a "**safe third country**," pursuant to which a person claiming refugee status may be sent to some other country deemed able and willing to protect refugees. The proliferation of various types of readmission arrangements, whether formal or ad hoc,[110] has facilitated the (often summary) return of third-country nationals to the states through which they have transited, many times without regard to rights obligations or track records in the receiving countries.[111] The European Union, for example, felt it appropriate to enter into an arrangement to force refugees back to Turkey – a country that has no legal obligation to protect modern refugees, and which itself has agreements to send refugees back to such countries as Syria, Pakistan, and Nigeria.[112] Italy brokered readmission with several North African states in

[108] "Department of Home Affairs Backs Down on Asylum Policy," *Business Day*, May 10, 2001. See e.g. *Katambayi and Lawyers for Human Rights v. Minister of Home Affairs et al.*, Dec. No. 02/5312 (SA HC, Witwatersrand Local Division, Mar. 24, 2002), in which the court intervened to stop the removal of a refugee claimant in transit at Johannesburg Airport, ordering the government "to allow [the applicant] to apply for asylum in South Africa."

[109] "In the following years, the Department has made repeated efforts to introduce the concepts, often referring to them as principles of international law, and, in practice, officials have used the concepts as a means to deny asylum seekers physical access at border posts and [Refugee Reception Centres], as well as a means to reject asylum seekers' claims to refugee status in status determination hearings": C. Johnson and S. Carciotto, "The State of the Asylum System in South Africa", in M. O'Sullivan and D. Stevens eds., *States, the Law and Access to Refugee Protection: Fortresses and Fairness* 167 (2017), at 176–177.

[110] More than 300 bilateral agreements linked to readmission have been concluded by European nations alone: J.-P. Cassarino, "A Reappraisal of the EU's Expanding Readmission System," (2014) 49(4) *The International Spectator* 130. Not all such agreements are formalized or instituted at a state level; instead, readmission policies are often given effect through police cooperation agreements, administrative arrangements, partnership agreements, and exchanges of letters and memoranda of understanding. As Mariagiulia Giuffré notes, these latter instruments "do not generally contain the same safeguards of readmission agreements, and are also not subjected to public scrutiny and monitoring": M. Giuffré, "Readmission Agreements and Refugee Rights: From a Critique to a Proposal," (2013) 32(3) *Refugee Survey Quarterly* 79 (Giuffré, "Readmission Agreements"), at 92.

[111] Such pacts also risk the direct return of refugees to their countries of origin. See e.g. "UN Envoy Says Russia–North Korea Deportation Pact puts Refugees at Risk," *Reuters*, Nov. 26, 2015; J. Ryall, "After 20 Years On Run in Russia, North Korean Defector Facing Repatriation and 'Execution,'" *Telegraph*, Feb. 7, 2017.

[112] M. Rais, "European Union Readmission Agreements," (Jan. 2016) *Forced Migration Review*. Further countries for which Turkey has sought readmission agreements reportedly include Afghanistan, Algeria, Bangladesh, Burma, Cameroon, Eritrea, Ghana, Iran, Iraq, Morocco, the Republic of Congo, Somalia, Sudan, and Tunisia: E. Kart, "Turkey Seeks Readmission Deals with Iraq, Iran," *Hürriyet Daily News*, Apr. 12, 2016. Interestingly, to qualify as a "safe third country" under EU law there must be a determination that the destination country is prepared to consider the applicant's refugee claim, and will not expose the claimant to persecution, (generalized) risk of torture or related ill-

the wake of the Arab Spring.[113] Australia has been especially aggressive in entering into such arrangements with neighboring countries.[114] Those arriving by boat are relocated to Nauru and Papua New Guinea for external processing of claims,[115] forcing refugees already under Australian jurisdiction to accept the increased risk of *refoulement* that arises from extreme deficiencies in these partner states' asylum procedures.[116] Notably, the Australian variant of the "safe third country" rule, in contrast to that adopted by the European Union, requires no more than a bare bones assessment of the actual protection available in the destination country;[117] nor is the destination country limited

treatment, or *refoulement* – a standard that Turkey would seem unable to meet: Council Directive on common procedures for granting and withdrawing international protection (recast), Doc. 2013/32/EU, (June 26, 2013) (EU Procedures Directive (recast)), at Art. 38(1).

[113] Thousands of Tunisian and Egyptian nationals were hastily repatriated in 2011 pursuant to readmission agreements with Italy: Giuffré, "Readmission Agreements," at 90. See also Y. Maccanico, "The EU's Self-Interested Response to Unrest in North Africa: The Meaning of Treaties and Readmission Agreements between Italy and North African States," *Statewatch Analysis*, Dec. 2011.

[114] Such arrangements are often hastily reached and lack adequate safeguards. Agreements with the governments of Nauru and Papua New Guinea were criticized for the rushed fashion in which they were formed, which left little time for proper consideration or public comment, and for the inability of Australia to ensure the obligations were met under the 1951 Refugee Convention as well as other human rights treaties to which the receiving states were not party: A. Warbrooke, "Australia's 'Pacific Solution': Issues for the Pacific Islands," (2014) 1(2) *Asia and the Pacific Policy Studies* 337, at 338, 339–340. The Australia–Malaysia agreement was also criticized and ultimately rejected for its vague and non-binding nature, the inability of affected individuals to submit complaints to the monitoring bodies for treaties such as the International Covenant on Civil and Political Rights (to which Australia, but not Malaysia, was party), and the lack of means of enforcing the parties' obligations under the arrangement: T. Wood and J. McAdam, "Australian Asylum Policy All at Sea: An Analysis of *Plaintiff M70/2011 v. Minister for Immigration and Citizenship* and the Australia–Malaysia Arrangement," (2012) 61(1) *International and Comparative Law Quarterly* 274 (Wood and McAdam, "Australia–Malaysia Arrangement"), at 291–293.

[115] "Australia experimented with extraterritorial processing during two time periods, from 2001 to 2008 and again from 2012 onward, by outsourcing to Nauru and Papua New Guinea the examination of asylum claims of individuals, intercepting them before they reached Australia or sending them to offshore centres after initial identity and health screening in Australia . . . In most public interviews, Australian Government representatives denied any responsibility, affirming that '[the] regional processing centres are a matter for the Nauru and Papua New Guinea governments as these centres are located in their sovereign territory', and arguing that Australia 'does not have the "very high level" of effective control necessary to establish its jurisdiction over asylum seekers and refugees offshore'": Liguori, "Extraterritorial Processing," at 153.

[116] See e.g. Committee Against Torture, "Concluding Observations on the fourth and fifth periodic reports of Australia," UN Doc. CAT/C/AUS/4–5, Nov. 26, 2014, at [17].

[117] Australia sends intercepted refugees to "regional processing countries" pursuant to Section 198AB(1) of the Migration Act, which provides the authority to designate particular countries as such if "the Minister thinks that it is in the national interest" to do so.

to a state through which the applicant passed en route to Australia. It has been suggested that this inattention to risk is intentional, in that the Australian government "relied on Malaysia being perceived as an inhospitable host country for asylum seekers … 'to make sure that [it] sent the maximum message of deterrence.'"[118] The United States has recently emulated the Australian model, claiming the right to force refugee claimants to have their claims adjudicated in any of El Salvador, Guatemala, or Honduras, even if they have never passed through the designated country.[119]

A third variant of *non-entrée* is the designation of **safe countries of origin**, claimants from which are entitled to less than the usual consideration for refugee status. Canada's "designated country of origin" – struck down by the Federal Court in 2016[120] – gave truncated procedural rights to the nationals of some forty-two "designated countries of origin," including all but one EU member state as well as the United States and Mexico.[121] Other countries presume safety but with specific carve-outs; for example, the United Kingdom designates Gambia, Ghana, Kenya, Liberia, Malawi, Mali, Nigeria, and Sierra Leone as "safe" for men, but not for women.[122] The safe country of origin principle has been codified in European Union law, albeit with an explicit safeguard

In considering this interest, the Minister need only be satisfied that the country will not violate the duty of *non-refoulement* and that the applicant will be permitted the opportunity to prove his or her refugee status: Migration Act 1958, s. 198AB(1). As interpreted by the High Court, the designation of a country is "largely a political question," the resolution of which may be determined by reference to assurances provided by the receiving government and which do not require further evaluation as to whether such assurances would be fulfilled: see *Plaintiff S156/2013 v. Minister for Immigration and Border Protection*, [2014] HCA 22 (Aus. HC, June 18, 2014), at [40], [46]. For a historical account, see also Francis, "Bringing Protection Home," at 286–290.

118 Wood and McAdam, "Australia–Malaysia Arrangement," at 274.

119 M. Hackman and J. Montes, "Asylum Seekers at US Southern Border Can Now Be Sent to Guatemala Instead," *Wall Street Journal*, Nov. 19, 2019.

120 *YZ v. Canada*, [2016] 1 FCR 575, 2015 FC 892 (Can. FC, July 23, 2015). See text at note 352.

121 Immigration and Refugee Protection Act, SC 2001, s. 109.1(2)(a); see www.canada.ca/en/immigration-refugees-citizenship/services/refugees/claim-protection-inside-canada/apply/designated-countries-policy.html, accessed Feb. 5, 2020, for the historical list of "designated countries of origin." As originally conceived, the designation of a country as a DCO entailed "a shortened timeframe for submitting evidence; no right to appeal a negative decision, and no right to remain in Canada while the Federal Court processed a request for judicial review of an unreasonable/unjust IRB decision; a faster timeline for a removal order after a negative decision; and no access to a Pre-Removal Risk Assessment (PRRA) for the first 36 months after a negative decision": C. Costello, "Safe Country? Says Who?" (2016) 28(4) *International Journal of Refugee Law* 601 (Costello, "Safe Country?"), at 618.

122 Refugee Council, "Safe Country of Origin: United Kingdom," Asylum Information Database, available at www.asylumineurope.org/reports/country/united-kingdom/asylum-procedure/safe-country-concepts/safe-country-origin#footnote3_8kcrett, accessed Feb. 5, 2020. The UK previously designated Jamaica as "safe" except for lesbian or gay persons; this provision was struck down after a successful judicial challenge: ibid.

provision:[123] asylum states are entitled to assume that all nationals of listed countries are not refugees, though applicants must be allowed to attempt to rebut the presumption that their claims are unfounded in the context of an accelerated procedure.[124] But the safe country of origin rule applies as among European Union states in a significantly more aggressive way, since European Union law explicitly disqualifies all citizens of member states from recognition as refugees.[125] Thus, for example, at-risk members of the Roma community in EU states have no effective means of securing refugee status within Europe.[126] Indeed, even those fleeing most states neighboring the EU – including for example Belarus and Russia – may be denied access to EU state asylum systems on the basis of what has come to be known as the "super safe third country" system.[127]

[123] A high-profile decision by Sweden in 2001 to refuse protection to a US citizen on the grounds that the US was a "safe country" may have accounted for some of the pressure to constrain the applicability of the principle. The applicant was a justice of the peace who had campaigned to make US law enforcement officials more accountable, leading to vicious reprisals which authorities were apparently powerless either to prevent or redress. The Swedish decision that the claim was "manifestly unfounded" because the United States is "an internationally recognized democracy" was criticized by Members of the European Parliament, who observed "that his case raises serious questions about the EU's proposed common asylum policy": J. Henley, "Swedes Face Call for Asylum U-Turn," *Guardian*, June 21, 2001, at 14.

[124] EU Procedures Directive (recast), at Art. 37.

[125] "'Refugee' means a *third-country national* or a stateless person who fulfils the requirements of Article 2(d) of Directive 2011/95/EU [emphasis added]": EU Procedures Directive (recast), at Art. 2(g). Moreover, under the Protocol on Asylum for Nationals of Member States of the European Union, annexed to the Treaty establishing the European Community, OJ 1997 C340/1, at 103 (Nov. 10, 1997), it is agreed that "Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters." It is further agreed that asylum applications are only receivable from a European national where the European Council is engaged in action against the country of origin, where the country of origin has derogated from the European Convention on Human Rights, or with the exceptional consent of the destination country – though the European Council must be informed of such a decision, and the claim must in any event be treated as "manifestly unfounded." See discussion of this discriminatory denial of protection in Chapter 3.4 at note 566 ff.

[126] Nor is it an answer that free movement within the Union permits would-be refugees to seek protection elsewhere. As Stern notes, "[t]o regard the right of free movement of Union citizens and their families as an acceptable alternative to protection is deeply problematic on at least two counts. One is that the right to freedom of movement is in practice not accessible or correctly applied to all EU citizens, as illustrated by the much-criticised French expulsions in 2010 of Romanian and Bulgarian citizens of Roma origin. In addition . . . the right of residence for longer than 3 months is reserved for certain categories of migrants fulfilling certain conditions and thus not applicable to everyone without exception. The right to seek asylum as understood in international law, on the other hand, is not limited to a person's occupation or social status": R. Stern, "At a Crossroad? Reflections on the Right to Asylum for European Union Citizens," (2014) 33(2) *Refugee Survey Quarterly* 54, at 72–73.

[127] EU Procedures Directive (recast), at Art. 39(2) (requiring only that a "safe state" have ratified relevant refugee and human rights instruments and "ha[ve] in place an asylum

The determination to rely on *non-entrée* policies has reached new heights in recent years, with some states enacting **formal excision** policies that deem parts of their own territory to be "outside" their jurisdiction, hoping thereby to avoid protection responsibilities to persons present therein. A particularly insidious mechanism of *non-entrée* is the designation by some states of part of their airports, coastlines, or borders as a so-called "transit zone," in which neither domestic nor international law is said to apply. Hungary, for example, has summarily expelled or turned away persons in transit areas seeking recognition of their refugee status without any examination of their need for protection.[128] President Putin adopted a similar position when confronted with the presence of whistle-blower Edward Snowden in the "transit zone" of Moscow's Sheremetyevo Airport.[129] Even more creatively, the Australian government "excised" more than 3,500 of its islands from Australia's self-declared "migration zone" in 2001, declaring that it had no protection obligations to refugees arriving in an excised part of Australian territory.[130] The excision policy has since been expanded to exclude the entire mainland of Australia, with the result that refugees arriving by boat are routinely removed from areas of Australian jurisdiction to overseas detention facilities.[131]

procedure prescribed by law"). See generally C. Costello, *The Human Rights of Refugees and Migrants in European Law* (2016) (Costello, *Human Rights of Refugees*), at 254.

[128] M. Robinson and G. Szakacs, "Hungary's 'Transit' Zones Will Send Refugees on a U-Turn," *Reuters*, Sept. 9, 2015. According to one report on Hungarian practices, "[t]he official government position, as communicated in the press, is that asylum seekers admitted to the transit zone are on 'no man's land', and that persons who were admitted and later 'pushed back' in the direction of Serbia have never really entered the territory of Hungary. Consequently, such 'push backs' do not qualify as acts of forced return . . . [But] [t]he transit zone and the fence are on Hungarian territory and even those queuing in front of the transit zone's door are standing on Hungarian soil – as also evidenced by border stones clearly indicating the exact border between the two states": Hungarian Helsinki Committee, "Border Procedure (Border and Transit Zones): Hungary," Asylum Information Database, 2017.

[129] A. Arutunyan, K. Hjelmgaard, and Z. Coleman, "Putin Says Snowden is Not Technically in Russia," *USA Today*, June 25, 2013.

[130] Migration Act 1958, as amended, ss. 5(1) and 7. "Any person without a valid visa (an 'unlawful non-citizen'), who first reached Australian territory at 'an excised offshore place' by sea was classified as an 'offshore entry person.' The key consequence of the Act was that 'offshore entry persons' were prevented from applying for a visa under Australia's existing application process. 'Offshore entry persons' were also to be barred from access to existing independent administrative and judicial review of migration decisions. Crucially, 'offshore entry persons' could be transferred to third countries for processing and they were precluded from initiating legal proceedings against the government challenging their designation as 'unlawful non-citizens', their potential transfer offshore for processing and the lawfulness of detention": A. Vogl, "Over the Borderline: A Critical Inquiry into the Geography of Territorial Excision and the Securitisation of the Australian Border," (2015) 38(1) *University of New South Wales Law Journal* 114, at 124.

[131] Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013. In truth, provisions purporting to exclude territory from Australia's migration zone are

In sum, refugees face a broad array of practices and policies that may prevent them from entering and remaining in an asylum state. Some efforts are direct physical interventions that deny refugees access to a state's territory altogether, including complete closure of borders, the erection of barriers to entry, and interdiction efforts. Alternatively the risk may arise after a refugee has already arrived, including summary ejection, refusal of access to an assessment procedure, practical weaknesses in the operation of asylum systems, extraterritorial processing, and "voluntary" repatriation. A third set of *non-entrée* mechanisms excludes refugees in a less direct way, relying on legal or other formal norms or arrangements to insulate an asylum state from the arrival or continued presence of refugees by, for example, the imposition of a visa requirement, invocation of "first country of arrival," "safe third country," or "safe country of origin" concepts, or even by the formal excision of territory.

Refugee Convention, Art. 33 Prohibition of Expulsion or Return ("Refoulement")

1. **No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.**
2. **The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.**

Art. 33 of the Refugee Convention is the primary response of the international community to the need of refugees to enter and remain in an asylum state.[132]

"internationally incapable of excluding [the duty of *non-refoulement*] . . . As the 1969 Vienna Convention on the Law of Treaties (Article 27) expressly indicates, domestic legislation cannot be used to escape treaty obligations": Jean Pierre Fonteyne, "Skulduggery on the High Seas," *Canberra Times*, Sept. 11, 2001, at A-9. See also J. Phippen, "Australia's Controversial Migration Policy," *Atlantic*, Apr. 29, 2016.

[132] The ambiguous relationship between *non-refoulement* and a right of entry is clear from the remark of Justices McHugh and Gummow of the High Court of Australia that "[a]lthough none of the provisions in Chapter V [of the Refugee Convention] gives to refugees a right to enter the territory of a contracting state, in conjunction they provide some measure of protection": *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14 (Aus. HC, Apr. 11, 2002), per McHugh and Gummow JJ. Indeed, the duty of *non-refoulement* "preserves a subtle – and sometimes insecure – compromise between, on the one hand, the inescapable right of states to control access to their territory and, on the other, the imperious protection of refugees whose lives and liberty are threatened": V. Chetail, "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and

The duty of *non-refoulement* is not, however, the same as a right to asylum from persecution,[133] in at least two ways.

First and most critically, the duty of *non-refoulement* only prohibits measures that cause refugees to "be pushed back into the arms of their persecutors";[134] it does not affirmatively establish a duty on the part of states to receive refugees.[135] As an obligation "couched in negative terms,"[136] it constrains, but does not fundamentally challenge, the usual prerogative of states to regulate

Human Rights Law," in R. Rubio-Marín ed., *Human Rights and Immigration* 19 (2014) (Chetail, "Are Refugee Rights Human Rights?"), at 33. Importantly, however, *non-refoulement* adds critical value since the duty of non-expulsion does not include a duty of non-exclusion: International Law Commission, "Draft Articles on the Expulsion of Aliens," [2011] 2(2) *Yearbook of the International Law Commission*, at Art. 1, Comment 3.

[133] Interestingly, even the (non-binding) Universal Declaration of Human Rights provides only that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution" – a formulation which stops distinctly short of requiring states to grant asylum: Universal Declaration of Human Rights, UNGA Res. 217A(III), Dec. 10, 1948 (Universal Declaration), at Art. 14(1). Perhaps most tellingly, not even a vague formulation of this kind made its way into the (binding) Covenant on Civil and Political Rights. This treaty provides only that "[e]veryone shall be free to leave any country, including his own": International Covenant on Civil and Political Rights, 999 UNTS 172 (UNTS 14668), adopted Dec. 16, 1966, entered into force Mar. 23, 1976 (Civil and Political Covenant), at Art. 12(2). Yet given these provisions and the Refugee Convention itself, the House of Lords erred in observing that "a person has no right to live elsewhere than in his country of nationality, and has no right to claim asylum": *Januzi and Hamid v. Secretary of State for the Home Department*, [2006] UKHL 5 (UK HL, Feb. 15, 2006), at [6].

[134] Statement of Mr. Chance of Canada, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 7. In line with this understanding, the Court of Justice of the European Union determined that cognate duties under the European Convention on Human Rights "do[] not, however, imply a general duty for a Contracting State . . . to bring persons who are under the jurisdiction of another State within its own jurisdiction": *ND and NT v. Spain*, Dec. Nos. 8675/15 and 8697/15 (ECtHR, Feb. 13, 2020), at [221].

[135] Art. 33 was said to be "a negative duty forbidding the expulsion of any refugee to certain territories but [which] did not impose the obligation to allow a refugee to take up residence": Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 33. See E. Lauterpacht and D. Bethlehem, "The Scope and Content of the Principle of *Non-refoulement*," in E. Feller et al. eds., *Refugee Protection in International Law* 87 (Lauterpacht and Bethlehem, "*Non-refoulement*"), at [76]: "[T]he 1951 Convention and international law generally do not contain a right to asylum . . . [W]here States are not prepared to grant asylum to persons who have a well-founded fear of persecution, they must adopt a course of action which does not amount to *refoulement*. This may involve removal to a safe third country or some other solution such as temporary protection or refuge." The English Court of Appeal thus correctly observed that "the key prohibition against *refoulement* . . . app[lies] only to persons who are within the territory (or at least the control) of a contracting state, and there is no obligation on a contracting state to admit asylum seekers to its territory": *R (AB) v. Secretary of State for the Home Department*, [2018] EWCA Civ 383 (Eng. CA, Mar. 6, 2018), at [23].

[136] *M38/2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2003] FCAFC 131 (Aus. FFC, June 13, 2003). See also *NBMZ v. Minister for Immigration and Border Protection*, [2014] FCAFC 38 (Aus. FFC, Apr. 9, 2014), at [12], in which the Full

the entry into their territory of non-citizens.[137] State parties may therefore deny entry to refugees so long as there is no real chance that their refusal will result in the return of the refugee to face the risk of being persecuted.[138] This is so even if the refugee has not previously been recognized as a refugee by any other country.[139] But where there is a real risk that rejection will expose the refugee "in any manner whatsoever" to the risk of being persecuted for a Convention ground, Art. 33 amounts to a de facto duty to admit the refugee, since admission is normally the only means of avoiding the alternative, impermissible consequence of exposure to risk.[140]

Federal Court observed that Art. 33 "does not create a right to asylum, but it comprises a negative obligation to refrain from acts that would risk return to persecution." It was similarly observed in the Canadian Federal Court of Appeal that "Article 33 of the Refugee Convention . . . impose[s] a negative obligation not to *refoule*, not a positive obligation to receive potential claimants": *Her Majesty the Queen v. Canadian Council for Refugees et al.*, [2008] FCA 229 (Can. FCA, June 27, 2008), at [114], per Evans J. (concurring). But in a case contesting Belgium's refusal to issue a Syrian refugee family in Lebanon with a visa to come to Belgium in order to seek asylum, the Advocate General opined that the European Charter of Fundamental Rights "implies the existence of a positive obligation on the part of Member States, which must require them to issue a visa with limited territorial validity where there are substantial grounds to believe that the refusal to issue that document will have the direct consequence of exposing persons seeking international protection to torture or inhumane or degrading treatment": *X and X v. Belgium*, Case No. C-636/16 PPU (CJEU, Opinion of Advocate General Mengozzi, Feb. 7, 2017), at [3]. A Grand Chamber of the Court, however, decided the case on jurisdictional grounds without addressing the merits of the Advocate General's views: *X and X v. Belgium*, Case No. C-636/16 PPU (CJEU, Mar. 7, 2017).

137 "Apart from any limitations which may be imposed by specific treaties, states have been adamant in maintaining that the question of whether or not a right of entry should be afforded an individual, or to a group of individuals, is something which falls to each nation to resolve for itself": *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14 (Aus. HC, Apr. 11, 2002), per McHugh and Gummow JJ. This formulation was endorsed in *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at [19]. In practice, of course, "the right of a state to grant or refuse asylum shall be exercised in accordance with its duty of *non-refoulement*," meaning that "asylum is generally the only practical means to respect and ensure respect for Article 33": V. Chetail, *International Migration Law* (2019) (Chetail, *International Migration Law*), at 192.

138 In defining the relevant evidentiary standard for sending a refugee to another state in line with Art. 33, the Full Federal Court of Australia has helpfully insisted that the destination country must be one in which "the applicant will not face a *real chance* of persecution for a Convention reason," and that there is not "a *real chance* that the person might be refouled [from the state of immediate destination] to a country where there will be a *real risk* of persecution [emphasis added]": *V872/00A v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 185 (Aus. FFC, June 18, 2002).

139 *Rajendran v. Minister for Immigration and Multicultural Affairs*, (1998) 166 ALR 619 (Aus. FFC, Sept. 4, 1998).

140 "While the principle does not oblige States to grant refugees asylum, it ensures that such persons must be allowed to stay, even if denied asylum, unless they can be sent to a third country where they are safe from persecution and from being returned to the country of

The second critical distinction between *non-refoulement* and a right of asylum follows directly from the purely consequential nature of the implied duty to admit refugees under Art. 33. Because the right of entry that flows from the duty of *non-refoulement* is entirely a function of the existence of a risk of being persecuted, it does not compel a state to allow a refugee to remain in its territory if and when that risk has ended. Thus, "[r]efugee status is a temporary status for as long as the risk of persecution remains."[141] Indeed, as the High Court of Australia has observed, "[t]he term 'asylum' does not appear in the main body of the text of the [Refugee] Convention; the Convention does not impose an obligation upon contracting states to grant asylum or a right to settle in those states to refugees arriving at their borders."[142]

4.1.1 Beneficiaries of Protection

The original prohibition of *refoulement*, contained in the 1933 Convention, could be claimed only by "refugees who have been authorized to reside [in the state party] regularly."[143] In line with this precedent, the original drafts[144] of the duty of *non-refoulement* in the 1951 Refugee Convention extended protection only to refugees whose arrival was sanctioned by the asylum state. Yet both the Secretary-General's and French drafts of the Convention also contained an additional sub-paragraph not conditioned on authorized entry, providing for a duty "in any case not to turn back refugees to the

persecution": W. Kälin, M. Caroni, and L. Heim, "Article 33, para. 1," in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 1327 (2011) (Kälin, "Article 33, para. 1"), at 1335.

141 *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002), per Lord Scott.

142 *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14 (Aus. HC, Apr. 11, 2002), per McHugh and Gummow JJ. See also *Ruddock v. Vadarlis*, (2001) 110 FCR 491 (Aus. FFC, Sept. 18, 2001), at 521: "By Art. 33, a person who has established refugee status may not be expelled to a territory where his life and freedom would be threatened for a Convention reason. Again, there is no obligation on the coastal state to resettle in its own territory." Similarly, the European Court of Human Rights has insisted that "neither the [European Convention on Human Rights] nor its Protocols protect, as such, the right to asylum": *ND and NT v. Spain*, Dec. Nos. 8675/15 and 8697/15 (ECtHR, Feb. 13, 2020), at [188].

143 Convention relating to the International Status of Refugees, 159 LNTS 3663, done Oct. 28, 1933, entered into force June 13, 1935 (1933 Refugee Convention), at Art. 3.

144 The drafts prepared by both the Secretary-General and France that were before the Ad Hoc Committee on Statelessness and Related Problems in February 1950 accorded protection against *refoulement* only to refugees "who have been authorized to reside [in the state party] regularly": United Nations, "Proposal for a Draft Convention," UN Doc. E/AC.32/2, Jan. 17, 1950 (United Nations, "Draft Convention"), at 45 (draft Art. 24(1)); and France, "Proposal for a Draft Convention," UN Doc. E/AC.32/L.3, Jan. 17, 1950 (France, "Draft Convention"), at 9 (draft Art. 19(1)).

frontiers of their country of origin, or to territories where their life or freedom would be threatened."[145]

A non-governmental text submitted by the Agudas Israel World Organization was, however, selected over the two official drafts as the basis for this part of the work of the Ad Hoc Committee on Statelessness and Related Problems.[146] Under the Agudas approach as modified by the delegates, the distinct provisions addressing *non-refoulement* and non-return to the risk of persecution were collapsed into a single provision applicable to all refugees, with no mention of the need for authorized arrival.[147] This critical conceptual shift attracted no comment.[148] The drafting process thereafter proceeded on the assumption that prior permission to reside in the asylum state was not a relevant issue.[149] This decision to protect all refugees from the risk of

[145] United Nations, "Draft Convention," at 45 (draft Art. 24(3)); and France, "Draft Convention," at 9 (draft Art. 19(3)).

[146] UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 3. The representative of the United Kingdom argued that this text "presented the question of expulsion and non-admittance in a more logical form than did the others": ibid.

[147] "Each of the High Contracting Parties undertakes not to expel or to turn back refugees to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality or political opinions": UN Doc. E/AC.32/L.22, Feb. 1, 1950.

[148] Indeed, an exchange between the Venezuelan, French, and Canadian representatives makes clear that the provision was not to be limited to refugees lawfully admitted to residency. "The Chairman, speaking as the representative of Canada, said that his country was in a similar situation to that of Venezuela in that shiploads of emigrants were often landed far away from any port control authorities. The difficulties entailed by such practices were, however, very small compared with those facing European countries. That was why he wanted to achieve unanimity on article [33], which gave refugees the minimum guarantees to which they were entitled": Statement of Mr. Chance of Canada, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 22. Ben-Nun's analysis of the drafting history thus sensibly concludes "that in all probability, *non-refoulement* did indeed apply to refugees on the high seas, which had been a well-known phenomenon since the late 1930s": G. Ben-Nun, "The British-Jewish Roots of *Non-refoulement* and its True Meaning for the Drafters of the 1951 Refugee Convention," (2014) 28(1) *Journal of Refugee Studies* 93 (Ben-Nun, "British-Jewish Roots"), at 113.

[149] A Swiss protest that the article "concerned only refugees lawfully resident in a country and not those who applied for admission or entered the country without authorization" evoked an immediate answer from the Israeli representative that in fact "[t]he Swiss observer was apparently under a misapprehension with regard to the application of article [33]. In the discussions at the first session it had been agreed that article [33] referred both to refugees legally resident in a country and those who were granted asylum for humanitarian reasons. Apparently the Swiss Government was prepared to accept the provisions of the article with regard to lawfully resident refugees but not to those entering illegally and granted asylum. He feared that the Swiss Government might find its interpretation in conflict with the general feeling which had prevailed in the Committee when it had drafted the article": Statements of Mr. Schurch and Mr. Robinson, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 32–33. But see Kälin, "Article 33, para. 1," at 1341, contending that "[w]hether the prohibition of *refoulement* would apply to individual cases of refugees arriving at the border was not discussed."

refoulement is clearly of huge importance to most contemporary refugees, since they have generally not been authorized to travel to, much less to reside in, the state from which they request protection. Indeed, as the Full Federal Court of Australia insisted in the context of an Iranian refugee denied a visa by the Minister, "the protection obligations in Article 33 of the Refugee Convention applied to the applicant because he is a refugee even though he has been refused a visa."[150]

On a related point, it has previously been explained that the duty of *non-refoulement* inheres on a provisional basis even before refugee status has been formally assessed by a state party.[151] In brief, because it is one's de facto circumstances, not the official validation of those circumstances, that give rise to Convention refugee status,[152] genuine refugees may be fundamentally disadvantaged by the withholding of rights pending status assessment. Unless status assessment were virtually immediate, refugees who are rights holders under international law could be precluded from exercising their legal rights during the often protracted domestic processes by which their entitlement to protection is verified by officials.[153] Not only do Convention rights clearly inhere (albeit provisionally) on the basis of satisfaction of the relevant attachment requirement, but the duty of *non-refoulement* is one of a small number of rights that is not contingent even on arrival at a state's territory, much less on the formal adjudication of status.[154] The duty therefore applies whether or not refugee status has been formally recognized and as soon as a refugee comes under the jurisdiction of a state party.[155]

[150] *NBMZ v. Minister for Immigration and Border Protection*, [2014] FCAFC 38 (Aus. FFC, Apr. 9, 2014), at [115].

[151] See Chapter 3.1 at note 34 ff. Thus, "all asylum seekers are protected by the principle of *non-refoulement*, and the protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure": *Alex Ruta v. Minister of Home Affairs*, [2018] ZACC 52 (SA CC, Dec. 20, 2018), at [29].

[152] See Chapter 3.1 at note 28. The South African High Court thus correctly determined that the making of a claim to refugee status on new grounds after an original claim was dismissed "will in some cases [give rise to] an obligation on the Department to reconsider that application . . . The principle of *non-refoulement* is binding on our country . . . It imposes an obligation not to surrender persons . . . where there are substantial grounds for believing that the person would . . . face persecution in the receiving state": *Esnat Maureen Makumba v. Minister of Home Affairs*, Case No. 6183/14 (SA HC, Dec. 3, 2014), at [20].

[153] "Article 33 protects 'refugees' against return . . . [T]his notion has to be understood in a wide sense, encompassing e.g. asylum seekers whose claims to be refugees have not been refuted by a final decision": Kälin, "Article 33, para. 1," at 1360.

[154] See Chapter 3.1.1 at note 40. Similarly, in the context of European asylum law, "the fact that the parties concerned had failed to expressly request asylum did not exempt Italy from fulfilling its [*non-refoulement*] obligations": F. Cherubini, *Asylum Law in the European Union* (2015), at 224.

[155] *ND and NT v. Spain*, Dec. Nos. 8675/15 and 8697/15 (ECtHR, Feb. 13, 2020), at [179]. See generally Chapter 3.1.1 and Chetail, *International Migration Law*, at 187, 189.

A somewhat more contentious question is whether the beneficiary class for protection against *refoulement* under the terms of Art. 33 is the same as the class of refugees defined by Art. 1 of the Refugee Convention. On the one hand, a narrow textual analysis of the kind embraced by the Supreme Court of the United States might lead one to believe that not all refugees are guaranteed Art. 33 rights, since the text of the provision prohibits only the return of refugees to places where their "life or freedom would be threatened" for a Convention reason.[156] As Weis affirms, however, the drafters of the Convention had no desire to limit protection against *refoulement* to only a subset of refugees.[157] Rather, the reference to "life or freedom" was intended to function as a shorthand for the risks that give rise to refugee status under the terms of Art. 1.[158] The drafting history affords no evidence whatever for the contrary thesis that this choice of language was intended fundamentally to limit the ability to claim the Convention's most basic right.[159] As the High Court of Kenya recently concluded,

[156] In a misguided effort to reconcile then prevailing domestic US law to the requirements of international law (since amended by 8 USC 1158(c)(1)(A)), the US Supreme Court seized on the "life or freedom" language in Art. 33 to validate the more limited American approach. The Court thus determined that "those who can only show a well-founded fear of persecution are not entitled to anything, but are eligible for the discretionary relief of asylum": *Immigration and Naturalization Service v. Cardoza Fonseca*, (1987) 480 US 421 (US SC, Mar. 9, 1987). This approach has recently been emphasized by the US Attorney General, who insisted that "[a]sylum is a discretionary form of relief from removal . . . I remind all asylum adjudicators that a favorable exercise of discretion is a discrete requirement for the granting of asylum and should not be presumed or glossed over *solely because an applicant otherwise meets the burden of proof* for asylum eligibility [emphasis added]": *Matter of AB*, Dec. No. 3929, 27 I&N Dec. 316 (US AG, June 11, 2018), at 345. But see generally J. Hathaway and A. Cusick, "Refugee Rights Are Not Negotiable," (2000) 14(2) *Georgetown Immigration Law Journal* 481.

[157] "The words 'where their life or freedom was threatened' may give the impression that another standard is required than for refugee status in Article 1. This is, however, not the case. The Secretariat draft referred to refugees 'escaping from persecution' and to the obligation not to turn back refugees 'to the frontier of their country of origin, or to territories where their life or freedom would be threatened on account of their race, religion, nationality, or political opinions.' In the course of drafting the words 'country of origin,' 'territories where their life or freedom was threatened' and 'country in which he is persecuted' were used interchangeably. The reference to Article 1 of the Convention was introduced mainly to refer to the dateline of 1 January 1951 but it also indicated that there was no intention to introduce more restrictive criteria than that of 'well-founded fear of persecution' used in Article 1(A)(ii)": P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (posthumously pub'd., 1995) (Weis, *Travaux*), at 303, 341.

[158] See Chapter 4.2.1 at note 1003 for discussion of the choice of comparable language for Art. 31(1).

[159] As Grahl-Madsen observes, "it was quite unwittingly that the concept of 'life [or] freedom' was introduced [into] Article 31, and it seems that the widening of [the] scope of the provision . . . must not lead us to restrict its meaning with regard to the kinds of

> As to the words "where his life or freedom would be threatened," it appears from the *travaux préparatoires* that they were not intended to lay down a stricter criterion than the words "well-founded fear of persecution" figuring in the definition of the term "refugee" in Article 1(A)(2). The different wording was introduced for another reason, namely to make it clear that the principle of *non-refoulement* applies not only in respect of the country of origin but to any country where a person has reason to fear persecution.[160]

Diametrically opposed to the approach of the US Supreme Court, Lauterpacht and Bethlehem argue that "the threat contemplated in Article 33(1) [may be] broader than simply the risk of persecution . . . [including] a threat to life or freedom [that] may arise other than in consequence of persecution."[161] In support of this thesis, they rely on the broadening of UNHCR's competence as an agency, on the humanitarian objectives of the Refugee Convention, and on the fact that various regional human rights instruments are now understood to provide for more broadly applicable forms of protection against *refoulement*. This leads them to conclude that "a broad reading of the threat *contemplated by Article 33(1)* is warranted [emphasis added],"[162] and specifically that:

> [T]he words "where his life or freedom would be threatened" must be construed to encompass circumstances in which a refugee or asylum-seeker (a) has a well-founded fear of being persecuted, (b) faces a real risk of torture or cruel, inhuman or degrading treatment or punishment, or (c) faces other threats to life, physical integrity, or liberty.[163]

Putting to one side the question of whether there is today a broader duty of *non-refoulement* under customary international law,[164] and recognizing that the threats noted in (b) and (c) are in any event likely to fall within modern understandings of a risk of "being persecuted,"[165] the analysis presented is

persecution which warrant exemption from penalties. It is likewise inadmissible to use the language of Articles 31 and 33 to restrict the meaning of 'persecution' in Article 1. The word 'freedom' must be understood in its widest sense": A. Grahl-Madsen, *Commentary on the Refugee Convention 1951* (1963, pub'd. 1997) (Grahl-Madsen, *Commentary*), at 175. See also Kälin, "Article 33, para. 1," at 1342 ("Every person encompassed by the refugee definition according to Art. 1 is automatically protected by Art. 33, provided none of the exclusion clauses of Art. 1F applies").

[160] *Kenya National Commission on Human Rights v. Attorney General*, Constitutional Petition No. 227 of 2016 (Ken. HC, Feb. 9, 2017), at 14.

[161] Lauterpacht and Bethlehem, "*Non-refoulement*," at [127].

[162] Ibid. at [128]–[132].

[163] Ibid. at [133].

[164] See Chapter 4.1.6.

[165] Justice Kirby of the High Court of Australia has observed that "decision-makers in several other jurisdictions [have approached] the meaning of the word 'persecuted' by reference to the purpose for which, and the context in which, it appears rather than strictly by reference to local dictionaries . . . [The Refugee Convention's] meaning should be ascertained having regard to its object, bearing in mind that the Convention is one of several important international treaties designed to redress 'violation[s] of basic human rights, demonstrative of a failure of state protection'": *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14

simply unsustainable as a matter of law. The fact that there has been an expansion of UNHCR's agency mandate and of the duty of non-return under international human rights law more generally cannot be invoked to determine the meaning of Art. 33(1) of the Refugee Convention. While reference can, of course, be made to understandings of these more general developments in order to interpret cognate ambiguous language,[166] evolution outside refugee law cannot be relied upon to override the explicit textual linkage between the risks described in Art. 33(1) and entitlement to recognition of refugee status under Art. 1.[167]

A sensible middle-ground between the extremes of the US Supreme Court and that of Lauterpacht and Bethlehem was taken by Lord Goff in the House of Lords decision of *Sivakumaran* – namely that Art. 33's guarantee against *refoulement* where "life or freedom would be threatened" for a Convention ground extends to situations where there is a risk of "being persecuted" for a Convention ground:

> It is, I consider, plain, as indeed was reinforced in argument by counsel for the High Commissioner with reference to the *travaux préparatoires*, that the *non-refoulement* provision in Article 33 was intended to apply to all persons determined to be refugees under Article 1 of the Convention.[168]

The approach has also been routinely endorsed in the Australian jurisprudence,[169] is affirmed in the more recent English case law,[170] has been adopted

(Aus. HC, Apr. 11, 2002), per Kirby J. The Canadian Supreme Court has held that "[u]nderlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination . . . Persecution, for example, undefined in the Convention, has been ascribed the meaning of sustained or systemic violation of basic human rights demonstrative of a failure of state protection": *Canada v. Ward*, (1993) 103 DLR 4th 1 (Can. SC, June 30, 1993). It has similarly been determined in the United Kingdom that "core entitlements [relevant to the meaning of 'being persecuted'] . . . may be found by reference either to obligations under international law (obligations between states), or by reference to the human rights of individuals, for example pursuant to the conventions on human rights, or as recognized by the international community at large": *Sepet v. Secretary of State for the Home Department*, [2001] EWCA Civ 681 (Eng. CA, May 11, 2001), per Waller L.J., appeal to the House of Lords rejected in *Sepet and Bulbul v. Secretary of State for the Home Department*, [2003] UKHL 15 (UK HL, Mar. 20, 2003).

166 See Chapter 2.3 at note 137. 167 See Chapter 2.1 at note 42.

168 *R v. Secretary of State for the Home Department, ex parte Sivakumaran*, [1988] 1 All ER 193 (UK HL, Dec. 16, 1987), per Lord Goff at 202–203.

169 "Article 33 states the principle of *non-refoulement*, which applies to persons who are refugees within the meaning of Article 1. Although the definition of 'refugee' in Article 1 and the identification of persons subject to the *non-refoulement* obligation in Article 33 differ, it is clear that the obligation against [*refoulement*] applies to persons who are determined to be refugees under Article 1": *M38/2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2003] FCAFC 131 (Aus. FFC, June 13, 2003). See also *Minister for Immigration and Multicultural Affairs v. Savvin*, (2000) 171 ALR 483 (Aus. FFC, Apr. 12, 2000).

170 "In my judgment it is Art. 1 . . . which must govern the scope of Art. 33 rather than the other way round": *Adan v. Secretary of State for the Home Department*, [1997] 1 WLR 1107

in New Zealand,[171] and was found to be compelling by the Supreme Court of Canada.[172] Not only is it a position that is firmly rooted in the actual intentions of the drafters, but it most effectively meshes with the internal structure of the Convention itself.[173] In contrast, the conservative view championed by the American Supreme Court[174] implies that at least some persons with a well-founded fear of being persecuted may nonetheless be forced back to persecution unless the risk they face is particularly egregious – surely an interpretation at odds with the Convention's basic purpose of ensuring that refugees are granted the Convention's protections.[175] Equally of concern, the expansionist optic contended for by Lauterpacht and Bethlehem[176] seems designed effectively to require state parties to the Refugee Convention to implement duties that in fact follow from

(Eng. CA, Feb. 13, 1997), per Simon Brown L.J. While the House of Lords reversed the result reached in the Court of Appeal, four members of the House of Lords (Lord Lloyd of Berwick, Lord Goff of Chieveley, Lord Nolan, and Lord Hope of Craighead) nonetheless specifically endorsed the views of Simon Brown L.J. on this point: *R v. Secretary of State for the Home Department, ex parte Adan*, [1999] 1 AC 293 (UK HL, Apr. 2, 1998), at 306, 301, 312, and 312. The English Court of Appeal expressly approved of the *Sivakumaran* approach, noting that "the *non-refoulement* provision was intended to apply to all persons determined to be refugees under Article 1 of the Convention": *AA v. Secretary of State for the Home Department*, [2006] EWCA Civ 401 (Eng. CA, Apr. 12, 2006), at [93].

171 The New Zealand Court of Appeal has determined that the scope of prohibited return under Art. 33(1) "is usually interpreted as covering all situations where the refugee risks any type of persecution for a Convention reason": *Attorney General v. Zaoui*, [2005] 1 NZLR 690 (NZ CA, Sept. 30, 2004), at [36]; varied on other grounds in *Attorney-General v. Zaoui*, [2005] NZSC 38 (NZ SC, June 21, 2005).

172 "The different words used in Articles 1 and 33 give rise to the question of whether all persons who meet the definition of refugee in Article 1 . . . are entitled to protection under Article 33, or whether some different or higher standard is required to be entitled to that protection. There is a strong case to be made that the thresholds are in fact the same under both provisions . . . There are, however, opinions to the contrary in the United States . . . [But even the majority position of the US Supreme Court in *Cardoza-Fonseca*] was not accepted by three members of the Court. Given the fundamental human rights character of the Refugee Convention and the centrality to refugee law of the principle of *non-refoulement*, I, with respect, find the views of the commentators and the judicial opinions from other jurisdictions . . . more persuasive on this point": *Jószek Németh v. Minister of Justice of Canada*, [2010] SCC 56 (Can. SC, Nov. 25, 2010), at [99]–[101].

173 Wouters agrees that such an interpretation is required for reasons of internal coherence, noting that any other view "would lead to incomprehensible consequences": C. Wouters, *International Legal Standards for the Protection from Refoulement* (2009) (Wouters, *Refoulement*), at 57.

174 See note 156, noting that the US Supreme Court's finding that a risk to "life or freedom" is a more demanding notion than a risk of "being persecuted."

175 "*The High Contracting Parties* . . . [c]onsidering that it is desirable to revise and consolidate previous international agreements . . . and to extend the scope of and the protection accorded by such instruments by means of a new agreement . . . [h]ave agreed as follows": Refugee Convention, at Preamble. The Convention then provides a definition of refugee status in Art. 1, and defines the rights that follow from refugee status in Arts. 2–34.

176 See text at note 161.

other human rights conventions – even if states are not actually parties to those other accords. The middle-ground position on Art. 33 contended for here, in contrast, ensures that all persons who are refugees are protected from return to the risks which gave rise to that status: no more, and no less.

It follows from this endorsement of a coordinated understanding of Arts. 1 and 33 that there is at least one, quite fundamental, limitation on the scope of Art. 33's duty of *non-refoulement*. If the duty of *non-refoulement* under Art. 33 of the Refugee Convention can be claimed only by persons who are, in fact, refugees, then it is not a right that inheres in persons who have yet to leave their own country. This is because Art. 1 of the Convention defines a refugee as a person who "is outside the country of his nationality."[177] Art. 33 is not therefore a constraint on actions which deny would-be refugees the ability to leave their own state.

This issue was thoroughly considered in the English *European Roma Rights Centre* case.[178] One of the arguments advanced was that the pre-entry clearance procedure operated by British authorities at Prague Airport was in breach of Art. 33. It was agreed that the system was "aimed principally at stemming the flow of asylum-seekers from the Czech Republic, the vast majority of these being of Romani ethnic origin (Roma), and that in this it has plainly had some considerable success."[179] Moreover, it was also understood that "[t]he object of these controls ... so far as asylum countries are concerned, is to prevent [refugees] from reaching [British] shores."[180] The key issue was therefore "whether a scheme designed to prevent any such asylum claims (whether genuine or otherwise) being made in the United Kingdom is inconsistent with the United Kingdom's obligations in international law, in particular under the Convention."[181] The Court of Appeal determined that it was not:

> That Article 33 of the Convention has no direct application to the Prague operation is plain ... [I]t applies in terms only to refugees, and a refugee is defined ... as someone necessarily "outside the country of his nationality" ... For good measure, Article 33 forbids "*refoulement*" to "frontiers" and, whatever precise meaning is given to the former term, it cannot comprehend action which causes someone to remain on the same side of the frontier as they began; nor indeed could such a person be said to have been returned to any frontier.[182]

[177] Refugee Convention, at Art. 1(A)(2). In the case of persons who are stateless, Art. 1 requires that they be "outside the country of [their] former habitual residence": ibid.

[178] *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), rev'd on other grounds at [2004] UKHL 55 (UK HL, Dec. 9, 2004).

[179] *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at [3].

[180] Ibid. at [1]. [181] Ibid. at [18].

[182] Ibid. at [31]. The House of Lords agreed, noting succinctly that "[t]he requirement that a foreign national applying for refugee status must, to qualify as a refugee, be outside his country of nationality is unambiguously expressed in the Convention definition of refugee": *R v.*

This conclusion is legally sound, even as it clearly points to a serious protection risk that arises by virtue of the gap between the duty of *non-refoulement* and a broader notion of access to asylum.[183] In truth, in-country interdiction schemes are more effectively challenged as violations by the home state of Art. 12(2) of the Civil and Political Covenant, which provides that "[e]veryone shall be free to leave any country, including his own."[184] The Human Rights Committee has determined that

> Freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus traveling abroad is covered, as well as departure for permanent emigration. Likewise, the right of the individual to determine the State of destination is part of the legal guarantee.[185]

This right may only be limited for a reason deemed legitimate under the Covenant,[186] and may in any event not be limited on a discriminatory

Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al., [2004] UKHL 55 (UK HL, Dec. 9, 2004), at [16].

183 In the High Court decision, it is recorded that counsel advanced the argument that the Prague pre-screening system is "if not in breach of an express term or obligation under the Convention, yet a breach of the obligation of good faith owed by a signatory state, in that it would be preventing those seeking asylum from gaining international protection": *European Roma Rights Centre v. Immigration Officer at Prague Airport*, [2002] EWCA 1989 (Eng. HC, Oct. 8, 2002), at [34]. In response, the court noted that "[t]he UNHCR has, it seems, reservations about a pre-clearance system, but it does not explain either how in practice it is to be distinguished from a visa system, and whether that system too is to be regarded as objectionable, and if so on what basis, or how the position it takes . . . is consistent with its own Handbook": ibid. at [49]. The House of Lords emphatically rejected the notion that the duty of good faith treaty interpretation could effectively result in the imposition of duties at odds with the text of the treaty, finding that "there is no want of good faith if a state interprets a treaty as meaning what it says and declines to do anything significantly greater than or different from what it has agreed to do": *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), per Lord Bingham at [19]. See generally the discussion of the implications of the duty of good faith interpretation in the opinion of Lord Hope, ibid. at [57]–[64], leading to the conclusion that "[w]hat the Convention does is assure refugees of the rights and freedoms set out in chapters I to V when they are in countries that are not their own. It does not require the state to abstain from controlling the movements of people outside its border who wish to travel to it in order to claim asylum": ibid. at [64].

184 Civil and Political Covenant, at Art. 12(2). "Refugees, like all persons, are free to leave any country pursuant to Art. 12(2) of the ICCPR. In accordance with Art. 12(3), the freedom to depart may be subjected only to limitations provided by law, implemented consistently with other ICCPR rights, and shown to be necessary to safeguard a state's national security, public order (*ordre public*), public health or morals, or the rights and freedoms of others": "The Michigan Guidelines on Refugee Freedom of Movement," (2017) 39 *Michigan Journal of International Law* 1, at [4].

185 UN Human Rights Committee, "General Comment No. 27: Freedom of Movement" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at [8].

186 This right is subject only to "restrictions . . . provided by law, [and which] are necessary to protect national security, public order (*ordre public*), public health or morals or the rights

basis.[187] Thus, at least in a situation akin to the *Prague Airport* case – where the prohibition of seeking protection abroad is unlikely to be deemed a legitimate reason for denial of the right to leave one's country, and where the prohibition was, at least in practice, implemented on a race-specific basis[188] – the home state should be found in breach of the Covenant.[189] Indeed, both the home state and any foreign countries with which it chooses to share jurisdiction over departure from its territory should be held jointly liable for a breach of Art. 12(2).[190] But this does not change the fact that prohibitions on departure operated from within the territory of one's own state, and which preclude exit altogether, cannot breach rights under the Refugee Convention, including to protection against *refoulement*:

> Article 33 . . . is concerned only with where a person must not be sent, not with where he is trying to escape from. The Convention could have, but chose not to, concern itself also with enabling people to escape their

and freedoms of others, and are consistent with the other rights recognized in the present Covenant": Civil and Political Covenant, at Art. 12(3). The scope of these permissible limitations is discussed in Chapter 6.6 at note 1123.

187 Art. 12(3) requires that restrictions be "consistent with the other rights recognized in the present Covenant"; if discriminatory, e.g. on grounds of race, there would be a breach of both Arts. 2(1) and 26 of the Covenant, thus disqualifying them from meeting the requirements of Art. 12(3): Civil and Political Covenant, at Art. 12.

188 The House of Lords struck down the British pre-screening system at Prague Airport precisely on the grounds that "[a]ll the evidence before us, other than that of the intentions of those in charge of the operation, which intentions were not conveyed to the officers on the ground, supports the inference that Roma were, simply because they were Roma, routinely treated with more suspicion and subjected to more intensive and intrusive questioning than non-Roma . . . [S]etting up an operation like this, prompted by an influx of asylum seekers who are overwhelmingly from one comparatively easily identifiable racial or ethnic group, requires enormous care if it is to be done without discrimination. That did not happen. The inevitable conclusion was that the operation was inherently and systematically discriminatory and unlawful": *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), per Baroness Hale at [97].

189 Indeed, "[s]o long as an individual seeking to leave a state's territory does so freely, meaning that he or she has made an autonomous decision to do so, the state of departure may not lawfully restrict the right to leave on the basis of concerns about risk to the individual's life or safety during the process of leaving or traveling": "The Michigan Guidelines on Refugee Freedom of Movement," (2017) 39 *Michigan Journal of International Law* 1, at [6].

190 Short of exercising territorial control, shared jurisdiction may be established on the basis of either authority over individuals or the exercise of public powers: see generally Chapter 3.1.1. The UN Human Rights Committee has read Art. 2(1) of the Civil and Political Covenant disjunctively, finding that the obligation to respect rights "within [a state's] territory and to all persons subject to [its] jurisdiction" means that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party": UN Human Rights Committee, "General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (2004), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at [10].

> country by providing for a right of admission to another country to allow them to do so . . .
>
> In an ideal world there would no doubt be provision for states to facilitate the escape of persecuted minorities . . . I am satisfied, however, that on no view of the Convention is this within its scope. The distinction between, on the one hand, a state preventing an aspiring asylum-seeker from gaining access from his own country to its territory, and on the other hand returning such a person to his own country . . . can be made to seem a narrow and unsatisfactory one. In my judgment, however, it is a crucial distinction to make and it is supported by both the text of the Convention and by the authorities dictating its scope.[191]

Art. 33 is similarly incapable of invalidating the classic tool of *non-entrée*: visa controls imposed on the nationals of refugee-producing states,[192] enforced by carrier sanctions.[193] Visa control policies are generally enforced in countries of origin by airline and other common carriers, aware that failure to do so could result in penalties or prosecution by the destination country.[194] Because countries generally do not issue visas for the purpose of entering their asylum systems, most travelers who honestly state that they intend to claim refugee status upon arrival will in practice be turned back at the port of departure.

[191] *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at [37], [43], affirmed in this regard in *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at [13]–[17].

[192] In many cases, of course, visa requirements are imposed for general migration control reasons, with no intent to stop the departure of refugees. Yet it remains that visa controls are unquestionably crude mechanisms that fail to distinguish between persons at risk of persecution and others, or between those at-risk persons who can safely access protection in other countries, and those who have no options.

[193] UNHCR has traditionally seemed unwilling to confront the fact that the denial of access to refugees by the imposition of visa controls is not simply the inadvertent consequence of a general policy of migration control, but can actually be a policy targeted at those who wish to claim protection. For example, the only mention of visa controls in UNHCR's position paper on interception notes that "[s]tates have a legitimate interest in controlling irregular migration. Unfortunately, existing controls, such as visa requirements and the imposition of carrier sanctions . . . often do not differentiate between genuine asylum-seekers and economic migrants. National authorities, including immigration and airline officials posted abroad, are frequently not aware of the paramount distinction between refugees, who are entitled to international protection, and other migrants, who are able to rely on national protection": UNHCR, "Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach," UN Doc. EC/50/SC/CRP.17, June 9, 2000 (UNHCR, "Interception"), at [17].

[194] Greater reliance by refugees on smugglers and traffickers in order to circumvent increasingly sophisticated border controls has, however, arguably reduced the efficacy of visa controls as a mechanism of *non-entrée*. Smugglers and traffickers have strong economic incentives to produce false travel documents that are often difficult to detect; they also secure access for their clients by bribing border officials and adapting travel routes. See Gammeltoft-Hansen and Hathaway, "Cooperative Deterrence," at 246.

Countries of origin are normally aware of such practices, or could readily inform themselves with minimal effort.[195]

In contrast to in-country interception of the kind implemented by the United Kingdom at Prague Airport, however, most visa controls – including, for example, those routinely imposed by Canada[196] and now required by European Union law[197] – operate passively, with no need for the state imposing the controls to establish a physical presence in the would-be refugee's country of origin. UNHCR argued before the English courts that reliance could be placed on this distinction in order to strike down the Prague system without simultaneously invalidating visa control systems that operate to keep refugees inside their own countries. It suggested "that there is a distinction to be made between 'the active interdiction or interception of persons seeking refuge from persecution' on the one hand and 'passive regimes, such as visa controls and carrier sanctions' on the other." The Court of Appeal sensibly found this distinction to be without merit:[198]

> In my judgment, there is nothing in these criticisms and indeed the Prague scheme seems to me to constitute if anything a less, rather than more, serious problem for would-be asylum-seekers than visa control . . .
>
> . . . [Objections] to visa controls . . . do not sound in international law. Rather one must hope that when in truth acute humanitarian concerns arise states will respond beyond the strict call of their international obligations. This, I believe, is the only answer the Court is entitled to give when [counsel] conjures up the spectre of a fresh holocaust. Visa controls are, in short, clearly not outlawed under the Convention or under international law generally.[199]

[195] See Feller, "Sanctions"; and J. Hathaway and J. Dent, *Refugee Rights: Report on a Comparative Survey* (1995), at 13–14.

[196] See text at notes 93–94. [197] See text at note 97.

[198] *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at [48]. In another context, though, UNHCR seemed to argue that visa controls *can* breach Art. 33. "Immigration control measures, although aimed principally at combatting irregular migration, can seriously jeopardize the ability of persons at risk of persecution to gain access to safety and asylum. As pointed out by UNHCR in the past, the exclusive resort to measures to combat abuse, without balancing them by adequate means to identify genuine cases, *may result in the refoulement of refugees* [emphasis added]": UNHCR, "Interception," at [18]. See also UNHCR, "UNHCR Position: Visa Requirements and Carrier Sanctions," Sept. 1995 (noting in particular that when efforts to control unauthorized migration generally "interfere with the ability of persons at risk of persecution to gain access to safety and obtain asylum in other countries, then States act inconsistently with their international obligations towards refugees").

[199] *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at [49]–[50]. The House of Lords was in full agreement on this point, noting that "[h]ad a visa regime been imposed, the effect on the appellants, so far as concerned their applications for asylum, would have been no different. But it could not plausibly be argued that a visa regime would have been contrary

The Court is quite right that visa controls, which operate routinely and in many places, actually pose a greater risk to refugees than do in-country interception schemes, which tend to be more selective and less routinely operationalized.[200] And the Court is equally correct that "[o]n the basis of the [Refugee] Convention as it stands at present, there is no obligation on a signatory state not to introduce or continue a system of immigration control, whether by way of a requirement for visas or by the operation of a pre-clearance system."[201]

As in the case of in-country interdiction schemes described above, the most plausible legal avenue to challenge visa control systems of this sort is to invoke Art. 12 of the Civil and Political Covenant, in this case in order to hold the home state liable for its complicity in efforts conducted under its jurisdiction to stymie the departure of at-risk persons who wish to claim refugee status abroad.[202] The UN Human Rights Committee has indicated its view that, in

to the practice of nations": *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at [28].

200 See also *R v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520 (Eng. HC, July 29, 1999), per Simon Brown L.J.: "Although under the Convention subscribing states must give sanctuary to any refugee who seeks asylum (subject only to removal to a safe third country), they are by no means bound to facilitate his arrival. Rather they strive increasingly to prevent it. The combined effect of visa requirements and carrier's liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents."

201 *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at [49], affirmed in this regard in *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at [34].

202 See text at note 184. In addition to reliance on Art. 12(2) of the Civil and Political Covenant, it has also been contended that where visa controls are applied after a refugee's departure from his or her own country – for example, in a transit country – this may amount to a breach of the Refugee Convention's Art. 31, which prohibits the imposition of penalties on refugees for illegal entry or presence: see Chapter 4.2. This possibility was raised by the English High Court in relation to refugees interdicted in the United Kingdom because they did not have the required Canadian visas for onward travel. In *R v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520 (Eng. HC, July 29, 1999), Simon Brown L.J. observed, "If I am right in saying that refugees are ordinarily entitled to choose where to claim asylum and that a short stopover en route in a country where a traveller's status is in no way regularized will not break the requisite directness of flight, then it must follow that these applicants would have been entitled to the benefit of Article 31 had they reached Canada and made their asylum claims there. If Article 31 would have availed them in Canada, then logically its protection cannot be denied to them [in the United Kingdom] merely because they have been apprehended en route." Indeed, on the basis of this argument, it might even be possible to find the state which established the visa controls to be liable for breach of Art. 31 where it exercises shared jurisdiction with the transit state – for example, by staffing or overseeing the personnel who enforce the visa controls. The real difficulty in relying on Art. 31 as an alternative to the (substantively inadequate) Art. 33, however, is that it does not prohibit the classic result of a visa control, namely return to the country of origin. As is detailed below, the drafters were clear that expulsion or return are not to be considered "penalties" for the purposes of Art. 31 protection: see Chapter 4.2.3.

at least some cases, the operation of a system of visa controls and carrier sanctions will put a state party in breach of the duty to respect the right of persons to leave their own country, and more generally to enjoy freedom of international movement:

> The practice of States often shows that legal rules and administrative measures adversely affect the right to leave, in particular, a person's own country. It is therefore of the utmost importance that States parties report on all legal and practical restrictions on the right to leave which they apply both to nationals and to foreigners, in order to enable the Committee to assess the conformity of these rules and practices with article 12, paragraph 3 [which defines permissible limitations on this right]. States parties should also include information in their reports on measures that impose sanctions on international carriers which bring to their territory persons without required documents, where those measures affect the right to leave another country.[203]

The case for finding a breach of Art. 12 would seem particularly strong where the visa requirement which the state of origin allows to be enforced in areas under its jurisdiction is intended explicitly to avoid the departure of at-risk persons. There is more generally a real question about the legitimacy of even visas set to regulate non-coerced migration, but which are known in practice also to preclude the freedom of movement of would-be refugees, for example generic rules said to be necessary to avoid smuggling or trafficking.[204]

[203] UN Human Rights Committee, "General Comment No. 27: Freedom of Movement" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at [10].

[204] "International law requires states to prosecute and punish transnational and other organized criminals who engage in human smuggling, that is the procurement of unauthorized entry of a person into another state for a financial or other material benefit. The deterrence of human smuggling may not, however, be invoked to justify a restriction on the right of persons seeking to leave any country. This is because the avoidance of breach of another state's migration laws or policies does not fall within the scope of the public order (*ordre public*) exception authorized by ICCPR Art. 12(3), which speaks to an interest of the state invoking the restriction rather than to an interest of another state. International law also requires states to combat human trafficking. In contrast to smuggling, human trafficking is by definition an exploitative practice that harms individuals under the departure state's jurisdiction. It may thus *prima facie* engage an interest under ICCPR Art. 12(3). But because the right of everyone to leave a country may only be lawfully restricted if that is the least intrusive means available to pursue even a clearly legitimate interest, state efforts must focus on interrupting the work of traffickers rather than on seeking to stop the departure of would-be refugees and others. This approach aligns with Art. 14 of the UN Trafficking Protocol, requiring anti-trafficking commitments to be pursued in a manner that ensures respect for refugee and other international human rights": "The Michigan Guidelines on Refugee Freedom of Movement," (2017) 39 *Michigan Journal of International Law* 1, at [7]–[8].

In contrast, finding a breach of Art. 12(2) of the Covenant by the destination country actually imposing the visa – for example, Lebanon's visa on Syrians seeking to escape their country[205] – may be more difficult. This is because, in contrast to situations in which that country actually operates an in-country interdiction scheme, it is not clear that the state that establishes the visa controls is in any sense exercising (even shared) jurisdiction over the place of departure – jurisdiction being the *sine qua non* for holding states liable for the extraterritorial actions of their agents.[206] The International Court of Justice has affirmed that "the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory":[207]

> The *travaux préparatoires* of the Covenant confirm the [UN Human Rights] Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.[208]

In essence, liability for extraterritorial actions follows where a state party exercises "effective jurisdiction."[209] While this will be a question of fact in each case, it is far from clear that a state can be said to exercise jurisdiction by the simple issuance of policies intended to apply extraterritorially, but which are wholly implemented by third parties operating inside the sovereign territory of another state.[210] The same jurisdictional concerns likely preclude a finding of

[205] See text at note 96.

[206] See e.g. *Casariego v. Uruguay*, HRC Comm. No. 56/1979, UN Doc. CCPR/C/OP/1 at 92, decided July 29, 1981, at [10.1]–[10.3]: "Article 2(1) of the Covenant places an obligation upon a state party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction,' but it does not imply that the state party concerned cannot be held accountable for violation of rights under the Covenant which its agents commit upon the territory of another state, whether with the acquiescence of the government of that state or in opposition to it . . . [I]t would be unconscionable to so interpret the responsibility under Article 2 of the Covenant, as to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory."

[207] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep 136, decided July 9, 2004, at [111].

[208] Ibid. at [109].

[209] Ibid. at [110]. The scope of modern understandings of jurisdiction – including that based on any of effective territorial control, being under a state's authority and personal control, or subject to a state's exercise of public powers abroad – is discussed in detail in Chapter 3.1.1.

[210] In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ibid., for example, the analysis of the International Court of Justice seems to have given

liability for visa controls set by a putative transit state – for example, the 2015 visas imposed by Ecuador on Cubans seeking to use Ecuador as a stepping stone to seeking protection in the United States.[211] Because a transit state – like a country of destination – does not exercise jurisdiction over the would-be refugee who has yet to depart her home country, the condition precedent for invocation of Art. 12(2) is normally absent. If, however, there were evidence that the transit or destination state imposing a visa requirement thereby contributed significantly to an effort *by the country of origin* to stymie departure, emerging law suggests that those states could in some circumstances be held responsible for aiding or assisting the country of origin to breach its duty under Art. 12(2).[212]

4.1.2 Nature of the Duty of Non-refoulement

The weakness of the duty of *non-refoulement* as an answer to measures that trap would-be refugees inside their own countries aside,[213] Art. 33 is otherwise quite a robust form of protection.[214] In particular, the duty of *non-refoulement* has ordinarily been understood to constrain not simply ejection from within a state's territory, but also non-admittance at its frontiers.[215] Indeed, the 1933

real weight to the Israeli physical presence in the Occupied Territories. "The [Human Rights] Committee, in its concluding observations after examination of the report, expressed concern at Israel's attitude and pointed 'to the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein' (CCPR/C/79/Add.93, at [10]). In 2003 in face of Israel's consistent position, to the effect that 'the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza . . .,' the Committee reached the following conclusion: 'in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law' (CCPR/CO/78/ISR, at [11]). In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory": ibid. at [110]–[111].

[211] See text at note 96.

[212] The relevant legal arguments, drawing on Art. 16 of the International Law Commission's Articles on State Responsibility, are outlined in detail below at notes 440–472.

[213] See Chapter 4.1.1.

[214] "This is a remarkable provision. Perhaps it is unprecedented in the history of our country's enactments. It places the prohibition it enacts above any contrary provision . . . That is a powerful decree": *Alex Ruta v. Minister of Home Affairs*, [2018] ZACC 52 (SA CC, Dec. 20, 2018), at [24].

[215] See e.g. UNHCR Executive Committee Conclusion No. 6, "Non-refoulement" (1977), at [(c)], acknowledging "the fundamental importance of the observance of the principle of *non-refoulement* – both at the border and within the territory of a State." "Today, there

Convention – from which the present duty of *non-refoulement* was derived – explicitly codified non-admittance as an aspect of *refoulement*.[216] This comprehensive definition corresponds to the authority enjoyed by police in some states summarily to remove aliens or to refuse them entry (*refoulement*) under a process distinct from formal expulsion (addressed by Art. 32[217] of the Convention).[218] It was clear to the drafters that summary refusals (*refoulement*) and formally sanctioned removals (expulsion or deportation) could equally undermine the sheltering of refugees from forcible return.[219]

The original purpose of the prohibition of *refoulement* was therefore to ensure that those states in which summary removal or denial of access was authorized by law not be allowed to rely on such provisions to subvert the general limitations on the expulsion of refugees.[220] If the minority of countries that authorized *refoulement* were required to temper the application of such systems in relation to refugees, all governments would face comparable obligations: refugees would be able to access the state's territory, and their removal

appears to be ample support for the conclusion that Article 33(1) of the Refugee Convention is applicable to rejection at the frontier of a potential host state": G. Noll et al., "Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure" (2002), at 36. See generally P. Mathew, "Australian Refugee Protection in the Wake of the *Tampa*," (2002) 96(3) *American Journal of International Law* 661 (Mathew, "*Tampa*"), at 667, drawing support for this proposition from the General Assembly's Declaration on Territorial Asylum; and Lauterpacht and Bethlehem, "*Non-refoulement*," at [76]–[86].

216 1933 Refugee Convention, at Art. 3. 217 See Chapter 5.1.

218 "[T]he term 'expulsion' was used when the refugee concerned had committed some criminal offence, whereas the term '*refoulement*' was used in cases when the refugee was deported or refused admittance because his presence in the country was considered undesirable": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 5. See also Goodwin-Gill and McAdam, *Refugee in International Law*, at 201: "In the context of immigration control in continental Europe, *refoulement* is a term of art covering, in particular, summary reconduction to the frontier of those discovered to have entered illegally and summary refusal of admission to those without valid papers."

219 "The legal nature of the prohibited act is . . . not relevant, whether it is labeled deportation, extradition, non-admission at the border, maritime interception, transfer, or rendition": Chetail, *International Migration Law*, at 187.

220 "Sir Leslie Brass (United Kingdom) concluded from the discussion that the notion of *refoulement* could apply to (a) refugees seeking admission, (b) refugees illegally present in a country, and (c) refugees admitted temporarily or conditionally. Referring to the practice followed in his own country, Sir Leslie stated that refugees who had been allowed to enter the United Kingdom could be sent out of the country only by expulsion or deportation. There was no concept in these cases corresponding to that of *refoulement* . . . Mr. Ordonneau (France) considered that the inclusion in the draft convention of a reference to the concept of *refoulement* would not in any way interfere with the administrative practices of countries such as the United Kingdom, which did not employ it, but that its exclusion from the draft convention would place countries like France and Belgium in a very difficult position": UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 5.

could only be effected in accordance with the general rules governing the expulsion or deportation of refugees.[221]

4.1.2.1 Non-admittance

In line with this general understanding, the debates of the Ad Hoc Committee on Statelessness and Related Problems show a clear commitment to the basic principle that peremptory non-admittance or ejection is normally impermissible. The United States vigorously argued that

> [w]hether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom could be threatened.[222]

While the English translation of *non-refoulement* varied from "undertakes not to turn back" to "undertakes not to expel or turn back,"[223] and ultimately to "undertakes not to expel or return," the intention to proscribe both non-admittance and ejection from within a state's territory was constant.[224] Indeed, the Belgian co-sponsor of the text adopted by the Committee emphasized that the duty had been expanded to an undertaking "not to expel *or in any way* [return] refugees [emphasis added]"[225] precisely to ensure that it was understood that the article "referred to various methods by which refugees could be expelled, refused admittance or removed."[226] As observed by the High Court of Kenya,

[221] "The Chairman suspended the discussion, observing that it had indicated agreement on the principle that refugees fleeing from persecution . . . should not be pushed back to the arms of their persecutors": Statement of Mr. Chance of Canada, ibid. at 7. See generally Chapter 5.1 on the question of the prohibition of formal expulsion or deportation of refugees.

[222] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 11–12. See also Statement of Mr. Robinson of Israel, ibid. at 12–13: "The article must, in fact, apply to all refugees, whether or not they were admitted to residence; it must deal with both expulsion and non-admittance."

[223] Ibid. at 12.

[224] The substitution of "return" for "turn back" was intended to be a matter of style only: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 20.

[225] UN Doc. E/AC.32/L.25, Feb. 2, 1950, at 1. In the draft convention finalized by the Working Group, the undertaking was rephrased to require states not to "expel or return, *in any manner whatsoever*, a refugee to the frontiers of territories where his life or freedom would be threatened [emphasis added]": UN Doc. E/AC.32/L.32, Feb. 9, 1950, at 12.

[226] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 20. Thus, "[i]f a refugee arrives directly from the country of persecution it does not make any difference whether he or she is ejected at the land border of a country adjacent to the country of persecution, sent there by plane from the airport after arrival, or sent back after

> The prohibition of *refoulement* to a danger of persecution under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or "renditions," and non-admission at the border . . . This is evident from the wording of Article 33(1) . . . which refers to expulsion or return (*refoulement*) "in any manner whatsoever."[227]

The European Court of Human Rights has similarly noted that "[i]t is crucial to observe . . . that the prohibition of *refoulement* includes the protection of asylum-seekers in cases of both non-admission and rejection at the border."[228] As such, the duty of *non-refoulement* is infringed by the actions of government officials which are intended to force refugees back to their country of origin. This includes formal policies authorizing force to deny entry to refugees, such as the Namibian policy of shooting at Angolan refugees seeking to enter its territory.[229] Even if not part of a formal policy, a government is moreover responsible for actions taken by its agents at the border, including for example the attacks on Syrian refugees by Turkish border guards,[230] the shots fired at African refugees by Egyptian security forces,[231] and the launching of smoke canisters and rubber bullets at refugees swimming toward Spain's Ceuta enclave by the Spanish Guardia Civil.[232] Indeed, the same is true when a state encourages private citizens to drive refugees away, as was the case when Hungary conscripted "border hunters" to threaten refugees arriving at its frontiers.[233]

While less immediately deadly, the decisions by Zaïre and Tanzania to close their borders to refugees fleeing conflicts between Hutus and Tutsis;[234] the more recent decisions of Nicaragua, Costa Rica, and Panama to close their borders to Cubans seeking to travel in search of protection in the United States;[235] as well as the Macedonian, Serbian, Croatian, and Slovenian border closures in order to shut down the "Balkan route" to asylum,[236] all engage the

admission to the territory and subsequent expulsion or removal. In each of these cases, the result is the same: the refugee will be sent back to the country of persecution and thus returned 'to the frontiers' of such country": Kälin, "Article 33, para. 1," at 1367.

[227] *Kenya National Commission on Human Rights v. Attorney General*, Constitutional Petition No. 227 of 2016 (Ken. HC, Feb. 9, 2017), at 18.

[228] *ND and NT v. Spain*, Dec. Nos. 8675/15 and 8697/15 (ECtHR, Feb. 13, 2020), at [178].

[229] See text at note 25. [230] See text at note 26. [231] See text at note 27.

[232] See text at note 28. Speaking more generally to practices at this Spanish enclave, the European Court of Human Rights insisted that "[w]ith regard to Contracting States like Spain whose borders coincide, at least partly, with external borders of the Schengen area, the effectiveness of Convention rights requires that these States make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border": *ND and NT v. Spain*, Dec. Nos. 8675/15 and 8697/15 (ECtHR, Feb. 13, 2020), at [209].

[233] See text at note 73. [234] See text at note 11. [235] See text at notes 18–20.

[236] See text at note 21.

prohibition of *refoulement*. Efforts short of complete border closures that have the same effect – for example, the erection by South Africa[237] and Hungary[238] of razor-wire fences – can also run up against the requirements of Art. 33. In all of these cases,

> [a] good faith understanding of the duty of *non-refoulement* requires states to provide reasonable access and opportunity for a protection claim to be made. While the mere existence of a natural barrier (e.g. a mountain range or river) does not in and of itself amount to an act of *refoulement*, a state may not lawfully construct or maintain a man-made barrier that fails to provide for reasonable access to its territory by refugees.[239]

In short, because the duty of *non-refoulement* requires states to refrain from turning back refugees "in any manner whatsoever," it is the consequence of exposing a refugee to the risk of being persecuted that matters – not *how* a state's actions give rise to that prohibited risk. On the other hand, the actions undertaken must in fact pose the risk of return to persecution in order to fall afoul of Art. 33. As such, the erection of the Calais barrier between the UK and France,[240] which simply compels refugees to have their claims assessed in France or elsewhere in Europe, was not an act of *refoulement*.[241]

4.1.2.2 Ejection

While efforts to push refugees back at the frontier are perhaps the more common variant of *refoulement*, states today continue to expel refugees already inside their borders. The forced return of recognized Uzbek refugees from both Kyrgyzstan[242] and Ukraine,[243] the luring of refugees into trucks that took them back to Rwanda,[244] the 2009 "rapid expulsion" of Rwandan refugees by Burundi without any assessment of protection needs,[245] and the busing by Algeria of sub-Saharan refugee claimants across its southern border[246] are blatant examples of *refoulement* by way of ejection. And while the risk was less immediate, the towing of a boat with refugees aboard by Australia back from its territorial waters to Indonesia, knowing that Indonesia has no mechanism to identify or protect refugees,[247] was simply an indirect means of engaging in the same prohibited conduct. The fact that an increasing number of such ejections results from the application of pressure by the refugees' country of origin – in particular, by China in

[237] See text at note 22. [238] See text at note 23.
[239] "The Michigan Guidelines on Refugee Freedom of Movement," (2017) 39 *Michigan Journal of International Law* 1, at [10].
[240] See text at note 24.
[241] The fact that many unaccompanied minor refugees seeking reunification with family members in the United Kingdom were present in the Calais "jungle" raises a distinct legal concern: see Chapter 4.6.
[242] See text at note 53. [243] See text at note 54. [244] See text at note 55.
[245] See text at note 62. [246] See text at note 68. [247] See text at note 56.

relation to Tibetan and Uighur refugees,[248] but also Tajik abuse of extradition procedures in order to secure the return of activists who had sought protection in Russia, Moldova, and Belarus[249] – makes the reality of risk especially clear.

Nor is a government insulated from liability when, rather than taking action through its own officials, it engages or encourages non-state actors to drive refugees back to their countries of origin. Sometimes such private actions are merely accessories to traditional migration enforcement systems abridging the duty of *non-refoulement* – as was the case, for example, when Malaysia deputized a volunteer corps to apprehend undocumented persons, including refugees,[250] or when Greek police handed Turkish asylum-seekers over to armed men who violently removed them to the Turkish side of the border.[251] In other instances, however, the non-state actors are themselves the direct enforcers. Because governments are liable for the actions they promote and support, Art. 33 was clearly infringed when Thailand encouraged fishermen to push back Vietnamese refugees,[252] and when Guinean President Conté encouraged his citizens to form militia groups to force refugees from Liberia and Sierra Leone to go home.[253] Indeed, as the Supreme Court of India has affirmed, governments have an affirmative duty to take such action as is necessary to avoid the *refoulement* of refugees instigated and carried out by third parties. Faced with a complaint that Chakma refugees were being subjected to an economic blockade by a student vigilante group intended to drive them out, the Court issued an unambiguous and comprehensive order to both state and national authorities to take whatever action was required to bring the student actions to an end.[254]

4.1.2.3 "Voluntary Repatriation"

Nor is it the case that an act amounts to *refoulement* only if it is clearly designed to block the arrival, or to bring about the return, of refugees. *Refoulement* may also be effected by a very wide range of actions taken which indirectly achieve

[248] See text at note 59. [249] See text at note 58. [250] See text at note 72.
[251] See text at note 57. [252] See text at note 69. [253] See text at notes 70–71.
[254] While India is not a party to the Refugee Convention or Protocol, the Court relied on Art. 21 of the Indian Constitution which establishes a guarantee of life and personal liberty for all. Its order was that "the State of Arunachal Pradesh shall ensure that the life and personal liberty of each and every Chakma residing within the State shall be protected and any attempt to forcibly evict or drive them out of the State by organised groups, such as the [student vigilante group], shall be repelled, if necessary by requisitioning the service of paramilitary or police force, and if additional forces are considered necessary to carry out this direction, the [State] will request the . . . Union of India to provide such additional force, and [the national government] shall provide such additional force as is necessary to protect the lives and liberty of the Chakmas": *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 83 AIR 1234 (In. SC, Jan. 9, 1996), at [21].

the same prohibited results. This is because the duty under Art. 33 is to avoid certain *consequences* (namely, return to the risk of being persecuted), whatever the nature of the actions that lead to that result.[255] For example, the Hong Kong High Court has observed that denial to refugees of the right to work "if carried out to extreme and without meaningful exception ... could even amount to constructive *refoulement*."[256]

Of particular concern, *refoulement* frequently arises in practice when refugees are coerced to accept "voluntary repatriation."[257] At least where refugees are left with no real option but to leave, de facto enforced departure is a form of *refoulement*. As such, Egypt engaged in blatant *refoulement* when its prisoner guards beat refugees in their custody to "persuade" them to agree to be "voluntarily" repatriated to Eritrea.[258] More commonly, states "promote" repatriation by denying the necessities of life to refugees, effectively starving them out – as was the case when Rwanda threatened to withdraw camp services from Congolese refugees who failed to "choose" to repatriate,[259] when Macedonia cut off basic sanitary facilities and services to induce Kosovar refugees to go home,[260] and when Bangladesh in collaboration with the UNHCR cut off food and medical services to Rohingya refugees – often accompanied by threats of beatings or jail time – until they "agreed" to go back to Burma.[261] Neither the indirectness of the removals consequent to such deprivations of core rights nor the too-frequent acquiescence of the UNHCR or other international agencies in such programs alters the fundamentally involuntary nature of much so-called "voluntary" repatriation, making it the most common ejection-based form of refugee *refoulement*. As courts in the United States held in enjoining American threats and subterfuge undertaken to force Salvadoran refugees to go home, the formal and legalized nature of acts which are in substance coercive does not in any sense render them lawful.[262]

[255] See *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002), per Lord Hope at [47]. Thus, for example, the right of a state to effect the extradition of a refugee is subject to compliance with the duty of *non-refoulement*: Lauterpacht and Bethlehem, "*Non-refoulement*," at [71]–[75].

[256] *MA v. Director of Immigration*, Dec. No. HCAL 10/2010, Constitutional and Administrative Law List No. 73 of 2010 (HK HC, Jan. 6, 2011), at [82]. See generally P. Mathew, *Reworking the Relationship between Asylum and Employment* (2012).

[257] This term of art, derived from Art. 8(c) of the Statute of the UNHCR (GA Res. 428(V), Dec. 14, 1950), is not a basis for the cessation of refugee status, but only a constraint on the actions which the UN refugee agency may itself undertake: see Chapter 7.2 and Hathaway and Foster, *Refugee Status*, at 472 ff. Sadly, the frequent conflation of the agency's mandate with state responsibilities under the Refugee Convention has created a space within which protection is in practice withdrawn for reasons not authorized by the Convention: ibid.

[258] See text at note 89. [259] See text at note 84. [260] See text at note 85.

[261] See text at note 86.

[262] In *Orantes-Hernandez v. Meese*, (1988) 685 F. Supp. 1488 (US DCCa, Apr. 29, 1988), affirmed as *Orantes-Hernandez v. Thornburgh*, (1990) 919 F. 2d 549 (US CA9, Nov. 29, 1990), the Immigration and Naturalization Service was found to have engaged in a

On the other hand, the UNHCR and Pakistan were not acting contrary to Art. 33 when they offered Afghan families the option to leave protection in Pakistan in exchange for a $400 cash payment.[263] Despite the resemblance to blackmail, the voluntariness of return consequent to such an offer of compensation was only clearly compromised when Pakistan followed up on the offer by closing Afghan schools and restricting the renewal of identity documents[264] – thereby effectively leaving many refugees with no real choice but to repatriate. The Australian offer of $A10,000 to Rohingya, Somali, and Sudanese refugees detained on Manus Island who were "willing" to go home[265] was similarly compromised; not only had those refugees been denied any meaningful protection option, but the offer of financial support was accompanied by a threat from the government of Papua New Guinea that action would be taken to drive out those who refused to cooperate.[266] As such, what might at first glance appear to have been simply a (lawful) incentive was tainted by being part of an overall plan that left refugees with no meaningful choice about whether to remain or go home – thereby constituting a component of a plan of orchestrated *refoulement*.

4.1.2.4 Failure to Identify Refugees

Art. 33 may be infringed not only by fairly blunt measures of the kind considered to this point, but also by "any measure, whether judicial or administrative, which secures the departure of an alien."[267] In particular, the duty of *non-refoulement* can be infringed by the refusal to consider a claim to refugee status, knowing that such a refusal leaves the refugee exposed to removal on general immigration grounds.[268] States sometimes simply refuse to assess refugee status, as was the case for pro-democracy Chinese dissidents barred from assessment procedures in Japan,[269] for Indonesians arrested and

persistent pattern of illegal conduct and enjoined from further harassment of Salvadoran refugees.

263 See text at note 90. 264 See text at notes 87–88. 265 See text at note 91.

266 See text at note 91.

267 G. Goodwin-Gill, *The Refugee in International Law* (1996), at 122, adopted in *Re S*, [2002] EWCA Civ 843 (Eng. CA, May 28, 2002). The same language is contained in Goodwin-Gill and McAdam, *Refugee in International Law*, at 206.

268 See e.g. UNHCR Executive Committee Conclusion No. 6, "Non-refoulement" (1977), at [(c)]: "The Executive Committee . . . [r]eaffirms the fundamental importance of the observance of the principle of *non-refoulement* . . . of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees." See also UNHCR Executive Committee Conclusions Nos. 79, "General Conclusion on International Protection" (1996), at [(j)], and 81, "General Conclusion on International Protection" (1997), at [(i)], ibid., insisting that the duty of *non-refoulement* inheres "whether or not they have been formally granted refugee status." The notion that access to Art. 33 could be limited to persons formally recognized as refugees has been described simply as "devoid of merit": Lauterpacht and Bethlehem, "*Non-refoulement*," at [89].

269 See text at note 74.

deported by Malaysian police while waiting to make refugee status appointments at the office of the UNHCR,[270] and for Somalis sent home by Saudi Arabia with no consideration of their claims to refugee status.[271] A risk of *refoulement* also arises where, as in the United States[272] and South Africa,[273] responsibility to identify refugees is entrusted to officials such as border guards or detention center officers who do not reliably carry out those responsibilities. Nor can states avoid the risk of *refoulement* by reclassifying persons who are in fact refugees without individuated assessment on the merits, as Spain has attempted to do by labeling of persons arriving at Ceuta and Melilla as "economic migrants" with no right to lodge a protection request,[274] as Israel does by branding Eritrean and Sudanese refugees as "infiltrators" with only a truncated ability to access protection,[275] or under the Chinese policy of classifying all North Korean refugees as "defectors" not entitled to protection.[276]

There is also no basis for a refusal to consider the independent refugee status of children on the grounds that children should be treated simply as wards of their parents.[277] To the contrary, as the English Court of Appeal has observed, the duty to protect refugees – including children who are refugees – may well trump other considerations, including the enforcement of child custody orders.[278] And while the failure to establish an appeal or review of a negative

[270] See text at note 75. [271] See text at note 77. [272] See text at note 79.
[273] See text at note 80. [274] See text at note 76. [275] See text at note 78.

[276] See text at note 61. In response to China's refusal to address the refugee claims of North Koreans, the United States Senate passed a resolution in which it called upon China to make "genuine efforts to identify and protect the refugees among the North Korean migrants encountered by Chinese authorities, including providing the refugees with a reasonable opportunity to petition for asylum": S. Con. Res. 114, 107th Congress (2002), at para. 1(A), cited in S. Murphy, "Contemporary Practice of the United States relating to International Law," (2002) 96(3) *American Journal of International Law* 706.

[277] As Pobjoy observes, "[t]here has been a general reluctance amongst states to assess individually the protection claims of children, particularly where the child arrives as part of a family. This is despite the fact that as a matter of principle a child, irrespective of age, and irrespective of whether accompanied or unaccompanied, is entitled to have her claim for Convention refugee status adjudicated prior to removal": J. Pobjoy, *The Child in International Refugee Law* (2017) (Pobjoy, *Child in Refugee Law*), at 52.

[278] "Having regard to the rule as to the paramountcy of the child's interests … I would respectfully suppose that a family judge would at the very least pay very careful attention to any credible suggestion that a child might be persecuted if he were returned to his country of origin or habitual residence before making any order that such a return should be effected": *Re S*, [2002] EWCA Civ 843 (Eng. CA, May 28, 2002). To similar effect, UNHCR is of the view that "[t]he child should not be refused entry or returned at the point of entry … As soon as a separated child is identified, a suitably qualified guardian or adviser should be appointed to assist him/her at all stages. Interviews should be carried out by specially trained personnel": UNHCR, "Asylum Processes," UN Doc. EC/GC/01/12, May 31, 2001 (UNHCR, "Asylum Processes"), at [46]. See generally Convention on the Rights of the Child, 1577 UNTS 3 (UNTS 27531), adopted Nov. 20, 1989, entered into force Sept. 2,

refugee status determination does not necessarily infringe Art. 33, the fact that the duty of *non-refoulement* is binding right up to the actual moment of return[279] requires that the system have the capacity to take account of new or previously unrecognized facts[280] before return is effected.[281] It was thus inappropriate for the United Kingdom to persist in the removal of refugee claimants from Zimbabwe, even as its own Foreign Office warned of emerging risks there.[282] Most important, as the South African Constitutional Court has made clear, there must be a dependable mechanism to guard against removal until the appeal or review is considered:

1990, at Art. 22(1): "States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights."

279 The duty of *non-refoulement* "continues so long as a refugee (defined by reference to a well-founded fear of being persecuted for a reason specified in the Convention) is in the United Kingdom. If a claim for asylum is made by a person, that is to say a claim that it would be contrary to the United Kingdom's obligations for him to be removed from or required to leave the United Kingdom, that person cannot be removed from or required to leave the United Kingdom pending a decision on his claim, and, even if his asylum claim is refused, so long as an appeal is being pursued": *R (Senkoy) v. Secretary of State for the Home Department*, [2001] EWCA Civ 328 (Eng. CA, Mar. 2, 2001), at [15].

280 "The obligation of the United Kingdom under the Convention is not to return a refugee . . . to a country where his life or freedom would be threatened for any reason specified in the Convention. That obligation remains binding until the moment of return . . . It would in my judgment undermine the beneficial object of the Convention and the measures giving effect to it in this country if the making of an unsuccessful application for asylum were to be treated as modifying the obligation of the United Kingdom or depriving a person of the right to make a fresh claim for asylum . . . Any other consideration would in my view be offensive to common sense. However rarely they may arise in practice, it is not hard to imagine cases in which an initial claim for asylum might be made on insubstantial, or even bogus, grounds, and be rightly rejected, but in which circumstances would arise or come to light showing a clear and serious threat of a kind recognised by the Convention . . . A scheme of legal protection which could not accommodate that possibility would in my view be seriously defective": *R v. Secretary of State for the Home Department, ex parte Onibiyo*, [1996] QB 768 (Eng. QBD, Mar. 5, 1996), cited with approval in *R v. Secretary of State for the Home Department, ex parte Nassir*, *The Times* (Dec. 11, 1998) (Eng. CA, Nov. 23, 1998).

281 Thus, it was determined that the duty of *non-refoulement* would be infringed if consideration were not given to new grounds of claim advanced after rejection of the original claim: *Esnat Maureen Makumba v. Minister of Home Affairs*, Dec. No. 6183/14 (SA HC, Dec. 3, 2014). In considering a change of rules pursuant to which persons assigned to the UK's "fast track" system would be able to pursue an appeal from outside the country, the Court of Appeal noted that "[i]t is the prospect of removal that is [the refugees'] principal concern. If their fears are well-founded, the fact that they can appeal after they have been returned to the country where they fear persecution is scant consolation": *R (L) v. Secretary of State for the Home Department*, [2003] EWCA Civ 25 (Eng. CA, Jan. 24, 2003), at [54].

282 See text at note 81.

> If the asylum seeker was returned, and if it was later determined in the judicial review that the asylum seeker had met the requirements for refugee status . . . the principle of *non-refoulement* would have been transgressed . . .
>
> It is cold comfort to say – between the exhaustion of internal remedies and the outcome of judicial review – [that] an asylum seeker may seek and obtain interim protection by means of an urgent application to court. Litigation being what it is, there is no guarantee that the approach to court will succeed; the urgent application may be dismissed on a technicality or any other legally cognisable basis. That would then expose the asylum seeker to the risk of return . . . That is a breach of the principle of *non-refoulement*.[283]

More generally, the risk of *refoulement* can arise from the simple inadequacy of assessment procedures. For example, the English Court of Appeal found a British expedited asylum procedure to set "time limits [that] are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases . . . The system is therefore structurally unfair and unjust"[284] – raising, of course, the specter of the wrongful rejection of claims as "unfounded." The evolving practice of contracting out status assessment to less well-resourced and relatively inexperienced third countries – as the United States did with Jamaica and the Turks and Caicos Islands during the 1990s,[285] and as Australia has done with Nauru and Papua New Guinea[286] – magnifies the risk of *refoulement*. Because such cooperation is designed to "prevent and deter access to statutory and judicial asylum safeguards in the country responsible,"[287] foreign processing mechanisms often fail to ensure protection of the refugees' acquired rights and at times result in their return to the country of origin.[288]

4.1.2.5 International Zones and Excision

Art. 33 may also be breached when a state creates a legal ruse in order to avoid formal acknowledgment of the arrival of a refugee.[289] Some states persist in

[283] *Cishahayo Saidi v. Minister of Home Affairs*, Dec. No. CCT 107/17 (SA CC, Apr. 24, 2018), at [25], [30]. Similarly, the Court of Justice of the European Union determined that the duty to provide an effective remedy required "automatic suspension of enforcement of the measure authorising [the refugee claimant's] removal" while review of a negative decision in his case was sought from the Council of State: *X v. Netherlands*, Dec. No. C-175/17 (CJEU, Sept. 26, 2018), at [32].

[284] *Lord Chancellor v. Detention Action*, [2015] EWCA Civ 840 (Eng. CA, July 29, 2015), at [45]; see also Refugee Council, "Accelerated Procedure: United Kingdom," *Asylum Information Database*.

[285] See text at note 82. [286] See text at note 83.

[287] A. Francis, "Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing," (2008) 20(2) *International Journal of Refugee Law* 273, at 275; see also ibid. at 280–281.

[288] Ibid. at 273.

[289] "As a matter of fact, anyone presenting themselves at a frontier post, port, or airport will already be within State territory and jurisdiction; for this reason, and the better to retain

establishing so-called "international zones" in which they purport to be able to act without regard for their international legal duties – for example, in the transit area of Moscow's Sheremetyevo Airport,[290] or at the so-called "no man's land" just inside Hungary's border with Serbia.[291] An even more poignant example is provided by Australia's refusal to consider the refugee status of persons present in islands or other parts of its territory on the grounds that its domestic law deems that territory to have been "excised" or otherwise rendered outside Australian immigration jurisdiction.

In truth, all such places – and indeed the state's territorial sea – are clearly part of a state's territory.[292] No form of words, and no domestic law, can change that fact[293] – as was affirmed by the European Court of Human Rights in the seminal *Amuur* decision.[294] There is thus no international legal difference between opting not to consider the refugee status of persons present in "international zones" or "excised territory" and refusing to consider the refugee status of persons clearly acknowledged to be on the state's territory. Where the refusal to process a refugee claim results, directly or indirectly, in the refugee's removal to face the risk of being persecuted, Art. 33 has been contravened.

4.1.2.6 "Protection Elsewhere" ("First Country of Arrival" and "Safe Third Country") Regimes

Refoulement may also result from the application of "protection elsewhere"[295] rules. These rules constrain the traditional prerogative of refugees to decide where they wish to seek protection,[296] whatever the particular circumstances

sovereign control, States have devised fictions to keep even the physically present alien technically, legally, unadmitted": Goodwin-Gill and McAdam, *Refugee in International Law*, at 207.

[290] See text at note 129. [291] See text at note 128. [292] See Chapter 3.1.2.

[293] As noted by the House of Lords in the case of a refugee claimant bound for the United States but intercepted at London's Heathrow Airport, it would be "artificial in the extreme to deny [the claimant] the protection to which she would have been entitled had she reached the United States just because she was detected at Heathrow before she boarded her flight to Washington. The situation is one where the United Kingdom, having asserted jurisdiction over her because she was present here, must assume responsibility for affording her the benefit of [refugee protection]": *R v. Asfaw*, [2008] UKHL 31 (UK HL, May 21, 2008), at [58].

[294] "The Court notes that even though the applicants were not in France within the meaning of the Ordinance of 2 November 1945, holding them in the international zone of Paris-Orly Airport made them subject to French law. Despite its name, the international zone does not have extraterritorial status": *Amuur v. France*, [1996] ECHR 25 (ECtHR, June 25, 1996), at [52].

[295] This term originates in the "Michigan Guidelines on Protection Elsewhere," (2007) 28 *Michigan Journal of International Law* 207.

[296] See e.g. UNHCR Executive Committee Conclusions Nos. 15, "Refugees Without an Asylum Country" (1979), and 58, "Problem of Refugees and Asylum-Seekers Who

or preferences of the refugee. Under both the European Dublin Regulation and the Canada–US Memorandum of Understanding, for example, the "first country of arrival" for a given refugee assumes all responsibility for assessment of the claim and delivery of protection. Indeed, under so-called "safe third country" rules – a cousin of the "first country of arrival" notion – a refugee may be required to have his or her claim to refugee status assessed in a designated third country, even if the refugee has never passed through that state. The country to which removal is effected, and that country alone, is deemed responsible to evaluate the refugee claim and to provide protection as required.

Interestingly, the risk inherent in such measures was explicitly considered by the drafters of the Convention. At the Conference of Plenipotentiaries, the Swedish representative introduced a proposal to frame the duty of *non-refoulement* in a way that would "cover cases where refugees were expelled to a country where their life would not be directly threatened, but where they would be threatened by further expulsion to a country where they would be in danger."[297] A consensus evolved in opposition to the proposal, for two basic reasons.

First, states rejected the Swedish initiative because they wanted to remain free to expel refugees to countries in which there was no danger of being persecuted,[298] at least insofar as the state to which removal would be effected had adhered to the Convention.[299] But second, they felt that the Swedish amendment was not necessary, since "if such expulsion presented a threat of subsequent forcible return to the country of origin, the life and liberty of the refugee in question were endangered" by the removal to the intermediate state – thus clearly abridging the duty of *non-refoulement*. The relevant issue was said to

Move in an Irregular Manner from a Country in Which They Had Already Found Protection" (1989).

297 Statement of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 4. Specifically, the proposal was that "[n]o Contracting States shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion, *or where he would be exposed to the risk of being sent to a territory where his life or freedom would thereby be endangered* [emphasis added]": UN Doc. A/CONF.2/70, July 11, 1951.

298 "It should, however, be pointed out that the paragraph was concerned with a special case, namely the expulsion or turning back into a territory where the refugee's life or liberty was in danger. The general case was that of expulsion to any country other than that in which the refugee would be threatened": Statement of Mr. Ordonneau of France, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 13.

299 "The Swedish amendment did not state that it related to countries which did not grant the right of asylum. Such countries were not necessarily those in which persecution occurred. If the States in question were signatories to the Convention, the question would not arise, because refugees would not be returned to countries where they risked being persecuted": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 10.

be the *foreseeability* of the ultimate consequences of the initial expulsion.[300] This clear prohibition of indirect *refoulement* has been neatly explained by the House of Lords:

> Suppose it is well-known that country A, although a signatory to the Convention, regularly sends back to its totalitarian and oppressive neighbour, country B, those opponents of the regime in country B who are apprehended in country A following the escape across the border. Against that background, if a person arriving in [a state party] from country A sought asylum as a refugee from country B, assuming he could establish his well-founded fear of persecution there, it would, it seems to me, be as much a breach of Article 33 of the Convention to return him to country A as to country B. The one course would effect indirectly, the other directly, the prohibited result, i.e. his return "to the frontiers of territories where his life or freedom would be threatened."[301]

Taking account of these understandings, application of the so-called "first country of arrival" or "safe third country" principles, while not anchored in the requirements of the Refugee Convention,[302] is also not necessarily in breach of it.[303] States declined to assume particularized responsibility for all who arrive at their borders, and insisted that they retain the liberty to send refugees onward to a country in which there is no threat of being persecuted.[304]

The position of the UNHCR on shared protection arrangements has been somewhat mercurial: initially insisting that "[t]he intentions of the asylum-seeker

[300] Statement of Mr. Larsen of Denmark, ibid. at 9–10. This is consistent with the concern of the French delegation to avoid the imposition of an unduly subjective duty on states: ibid. at 4.

[301] *R v. Secretary of State for the Home Department, ex parte Bugdaycay*, [1987] AC 514 (UK HL, Feb. 19, 1987), per Lord Bridge of Harwich at 532D. This approach has been affirmed in *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002).

[302] UNHCR, "Summary Conclusions on the Concept of 'Effective Protection' in the Context of Secondary Movements of Refugees and Asylum-Seekers," Lisbon, Dec. 9–10, 2002, at [11].

[303] As observed in the House of Lords, the Refugee Convention "did not lay down any rules as to which State ought to provide protection": *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002), per Lord Hope at [22].

[304] "Article 33(1) cannot . . . be read as precluding removal to a 'safe' third country, i.e. one in which there is no danger . . . The prohibition of *refoulement* applies only in respect of territories where the refugee or asylum-seeker would be at risk, not more generally. It does, however, require that a State proposing to remove a refugee or asylum-seeker undertake a proper assessment as to whether the third country concerned is indeed safe": Lauterpacht and Bethlehem, "*Non-refoulement*," at [116]. Importantly, courts have insisted on clear analysis of the safety of the destination state: *NBMZ v. Minister for Immigration and Border Protection*, [2014] FCAFC 38 (Aus. FFC, Apr. 9, 2014) (expressing concern with the government's lax undertaking that it "will not necessarily remove a person . . . to the country in respect of which the *non-refoulement* obligation exists": ibid. at [15], [136]).

as regards the country in which he wishes to request asylum should as far as possible be taken into account,"[305] and most specifically "that asylum should not be refused solely on the ground that it could be sought from another State";[306] softening its view over the years[307] to include encouragement of governments to give "consideration … to the possibility of concluding other multilateral or bilateral Dublin-type agreements" on the grounds that "[s]uch agreements would serve to enhance predictability, and address concerns regarding unilateral returns";[308] and more recently, seeming to revert to its original position "that asylum-seekers and refugees should ordinarily be processed in the territory of the State where they arrive … The primary responsibility to provide protection rests with the State where asylum is sought."[309] Indeed, the agency has now helpfully made clear that in its view lawful transfers may only occur between states that are

[305] UNHCR Executive Committee Conclusion No. 15, "Refugees Without an Asylum Country" (1979), at [(h)(iii)].

[306] Ibid. at [(h)(iv)].

[307] See UNHCR Executive Committee Conclusion No. 58, "Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Have Already Found Protection" (1989), making an exception to the general right of refugees to choose where to seek protection where they have already found protection in some other state; UNHCR Executive Committee Conclusion No. 71, "General Conclusion on International Protection" (1993), acknowledging the value of designated states of protection where needed to avoid "refugee in orbit" situations; and, in particular, UNHCR Executive Committee Conclusion No. 74, "General Conclusion on International Protection" (1994), at [(p)], which "[a]cknowledges the value of regional harmonization of national policies to ensure that persons who are in need of international protection actually receive it."

[308] UNHCR, "Asylum Processes," at [18]. There is reason to believe, however, that there is a less-than-unanimous consensus favoring this shift. The conclusions of one of UNHCR's Global Consultations expert roundtables, for example, posit that "[t]here is no obligation under international law for a person to seek international protection at the first effective opportunity. On the other hand, asylum-seekers and refugees do not have an unfettered right to choose the country that will determine their asylum claim in substance and provide asylum. Their intentions, however, ought to be taken into account": UNHCR, "Summary Conclusions on the Concept of 'Effective Protection' in the Context of Secondary Movements of Refugees and Asylum-Seekers," Dec. 10, 2002, at [11]. This Conclusion cites UNHCR Executive Committee Conclusion No. 15, in support; it makes no reference to UNHCR Executive Committee Conclusions Nos. 58, "Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Have Already Found Protection" (1989); 71, "General Conclusion on International Protection" (1993); or 74, "General Conclusion on International Protection" (1994).

[309] UNHCR, "Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers," May 2013. See also UNHCR Regional Representation Canberra, "Position paper: Bilateral and/or Multilateral Arrangements for Processing Claims for International Protection and Finding Durable Solutions for Refugees," Apr. 20, 2016 (relating to the Southeast Asian region); and UNHCR, "Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU–Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept," Mar. 23, 2016.

bound by relevant refugee and human rights instruments[310] and which live up to their duties in practice, including scrupulous respect for the duty of *non-refoulement*.[311]

As the focus of the most recent UNHCR advice suggests, the main concern with "first country of arrival" or "safe third country" rules is that the duty of *non-refoulement* set by Art. 33 can too easily be compromised by risks arising from the relatively mechanical way in which shared responsibility is sometimes implemented.[312] While the risk is perhaps higher under the relatively fluid "safe third country" rules than under formalized responsibility-sharing partnerships relying on the "first country of arrival" principle, even the latter can present the threat of *refoulement*, as was made clear by the European Court of Human Rights:

> Nor can [a state] rely automatically . . . on the arrangement made in the Dublin Convention concerning attribution of responsibility between European countries for deciding asylum claims. Where states establish international organizations, or *mutatis mutandis* international agreements, to pursue cooperation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if contracting states were thereby absolved from their responsibility under the Convention . . .
>
> The Court notes the comments of the UNHCR that, while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered.[313]

Keenly aware of this risk, courts have taken the view that while governments may legitimately begin from the position that partner states will carry out their responsibilities in good faith,[314] this prerogative is balanced against the duty of

[310] UNHCR, "Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers," May 2013, at [3(iii)].

[311] Ibid. at [3(vi)], [4].

[312] See e.g. Giuffré, "Readmission Agreements"; and E. Guild, "Asylum and refugees in the EU: A practitioner's view of developments," *European Information Service* (Dec. 2000), at 215, cited with approval by Lord Hope in *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002).

[313] *TI v. United Kingdom*, [2000] INLR 211 (ECtHR, Mar. 7, 2000). See also *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002), per Lord Hutton, observing that the duty under Art. 33 to avoid the risk of indirect return to the risk of being persecuted "is applicable . . . notwithstanding that the person is removed from the United Kingdom to another country pursuant to the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims."

[314] Indeed, the Court of Justice of the European Union initially took the view that only "systemic flaws" in a partner state's system would justify failure to assign refugees on the basis of first country of arrival rules: *NS v. Secretary of State for the Home Department*, Dec. Nos. C-411/10 and C-493/10 (CJEU, Dec. 21, 2011); affirmed in *Shamso Abdullahi v.*

the sending state to refuse removal where there is a real risk that the partner state will not grant protection where warranted.[315]

First and most fundamentally, courts have insisted that there be a clear ability lawfully to enter and remain in the partner or other designated state while the claim to protection is assessed,[316] not just "a practical capacity to

Austria, Dec. No. C-394/12 (CJEU, Dec. 10, 2013), at [60]. The Supreme Court of the United Kingdom, however, expressed concern about this approach, noting that "[t]he presumption [of partner state respect for refugee rights] should not operate to stifle the presentation and consideration of evidence . . . [regarding] the consequences of enforced return. Nor should it be required that, in order to rebut it, it must be shown, as a first and indispensable requirement, that there is a systemic deficiency in the procedure and reception conditions provided for the asylum seeker": *R (EM, Eritrea) v. Secretary of State for the Home Department*, [2014] UKSC 12 (UK SC, Feb. 19, 2014), at [41]. The European Court of Human Rights was similarly disinclined to adopt the "systemic deficiency" threshold, insisting instead on an analysis of particularized risks: *Tarakhel v. Switzerland*, (2015) 60 EHRR 28 (ECtHR [GC], Nov. 4, 2014). The Court of Justice seems now to have taken this concern onboard, determining more recently that "[t]he . . . argument that . . . only the existence of systemic flaws in the Member State responsible is capable of affecting the obligation to transfer an asylum seeker to that Member State is unfounded": *CK v. Slovenia*, Dec. No. C-578/16 PPU (CJEU, Feb. 16, 2017), at [91].

315 While the analysis here is restricted to the duty of *non-refoulement*, courts have increasingly constrained removals on grounds of other rights violations that may occur in the destination state, and more generally on whether there can be an expectation of compliance with duties owed to refugees: see Hathaway and Foster, *Refugee Status*, at 39–49. Contrary to the approach adopted by the European Court of Human Rights in *Hirsi Jamaa v. Italy*, (2012) 55 EHRR 21 (ECtHR [GC], Feb. 23, 2012), at [211], it is not enough to have "assurances" from the government of the destination country that rights will be respected; the real facts on the ground must be considered. Thus, Costello correctly insists that "Italy was not entitled to rely on assurances from Libya . . . in the face of evidence from 'reliable sources' of 'practices . . . manifestly contrary to the principles of the Convention'": Costello, *Human Rights of Migrants*, at 263.

316 This requirement may be satisfied "if the person has a legally enforceable right to enter that territory . . . Likewise, if the person in fact is permitted to enter, then the principle of international comity, whether or not actually infringed, is not material and could be taken to be waived at least once entry is permitted. When these matters are put together with Article 33, it can be concluded that Australia would have no protection obligations where the safe third country consents to admit the refugee, where the refugee has a legally enforceable right to enter the safe third country, or where as a matter of fact the safe third country . . . admits the refugee": *V872/00A v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 185 (Aus. FFC, June 18, 2002). But "the Tribunal must consider whether it is satisfied that the third country will permit entry so that the applicant will not be left at the border and denied admission. In deciding whether it is satisfied the Tribunal will take into account the important matters of international obligation and comity . . . as well as the significance of the decision to the individual whose life or liberty may be at risk. Where there is doubt, that doubt should be resolved in favour of the applicant": ibid. For example, the court observed in *Tharmalingam v. Minister for Immigration and Multicultural Affairs*, Dec. No. BC9905456 (Aus. FFC, Aug. 26, 1999) that "the material in the present case does indicate that the appellant now faces a risk of *refoulement* to Sri Lanka because he can apparently no longer return to France as of right."

bring about a lawful permission to enter and reside legally in the relevant country."[317] The sending state moreover breaches Art. 33 if there is a real chance that the destination country will remove the refugee claimant to another state in which the risk of onward *refoulement* exists.[318] In these circumstances, there can be no question of the first state avoiding responsibility for a breach of Art. 33 simply because it does not itself directly effect the removal to the place of risk:

> [F]or a country to return a refugee to a state from which he will then be returned by the government of that state to a territory where his life or freedom will be threatened will be as much a breach of Article 33 as if the first country had itself returned him there direct. This is the effect of Article 33.[319]

Indeed, as the Supreme Court of Canada has affirmed,

> At least where Canada's participation is a necessary precondition for the deprivation, and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid [responsibility] because the deprivation in question would be effected by someone else's hand ... [W]e cannot pretend that Canada is merely a passive participant.[320]

As such, when Kenya and the UNHCR forced refugees back to Uganda and Tanzania, knowing that Uganda would not assess their claims and that

[317] *Minister for Immigration and Multicultural Affairs v. Applicant "C,"* [2001] FCA 1332 (Aus. FFC, Sept. 18, 2001). In interpreting the language of Australian domestic legislation, the same court has more recently determined that a "liberty or privilege lawfully given" is sufficient, "albeit [a liberty or privilege] capable of withdrawal and not capable of enforcement": *Minister for Immigration and Border Protection v. SZUSU*, [2016] FCAFC 50 (Aus. FFC, Mar. 31, 2016), at [12], [23]. While the Court is correct that the inquiry is fundamentally practical, the ability of an offer of entry to be withdrawn without any remedy surely calls for extraordinarily careful scrutiny of the real risk of such a withdrawal. As such, the Full Federal Court's determination in this case that a mere announcement on a government website forecloses the need for any factual inquiry into the right of entry (ibid. at [38]) is not sound. To be preferred is the reasoning of North J. in *MZZXS v. Minister for Immigration and Border Protection*, [2015] FCA 1384 (Aus. FC, Dec. 4, 2015), at [14], requiring substantive scrutiny of the reality of the advertised right of entry. Indeed, the Court of Justice of the European Union has recently insisted that claimants may be sent to a non-EU "safe third country" only where authorities have affirmatively satisfied themselves that the duty of *non-refoulement* and other Refugee Convention duties will be respected there: *LH v. Hungary*, Dec. No. C-564/18 (CJEU, Mar. 19, 2020), at [37].

[318] Kälin, "Article 33, para. 1," at [155].

[319] *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer*, [2001] 2 WLR 143 (UK HL, Dec. 19, 2000), per Lord Hobhouse.

[320] *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002). While the focus of the court's analysis here was the indirect breach of the domestic duty to guarantee fundamental justice, the analysis is helpful in understanding a broader range of indirect risks initiated by the sending away of an individual from a state's territory.

Tanzania was threatening to return them to their home country,[321] they violated the duty of *non-refoulement*. Similarly, the decision of South African border guards summarily to force refugees back to "safe" neighboring states without any assessment of whether protection was truly available there[322] amounted to the very sort of willful blindness that engages Art. 33 of the Convention. Equally clearly, the decision of European Union states to force refugees back to Turkey, knowing that refugees are returned from that country to Nigeria, Pakistan, and Syria,[323] poses the risk of indirect *refoulement* of such refugees.

Second, care must be taken to avert the risk of *refoulement* that would arise if there were reason to believe that the laws or practices of the partner state could not be relied upon accurately to recognize the refugee status of persons who are in fact Convention refugees. Thus, the House of Lords disallowed automatic reliance on the Dublin Convention's "first country of arrival" rule to remove refugees fleeing non-state agents of persecution to France and Germany, reasoning that the understanding of the refugee definition then embraced in those two states (which at that time excluded such cases) did not meet the requirements of international law.[324] While minor differences of interpretation were found not to give rise to the risk of indirect *refoulement*,[325] state parties are bound – precisely in line with the intentions of the Convention's drafters – to engage in a "rigorous examination" of the laws and practices of the proposed destination state, with "anxious scrutiny" of their duty of *non-refoulement*.[326] If it is known (or could reasonably become known) that the understanding of the Convention refugee definition in the "country of first arrival" or "safe third country" is deficient – in consequence of which there is a real chance of eventual *refoulement* – it follows that sending a refugee to that country is a breach of the duty to avoid the *refoulement* of a refugee "in any manner whatsoever." The EU's "super-safe third country" approach, which authorizes the turning away of refugee claimants to neighboring states based

[321] See text at notes 106–107. [322] See text at notes 108–109. [323] See text at note 112.

[324] "[T]he enquiry must be into the meaning of the Refugee Convention approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It is necessary to determine the autonomous meaning of the relevant treaty provision": *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer*, [2001] 2 WLR 143 (UK HL, Dec. 19, 2000), per Lord Steyn.

[325] Lord Bingham noted that only "significant differences" of interpretation would make removal unlawful because of the importance of what he defined as "the humane objective of the Convention ... to establish an orderly and internationally agreed regime for handling asylum applications": *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002).

[326] Ibid., per Lord Hutton at [74]; and at [58], per Lord Hope, citing to the holding of Lord Bridge of Harwich in *R v. Secretary of State for the Home Department, ex parte Bugdaycay*, [1987] AC 514 (UK HL, Feb. 19, 1987).

only on their having established an asylum procedure and acceded to relevant instruments (with no scrutiny of de facto compliance with relevant obligations)[327] is an example of a system that is willfully blind to the risk of *refoulement* in the destination state. Nor may Canada lawfully force all refugees back to the United States under the Canada–US safe country agreement:[328] because the peculiarities of American law result in only a subset of Convention refugees being granted protection against *refoulement*,[329] there is a foreseeable risk of indirect *refoulement* from the United States for many refugees.

Third, the risk of *refoulement* may arise not only from the risk of onward removal or substantive error in the assessment of refugee status, but rather because the procedures in the destination country are inadequate to identify and protect genuine refugees.[330] In the seminal case on point, the European Court of Human Rights determined that Belgium could not return a person seeking recognition of refugee status to the overwhelmed and failing Greek asylum system since "[w]hen they apply the Dublin Regulation . . . [s]tates must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces."[331] In line with the result-oriented duty of *non-refoulement*, it is of course irrelevant whether the risk of removal to persecution arises from the threat of onward expulsion, material disagreement on the substance of refugee status, or the simple inability or unwillingness carefully to scrutinize asylum claims. In each case, the end result is the same:

> [T]he focus . . . is on the end result rather than the precise procedures by which the result was achieved. The question is whether the government of the third country "would not" send the person to another country or territory otherwise than in accordance with the Geneva Convention. The concern is essentially a practical one rather than one which is theoretical.[332]

As such, when the United States requires asylum applicants to have their claims assessed in El Salvador, Guatemala, or Honduras[333]and when Australia forces refugees into refugee status systems in Nauru and Papua and New Guinea despite knowledge of the inadequacy of the systems in those countries to

[327] See text at note 127. [328] See text at note 100. [329] See Chapter 4.1.1, note 156.

[330] The Netherlands thus declined to transfer an Afghan refugee claimant to Hungary, noting that Hungary's asylum procedure provided no remedy against negative first instance decisions, did not ensure legal assistance, lacked interpreters, and imposed inappropriately short deadlines: Rechtbank Den Haag AWB Dec. No. 15/2751 (Neth. DC, Oct. 16, 2015).

[331] *MSS v. Belgium and Greece*, (2011) 53 EHRR 28 (ECtHR, Jan. 21, 2011), at 342.

[332] *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002), per Lord Hope.

[333] See text at note 119.

identify genuine refugees,[334] they create the risk of *refoulement* and are thus liable for any such consequence. Indeed, the fact that Australia has at times explicitly defended its actions as designed to create an inhospitable climate that will deter refugees from arriving to seek protection[335] is an extraordinary "smoking gun," making clear that it is prepared to tolerate the risk of *refoulement* in order to achieve its preferred migration management goals.

4.1.2.7 "Safe Country of Origin" Rules

In some cases, governments make blanket determinations of safety with regard to a particular country of origin without examination of individuated circumstances, limiting or denying access to the usual refugee assessment procedures to nationals of listed states.[336] In principle, this approach conflicts with the individuated nature of the Convention refugee definition: even if nearly all persons from a given country cannot qualify for refugee status, this fact may not lawfully impede recognition of refugee status to the small minority who are in fact Convention refugees.[337] For example, the decision of the United Kingdom to designate Pakistan as presumptively safe was characterized by a reviewing court as simply "irrational" in view of that country's fundamental disfranchisement of its Ahmadi minority[338] – leading, no doubt, to the UK's recent shift to a more constrained approach in which the presumption of safety makes clear which minorities of a given nationality are not to be caught by the "safe country of origin" rule.[339] An assessment of the legality of designating "safe countries of origin" therefore hinges on whether it can dependably ensure the protection of genuine refugees coming from those states.

Most clearly, there can be no question of automatically refusing all claims from any country: an approach of this kind will inevitably force away at least some refugees.[340] Nor is it an answer to this concern to suggest that only

[334] See text at notes 114–116. [335] See text at note 118.

[336] See generally M. Hunt, "The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future," (2014) 26(4) *International Journal of Refugee Law* 500 (Hunt, "Safe Country of Origin Concept") and Costello, "Safe Country?."

[337] *NS v. Secretary of State for the Home Department*, Dec. Nos. C-411/10 and C-493/10 (CJEU, Dec. 21, 2011), at [99]–[101]; *CK v. Slovenia*, Dec. No. C-578/16 PPU (CJEU, Feb. 16, 2017).

[338] *R v. Secretary of State for the Home Department, ex parte Javed*, [2001] EWCA Civ 789 (Eng. CA, May 17, 2001).

[339] See text at note 122. Given the greater logic of rules that exclude known at-risk subpopulations from safe country designations, the decision of the European Union to eliminate Art. 30(3) of the original Asylum Procedures Directive, Council Directive 2005/85/EC, OJ 2005 L326/13, which allowed states to designate partial and group-specific safe countries of origin, may have been a counterproductive move.

[340] UNHCR takes an equivocal position on the legality of designating whole countries of origin as presumptively safe, noting without comment that "[s]ome states have drawn up extensive lists of such countries, sometimes applying them as an automatic bar to access to

countries which adhere to the Refugee Convention or other human rights instruments will be designated as "safe countries of origin." Sadly, even countries considered democracies and defenders of human rights have generated – at some times, and in some circumstances – persons who are in fact Convention refugees.[341] As UNHCR has made clear, account needs to be taken "not simply of international instruments ratified and relevant legislation enacted there, but also of the actual degree of respect for human rights and the rule of law, of the country's record of not producing refugees, of its compliance with human rights instruments, and of its accessibility to national or international organizations for the purpose of verifying human rights issues."[342] It thus follows that the European Union's effective bar on the reception of refugee claims from EU citizens[343] – even as, for example, European citizens of Roma ethnicity are being recognized in other state parties as refugees[344] – makes it impossible for member states to honor their duties under Art. 33.

More commonly, however, designation of a country of origin as "safe" operates not as a bar on seeking protection as such, but rather as a procedural device which requires an applicant to establish his or her refugee status under an accelerated or otherwise truncated procedure, often with the requirement to rebut a presumption against recognition of refugee status.[345] In a particularly

the asylum procedures": UNHCR, "Asylum Processes," at [39]. More ominously, UNHCR refers to the need to give attention to individuated concerns as "best state practice," rather than a clear duty: ibid. at [39]. Thus, in the context of advising on the Canadian "safe country of origin" rule, UNHCR did not condemn the proposal (since struck down in part by the Canadian Federal Court: See text at note 352), but simply called for designation to be based on "objective, reliable and up-to-date information and [to] be decided by a panel of experts" and for that designation to be amenable to challenge in court: UNHCR, "UNHCR Submission on Bill C-31: Protecting Canada's Immigration System Act," May 2012, at 12.

341 For example, in *Roszkowski v. Special Adjudicator*, [2001] EWCA Civ 650 (Eng. CA, May 9, 2001), the court did not question the designation of Poland as a safe country of origin despite the fact that the Special Adjudicator had accepted that the Polish Roma applicants had not only experienced demands for money and beatings, but had been subjected to attacks by anti-Roma vigilantes on their apartment – including physical assaults – on three separate occasions.

342 UNHCR, "Asylum Processes," at [39]. 343 See notes 125–126.

344 See C. Levine-Rasky, "Designating Safety, Denying Persecution: Implications for Roma Refugee Claimants in Canada," (2017) 16 *Journal of Immigrant and Refugee Studies* 1.

345 UNHCR offers some support for this approach, suggesting that "a proper designation of a country as a 'safe country of origin' does not, by that fact alone, serve as a declaration of cessation of refugee status in regard to refugees from that country. It should serve merely as a procedural tool to expedite processing of refugee claims": UNHCR, "Note on the Cessation Clauses," UN Doc. EC/47/SC/CRP.30 (1997) (UNHCR, "Cessation"), at [7]. The concern, though, is that while apparently just altering procedural norms, safe country of origin rules "seem to be fatal in practice. EASO reports that 90 per cent of asylum claims that are dealt with in accelerated procedures are rejected": Costello, "Safe Country?," at 609.

helpful judgment, the English Court of Appeal insisted that such a procedure can be operated without breach of the duty of *non-refoulement* only if it delivers a "fair hearing," including access to legal counsel.[346] The procedure may begin from a presumption of safety in the country of origin, but must give "careful consideration to the facts of the individual case."[347] For example, it must be possible for an applicant to adduce expert medical evidence where relevant.[348] Perhaps most critically, where it becomes clear that credibility is at the heart of the case, protection should not ordinarily be refused without access to a more traditional refugee status inquiry.[349] The European Union's rules, which insist the refugee claimants originating in a non-EU designated safe country be entitled to rebut a presumption of safety,[350] thus seek to align state practice with these understandings.

Yet even if procedural safeguards like those set by the European Union avert most risks of a breach of the duty of *non-refoulement*, there is surely still a principled objection to deeming whole countries to be "safe countries of origin." Since the very point of such a designation is to deny rights to a group of refugee claimants based on their national origin rather than on the particularized merits of their claim to protection, the risk of prohibited stereotyping at the heart of the duty of non-discrimination is clearly real.[351] Indeed, the Canadian Federal Court struck down a Canadian law denying appeal rights to persons from "designated countries of origin" (DCOs) on precisely that basis:

> The distinction drawn between the procedural advantage now accorded to non-DCO refugee claimants and the disadvantage suffered by DCO refugee claimants . . . is discriminatory on its face. It also serves to further marginalize, prejudice, and stereotype refugee claimants from DCO countries which are generally considered safe and "non-refugee producing." Moreover, it

[346] *R (L) v. Secretary of State for the Home Department*, [2003] EWCA Civ 25 (Eng. CA, Jan. 24, 2003), at [30], [38].

[347] Ibid. at [45]. [348] Ibid. at [49].

[349] "Where an applicant's case does turn on an issue of credibility, the fact that the interviewer does not believe the applicant will not, of itself, justify a finding that the claim is clearly unfounded. In many immigration cases, findings on credibility have been reversed on appeal. Only where the interviewing officer is satisfied that nobody could believe the applicant's story will it be appropriate to certify the claim as clearly unfounded on the ground of lack of credibility alone": ibid. at [60].

[350] See text at notes 123–124.

[351] See Chapter 3.4. The risk that designation as a "safe country of origin" amounts to nationality-based discrimination is intensified where the criteria relied upon for designation do not accurately focus on the reality of risk for a Convention reason. Costello, for example, criticizes the EU proposal of 2015 for a common safe country of origin list that would have been based on a quantitative assessment of the country's record before the European Court of Human Rights and whether the country was or was not a candidate for EU membership, rightly said to be "weak proxies for the actual human rights situation": Costello, "Safe Country?," at 611.

> perpetuates a stereotype that refugee claimants from DCO countries are somehow queue-jumpers or "bogus" claimants who only come here to take advantage of Canada's refugee system and its generosity . . .
>
> This [rule] draws a clear and discriminatory distinction between refugee claimants from DCO-countries and those from non-DCO countries, by denying the former a right to appeal a decision of the RPD and allowing the latter to make such an appeal. This is a denial of substantive equality to claimants from DCO countries based upon the national origin of such claimants.[352]

As Costello poignantly observes, this judgment makes clear why "safe country of origin" rules are as unnecessary as they are ethically suspect:

> The finding [of the Canadian Federal Court] is startling in its clarity. There was no justification for disadvantaging claimants from particular countries. If there were weak or fraudulent asylum claims, adjudicators were assumed to be capable of doing their job and rejecting such claims. While evidence of weak claims could be used as a reason to accelerate administrative processes, it provided no basis for limited appeal rights.[353]

In sum, the duty of *non-refoulement* – because of its broad ambit and consequence-defined nature – is a powerful means of ensuring access to protection for at-risk persons able to reach the jurisdiction of a state party to the Convention. It prohibits non-admittance of refugees by way of force, border closures, or the erection of unresponsive barriers to access. It proscribes ejection from a state party's territory, whether by formal policy, acquiescence, or the implementation of so-called "voluntary repatriation" arrangements which are in fact coercive. The duty of *non-refoulement* is engaged in the event of the removal of a refugee consequent to refusal to consider a claim or because of inadequate procedures, as well as by virtue of reliance on such legally fictitious notions as "international zones" or "excision." And "protection elsewhere" rules – including so-called "first country of arrival" and "safe third country" rules that fail to ensure the right of a refugee to enter and remain in the designated partner state, or which otherwise create gaps in the ability of a refugee to secure recognition and protection, as well as "safe country of origin" designations that stigmatize all (or many) citizens of a given state as unworthy of the usual procedures for investigation of their refugee claims – may similarly result in the removal of genuine refugees, thus violating the duty not to return a refugee to the risk of being persecuted "in any manner whatsoever."

[352] *YZ v. Canada*, [2016] 1 FCR 575, 2015 FC 892 (Can. FC, July 23, 2015), at [124], [130]. The Belgian Court of Arbitration similarly ruled that the so-called "double 5%" rule relied upon by Belgium to devise its safe country of origin list was discriminatory: Hunt, "Safe Country of Origin Concept," at 510, citing to Belgian Court of Arbitration Judgment 20/93 of Mar. 25, 1993, at 6392.

[353] Costello, "Safe Country?," at 619.

4.1.3 *Extraterritorial* Refoulement

Analysis to this point has focused on the implications of the duty of *non-refoulement* for refugees at a state's borders or within its territory. Increasingly, however, states are inclined to take action in areas beyond their own territory (including beyond their territorial sea) with a view to forcing refugees back to their place of origin, or at least toward some other state. They seek to ensure that refugees never arrive,[354] and hence cannot claim the protection to which they are in principle entitled. Because the deterrent measures are premised on denial to the refugee of any direct contact with the destination state, the question arises whether a state party that engages in arm's-length actions that lead ultimately to refugees being forced back to their country of origin has breached the duty of *non-refoulement*.

4.1.3.1 Unilateral Extraterritorial Deterrence

It is generally understood that measures undertaken by a state to prevent refugees from crossing its border are acts of *refoulement*. For example, the European Court of Human Rights was called upon to assess the legality of measures taken by Spain at the frontier of its African enclave in Melilla.[355] Spain argued that the Malian and Ivorian nationals turned back in the maze between two six-meter high external barriers and a three-meter high internal barrier dividing Melilla from Morocco had not entered Spanish territory, and could therefore not be said to be under Spanish jurisdiction. The Court insisted that even if the asylum-seekers were not "in" Spain at the time of the push-backs, Spain was nonetheless responsible for their rejection because the true lynchpin for liability – jurisdiction, not territory – was clearly established by its continuous control over the area in question.[356]

In taking this view,[357] the Court drew upon the approach pioneered in its Grand Chamber ruling in *Hirsi*[358] that Italy had jurisdiction over migrants turned back on the high seas:

> The Court observes that in the instant case the events took place entirely on board ships of the Italian armed forces, the crews of which were composed exclusively of Italian military personnel. In the Court's opinion, in the period between boarding the ships of the Italian armed forces and

[354] See generally Hathaway, "*Non-entrée*." Whereas refugee law is predicated on the duty of *non-refoulement*, the politics of *non-entrée* is based on a commitment to ensuring that refugees not be allowed to arrive.

[355] *ND and NT v. Spain*, Dec. Nos. 8675/15 and 8697/15 (ECtHR, Feb. 13, 2020).

[356] Ibid. at [49]–[51].

[357] Much of the analysis that follows draws on Gammeltoft-Hansen and Hathaway, "Cooperative Deterrence."

[358] *Hirsi Jamaa v. Italy*, (2012) 55 EHRR 21 (ECtHR [GC], Feb. 23, 2012). The same principle was recently affirmed in *ND and NT v. Spain*, Dec. Nos. 8675/15 and 8697/15 (ECtHR, Feb. 13, 2020), at [110].

> being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities.[359]

Given the lack of protection for refugees in Libya and the risk of persecution in the applicants' countries of origin (Eritrea and Somalia), the Court found Italy in breach of its human rights obligations, including the duty of *non-refoulement*.[360] This holding aligns with the dominant understanding of jurisdiction, previously analyzed in detail.[361] As the International Court of Justice itself has made clear, human rights obligations presumptively apply within any area under the effective control of a state party.[362]

An outlier position was, however, adopted by the majority of the Supreme Court of the United States in the decision of *Sale v. Haitian Centers Council*,[363] a challenge to the American policy of interdicting Haitians in search of protection in international waters and returning them to Haiti.[364] The Court observed that "the text and negotiating history of Article 33 ... are both completely silent with respect to the Article's possible application to actions taken by a country outside its own borders."[365] Moreover, it was noted that the original continental European understanding of *refoulement* – which spoke to rejections which occurred at, or from within, a state's borders – was in line with the textual reference in Art. 33 to the duty to avoid "return," said by the Court to denote "a defensive act of resistance or exclusion at a border rather than an act of transporting someone to [their home state, or some other country] ... In the context of the Convention, to 'return' means to 'repulse' rather than to 'reinstate.'"[366] Indeed, it was determined by the Court that only a territory-based understanding would allow the primary duty set by Art. 33(1) to be read in consonance with the right of states under Art. 33(2) to deny protection against *refoulement* to persons who pose a danger to the security "of the

[359] *Hirsi Jamaa v. Italy*, (2012) 55 EHRR 21 (ECtHR [GC], Feb. 23, 2012), at [81].
[360] Ibid. at [122]–[138], [146]–[158], [183]–[186].
[361] See Chapter 3.1.1 at note 58 ff.
[362] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep 136, at [110].
[363] *Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc., et al.*, 509 US 155 (US SC, Jan. 12, 1993).
[364] The analysis here focuses on issues of international refugee law taken up by the Court. It has been observed, however, that the Court's approach to relevant US law – in particular its finding that the statutory language was addressed only to the Attorney General, not to the President or the Coast Guard, and its invocation of the presumption against extraterritorial application of American law – was equally flawed. See S. Legomsky, "The USA and the Caribbean Interdiction Program," (2006) 18(3–4) *International Journal of Refugee Law* 677 (Legomsky, "Caribbean Interdiction"), at 687–689.
[365] *Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc., et al.*, 509 US 155 (US SC, Jan. 12, 1993), at 178.
[366] Ibid. at 182. Ironically, the Court reached this conclusion based on the difference between "return" and "exclude" as codified in US domestic law.

country *in which he is* [emphasis added]." In the view of the American Supreme Court, reading Art. 33(1) to apply to extraterritorial deterrence "would create an absurd anomaly: dangerous aliens on the high seas would be entitled to the benefits of Art. 33(1) while those residing in the country that sought to expel them would not. It seems more reasonable to assume that the coverage of Art. 33(2) was limited to those already in the country because it was understood that Art. 33(1) obligated the signatory states only with respect to aliens within its territory."[367] Thus, the prohibition against *refoulement* was determined to accrue to the benefit only of persons "on the threshold of initial entry."[368]

These arguments have little merit. Perhaps most spurious is the construction of Art. 33(1) based on the need for consistency with Art. 33(2). Since a refugee can be ejected under Art. 33(2) on national security grounds only where his or her presence or actions are shown to give rise to an objectively reasonable, real possibility of direct or indirect substantial harm to the host state's most basic interests,[369] it is difficult to conceive in practice of a situation in which a refugee not yet at or within a state's territory could be subject to such exclusion. It is thus perfectly logical that this very limited prerogative to avoid the fundamental duty of *non-refoulement* would be textually constrained to situations in which a clear and critical risk could, in fact, arise.[370] As Justice Blackmun noted in his dissenting opinion in *Sale*, "[t]he tautological observation that only a refugee already in a country can pose a danger to the country 'in which he is' proves nothing."[371]

Second, the fact that the drafters assumed that *refoulement* was likely to occur at, or from within, a state's borders – and therefore did not expressly proscribe extraterritorial acts which lead to a refugee's return to be persecuted – simply reflects the empirical reality that when the Convention was drafted there was little evidence of countries seeking to deter refugees other than from within, or at, their own borders.[372] As the American representative to the Ad Hoc

[367] Ibid. at 180. [368] Ibid. at 187. [369] See Chapter 4.1.4 at note 512 ff.

[370] "[I]n UNHCR's opinion [the US Supreme Court's] view is contradicted by the clear wording of Article 33(1) and 33(2), respectively, which address different concerns, as well as [by] the fact that the territorial scope of a number of other provisions of the 1951 Convention is made explicit": UNHCR, "Advisory Opinion on the Extraterritorial Application of *Non-refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol," Jan. 26, 2007, at [28]. See also *Hirsi Jamaa v. Italy*, (2012) 55 EHRR 21 (ECtHR [GC], Feb. 23, 2012) (separate opinion of Judge Pinto de Albuquerque), at 68 ("The scope of application of a rule beneficial to refugees should not be limited by a territorial reference foreseen in the exception to the rule").

[371] *Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc., et al.*, 509 US 155 (US SC, Jan. 12, 1993), at 194.

[372] This is not to say, of course, that no such practices had occurred (see the discussion of the turning away of the *St. Louis*, described in Chapter 4.1 at note 9). Indeed, Ben-Nun's analysis of the drafting history leads him to conclude "that in all probability, *non-refoulement* did

Committee that prepared the Refugee Convention observed in the aftermath of the *Sale* decision, "[i]t is incredible that states that had agreed not to force any human being back into the hands of his/her oppressors intended to leave themselves – and each other – free to reach out beyond their territory to seize a refugee and to return him/her to the country from which he sought to escape."[373] There is simply no basis whatever to maintain that the drafters envisaged, let alone would have sanctioned, interdiction and return as practiced on the high seas by the United States. There was certainly no historical precedent of a policy of proactive deterrence, encompassing affirmative actions intended specifically to take jurisdiction over refugees (such as forcing them onto US ships and destroying their boats), without a concomitant assumption of responsibility.

This leaves us with the Court's fairly basic literal proposition[374] that because a state cannot "expel or return" someone who has yet to arrive at its territory, the duty to avoid "return" speaks only to "a defensive act of resistance or exclusion at a border," and not to the act of actually sending them home. Of all the Court's arguments, this is perhaps the most disingenuous. Not only does the word "return" not have the plain meaning attributed to it,[375] but a construction that excludes actions that would actually deliver a refugee back to his or her persecutors – rather than simply resisting or excluding them – is in fact the plainest and most obvious breach of the object and purpose of the duty conceived by the

indeed apply to refugees on the high seas, which had been a well-known phenomenon since the late 1930s": Ben-Nun, "British-Jewish Roots," at 113.

373 L. Henkin, "Notes from the President," [1993] 5 *American Society of International Law Newsletter* 1.

374 As the House of Lords has insisted, "[i]t is of course true that in construing any document the literal meaning of the words used must be the starting point. But the words must be construed in context, and an instrument such as the Refugee Convention must be given a purposive construction consistent with its humanitarian aims": *R v. Asfaw*, [2008] UKHL 31 (UK HL, May 21, 2008), at [11]. This passage was more recently approved by the UK Supreme Court in *SXH v. Crown Prosecution Service*, [2017] UKSC 30 (UK SC, Apr. 11, 2017), at [7]. See generally Chapter 2.1.

375 The primary definition of "return" is "[t]he act of coming back to or from a place, person, or condition": *The Oxford English Dictionary*, 2nd ed. (1989), Vol. XXX, at 802; "come or go back to a place": *Concise Oxford English Dictionary*, 12th ed. (2011), at 1230. Moreover, as UNHCR argued before the Supreme Court, "the definition of '*refouler*' upon which the government relies to render the term 'return' ambiguous simultaneously renders it redundant. Under [the US government's] reading, the phrase 'expel or return' is transformed into 'expel or expel'": UNHCR, "Brief as *Amicus Curiae*," filed Dec. 21, 1992 in *McNary v. Haitian Centers Council Inc.*, Case No. 92-344, at 10 (*Sale v. Haitian Centers Council*, 509 US 155 (US SC, June 21, 1993)), reprinted in (1994) 6(1) *International Journal of Refugee Law* 85. As Legomsky observes, "that argument assumes the treaty drafters meant to describe the prohibition [of *refoulement*] by using terminology unique to United States law – a highly unlikely premise": Legomsky, "Caribbean Interdiction," at 688.

drafters: namely, to prohibit measures which would cause refugees to be "pushed back into the arms of their persecutors."[376]

More generally, the US Supreme Court's approach takes no account of the previously noted decision of the drafters to amend Art. 33 in order to stipulate that the duty of *non-refoulement* prohibits return to the risk of being persecuted "in any manner whatsoever,"[377] said to "refer to various methods by which refugees could be expelled, refused admittance, or removed."[378] Much less does it give any consideration to the fact that the essential purpose of the Refugee Convention is to provide rights to seriously at-risk persons able to escape from their own countries – a goal that would clearly be undermined by an approach to Art. 33 which effectively authorized governments to deny them all rights by forcing them back home before the refugees reached a state party's territory.[379] Equally important is the policy concern expressed by the UNHCR in its *amicus curiae* brief filed in the *Sale* case:

> [The US government's] interpretation of Article 33 . . . extinguishes the most basic right enshrined in the treaty – the right of non-return – for an entire class of refugees, those who have fled their own countries but have not yet entered the territory of another State. Under [the US government's] reading, the availability of the most fundamental protection afforded refugees turns not on the refugee's need for protection, but on his or her own ability to enter clandestinely the territory of another country.[380]

[376] Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 7. It is also an interpretation fundamentally at odds with the most central goal of the Refugee Convention itself, namely "to assure refugees the widest possible exercise of . . . fundamental rights and freedoms": Refugee Convention, at Preamble, [2].

[377] See Chapter 4.1.2, note 225.

[378] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 20. See also UNHCR, "Advisory Opinion on the Extraterritorial Application of *Non-refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol," Jan. 26, 2007, at [29] ("[A]ny interpretation which construes the scope of Article 33(1) of the 1951 Convention as not extending to measures whereby a State, acting outside its territory, returns or otherwise transfers refugees to a country where they are at risk of persecution would be fundamentally inconsistent with the humanitarian object and purpose of the 1951 Convention and its 1967 Protocol"). The UNHCR adopts much the same understanding of the drafting history as described here: ibid. at [30]–[31].

[379] See UNHCR, "Interception," at [23]: "The principle of *non-refoulement* does not imply any geographical limitation. In UNHCR's understanding, the resulting obligations extend to all government agents acting in an official capacity, within or outside national territory. Given the practice of States to intercept persons at great distance from their own territory, the international refugee protection regime would be rendered ineffective if States' agents abroad were free to act at variance with obligations under international refugee law and human rights law."

[380] UNHCR, "Brief as *Amicus Curiae*," filed Dec. 21, 1992 in *McNary v. Haitian Centers Council Inc.*, Case No. 92-344 (US SC), at 18, reprinted in (1994) 6(1) *International Journal of Refugee Law* 85. The US Supreme Court invoked arguments by both Robinson and

Perhaps most fundamentally, the American Supreme Court's analysis seems erroneously to assume that international rights can apply only in a state's territory: no account whatever was taken of the fact that some Convention rights are explicitly not subject to a territorial or other level of attachment – including, of course, Art. 33's duty of *non-refoulement*. As analyzed in detail above,[381] under international law the duty of *non-refoulement* is owed to any refugee under the jurisdiction of a state party. A state party exercises jurisdiction and is thereby bound to respect the duty of *non-refoulement* if, *inter alia*, the refugees themselves are subject to that state party's effective authority and control (whether lawfully or not), even if outside that state's territory.[382] There can be no doubt that interception and detention by officials aboard a United States military vessel in international waters easily qualifies as such an exercise of de facto jurisdiction.

Much the same conclusion was reached by the English Court of Appeal. Noting that the Inter-American Commission on Human Rights[383] was "fiercely critical of the majority decision of the Supreme Court,"[384] the Court treated the *Sale* decision as "wrongly decided; it certainly offends one's sense of fairness."[385] It concluded that "it is impermissible to return refugees from the high seas to their country of origin."[386] All in all, the textual and historical

Grahl-Madsen in support of its conclusion that Art. 33 only applies once persons reach a state party's territory. Yet both writers impliedly acknowledge the illogical policy implications of distinguishing between refugees located on either side of a border. Robinson commented that "if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck": N. Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation* (1953) (Robinson, *History*), at 163. Grahl-Madsen posited the scenario of a refugee approaching a frontier post some distance inside the actual frontier, who may be refused permission to proceed farther inland, but must be allowed to stay in the bit of territory situated between the actual frontier line and the control post, because any other course of action would violate Art. 33: Grahl-Madsen, *Commentary*, at 229–230.

381 See Chapter 3.1.1. "In view of the purposes and objects of human rights treaties, there is no a priori reason to limit a state's obligation to respect human rights to its national territory. Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues. That presumption could be rebutted only when the nature and content of a particular right or treaty language suggest otherwise": T. Meron, "Extraterritoriality of Human Rights Treaties," (1995) 89(1) *American Journal of International Law* 78, at 80–81.

382 See Chapter 3.1.1 at note 58 ff.

383 *Haitian Centre for Human Rights et al. v. United States*, Case No. 10.675, Report No. 51/96, IAComHR Doc. OEA/Ser.L/V/II.95 Doc. 7 rev., at 550 (IAComHR, Mar. 13, 1997).

384 *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at [34].

385 Ibid.

386 *R (European Roma Rights Centre and Others) v. Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), at [35].

arguments for reading Art. 33 in the narrow way posited by the Supreme Court of the United States are simply not compelling. As Justice Blackmun concluded in his dissenting opinion in *Sale*,

> Today's majority ... decides that the forced repatriation of the Haitian refugees is perfectly legal because the word "return" does not mean return [and] because the opposite of "within the United States" is not outside the United States ...
>
> The Convention ... was enacted largely in response to the experience of Jewish refugees in Europe during the period of World War II. The tragic consequences of the world's indifference at that time are well known. The resulting ban on *refoulement*, as broad as the humanitarian purpose that inspired it, is easily applicable here, the Court's protestations of impotence and regret notwithstanding.[387]

There are, however, some judicial opinions that approve of the US Supreme Court's approach. In the House of Lords *Roma Rights Centre* decision,[388] Lord Hope made clear in *obiter dicta* that he did "not, with respect, think that the *Sale* case was wrongly decided ... The majority recognised the moral weight of the argument that a nation should be prevented from repatriating refugees to their potential oppressors whether or not the refugees were within that nation's borders ... But in their opinion both the text and the negotiating history of article 33 affirmatively indicated that it was not intended to have extraterritorial effect."[389] Two judges of the High Court of Australia have also offered some support for the approach of the US Supreme Court.[390] Yet as UNHCR correctly observes, the small

[387] *Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc., et al.*, 509 US 155 (US SC, Jan. 12, 1993), at 207–208.

[388] *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, [2005] 2 AC 1 (UK HL, Dec. 9, 2004).

[389] Ibid. at [68], per Lord Hope. See also the views of Lord Bingham, ibid. at [17].

[390] Noting both the approach taken in *Sale* and Lord Hope's remarks in *Roma Rights*, as well as some comparable remarks in two earlier Australian decisions (*Minister for Immigration and Multicultural Affairs v. Haji Ibrahim*, [2000] HCA 55 (Aus. HC, Oct. 26, 2000), at [136], per Gummow J.; *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14 at [42], per McHugh and Gummow JJ.), Justice Keane found that "[j]udicial authority in Australia, the United Kingdom, and the United States of America suggests that a state's obligations under the Convention arise only with respect to persons who are within that state's territory": *CPCF v. Minister for Immigration and Border Protection*, [2015] HCA 1 (Aus. HC, Jan. 28, 2015), at [461], per Keane J. Only somewhat more cautiously, Chief Justice French observed that "[t]he defendants argued that the *non-refoulement* obligation under the Refugee Convention only applied to receiving states in respect of refugees within their territories. There is support for that view in some decisions of this court, the House of Lords and the Supreme Court of the United States": ibid. at [10], per French C.J. The majority of the Court nonetheless seemed to assume that the duty of *non-refoulement* does apply extraterritorially, but felt no need to grapple with that question given the duty under Australian domestic law to ensure "that it is safe for the person to be in that place" before disembarking a refugee claimant in a foreign jurisdiction: ibid. at [12].

number of judicial opinions favoring the *Sale* approach are found in cases that were actually decided on the basis of domestic, rather than international, law.[391] Moreover, after considering not only the US Supreme Court's reasoning, but also the endorsements of that approach in some British and Australian jurisprudence, Judge Pinto de Albuquerque of the European Court of Human Rights concluded:

> With all due respect, the United States Supreme Court's interpretation contradicts the literal and ordinary meaning of the language of Article 33 of the United Nations Convention relating to the Status of Refugees, and departs from the common rules of treaty interpretation . . . Unlike other provisions of the [Refugee Convention], the applicability of Article 33(1) does not depend on the presence of the refugee in the territory of a State . . . [T]he French term of *refoulement* includes the removal, transfer, rejection, or refusal of admission of a person. The deliberate insertion of the French word in the English version has no other possible meaning than to stress the linguistic equivalence between the verb return and the verb *refouler*. Furthermore, the preamble of the Convention states that it endeavors to "assure refugees the widest possible exercise of these fundamental rights and freedoms" and this purpose is reflected in the text of Article 33 itself through the clear expression "in any manner whatsoever" (*de quelque manière que ce soit*).[392]

The joint decision of Justices Hayne and Bell noted that "Section 74 precluded taking him to [his country of origin, namely] Sri Lanka without asking at least whether he feared for his personal safety in that place . . . By acceding to the Refugee[] Convention, Australia has undertaken to other parties to the Convention obligations with respect to certain persons . . . It is unnecessary to decide whether these obligations are relevant to the construction of the [Australian] Act": ibid. at [110]–[112]. Justice Crennan assumed the relevance of Refugee Convention obligations, but determined that "no such issues arose on the facts in the special case": ibid. at [219]. Justice Kiefel similarly clearly acknowledged the *non-refoulement* obligation, but agreed that relevant inquiries were subsumed under the Australian "safety" inquiry: ibid. at [297]–[299]. Justice Gageler took the view that it was "uncontroversial" that "the exercise of maritime powers over persons on board a foreign vessel in the Australian contiguous zone is subject to international law" (ibid. at [383]), but was of the view that amendments to Australian law made that fact irrelevant for purposes of domestic adjudication: ibid. at [390].

391 "[I]t is important to stress that, at international law, the principle of *non-refoulement* . . . applies wherever and however a state exercises jurisdiction . . . UNHCR considers that there is only one superior court decision [citing to *Sale* in the US Supreme Court] that is at variance with this understanding and that decision . . . was based on an interpretation of national rather than international law." UNHCR, "UNHCR Legal Position: Despite court ruling on Sri Lankans detained at sea, Australia bound by international obligations," Feb. 4, 2015. This position paper was issued in response to the decision of the High Court of Australia in *CPCF v. Minister for Immigration and Border Protection*, [2015] HCA 1 (Aus. HC, Jan. 28, 2015), in which it was determined that detention at sea was permissible under Australian law subject to limitations involving, for example, safety. The Court did not, however, decide on the scope of Australia's *non-refoulement* obligations, finding resolution of that issue unnecessary to decide the case before it.

392 *Hirsi Jamaa v. Italy*, (2012) 55 EHRR 21 (ECtHR [GC], Feb. 23, 2012) (separate opinion of Judge Pinto de Albuquerque), at 67–68. As Goldenziel opines in her analysis of these cases,

As such, the American interdiction and return of Haitians seeking protection,[393] as well as more recent efforts by Indonesia, Thailand, and Malaysia to drive Rohingya refugees back to Burma,[394] should be understood to have amounted to unlawful *refoulement*.

Given the presumptive illegality of extraterritorial deterrence, it is increasingly common for states to justify efforts to turn back refugees on the high seas on the grounds that such action is necessary in order to deter refugees from risking their lives in the search for protection. This argument has been made by the United States in support of its interdiction and repatriation efforts in the Caribbean[395] and most especially by Australia, which routinely refuses admission to any refugee arriving by sea.[396] There is, of course, no doubt both that many asylum journeys are very risky,[397] and that saving lives is an eminently noble goal. In addition, many countries have undertaken obligations to deter human trafficking and smuggling which arguably afford legitimate cause to intercept non-citizens in areas beyond their territorial jurisdiction.[398] For example, state parties to the Smuggling Protocol[399] may rely on that treaty to assert this authority in some circumstances:

the European Court of Human Rights' "more expansive interpretation of *non-refoulement* can . . . be explained by its unique position as a tribunal. Unlike any courts in the US and Australia, [it] is a supranational court that is explicitly charged with enforcing and implementing a human rights convention": J. Goldenziel, "When Law Migrates: Refugees in Comparative International Law," in A. Roberts et al. eds., *Comparative International Law* (2018), at 22. Martin advances a series of instrumentalist arguments against this approach, arguing most intriguingly that understanding the duty of *non-refoulement* to prohibit extraterritorial deflection efforts will simply "drive[e] control measures into the shadows": D. Martin, "Interdiction of Asylum Seekers: The Realms of Policy and Law in Refugee Protection," Virginia Public Law and Legal Theory Research Paper No. 2014-57 (Sept. 1, 2014). This plea to avoid an understanding of the duty of *non-refoulement* that some states would find inimical to their general migration management goals comes perilously close to a bald endorsement of state practice as determinative of the meaning of a treaty, an approach not justified under norms of treaty interpretation: see Chapter 2.4.

393 See text at note 29. 394 See text at note 33. 395 See text at notes 30–31.

396 See text at note 36. See generally R. Rothfield ed., *The Drownings' Argument* (2014); and Schloenhardt and Craig, "Turning Back the Boats."

397 UNHCR, "Desperate Journeys: Refugees and migrants entering and crossing Europe via the Mediterranean and Western Balkans Routes," Feb. 2017. Yet there is reason to doubt the effectiveness of deterrence as a life-saving measure: see Schloenhardt and Craig, "Turning Back the Boats."

398 For a detailed analysis of the relationship between refugee law duties and responsibilities to combat human trafficking and smuggling see J. Hathaway, "The Human Rights Quagmire of 'Human Trafficking,'" (2008) 49(1) *Virginia Journal of International Law* 1–49; republished in M. Segrave ed., *Human Trafficking* (2013).

399 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2241 UNTS 507 (UNTS 39574), adopted Nov. 15, 2000, entered into force Jan. 28, 2004 (Smuggling Protocol).

> A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.[400]

Thus, at least when the vessel in question does not have a flag state,[401] state parties to the Smuggling Protocol enjoy a presumptive right to board and search vessels reasonably suspected of smuggling migrants.

But neither the cause of saving lives nor the responsibility to combat trafficking or smuggling justifies a state acting in ways that are at odds with the ability simultaneously to respect obligations under the Refugee Convention, including the duty of *non-refoulement*.[402] Because a refugee subject to the de facto control of a state – including, for example, a refugee on a vessel that has been boarded or intercepted by the agents of that state[403] – is entitled to protection against *refoulement*, governments engaged in life-saving or anti-trafficking/smuggling operations are required to conduct their operations in a way that enables refugees to seek and secure protection.[404] In contrast, the rough-and-ready approach of US authorities intercepting Haitian refugees in international waters – granting them access to an assessment procedure only if they somehow demonstrate a "physical manifestation" of

[400] Ibid. at Art. 8(7).

[401] Where the vessel suspected of engaging in people smuggling has a flag state, that country's cooperation is normally to be sought before boarding or searching the vessel: ibid. at Art. 8(2).

[402] "States have a legitimate interest in controlling irregular migration. Unfortunately, existing control tools, such as visa requirements and the imposition of carrier sanctions, as well as interception measures, often do not differentiate between genuine asylum-seekers and economic migrants. National authorities, including immigration and airlines officials posted abroad, are frequently not aware of the paramount distinction between refugees, who are entitled to international protection, and other migrants, who are able to rely on national protection": UNHCR, "Interception," at [17].

[403] See Chapter 3.1.1 at note 73.

[404] "A good faith understanding of the duty of *non-refoulement* requires states to provide reasonable access and opportunity for a protection claim to be made": "The Michigan Guidelines on Refugee Freedom of Movement," (2017) 39 *Michigan Journal of International Law* 1, at [10]. Indeed, the UNHCR has suggested that "States should avoid the categorization of interception operations as search and rescue operations, because this can lead to confusion with respect to disembarkation responsibilities . . . Measures to combat smuggling and trafficking of persons must not adversely affect the human rights and dignity of persons and must not undermine international refugee protection responsibilities": Report of the Office of the United Nations High Commissioner for Refugees, "The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees," UN Doc. A/AC.259/17, June 23–27, 2008, at [20], [47].

fear[405] – offers only the form rather than the substance of access to protection.[406] And while the duty of *non-refoulement* does not require that all refugees be admitted to the territory of the intercepting state,[407] neither does it allow willful blindness to the foreseeable consequences of taking refugees to countries that do not have an adequate procedure to identify and protect refugees[408] – including, for example, disembarkations by Australia of intercepted refugees in Indonesia.[409]

Nor may a state avoid liability for *refoulement* by subcontracting its deterrent strategy to transportation companies or other private actors. Under principles of state responsibility, governments are responsible *inter alia* for "the conduct of a person or group of persons in fact acting on the instruction of, or under the direction or control of, the State,"[410] as well as for "conduct

[405] See Chapter 4.1 at note 32.

[406] "During the last three decades, US Coast Guard has returned all Haitians who do not demonstrate a 'physical manifestation' of a fear of return. Those that pass this 'shout test' or 'sweat test' may be referred for an asylum screening. The shout test does not pass the smell test. It is ineffective as a refugee screening tool and makes a mockery of international legal standards. No Haitian has been granted asylum after having been 'screened' in this careless and arbitrary fashion. The US Coast Guard has subsequently identified one Haitian as having a manifestation of fear, and that person did not pass the credible fear screening. In contrast, in 2010, 55 percent of Haitians who applied for asylum in the US after arriving by air or land were granted asylum": Hebrew Immigrant Aid Society, "Refugees Must Be Protected, Even at Sea," Dec. 2014. As Legomsky opines, "in theory a fair refugee status determination could possibly be made outside the country's territory . . . [H]owever, the practical obstacles to a fair procedure in conjunction with interdiction are formidable": Legomsky, "Caribbean Interdiction," at 686, n. 58.

[407] See Chapter 4.1 at notes 134–135.

[408] The UNHCR has issued helpful analyses of duties in the context of extraterritorial processing: UNHCR, "Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing," Nov. 2010; UNHCR, "Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers," May 2013. See also A. Francis, "Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing," (2008) 20(2) *International Journal of Refugee Law* 273; and S. Hamood, "EU–Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?," (2008) 21(1) *Journal of Refugee Studies* 19.

[409] See Chapter 4.1 at note 35. Sadly, the High Court of Australia felt constrained by domestic legislation allowing refugees to be sent to countries such as Papua New Guinea on the basis of a designation that "need not be [made] by reference to the international obligations or domestic law of that country" to find that while "[t]here may be some doubt whether the provisions . . . can be said to respond to Australia's obligations under the Refugee Convention . . . However, there was no statutory requirement that the Minister be satisfied of these matters in order to exercise the relevant power": *Plaintiff S156/2013 v. Minister for Immigration and Border Protection*, [2014] HCA 22 (Aus. HC, June 18, 2014), at [10], [44]–[46].

[410] International Law Commission, "Articles on the Responsibility of States for Internationally Wrongful Acts," UN Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), at Art. 8.

which is . . . acknowledged and adopted by the State as its own."[411] Where these requirements are met, an act that would amount to an exercise of extraterritorial jurisdiction is no less so because it is committed by an entity such as a private corporation at the behest of a government than if committed directly by officials of the state party itself.

4.1.3.2 Cooperative Extraterritorial Deterrence

No doubt prompted by the realization that significant obligations flow from the duty of *non-refoulement*, wealthier countries have turned to cooperative variants of deterrence in the hope of circumventing their duties of protection. Rather than relying solely on unilateral deterrent strategies, wealthy countries now increasingly conscript poorer buffer states to do much of the work of interception for them[412] – as in the case of Italian agreements with Libya,[413] US arrangements with Mexico,[414] and Spanish accords with Cabo Verde, Mauritania, and Senegal.[415] This geographical reorientation is thought to be legally instrumental because even as international law has evolved to make clear that liability under the *non-refoulement* norm ensues for actions taken by a state outside its borders, governments have assumed that actions undertaken under the jurisdiction of the authorities of *other* countries are legally risk-free. With poorer states often willing for economic, political, and other reasons to serve as the gatekeepers to the developed world,[416] wealthier countries have therefore sought to insulate themselves from liability for refugee deterrence by having such action take place under the sovereign authority of another country. Ad hoc and bilateral arrangements have now spawned a series of more comprehensive arrangements. Under the American-led Merida Initiative,[417] the Bali Process co-chaired by Australia and Indonesia,[418] and the European Union's "external dimension,"[419] developed states are crafting regional platforms that embed asylum and migration questions into the mainstream of their foreign policy.

[411] Ibid. at Art. 11. [412] See generally Gammeltoft-Hansen, *Access to Asylum*.
[413] See text at note 39. [414] See text at note 42. [415] See text at note 41.
[416] See e.g. J. Niessen and Y. Schibel eds., *International Migration and Relations with Third Countries: European and US Approaches* (2004); S. Lavenex, "Shifting Up and Out: The Foreign Policy of European Immigration Control," (2006) 29 *Western European Politics* 329, at 330–333; A. Geddes, "Migration as Foreign Policy? The External Dimension of EU Action on Migration and Asylum," (2009) 2 *Swedish Inst. European Policy Studies* 1, at 16.
[417] The Merida Initiative is a multi-year agreement between the United States and Mexico to combat drug smuggling, transnational crime, and illegal immigration. See generally I. Vaughne ed., *The Merida Initiative: US Counterdrug and Anticrime Assistance for Mexico* (2010).
[418] S. Kneebone, "The Bali Process and Global Refugee Policy in the Asia-Pacific Region," (2014) 27 *Journal of Refugee Studies* 596, at 599–610.
[419] C. Boswell, "The 'External Dimension' of EU Immigration and Asylum Policy," (2003) 79 *International Affairs* 619; see also Tampere European Council, European Parliament, Presidency Conclusions (1999), at [15]–[16].

These strategies might seem capable of enabling states to evade legal liability, at least where the collaboration is with a partner state, such as Indonesia or Libya, that is itself not bound by Art. 33's duty of *non-refoulement*. This is because the primary form of jurisdiction – and the lynchpin to liability for *refoulement* – is control over territory, and such control is normally exclusive. But neither of the alternative bases for establishing jurisdiction (authority over individuals nor the exercise of public powers)[420] necessarily preempts the simultaneous jurisdiction of a territorial or cooperating state. The question thus arises whether the state acting extraterritorially may be held to exercise jurisdiction in the case of such non-exclusivity.

Under general norms of public international law, the fact that more than one state has jurisdiction does not diminish the individual responsibility of any particular state.[421] Human rights jurisprudence has aligned with this approach, expressly rejecting an "all or nothing" approach, and finding that "rights can be 'divided and tailored.'"[422] Thus, for example, the European Court of Human Rights found that both Moldova and Russia had exercised jurisdiction over individuals detained in the Transnistrian region – Russia due to its decisive influence over the local regime, and Moldova through its de jure sovereignty over the area – and determined that simultaneous yet differentiated human rights responsibility followed.[423] The European Court of Human Rights has also rejected the view that the Netherlands had no jurisdiction over a command checkpoint in Iraq manned by its troops simply because the United Kingdom – as a formal occupying power – might also have jurisdiction there. To the contrary, the Court found that a party "is not divested of its 'jurisdiction' ... solely by dint of having accepted the operational control of ... a United Kingdom officer."[424]

The same principle was found to apply where distinct actions by more than one state result in a common harm. In the case of *MSS v. Belgium and Greece* it was determined that Belgium was in breach for returning the applicant to Greece contrary to the duty of *non-refoulement*, even as Greece was found liable for the failure to establish adequate asylum procedures and to avoid the ill-treatment of those seeking its protection.[425] As such, depending on the nature of the role, the stationing of officials in a transit state may amount to

[420] See Chapter 3.1.1 at note 69 ff. and note 80 ff.

[421] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections*, [1992] ICJ Rep 240, at 261–262; *East Timor (Portugal v. Australia)*, [1995] ICJ Rep 90, at 104–105; *Corfu Channel (United Kingdom v. Albania)*, [1949] ICJ Rep 4, at 36.

[422] *Al-Skeini v. United Kingdom*, (2011) 53 EHRR 589 (ECtHR, July 7, 2011), at [137]; *Hirsi Jamaa v. Italy*, (2012) 55 EHRR 21 (ECtHR [GC], Feb. 23, 2012), at [74].

[423] *Ilaşcu v. Moldova*, Dec. No. 48787/99 (ECtHR, July 8, 2004), at [376]–[394]; see also *Drozd v. France*, [1992] ECHR 52 (ECtHR, July 26, 1992), at [91]–[96].

[424] *Jaloud v. Netherlands*, Dec. No. 47708/08 (ECtHR, Nov. 20, 2014), at [143].

[425] *MSS v. Belgium*, Dec. No. 30696/96 (ECtHR, Jan. 21, 2011).

shared jurisdiction by virtue of authority over individuals; that was almost certainly the case when UK officials stationed in Prague Airport made decisions about who would be allowed to board UK-bound flights[426] (though as previously noted, Czech nationals trapped by this policy were not yet refugees, meaning there was no breach of Art. 33's duty of *non-refoulement*).[427] Whether liability arises from placing Australian Airline Immigration Officers in refugee transit states[428] is, however, less clear: while the mere giving of support and advice to local officials does not amount to de facto control over the refugees, it would be otherwise if shown that transit state officials simply executed the turn-back decisions dictated by the Australian officials.[429]

Importantly, particularized liability may ensue even when not all of the states exercising jurisdiction are bound by the same international legal obligations. In *Al-Skeini*, the United Kingdom was held responsible under the European Convention on Human Rights even though it shared its jurisdiction in Iraq with the United States and other non-party states making up the Coalition Provisional Authority following the removal of the Ba'ath regime.[430] Similarly, the active assistance of Kenyan authorities in the arrest of the PKK leader in Nairobi was considered in *Öcalan*; yet this did not detract from a finding of Turkish jurisdiction once Turkish authorities took him into custody.[431] Accordingly, the fact that a partner state is not a party to the Refugee Convention (for example, Libya, which has entered into cooperation agreements with Italy)[432] is no bar to finding the sponsoring state party exercising jurisdiction to be liable.

Nor does it matter whether shared jurisdiction exists directly among the states in question or is achieved by the delegation of authority to an agency or organ.[433] In *TI v. United Kingdom*,[434] the European Court of Human Rights determined that

> where States establish international organisations, or mutatis mutandis international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.[435]

[426] See text at note 52. [427] See Chapter 4.1.1 at note 182. [428] See text at note 51.

[429] Engagement of this kind may, however, amount to unlawfully aiding or assisting another state to breach its legal obligations: See text at note 442 ff.

[430] *Al-Skeini v. United Kingdom*, (2011) 53 EHRR 589 (ECtHR, July 7, 2011), at [144]–[150].

[431] *Öcalan v. Turkey*, Dec. No. 46221/99 (ECtHR, May 12, 2005), at [93].

[432] See text at note 51.

[433] International Law Commission, "Articles on the Responsibility of States for Internationally Wrongful Acts," UN Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), at art. 47, comment 125. This is corroborated by International Law Commission, "Draft Articles on the Responsibility of International Organisations," UN Doc. A/66/10; GAOR, 63rd Sess., Supp. No. 10 (2011), at arts. 58–62, comments 89–90.

[434] *TI v. United Kingdom*, Dec. No. 43844/98 (ECtHR, Mar. 7, 2000). [435] Ibid. at 15.

Because legal liability is not avoided when authority is delegated to an international organization,[436] patrols conducted under the auspices of such entities as the European Union's Frontex agency (and its successor European Border and Coast Guard Agency)[437] still engage the liability of each participating state whose officials or agents have taken part in an action that gives rise to jurisdiction, and which leads to *refoulement* or another human rights breach. So too does the entrusting to NATO of the duty to intercept boats carrying refugees in the Aegean without regard to *non-refoulement* obligations.[438]

It is thus clear that the notion of shared jurisdiction – allowing more than one state to be held liable for a given breach of human rights as a function of its own actions, whatever the liability of other states – is an important bulwark against cooperation-based forms of *non-entrée* that purport to leave partner states holding the bag for the *refoulement* of refugees. As the European Court of Human Rights noted succinctly in *Xhavara*, the "Italian–Albanian Agreement cannot, by itself, engage the responsibility of [Albania] under the Convention for any action taken by Italian authorities in the implementation of this agreement."[439]

But what of the situation where the involvement of the sponsoring state falls short of establishing jurisdiction, even under one of the expanded notions of jurisdiction?[440] For example, states are clearly not exercising jurisdiction when

[436] D. Sarooshi, *International Organisations and their Exercise of Sovereign Powers* (2007), at 64; O. de Schutter, *International Human Rights Law: Cases, Materials, Commentary* (2010), at 216–238. State responsibility for acts committed by states acting under the authority of the UN Security Council remains a special case: *Behrami v. France*, (2007) 45 EHRR 85 (ECtHR, May 31, 2007).

[437] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (OJ 2016 L251/1).

[438] See text at note 48.

[439] *Xhavara v. Italy*, Dec. No. 39473/98 (ECtHR, Jan. 11, 2001). The European Court of Human Rights further considered the impact of bilateral agreements in *Al-Saadoon*, in which the United Kingdom argued that since United Kingdom forces operated in Iraq subject to a memorandum of understanding establishing Iraqi jurisdiction, the United Kingdom was under a legal obligation to transfer the applicants to the Iraqi authorities despite a known risk that this might subject the applicants to the death penalty. Recalling the *Soering* principle that such a transfer would constitute *refoulement*, the Court held that "a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of the Contracting Party's 'jurisdiction' from scrutiny under the Convention": *Al-Saadoon v. United Kingdom*, Dec. No. 61498/08 (ECtHR, June 30, 2009), at [128].

[440] See Chapter 3.1.1.

they provide only training or material assistance to a partner state. Even when immigration officers or other officials are posted to another country as advisers, there will be no exercise of jurisdiction unless the authorities of the territorial state can be shown to act under the direction and control of the sponsoring state. There is nonetheless an emerging consensus that international law will hold states responsible for aiding or assisting another state's wrongful conduct[441] even where the sponsoring state is not exercising jurisdiction. This understanding is most clearly set out in Article 16 of the International Law Commission's Articles on State Responsibility:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.[442]

While the ILC Articles are not, of course, formally binding, Article 16 has garnered wide support as a matter of state practice and *opinio juris*.[443] In the *Bosnian Genocide* case, for example, the International Court of Justice drew on Article 16, noting that it considered the article to be an expression of customary international law.[444] The Venice Commission of the Council of Europe similarly referred to Article 16 as applicable to European states contributing to instances of *refoulement* and other human rights abuses in the context of the US-led

[441] See e.g. H. Aust, *Complicity and the Law of State Responsibility* (2013) (Aust, *Complicity*); J. Crawford, *State Responsibility: The General Part* (2013) (Crawford, *State Responsibility*); M. Gibney, K. Tomaševski, and J. Vedsted-Hansen, "Transnational State Responsibility for Violations of Human Rights," (1999) 12 *Harvard Human Rights Journal* 267.

[442] International Law Commission, "Articles on the Responsibility of States for Internationally Wrongful Acts," UN Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), at art. 16. Earlier drafts of the ILC Articles equally referred to "complicity" and "accessory" responsibility, but "aid and assistance" was eventually chosen as a more neutral-sounding term: G. Nolte and H. Aust, "Equivocal Helpers – Complicit States, Mixed Messages and International Law," (2009) 58 *International and Comparative Law Quarterly* 1. As Milanovic has pointed out, "aid and assistance" may perhaps best be thought of as a particular kind of complicity, involving a degree of material assistance beyond mere instigation. M. Milanovic, "State Responsibility for Genocide: A Follow-Up," (2007) 18 *European Journal of International Law* 669 (Milanovic, "State Responsibility for Genocide"), at 682.

[443] Aust, *Complicity*, at 107–191 (providing an overview in this area). As Aust concludes, "[t]he number of positive statements available allows us to ascribe the necessary *opinio juris* to the elements of practice we have assembled to a degree that is seldom found in international law . . . [N]ot only can we point towards a significant amount of practice here, but we can underline its legal significance with the amount of support Article 16 ASR [ILC Articles on State Responsibility] has found in the deliberations of States in the United Nations": ibid. at 186.

[444] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)*, [2007] ICJ Rep 43, at [420].

extraordinary rendition program,[445] as did Judge Pinto de Albuquerque in his separate opinion in *Hirsi*.[446] This approach is moreover very much in line with the general view of the European Court of Human Rights that international human rights law is to be interpreted in the light of the law on state responsibility:

> [P]rinciples underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law.[447]

The commentary to Article 16 notes moreover that the assistance need not be essential to performing the illegal act, so long as it contributes significantly thereto[448] – suggesting, at the very least, that action beyond mere instigation is required.[449] State responsibility does however arise where a state provides "material aid to a State that uses the aid to commit human rights violations."[450] The ICJ thus sensibly determined in the *Bosnian Genocide* case that the supply of weapons, military equipment, and financial resources amounted to "aid and assistance" by the Federal Republic of Yugoslavia to the army of Republika Srpska.[451]

[445] European Commission for Democracy Through Law (Venice Commission), "On the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners," Op. No. 363/2005, CDL-AD(2006)009 (2006), at [44]–[45].

[446] *Hirsi Jamaa v. Italy*, (2012) 55 EHRR 21 (ECtHR [GC], Feb. 23, 2012), at [97] (separate opinion of Judge Pinto de Albuquerque).

[447] *Banković v. Belgium*, Dec. No. 52207/99 (ECtHR, Dec. 12, 2001), at [57]. Indeed, Article 6 of the ILC Articles on State Responsibility was applied in *Jaloud* to determine questions of attribution between the Netherlands and the United Kingdom: *Jaloud v. Netherlands*, Dec. No. 47708/08 (ECtHR, Nov. 20, 2014), at [151]. Similarly, the Court has applied Article 5 of the parallel Draft Articles on the Responsibility of International Organizations to determine the question of attribution between the United Kingdom and the United Nations: *Al-Jedda v. United Kingdom*, Dec. No. 27021/08 (ECtHR, July 7, 2011), at [84].

[448] "There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act": International Law Commission, "Articles on the Responsibility of States for Internationally Wrongful Acts," UN Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), Art. 16, at [5].

[449] Aust, *Complicity*, at 209; Crawford, *State Responsibility*, at 403; Milanovic, "State Responsibility for Genocide," at 682.

[450] International Law Commission, "Articles on the Responsibility of States for Internationally Wrongful Acts," UN Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), Art. 16, at [9].

[451] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)*, [2007] ICJ Rep 43, at [239]–[241], [422]. See also International Law Commission, "Articles on the Responsibility of States for Internationally Wrongful Acts," UN Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), Art. 16, at [7].

In line with these understandings, a state which takes steps such as providing maritime patrol vessels or border control equipment, which seconds border officials, or which shares relevant intelligence or directly funds migration control efforts that assist another country to breach its *non-refoulement* obligations is taking action that can fairly be characterized as within the ambit of aiding or assisting. A clear example would be the transporting of Libyan, Mauritanian, and Senegalese officials aboard European ships in order to enable those officials to conduct refugee interceptions,[452] or France's provision of aid to Italy specifically to blockade Italian ports and force North African refugees away.[453] Equally clearly, US collaboration with Central American states – including not only funding and training for officials, but even the deployment of US security officials to assist with interceptions of US-bound refugees[454] – amounts to unlawful aiding or assisting in the push-backs of those refugees. The massive financial investment of the European Union in forcing refugees to remain in Turkey,[455] from which country the *refoulement* of Syrian and other refugees has been documented,[456] also likely meets this threshold. On the other hand, merely applying diplomatic pressure to introduce or enforce exit migration controls or to sign readmission agreements – while undoubtedly creating a climate within which *refoulement* may occur – is likely too remote from the harm to be deemed aiding or assisting the commission of *refoulement*.[457] Nor does a pure act of omission by, for example, failing to step in to prevent an instance of *refoulement* by another state, rise to the level of aiding or assisting that country to breach its obligations.[458]

Even where the sponsoring state takes more direct forms of action, however, Article 16 provides that the assisting state must also have "knowledge of the circumstances of the internationally wrongful act."[459] As such, liability does

[452] See text at note 50. [453] See text at notes 63–65. [454] See text at notes 43–44.
[455] See text at note 49. [456] See text at note 112.
[457] R. Byrne et al. eds., *New Asylum Countries: Migration Control and Refugee Protection in an Enlarged European Union* (2002), at 16.
[458] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)*, [2007] ICJ Rep 43, at [222]–[223]; Crawford, *State Responsibility*, at 403–405.
[459] International Law Commission, "Articles on the Responsibility of States for Internationally Wrongful Acts," UN Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), Art. 16. Indeed, the commentary goes further, suggesting both an intention and a consummation requirement, namely that aid or assistance must be given "with a view to facilitating the [internationally] wrongful act, and must actually do so": ibid. at [5]. The interpretation of this requirement has been an issue of some contestation both within and outside the ILC. On the one hand, it could be taken to imply that the assisting state must share the wrongful intent of the principal state, effectively narrowing the scope of application: Aust, *Complicity*, at 239–240; Milanovic, "State Responsibility for Genocide," at 682–684. The International Court of Justice raised this question in the *Genocide* case, but ultimately left it unanswered: "Before the Court turns to an examination of the facts, one further comment is required. It concerns the link between the

not follow where aid or assistance given in good faith is subsequently misused by another country; thus a state providing development aid is not responsible if, unbeknownst to it, that aid is used to implement border controls that lead to the *refoulement* of refugees. It is otherwise, however, where the sponsoring state has at least constructive knowledge that its contributions will aid or assist another country to breach its obligations and chooses to aid or assist despite such knowledge. For example, in *Hirsi*, Italy argued that it reasonably considered Libya to be a "safe host country" based on its ratification of several human rights treaties and the African Union's regional refugee treaty, coupled with the express stipulation in the Italian–Libyan agreement requiring Libya to comply with international human rights law.[460] Relying on these formal commitments, Italy argued that it "had no reason to believe that Libya would evade its commitments."[461] This argument was, however, rejected by the Court:

> [T]he Court is bound to observe that the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities . . .
>
> The Court notes again that [this] situation was well known and easy to verify on the basis of multiple sources. It therefore considers that when the applicants were removed, the Italian authorities knew or should have known that, as irregular migrants, they would be exposed in Libya to treatment in breach of the Convention and that they would not be given any kind of protection in that country.[462]

This holding aligns neatly with the general refusal of courts to countenance willful blindness to readily ascertainable facts.[463]

specific intent (*dolus specialis*) which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime): the question arises whether complicity presupposes that the accomplice shares the specific intent (*dolus specialis*) of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will thus first consider whether this latter condition is met in the present case. It is only if it replies to that question of fact in the affirmative that it will need to determine the legal point referred to above": *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)*, [2007] ICJ Rep 43, at [421].

460 *Hirsi Jamaa v. Italy*, (2012) 55 EHRR 21 (ECtHR [GC], Feb. 23, 2012).

461 Ibid. at [98].

462 Ibid. at [128], [131].

463 See e.g. Aust, *Complicity*, at 244–249; I. Brownlie, *System of the Law of Nations: State Responsibility* Part 1 (1983), at 12. This would align the knowledge requirement for

Beyond the requirement of knowledge, liability for aiding or assisting can be imposed only where the act "would be internationally wrongful" if committed by both the principal state actor and the state said to be aiding or assisting that country.[464] The starting point is therefore to ascertain whether the conduct in question is in breach of an international obligation of the principal state – not a minor matter when, as is often the case, *non-entrée* cooperation is undertaken with a state that is not bound by the Refugee Convention or Protocol, including such key partner states as Libya, Indonesia, and Malaysia.[465] Some would no doubt seek to locate the required unlawfulness in the alleged existence of a customary legal duty of *non-refoulement*.[466] The better approach, however, is to draw on Crawford's view that Article 16(b) "merely requires that the conduct in question would have been internationally wrongful if committed by the assisting state and says nothing about the identity of norms or sources,"[467] thus opening the possibility of liability for aiding or assisting where the act in question is unlawful for both the principal and sponsoring states, albeit on the basis of distinct legal norms.[468] Many partner states not bound by the Refugee Convention or Protocol are nonetheless parties to other human rights instruments that contain a cognate duty of *non-refoulement* (though the scope of the same may not in all cases be identical),[469] many of which provide the required basis for a finding of international wrongfulness. For example, Libya and Indonesia have both ratified the International Covenant on Civil and Political Rights (which has been interpreted to impose a duty of *non-refoulement* at least in cases involving risk of the breach of Articles 6 and 7)[470] as well as the Convention against Torture (which

complicity with that ordinarily applied in the context of *non-refoulement*. But see Crawford, *State Responsibility*, at 406.

[464] This is a reflection of the *pacta tertii* principle that no state is bound by the obligations of another state vis-à-vis third states. See Vienna Convention on the Law of Treaties, 1155 UNTS 331 (UNTS 18232), at Arts. 34–35.

[465] See T. Gammeltoft-Hansen, "The Externalisation of European Migration Control and the Reach of International Refugee Law," in E. Guild and P. Minderhoud eds., *The First Decade of EU Migration and Asylum Law* 273 (2012).

[466] The arguments against this view are detailed in J. Hathaway, "Leveraging Asylum," (2010) 45(3) *Texas International Law Journal* 503; see also Chapter 4.1.6.

[467] Crawford, *State Responsibility*, at 410.

[468] Notably, the International Court of Justice, when considering that Article 16 could be applied analogously to state complicity under the Genocide Convention, did not consider the equal obligations requirement to be essential since the Bosnian Serb forces committing the genocide did not constitute a state: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)*, [2007] ICJ Rep 43.

[469] These alternative duties of *non-refoulement* are described in Chapter 4.1.6. at note 815 ff.

[470] UN Human Rights Committee, "General Comment 20: Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 7)," UN Doc. HRI/GEN/1/Rev.1 at 30, 44th Sess. 1992 (1994), at [9].

proscribes return to torture in Article 3).[471] Indeed, it may even be the case that it would be "internationally wrongful" for a partner state to breach the terms of an international *non-entrée* cooperation agreement of the kind favored by the European Union with Mediterranean and Eastern European states,[472] which commonly condition such cooperation on respect for refugee and other rights.

In sum, three evolving areas of international law – jurisdiction, shared responsibility, and liability for aiding or assisting – are likely to stymie many if not all of the new forms of cooperative deterrence of refugees. The fact that jurisdiction, and hence liability, is now understood to flow not just from territory, but also from authority over individuals in areas beyond a state's jurisdiction and indeed from the exercise of public powers abroad, has expanded the scope of accountability for core refugee rights, including in particular the duty of *non-refoulement*. Particularized liability may moreover ensue even where more than one state is liable for the violation of human rights. And even when no case can be made for the exercise of jurisdiction, the emerging law on liability for aiding or assisting another state to breach its duties under international law has enormous potential to close the accountability gaps that the new generation of cooperative deterrence practices seeks to exploit.

4.1.4 *Individuated Exceptions*

States are not bound to honor the Refugee Convention's duty of *non-refoulement*[473] in the case of refugees who are individually determined to pose a fundamental threat to the receiving state.[474] Critically, Art. 33(2) does

[471] See B. Gorlick, "The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees," (1999) 11 *International Journal of Refugee Law* 479.

[472] See text at note 46.

[473] "The benefit of the present provision may not, however, be claimed by *a refugee* whom there are reasonable grounds for regarding as *a danger* to the security of the country in which *he* is, or who, having been convicted by *a final judgment* of *a particularly serious crime*, constitutes *a danger* to the community of that country [emphasis added]": Refugee Convention, at Art. 33(2). States also bound by Art. II(3) of the Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45 (UNTS 14691), done Sept. 10, 1969, entered into force June 20, 1974 ("AU Refugee Convention") enjoy no right to engage in *refoulement* of a refugee, as that treaty's *non-refoulement* duty is framed without qualification. See generally Chapter 1.5.3 at note 262.

[474] Despite the prerogative afforded by Art. 33(2), state parties to other human rights treaties – for example, to the European Convention on Human Rights, to the Convention against Torture, and to the International Covenant on Civil and Political Rights – will be subject to additional constraints on removal as a result of these other treaty obligations: see Chapter 4.1.6 at note 815 ff. Lauterpacht and Bethlehem go much farther, suggesting that – the clear language of Art. 33(2) notwithstanding – there is today a basis for understanding the duty of *non-refoulement* to include no exceptions whatever: Lauterpacht and Bethlehem, "*Non-refoulement*," at [151]–[158]. The argument is based on an unsound construction of Art.

not exclude persons from refugee status,[475] but rather provides the means for states to expel or return two categories of refugees.[476] First, it authorizes the *refoulement* of any refugee whom there are reasonable grounds for regarding as a danger to the security of the asylum country, whether or not there is an allegation of criminality. Second, Art. 33(2) sanctions the removal of refugees adjudged to endanger the safety of the community of the asylum country because of particularly serious crimes committed in the state of refuge or elsewhere, whether or not those crimes remain justiciable. While Art. 33(2) thus affords asylum states the means to protect their most basic interests, it is – as described in detail below – a provision that is carefully framed to ensure that a refugee's right to protection can be forfeited only in cases of clearly demonstrated and very substantial risk to the host country or its people.

There is, however, frequently confusion between the right of a state to expel or return dangerous refugees pursuant to Art. 33(2) and the exclusion of fugitives from justice under Art. 1(F)(b) of the Convention.[477] Art.

33(2) which draws on a mix of regional norms, norms derived from other instruments, and policy positions of international agencies. While the authors "are not ultimately persuaded that there is a sufficiently clear consensus opposed to exceptions to *non-refoulement* to warrant reading the 1951 Convention without them," they nonetheless insist that the exceptions "must be read subject to very clear limitations": ibid. at [158].

[475] "The 1951 Convention foresees that ... refugees ... can be subject to ... expulsion proceedings in accordance with Article 32 and, in exceptional cases, to removal under Article 33(2). Neither action per se involves revocation of refugee status ... [On the other hand] [w]here the [Art. 1(F)] exclusion clauses apply, the individual cannot be recognised as a refugee and benefit from protection under the 1951 Convention. Nor can the individual fall within the UNHCR's mandate": UNHCR, "Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees," Sept. 4, 2003, at [17], [21]. It has thus been determined that invocation of provisions under EU law implementing Art. 33(2) "cannot be interpreted as meaning that ... [the person concerned] is no longer a refugee for purposes of ... the Geneva Convention ... [It] in no way means that he or she ceases to satisfy the material conditions, relating to a well-founded fear of persecution in his or her country of origin, on which his or her being a refugee depends": *M v. Czech Republic, X and X v. Belgium*, Dec. Nos. C-391/16, C-77/17, and C-78/17 (CJEU, May 14, 2019), at [97]–[98].

[476] See e.g. *MS and MBT v. Secretary of State for the Home Department*, [2017] EWCA Civ 1190 (Eng. CA, July 31, 2017), at [7] (noting that but for the countervailing requirements of the European Convention on Human Rights, Art. 33(2) allows "a person guilty of acts of the kind specified [to] ... be refused asylum and returned to a country where he is at serious risk of persecution or other serious harm").

[477] See generally Hathaway and Foster, *Refugee Status*, at 537–543. See e.g. decisions of the Supreme Court of Canada effectively treating the domestic incorporation of Art. 1(F) exclusion as the basis for permissible *refoulement* in *Józef Németh v. Minister of Justice of Canada*, [2010] SCC 56 (Can. SC, Nov. 25, 2010), at [23], [108], and *Tiberiu Gavrila v. Minister of Justice of Canada*, [2010] SCC 57 (Can. SC, Nov. 25, 2010), at [12]. European Union law shows that the confusion can also run in the opposite direction, with refusal of refugee status purportedly authorized in relation to persons in fact subject only to particularized *refoulement* under Art. 33(2), but who actually remain refugees under the

1(F)(b),[478] inserted at the insistence of countries that perceived themselves to be vulnerable to large flows of refugees,[479] was designed to afford the possibility of pre-admission exclusion from refugee status without recourse to a formal trial to assess the criminal charge. But it is a provision that applies in only very narrowly defined circumstances,[480] specifically only to persons believed to have committed serious, pre-entry crimes which remain justiciable.[481] While the complete exclusion of such persons from refugee status may appear

Convention: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) ("EU Qualification Directive"), at Art. 14(4)–(5). This point was argued, but not resolved, in *EN (Serbia) and KC (South Africa) v. Secretary of State for the Home Department*, [2009] EWCA Civ 630 (Eng. CA, June 26, 2009), at [63]. The UK Home Office nonetheless takes the view that the Qualification Directive entitles it to rely on the equivalent of Art. 33(2) in "cases where a decision is yet to be made on an asylum claim": UK Home Office, "Exclusion (Article 1F) and Article 33(2) of the Refugee Convention," July 1, 2016, at 5. See generally A. Zimmermann and P. Wennholz, "Article 1 F," in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 579 (2011) (Zimmermann and Wennholz, "Article 1F"), at 590–591.

[478] "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that . . . he has committed a serious non-political crime outside the country of refuge prior to this admission to that country as a refugee": Refugee Convention, at Art. 1(F)(b).

[479] "France's reason for taking such a firm stand on the subject lay in the fact that she had to administer the right of asylum under much more difficult conditions than did countries which were in a position to screen immigrants carefully at their frontiers": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.24, July 17, 1951, at 13. See also Statement of Mr. Makiedo of Yugoslavia, ibid. at 18. These states were concerned not to undermine the possibilities for resettlement of the refugees admitted: "If refugee status was to be granted to criminals, immigration countries could not fail to question its value": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.19, July 13, 1951, at 7.

[480] Indeed, because of the generality of Art. 33(2) it was argued by the United Kingdom that there was no need for a criminality exclusion clause in Art. 1(F)(b): Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.24, July 17, 1951, at 4. See also Statement of Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.29, July 19, 1951, at 12: "Common criminals should not enjoy the right of asylum; but that consideration had already been taken care of in article [33] of the draft Convention."

[481] "There is little doubt that the primary purpose of Article 1(F)(b) was to exclude those individuals who would abuse the status of refugee by avoiding accountability through prosecution or punishment for a serious crime committed outside the country of refuge. For the clause to apply, the crime must have been committed 'outside the country of refuge prior to his [or her] admission to that country as a refugee.' This territorial limitation has been relied on as a strong indication that Article 1(F)(b) was intended to exclude those individuals who seek to abuse the status of being a refugee by evading prosecution in another jurisdiction": *Luis Alberto Hernandez Febles v. Minister for Citizenship and Immigration*, [2014] SCC 68 (Can. SC, Oct. 30, 2014), at [101], per Abella and Cromwell JJ. in dissent.

harsh,[482] it was understood to be the only means available to ensure that refugee law did not provide shelter to fugitives from justice.[483] Because ordinary crimes cannot normally be prosecuted in other than the country where they were committed, any response short of the exclusion of common law criminals from the refugee protection system (and consequential amenability to deportation) was believed by the drafters to risk undermining international comity in the fight against crime, thereby bringing the refugee system into disrepute.[484]

If, in contrast, the concern is not complicity in the avoidance of criminal responsibility, but instead protection of the core interests of the host state or of its citizenry, there is no need for the peremptory denial of refugee status.[485] Criminality in the host state can, of course, be tried and punished. And even if a convicted refugee poses a clear risk to the host community, there is no need to strip him of his refugee status; rather it is sufficient, as Art. 33(2) provides, to authorize the host government to divest itself of its particularized protective responsibilities. The individual in question remains a refugee,[486] and is therefore entitled both to UNHCR institutional assistance and to the protection of any other state party the safety and security of which is not infringed by the refugee's presence within its territory.[487] As described in more detail below, the criminality branch of Art. 33(2) requires conviction by a final judgment of a particularly serious crime.[488] Beyond this, Art. 33(2) requires an additional

[482] As framed by Justice Bastarache in a foundational decision of the Supreme Court of Canada, "persons falling within Art. 1(F) of the Convention are automatically excluded from the protections of the [Convention]. Not only may they be returned to the country from which they have sought refuge without any determination . . . that they pose a threat to public safety or national security, but their substantive claim to refugee status will not be considered. The practical implications of such an automatic exclusion, relative to the safeguards of the [Art. 33(2)] procedure, are profound": *Pushpanathan v. Minister of Citizenship and Immigration*, [1998] 1 SCR 982 (Can. SC, June 4, 1998), at [13].

[483] "There is little doubt that the primary purpose of Article 1(F)(b) was to exclude those individuals who would abuse the status of a refugee by avoiding accountability through prosecution or punishment for a serious crime outside the country of refuge": *Luis Alberto Hernandez Febles v. Minister for Citizenship and Immigration*, [2014] SCC 68 (Can. SC, Oct. 30, 2014), at [101].

[484] See generally Hathaway and Foster, *Refugee Status*, at 543–544.

[485] See *NBMZ v. Minister for Immigration and Border Protection*, [2014] FCAFC 38 (Aus. FFC, Apr. 9, 2014), at [21], per Allsop C.J. and Katzmann J. concurring: "Article 33(2) and the circumstances within it reflect the balance contained within the Refugee[] Convention between protection of those who need it, and the legitimate entitlement of Contracting States not to be required to give protection to those who pose a danger to the host State and its people."

[486] UNHCR, "Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees," Sept. 4, 2003, at [17].

[487] See generally A. Zimmermann and P. Wennholz, "Article 33, para. 2," in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 1397 (2011) (Zimmermann and Wennholz, "Article 33, para. 2"), at 1413.

[488] See text at note 551.

determination that the offender "constitutes a danger to the community." This distinction was clearly enunciated in the Supreme Court of Canada's *Pushpanathan* decision:

> The purpose of Article 1 is to define who is a refugee. Article 1(F) then establishes categories of persons who are specifically excluded from that definition. The purpose of Article 33 of the Convention, by contrast, is not to define who is and who is not a refugee, but rather to allow for the *refoulement* of a *bona fide* refugee to his or her native country where he or she poses a danger to the security of the country of refuge, or to the safety of the community . . . Thus, the general purpose of Article 1(F) is not the protection of the society of refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33 of the Convention.[489]

More generally, as the Court of Justice of the European Union has observed, the highly exceptional nature of the particularized *refoulement* authority means that it can be resorted to only where "no other measure is possible or is sufficient for dealing with the threat that the refugee poses to the security or to the public of that Member State";[490] thus, for example, Art. 33 should be read in consonance with Arts. 31 and 32 to allow refugees the opportunity to seek entry into a non-persecutory state as an alternative to being returned to their home country.[491]

The genesis of the confusion between the functions of Art. 33(2) and Art. 1(F)(b) is a passage in the UNHCR's *Handbook* suggesting that Art. 1(F)(b) is concerned *both* to exclude fugitives from justice *and* to protect the security of the asylum state[492] – thus attributing to Art. 1(F)(b) some of the work that is meant to be done by Art. 33(2). While more recently recognizing the importance of avoiding this overlap,[493] UNHCR nonetheless continues to argue for an understanding of Art. 1(F)(b) that strays beyond the drafters' goal of ensuring

[489] *Pushpanathan v. Minister of Citizenship and Immigration*, [1998] 1 SCR 982 (Can. SC, June 4, 1998), at [58]. To similar effect, the New Zealand Court of Appeal determined that "Art. 1(F) is concerned with past acts. Art. 33(2) is only concerned with past acts to the extent that they may serve as an indication of the behaviour one may expect from the refugee in the future. The danger that the refugee constitutes must be a present or future danger": *Attorney General v. Zaoui*, [2005] 1 NZLR 690 (NZ CA, Sept. 30, 2004), at [166]; varied on other grounds in *Attorney-General v. Zaoui*, [2005] NZSC 38 (NZ SC, June 21, 2005).

[490] *HT v. Land Baden-Württemberg*, Dec. No. C-373/13 (CJEU, June 24, 2015), at [71].

[491] See Weis, *Travaux*, at 343.

[492] UNHCR, *Handbook*, at [151].

[493] UNHCR observed that "Article 1F should not be confused with Article 33(2)"; they are "two provisions serving very different purposes": UNHCR, "Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees," Sept. 4, 2003, at [10]. The agency has helpfully clarified that "[w]hile Article 1F is aimed at preserving the integrity of the refugee protection regime, Article 33(2) concerns protection of the national security of the host country": UNHCR, "Statement on Article 1F of the 1951 Convention," July 2009, at 8.

that the integrity of the refugee regime not be compromised by the admission to asylum of criminals seeking to avoid legitimate prosecution or punishment.[494] Before the Supreme Court of Canada, for example, the agency asserted that exclusion under Art. 1(F)(b) requires consideration of not only the gravity of the crime "but [also] of how long ago the offence was committed, the conduct of the claimant since the commission of the offence, whether the claimant has expressed regret or renounced criminal activities, and whether the claimant poses a threat to the security of Canada at the present time."[495] Similarly, in the United Kingdom Supreme Court, UNHCR advocated a "twofold purpose of Article 1(F)(b), that is, denial of refugee status (a) to those unworthy of international protection and (b) to fugitive criminals."[496] In arguing for these overly broad constructions of Art. 1(F)(b), UNHCR regrettably subverted its own admonition not to confuse the roles of Art. 1(F)(b) and Art. 33(2) – with both the Canadian and British Supreme Courts ruling that even refugees who were not fugitives from justice in any sense were nonetheless subject to peremptory exclusion.[497] This confusion is sadly understandable: if Art. 1(F)(b) allows states to exclude anyone who is unworthy of protection because he has at some point committed a serious crime – as UNHCR seems to suggest – why contend with the more demanding requirements of seeking to protect a state's security interests against criminals by means of authorized *refoulement* under Art. 33(2)?

The response usually given[498] – that the role of Art. 33(2) is meant to address post-admission criminality (because Art. 1(F)(b) is limited to crimes committed "outside" the asylum state) – is deeply unsatisfactory. As explained in more detail below,[499] Art. 33(2) only authorizes removal at a higher

[494] See Hathaway and Foster, *Refugee Status*, at 541–542.

[495] *Luis Alberto Hernandez Febles v. Minister for Citizenship and Immigration*, [2014] SCC 68 (Can. SC, Oct. 30, 2014), at [4].

[496] *AH (Algeria) v. Secretary of State for the Home Department*, [2015] EWCA Civ 1003 (Eng. CA, Oct. 14, 2015), at [31].

[497] *Luis Alberto Hernandez Febles v. Minister for Citizenship and Immigration*, [2014] SCC 68 (Can. SC, Oct. 30, 2014), at [35]–[36]; *AH (Algeria) v. Secretary of State for the Home Department*, [2015] EWCA Civ 1003 (Eng. CA, Oct. 14, 2015), at [28]–[32].

[498] "The exclusion clause now refers to crimes committed 'prior to his (the refugee's) admission to that country (i.e. the country of asylum) as a refugee' while persons who have committed a serious crime in the country of residence remain refugees, but may in certain conditions be denied asylum and returned to their country of origin (Article 33(2) of the Convention)": P. Weis, "The Concept of the Refugee in International Law," (1960) 87 *Journal du droit international* 928, at 984. This approach has been adopted in e.g. *Luis Alberto Hernandez Febles v. Minister for Citizenship and Immigration*, [2014] SCC 68 (Can. SC, Oct. 30, 2014), at [24]–[25]; UK Home Office, "Exclusion (Article 1F) and Article 33(2) of the Refugee Convention," July 1, 2016, at 5–6; UNHCR, "Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees," Sept. 4, 2003, at [10].

[499] See text at note 541 ff.

standard ("*particularly* serious crime" and "having been *convicted* by a final judgment") than that governing Art. 1(F)(b). As such, this account of the role of Art. 33(2) would make sense only if it is assumed that the drafters saw those who committed a crime *on* asylum state territory as "less unworthy" of protection than those who committed a crime *outside* it – a proposition that is both implausible and unsupported.[500] Such concerns do not, however, arise if the drafters' vision of Art. 1(F)(b) – requiring only the exclusion of fugitives from justice[501] – is adopted. The comparatively relaxed standard of Art. 1(F)(b) can in this context be seen as a sensible response to the challenges of assessing the nature of common crimes committed abroad and, in particular, the vagaries of prosecution and punishment in a foreign state. This more circumscribed understanding of Art. 1(F)(b) is moreover confirmed by the Refugee Convention's context,[502] as only fugitives from justice are excluded under the cognate provision in all predecessor refugee treaties, the contemporaneously drafted UNHCR Statute, and the Universal Declaration of Human Rights upon which the Refugee Convention was based.[503]

In practice, however, the invitation to transmute Art. 1(F)(b) into a provision that allows states peremptorily to exclude anyone whose past criminality makes them somehow unworthy can prove nearly irresistible to states. Indeed, the majority of the Supreme Court of Canada departed from its own precedent[504] to hold that the mere fact of past criminality justifies summary exclusion under Art. 1(F)(b) because such persons are to be assumed to be "undeserving" of protection:

> Article 1(F)(b) is not directed solely at fugitives and neither is it directed solely at some subset of serious criminals who are undeserving at the time of the refugee application. Rather, in excluding all claimants who have committed serious non-political crimes, Article 1(F)(b) expresses the contracting states' agreement that such persons by definition would be undeserving of refugee protection by reason of their serious criminality.[505]

This sweeping reinterpretation[506] essentially allows asylum countries to refuse protection to refugees believed to have committed a serious crime, including

[500] See Hathaway and Foster, *Refugee Status*, at 541. [501] Ibid. at 541–542.
[502] See generally Chapter 2.2. [503] See Hathaway and Foster, *Refugee Status*, at 541.
[504] *Pushpanathan v. Minister of Citizenship and Immigration*, [1998] 1 SCR 982 (Can. SC, June 4, 1998), at [58].
[505] *Luis Alberto Hernandez Febles v. Minister for Citizenship and Immigration*, [2014] SCC 68 (Can. SC, Oct. 30, 2014), at [35].
[506] The decision of the Court's majority was based largely on the perceived absence of a textual toehold for restricting Art. 1(F)(b) to extraditable criminals: *Luis Alberto Hernandez Febles v. Minister for Citizenship and Immigration*, [2014] SCC 68 (Can. SC, Oct. 30, 2014), at [35]–[36], an argument also made by Zimmermann and Wennholz, "Article 1 F," at 597 ("It remains, however, to be considered that the ordinary meaning of the provision provides no indication of any such limitation"). Yet as the dissenting judges

those who have already been prosecuted and punished, and to do so without any showing that they pose a risk of any kind to the host country. It thus invites governments to do an end run on the carefully framed provisions of Art. 33(2), which authorizes a state to divest itself of protection responsibilities to persons who have been found guilty of serious crimes, *but only if safety and security concerns are shown to arise*. In avoiding these strictures, the Canadian Supreme Court took comfort in a throwaway comment by the Court of Justice of the European Union that Art. 1(F)(b) operates as "a penalty for acts committed in the past,"[507] leading the Canadian court to insist that protection may be summarily denied to anyone "who has ever committed"[508] a serious crime.

It would, of course, be antithetical to the purposes of refugee protection to send a person back to persecution as some sort of "penalty." There is also no basis to expand Art. 1(F)(b) beyond fugitives from justice (and *only* fugitives from justice) since, for reasons described above,[509] only their admission poses a risk to the systemic integrity of refugee law – that being the rationale for exclusion under Art. 1(F).[510] While there is a critical need also to ensure that asylum states are not left defenseless against refugees who threaten their safety or security, that is the role of the exceptions to the duty of *non-refoulement* codified in Art. 33(2).

4.1.4.1 Danger to National Security

The first category of persons legitimately subject to *refoulement* comprises those "whom there are reasonable grounds for regarding as a danger to the security of the [reception] country." The notion of "reasonable grounds"

in *Febles* observed, the textual reference to persons who have committed crimes "outside" the country of asylum is in fact consistent with such a limitation (and not with a focus on host state security): ibid. at [105]. In any event, rules of treaty interpretation do not allow deference to literal construction, a point also recognized by the dissenting judges: ibid. at [101]–[116]. See generally Chapter 2.1.

[507] *B and D v. Germany*, Dec. Nos. C-57/09 and C-101/09 (CJEU, Nov. 9, 2010), at [103]. The CJEU nonetheless insisted that Art. 1(F)(b) should not be subverted to address "any danger which a refugee currently poses to the Member State," since it is "Article 33(2) of the 1951 Geneva Convention [that allows a state to] *refoule* a refugee where there are reasonable grounds for considering him to be a danger to the community of that Member State": ibid. at [101].

[508] *Luis Alberto Hernandez Febles v. Minister for Citizenship and Immigration*, [2014] SCC 68 (Can. SC, Oct. 30, 2014), at [54].

[509] See text at notes 478–484.

[510] A risk to systemic integrity was agreed to exist in only two other cases: international criminals and persons who have violated the principles and purposes of the United Nations: Refugee Convention, at Arts. 1(F)(a) and 1(F)(c). See generally Hathaway and Foster, *Refugee Status*, at 567–598. Drawing on the views of the UNHCR, the Supreme Court of the United Kingdom correctly observed that Art. 1(F) should be "interpreted restrictively and applied with caution": *Al-Sirri v. Secretary of State for the Home Department*, [2012] 3 WLR 1265 (UK SC, Nov. 21, 2012), at [16].

requires "objective"[511] evidence; thus "the State concerned cannot act either arbitrarily or capriciously and . . . it must specifically address the question of whether there is a future risk and the conclusion on the matter must be supported by evidence."[512] There is more generally a strong argument that this evidentiary standard should be interpreted to align with the "serious reasons for considering" threshold used in Art. 1(F): while there is a variation in the English text, the original[513] French version is identical in both Art. 1(F) and Art. 33(2).[514] Under this approach, there are "reasonable grounds" for regarding a particular refugee as a danger to national security only when "clear and convincing"[515] or "clear and credible . . . strong"[516] evidence has been adduced. More than just "compelling reasons" are required.[517] As the English Court of Appeal observed, this test "imposes a demanding hurdle."[518]

The drafters did not agree to a precise definition of national security, though it is clear that delegates to the Conference of Plenipotentiaries were particularly concerned about the possibility of Communist infiltration.[519] Under the

[511] *Attorney-General v. Zaoui*, [2005] NZSC 38 (NZ SC, June 21, 2005), at [45].

[512] *Attorney General v. Zaoui*, [2005] 1 NZLR 690 (NZ CA, Sept. 30, 2004), at [133], per Glazebrook J.; varied on other grounds in *Attorney-General v. Zaoui*, [2005] NZSC 38 (NZ SC, June 21, 2005). In his concurring opinion, Young J. observed that "these words must be interpreted so as to ensure that [the state party] conforms to its obligations under the Refugee Convention and thus in light of the international understanding of what they mean (or imply)": ibid. at [198]. It is nonetheless true that this standard is, for example, "less stringent than preponderance of the evidence": *In re AH*, 2005 BIA Lexis 11 (US AG, Jan. 26, 2005).

[513] Ben-Nun, "British-Jewish Roots," at 111–112.

[514] Zimmermann and Wennholz, "Article 33, para. 2," at 1413.

[515] *Cardenas v. Canada (Minister of Employment and Immigration)*, [1994] FCJ 139 (Can. FCTD, Feb. 4, 1994), at [24]; adopted in *WAKN v. Minister for Immigration and Multicultural and Indigenous Affairs*, (2004) 138 FCR 579 (Aus. FC, Sept. 23 2004), at [52].

[516] *Al-Sirri v. Secretary of State for the Home Department*, [2012] 3 WLR 1263 (UK SC, Nov. 21, 2012), at [75].

[517] *HT v. Land Baden-Württemberg*, Dec. No. C-373/13 (CJEU, June 24, 2015), at [75].

[518] *AH (Algeria) v. Secretary of State for the Home Department*, [2015] EWCA Civ 1003 (Eng. CA, Oct. 14, 2015), at [26]. The Court of Justice of the European Union has noted the logic of a relatively demanding standard in view of the "potentially very drastic" consequences of falling under Art. 33(2): *HT v. Land Baden-Württemberg*, Dec. No. C-373/13 (CJEU, June 24, 2015), at [81].

[519] "It must be borne in mind that . . . each government had become more keenly aware of the current dangers to its national security. Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against the country of their asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 8. See also Statement of Mr. Chance of Canada, ibid.: "In drafting [Art. 33], members of [the Ad Hoc] Committee had kept their eyes on the stars but their feet on the ground. Since that time, however, the international situation had deteriorated, and it must be recognized, albeit with reluctance,

modern jurisprudential views analyzed earlier,[520] however, invocation of a national security argument is appropriate where a refugee's presence or actions give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions.

A risk to national security is by definition a grave threat.[521] It is not sufficient, for example, to assert the importance of safeguarding international relations[522] or avoiding political tension[523] as the basis for excluding refugees on national security grounds.[524] Nor is there any basis in international law for deeming a refugee to pose a threat to national security because property or economic interests might be adversely impacted by his or her presence[525] or

that at present many governments would find difficulty in accepting unconditionally the principle [of *non-refoulement*]." See Ben-Nun, "British-Jewish Roots," at 110.

[520] See Chapter 3.5.1 at note 680. National security thus does not speak to health-related concerns, which should instead be managed by mandatory treatment, quarantine, or other proportionate constraints on freedom of movement: see note 1161. "[S]tates have a legitimate right under international and EU law to manage their borders, including through measures aimed at curbing risks to public health in the context of the coronavirus pandemic. However, such measures may not prevent non-nationals from seeking protection from persecution ... States must therefore respect the right to asylum ... and the principle of *non-refoulement* vis-à-vis persons who have arrived at their borders seeking international protection": European Parliament, "Tackling the Coronavirus Outbreak: Impact on Asylum-Seekers in the EU" (2020), at 3.

[521] "It must constitute a serious danger rather than a danger of some lesser order": Zimmermann and Wennholz, "Article 33, para. 2," at 1417. The US, however, seems to embrace a more sweeping definition, opining that "[a]ny level of danger to national security is deemed unacceptable; it need not be a 'serious,' 'significant,' or 'grave' danger ... [A]ny nontrivial degree of risk [suffices to] bar eligibility": *In re AH*, [2005] BIA Lexis 11 (US AG), Jan. 26, 2005.

[522] The Canadian Federal Court of Appeal thus went too far in suggesting that national security encompasses "domestic and international interests of keeping good relations with international partners": *Minister of Public Safety and Preparedness v. Nawal Haj Khalil*, [2014] FCA 213 (Can. FCA, Sept. 30, 2014), at [35].

[523] UNHCR, "Advisory Opinion regarding the scope of the national security exception under Article 33(2) of the 1951 Convention," Jan. 6, 2006, at 5.

[524] "Concerns about New Zealand's reputation can be taken into account [under Art. 33(2)] only if they impinge to such a serious extent on national security that they could fairly be said to constitute a danger to national security": *Attorney General v. Zaoui*, [2005] 1 NZLR 690 (NZ CA, Sept. 30, 2004), at [141]; varied on other grounds in *Attorney-General v. Zaoui*, [2005] NZSC 38 (NZ SC, June 21, 2005). But see *Suresh v. Minister of Citizenship and Immigration*, 2000 DLR Lexis 49 (Can. FCA, Jan. 18, 2000), reversed on appeal in *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002). "[T]he 'security of Canada' ... logically extends to situations where the integrity of Canada's international relations and obligations are affected."

[525] The decision of Venezuelan President Maduro to order the return of Colombian refugees on the grounds of an economic "national emergency" (See text at note 67) thus fails to meet the required international standard. On the other hand, the court in *Cheema v.*

because a refugee has arrived in a disorderly way rather than availing himself or herself of legal procedures.[526] Much less can national security be said to justify the denial of protection in order to discourage the departure of other persons from the refugee's country of origin.[527]

On the other hand, there is no good reason to limit national security concerns to risks aimed directly at the asylum country rather than, for example, to include also a threat against a partner state or community of states that *indirectly* affects the security of the host country.[528] While "under international law the state must prove a connection between the [threatening] activity and the security of the [asylum] country,"[529] the traditional notion that national security can be implicated only by evidence of direct impact "limits too tightly

Immigration and Naturalization Service, Dec. No. 02-71311 (US CA9, Dec. 1, 2003) simply adopted without any analysis a nearly unbounded test of "national security" posited by the Board of Appeals, namely that there is a risk to national security where the individual concerned "(1) endangers the lives, *property* or *welfare* of United States citizens; (2) *compromises* the national defense of the United States; or (3) materially damages the *foreign relations or economic interests* of the United States [emphasis added]."

526 There is therefore reason to be concerned by the reasoning of the European Court of Human Rights that a state might be justified in summarily expelling refugees who failed without "cogent reasons" to take advantage of "genuine and effective access to means of legal entry, in particular border procedures": *ND and NT v. Spain*, Dec. Nos. 8675/15 and 8697/15 (ECtHR, Feb. 13, 2020), at [209], [218]. Nor do arguments tantamount to *violenti non fit injuria* ("the Court considers that it was in fact the applicants who placed themselves in jeopardy by participating in the storming of the Melilla border fences": ibid. at [231]) resonate with the permissible grounds for exclusion from protection against *refoulement* authorized by Art. 33(2) of the Convention. On the salience of the court's reasoning based on "large numbers and using force" see Chapter 4.1.5 at notes 636–649.

527 In overruling a decision of the Board of Immigration Appeals that no national security threat had been shown in the case of an unauthorized entrant from Haiti, the Attorney General took the unusual step of issuing a "binding determination," specifically said to be treated as a precedent in future cases, that national security would be compromised by the release on bail of Haitian entrants because this "would tend to encourage further surges of mass migrations from Haiti by sea, with attendant strains on national and homeland security resources": *In re DJ*, 2003 BIA Lexis 3 (US AG, Apr. 17, 2003). Incredibly, the Attorney General explicitly advanced a deterrent rationale for his decision, asserting that "surges in such illegal migration by sea injure national security by diverting valuable Coast Guard and DOD resources from counter-terrorism and homeland security responsibilities": ibid.

528 Lauterpacht and Bethlehem argue that an interpretation of this kind would be "inconsistent with the nature of [the] compromise [between state and individual interests], and with the humanitarian and fundamental character of the prohibition of *refoulement*," in consequence of which the national security exemption set by Art. 33(2) "does not address circumstances in which there is a possibility of danger to the security of other countries or to the international community more generally": Lauterpacht and Bethlehem, "*Non-refoulement*," at [165].

529 *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002), at [88]. The general approach of the Canadian Supreme Court was endorsed by the Supreme Court of New Zealand: *Attorney-General v. Zaoui*, [2005] NZSC 38 (NZ SC, June 21, 2005), at [45].

the discretion of the executive in deciding how the interests of the state, including not merely military defense but democracy, the legal and constitutional systems of the state, need to be protected."[530] As Zimmermann and Wennholz have noted,

> [I]f ... a danger manifestly affects a collectivity of States, such as ... member states of the EU or of NATO, with a real threat being directed against common institutions created to safeguard vital interests, it is only logical to consider this danger as constituting a potential harm to the most basic interests of every individual member State. In times of globalization, growing interdependence, and striving for multilateral solutions for common security problems, it would appear too narrow to restrict dangers to national security to imminent dangers to the territory, national institutions, and population of a specific single country.[531]

A more difficult question arises when the threat to the asylum country's national security takes the form of retaliation by the agent of persecution. The US Board of Immigration Appeals has emphatically asserted that *refoulement* in order to protect national security is not lawful in such a circumstance:

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

[530] *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47 (UK HL, Oct. 11, 2001), at [17], per Lord Slynn of Hadley. See generally Chapter 3.5.1 at note 673 ff.

[531] Zimmermann and Wennholz, "Article 33, para. 2," at 1416. In contrast, UNHCR appears more tightly wedded to the traditional view, having observed that "Article 33(2) makes no reference to the security of other countries. To justify *refoulement* under article 33(2), the danger must therefore be a danger to the security of the country of refuge": UNHCR, "Advisory Opinion regarding the scope of the national security exception under Article 33(2) of the 1951 Convention," Jan. 6, 2006, at 6.

> contemplated violence against the United States (or the alien himself) in retaliation for granting him the protective relief of asylum.[532]

While a highly principled position with some support in the drafting history of the Convention,[533] on balance this interpretation takes an overly narrow view of the notion of the national security exception to the duty of *non-refoulement*. It is of course literally true that the refugee is merely the instrumentality triggering the risk to national security, rather than the immediate source of that risk.[534] But unlike the exclusion clauses of the Convention, Art. 33(2) is not predicated on any evidence of blameworthiness; it exists rather to enable states to reconcile the duty to protect refugees to their more general obligation to ensure the security of their country and its citizens. As such, if the demanding standard of a true risk to national security is met,[535] it is legally irrelevant whether the refugee to be removed voluntarily contributed to the risk or not. For purposes of Art. 33(2), the only question is whether there genuinely is a real chance of a retaliation that poses a risk of substantial harm to the host state's most basic interests – such as an armed attack on its territory or its citizens, or the destruction of its democratic institutions.[536] If these strict criteria are satisfied, the national security exception to the Refugee Convention's duty of *non-refoulement* may in principle be invoked, and the refugee required to leave the host state if no less intrusive means of protecting the host country exists.

Even where truly vital interests are at stake, a state seeking to rely on the national security exception to the duty of *non-refoulement* must, of course, undertake a careful assessment of the security threat actually posed by the presence of the particular refugee whose *refoulement* is being contemplated.[537] As the Supreme

[532] *In re Anwar Haddam*, 2000 BIA Lexis 20 (US BIA, Dec. 1, 2000).

[533] Concern about excluding a refugee whose presence might give rise to home state retaliation was voiced by the Danish representative to the Conference of Plenipotentiaries (Statement of Mr. Hoeg of Denmark, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 10–11), leading the British delegate to respond without explanation that such a circumstance was not contemplated by Art. 33(2): Statement of Mr. Hoare of the United Kingdom, ibid., at 13.

[534] "The national security exception . . . cannot – even in extreme cases – be invoked in order to avoid the risk of retaliation by those who would persecute a refugee . . . In this case it is not, as required by the explicit wording of Art. 33, para. 2, the refugee who constitutes a danger to the national security of the State of refuge, but rather his or her State of origin": Zimmermann and Wennholz, "Article 33, para. 2," at 1414. The writers nonetheless concede that general principles of necessity might in cases of grave and imminent peril be invoked to allow the *refoulement* of a refugee: ibid. at 1415.

[535] As Ben-Nun rightly observes, "[n]ational security was never meant to be used as a 'basket clause' masking other purposes such as demographic or political considerations. 'National security' must not be employed as a tool against perceived threats stemming from ethnicity, skin colour, religion, or changes in the demographic composition of one's state": Ben-Nun, "British-Jewish Roots," at 113.

[536] See also Chetail, *International Migration Law*, at 189.

[537] In a cognate context – namely, in response to national security and public order arguments made to avoid refugee responsibility sharing duties under EU law – the Court of Justice of the

Court of Canada has insisted, it cannot be assumed that a person poses a risk to national security based on the fact of group membership or other affiliation alone; the risk must rather be proved on the basis of fair procedures.[538] Because resort to *refoulement* is a particularized and highly exceptional form of protection for states, a restrictive approach is clearly called for, with the state asserting the danger posed by the refugee logically expected to establish a case for the refugee to answer.[539] As

European Union rightly insisted that "a danger to national security or public order can be invoked by the authorities . . . only if there is consistent, objective and specific evidence that provides grounds for suspecting that the applicant in question actually or potentially represents such a danger . . . and not until those authorities, *in respect of each applicant* . . . have made an assessment of the facts within their knowledge with a view to determining whether, in the light of an overall examination of all the circumstances *of the individual case concerned*, such reasonable grounds exist [emphasis added]": *European Commission v. Republic of Poland*, Dec. Nos. C-715/17, C-718/17, and C-719/17 (CJEU, Apr. 2, 2020), at [159]. As such, Niger's summary expulsion of whole groups of Nigerian refugees fleeing Boko Haram – after Boko Haram attacked Niger in retaliation for hosting the refugees (See text at note 66) – was not lawful despite the reality of the threat to national security.

538 "[C]ontrary to the government's submission, [we would] distinguish 'danger to the security of Canada' from 'danger to the public,' although we recognize that the two phrases may overlap. The latter phrase clearly is intended to address threats to individuals in Canada, but its application is restricted by requiring that any individual who is declared to be a 'danger to the public' have been convicted of a serious offence . . . The government's suggested reading of 'danger to the security of Canada' effectively does an end-run around the requirements of Article 33(2) of the Refugee Convention that no one may be refouled as a danger to the community of the country unless he has first been convicted by a final judgment of a particularly serious crime": *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002), at [84]. Despite this guidance, the Canadian Federal Court of Appeal has effectively authorized the *refoulement* on national security grounds of refugees stigmatized on the basis of no more than their membership of subversive or terrorist groups: see *Minister of Public Safety and Emergency Preparedness v. Nawal Haj Khalil*, [2014] FCA 213 (Can. FCA, Sept. 30, 2014); *Behzad Najafi v. Minister of Public Safety and Emergency Preparedness*, [2014] FCA 262 (Can. FCA, Nov. 7, 2014). To avoid such errors, there is wisdom in the advice of the Supreme Court of Canada that it will often make more sense to consider the permissibility of *refoulement* not on the basis of the national security leg of Art. 33(2), but rather on the basis of the other branch of Art. 33(2), which authorizes *refoulement* in the case of persons who are shown to pose a danger to the community of their intended host state, but only after final conviction of a particularly serious crime.

539 In *NSH v. Secretary of State for the Home Department*, [1988] Imm AR 410 (Eng. CA, Mar. 23, 1988), the English Court of Appeal held that the grounds for determining an applicant to be a risk to the national security of a country must in fact be reasonable before protection against *refoulement* may validly be denied. While the courts cannot expect all evidence to be placed before them, the assertion of risk must be "sufficiently particularized" to substantiate the reasonableness of exclusion. In the view of the New Zealand Court of Appeal, "it is incumbent upon the [state party] to provide as much information as is possible, without risking the disclosure of the classified security information itself": *Attorney General v. Zaoui*, [2005] 1 NZLR 690 (NZ CA, Sept. 30, 2004), at [72]; varied on other grounds in *Attorney-General v. Zaoui*, [2005] NZSC 38 (NZ SC, June 21, 2005). In general terms, "[t]he relevant authorities must specifically address the question of whether there is a future risk [to national security]; and their conclusion on the matter must be supported by evidence": Lauterpacht and Bethlehem, "*Non-refoulement*," at [168].

recently observed by the Kenyan High Court in rejecting an effort by that country's government to expel all Somali refugees on national security grounds,

> The application of Article 33(2) requires an individualized determination by the country in which the refugee is that he or she comes within one of the two categories provided for under Article 33(2) of the 1951 Convention. Thus, this rules out group or generalized application or collective condemnation. Unfortunately, the averment by the Government that the two exceptions . . . are applicable [is] not based on individual consideration or determination to each affected refugee but [is] dangerously generalized in a manner that is akin to collective punishment.[540]

4.1.4.2 Danger to the Asylum State Community

In addition to cases where there is a demonstrable risk to national security, *refoulement* is also allowed in the case of a refugee who has been "convicted by a final judgment of a particularly serious crime," and who is determined to constitute "a danger to the community" of the asylum state. In contrast to Art. 1(F)(b) of the Refugee Convention, the purpose of which is to ensure the integrity of the refugee regime by denying extraditable criminals the ability to avoid prosecution and punishment,[541] the criminality exclusion set by Art. 33(2) exists to enable host states to protect the safety of their own communities from criminal refugees who are shown to be dangerous.[542] This right to engage in the *refoulement* of dangerous criminals is, however, carefully constrained.

First, the gravity of criminality which justifies *refoulement* under Art. 33(2) – "a *particularly* serious crime" – is higher than that which justifies the exclusion of fugitives from justice under the "serious" non-political crime rule set by Art. 1(F)(b) of the Convention.[543] Only an extraditable crime is appropriately adjudged

[540] *Kenya National Commission on Human Rights v. Attorney General*, Constitutional Petition No. 227 of 2016 (Ken. HC, Feb. 9, 2017), at 19.

[541] See text at notes 509–510.

[542] See J. Hathaway and C. Harvey, "Framing Refugee Protection in the New World Disorder," (2001) 34(2) *Cornell International Law Journal* 257. In describing the different functions of Art. 1(F)(b) and Art. 33(2) of the Refugee Convention, Lord Mustill observed that the argument that Art. 1(F)(b) should be used to exclude dangerous refugees "overlooks Article 33(2) of the 1951 Convention . . . The state of refuge has sufficient means to protect itself against harbouring dangerous criminals without forcing on an offence, which either is or is not a political crime when and where committed, a different character according to the opinions of those in the receiving state about whether the refugee is an undesirable alien": *T v. Secretary of State for the Home Department*, [1996] 2 All ER 865 (UK HL, May 22, 1996), per Lord Mustill. See also *Pushpanathan v. Minister of Citizenship and Immigration*, [1998] 1 SCR 982 (Can. SC, June 4, 1998), at [73].

[543] Refugee Convention, at Art. 1(F)(b). See generally A. Grahl-Madsen, *The Status of Refugees in International Law* (vol. I, 1966) (Grahl-Madsen, *Status of Refugees I*), at 289–304; Hathaway and Foster, *Refugee Status*, at 537–562; and Goodwin-Gill and McAdam, *Refugee in International Law*, at 171–184.

"serious";[544] examples commonly given include acts that involve violence against persons, such as homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery.[545] The gravity of harm necessary to justify the *refoulement* of a person who qualifies for refugee status – expressly framed as a "particularly" serious crime – is clearly higher still,[546] and has been interpreted to require that even when the refugee has committed a serious crime, *refoulement* is only warranted when account has been taken of all mitigating and other circumstances surrounding commission of the offense.[547]

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

> On its proper construction, Article 33(2) does not contemplate that a crime will be characterized as particularly serious or not particularly serious merely by reference to the nature of the crime that has been committed, although this may suffice in some cases. The reason is that

[544] To constitute a "serious crime" for purposes of Art. 1(F)(b), the facts must show that the act was criminal both where committed and in the asylum state and that it is an extraditable crime as defined by reference to international minimum standards: Hathaway and Foster, *Refugee Status*, at 549–551.

[545] Grahl-Madsen, *Status of Refugees I*, at 297; Goodwin-Gill and McAdam, *Refugee in International Law*, at 176–177.

[546] The conclusion of a US appellate court that "the offense need not necessarily involve violence in order to qualify" (*Lizbeth Patricia Valerio Ramirez v. Attorney General*, 882 F. 3d 289 (US CA1, Feb. 18, 2018) thus adopts an overly broad reading of a "particularly serious crime."

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

> there are very many crimes where it is just not possible to determine whether they are particularly serious without regard to the circumstances surrounding their commission.[548]

Much the same approach has been adopted in the United Kingdom, where the Asylum and Immigration Tribunal has insisted that "in applying Art. 33(2) to a specific individual, consideration must be taken of the individual circumstances of the commission of the offense."[549] Thus, "Art. 33(2) can only be applied in a fact-sensitive way taking account of all the circumstances of the offence including its nature, gravity and consequences and of the offender, including any aggravating or mitigating factors."[550]

Second, while refugee status is to be withheld from persons reasonably suspected of justiciable criminal conduct under Art. 1(F)(b), the *refoulement* of refugees under Art. 33(2) is permissible only when there has actually been conviction by a final judgment. Appeal rights should therefore have expired or been exhausted,[551]

[548] Ibid. A finding that remediable psychological illness was at the root of criminal acts may also lead to a finding that the additional requirement to show a "danger to the community" (see text at note 553 ff.) is not satisfied. In the case of a Zimbabwean refugee whose violent tendencies were attributable to schizophrenia that "was fully under control with medication" and whose evidence made it clear that "he was motivated to ensure he continued to receive that medication," it was determined that "he does not represent a danger to the community in the United Kingdom for the purpose of . . . Article 33(2) of the Refugee Convention": *Secretary of State for the Home Department v. MM (Zimbabwe)*, [2017] EWCA Civ 797 (Eng. CA, June 22, 2017), at [15].

[549] *IH v. Secretary of State for the Home Department*, [2009] UKAIT 00012 (UK AIT, Mar. 9, 2009), at [73].

[550] Ibid. at [76]. In contrast to this thoughtful analysis, the US Court of Appeals for the 9th Circuit upheld the view that the conviction for drunk driving of a Mexican transgender woman – whose alcoholism stemmed from years of relentless beatings, sexual assaults, and rape – was a "particularly serious crime": *Edin Carey Avendano Hernandez v. Attorney General*, 800 F. 3d 1072 (US CA9, Sept. 3, 2015). In truth, it is highly doubtful that this offense (which resulted in only a term of incarceration of 364 days) was appropriately defined as even a "serious" crime, much less a "particularly serious" crime. More shockingly, the US Board of Immigration Appeals was "not persuaded that any inconsistency exist[ed]" between US and international law on permissible *refoulement* of serious criminals in finding that the Art. 33(2) exception to the duty of *non-refoulement* applied to a crime committed under duress (acceding to extortion demands from the Colombian FARC, the proceeds of which funded "terrorism," after having been attacked by them): *Matter of MHZ*, 26 I&N Dec. 757 (US BIA, June 9, 2016). Even if this action could somehow be treated as criminal – a doubtful proposition given clear evidence of duress – the failure even to consider the truly extreme circumstances under which funds were provided to FARC is inconsistent with the notion of a "particularly serious" crime, the standard for *refoulement* under Art. 33(2). As the English Court of Appeal has correctly observed, simple deference to asylum standards of "particularly serious criminality" is not warranted, as "the expression 'particularly serious crime,' in an international treaty . . . has autonomous meaning": *EN (Serbia) and KC (South Africa) v. Secretary of State for the Home Department*, [2009] EWCA Civ 630 (Eng. CA, June 26, 2009), at [40].

[551] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 14. See also Lauterpacht and Bethlehem, "*Non-refoulement*," at [188]: "'Final judgment'

limiting the risk of *refoulement* strictly to those whose criminality has been definitively established in accordance with accepted, general legal norms. As such, if authorities are able to "show that a person who has not been convicted of a particularly serious crime is nonetheless a danger to the community [they] cannot rely on Article 33(2)."[552]

Third and most important, the nature of the conviction and other circumstances must be found to justify the conclusion that the refugee in fact constitutes a danger to the community[553] in which protection is sought.[554] The simple fact of conviction does not suffice; rather, as the English Court of Appeal made clear,

> [I]t is clear that Article 33(2) imposes two requirements on a state wishing to refoule a refugee . . . his conviction by a final judgment of a particularly serious crime and his constituting a danger to the community.[555]

must be construed as meaning a judgment from which there remains no possibility of appeal. It goes without saying that the procedure leading to the conviction must have complied with minimum international standards."

[552] *EN (Serbia) and KC (South Africa) v. Secretary of State for the Home Department*, [2009] EWCA Civ 630 (Eng. CA, June 26, 2009), at [39]. If the crime alleged is serious and the individual concerned has not expiated that criminality, exclusion under Art. 1(F) would nonetheless be available: see text at note 478 ff.

[553] See e.g. *Ragupathy v. Canada*, [2006] FCJ 654 (Can. FCA, Apr. 26, 2006), at [13]. "[I]t is evident that [the word 'community'] is intended as a reference to the safety and well-being of the population in general, in contrast to the national security exception which is focused on the larger interests of the State": Lauterpacht and Bethlehem, "*Non-refoulement*," at [192].

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

[555] *EN (Serbia) and KC (South Africa) v. Secretary of State for the Home Department*, [2009] EWCA Civ 630 (Eng. CA, June 26, 2009), at [39]. The Court nonetheless approved of a rebuttable presumption of danger following from a relevant conviction, determining that "once the State has established that a person has been convicted of what is on the face of it a particularly serious crime, it will be for [the refugee] to show either that it was not in fact particularly serious, because of mitigating factors associated with its commission, or that because there is no danger of its repetition he does not constitute a danger to the community": ibid. at [66]. See also *Jeevakaran Ramanthan v. Minister of Immigration, Refugees and Citizenship and Minister of Public Safety and Emergency Preparedness*, [2017] FC 834 (Can. FC, Sept. 22, 2017), at [41], finding that "conviction of a serious criminal offence is not, alone, sufficient to conclude that the individual poses a danger to the public." In contrast, the practice of the United States of *automatically* equating conviction for a given category of crime with a finding of "dangerousness" (approved in *Edson Flores v. Attorney General*, 779 F. 3d 159 (US CA2, Feb. 26, 2015), at [13]; and in *Lizbeth Patricia Valerio Ramirez v. Attorney General*, 882 F. 3d 289 (US CA1, Feb. 15, 2018)) is not sound, as it elides two distinct inquiries. See e.g. *Jose Hernandez Nolasco v. Attorney General*, 807 F. 3d 95 (US CA4, Dec. 4, 2015), finding that "an alien who has been convicted of a 'particularly serious crime' *and, thus,* 'is a danger to the community' is not eligible for withholding of removal" and upholding domestic US law that makes conviction of an "aggravated felony" an automatic basis for the application of Art. 33(2). The "aggravated felony" category in the US can be astoundingly inclusive, resulting, for example, in a finding of removability against a Somali refugee who had fraudulently used food stamp benefits: *Jeylani Mowlana v. Attorney General*, 2015 US App. Lexis 17182 (US CA8, Sept. 30, 2015).

The focus of analysis must always be on whether the refugee "is a possible re-offender whose presence . . . creates an unacceptable risk to the public."[556] It thus follows, as observed by the Kenyan High Court, that "the possibilities of rehabilitation and reintegration within society"[557] must be considered, as they may negate the required forward-looking assessment of danger to the host community.[558] Similarly, where there is evidence that the crime committed was strictly situation-specific and that comparable circumstances do not exist in the host country – for example, the use of a weapon to escape unlawful detention or other persecution – *refoulement* ought not to be authorized.[559]

Because danger follows from the refugee's criminal character, it does not matter whether the crime was committed in the state of origin, an intermediate state, or the asylum state.[560] Nor is it relevant whether the claimant has or has not served a penal sentence or otherwise been punished.[561] On the other hand, *refoulement* is appropriately authorized only as a last resort[562] where there is no alternative mechanism to protect the community in the country of asylum

[556] *Jeevakaran Ramanthan v. Minister of Immigration, Refugees and Citizenship and Minister of Public Safety and Emergency Preparedness*, [2017] FC 834 (Can. FC, Sept. 22, 2017), at [40].

[557] *Kenya National Commission on Human Rights v. Attorney General*, Constitutional Petition No. 227 of 2016 (Ken. HC, Feb. 9, 2017), at [19].

[558] *Accord* Zimmermann and Wennholz, "Article 33, para. 2," at 1421.

[559] The English Court of Appeal determined that once evidence of conviction of a particularly serious crime has been presented, the refugee can nonetheless avoid *refoulement* by showing *inter alia* "that because there is no danger of its repetition, he does not constitute a danger to the community": *EN (Serbia) and KC (South Africa) v. Secretary of State for the Home Department*, [2009] EWCA Civ 630 (Eng. CA, June 26, 2009), at [66].

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

[561] *Accord* Zimmermann and Wennholz, "Article 33, para. 2," at 1421.

[562] Thus, "the danger involved is not a present or future danger that a person may commit a crime as that can be dealt with by the ordinary criminal law": *Attorney General v. Zaoui*, [2005] 1 NZLR 690 (NZ CA, Sept. 30, 2004), at [167]; varied on other grounds in *Attorney-General v. Zaoui*, [2005] NZSC 38 (NZ SC, June 21, 2005). This is in line with the view of the drafters of the Refugee Convention. For example, "the Swiss Government wished to reserve the right in quite exceptional circumstances to expel an undesirable alien, even if he was unable to proceed to a country other than the one from which he had fled, since the Federal Government might easily find itself so placed that there was no other means of getting rid of an alien who had seriously compromised himself": Statement of Mr. Schurch of Switzerland, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 32.

from an unacceptably high risk of harm.[563] The practice of some states to give dangerous refugees the option of indefinite incarceration in the asylum state as an alternative to *refoulement* is therefore one mechanism to be considered, since it protects the host community, yet averts the risk of being persecuted.[564]

In the end, however, the Refugee Convention accepts that in extreme and genuinely exceptional cases, the usual considerations of humanity must yield to the critical security interests of the receiving state.[565] As observed in the Full Federal Court of Australia, Article 33(2)

> describes the serious conditions that justify the return of a refugee to a place where he or she may face persecution. Article 33(2) and the circumstances within it reflect the balance contained within the Refugee Convention between protection of those who need it, and the legitimate entitlement of Contracting States not to be required to give protection to those who pose a danger to the host state and its people.[566]

4.1.4.3 No Balancing Requirement

Because Art. 33(2) allows states to contemplate *refoulement* in only clear and extreme cases,[567] there is no additional proportionality requirement to be met: by

[563] *HT v. Land Baden-Württemberg*, Dec. No. C-373/13 (CJEU, June 24, 2015), at [71].

[564] The drafters of the Convention, however, assumed this option to be no better than *refoulement*. "To condemn such persons to lifelong imprisonment, even if that were a practicable course, would be no better solution": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 8. This option has moreover been opposed by Zimmermann and Wennholz, who observe that "indefinite detention . . . is a means not provided for in the 1951 Convention. As such a measure would severely affect personal liberty . . . it appears hardly conceivable to apply it as a 'minus' to *refoulement* . . . Establishing it as a 'voluntary' alternative option to permitted *refoulement* . . . would hardly be a solution . . . since justification of an encroachment upon personal liberty by consent presupposes a decision based on free will": Zimmermann and Wennholz, "Article 33, para. 2," at 1422. While it is of course true that opting for detention as an alternative to *refoulement* (for the duration of risk in the country of origin, unless the refugee subsequently opts instead for *refoulement*) is far from ideal, the net result of the Zimmermann and Wennholz critique seems to be that the asylum state would be effectively left with no choice under the Refugee Convention but to proceed to *refoulement* (at least, unless some other state proves willing to receive the criminal refugee). From a human rights optic this seems a worse result than offering even a less-than-truly-voluntary option of detention in the asylum country. Any ongoing detention would, of course, have to meet the requirements of applicable international human rights law, including in particular the prohibition of arbitrary detention under Art. 9 and the duty to treat persons deprived of their liberty with humanity and dignity under Art. 10 of the Civil and Political Covenant: see Chapter 4.2.4.

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

[566] *NBMZ v. Minister for Immigration and Border Protection*, [2014] FCAFC 38 (Aus. FFC, Apr. 9, 2014), at [21], per Allsop C.J. and Katzmann J. concurring.

[567] "The Chairman realized that the presence of particularly intractable refugees might cause certain difficulties in certain reception countries. Nevertheless, it was for the governments

definition, no purely individuated risk of persecution can offset a real threat to such critical interests of the receiving state. So long as national security or danger arising from particularly serious criminality is conceived in line with the admonition of the drafters to interpret those notions restrictively "so as not to prejudice the efficiency of the article as a whole,"[568] a clear risk to such vital collective interests defeats the refugee's right to invoke the duty of *non-refoulement*.

Most writers have taken a contrary position,[569] relying largely on a single comment of the British co-sponsor of the particularized *refoulement* provision.[570] Yet the British reference to the importance of letting states weigh relative risks was actually an answer to a proposal to restrict states' margin of appreciation,[571] not an argument for a super-added proportionality test. Indeed, the British representative associated himself with his French co-sponsor's explanation of the rationale for the particularized *refoulement* clause:

> The French and United Kingdom delegations had submitted their amendment in order to make it possible for states to punish activities . . . directed against national security or constituting a danger to the community . . . The right of asylum rested on moral and humanitarian considerations which were freely recognised by receiving countries, but it had certain essential limitations. A country could not contract an unconditional obligation towards

of those countries to find the means of making reservations to meet special cases, while accepting the principle, which applied to all civilized nations, of not expelling refugees to territories where they would meet certain death": Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 15.

568 Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 8.

569 See Robinson, *History*, at 164; Weis, *Travaux*, at 342; UNHCR, "Advisory Opinion regarding the scope of the national security exception under Article 33(2) of the 1951 Convention," Jan. 6, 2006, at 6–8; Zimmermann and Wennholz, "Article 33, para. 2," at 1419–1420.

570 "It must be left to States to decide whether the danger entailed to refugees by expulsion outweighed the menace to public security that would arise if they were permitted to stay": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 8. Rather than invoking this comment, Zimmermann and Wennholz ground their plea for proportionality in part on the fact that other human rights duties may preclude removal: Zimmermann and Wennholz, "Article 33, para. 2," at 1419–1420. In the (more limited) circumstances in which a countervailing human rights duty (e.g. the prohibition of return to torture under Art. 3 of the Torture Convention) applies, a state party must of course comply with that additional duty notwithstanding whatever rights it has under Art. 33(2) of the Refugee Convention. It is thus not accurate to suggest that the approach advanced here "leaves no room for taking into account the refugee's rights . . . [and] is in any case at odds with basic principles of human rights protection": ibid. at 1420. But the existence of these other obligations is not the basis for asserting that "basic principles of human rights protection" (ibid.) justify any such additional test being deemed part of Art. 33(2).

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

> persons over whom it was difficult to exercise any control, and into the ranks of whom undesirable elements might well infiltrate. The problem was a moral and psychological one, and in order to solve it, it would be necessary to take into account the possible reactions of public opinion.[572]

This conviction that the establishment and maintenance of a relatively open refugee protection system requires a strong safeguard of the basic security interests of receiving states was precisely the reason that the Conference of Plenipotentiaries rejected the Ad Hoc Committee's unconditional insistence on strict observance of the duty of *non-refoulement*.[573]

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

> [T]he Secretary of State argues that on the plain wording of the Article a refugee may be expelled or returned even to a country where his life or freedom would be threatened, and that no balancing exercise is necessary; expulsion or return is permitted even where the threat to life or freedom *is much more serious than* the danger to the security of the country ... Despite the literal meaning of Article 33, it would seem to me quite wrong that *some trivial danger* to national security should allow expulsion or return in a case where there was a present threat to the life of the refugee if that took place [emphasis added].[574]

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

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

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

The very notion that there could be any such thing as a "trivial danger to national security" to be balanced against purely individuated interests is disturbing.[575] This decision shows how assertion of the importance of a "balancing test" inadvertently legitimates an unwarranted extension of the scope of the security-based exception to the duty of *non-refoulement*.[576] If, in contrast, national security and danger to the community are more carefully constrained as described here, it is readily apparent that they would always trump purely individuated risks, in consequence of which no super-added balancing test is required or appropriate.

Jurisprudence on cognate obligations affirms the view that Art. 33(2) is to be interpreted without importation of a "balancing" test. The European Court of Human Rights, for example, rejected the UK's plea to balance in the opposite direction – specifically, that the duty of non-return under Art. 3 of the European Convention on Human Rights should be balanced against the risk to its security interests – pointing out the intellectual incoherence of balancing metaphorical "apples and oranges":

> The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return.[577]

In the specific context of the Refugee Convention, virtually all leading courts have similarly rejected the argument that the right of states to exclude refugees under Art. 1(F)(b) is subject to a duty to "balance" the degree of a refugee's

a refugee cannot claim the benefit of Article 33(1) where there are reasonable grounds for regarding him 'as a danger to the security of the country in which he is.'"

[575] Zimmermann and Wennholz concur, noting that "anything such as a minor or trivial danger to national security is hardly imaginable": Zimmermann and Wennholz, "Article 33, para. 2," at 1417.

[576] Indeed, in arguing for a proportionality test, Zimmermann and Wennholz fall into precisely this trap, arguing that otherwise the presence of a person who had only engaged in "fundraising" for terrorist purposes might be found to "constitute a danger to national security," leading to his return to the risk of being persecuted: ibid. at 1420. It is, however, difficult to imagine how the presence of such a person could give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions. To the contrary, a positive contribution to security might follow from the refugee's removal from the sphere in which he was able to raise funds to support terrorism (and if he were to engage in such activities in the asylum state, he could readily be prosecuted and imprisoned if found guilty).

[577] *Saadi v. Italy*, (2009) 49 EHRR 30 (ECtHR [GC], Feb. 28, 2008), at [139].

criminality against the gravity of the persecution feared.[578] Drawing on early Canadian case law that simply rejected any duty to balance[579] and comments in the House of Lords suggesting that the character of a crime "cannot depend on the consequences which the offender may afterwards suffer if he is returned,"[580] the New Zealand Court of Appeal determined that the notion of a duty to balance criminality with the degree of persecution anticipated is both illogical and unfair:

> It is not easy to grasp the concept that the same offending may or may not be serious depending upon the level or degree of persecution expected to be suffered in the homeland. Acceptance of the concept would mean that in some circumstances Applicant A would be excluded from the Convention provisions . . . but Applicant B, who had committed an identical crime and bears the same culpability in the eyes of the law, would not . . .
>
> Whether a crime is to be categorised as serious is to be determined by reference to the nature and details of the particular offending, and its likely penal consequences. It does not depend upon, nor does it involve, a comparative assessment of its own gravity with the gravity of the perceived persecution if return to the homeland eventuates.[581]

Similarly, the US Supreme Court determined that "[a]s a matter of plain language, it is not obvious that an already-completed crime is somehow rendered less serious by considering the further circumstance that the alien may be subject to persecution if returned to his home country."[582] The Full Federal Court of Australia chimed in, finding that "[t]here is no textual or contextual basis for reading into Art. 1(F)(b) an additional requirement of a balancing test nor would such a requirement be justified on the basis that it is giving effect to the purpose or object of Art. 1(F)(b)."[583] And most recently the Court of Justice of the European Union agreed, finding that "[s]ince the competent authority has already, in its assessment of the seriousness of the acts committed by the person concerned and of that person's individual responsibility, taken into account all the circumstances surrounding those

[578] See generally Hathaway and Foster, *Refugee Status*, at 562–567.

[579] *Malouf v. Canada*, [1995] 1 FC 537 (Can. FCTD, Oct. 31, 1994); affirmed in *Xie v. Canada*, [2005] 1 FCR 304 (Can. FCA, June 30, 2004); affirmed in *obiter dicta* in *Pushpanathan v. Minister of Citizenship and Immigration*, [1998] 1 SCR 982 (Can. SC, June 4, 1998).

[580] *T v. Immigration Officer*, [1996] AC 742 (UK HL, May 22, 1996), at 769, per Lord Mustill.

[581] *S v. Refugee Status Appeals Authority*, [1998] 2 NZLR 291 (NZ CA, Apr. 2, 1998), at 296, 300. The New Zealand Supreme Court has more recently affirmed this view, finding that "the gravity of the offending [is not] to be balanced against the risk of persecution if the claimant is returned home": *Attorney General v. Tamil X*, [2011] 1 NZLR 721 (NZ SC, Aug. 27, 2010), at [87].

[582] *INS v. Aguirre Aguirre*, (1999) 526 US 415 (US SC, May 3, 1999), at 426.

[583] *NABD of 2001 v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 326 (Aus. FFC, Oct. 31, 2002), at [41].

acts and the situation of the person, it cannot . . . be required . . . to undertake an assessment of proportionality, implying as it does a fresh assessment of the level of seriousness of the acts committed."[584]

The Supreme Court of New Zealand has led the way in applying much the same reasoning to reject an argument for a balancing requirement to be required under Art. 33(2). The Court began by observing the same logical challenge identified in responding to arguments for "balancing" in other contexts:

> The decision-maker would have to measure against one another two matters which are very difficult to relate: the level of threat to the life or liberty of an individual, on the one side, and, on the other, the level of reasonably perceived danger to the security of the State. While the law may sometimes appear to require such weighing, such an interpretation is to be avoided unless it is plainly called for.[585]

After a detailed review of plain meaning, context, state practice, relevant rules of international law, the drafting history, and scholarly commentaries, the Supreme Court concluded succinctly – and in line with the views taken in relation to similar arguments in cognate contexts –

> that the judgment or assessment to be made under article 33.2 is to be made in its own terms, by reference to danger to the security, in this case, of New Zealand, and without any balancing or weighing or proportional reference to the matter dealt with in article 33.1, the threat, were [the refugee] to be expelled or returned, to his life or freedom on the proscribed grounds . . .[586]

4.1.5 *Qualified Duty in the Case of Mass Influx?*

Every few years, an asylum state closes its borders to refugees on the grounds that it is faced with a "mass influx"[587] with which it cannot cope. Turkey closed

[584] *B and D v. Germany*, Dec. Nos. C-57/09 and C-101/09 (CJEU, Nov. 9, 2010), at [108]–[109].

[585] *Attorney-General v. Zaoui*, [2005] NZSC 38 (NZ SC, June 21, 2005), at [27].

[586] Ibid. at [42].

[587] "[M]ass influx is a phenomenon that has not been defined, but . . . for the purposes of this Conclusion, mass influx situations may, inter alia, have some or all of the following characteristics: (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers": UNHCR Executive Committee Conclusion No. 100, "Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations" (2004), at [(a)]. This is actually quite a fungible standard since "[t]here is neither a minimum number, nor speed of arrival, for a 'mass influx'": A. Edwards, "Temporary Protection, Derogation and the 1951 Refugee

its border to Kurdish refugees from Iraq in 1991;[588] first Zaïre, and then Tanzania, closed their borders in 1994–1995 to refugees in flight from Hutu–Tutsi conflict;[589] Macedonia closed its border to refugees attempting to flee Kosovo in 1999;[590] Pakistan closed its borders to Afghan refugees in 2000;[591] Kenya closed its border to refugees fleeing war in Somalia in 2007;[592] despite admitting hundreds of thousands of refugees from Syria, Jordan closed its border to Palestinians fleeing Syria in 2012;[593] and Croatia, Hungary, Macedonia, Serbia, and Slovenia closed their borders to Syrian and other refugees in 2016.[594] This pattern suggests that states believe that they are entitled to take what is clearly a draconian measure in order to safeguard their national interests. Yet in truth, such generalized border closures are irreconcilable to the two bases for permissible *refoulement* set by Art. 33(2),[595] each of which requires an *individuated* assessment of risk – a logistical impossibility for a state confronted with truly massive numbers of refugees. As a report prepared for the UNHCR observes, "[t]he obligation to offer asylum may . . . directly conflict with a state's claim to sovereignty, especially if the claim is made that a mass influx will threaten the security (even the very survival) of the nation-state."[596]

One answer is that border closures in the face of a mass influx are simply illegal:[597] Art. 33(2) provides two exceptions to a fundamental norm of international refugee law and must therefore be understood to speak exhaustively to the scope of lawful *refoulement*. This is essentially the position of the UNHCR, which invokes Executive Committee Conclusion No. 22 as authority for the view that even in situations of mass influx, "the fundamental principle of *non-refoulement* – including non-rejection at the frontier – must be scrupulously observed."[598] Conclusion No. 22 nonetheless seeks to soften the blow by offering states faced with a mass influx the authority to suspend some Convention rights. Specifically, it purports to bless an indefinite delay of the regularization of status[599] and, therefore, access to the rights that accrue upon

Convention," (2012) 13(2) *Melbourne Journal of International Law* 595 (Edwards, "Temporary Protection"), at 603.

[588] See text at note 10. [589] See text at note 11. [590] See text at note 12.
[591] See text at note 13. [592] See text at note 14. [593] See text at note 16.
[594] See text at note 21.
[595] See text at note 511 ff. (regarding danger to national security) and at note 541 ff. (regarding danger to the security of the community of the asylum state).
[596] Long, "Review of UNHCR's Response," at [7].
[597] Goodwin-Gill and McAdam, for example, suggest that the duty of *non-refoulement* must be respected "no matter how debilitating a sudden influx of refugees might be on a State's resources, economy, or political situation": Goodwin-Gill and McAdam, *Refugee in International Law*, at 336.
[598] UNHCR Executive Committee Conclusion No. 22, "Protection of Asylum-Seekers in Situations of Large-Scale Influx" (1981), at [II(A)(2)].
[599] Ibid. at [II(B)(2)].

lawful presence – including, for example, the right to undertake self-employment. Even more seriously, Conclusion No. 22 seems to take away even some rights owed to refugees as soon as they come under the jurisdiction of a state party[600] – for example, the right to access courts and for refugee children to receive elementary education. Refugees arriving as part of a mass influx are essentially treated as a class apart.[601]

The problem with this answer to the challenges of mass influx is that while Executive Committee Conclusion No. 22 is properly regarded as context to be taken into account in interpreting the Refugee Convention,[602] it actually does more than simply *interpret* the Convention; it purports instead tacitly to *amend* the Convention by authorizing the withholding of rights on terms not authorized by the treaty – a course of action that is not lawful.[603]

The UNHCR has consistently hewed closely to the "indefinite suspension of some rights" approach proposed in Conclusion No. 22.[604] But in tacit recognition that the Executive Committee's list of rights that can be suspended by a state faced with a mass influx is not in line with Convention requirements, the agency has elaborated guidelines defining an expanded list of "minimum standards of treatment."[605] This list of the rights due to persons subject to what UNHCR calls "temporary protection,"[606] while clearly an improvement on the approach of Conclusion No. 22, is unfortunately framed in exceedingly

[600] Ibid. at [II(B)(2)].

[601] A UNHCR discussion paper concedes that "[t]emporary protection is not a protection scheme replacing the 1951 Convention or obligations arising thereunder (*except in crisis/mass influx situations in the initial phases*) [emphasis added]": UNHCR, "Roundtable on Temporary Protection: Discussion Paper, Division of International Protection," July 7, 2012, at 12. Indeed, the Executive Committee has determined that as temporary protection is "a specific provisional protection response to situations of mass influx providing immediate emergency protection from *refoulement*, [it] should be clearly distinguished from other forms of international protection": UNHCR Executive Committee Conclusion No. 103 (2005), at [l].

[602] See Chapter 2.2 at note 80.

[603] While it is sometimes suggested that Conclusion No. 22 was initially meant to speak only to non-party states, "it has been recalled on many subsequent occasions to apply to refugees in the territories of both [party] and non-party states": Edwards, "Temporary Protection," at 625.

[604] UNHCR, "Guidelines on Temporary Protection or Stay Arrangements," Feb. 2014, at [16].

[605] Ibid.

[606] The label is in truth a misnomer since the proposed status has no clear endpoint and is thus not truly defined by its temporariness. The alternate regime proposed by UNHCR is more accurately defined by subjection to a *qualitatively* inferior regime – hence perhaps "minimal" or "alternative" protection would be a more candid label than "temporary" protection. This approach has been taken since 2004: UNHCR, "Protection and Cooperation in Mass Influx Situations," UN Doc. EC/54/SC/CRP.11, at [6]. For a history of the agency's use of the "temporary protection" term, see UNHCR, "Roundtable on Temporary Protection: Discussion Paper, Division of International Protection," July 7, 2012, at [1]–[4].

vague language.[607] Nor is there any guarantee that the suspension of access to regularization must at some point come to an end; rather, the Guidelines simply observe that "[i]n cases of extended stay, or where transition to solutions is delayed, the standards of treatment would need to be gradually improved."[608]

The UNHCR's approach is problematic in at least two key ways. First, the agency's principled effort to attenuate the risks to refugees that reliance on Conclusion No. 22 entails has ironically resulted in a catalog of duties for states faced with a mass influx that, even if short of compliance with the Convention, is nonetheless quite daunting – including not only the duty of *non-refoulement*, but more than a dozen other rights.[609] As such, it is difficult to see how this approach meets the concerns of states that have been demonstrably prepared simply to close their borders to a mass influx of refugees. Second, the agency is even less well-placed than the Executive Committee to authorize states to ignore or suspend any obligation under the Convention; it may supervise the application of the Convention,[610] but it is not entrusted with the power to vary the obligations of states, no matter how dire the circumstances.

Edwards has proposed an answer to this legal conundrum by drawing on Art. 9 of the Refugee Convention which, as previously analyzed,[611] allows a state to take essential measures to protect national security "in time of war or other grave and exceptional circumstances."[612] While intended primarily to enable states at war to intern refugee claimants until their status could be assessed, the textual scope of Art. 9 is broad – suggesting that in an appropriate case a state might suspend *any* of the rights in the Convention. Edwards thus contends that Art. 9 might be the place[613] to ground the right of states to

[607] For example, there is no more than a general reference to "self-sufficiency or work opportunities" and to "education," standards that are a far cry from the specificity of cognate duties under the Refugee Convention. There is moreover no provision for access to the courts; rather there is only "access to UNHCR and, as appropriate, other relevant international organizations and non-governmental organizations and civil society": UNHCR, "Guidelines on Temporary Protection or Stay Arrangements," Feb. 2014, at [16]. Despite the agency's insistence that temporary protection is "without prejudice to the obligations of States under international law, including particularly the 1951 Refugee Convention" (ibid. at [8]) it is difficult to see these standards as compliant with the Convention.

[608] Ibid. at [17]. See also UNHCR, "Roundtable on Temporary Protection: Discussion Paper, Division of International Protection," July 7, 2012, at [15] ("Rights should improve over time").

[609] UNHCR, "Guidelines on Temporary Protection or Stay Arrangements," Feb. 2014, at [16]. See also UNHCR, "Roundtable on Temporary Protection: Discussion Paper, Division of International Protection," July 7, 2012, at [12]–[13].

[610] See Chapter 1.5.2 at note 212 ff. and Chapter 2.2 at note 86.

[611] See Chapter 3.5.1.

[612] Refugee Convention, at Art. 9.

[613] Edwards, "Temporary Protection," at 624. Edwards also invokes Art. 8 ("exemption from exceptional measures"). Art. 8 is not, however, a source of state discretion over refugees but a

derogate from Convention duties when confronted with a mass influx.[614] There are, however, problems with this approach. First, Art. 9 authority must be exercised on an individuated basis ("which it considers to be essential *in the case of a particular person*").[615] Second, Art. 9 is explicitly provisional ("*pending a determination* by the Contracting State that that person is in fact a refugee"), thus requiring the state invoking it to proceed to assess status – precisely what countries faced with a mass influx allege the circumstances prevent them from doing.[616]

Painfully aware of the prisoner's dilemma that the arrival of a "mass influx" could pose for asylum countries, the drafters debated how best to accommodate the critical public order and national security concerns that might arise.[617]

prohibition of applying to refugees *general* measures that would be imposed on foreign nationals. It requires that refugees always be exempted from such general measures, and is not predicated on any showing that the exceptional measures be discriminatory (but see ibid. at 622). Nor is her appeal to various ways in which states have acquiesced in rights suspension by other countries in the context of a mass influx demonstrative of "subsequent agreement . . . that the Convention impliedly permits the derogation of certain rights" (ibid. at 627–628) convincing. As observed by Judge Winiarski, "[i]t is sometimes difficult to attribute any precise legal significance to the conduct of the contracting parties, because it is not always possible to know with certainty whether they have acted in a certain manner because they consider that the law so requires or allows, or for reasons of expediency": *Certain Expenses of the United Nations*, [1962] ICJ Rep 151, at 232 (Dissenting Opinion – on another proposition – of Judge Winiarski). See generally Chapter 2.4.

614 Edwards excludes suspension of the duty of *non-refoulement* under Art. 9 on the basis of the non-derogable character of Art. 33: Edwards, "Temporary Protection," at 624. The same result is reached on an arguably more solid ground by Cantor, who contends that the provisional nature of the Art. 9 authority makes it an unwieldy basis to inflict the permanent harm of *refoulement*: D. Cantor, "Laws of Unintended Consequence: Nationality, Allegiance, and the Removal of Refugees during Wartime," in D. Cantor and J. Durieux eds., *Refuge from Inhumanity: War Refugees and International Humanitarian Law* 345 (2014), at 368.

615 Edwards' effort to read away this language on the grounds that many Convention rights that accrue to individuals are in practice granted on a group basis is unconvincing since there is of course no protection downside in such cases. The only example she cites of a putative group-based disfranchisement is the cessation clause of Art. 1(C)(5)–(6) which she contends "ha[s] most commonly been applied to groups of refugees": Edwards, "Temporary Protection," at 624. This example does not, however, support Edwards' position. While a state may lawfully require refugees to respond to prima facie evidence of a fundamental and durable change that restores protection, cessation may not lawfully be imposed on a group basis: see Hathaway and Foster, *Refugee Status*, at 485; and Chapter 7.1.

616 UNHCR has observed that in large-scale influxes, "individual status determination is either not applicable or feasible, or both": UNHCR, "Guidelines on Temporary Protection or Stay Arrangements," Feb. 2014, at [10].

617 The Swiss and French delegations to the Conference of Plenipotentiaries appear initially to have argued that *non-refoulement* proscribes the expulsion of refugees from within a state's territory, but not the refusal of admission: Statement of Mr. Zutter of Switzerland, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 6; and Statement of Mr. Rochefort of France, ibid. On closer examination, however, it is clear that their intention was not to endorse the routine *refoulement* of refugees, but rather only to authorize states to defend their frontiers in the event of a

The British[618] and Swiss[619] delegates to the Ad Hoc Committee argued that the Convention should recognize the traditional prerogative of states to engage in *refoulement* where required by vital national security interests.[620] In contrast, France[621] and the United States asserted that "it would be highly undesirable to suggest in the text . . . that there might be cases, even highly exceptional cases, where a [refugee] might be sent to death or persecution."[622] The latter view prevailed in the Ad Hoc Committee, resulting in a draft article that made no mention of any right to engage in *refoulement* under any circumstances.[623]

At the Conference of Plenipotentiaries, however, the President observed that the work of the preparatory Ad Hoc Committee had set perhaps too absolute a standard of respect for *non-refoulement*.[624] Switzerland and the

threat to their national security engendered by a mass migration of refugees: "The Swiss Government considered that in the present instance the word ['return'] applied solely to refugees who had already entered a country, but were not yet resident there. According to that interpretation, States were not compelled to allow *large groups of persons* claiming refugee status to cross [their] frontiers [emphasis added]": Statement of Mr. Zutter of Switzerland, ibid. See also Statement of Baron van Boetzelaer of the Netherlands, ibid. at 11: "He appreciated the importance of the basic principles underlying article [33] but, as a country bordering on others, was somewhat diffident about assuming unconditional obligations *so far as mass influxes of refugees were concerned* [emphasis added]."

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

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

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

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

622 Statement of Mr. Henkin of the United States, ibid. at 31.

623 UN Doc. E/1850, Aug. 25, 1950, at 25.

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

Netherlands reasserted the customary understanding that a comprehensive and absolute duty of *non-refoulement* was untenable in the face of a mass influx.[625] The President agreed, ruling that "the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33."[626] To codify this understanding, the French term "*refoulement*" was added to the English text of the article following the word "return," the goal being to ensure that it was understood that the duty of non-return under Art. 33 would have "no wider meaning"[627] than the French expression, which was agreed not to apply in the event that national security or public order was genuinely threatened by a mass influx.

The view that there is an implied limitation on the scope of the duty of *non-refoulement* where a state is at grave risk owing to a mass influx is, however, generally resisted.[628] Indeed, Lauterpacht and Bethlehem dismiss this position out of hand: "Although by reference to passing comments in the *travaux préparatoires* of the 1951 Convention, it has on occasion been argued that the principle does not apply to [mass influx] situations, this is not a view that has any merit. It is neither supported by the text as adopted nor by subsequent practice."[629] At the level of text, this position ignores the explicit decision to add the French language word "*refoulement*" to the English language version of Art. 33 in order to ensure that the traditional civil law understanding of that term (which did not govern in a mass influx) would be formally recognized.[630] Moreover, most of the "state practice" invoked by these writers against the mass influx exception is not properly considered to be state practice at all.[631]

general scope of the prohibition of *refoulement* as elaborated by the Ad Hoc Committee as including both ejection and non-admittance at the frontier.

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

626 Statement of Mr. Larsen of Denmark, ibid.

627 Statement of Mr. Hoare of the United Kingdom, ibid.

628 See e.g. Kälin, "Article 33, para. 1," at 1377–1379; Wouters, *Refoulement*, at 156; J.-F. Durieux and J. McAdam, "*Non-refoulement* through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies," (2004) 16(1) *International Journal of Refugee Law* 4 (Durieux and McAdam, "Case for a Derogation Clause"), at 9–10; Edwards, "Temporary Protection," at 632–634.

629 Lauterpacht and Bethlehem, "*Non-refoulement*," at [103].

630 See text at note 627.

631 Various memoranda and position papers authored by regional and international agencies are cobbled together as evidence of state practice in Lauterpacht and Bethlehem, "*Non-refoulement*," at [108]–[110]. Kälin similarly opines that "[i]t is sometimes argued that the prohibition of *refoulement*, at least regarding rejection at the frontier, does not apply in situations of mass influx. Support for this position can be found, to a certain extent, in the drafting history. *Subsequent and uniform practice* . . . however, prevails over any drafting history, [and] evidences . . . that states regularly admit large numbers of refugees to cross international borders in that in the relatively few cases of push-backs at the border, other

Beyond the historical record and textual toehold, there is also a logic – borne out in much relevant state practice – to allowing states faced with truly extreme domestic consequences the ability to refuse to admit refugees.[632] In the context of routine, individuated applications for protection, it is of course feasible for states scrupulously to avoid peremptory acts of *refoulement*. The applicant can be admitted to the state's territory and removed if ultimately adjudged to constitute a serious risk to either national security or the safety of the community.[633] In contrast, it is not usually practical for a country overwhelmed by a mass influx of refugees to engage in this kind of detailed, case-by-case analysis of risks to its own well-being. Insisting that they nonetheless allow all refugees in would, in this extreme context, be tantamount to demanding that they sacrifice their own most vital interests in order to protect refugees. It is thus perhaps not surprising that, as Martin reminds us, the states that adopted the 1967 Declaration on Territorial Asylum made clear even as they affirmed a comprehensive understanding of the duty of *non-refoulement*, "[e]xception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons."[634] Indeed, this sense that states cannot be expected to ignore real threats arising from the arrival of large numbers of refugees was evident in the recent suggestion of the European Court of Human Rights that large groups of refugees arriving in a disorderly way (rather than availing themselves of meaningful protection options) might not be entitled to claim protection against removal.[635]

That said, it is nonetheless indisputable that the textual basis for a mass influx exception to the duty of *non-refoulement* is oblique at best. More importantly, reliance on an implied exception to limit the duty of *non-refoulement* where

states have protested such behaviour [emphasis added]": W. Kälin, "Towards a Concept of 'Temporary Protection': A Study Commissioned by the UNHCR Division of International Protection," unpublished paper, Nov. 12, 1996, at 13–14. A more circumspect approach to the definition of state practice relevant to treaty interpretation is, however, called for in the context of human rights treaties: see Chapter 2.4.

632 A report for UNHCR notes that "this exchange [during the Convention's drafting] is certainly proof of states' anxiety about [the] prospect that observing *non-refoulement* could require a state to admit large numbers of refugees": Long, "Review of UNHCR's Response," at [71].

633 Refugee Convention, at Art. 1(F).

634 UNGA Res. 2312 (XXII), 22 UNGAOR Supp. No. 16, at 81, Art. 3(2), cited in D. Martin, "Interdiction of Asylum Seekers: The Realms of Policy and Law in Refugee Protection," University of Virginia School of Law Public Law and Legal Theory Research Paper Series 2014-57 (Sept. 2014), at 2.

635 Noting "the importance of managing and protecting borders," the Court took the view that while states "cannot justify recourse to practices which are not compatible with the Convention," nor may refugees complain of unlawful expulsion where they "deliberately take advantage of their large numbers and use force . . . such as to create a clearly disruptive situation which is difficult to control and endangers public safety" insofar as they have "genuine and effective access to means of legal entry, in particular border procedures": *ND and NT v. Spain*, Dec. Nos. 8675/15 and 8697/15 (ECtHR, Feb. 13, 2020), at [168], [170], [201].

critical interests are at stake in a mass influx is not a happy solution. It is unsatisfactory not only because it leaves refugees without protection, but also because it affords states only a very blunt tool to respond to difficult circumstances. The efforts of the UNHCR and its Executive Committee to define an alternative response thus make good sense, even if the precise way in which the alternatives have been elaborated does not.

The seeds of a more honest and genuinely effective response to the dilemma posed by mass influx are, however, suggested by Executive Committee Conclusion No. 22 itself. Read as a whole, it is clear that Conclusion No. 22 argues for a much less one-sided responsibility than is typically suggested.[636] The duty of state parties to respect the principle of *non-refoulement* ("at least on a temporary basis") is in fact balanced against a duty of international solidarity owed by other state parties to the receiving country:

> A mass influx may place unduly heavy burdens on certain countries; a satisfactory solution of a problem, international in scope and nature, cannot be achieved without international cooperation. States *shall*, within the framework of international solidarity and burden-sharing, *take all necessary measures* to assist, at their request, States which have admitted asylum-seekers in large-scale influx situations [emphasis added].[637]

This approach draws directly on the language of the Preamble to the Refugee Convention, itself a part of the context of the treaty for interpretive purposes.[638] In the result, Executive Committee Conclusion No. 22 actually suggests an understanding of the duty of *non-refoulement* that disallows state parties any prerogative to deny entry to refugees in a mass influx situation *so long as* there is reason to believe that the risk to their critical national interests occasioned by the mass influx will be countered by timely assistance from other states.[639] Indeed, much the same conclusion flows from the limited scope of the mass influx exception as

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

[637] UNHCR Executive Committee Conclusion No. 22, "Protection of Asylum-Seekers in Situations of Large-Scale Influx" (1981), at [IV(1)].

[638] "Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation": Refugee Convention, at Preamble. See Chapter 2.2 at note 63 regarding the importance of a treaty's preamble as a reference point for interpretation.

[639] Although Long has suggested that there should be a "presumption that . . . the burden will be shared between states" (Long, "Review of UNHCR's Response," at [81]) there is clearly no empirical basis for such a position. In any event, as she herself acknowledges, even if such a presumption could somehow be justified, it would still not be "a legal obligation, leaving us with another lopsided commitment shoring up the contemporary refugee protection regime": ibid. at [82].

conceived by the drafters of the Convention: states are allowed to deny entry to refugees only in truly exceptional circumstances, and even then only to the extent truly necessary to protect their most critical national interests.[640] The real answer is thus an optional protocol or other agreement that binds other state parties to come to the aid of a country experiencing a mass influx by way of both burden *and* responsibility sharing; in return, the receiving state so aided should be required to respect all applicable refugee and other international human rights. With the benefit of such a system, no state could legitimately invoke a mass influx exception to the duty of *non-refoulement* since the support received would negate the *in extremis* argument which is an essential condition for its application.[641]

Until and unless a speedy and reliable system of international burden and responsibility sharing is in place, how ought international law to engage state practice suggesting that the duty of *non-refoulement* does not apply in the context of a mass influx? Since none of the usual approaches – arguing that mass influx is simply legally irrelevant, leveraging soft law or institutional power indirectly to amend the Convention, squeezing mass influx into a provision intended for individuated application, or relying on a modest textual amendment to authorize a major suspension of a core right – is really satisfactory, is there an alternative legal basis upon which to ground analysis?[642]

[640] The Executive Committee has since taken a more absolutist approach, albeit without explicit reference to the duty of *non-refoulement*. "[A]ccess to asylum and the meeting by all States of their international protection obligations should not be dependent on burden and responsibility sharing arrangements first being in place, particularly because respect for human rights and humanitarian principles is a responsibility for all members of the international community": UNHCR Executive Committee Conclusion No. 100, "Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations" (2004), at Preamble. The same Conclusion, however, "[r]eaffirm[s], in regard to mass influx, the guidance on reinforcing burden and responsibility sharing, including in particular that set out in Conclusion No. 22 (XXXII) of 1981 on the protection of asylum-seekers in situations of large-scale influx": ibid. at Preamble.

[641] The prospects for such a commitment appear tragically remote. The New York Refugee Declaration of 2016 proclaimed that "[t]o address the needs of refugees and receiving States, we commit to a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees, while taking account of existing contributions and the differing capacities and resources among States": "New York Declaration for Refugees and Migrants," UN Doc. A/RES/71/1, Sept. 19, 2016, at [68]. The operational "Comprehensive Refugee Response Framework," however, promised only that "States, in cooperation with multilateral donors and private sector partners, as appropriate, would, in coordination with receiving States . . . [m]obilize adequate financial and other resources to cover the humanitarian needs identified within the comprehensive refugee response framework": ibid. at Annex, [6a].

[642] A proposal has been made to amend the Refugee Convention to include an emergency derogation clause that could be activated in the context of a mass influx: see Durieux and McAdam, "Case for a Derogation Clause." While such a codification would, as argued, present the opportunity to clarify both normative and procedural expectations, reopening treaty obligations would, of course, also afford the opportunity for a significant retreat from duties owed to refugees (including, but in no sense limited to, the duty of *non-refoulement*).

International experts attending the Eighth Colloquium on Challenges in International Refugee Law in 2017 determined that there was: the doctrine of necessity. A state of necessity exists when a country is threatened by a grave and imminent peril and has no means of safeguarding an essential interest but to act in a manner that is not in conformity with its international legal obligations.[643] In such a situation, so long as the actions taken are "the only way"[644] to protect an essential interest and the state in question has "not contributed to the situation of necessity,"[645] no internationally wrongful act is committed. As succinctly framed by Crawford and Olleson, "[a] State is not required to sacrifice human life or to suffer inordinate damage to its interests in order to fulfil its international obligations."[646] Invocation of necessity is not, however, a simple matter of making a relevant declaration;[647] to the contrary, the onus falls on the state invoking necessity to demonstrate that the conditions and requirements of necessity are fulfilled in the particular case.[648] Applying the principle to the mass influx context, agreement was reached at the Colloquium that:

> The existence of a mass influx of refugees, defined as a situation in which the number of refugees arriving at a state's frontiers clearly exceeds the capacity of that state to receive and to protect them, may, in an extreme case, justify derogation from one or more Convention or other rights on the basis of the principle of necessity. Derogation based upon necessity may be invoked only if the state faces a grave and imminent peril and must derogate in order to safeguard an essential interest.
>
> A state may, however, only invoke necessity where it has not contributed to the peril. It must also continuously assess that peril and its response thereto in order to ensure that the derogation undertaken remains necessary. Because derogation is necessary only if it is the least intrusive response capable of safeguarding the essential interest, the *refoulement* of refugees will almost invariably be impermissible. More generally, if and when a dependable system of burden and responsibility sharing as envisaged by the

[643] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 178. The doctrine has been approved by the International Court of Justice in *Gabčíkovo–Nagymaros Project (Hungary v. Slovakia)*, [1997] ICJ Rep 40, at [51]; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, at [140].

[644] International Law Commission, "Articles on the Responsibility of States for Internationally Wrongful Acts," annexed to UNGA Res. 56/83 (2002), Dec. 12, 2001, at Art. 25(1)(a).

[645] Ibid. at Art. 25(1)(b).

[646] J. Crawford and S. Olleson, "The Nature and Forms of International Responsibility," in M. Evans ed., *International Law* 446 (2003), at 464.

[647] This is one of the real problems with the malleable "mass influx" approach. As Edwards observes, "states have been able to call a particular situation a mass influx and to adopt special arrangements for refugees in response, when objectively it may be clear that the situation is not . . . a mass influx": Edwards, "Temporary Protection," at 604.

[648] *Gabčíkovo–Nagymaros Project (Hungary v. Slovakia)*, [1997] ICJ Rep 40, at [51].

> Convention's Preamble is implemented, the conditions precedent for lawful resort to necessity-based derogation are unlikely to be satisfied.[649]

Drawing on this approach, most recent invocations of a "mass influx exception" to the duty of *non-refoulement* can be adjudged unjustified. For example, Turkey's 1991 refusal of entry to Kurdish refugees[650] was not capacity-based, but rather a response to political sensitivities about adding to the strength of its own domestic Kurdish population. Concerns about demographic change also largely fueled Kenya's 2007 decision to refuse entry to ethnic Somalis[651] and, even more clearly, Jordan's 2014 denial of entry to ethnic Palestinian refugees arriving from Syria.[652] Despite the fact that each of these countries had already made significant contributions to refugee protection, the border closures were not dictated by imminent peril, but rather reflected ethnic discrimination closely linked to domestic politics.

Nor can a credible case of necessity be made out when real offers of international assistance exist. Thailand, for example, had effectively put itself in a position of administrative incapacity to respond to Vietnamese refugees[653] by refusing an offer from the United States to build new facilities to provide for the arriving refugees; similarly, Croatia, Macedonia, Serbia, and Slovenia chose to take blunt deterrent measures notwithstanding Germany's offer to receive the refugees arriving at their borders and European Union assurances of support.[654] Because the existence of such external support would have answered any allegation of insufficient reception capacity, a claim grounded in necessity would fail. While no doubt a closer case,[655] Macedonia's 1999 closure of its border to Kosovo Albanian refugees[656] appears to have been less a truly unavoidable act premised on necessity than a bargaining chip to garner increased support from other countries to cope with the refugee flow. As Eggli has concluded, Macedonia was "playing politics with refugees,"[657] making it difficult to see its actions as limited to strictly what was required in order to avoid fundamental risk to its own most basic interests.

Two other recent cases, however, present more arguable claims for a necessity-based exception to at least some significant Convention obligations. Pakistan's closure of its border to Afghan refugees in 2000[658] came only after it had already received, and hosted, millions of Afghan refugees for many years. The decision to

[649] "The Michigan Guidelines on Refugee Freedom of Movement," (2017) 39 *Michigan Journal of International Law* 1, at [12]–[13].

[650] See text at note 10. [651] See text at note 14. [652] See text at note 17.

[653] See text at note 69. [654] See text at note 21.

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

[656] See text at note 12.

[657] A. Eggli, *Mass Refugee Influx and the Limits of Public International Law* (2001), at 225.

[658] See text at note 13.

close the border was made only after a marked increase in arrivals and against the backdrop of UNHCR and the World Food Programme having ended food aid and other assistance programs for refugees due to funding shortfalls. As a study for UNHCR observed, "[t]he act of closing signaled a cumulative frustration with the failures of international refugee policy."[659] An even more compelling case can be made in the context of the 1994 border closings by Zaïre and Tanzania to refugee flows from Rwanda and Burundi.[660] Both states had been overwhelmed by hundreds of thousands of refugees, and were faced with the imminent prospect of additional flows at the time of the border closures. At least in the case of Zaïre, there was also good reason to believe that internal security could be threatened by the entry of refugees, many of whom were suspected of having committed serious criminal offenses. The decisions to suspend border crossings were moreover of limited duration, while efforts to secure international resources to protect refugees were being pursued.

While opinions may differ about whether the clearly dire circumstances of Pakistan, Tanzania, and Zaïre truly warranted *refoulement* or perhaps only some lesser suspension of duties owed to refugees, the necessity framework seems the right place for the debate. Not only is this approach firmly anchored in general international law, but it is neatly predicated on enabling asylum states to preserve their own vital interests in a manner that does not subject refugees to rights deprivations in other than an extreme and truly unavoidable situation, and only to the extent that these are demonstrably required.[661] The necessity doctrine does not rule out the possibility of a genuinely exceptional resort to *refoulement* in the case of mass influx, though it tightly constrains that possibility. And perhaps most important, it makes clear that once a solid and reliable burden and responsibility sharing mechanism is in place, there will be no need for even this exceedingly narrow implied exception to the duty of *non-refoulement*.

4.1.6 *An Expanded Concept of* Non-refoulement*?*

It is frequently argued that the duty to avoid the *refoulement* of refugees has evolved at the universal level beyond the scope of Art. 33 of the Refugee Convention.[662] In two important scholarly studies – a foundational analysis prepared in 2003 for the

[659] Long, "Review of UNHCR's Response," at [268]. [660] See text at note 11.

[661] Most fundamentally, there can be no question of avoiding the duty of *non-refoulement* under this implied exception where the numbers arriving and the resources of the receiving state are such that security concerns can be addressed under the individuated exceptions set by Art. 33(2).

[662] See e.g. Kälin, "Article 33, para. 1," at 1342; Goodwin-Gill and McAdam, *Refugee in International Law*, at 354; J. Allain, "The *Jus Cogens* Nature of *Non-refoulement*," (2001) 13 *International Journal of Refugee Law* 533, at 538. But see K. Hailbronner, "*Non-refoulement* and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?," (1986) 26 *Virginia Journal of International Law* 857 (Hailbronner, "Wishful Legal Thinking?"), at 861–867.

UNHCR by Lauterpacht and Bethlehem[663] and a more recent and probing analysis by Costello and Foster in 2016[664] – the argument is made that even states not bound by the Refugee Convention (or any other treaty) are required by customary international law to protect refugees against *refoulement*. Indeed, Lauterpacht and Bethlehem say that the customary duty of *non-refoulement* is owed not only to any refugee, but also to any potential victim of torture, cruel or inhuman or degrading treatment or punishment ("torture"), as well as to most persons facing risk to "life, physical integrity, or liberty."[665] Costello and Foster go farther still, claiming that the customary duty of *non-refoulement* applies to anyone who faces "return to *serious human rights violations*, unless the risk in question is not sufficiently 'real' [emphasis added]";[666] and further that this duty is a *jus cogens* norm[667] – that is, a "super norm" that trumps any conflicting claim.[668]

[663] Lauterpacht and Bethlehem, "*Non-refoulement*".

[664] C. Costello and M. Foster, "*Non-refoulement* as Custom and *Jus Cogens*? Putting the Prohibition to the Test," in M. den Heijer and H. van der Wilt eds., [2016] *Netherlands Yearbook of International Law* 273 (Costello and Foster, "Custom and *Jus Cogens*").

[665] Lauterpacht and Bethlehem, "*Non-refoulement*," at [253]. They argue, however, that the duty of *non-refoulement* in relation to persons who face a threat to "life, physical security, or liberty" not rising to the level of a risk of "torture or cruel, inhuman or degrading treatment or punishment" can be trumped by "overriding reasons of national security or public safety": ibid. at [253(c)].

[666] Costello and Foster, "Custom and *Jus Cogens*," at 285.

[667] This claim fails for several reasons. Even on the test proposed by Costello and Foster – namely whether "there is sufficiently widespread *opinio [juris]*" (Costello and Foster, "Custom and *Jus Cogens*", at 307) – the analysis at note 701 ff. shows that there is not. They also attempt to read away the minimum condition for *jus cogens* status (non-derogability: see Vienna Convention on the Law of Treaties, 1155 UNTS 331 (UNTS 18232), done May 23, 1969, at Art. 53), suggesting that Moore's more forthright analysis that Art. 33(2) exceptions to the duty of *non-refoulement* be taken into account "is a wrong move": Costello and Foster, "Custom and *Jus Cogens*", at 312, rejecting J. Moore, "Protection against the Forced Return of War Refugees: An Interdisciplinary Consensus on Humanitarian *Non-refoulement*," in D. Cantor and J.-F. Durieux eds., *Refuge from Inhumanity? War Refugees and International Humanitarian Law* 411 (2014), at 416. See also Edwards, "Temporary Protection," at 632, indicating that the exceptions to the duty of *non-refoulement* set by Art. 33(2) "speak[] against art. 33 being able to achieve the status of a *jus cogens* norm, against which no derogation is permitted." Indeed, Goodwin-Gill and McAdam opine that the claim that *non-refoulement* is a *jus cogens* norm "is far less certain [than its customary law status], and it may be that little is likely to be achieved by insisting on its status as such": Goodwin-Gill and McAdam, *Refugee in International Law*, at 346, n. 421. The Supreme Court of Canada noted the claim that *non-refoulement* is *jus cogens*, but declined to determine it, noting that the claim "is controversial among international scholars": *Jószek Németh v. Minister of Justice of Canada*, [2010] SCC 56 (Can. SC, Nov. 25, 2010), at [104]. See also *C v. Director of Immigration*, Dec. No. HCAL 132/2006 (HK HC, Feb. 18, 2008), at [133]–[135] ("I think it goes too far to hold – at this time – that the [*non-refoulement*] rule has acquired the status of a peremptory norm. Put another way, the ideal does not accord with present reality and, if the ideal is to prevail, it may bring the norm itself into disrepute").

[668] Costello and Foster, "Custom and *Jus Cogens*," at 309. The attribution of status as "higher law" derives from the intersection of a given norm with the general principle of law

On the core question of whether there is today a customary international legal duty binding all states to avoid the *refoulement* of refugees, the two analyses are largely in sync. The essence of their reasoning is that the frequency with which some sort of duty of *non-refoulement* has been agreed – albeit in different contexts, arising under different treaties, and for different beneficiaries – means that it has become a norm of such generality that it is now the case that *all states* – even those that have accepted not a single treaty-based obligation of *non-refoulement* – are now legally obligated to honor that duty.[669] Lauterpacht and Bethlehem invoke the decision of the International Court of Justice (ICJ) in the *North Sea Continental Shelf Cases*[670] for the view that treaties "may influence the creation of . . . a rule of custom."[671] They argue that because the treaty-based principle of *non-refoulement* is of norm-creating character,[672] enjoys widespread and representative state support,[673] and has stimulated consistent relevant practice,[674] "*non-refoulement* must be regarded as a principle of customary international law."[675] Costello and Foster[676] similarly contend that "[t]he principle of *non-refoulement* embodied in a wide range of treaties has the same fundamental core, albeit expressed in slightly different terms across different instruments."[677]

This argument has proven quite seductive, garnering the support not only of the UNHCR[678] but also of the only top court explicitly to analyze the claim, the Hong Kong Court of Final Appeal:

prohibiting agreements that are inconsistent with the most basic values of the international community: F. Domb, "*Jus Cogens* and Human Rights," (1976) 6 *Israeli Yearbook of Human Rights* 104.

669 Yet "the concordance of even a considerable number of treaties per se constitutes neither sufficient evidence nor even a sufficient presumption that the international community as a whole considers such treaties as evidence of general customary law": International Law Commission, "Third Report on Identification of Customary International Law," UN Doc. A/CN.4/682, Mar. 27, 2015, at [42], quoting K. Wolfke, "Treaties and Custom: Aspects of Interrelation," in J. Klabbers and R. Lefeber eds., *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag* 31 (1998), at 35.

670 *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 3, cited in Lauterpacht and Bethlehem, "*Non-refoulement*," at [198].

671 Lauterpacht and Bethlehem, "*Non-refoulement*," at [198].

672 Ibid. at [201]–[208]. They add for good measure, that there is an "evident lack of expressed objection by any state to the normative character of the principle of *non-refoulement*": ibid. at [216].

673 Ibid. at [209]–[210]. 674 Ibid. at [211]–[215].

675 Ibid. at [216]. Somewhat confusingly, the authors also seem to suggest that *non-refoulement* is a general principle of international law, though they provide no analysis in support of that view: ibid. Their analysis is largely adopted in Kälin, "Article 33, para. 1," at 1344.

676 Costello and Foster, "Custom and *Jus Cogens*," at 283–285. 677 Ibid. at 284.

678 UNHCR, Intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between *C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents)*, Civil Appeals Nos. 18, 19 and 20 of

> The principle of *non-refoulement* developed under international refugee and human rights law stems from a single unified value: States must not exercise their right to remove, in any manner whatsoever, people from their territory and/or jurisdiction, where they face a threat to their lives or freedoms.[679]

Yet this approach raises both a logical and a legal challenge.

At the level of logic, while *non-refoulement* is commonly referred to as a principle or a norm, in fact it is neither. It is rather a *mechanism* – that is, a means by which a principle or norm may be effectuated, not a principle or norm itself. As applied to refugees, it precludes return to the risk of being persecuted.[680] The same mechanism exists in the Torture Convention to benefit a different group of persons – those who face the probability of torture.[681] The mechanism has been found to be implicit in the Civil and Political Covenant, this time operating to stop states from returning individuals subject to arbitrary deprivation of life, as well as those who face cruel, inhuman, or degrading treatment or punishment or torture.[682] Multiple other variants exist: there is a duty of *non-refoulement* to stop people from being "disappeared,"[683] to prevent civilians from being forced back into ongoing armed conflict,[684] to prevent removals at odds with the best interests of the

2011, Jan. 31, 2013, at [18]–[27]; UNHCR, "Advisory Opinion on the Extraterritorial Application of *Non-refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol," Jan. 26, 2007, at [14]–[22].

679 *C v. Director of Immigration*, Dec. No. FACV 18, 19 and 20/2011 (HK CFA, Jan. 31, 2013), at [17]. The same conclusion was also reached in *Kenya National Commission on Human Rights v. Attorney General*, Constitutional Petition No. 227 of 2016 (Ken. HC, Feb. 9, 2017), at 15–16. The International Criminal Court has moreover noted that "[t]he '*non-refoulement*' principle is considered to be a norm of customary international law," though it offered no analysis on point: *Situation en Republique Democratique du Congo: Le Procureur c. Germain Katanga et Mathieu Ngudjolo Chui*, Dec. ICC-01/04-01/07 (ICC, June 9, 2011), at [68].

680 Refugee Convention, at Art. 33(1). See Chapter 4.1.1.

681 Torture Convention, at Art. 3. See text at note 816.

682 UN Human Rights Committee, "General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (2004), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at [12]; UN Human Rights Committee, "General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life," Revised draft prepared by the Rapporteur, UN Doc. CCPR/C/GC/R.36/Rev.5, July 26, 2016, at [34]. See text at notes 819–821.

683 International Convention for the Protection of All Persons against Enforced Disappearance, 2716 UNTS 3 (UNTS 48088), adopted Dec. 20, 2006, entered into force Dec. 23, 2010, at Art. 16(1). See text at note 817.

684 R. Ziegler, "*Non-refoulement* between 'Common Article 1' and 'Common Article 3,'" in D. Cantor and J.-F. Durieux eds., *Refuge from Inhumanity: War Refugees and International Humanitarian Law* 386 (2014) (Ziegler, "'Common Article 1' and 'Common Article 3'"). See text at note 817.

child,[685] and – at least in Europe – to avoid a whole host of possible rights infringements, including at least some cases of enslavement, loss of liberty and security, subjection to an unfair trial, unlawful punishment, breach of privacy and family rights, and denial of the freedom of thought, conscience, and religion.[686]

Because the *non-refoulement* mechanism operates to achieve a different end in each different treaty-based context, to say that nearly all states accept at least some duty of *non-refoulement* is not to say anything with substantive meaning.[687] How could the existence of this panoply of different duties operationalized at least in part by a common mechanism be said to give rise to a common duty? The only thing in common is the *means* to a variety of different ends; that fact simply does not result in a shared substantive obligation.[688]

By way of analogy, the courts of virtually all states authorize resort to the mechanism of injunctive relief in at least some circumstances. Yet it would be meaningless to claim a normative consensus on a duty "to issue injunctions" without evidence of substantive accord on the circumstances in which the remedy is to be granted. Costello and Foster misunderstand this concern,[689] invoking the International Law Commission's sensible view that "the repetition *of similar* or identical provisions in a large number of bilateral treaties may give rise to a rule of customary international law or attest to its existence."[690] That is of course true – but this principle would be relevant only if *non-refoulement* did "similar or identical" work under the various treaties – for example, if five treaties all required states to grant torture victims protection against *refoulement*. There is simply no basis to apply this principle to substantively divergent duties sharing no more than an implementation mechanism. Nor is the fact of multiple treaties sharing a common mechanism more relevant when framed as evidence

[685] J. Pobjoy, "The Best Interests of the Child Principle as an Independent Source of International Protection," (2015) 64(2) *International and Comparative Law Quarterly* 327 (Pobjoy, "Best Interests"). See text at note 818.

[686] A succinct summary of key case law establishing these implied duties of *non-refoulement* is provided in Costello and Foster, "Custom and *Jus Cogens*," at 285. For a more detailed analysis, see K. Greenman, "A Castle Built on Sand? Article 3 ECHR and the Source of Risk in *Non-refoulement* Obligations in International Law," (2015) 27(2) *International Journal of Refugee Law* 264 (Greenman, "Castle Built on Sand?").

[687] Indeed, Costello and Foster concede that "[t]he key challenge is that there is often no definition of the beneficiary class in the numerous General Assembly resolutions or Executive Committee Conclusions on this point, and many of the sources relied upon . . . are similarly imprecise": Costello and Foster, "Custom and *Jus Cogens*," at 305.

[688] Costello and Foster acknowledge that "[a]lthough the texts differ in terms of the focal harms, the duty of *non-refoulement* is similar in all cases. It prohibits return to serious human rights violations": ibid. at 285. This passage makes clear that it is really only the operational mechanism – the *thing* that "prohibits return" – that is shared.

[689] The concern is not, as has been suggested, that "the various treaties cited are not identical": but see ibid. at 284.

[690] Ibid., citing M. Wood, "Third Report on Identification of Customary International Law," UN Doc. A/CN.4/682, Mar. 27, 2015, at [42].

of *opinio juris*, the approach taken by Lauterpacht and Bethlehem. Precisely what is it that states can be said to feel bound to do by reason of scholars having cobbled together disparate commitments with only the veneer of a remedial mechanism – *non-refoulement* – in common?

Not only can no unifying principle be identified, but the logic of the assertion is baffling. State "A" signs a treaty proscribing the *refoulement* of refugees; State "B" commits to no *refoulement* of people at risk of torture; State "C" signs on to a treaty pursuant to which it must avoid the *refoulement* of civilians into armed conflict; and State "D" refuses to sign any treaty at all. Under the approach championed in particular by Costello and Foster,[691] *all four* states would – irrespective of their treaty obligations or lack thereof – be legally required to avoid the *refoulement* of the combined class of refugees, those who might be tortured, civilians fleeing armed conflict, and perhaps more.[692] Their consent to be bound by one or more treaties would effectively be rendered irrelevant.

Given the gravity of an assertion that customary international law arising from the existence of treaties overrides the specificity of treaty obligations, any such claim must be approached with real caution. The basic notion that customary law may emerge from a treaty-based norm is of course well accepted. At least since the *Asylum* case,[693] it has been recognized that the tree of customary international law can grow from the acorn of specific treaties.[694] Importantly, though, the focus must be mainly on the practice of states *not* already bound by the treaty to act in accordance with the norm, as what "States do in pursuance of their treaty obligations is *prima facie* referable only to the treaty, and therefore does not count towards the formation of a customary rule."[695] It must moreover be recognized that the role of the treaty-based norm is essentially auxiliary:[696] it crystallizes the content of the putative norm[697] and provides a context within which the two essential elements of a

[691] Costello and Foster, "Custom and *Jus Cogens*," at 285. [692] Ibid.
[693] *Asylum Case (Colombia v. Peru)*, [1950] ICJ Rep 266. [694] Ibid. at 277.
[695] M. Mendelson and R. Mullerson, "Final Report, International Law Association, Statement of Principles Applicable to the Formation of General Customary International Law" (2000) (ILA, "General Custom"), at 758. The main exception is "the conduct of parties to a treaty in relation to non-parties [since that] is not practice under the treaty, and therefore counts towards the formation of customary law": ibid.
[696] "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them": *Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgment*, [1985] ICJ Rep 13, at [27]. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits*, [1986] ICJ Rep 14, at [183]; and *Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep 226, at [64].
[697] Thus, the norm must "be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law": *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 3, at [72].

customary norm – *opinio juris* and consistent state practice[698] – can be located.[699] In the case of the putative customary duty of *non-refoulement*, these two essential requirements for the emergence of customary international law are simply not clearly established,[700] especially not as regards states that have yet to agree to be bound by the Refugee Convention's duty of *non-refoulement*.

4.1.6.1 *Opinio Juris*?

To begin – even if we can somehow get over the basic challenge that *non-refoulement* is a mechanism to implement norms rather than a norm itself – is there *opinio juris* sufficient to justify the putative norm?[701] The rigid traditional understanding of *opinio juris sive necessitatis* – requiring that the observed uniformity of practice be a *consequence* of a sense of legal obligation[702] – has of course given way to the less demanding requirement "of an express, or most often presumed, acceptance of the practice as law by all interested states."[703] It

[698] Ibid. at [209]–[215]. "[T]he substance of [customary] law must be 'looked for primarily in the actual practice and *opinio juris* of States'": *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits*, [1986] ICJ Rep 14, at [64]. *Accord* ILA, "General Custom," at [9].

[699] "At best, the recommendation made by the Council constitutes the point of departure of an administrative practice": *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, [1951] ICJ Rep 15, at 25.

[700] To be fair, customary international law is notoriously murky terrain. As Goldsmith and Posner write, "[i]t is unclear which state acts count as evidence of a custom, or how broad consistent state practice must be to satisfy the custom requirement. It is also unclear what it means for a nation to follow a custom from a sense of legal obligation, or how one determines whether such an obligation exists": J. Goldsmith and E. Posner, "A Theory of Customary International Law," (1999) 66 *University of Chicago Law Review* 1113, at 1114. In the result, "international law arguments based on custom always suffer from a considerable degree of arbitrariness": N. Petersen, "Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation," (2007) 23(2) *American University International Law Review* 275, at 277.

[701] Anthony D'Amato has strongly criticized the ICJ for commencing with analysis of *opinio juris* (rather than with analysis of whether there is consistent relevant state practice) in the *Nicaragua* case: A. D'Amato, "Trashing Customary International Law," (1987) 81 *American Journal of International Law* 101 (D'Amato, "Trashing"), at 102. But as Oscar Schachter has observed, "[e]ven if the [reversal] seemed to place the cart before the horse, it did not depart in principle from the basic postulate that binding custom was the result of the two elements: State practice and *opinio juris*": O. Schachter, "New Custom: Power, *Opinio Juris* and Contrary Practice," in J. Makarczyk ed., *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* 531 (1996) (Schachter, "New Custom"), at 534.

[702] Only if relevant state actions are "based on their being conscious of having a duty to [act in a particular way] would it be possible to speak of an international custom": *The Case of the SS "Lotus,"* [1927] PCIJ Rep, Series A, No. 10, at 28.

[703] K. Wolfke, *Custom in Present International Law* (1993) ("Wolfke, *Custom*"), at 51. See also ILA, "General Custom," at 10: "[T]he main function of the subjective elements is to

is sufficient to show that states presently regard the putative norm as legally compelled, even if their concordant actions in keeping with the norm were not induced by a sense of legal duty. There is moreover good authority that *opinio juris* can be shown in many different ways. In its *Nicaragua* decision, for example, the ICJ held that "*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of . . . States towards certain General Assembly resolutions . . . support of [regional conference] resolutions . . . [and] statements by State representatives."[704]

Despite this very flexible approach to the material basis for identification of *opinio juris*, the specific facts relied upon by Lauterpacht and Bethlehem fall short. They ground their claim of *opinio juris* for a universally binding duty of *non-refoulement* on a combination of, first, the "near-universal acceptance"[705] of a *non-refoulement* duty in various UN and regional treaties; and second, the unanimous adoption by the General Assembly of the 1967 Declaration on Territorial Asylum, coupled with the absence of express opposition to the principle of *non-refoulement* by the states which neither signed a relevant treaty nor were present in the General Assembly when the 1967 declaration was adopted.[706] Costello and Foster take a more credible but still challenging tack, drawing on a broader range of General Assembly resolutions,[707] and the Conclusions on International Protection of the UNHCR's Executive Committee.[708]

For reasons noted above,[709] the core of Lauterpacht and Bethlehem's *opinio juris* claim is substantively rickety. For a single rule of customary international

indicate what *practice* counts (or, more precisely, does not count) towards the formation of a customary rule." As Kammerhofer writes, "[t]he concept of *opinio juris* is arguably the centrepiece of customary international law. It is the most disputed, least comprehended component of the workings of customary international law. At the heart of the debate lies an important conflict: on the one hand, customary law-making seems by nature indirect and unintentional. On the other hand, law-making normally requires some form of intentional activity, an act of will. In the international legal system, great value has traditionally been placed in the states' agreement or consent to create legal obligations binding on them" : J. Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems," (2004) 15 *European Journal of International Law* 523 (Kammerhofer, "Uncertainty"), at 532.

[704] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits*, [1986] ICJ Rep 14, at [188]–[190]. A similar position is taken by J. Crawford, *Brownlie's Principles of Public International Law* (2012) (Crawford, *Brownlie's Public International Law*), at 24. But see J. Kelly, "The Twilight of Customary International Law," (2000) 40 *Virginia Journal of International Law* 449 (Kelly, "Twilight"), at 487: "Aspirational or recommendatory instruments, enacted while states remain unwilling to sign concrete treaties, provide compelling evidence that states lack the normative conviction necessary to create customary obligations, rather than evidence that states believe these norms are binding."

[705] Lauterpacht and Bethlehem, "*Non-refoulement*," at [209].

[706] Ibid. at [209].

[707] Costello and Foster, "Custom and *Jus Cogens*," at 287–289.

[708] Ibid. at 290–291.

[709] See text at note 690.

law to emerge, the indicia of *opinio juris* must clearly relate to *the same* putative rule.[710] In contrast, Lauterpacht and Bethlehem weave together disparate bits of *opinio juris* arising from distinct treaties dealing with distinct issues to locate *opinio juris* for a principle that is more comprehensive than any of the underlying commitments. Specifically, they argue that because nearly all UN member states "participat[e] in some or other conventional arrangement embodying *non-refoulement*"[711] – that is, they have all agreed to be bound by at least *one of* Art. 33 of the Refugee Convention, Art. 3 of the Torture Convention, Arts. 6 and 7 of the Civil and Political Covenant, or by a comparable provision under a relevant regional treaty – it is now possible to conclude that there is a sufficiently widespread and representative *opinio juris* for an overarching principle that "*non-refoulement* must be regarded as a principle of customary international law."[712]

But because *non-refoulement* is merely a means to a protection end, it can only be the subject of general acceptance within a particular context. That is, the assertion that all states accept the duty of protection against *refoulement* assumes some agreement about the circumstances in which the duty is owed. Yet there is no such agreement, since the evidence of *opinio juris* relied upon by Lauterpacht and Bethlehem sometimes relates to persons who have a well-founded fear of being persecuted; in other cases, to persons at risk of torture; and in still other circumstances, to persons at risk of other forms of human rights abuse. There is, in short, no common acceptance of the duty of *non-refoulement* related to any particular class of persons or type of risk, much less to their combined beneficiary class.[713] Costello and Foster sensibly decline to assert that the existence of various treaties embodying the *non-refoulement* mechanism amounts to *opinio juris* of the broader norm they favor,[714] though they resuscitate the argument indirectly in an awkward effort to prove that states that have not acceded to the Refugee Convention nonetheless accept the duty to avoid the *refoulement* of refugees.[715]

[710] Writing in relation to the practice component of customary law, Villiger observes that "the condition of uniform practice requires that the instances of practice of individual States and of States in general circumscribe, apply, or refer to, and thereby express, the *same* customary rule": M. Villiger, *Customary International Law and Treaties: A Manual of Theory and Practice of the Interrelation of Sources* (1997) (Villiger, *Interrelation of Sources*), at 43.

[711] Lauterpacht and Bethlehem, "*Non-refoulement*," at [210]. [712] Ibid. at [216].

[713] Considering the combined effect of Art. 33 of the Refugee Convention and the duty of non-return arising from the European Convention on Human Rights, the English Court of Appeal sensibly described the Refugee Convention norm as "overlain by the provisions of the ECHR" (*MS and MBT v. Secretary of State for the Home Department*, [2017] EWCA Civ 1190 (Eng. CA, July 31, 2017), at [7]) – thus recognizing the independent if overlapping nature of the duties arising under the two treaties.

[714] Costello and Foster, "Custom and *Jus Cogens*," at 285–286.

[715] Despite the fact that many states in Asia and the Middle East have declined to sign the Refugee Convention, it is suggested by Costello and Foster that the failure to do so does not "equate[] to a rejection of the norm of *non-refoulement*" as applied to refugees given

The second form of evidence of *opinio juris* relied upon by Lauterpacht and Bethlehem, the unanimous adoption by the General Assembly of the 1967 Declaration on Territorial Asylum,[716] does have a common substantive core. Unfortunately for their project, the common core is limited to persons seeking "asylum from persecution,"[717] a group far smaller than that said by them to benefit from the customary norm.[718] More fundamentally, General Assembly resolutions cannot be relied upon *in abstracto* as evidence of universal *opinio juris*.[719] As the ICJ observed in *Nicaragua*, the *opinio juris* is instead to be deduced from "*the attitude of* . . . States towards certain General Assembly resolutions [emphasis added]."[720] The Court noted that while General Assembly resolutions may be the basis for *opinio juris*,[721] they have to be

the fact that many such states have agreed to treaties that require them to avoid *refoulement* of other categories of persons: ibid. at 294–295. For reasons previously set out (see text at note 680 ff.) this is not persuasive: the fact that a state has agreed not to send back torture victims, for example, cannot be seen as evidence that it has also agreed not to send back other categories of persons, including refugees.

716 UNGA Res. 2312 (XXII), adopted Dec. 14, 1967. 717 Ibid. at Art. 1(1) and Preamble.

718 Specifically, persons threatened with persecution are one of the three groups said by Lauterpacht and Bethlehem to be entitled to protection against *refoulement* under a general customary duty. The other two are persons who face "a real risk of torture or cruel, inhuman or degrading treatment or punishment" and persons who face "a threat to life, physical integrity, or liberty": Lauterpacht and Bethlehem, "*Non-refoulement*," at [218].

719 There is a not-insignificant policy concern, noted by Thomas Franck. "The effect of [an] enlarged concept of the lawmaking force of General Assembly resolutions may well be to caution states to vote against 'aspirational' instruments if they do not intend to embrace them totally and at once, regardless of circumstances. That would be unfortunate. Aspirational resolutions have long occupied, however uncomfortably, a twilight zone between 'hard' treaty law and the normative void. Even if passed with a degree of cynicism, they may still have a bearing on the direction of normative evolution. By seeking to harden this 'soft' law prematurely, however, the [ICJ] advises prudent states to vote against such resolutions, or at least to abstain": T. Franck, "Some Observations on the ICJ's Procedural and Substantive Innovations," (1987) 81 *American Journal of International Law* 116 (Franck, "Innovations"), at 119.

720 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits*, [1986] ICJ Rep 14, at [188].

721 Some commentators take strong objection to this holding. "[A] customary rule arises out of state practice; it is not necessarily to be found in UN resolutions and other majoritarian political documents . . . If voting for a UN resolution means investing it with *opinio juris*, then the latter has no independent content: one may simply apply the UN resolution as it is and mislabel it 'customary law'": D'Amato, "Trashing," at 102. This critique is overstated, as the ICJ merely held that General Assembly resolutions could contribute to *opinio juris*; consistent state practice must also be identified. D'Amato no doubt makes his charge in view of the Court's regrettable assumption (rather than interrogation) of consistent state practice. The judgment is, however, clear that consistent state practice remains an essential element of customary international law formation: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits*, [1986] ICJ Rep 14, at [184]. *Accord* ILA, General Custom, at 63: "Given that General Assembly resolutions are not, in

considered "in their totality."[722] A critical part of that totality is the fact that a United Nations conference convened in 1977 with the specific intention of transforming the 1967 declaration into binding law was a failure.[723] Lapenna notes that "the Committee met for [more than] four weeks, and only three of the ten articles of the experts' draft were discussed and voted on . . . [T]he preoccupation of the majority of the states was that of safeguarding, to exasperation point, the sovereign right of a state to grant asylum."[724] There has moreover been no subsequent effort to revisit the asylum convention project.[725] To rely on the 1967 asylum declaration as an indication of state parties' acceptance of a comprehensive duty of *non-refoulement* – much less to isolate the nineteen abstaining countries and deem their failure to protest to be implied support – is disingenuous given the totality of the evidence of state attitudes.

The more plausible basis for General Assembly-based *opinio juris* – ironically, not invoked by Lauterpacht and Bethlehem, but drawn upon by Costello and Foster[726] – is the line of subsequent General Assembly calls to respect the

principle, binding, something more is needed to establish [*opinio juris*] than a mere affirmative vote (or failure to oppose a resolution adopted by consensus)."

722 *Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep 226, at [71]. "[I]t is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule": ibid. An extreme interpretation is that "[t]his decision goes much farther than its predecessors in transforming [General Assembly resolutions] from exhortations or 'soft law' principles into 'hard law' prescriptions, at least in the eyes of the Court . . . Every resolution that purports to express a legal norm, even a 'soft law' exhortation or aspiration, has the potential of being recognized by the Court as a binding and strictly enforceable obligation, at least for those states which did not expressly dissent from it": F. Morrison, "Legal Issues in the *Nicaragua* Opinion," (1987) 81 *American Journal of International Law* 160, at 161. As James Crawford helpfully reminds us, "[o]f course, the General Assembly is not a legislature. Mostly its resolutions are only recommendations, and it has no capacity to impose new legal obligations on states": J. Crawford, *The Creation of States in International Law* (2006) (Crawford, *Creation of States*), at 113.

723 See generally A. Grahl-Madsen, *Territorial Asylum* (1980).

724 E. Lapenna, "Territorial Asylum – Developments from 1961 to 1977 – Comments on the Conference of Plenipotentiaries," (1978) 16 *AWR Bulletin* 1, at 4.

725 A helpful contrast is provided by the facts of the *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, [1974] ICJ Rep 3, at [56], noting that the *opinio juris* contended for by Iceland – a provision for special treatment of states overwhelmingly dependent on fishing – initially "failed to obtain the majority required, but a resolution was adopted at the 1958 Conference concerning the situation of countries or territories whose people are overwhelmingly dependent upon coastal fisheries for their livelihood or economic development."

726 Costello and Foster, "Custom and *Jus Cogens*," at 287–289. This argument has also been made by the UNHCR. "The principle of *non-refoulement* has been consistently referred to by the United Nations General Assembly in its various resolutions on the High Commissioner's Annual Report. The Office of UNHCR considers that these references

duty of *non-refoulement*, often said to apply to "asylum-seekers" as well as to refugees.[727] The regularity of the endorsement of *non-refoulement* in the General Assembly[728] is noteworthy and goes some distance in support of the claim that there is *opinio juris* for a duty of *non-refoulement* owed to more than just Convention refugees. On the other hand, it is important not to overstate the import of these resolutions: the General Assembly has never declared there to be a customary legal duty of *non-refoulement*;[729] the closest it has come was once to "welcome" a resolution of state parties to the Refugee Convention in which it was said that "the core principle of *non-refoulement* . . . is embedded in customary international law."[730] More commonly, however, the General Assembly ties its advocacy of *non-refoulement* to a call to states to accede to, or to honor duties under, *specific treaties* that contain a *non-refoulement*

to the principle of *non-refoulement*, taken together with the . . . Conclusions of the [UNHCR] Executive Committee[,] constitute further evidence of its acceptance as a basic normative principle": UNHCR, "The Principle of *Non-refoulement* as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93," Jan. 31, 1994, at [43].

727 See e.g. the references to *non-refoulement* in resolutions adopted routinely by the General Assembly upon receiving the High Commissioner's annual report: UNGA Res. 38/121, adopted Dec. 16, 1983; UNGA Res. 39/140, adopted Dec. 14, 1984; UNGA Res. 40/118, adopted Dec. 13, 1985; UNGA Res. 41/124, adopted Dec. 4, 1986; UNGA Res. 42/109, adopted Dec. 7, 1987; UNGA Res. 43/117, adopted Dec. 8, 1988; UNGA Res. 44/137, adopted Dec. 15, 1989; UNGA Res. 45/140, adopted Dec. 14, 1990; UNGA Res. 46/106, adopted Dec. 16, 1991; UNGA Res. 47/105, adopted Dec. 16, 1992; UNGA Res. 48/116, adopted Dec. 20, 1993; UNGA Res. 49/169, adopted Dec. 23, 1994; UNGA Res. 50/152, adopted Dec. 21, 1995; UNGA Res. 51/75, adopted Dec. 12, 1996; UNGA Res. 52/103, adopted Dec. 12, 1997; UNGA Res. 53/125, adopted Dec. 9, 1998; UNGA Res. 54/146, adopted Dec. 17, 1999; UNGA Res. 55/74, adopted Dec. 4, 2000; UNGA Res. 56/137, adopted Dec. 19, 2001; UNGA Res. 57/187, adopted Dec. 18, 2002; UNGA Res. 58/151, adopted Dec. 22, 2003; UNGA Res. 59/170, adopted Dec. 20, 2004; UNGA Res. 60/129, adopted Dec. 16, 2005; UNGA Res. 61/137, adopted Dec. 19, 2006; UNGA Res. 62/124, adopted Dec. 18, 2007; UNGA Res. 63/127, adopted Dec. 11, 2008; UNGA Res. 63/148, adopted Dec. 18, 2008; UNGA Res. 64/127, adopted Dec. 16, 2009; UNGA Res. 65/194, adopted Dec. 21, 2010; UNGA Res. 66/133, adopted Dec. 19, 2011; UNGA Res. 67/149, adopted Dec. 20, 2012; UNGA Res. 68/141, adopted Dec. 18, 2013; UNGA Res. 69/152, adopted Dec. 18, 2014; UNGA Res. 71/1, adopted Oct. 3, 2016; UNGA Res. 71/72, adopted Dec. 19, 2016; and UNGA Res. 73/151, adopted Dec. 17, 2018.

728 There is moreover no pattern of substantial negative votes or abstentions of a kind that would negate the *opinio juris* value of the resolutions: *Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep 226, at [71].

729 Costello and Foster are correct, of course, that the absence of specific language does not render the resolutions irrelevant to the *opinio juris* claim: Costello and Foster, "Custom and *Jus Cogens*," at 287.

730 UNGA Res. 57/187 (2011), at [4]. Given the neutral "welcome" language, it surely overstates the case to claim that "its endorsement by the General Assembly ensures that it has the approval and *agreement* of all members of the United Nations [emphasis added]": Costello and Foster, "Custom and *Jus Cogens*," at 289.

duty[731] – hardly the basis for arguing an agreed sense of obligation beyond those treaties.

Costello and Foster bolster their *opinio juris* claim by drawing on the work of the UNHCR's Executive Committee, comprised mainly but not exclusively of state parties to the Refugee Convention. They quite rightly note the regularity of this body's calls for observance of the duty of *non-refoulement*, though the fact that the duty is never framed by the Executive Committee as a customary international legal duty is surely noteworthy.[732] More generally, though, caution is warranted since the Executive Committee – while a clear factor in identifying context relevant to interpretation of the Refugee Convention[733] – is not a body charged with undertaking interstate deliberations on the scope of broad, global human rights obligations.

Most fundamentally, though, such resolutions are merely one factor to consider in the assessment of *opinio juris*.[734] They must be weighed up against contrary indications,[735] in particular those emanating from states not already bound by treaty to avoid the *refoulement* of refugees.[736] Apart from the failure of (and failure to resuscitate over the ensuing forty years) the territorial asylum initiative described above,[737] the major contraindication is the persistent refusal of states outside the Refugee Convention regime – predominantly in Asia and the Middle East – to voice support for the view that they are legally obligated to avoid the *refoulement* of refugees.[738] Indeed, what is perhaps most

[731] Costello and Foster, "Custom and *Jus Cogens*," at 288.

[732] Ibid. at 290–291. The authors inexplicably invoke the frequency of the Executive Committee's rather bland call on "all States to abide by their international obligations in this respect" (ibid. at 291); this phrasing merely calls on states to honor whatever duties they have, rather than suggesting that the Executive Committee believes there is some broader duty arising by custom.

[733] See Chapter 2.2.

[734] "A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law": International Law Commission, "Identification of Customary International Law," UN Doc. A/CN.4/L.872, May 30, 2016, at draft conclusion 12(1).

[735] "Caution is required when seeking through written texts, such as treaties and resolutions, to identify rules of customary international law . . . [A]ll of the surrounding circumstances need to be considered and weighed": International Law Commission, "Third Report on Identification of Customary International Law," UN Doc. A/CN.4/682, Mar. 27, 2015, at [29].

[736] "To begin with, over half the States concerned, whether acting unilaterally or conjointly, were or shortly [afterward] became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle": *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 3, at [76].

[737] See text at note 723.

[738] As much is impliedly conceded by the UNHCR, which observed that when it has made representations to non-party states that they are bound to avoid the *refoulement* of

striking is that many of these same states *have* legally bound themselves to other *non-refoulement* obligations, in particular to avoid the return of those at risk of torture.[739] Their reluctance to agree to guarantee refugees access to the same mechanism of protection is thus unlikely to be an accident.[740] The unwillingness of most states in Asia and the Middle East to accept a legal obligation to avoid the *refoulement* of refugees is moreover borne out in the facts that the Arab Refugee Convention is still not in force a quarter century after its adoption[741] and that Asian states have to date agreed to adopt only non-binding initiatives in relation to refugee protection.[742] While it is of course true that such states have often agreed to admit refugees and other human rights victims and have also negotiated context-specific arrangements with UNHCR,[743] there is no evidence that the openness they have

refugees, "the Governments approached have almost invariably reacted in a manner indicating that they accept the principle of *non-refoulement* as a *guide for their action* [emphasis added]": UNHCR, "The Principle of *Non-refoulement* as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, Jan. 31, 1994," at [5]. Accepting something as a "guide for action" is a far cry from the required standard of accepting it as legally obligatory.

739 Participation in both the Torture Convention (containing an express duty of *non-refoulement* in Art. 3) and the Civil and Political Covenant (containing an implied duty of *non-refoulement* in relation to Arts. 6 and 7) is reasonably strong. 60% of Asia/Pacific states and 90% of Middle Eastern/North African countries are parties to the Torture Convention, while 63% of Asia/Pacific countries and 81% of Middle Eastern/North African nations are parties to the Civil and Political Covenant: Office of the High Commissioner on Human Rights (OHCHR), https://treaties.un.org, accessed Dec. 21, 2020. Calculations for each category were based on OHCHR's classifications for the MENA and Asia-Pacific regions, with two modifications: Central and Western Asian nations were also referenced, and Iran and Afghanistan were counted as falling in the MENA region rather than in the Asia-Pacific.

740 Fewer than half of the states in each region have accepted a treaty-based duty of *non-refoulement* vis-à-vis refugees. Only about 40 percent of Asian and Middle Eastern/North African states have acceded to either the Refugee Convention or Protocol: UNHCR, "State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol," www.unhcr.org, accessed Feb. 5, 2020. Calculations for each category were based on OHCHR's classifications for the MENA and Asia-Pacific regions, with two modifications: Central and Western Asian nations were also referenced, and Iran and Afghanistan were counted as falling in the MENA region rather than in the Asia-Pacific. This refusal formally to be bound by the duty to avoid the *refoulement* of refugees is moreover long-standing: see Hailbronner, "Wishful Legal Thinking?," at 128–129.

741 See Chapter 1.5.3 at note 356.

742 See Chapter 1.5.3 at note 369. Indeed, the only recent non-binding pact is the sub-regional ASEAN Declaration (see Chapter 1.5.3 at note 357). The single pan-Asian statement has not generated a binding treaty more than fifty years after its adoption: Asian-African Legal Consultative Organization, "Bangkok Principles on the Status and Treatment of Refugees," adopted Dec. 31, 1966.

743 Reliance is sometimes placed on express acknowledgments of the duty of *non-refoulement* in bilateral arrangements between regional states and the UNHCR. While cooperation agreements can be a source of protection for refugees (see generally M. Zieck, *UNHCR's*

shown – often partial, and usually highly conditional[744] – has been influenced by a sense of *legal obligation*[745] (rather than, for example, following simply from political or economic calculus, social or cultural affiliation, or a sense of moral responsibility).[746] A former Chief Justice of India, for example, affirmed that while courts in his country "have stepped in" on occasion to prevent refugee deportations, "most often these are ad hoc orders. And an ad hoc order certainly does not advance the law. It does not form part of the law, and it certainly does not make the area clear."[747] As the ICJ noted in the *North*

Worldwide Presence in the Field: A Legal Analysis of UNHCR's Cooperation Agreements (2006), at 322), they are not really a dependable indicator of *opinio juris* in relation to *non-refoulement*. For example, despite having executed such an agreement Jordan simply closed its borders to Palestinian and Iranian Kurdish refugees in 2006 on the basis of capacity and concerns that the refugees would not depart even when the risk abated: Human Rights Watch, "Nowhere to Flee: The Perilous Situation of Palestinians in Iraq," Sept. 2006 (Human Rights Watch, "Nowhere to Flee"), at 38.

744 In the case of Lebanon, for example, a government representative explained to a UN human rights supervisory committee that "[t]he direct and indirect losses incurred by the Lebanese economy had been estimated at US$13 billion. The unemployment rate had risen and investment indicators had declined. Repeated terrorist attacks on the borders and within the country had seriously challenged the security forces. The Government had therefore decided in late 2014 to regulate the entry of Syrians into Lebanon with a view to preventing the collapse of the host country. Syrians were not prohibited from entering Lebanon. They were admitted if they sought temporary residence in accordance with the existing legislation. However, if they sought permanent residence as refugees or immigrants, each case was studied separately and an appropriate decision was taken": Statement of Ms. Assaker to the UN Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/SR.2463, Aug. 11, 2016, at [5], reported in M. Janmyr, "No Country of Asylum: 'Legitimizing' Lebanon's Rejection of the 1951 Refugee Convention," (2017) 29(3) *International Journal of Refugee Law* 438, at 454. See generally M. Kagan, "The Beleagured Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination," (2006) 18(2) *International Journal of Refugee Law* 1.

745 "[T]he general practice . . . must be undertaken with a sense of legal right or obligation": International Law Commission, "Identification of Customary International Law," UN Doc. A/CN.4/L.872, May 30, 2016, at draft conclusion 9(1).

746 For this reason, it is insufficient to say simply that the fact that "[s]ome specially affected States [that] have acceded to neither the 1951 Convention nor the 1967 Protocol . . . have hosted large numbers of refugees for many years indicates that their behaviour is in line with the principle of *non-refoulement*" (Kälin, "Article 33, para. 1," at 1343–1344. While self-interest can coexist with a sense of legal obligation (see G. Norman and J. Trachtman, "The Customary International Law Game," (2005) 99 *American Journal of International Law* 541, at 571), proponents of a customary norm must be able to identify some evidence that relevant and consistent state actions are taken out of a sense of legal obligation.

747 J. Verma, "Inaugural Address," in UNHCR and SAARCLAW eds., *Seminar Report: Refugees in the SAARC Region: Building a Legal Framework* (1997), at 13–18. *Accord* P. Saxena, "Creating Legal Space for Refugees in India: The Milestones Crossed and the Roadmap for the Future," (2007) 19(2) *International Journal of Refugee Law* 246, at 255: "A plethora of unreported cases demonstrates that the courts have treated these matters on purely technical grounds; no pronouncements of law are made nor are any general guidelines laid. This explains why the majority of these cases do not find a place in law

Sea Continental Shelf Cases, such actions do not support a finding of *opinio juris*.[748]

4.1.6.2 Consistent State Practice?

Even if *opinio juris* could be located, the next question that must be addressed is whether there is evidence of consistent and relatively uniform state practice that aligns with the putative norm (the second essential element for establishment of a customary law).[749] Sadly, there is in fact very significant empirical evidence that does exactly the opposite. As the analysis earlier in the chapter makes clear, there is a long-standing and extensive pattern of *refoulement* across the world, including complete

reports. Interim non-speaking orders may provide relief in individual cases, but their contribution to jurisprudence is negligible, even negative at times. Ranabir Samaddar has agreed that the judicial reasoning has been mainly humanitarian and not rights based, dispensing kindness and not justice, and that the Court has nothing to say on the 'refugee-situation.'" See also O. Chaudhary, "Turning Back: An Assessment of *Non-refoulement* under Indian Law," (2004) 39 *Economic and Political Weekly* 3257. But see V. Vijayakumar, "Judicial Responses to Refugee Protection in India," (2000) 12(2) *International Journal of Refugee Law* 235, at 235–236, arguing that Indian court decisions have provided "a series of rights to the millions of refugees who had to cross the internationally recognized borders and continue to stay in India."

748 "As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and . . . there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature . . . The frequency, or even habitual character of the acts is not itself enough": *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 3, at [76]–[77].

749 Hudson's classic definition speaks of four elements, including "(a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations; (b) continuation or repetition of the practice over a considerable period of time; (c) conception that the practice is required by, or consistent with, prevailing international law; and (d) general acquiescence in the practice by other States": M. Hudson, [1950] 2 *Year Book of the International Law Commission* 26, UN Doc. A/CN.4/SER.A/1950/Add.1. Elements (a), (b), and (d) have converged over time in the requirement to demonstrate that "the conduct of States should, in general, be consistent with [the putative norm]": *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits*, [1986] ICJ Rep 14, at [186]. Yet "[i]t is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from [actions prohibited by the putative norm]": ibid. at [185]. Hudson's element (c) remains a second and independent criterion for recognition of a rule of customary international law. "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States": *Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgment*, [1985] ICJ Rep 13, at [27].

border closures;[750] the erection of barriers to entry;[751] unilateral, bilateral, and multilateral interdiction efforts;[752] summary ejection of refugees from asylum state territory, both as formal policy and informally;[753] refusal of access to protection procedures;[754] removal of refugees in consequence of practical deficiencies in processing systems;[755] thinly disguised *refoulement* under the guise of "voluntary" repatriation;[756] the creation of protection gaps by adoption of *non-entrée* policies, including visa requirements, first country of arrival rules, safe third country systems, and designation of countries of origin as presumptively safe;[757] and formal excision of territory so as to avoid protection obligations.[758]

There is, in short, pervasive state practice that denies in one way or another the right to be protected against *refoulement*; indeed, as the informal survey at the start of this chapter makes clear, in recent years nearly sixty countries have participated in acts amounting to *refoulement*.[759] And while this pattern of disrespect is tragically global in scale, for purposes of customary international lawmaking it is especially noteworthy that fully one-quarter of the states that have *not* signed the Refugee Convention or Protocol have engaged in the *refoulement* of refugees.[760] How, then, can it be argued that there is relatively consistent state practice – especially in non-party states – that conforms to the putative universal duty to protect refugees and other human rights victims against *refoulement*?

First, some argue that the depth and consistency of state practice required for the establishment of customary international law should not be overstated. So long as respect for *non-refoulement* remains the norm, it is suggested that

[750] See text at note 10 ff.
[751] See text at note 22 ff.
[752] See text at note 29 ff.
[753] See text at note 53 ff.
[754] See text at note 74 ff.
[755] See text at note 79 ff.
[756] See text at note 84 ff.
[757] See text at note 92 ff.
[758] See text at note 128 ff.

[759] See text at notes 10–131. This evidence of non-conforming state practice is moreover restricted to the comparatively well-protected category of "refugees"; it is likely that the *refoulement* of the broader categories of human rights victims claimed by Lauterpacht/Bethlehem and Costello/Foster to be part of the beneficiary class of the customary norm is even more pervasive.

[760] These include Bangladesh, Indonesia, Jordan, Libya, Malaysia, Nepal, Pakistan, Saudi Arabia, Thailand, Turkey (being effectively a non-party due to its geographical reservation: see Chapter 1.4.3), and Uzbekistan: See text at notes 10–131. Costello and Foster seek to downplay the significance of discordant practice by these countries, arguing that it is not clear that they meet the definition of "specially affected" states said to be of particular importance by the ICJ in *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 3, at [74]. In truth, each of the possible measures of "specially affected" they propose – refugee hosting in "gross terms, per capita, or relative to GDP" (Costello and Foster, "Custom and *Jus Cogens*," at 292) – would result in most of the states named here being deemed specially affected by refugee arrivals. They also question the general notion of "quantitative assessment" as the basis for being "specially affected" altogether: ibid. But see e.g. Kälin, "Article 33, para. 1," at 1343, n. 84 (in which "specially affected" states analyzed are those "among the top 10 refugee hosting countries").

the state practice requirement is met. Second, and impliedly conceding the inadequacy of an empirical record of concordant practice, there is authority for the view that so long as there is an effort to justify acts of *refoulement* as permissible exceptions to the alleged norm, practice that is on its face violative of the norm is in fact supportive of it. And third and most significantly, it is claimed that while state practice is required, real state action on the ground may be overcome by alternative "practice" in the form of verbal commitments to protect refugees against *refoulement*. Each of these claims fails in the context of the putative customary duty of *non-refoulement*.

First, what of the view that the depth and consistency of state practice required for the establishment of customary international law should not be overstated? There has certainly been a trend in the ICJ jurisprudence to soften the standard of uniformity required. While the 1950 *Asylum* decision spoke of "constant and uniform usage,"[761] the 1969 *North Sea Continental Shelf* cases stated the test as "extensive and virtually uniform"[762] practice, and the *Nicaragua* decision of 1986 determined that "absolutely rigorous conformity"[763] is not required. It is thus easy to see why scholars are disinclined to set an overly demanding threshold of consistency of state practice. Crawford, for example, opined that consistency of state practice "is very much a matter of appreciation."[764]

That having been said, there is little doubt that clearly predominant global practice remains a requirement for the establishment of a customary legal duty. The ICJ's exhortation in the *Asylum* decision that "fluctuation and discrepancy"[765] in practice undermines the argument for custom is a helpful, and surely not overstated, indicator of the circumstances in which consensus through action is simply not present.[766] While those seeking to downplay the relevance of practice often rely on the Court's statement in *Nicaragua* that custom can arise despite "not infrequent"[767] inconsistent practice, this *obiter dictum*[768] must be balanced against the same judgment's insistence that a

[761] *Asylum Case (Colombia v. Peru)*, [1950] ICJ Rep 266, at 276.
[762] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 3, at [74].
[763] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits*, [1986] ICJ Rep 14, at [186].
[764] Crawford, *Brownlie's Public International Law*, at 24. Hersch Lauterpacht cautions, however, that "because of the underlying requirement of consent, the condition of constancy and uniformity is liable on occasion to be interpreted with some rigidity when there is a question of ascertaining a customary rule of general validity": E. Lauterpacht ed., *International Law: The Collected Papers of Hersch Lauterpacht* 62 (1970).
[765] *Asylum Case (Colombia v. Peru)*, [1950] ICJ Rep 266, at 277.
[766] "State practice, the material element, provides the concrete evidence of normative conviction": Kelly, "Twilight," at 500.
[767] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits*, [1986] ICJ Rep 14, at [202].
[768] In the same paragraph, the Court found that "[t]he existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice": ibid.

"settled practice"[769] be identified. More specifically, as Villiger writes, state practice for a customary norm binding *all states* must at least be "general" in the sense "that common and widespread practice among many States is required. While universal practice is not necessary, practice should be 'representative,' at least of all major political and socio-economic systems."[770] Assessed against even this relatively low benchmark, the case for identification of consistent state practice in line with a broadly inclusive duty of *non-refoulement* fails. To suggest that there is anything approaching a "settled practice" of *non-refoulement* defies the facts.[771]

Nor is the case for a settled practice in line with the duty of *non-refoulement* assisted by a second argument, namely that breaches can sometimes support a finding of consistent state practice.[772] The ICJ's *Nicaragua* judgment, generally regarded as the most authoritative statement of this rule,[773] is at pains carefully to explain the basis for its holding that "instances of State conduct inconsistent with a given rule . . . treated as breaches of that rule"[774] contribute to a finding of consistent state practice in support of the norm:

> If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[775]

In that case, the question was whether instances of foreign intervention in support of an internal opposition group espousing "worthy . . . political or moral values"[776] – at least prima facie in breach of the putative norm of non-intervention – had been defended on the basis of justifications or exceptions said to be part of the putative norm itself. The manner in which the argument was rejected is instructive:

> [T]he Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for

[769] Ibid. at [207]. [770] Villiger, *Interrelation of Sources*, at 29.

[771] In recent years, at least sixty states have participated in acts amounting to *refoulement*: see text at note 759. Moreover one-quarter of non-party states have engaged in *refoulement*: see note 160.

[772] It is of course correct that the existence of a customary norm "does not depend on the absence of any violation": Kälin, "Article 33, para. 1," at 1345. But such violations must be comparatively infrequent, and certainly not as pervasive as the ongoing pattern of breaches of the duty of *non-refoulement* in all parts of the world summarized here.

[773] Villiger, *Interrelation of Sources*, at 44.

[774] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits*, [1986] ICJ Rep 14, at [186].

[775] Ibid. [776] Ibid. at [206].

> reasons concerned with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law. In particular, as regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention.[777]

Much the same concerns arise from an examination of state practice of *refoulement*. To begin with, many instances of *refoulement* appear not to be justified at all – they simply occur.[778] And where an effort to justify *refoulement* is made, states tend to offer only blunt and unsubstantiated assertions that those seeking protection are not refugees or that the political cost of protection is too high.[779] There is, in short, rarely an effort made to justify turn-backs and other acts of *refoulement* by reference to the norm of *non-refoulement* itself, much less by arguing the applicability of the internal limitations to that duty.[780]

[777] Ibid. at [207]–[208].

[778] For example, Uganda provided no explanation for luring Rwandan refugees into trucks and returning them to the border: See text at note 55. Egypt summarily sent Sudanese refugees back to Sudan in 2007, as well as Eritrean refugees to Eritrea in 2008 with no explanation or justification given: Amnesty International, "Egypt/Israel: Fear For Safety," Doc. MED 15/038/2008/UA/241/08, Sept. 3, 2008. And US President Bush simply declared, "We will turn back any refugees that attempt to reach our shore, and that message needs to be very clear as well to the Haitian people": Human Rights Watch, "US: Don't Turn Away Haitian Refugees," Feb. 26, 2004. As Kelly observes, "[n]ations do not regularly explain the legal basis of their actions, nor is it clear how to determine the normative belief of hundreds of states, many of whom have never had the opportunity or need to express their opinion on a particular principle": Kelly, "Twilight," at 470.

[779] For example, Greece has asserted that whole groups of persons seeking protection are not refugees, treating them simply as unauthorized migrants: USCRI, *World Refugee Survey 2008*; see also S. Troller, "Greece does EU's Migration Dirty Work," *Guardian* (Jan. 25, 2009). Other examples of unsubstantiated categorical reclassification of refugees to avoid the duty of *non-refoulement* include Spain's summary classification of refugees arriving at Ceuta and Melilla as "illegal migrants" subject to removal (See text at note 77); China's claim that all North Korean refugees are merely "food migrants" or "defectors" who should be returned (see note 61); and Burundi's reclassification of persons found to be refugees by UNHCR as mere migrants subject to deportation (see note 62). Broad-brush allegations that protection would not be considered because the costs or risks were deemed too high include Niger's summary removal of Nigerian refugees after attacks by Boko Haram (See text at note 66); and the return to China of Uighur and other refugees after pressure was put on Cambodia, Kazakhstan, Nepal, and Thailand (See text at notes 59–60).

[780] Lauterpacht and Bethlehem argue that the only internal limitation to the putative customary norm is where a state demonstrates "[o]verriding reasons of national security or safety . . . in circumstances in which the threat of persecution does not equate to and would not be regarded as being on par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable

As such, inconsistent practice is just that – inconsistent, and hence at odds with the assertion of a customary legal duty. There is in any event an unanswered foundational question: while non-conforming conduct might be treated as a breach of the rule rather than undermining it if routinely treated as such,[781] there must still have been some moment when the practice of *non-refoulement* met the foundational standard of being consistently aligned with the putative norm. Yet no advocate of ignoring inconsistent practice has ever identified the moment at which the requisite respect for *non-refoulement* existed, allowing the norm to crystallize.

This analysis leaves us, then, with one final argument in support of state practice sufficient to ground a broad duty of *non-refoulement* in customary international law. The essence of the argument is that a very broad reading of "state practice" is justified under which words alone may amount to "practice." The proponents of this position look to many of the same statements relied upon to show *opinio juris* as the relevant practice in support of the norm, and thereby arrive at the conclusion that consistent state "practice" can be located despite the evidence of non-conforming "practice on the ground" identified above.[782]

It is in regard to this issue that the rules of customary law formation are most contested.[783] As Kammerhofer explains, there is a tendency among many academics to define "practice" in a way that obviates the distinction between practice and *opinio juris*:

> Behind the apparent dichotomy of "acts" and "statements" lies a more important distinction: that between one argument that sees practice as the exercise of the right claimed and the other that includes the claims

customary principles of human rights. The application of these exceptions is conditional on the strict compliance with principles of due process of law and the requirements that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country": Lauterpacht and Bethlehem, "*Non-refoulement*," at [253].

781 It is sadly not accurate to suggest that "acts of *refoulement* are virtually always condemned by States" (UNHCR, Intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between *C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents)*, Civil Appeals Nos. 18, 19, and 20 of 2011, Jan. 31, 2013, at [67]). To the contrary, specific condemnation by other states or interstate bodies is rare; most engagement with *refoulement* is at the level of vague generality only.

782 Yet "[w]hen seeking to identify the existence of a rule of customary international law, evidence of the relevant practice should . . . generally not serve as evidence of *opinio juris* as well: such 'double counting' (repeat referencing) is to be avoided": International Law Commission, "Third Report on Identification of Customary International Law," UN Doc. A/CN.4/682, Mar. 27, 2015, at [15].

783 Examples of the classic opposition are those who assert that only physical acts count as practice, e.g. A. D'Amato, *The Concept of Custom in International Law* (1971); and, arguing that custom may be based on verbal acts alone, B. Cheng, "Custom: The Future of General State Practice in a Divided World," in R. Macdonald and D. Johnston eds., *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* 532 (1983).

> themselves and thus blurs the border between the concept of "state practice" and "*opinio juris*."[784]

This is indeed the nub of the controversy: despite the continued insistence of the ICJ that there are two, not one, essential elements to the formation of customary international law,[785] there seems to be a determined academic effort to downplay that requirement. The Final Report of the International Law Association (ILA) Committee on Formation of Customary (General) International Law[786] provides a classic example of this propensity to confuse:

> The Court has not in fact said in so many words that just because there are (allegedly) distinct elements in customary law the same conduct cannot manifest both. It is in fact often difficult or even impossible to disentangle the two elements.[787]

The language used is quite extraordinary: note that the ILA does *not* say that the International Court of Justice *has* held that both elements of custom may be manifested by the same, presumably purely verbal, evidence, but rather simply that it "has not . . . said in so many words" that it cannot!

This cautious, if convoluted, framing is to some extent understandable given the actual state of ICJ jurisprudence. The decision in *Nicaragua*, while often cited as the leading source of the notion that words alone can constitute state practice,[788] did not actually reach that conclusion. The focus of the dispute was whether there was a customary norm prohibiting the threat or use of force against the territorial integrity or political independence of a state that parallels the treaty-based rule in Art. 2(4) of the UN Charter.[789] The Court was insistent that a customary norm could arise only upon proof of "the actual practice and *opinio juris* of States."[790] For good measure, it added:

> The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law . . . [I]n the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.[791]

[784] Kammerhofer, "Uncertainty," at 525. [785] See text at note 698.
[786] ILA, "General Custom." [787] Ibid. at [10(c)].
[788] See e.g. Franck, "Innovations," at 118–119; S. Donaghue, "Normative Habits, Genuine Beliefs and Evolving Law: *Nicaragua* and the Theory of Customary International Law," (1995) 16 *Australian Year Book of International Law* 327 (Donaghue, "Normative Habits"), at 338; Villiger, *Interrelation of Sources*, at 20.
[789] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits*, [1986] ICJ Rep 14, at [188].
[790] Ibid. at [183], quoting from *Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgment*, [1985] ICJ Rep 13, at [27].
[791] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits*, [1986] ICJ Rep 14, at [184].

The common confusion about just what the Court decided arises from the fact that it took what can only be described as a fairly slipshod approach to the assessment of state practice before focusing on the issue of *opinio juris*.[792] Implicit in its analysis that "[i]t is not to be expected that in the practice of States the application of the rules in question should have been perfect,"[793] that "rigorous conformity"[794] is too high a standard, and that prima facie violations justified by reference to the rule itself "confirm rather than weaken the rule"[795] is an assumption – admittedly, an empirically suspect assumption[796] – that one could reasonably assume evidence of relatively consistent state practice of non-intervention other than as authorized by the Charter.[797] Because the parties chose not to contest the issue of state practice, the Court understandably focused its analysis on the *opinio juris* question, finding (as previously noted)[798] that a wide-ranging set of verbal acts could give rise to *opinio juris*.[799]

The Court is, however, explicit that these verbal acts are approved strictly as forms of *opinio juris*, not state practice.[800] As such, and despite the failure of the Court clearly to interrogate the state practice dimension of the claim, it is disingenuous to suggest that its lack of precision in this regard amounts to an endorsement of a new theory of customary international law formation in which state practice is rendered virtually identical to *opinio juris*. If this had been the Court's intention, why would it have been at such pains to confirm the traditional two-part test and address the sufficiency of imperfect state practice?

Nor is it the case that the International Law Commission has sought to roll back the International Court of Justice's affirmation that words should not be

[792] "In *Nicaragua* . . . the ICJ discussed the requirement of state practice, but neither analyzed, nor cited examples of this element": Kelly, "Twilight," at 476, n. 112. See also Franck, "Innovations," at 118–119, and F. Kirgis, "Custom on a Sliding Scale," (1987) 81 *American Journal of International Law* 146 (Kirgis, "Sliding Scale"), at 147.

[793] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits*, [1986] ICJ Rep 14, at [186].

[794] Ibid. [795] Ibid. [796] Franck, "Innovations," at 118–119; Kirgis, "Sliding Scale," at 147.

[797] Having found there to be "abstention" from the use of force other than as authorized by the UN Charter, the Court turned to the issue of *opinio juris*: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits*, [1986] ICJ Rep 14, at [188].

[798] See text at note 704.

[799] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits*, [1986] ICJ Rep 14, at [188]–[190].

[800] "The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions . . . It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rules (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter": ibid. at [188].

double-counted as both *opinio juris* and practice.[801] In its 2016 report on identification of customary international law,[802] the Commission did agree that relevant practice may include "both physical and verbal acts."[803] Critically, however, in its list of relevant examples of practice it cites only three purely verbal forms of practice – diplomatic acts and correspondence, legislative and administrative acts, and decisions of national courts[804] – none of which is remotely controversial. Beyond this short list, however, practice is not purely verbal, but consists rather of executive *conduct*, including operational *conduct* on the ground; *conduct* in connection with resolutions adopted by an international organization or at an intergovernmental conference; and *conduct* in connection with treaties.[805]

It follows that the notion that verbiage without concordant state practice gives rise to customary law is at best *de lege ferenda* rather than settled law. Indeed, the approach might well be seen to amount to a disingenuous circumvention of the requirements of lawmaking by treaty.[806] Customary law is not simply a matter of words, wherever spoken and however frequently recited: custom can evolve only through practice in which governments effectively agree to be bound through the medium of their conduct. To treat words not simply as *opinio juris*[807] but as binding in and of themselves would, as Kelly rightly asserts, be to "constitute a new legislative form of lawmaking, not customary international law based on state behavior accepted as law."[808] Proponents of an exaggerated definition of state "practice" deny the most elementary distinction between treaties and custom: custom is not simply about words, but is a function of what is happening in the real world;[809] it is

[801] But see Costello and Foster, "Custom and *Jus Cogens*," at 298: "As is evident from [the ILC] list, some factors are considered relevant *both* to establishing *opinio juris* and state practice."

[802] International Law Commission, "Identification of Customary International Law," UN Doc. A/CN.4/L.872, May 30, 2016.

[803] Ibid. at Draft conclusion 6(1). [804] Ibid. at Draft conclusion 6(2).

[805] Ibid. at Draft conclusion 6(2).

[806] "[T]hat customary international law furnishes a means to develop universal norms when actual agreement is difficult or inconvenient cannot justify norms when there is no genuine acceptance": Kelly, "Twilight," at 537.

[807] See text at note 701 ff. [808] Kelly, "Twilight," at 486.

[809] The International Court of Justice has, however, taken the position that "[w]hen it is the intention of the State making [a] declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with that declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding": *Nuclear Tests (Australia v. France)*, [1974] ICJ Rep 253, at 267; endorsed in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits*, [1986] ICJ Rep 14, at [39]–[40]. It seems clearly to have been the Court's intention to constrain this doctrine; however, the same result could readily have been avoided by reliance on such general principles of law as acquiescence or estoppel. A WTO panel has appropriately urged caution in the application of this approach, noting that "[a]ttributing international legal significance to

about negotiation via practice.[810] The effective obliteration of the consistent practice requirement advocated by many scholars is thus conceptually flawed.[811] As Wolfke has acerbically observed, "repeated verbal acts are also acts of conduct . . . but only to customs of making such declarations . . . and not to customs of the conduct described in the content of the verbal acts."[812]

The claim that there is today a customary international legal duty pursuant to which all refugees, whether in a state party or not, are entitled to protection against *refoulement* is thus not sound.[813] While there is growing evidence of *opinio juris*, it remains far from conclusive and is not, in any event, matched by concordant and generalized state practice as customary lawmaking requires.

4.1.6.3 Other Duties of *Non-refoulement*

While beyond the scope of this book, the discussion above has noted[814] that evolution in treaties outside international refugee law provides important support to the Refugee Convention's duty of *non-refoulement* as a means of facilitating entry of at least those at-risk persons able to exit their own state.[815] Art. 3(1) of the United Nations Convention against Torture, for example, explicitly prohibits the return of a person to another state where there are substantial grounds to perceive a risk of subjection to torture;[816] Art. 16(1) of

unilateral statements made by a State should not be done lightly and should be subject to strict conditions": WTO Panel Report, *United States – Sections 301–310 of the Trade Act of 1974*, Dec. No. WT/DS152/R (WTO Panel, Jan. 27, 2000), at [7.118].

[810] "The misunderstanding resulting from such a broad interpretation [of state practice] arises from the fact that it neglects the very essence of every kind of custom, which for centuries has been based upon material deeds and not words": Wolfke, *Custom*, at 41–42.

[811] "The strategic advantage of elevating customary international law to a rule of recognition is that it allows the theorist to redefine the requirements of customary international law from empirical law to a preferred process while retaining its formal authority": Kelly, "Twilight," at 494.

[812] Wolfke, *Custom*, at 42.

[813] The fact that an increasing number of states guarantee *non-refoulement* of some kind in their domestic laws may at some point give rise to at least a lowest common denominator claim based on a new general principle of law: see Lauterpacht and Bethlehem, "*Non-refoulement*," at Annex 2.2, indicating that at the time of writing some 125 states had incorporated some aspect of a duty of *non-refoulement* in their domestic law.

[814] See text at notes 681–686.

[815] See Lauterpacht and Bethlehem, "*Non-refoulement*," at [5]–[9], [220]–[253]. See generally Chetail, *International Migration Law*, at 194–199.

[816] "The Committee recalls that the prohibition of torture, as defined in Article 1 of the Convention, is absolute": UN Committee Against Torture, "General Comment No. 4: Implementation of Article 3 of the Convention in the Context of Article 22," UN Doc. CAT/C/GC/4, adopted Sept. 4, 2018, at [8]. As regards a risk of "cruel, inhuman or degrading treatment or punishment (ill-treatment), which do not amount to torture as defined in Article 1 of the Convention . . . States parties should consider whether other forms of ill-treatment that a person facing deportation is at risk of experiencing could likely change so as to constitute torture before making an assessment on each case relating to the principle of *non-refoulement*": ibid. at [15]–[16]. UNHCR has taken the view that

the Convention on Enforced Disappearance does the same for those who face the risk of being "disappeared,"[817] and the Convention on the Rights of the Child may be understood to prohibit the removal of a child in circumstances where that is not in the child's best interests.[818] Arts. 6 and 7 of the International Covenant on Civil and Political Rights, which respectively require state parties to avert the arbitrary deprivation of life and to ensure that nobody is subject to cruel, inhuman or degrading treatment or punishment, have similarly been interpreted by the Human Rights Committee[819] to prohibit removal of individuals from a state's territory to face a relevant risk:

> [T]he article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.[820]

the Torture Convention's duty of *non-refoulement* "is in the process of becoming customary international law, at the very least at regional level": UNHCR, "Advisory Opinion on the Extraterritorial Application of *Non-refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol," Jan. 26, 2007, at [21].

817 "No State Party shall expel, return ('refouler'), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law": International Convention for the Protection of All Persons against Enforced Disappearance, 2716 UNTS 3 (UNTS 48088), adopted Dec. 20, 2006, entered into force Dec. 23, 2010, at Art. 16(1). See generally M. Vermeulen, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance* (2012).

818 Drawing on the self-executing nature of Art. 3(1) of the Convention on the Rights of the Child, 1577 UNTS 3 (UNTS 27531), entered into force Sept. 2, 1990, "[t]he relevant inquiry in these cases is whether the removal of the child is in the child's best interests. If removal is contrary to those interests, there will be a strong presumption against removing the child, subject only to a tightly circumscribed range of considerations that may in certain circumstances override the child's best interests": J. Pobjoy, "Best Interests," at 333; see generally Pobjoy, *Child in Refugee Law*, at chapter 6.

819 "Even though treaty bodies have remained surprisingly evasive about the exact basis of their praetorian construction, this implicit duty of *non-refoulement* is anchored in the theory of positive obligations": Chetail, *International Migration Law*, at 196.

820 UN Human Rights Committee, "General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (2004), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at [12]. With respect to Art. 6, "the right to life requires State Parties

Indeed, the Committee has recently opined that environmental degradation may in some circumstances engage risks under Arts. 6 and 7, thus mandating protection against *refoulement*.[821]

In addition to a clear duty not to return anyone to face grave risks to their physical security, there is nascent support for the view that state parties to the European Convention on Human Rights and Fundamental Freedoms will not be allowed to remove persons who face the risk of a particularly serious violation of a fairly wide range of human rights.[822] Beyond norms of non-

to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that they would be deprived of their life in violation of article 6": UN Human Rights Committee, "General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life," Revised draft prepared by the Rapporteur, UN Doc. CCPR/C/GC/R.36/Rev.5, July 26, 2016, at [34]. A concurring opinion in the UN Human Rights Committee suggests that some caution is warranted before interpreting other obligations to contain an implied duty of *non-refoulement*: *X v. Denmark*, HRC Comm. No. 2007/2010, UN Doc. CCPR/C/110/D/2007/2010, decided Mar. 26, 2014, per G. Neuman (noting "the fallacy of the abstract argument that a State's duty not to violate a right always entails an obligation not to send an individual to a second State where there is a real risk that the second State will violate the right. The Committee's general comment No. 31 speaks of 'irreparable harm . . . ' as the kind of injury that is severe enough to justify a *non-refoulement* obligation. Some violations of the Covenant have only financial consequences and are easily reparable; but beyond that, the language of the general comment suggests that it is referring to irreparability in a deeper sense"). Some caution about the scope of these duties is, however, suggested by the determination of the High Court of Australia that there is a "high hurdle" to benefit from the implied duty of *non-refoulement* under Arts. 6 and 7 of the Civil and Political Covenant, including in particular a duty to avoid that risk by "reasonable relocation within the applicant's country of nationality": *CR1026 v. Republic of Nauru*, [2018] HCA 19 (Aus. HC, May 16, 2018), at [24].

821 "The obligation not to extradite, deport or otherwise transfer pursuant to article 6 of the Covenant may be broader than the scope of the principle of *non-refoulement* under international refugee law, since it may also require the protection of aliens not entitled to refugee status . . . The Committee also observes that it, in addition to regional human rights tribunals, ha[s] established that environmental degradation can compromise effective enjoyment of the right to life, and that severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life . . . The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending states. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized": *Ioane Teitiota v. New Zealand*, HRC Comm. No. 2728/2016, UN Doc. CCPR/C/127/D/2728/2016, decided Oct. 24, 2019, at [9.3], [9.5], [9.11].

822 See Costello and Foster, "Custom and *Jus Cogens*," at 284–285. In a very thoughtful analysis, Greenman argues that "there will and must be some limits on the scope of the principle of *non-refoulement*," positing that a choice will have to be made between retaining the principle's absolute status but constraining its scope to acts that engage state responsibility or defining it broadly but allowing resource constraints to be taken into

return derived from human rights law, there is tentative judicial authority for the view that international humanitarian law should be construed to preclude the forcible repatriation of non-combatants who have fled generalized violence or other threats to their security arising out of armed conflict in their state of nationality.[823]

For at least some refugees in non-party states, the inability to invoke Art. 33 of the Refugee Convention is thus effectively remedied by the ability to invoke other standards of international law.[824] These additional duties of *non-refoulement* are also relevant for at least some refugees in state parties since where a state is bound by a duty of non-return external to the Refugee Convention, the state concerned may not invoke the flexibility afforded by Art. 33 in order to counter its other legal responsibilities.[825]

account: Greenman, "Castle Built on Sand?," at 294. The European Court of Human Rights has carefully summarized its approach to *non-refoulement* duties in *JK v. Sweden*, Dec. No. 59166/12 (ECtHR, Aug. 23, 2016), at [77]–[105].

[823] See e.g. *Orelien v. Canada*, [1992] 1 FC 592 (Can. FCA, Nov. 22, 1991); and *In re Santos*, Dec. No. A29-564-781 (US IC, Aug. 24, 1990). These decisions related to Common Article 3 of the Geneva Conventions, textually restricted to persons in flight from non-international conflict. It has, however, been argued that the broadly applicable obligation in Common Article 1 to "respect and to ensure respect" for the Conventions "in all circumstances" should be read to include Common Article 3 as a "minimum yardstick," with the result that non-combatants from either internal or international conflict are similarly entitled to protection against *refoulement* from non-belligerent states: Ziegler, " 'Common Article 1' and 'Common Article 3.'"

[824] For example, since "EU law provides more extensive international protection," it follows in some cases that "the member state concerned may not derogate from the principle of *non-refoulement* [by invoking] article 33(2) of the Geneva Convention": *M v. Czech Republic, X and X v. Belgium*, Dec. Nos. C-391/16, C-77/17, and C-78/17 (CJEU, May 14, 2019), at [95]–[96]. See generally Chetail, "Are Refugee Rights Human Rights?," at 36–37 (outlining ways in which human rights law may provide *non-refoulement* protections that go beyond those of refugee law).

[825] The genesis of this understanding is *Chahal v. United Kingdom*, (1996) 23 EHRR 413 (ECtHR, Nov. 15, 1996), in which the Court rejected the state party's argument that account should be taken of considerations of international security of the kind recognized as valid constraints on *refoulement* under Art. 33 of the Refugee Convention in order to determine obligations under Art. 3 of the European Convention. Much the same approach was taken by the Supreme Court of Canada in *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002): "In our view, the prohibition in the Civil and Political Covenant and the [Convention Against Torture] on returning a refugee to face the risk of torture reflects the prevailing international norm. Article 33 of the Refugee Convention protects, in a limited way, refugees from threats to life and freedom from all sources. By contrast, the CAT protects everyone, without derogation, from state-sponsored torture. Moreover, the Refugee Convention itself expresses a 'profound concern for refugees' and its principal purpose is to 'assure refugees the widest possible exercise of . . . fundamental rights and freedoms.' This negates the suggestion that the provisions of the Refugee Convention should be used to deny rights that other legal instruments make universally available to everyone." The UN Human Rights Committee has moreover found even the minimal discretion to remove a person at risk of torture identified by the Supreme Court of Canada

In sum, most threats to the ability of refugees to enter and remain in an asylum state are in fact answered by a good faith interpretation of the Refugee Convention's prohibition of *refoulement*. There are, however, three significant gaps in the protective ambit of Art. 33.

First and most fundamentally, the duty of *non-refoulement* does not constrain policies such as visa controls implemented in countries of origin, or interstate agreements to deter migration. Until and unless refugees actually leave their own state, they are not legally entitled to protection against *refoulement*, or to any other refugee rights. Second, individuals who are refugees, but who pose a risk to the national security of the state of reception, or who are particularly serious criminals who endanger its community, cannot claim protection against *refoulement* by virtue of the express exceptions set by Art. 33(2). Third, the duty of *non-refoulement* can be trumped by a claim of necessity in the case of a state faced with a mass influx of refugees insofar as the arrival of refugees truly threatens its ability to protect its most basic national interests.

The last of these gaps could be answered by more effective international burden and responsibility sharing arrangements. The second concern might similarly be remedied by a combination of responsibility sharing to relocate refugees to states in which they do not constitute a security risk, and burden sharing to finance the cost of allowing criminal refugees the option of incarceration or other appropriate custodial arrangements as an alternative to *refoulement*. The first dilemma is, however, the most challenging – though reliance on the right of "everyone to leave any country" set by Art. 12(2) of the Civil and Political Covenant certainly has real potential value.[826] But with the

in *Suresh* to be viable under Canadian domestic law to be of doubtful legality. "The Committee does however refer, in conclusion, to the Supreme Court's holding in *Suresh* that deportation of an individual where a substantial risk of torture had been found to exist was not necessarily precluded in all circumstances. While it has neither been determined by the State party's domestic courts nor by the Committee that a substantial risk of torture did exist in the author's case, the Committee expresses no further view on this issue other than to note that the prohibition on torture, including as expressed in article 7 of the Covenant, is an absolute one that is not subject to countervailing considerations": *Ahani v. Canada*, HRC Comm. No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002, decided Mar. 29, 2004, at [10.10]. See generally Kälin, "Article 33, para. 1," at 1346–1357; and Zimmermann and Wennholz, "Article 1 F," at 1407–1412.

826 "Refugees, like all persons, are free to leave any country pursuant to Art. 12(2) of the ICCPR. In accordance with Art. 12(3), the freedom to depart may be subjected only to limitations provided by law, implemented consistently with other ICCPR rights, and shown to be necessary to safeguard a state's national security, public order (*ordre public*), public health or morals, or the rights and freedoms of others. A limitation is only necessary if shown to be the least intrusive means to safeguard the protected interest. So long as an individual seeking to leave a state's territory does so freely, meaning that he or she has made an autonomous decision to do so, the state of departure may not lawfully restrict the right to leave on the basis of concerns about risk to the individual's life or safety during the

dissipation of the political and economic concerns that once sustained the commitment to refugee protection, we can unfortunately expect to see an exacerbation of the tendency to endorse visa controls, carrier sanctions, and migration control agreements as exclusionary mechanisms. As a practical matter, only a fundamental recasting of the objectives and modalities of refugee protection has any realistic chance of persuading states to relinquish their tools of refugee deterrence.[827]

4.2 Freedom from Arbitrary Detention and Penalization for Illegal Entry

The ability simply to enter and remain in an asylum state is cold comfort for many refugees. As UNHCR observes, "it frequently occurs that the necessary distinction is not made either in law or in administrative practice between asylum-seekers and ordinary aliens seeking to enter the territory. The absence of such a distinction may, and in many cases does, lead to asylum-seekers being punished and detained for illegal entry in the same manner as illegal aliens."[828]

In some cases, there simply has been no effort to enact specific protections for refugees. For example, under the Thai Immigration Act refugees without valid passports and visas are not distinguished from other illegal immigrants and are therefore subject to arrest, detention, and deportation absent an exercise of ministerial discretion.[829] Similarly, Libya has long resisted calls to reform its system of mandatory detention for migrants and refugees alike;[830] its reliance on arbitrary and indefinite detention[831] is exacerbated by agreements

process of leaving or traveling": "The Michigan Guidelines on Refugee Freedom of Movement," (2017) 39 *Michigan Journal of International Law* 1, at [4]–[6].

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

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

829 "The Thai Immigration Act of 1979 (B.E. 2522) makes no exception for refugees when it says anyone who enters Thailand without authorization 'shall be punished by an imprisonment not exceeding two years and a fine not exceeding 20,000 Baht [about US$600]' (section 62), and that any foreigner who 'stays in the Kingdom without permission or with permission expired or revoked shall be punished with imprisonment not exceeding two years or a fine not exceeding 20,000 Baht or both' (section 81)": Human Rights Watch, "Ad Hoc and Inadequate: Thailand's Treatment of Refugees and Asylum Seekers," Sept. 12, 2012, at 99.

830 Human Rights Watch, "Libya: Carry Out UN Calls for Reform," Nov. 17, 2010.

831 UN Support Mission in Libya and UN Human Rights Office of the High Commissioner, "'Detained and Dehumanized': Report on Human Rights Abuses against Migrants in Libya," Dec. 13, 2016, at 11–13. Indeed, several detention centers are controlled by non-state armed groups: United Nations Support Mission in Libya, "Desperate and Dangerous: