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## Refugees and the Right to Freedom of Movement: From Flight to Return

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## REFUGEES AND THE RIGHT TO FREEDOM OF MOVEMENT: FROM FLIGHT TO RETURN\*

*Marjoleine Zieck\*\**

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## INTRODUCTION

The human right to freedom of movement has been characterized as a right of personal self-determination.<sup>1</sup> This is a particularly apt characterization when applied to refugees: those who are forced to flee their country of origin on account of a well-founded fear of persecution.<sup>2</sup> For them, the right to leave is a prerequisite to securing protection against (anticipated) persecution and the enjoyment of human rights. Not only departure, but also finding refuge abroad, stay abroad, and eventual return are elements of this human right, and that means that the physical span of refugee status coincides with the scope of the right to freedom of movement, which includes the right to leave one's country, liberty of movement within the host state, external freedom of movement, and the right to enter one's country.

This background study focuses on the right to freedom of movement of refugees. It reviews the law pertaining to this freedom from the perspective of the spatial journey of refugees. This focus on the law means that extralegal considerations will not be taken into consideration. The analysis will not proceed from any perceived need for limits that should be accepted as "a product of realism about the strains that migration, especially high-volume migration or sudden influxes, can bring to a society."<sup>3</sup>

The decision to ignore such realism follows from the intention to identify the state of the law with respect to the right to freedom of movement of refugees.<sup>4</sup> Moreover, the drafters of the 1951 Convention Relating to

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1. José Inglés (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of Discrimination in Respect of the Right of Everyone to Leave Any Country, Including His Own, and to Return to His Country*, at 9, U.N. Doc. E/CN.4/Sub.2/220/Rev.1 (Jan. 14, 1964); see also U.N. Human Rights Comm., *CCPR General Comment No. 27: Article 12, Freedom of Movement*, ¶ 1, U.N. Doc. CCPR/C/21Rev.1/Add.9 (1999) (stating that freedom of movement is "an indispensable condition for the free development of a person"); Roger Nett, *The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth*, 81 *ETHICS* 212, 218 (1971) (characterizing this right in terms of a right that is fundamental to human opportunity). In the drafting process of what would become Art. 12 of the 1966 International Covenant on Civil and Political Rights, the question had nonetheless been raised whether freedom of movement was as basic or as fundamental as, for example, the right to live. See U.N. ESCOR, 6th Sess., 150th mtg. ¶ 50, U.N. Doc. E/CN.4/SR.150 (Apr. 27, 1950); U.N. Secretary-General, Draft International Covenants on Human Rights, at 38, U.N. Doc. A/2929 (July 1, 1955).

2. Throughout, use will be made of the masculine gender when referring to refugees, in line with the predominant usage of the masculine pronoun in the text of the 1951 U.N. Convention Relating to the Status of Refugees. It should not be taken to reflect any normative position. See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

3. David A. Martin, *Immigration's Enigma Principle: Protection and Paradox*, U. OF VA. PUB. L. & LEGAL THEORY RES. PAPER SERIES 63, at 2 (2015).

4. The focus is hence on positive international law, and particularly on the human freedom of movement and the restrictions to which it may be subjected by the relevant human rights instruments. The historical origin of such restrictions or their legitimacy in the sense of historical injustices are not questioned. For an analysis on freedom of movement from that angle, see Satvinder Juss, *Free Movement and the World Order*, 16 *INT'L J. OF*

the Status of Refugees<sup>5</sup> (the 1951 Convention) were aware of the possibility of “high-volume migration or sudden influxes,”<sup>6</sup> as will be illustrated in paragraphs 2.5 and 3.4. Calls for realism—the observation that protection must observe limits in order to preserve the requisite societal commitment to protection<sup>7</sup>—may therefore boil down to advocating breaches of the law, in particular when heeding the proposed “limitation imperative” leads to the erection of barriers and barbed wire fences, maritime interdiction, push-backs, and other measures to prevent those who need protection from finding refuge. Alarming in this respect is that such calls for realism are only heard when refugees reach the affluent West; no such calls are heard when they— as eighty-four percent of them do<sup>8</sup>—seek refuge in the less affluent regions of the world.

Setting aside such limitation imperatives is not tantamount to ignoring relevant state practice. On the contrary, it is particular state practice and actual challenges with respect to the right to freedom of movement of refugees that gave rise to the specific questions that are addressed in this background study. The answers to those questions are based on an analysis of the applicable international—rather than domestic—law, and the analysis thereby proceeds from a single non-hierarchical rule of treaty interpretation as exemplified by article 31(1) of the 1969 Vienna Convention on the Law of Treaties:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>9</sup>

The *travaux préparatoires* are, in conformity with article 32 on supplementary means of interpretation of the same Convention, considered as an evidentiary source that may be used in the interpretative process, alongside other relevant sources.

The freedom of movement of refugees is governed by different instruments that may be applicable simultaneously, particularly—but not exclu-

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REFUGEE L. 289 (2004); see also REECE JONES, *VIOLENT BORDERS: REFUGEES AND THE RIGHT TO MOVE* (2016).

5. 1951 Convention, *supra* note 2.

6. The possibility of a massive influx induced France to propose to insert in the Preamble to the 1951 Convention recognition of the fact that the “grant of asylum places an unduly heavy burden on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot be achieved without international co-operation” to help to distribute refugees throughout the world. U.N. High Comm’r for Refugees, Preamble to the Convention Relating to the Status of Refugees, U.N. Doc. E/L.81 (1950).

7. Martin, *supra* note 3, at 2, 3.

8. U.N. High Comm’r for Refugees, *Global Trends: Forced Displacement in 2016*, at 2 (2017), <http://www.unhcr.org/en-us/statistics/unhcrstats/5943e8a34/global-trends-forced-displacement-2016.html>. In addition, the least developed countries among those provided asylum to about twenty-eight percent of the global total. *Id.*

9. The Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

sively—the 1966 International Covenant on Civil and Political Rights (ICCPR)<sup>10</sup> and the 1951 Convention. The analysis will proceed from a presumption against normative conflict,<sup>11</sup> an assumption that is based on provisions such as article 5(2) of the ICCPR,

There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.<sup>12</sup>

and article 5 of the 1951 Convention,

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.<sup>13</sup>

An early commentator, Nehemiah Robinson, qualified this particular provision as “a self-evident rule because the purpose of the [1951] Convention is to grant refugees as many rights as possible, not to restrict them,”<sup>14</sup> and the phrase “apart from”, “obviously includes past, present and further [future?] provisions”.<sup>15</sup> Robinson refers explicitly to “broader rights than are prescribed by the Convention” on the basis of, *inter alia*, international treaties.<sup>16</sup>

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10. International Covenant on Civil and Political Rights, art. 12, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

11. Int'l Law Comm'n, *Rep. of the Study Group of the Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 37, UN Doc. A/CN.4/L.682, (Apr. 13, 2006) (stating, “In international law, there is a strong presumption against normative conflict.”).

12. ICCPR, *supra* note 10, art. 5(2). See also MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY, 112 (2d ed. 2005) (noting, “[T]he savings clause [. . .] gives expression to the principle that the rights of the Covenant merely represent a *minimum standard* and that the cumulation of various human rights conventions, domestic norms and customary international law may not be interpreted to the detriment of the individual.”).

13. 1951 Convention, *supra* note 2, art. 5.

14. NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY AND INTERPRETATION: A COMMENTARY 19 (1955), <http://www.unhcr.org/home/PUBL/3d4ab67f4.pdf>; see also JAMES HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 109-110 (2005) (stating that the 1951 Convention assumed those rights include international rights); but see ACHILLES SKORDAS, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 698 (arguing that art. 7, on exemption from reciprocity, rather than art. 5 governs the relationship between the 1951 Convention and general human rights law).

15. ROBINSON, *supra* note 14, 79-80.

16. *Id.* Reference should also be made to Art. 7 on exemption from reciprocity that has been referred to as the normative link between the 1951 Convention and international human rights law. SKORDAS, *supra* note 14, at 753. Art. 7(1), an omnibus clause, provides that “Except where this Convention contains more favorable provisions, a Contracting State shall

The analysis of the right to freedom of movement will follow the journey of the refugee. It is divided into six phases, each of which—with the exception of the second—corresponds with a particular aspect of the right to freedom of movement: (1) departure from the country of origin (the right to leave one's country); (2) entering a foreign state with a view to finding refuge; (3) freedom of movement upon arrival (the right to liberty of movement); (4) freedom of movement in the asylum state (the right to liberty of movement); (5) external freedom of movement (the right to leave any country); and (6) return to the country of origin (the right to enter one's country). Analyzing these phases from the perspective of the needs and plight of the refugee may serve to illustrate the extent to which this right can actually be exercised, and that includes identifying the corresponding obligations of states.

Considering the complexity and breadth of the issues at stake, this background study will refrain as much as possible from elaborating issues that have already been dealt with extensively elsewhere, focusing instead on those that are less clear and perhaps even controversial. Nor will it address topics that are only peripherally related to the subject of refugees and the right to freedom of movement, such as bilateral arrangements and regional regimes that allocate refugees seeking protection among states.<sup>17</sup>

## I. THE RIGHT TO LEAVE ONE'S COUNTRY IN SEARCH OF ASYLUM

### A. Introduction

The 1948 Universal Declaration of Human Rights provides, “[e]veryone has the right to leave any country, including his own.”<sup>18</sup> The 1966 Covenant on Civil and Political Rights (ICCPR) also provides that everyone has the right to leave any country. Article 12(2) provides that:

Everyone shall be free to leave any country, including his own.<sup>19</sup>

This right is not, however, an absolute one.<sup>20</sup> Article 12(3) ICCPR provides that:

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accord to refugees the same treatment as is accorded to aliens generally.” See ATLE GRAHL-MADSEN, COMMENTARY ON THE REFUGEE CONVENTION 1951, ARTICLES 2–11, 13–37, art. 7 ¶ 2 (UNHCR 1997) (1963) (qualifying this provision as one of the most important provisions of the 1951 Convention that gives refugees the full protection of international law, which places refugees on an equal footing with persons with an effective nationality).

17. See James C. Hathaway, *The Michigan Guidelines on Protection Elsewhere*, *Adopted January 3, 2007*, 28 MICH.J. INT'L L. 2, 207 (2007).

18. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 13(2) (Dec. 10, 1948).

19. Other universal treaties comprise the same right. See International Convention on the Elimination of All Forms of Racial Discrimination art. 5(d)(ii), Jan. 4, 1969, 660 U.N.T.S. 195; Convention on the Rights of the Child art. 10(2), Sept. 2, 1990, 1577 U.N.T.S. 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 8(1), July 1, 2003, 2220 U.N.T.S. 3.

20. The complexity of envisaged restrictions was such that it was even suggested to delete this right from the covenant for consideration in a later convention. U.N. ESCOR, 6th

The above-mentioned rights [the right to liberty of movement and freedom to choose residence within the territory of a state, and the freedom to leave one's country] shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

In short, potentially far-reaching restrictions, but the Human Rights Committee (the HRC) has set a clear limit to restrictions in its General Comment on article 12: restrictions may neither impair the essence of the right nor nullify it.<sup>21</sup>

However, the right to leave one's country is a derogable right: additional restrictions may be applied in time of public emergency under ICCPR article 4(1):

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.<sup>22</sup>

In practice, the right to leave is not only restricted by countries of origin, but also stymied by (groups of) other states desirous of, and set on, preventing (unauthorized) arrivals. In this section, the central question regarding the former—countries of origin—is to what extent those practices, which may have been induced by legitimate international obligations (such as the duty to prevent human trafficking) are compatible with the right to leave one's country as laid down in the ICCPR. With respect to other states, the first question is to what extent they should refrain from preventing departure considering the fact that the duty bearer of the right to leave one's country is the state within whose territory and jurisdiction

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Sess., 151st mtg. at ¶¶ 12, 13, 17, 19, 44, 49, U.N. Doc. A/CN.4/SR.150 (Apr. 17, 1950); U.N. ESCOR, 6th Sess., 151st mtg., Doc. E/CN.4/SR.151 (Apr. 10, 1950).

21. U.N. Human Rights Comm., *supra* note 1, ¶¶ 2, 13 (“The relation between right and restriction . . . must not be reversed.”).

22. See also U.N. Human Rights Comm., *CCPR General Comment No. 29: Article 4: Derogations During a State of Emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.1 (Aug. 31, 2001). During the drafting, there was a proposal to exchange the list of non-derogable rights with a list of rights that may be suspended, including freedom of movement; that proposal was not adopted. See MARC J. BOSSUYT, *GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 95* (1987). Freedom of movement is particularly targeted during national emergencies, and nearly all notifications for derogations mention its suspension. See NOWAK, *supra* note 12, at 95.



the individual finds himself.<sup>23</sup> The second question is when they can be considered complicit in the commission of applying unlawful restrictions by the country of origin.

### B. Restrictions Imposed by the Country of Origin

Countries of origin impose restrictions on the right to leave one's country for various reasons, and different motives.<sup>24</sup> Classical restrictions are those that are induced by ideological considerations or economic reasons. Examples of the former are the prevention of unauthorized departure by means of (sometimes severe) penalization of departure, as practiced by closed undemocratic societies such as East Germany in the past<sup>25</sup> (where it was known as *Republikflucht*) and North Korea in the present.<sup>26</sup> The desire to preclude "brain drain" is an example of an economic reason to prevent departure.<sup>27</sup> Other motives for restricting travel include preventing breaches of the immigration laws of other states,<sup>28</sup>

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23. See ICCPR, *supra* note 10, art. 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . ."); see also U.N. Human Rights Comm., *CCPR General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.1326 (2004). See *infra* Section I.E for the extra-territorial application of Art. 12.

24. Sometimes restrictions are encouraged by "aid, trade and other funds." Eur. Council on Refugees and Exiles, *European Council adopts migration compact despite NGOs statement*, ECRE WEEKLY BULLETIN, July 1, 2016. See generally Eur. Comm'n, *Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank: on Establishing a new Partnership Framework with third countries under the European Agenda on Migration*, COM (2016) 385 final (June 7, 2016).

25. "Republikflucht," the exit of nationals without official permission, was considered a crime; in the German Democratic Republic, unlawful border crossing could be punished with up to two years' imprisonment, and severe violations of this crime even with five to eight years. Ulrike Brandl, *Emigration*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. ¶ 7 (Jan. 2013).

26. See Elim Chan & Andreas Schloenhardt, *North Korean Refugees and International Refugee Law*, 19 INT'L J. REFUGEE L. 215, 221-22 (2007); Human Rights Watch, "Country Summary: North Korea", January 2017, [https://www.hrw.org/sites/default/files/northkorea\\_2.pdf](https://www.hrw.org/sites/default/files/northkorea_2.pdf).

27. See ALAN DOWTY, *CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT* (1987). At present, this is even practiced with respect to refugees who have been selected for resettlement in a third state. See *infra* note 346.

28. With a view to reducing the likelihood of those states refusing other nationals of the state concerned "entry" or "toughening or refusing to relax their visa regime" in respect of those other nationals. *Stamose v. Bulgaria*, 2012-VI Eur. Ct. H.R. 1, para. 32. Based on domestic legislation that aimed to discourage and prevent breaches of immigration laws of other states, a two-year travel ban was imposed on Mr. Stamose who had been expelled from the United States when he had overstayed his permitted period of stay in that country. *Id.* ¶¶ 32-36. The Court criticized the automatic imposition of the ban, which prevented him from travelling to any and every foreign country on account of his having committed a breach of the immigration laws of one country, and qualified the measure as "quite draconian". *Id.* ¶¶ 33-34.

jeopardizing visa-free regimes,<sup>29</sup> and trafficking and smuggling as described by the Trafficking and Smuggling Protocols (also known as the Palermo Protocols).<sup>30</sup>

The question is whether such restrictions are compatible with ICCPR article 12(3), which prescribes that restrictions should be: provided by law (in the formal sense of the word)<sup>31</sup>; are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others; and are consistent with the other rights recognized in the Covenant.<sup>32</sup>

The requirement of necessity is subject to “proportionality:”<sup>33</sup> a restriction should be “appropriate to achieve their protective function,” be the “least intrusive amongst those which might achieve the desired result,” and be “proportionate to the interest to be protected.”<sup>34</sup> All restrictions should in addition be consistent with the other rights listed in the ICCPR. The prohibition of discrimination, included in ICCPR article 2(1), seems to be particularly relevant in this respect.<sup>35</sup> In practice this prohibition

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29. E.g. Thomas Hammarberg, *The right to leave one's country should be applied without discrimination*, HUMAN RIGHTS COMMENT, Nov. 22, 2011 (discussing the former Yugoslav Republic of Macedonia that decided to criminalize abuse of the European Union visa-free regime and of the Schengen agreement).

30. Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, Nov. 15, 2000, 2241 U.N.T.S. 507 [hereinafter Smuggling Protocol]; Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol]. Long before the Palermo Protocols were adopted, during the drafting of the ICCPR, Australia considered that certain restrictions on freedom of movement were desirable, particularly restrictions involved in legislation to prevent exploitation of, or traffic in, women and minors. See U.N. ESCOR, 6th Sess., 151st mtg., U.N. Doc. E/CN.4/353/Add.10 (Mar. 22, 1950).

31. NOWAK, *supra* note 12, at 270 (stating that mere administrative provisions are insufficient); BOSSUYT, *supra* note 22, at 253.

32. Initially an exhaustive list of all grounds for restriction had been envisaged, and that included restrictions imposed on emigration to assist a neighboring country to control illegal immigration. NOWAK, *supra* note 12, at 270.

33. U.N. Human Rights Comm., *supra* note 1, ¶ 14.

34. *Id.*

35. Each state party to the Covenant “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinctions of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” ICCPR, *supra* note 10, art. 2(1). Although distinctions of “any kind” are prohibited, the protection of members of ethnic, religious or linguistic minorities is addressed separately in Art. 27: they have the right, “in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” *Id.* art. 27. See also NOWAK, *supra* note 12, at 274 (providing an example that if a person is barred from leaving the country solely on account of an opinion or his political conviction, this interference may well be provided for by law and perhaps also be justifiable in the interests of the protection of national security or public order, but it is not compatible with the prohibition of discrimination, nor, for that matter, other rights of the ICCPR such as freedom of expression); *but see infra*, Section I.C.

may mean that a non-discriminatory restriction on departure, which is provided by law and satisfies all other conditions of article 12(3), nonetheless violates article 2(1) when it is applied in a discriminatory manner, for instance, by means of profiling that may particularly affect members of minorities<sup>36</sup> or otherwise only affects particular individuals or groups, since article 2(1) is not confined to the law but also includes its implementation.<sup>37</sup>

The restrictions must be based on specific grounds. With respect to national security,<sup>38</sup> the HRC has addressed limitations on departure with respect to those who had to perform military service, and those who held state secrets. With respect to the former, the Committee observed that restrictions of the freedom of movement of individuals who have not yet performed their military service are in principle to be considered necessary for the protection of national security and public order.<sup>39</sup> However, the prevention of departure on the grounds of holding state secrets was considered to fall short of meeting the requirements of clear legal grounds, necessity and proportionality.<sup>40</sup>

It is not clear what other acts fall under “national security” since neither the *travaux* relating to article 12(3) nor the relevant General Comment sheds light on this particular notion.<sup>41</sup> In view of its inherently blan-

36. The former Yugoslav Republic of Macedonia and other countries in the region require persons to “justify the purpose of their travel [to the EU] and to prove they can finance their stay there as well as their return;” these exit procedures appear to target minorities, in particular the Roma. Hammarberg, *supra* note 29; *see also* U.N. Human Rights Comm., *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant*, ¶ 23 U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998); *cf.* U.N. Human Rights Comm., *CCPR General Comment No. 18: Non-discrimination*, ¶¶ 7, 9, U.N. Doc. HRI/GEN/1/Rev.9 (Nov. 10, 1989).

37. ICCPR, *supra* note 10, art. 2(2); U.N. Human Rights Comm., *CCPR General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, ¶ 13, U.N. doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); *see also* NOWAK, *supra* note 12, at 37-38.

38. That is, in situations that do not warrant or call for the proclamation of a state of emergency. ICCPR, *supra* note 10, art. 4.

39. *See* U.N. Human Rights Comm., *Lauri Peltonen v. Finland, Communication No. 492/1992*, ¶ 8.4, U.N. Doc. CCPR/C/51/D/492/1992 (July 21, 1994). *Cf. In re Sepet and Bulbul* [2003] 1 WLR 856 (Eng.) (stating that as yet there is no right in international law to object to military service on grounds of conscience). It should be added, that penalization for evading military service may be tantamount to persecution and form the basis for protection needs. *See MST and Others* [2016] UKUT 0043 (IAC) (Eng.).

40. U.N. Human Rights Comm., *supra* note 1, ¶ 16.

41. *Cf.* BOSSUYT, *supra* note 22 at 252-256; U.N. Human Rights Comm., *supra* note 1, ¶¶ 11-18. The notion is also included in other provisions of the ICCPR. *Cf.* ICCPR, *supra* note 10, arts. 13, 14(1), 19(3), 21. But as far as could be ascertained, national security was not defined. *Cf.* BOSSUYT, *supra* note 22 at 114, 267, 417-18, 430-1; U.N. GAOR, 10th Sess., ¶¶ 112, 114, 143, 151, U.N. Doc. A/2929 (July 1, 1955); Nowak observes that national security is endangered only in grave cases of political or military threat to the entire nation, and thus raises the bar very high. NOWAK, *supra* note 12, at 276. The so-called Siracusa principles appear to set the bar high too: “National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force”, and: “National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively

ket nature, measures such as preventing departure for ideological or economic reasons in the sense referred to earlier could probably fall into this category. However, even when those restrictions would be provided by law, it is a moot point whether these can be considered *necessary* to protect national security, specifically in the sense of being proportionate to the aim that is pursued, since they in essence result in nullifying the right to leave one's country altogether.<sup>42</sup>

Another ground for restriction, comparable in terms of having the same blanket nature, is that of public order. Unlike national security, this particular notion was the subject of extensive debates in the drafting process. These are worth recalling here with a view to determining whether public order should be taken to designate merely domestic concerns or, beyond that, to include transnational ones such as in particular combating trafficking and smuggling pursuant to international obligations, and hence draw in the international public order.

The *travaux* consist of different phases. The first draft ICCPR was discussed in 1950. At that time, there were clear hesitations about inserting "public order" in the text of what would become article 12(3). It was recalled that the notion had often been characterized as "vague and indefinite", and was therefore not suitable to be included in the covenants.<sup>43</sup> In order to avoid any abuse that dictators or potential dictators might commit under cover of it, the French representative suggested adopting the formula "public order in a democratic society," which would enshrine the democratic conception of that idea.<sup>44</sup> That formula was not adopted. States remained divided about including the term public order as it, and comparable restrictions, were considered to be too far-reaching.<sup>45</sup> Eventually the Commission on Human Rights adopted a draft that did not in-

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isolated threats to law and order", "National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse", etc. U.N. Comm'n on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, at 5, U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984) [hereinafter *Siracusa Principles*].

42. In East Germany, the restrictions were moreover applied in a discriminatory manner, and confined to those who were not "politically privileged" or below pensionable age. RAYMOND YOUNGS, *SOURCEBOOK ON GERMAN LAW* 653 (2d ed. 2002). Likewise, with respect to present-day North Korea, see MORSE TAN, *NORTH KOREA: INTERNATIONAL LAW AND THE DUAL CRISES, NARRATIVE AND CONSTRUCTIVE ENGAGEMENT* (2015). For more in general, see DOWTY, *supra* note 27.

43. U.N. GAOR, 5th Sess., 288th mtg., ¶ 18, U.N. Doc. A/C.3/SR.288 (Oct. 18, 1950). UN docs. E/L.68, para. 83; A/C.3/SR.956, 13 November 1959, para. 25; *cf.* U.N. GAOR, 5th Sess., 289th mtg. ¶ 5, U.N. Doc. A/C.3/SR.289 (Oct. 19, 1950). (The Lebanese delegation thought "public order," which it considered a wide reservation, would be out of place in the covenant.)

44. U.N. GAOR, 5th Sess., 290th mtg., ¶ 29, U.N. Doc. A/C.3/SR.290 (Oct. 20, 1950); *see also* U.N. ESCOR, 8th Sess., 319th mtg. at 4, U.N. Doc. E/CN.4/SR.319 (June 17, 1952) (The French delegation stated that "'*Ordre public*' had both material and moral connotations and embraced the whole of the principles on which the State was built.").

45. *Cf.* U.N. Secretary-General, *supra* note 1, at 39.

clude this term but instead included “national security, public safety, health or morals” as limiting grounds.<sup>46</sup>

When the drafting of article 12 was resumed, an amendment had been proposed that included the expression “ordre public” in the limitation clause.<sup>47</sup> The difficulty of including this expression in the English text was the fact that the English expression, “public order,” was not considered to be equivalent to the French expression *ordre public* (or similar concepts in other civil law countries, for that matter). In common law countries, the term “public order” was ordinarily understood as indicating the absence of disorder.<sup>48</sup> The French notion of *ordre public* meant public security, health, and peace.<sup>49</sup> Since the French notion is much wider than the English one, the U.K. representative felt that it was essential that the English text should indicate that the words “public order” did not have their usual meaning but were intended to have the same range as the French expression “ordre public.”<sup>50</sup> This could be done by adding the French words “*ordre public*” in parentheses after the words “public order.”<sup>51</sup> The current text of article 12(3) reflects this particular amendment.<sup>52</sup>

On the basis of the *travaux*, it can hardly be argued that the notion of public order extends beyond the domestic legal order.<sup>53</sup> If the notion of

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46. U.N. ESCOR, 8th Sess., 316th mtg. at 4-5, U.N. Doc. E/CN.4/SR.316 (June 17, 1952).

47. See U.N. GAOR, 14th Sess., 956th mtg. ¶ 5, U.N. Doc. A/C.3/SR.956 (Nov. 13, 1959). The documents are confusing since the amendment that was discussed — included in U.N. GAOR, 14th Sess., 954th mtg., U.N. Doc. A/C.3/L.812 (Nov. 12, 1959) (suggested by Argentina, Belgium, Iran, Italy and the Philippines, referred to as the “five-Power amendment”) — did not include this notion, yet France expressed its gratitude for having the idea of “ordre public” restored to the text, *id.*, ¶ 5. Only the revised amendment — U.N. GAOR, 14th Sess., 956th mtg., U.N. Doc. A/C.3/L.812/Rev.1 (Nov. 13, 1959), — included “public order.” The explanation for this confusion is most likely the fact that the English text of the relevant amendment, which did not include “public order” but the notion of “public safety,” had been translated in the Spanish version of the amendment with the words “*orden público*,” see U.N. GAOR, 14th Sess., 955th mtg. ¶ 7, U.N. Doc. A/C.3/SR.955 (Nov. 12, 1959); U.N. GAOR, 14th Sess., 956th mtg. ¶ 13, U.N. Doc. A/C.3/SR.956 (Nov. 13, 1959).

48. Francisco Cuevas Cancino (Special Rapporteur), Rep. of the Third Committee, ¶ 15, U.N. Doc. A/4299 (Dec. 3, 1959); see also U.N. Doc. A/C.3/SR.956 (13 Nov. 1959), *supra* note 47, ¶ 25.

49. U.N. Doc. A/C.3/SR.956 (Nov. 13, 1959), *supra* note 47, ¶ 5.

50. U.N. Doc. A/C.3/SR.956 (Nov. 13, 1959), *supra* note 47, ¶ 25.

51. *Id.*

52. See U.N. GAOR, 14th Sess., 957th mtg., U.N. Doc. A/C.3/L.812/Rev.2 (Nov. 16, 1959). A separate vote was taken on the words “public order (*ordre public*)”, at the request of Iraq, and adopted, see U.N. GAOR, 14th Sess., 959th mtg. ¶¶ 11, 15, U.N. Doc. A/C.3/SR.959 (Nov. 17, 1959); Cuevas Cancino, *supra* note 48, ¶ 18.

53. Even if “public order,” as has been suggested by Nowak, covers universally accepted fundamental principles on which a democratic society is based (see NOWAK, *supra* note 12, at 277), the notion “democratic society” primarily denotes an inclusive society in which power is held by elected representatives: this or a comparable basic notion of “democracy” does not venture beyond norms that are geared to this particular form of government. Put differently, there are many international norms that are not inherently related to “democracy” such as norms regarding international trade and investment, climate change, and

“public order” is consequently a domestic concern,<sup>54</sup> and, similar to “national security,” geared to an interest of the state invoking the restriction rather than that of another state, it follows that restricting the right to leave in order to assist other states in controlling illegal immigration,<sup>55</sup> even if carried out pursuant to relevant international obligations,<sup>56</sup> cannot be justified on the basis of this particular ground. This reading is confirmed by restrictions, which have been deemed legitimate under this heading: lawful deprivation of liberty based on criminal law, for safety in the wake of natural disasters, and in the event of internal unrest or terrorist attacks.<sup>57</sup>

Even if the notion of “public order” would be considered to comprise transnational concerns, such as preventing child sex abroad, exporting jihadi brides and fighters, or combating human trafficking and smuggling, and thus had an international dimension, there remains the question of whether preventing departure in order to combat human trafficking and smuggling pursuant to the Palermo Protocols, or to prevent loss of life, would be lawful.<sup>58</sup>

Both Palermo Protocols, as part of a comprehensive international approach, require states parties to strengthen border controls as may be necessary to prevent trafficking and detect smuggling.<sup>59</sup> The obligations of

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trafficking. As explained in the Siracusa Principles: “The expression “public order (ordre public)” as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).” Siracusa Principles, *supra* note 41, at 2.

54. Butressing this interpretation is the view of the Human Rights Committee in the case *Sayad and Vinck v. Belgium*, in which the travel ban for persons on the sanctions list pursuant to UNSC decisions adopted under Ch. VII of the Charter was discussed in terms of a restriction necessary to protect national security or public order. (The Committee did not consider these restrictions necessary to protect national security or public order, and concluded that Art. 12 had been violated.) U.N. Human Rights Comm., *Sayad and Vinck v. Belgium*, *Comm'n 1472/2006*, ¶ 10.8, U.N. Doc. CCPR/C/94/D/1472/2006 (Dec. 29, 2008).

55. *Cf.* NOWAK, *supra* note 12, at 279 (qualifying this restriction as doubtful). Worth mentioning in this respect is that the 1951 Convention exempts refugees from the imposition of penalties who, coming directly from a territory where their life or freedom was threatened, enter or are present in the country of refuge without authorization. 1951 Convention, *supra* note 2, art. 31(1); *see also* Section III *infra*.

56. *See* Smuggling Protocol, *supra* note 30.

57. *See* NOWAK, *supra* note 12 at 278-79 (stating that restrictions based on considerations of “debts” owed to the state are not justified under this heading nor the manifold legal and bureaucratic barriers pertaining to departure such as excessive fees and unreasonable delays in the issuance of travel documents, the requirement of a repatriation deposit and similar fees, guarantees or financial payments in order to obtain a permit to leave the country); *see also* U.N. Human Rights Committee, *supra* note 1, ¶ 17 (criticizing a number of practices).

58. As to loss of life in transit in the Mediterranean Sea, *see Missing Migrants Project: Mediterranean*, INT'L ORG. FOR MIGRATION (Aug 7, 2017), <https://missingmigrants.iom.int/mediterranean>.

59. Smuggling Protocol, *supra* note 30, art. 11; Trafficking Protocol, *supra* note 30, art. 11.

states under those Protocols are geared toward (prosecuting and punishing) those who engage in trafficking and smuggling rather than those who attempt to leave.<sup>60</sup> The Smuggling Protocol explicitly provides that migrants shall not become liable to criminal prosecution for having been the object of smuggling activities,<sup>61</sup> and the Trafficking Protocol includes provisions that focus on assistance to and protection of victims of trafficking.<sup>62</sup> In addition, the Protocols require that anti-smuggling and anti-trafficking commitments are pursued in a manner that does not affect the rights, obligations, and responsibilities of states and individuals under international law, including international humanitarian law, international human rights law, and international refugee law.<sup>63</sup> Thus, the implementation of the obligations under the Palermo Protocols cannot be invoked to justify preventing the departure of those who want to leave; additionally, it would fail the test of being necessary to protect public order, since it would not be proportionate and would in fact most likely nullify the right to leave of the persons concerned. The prevention of loss of life is not part of the notion of public order, regardless of whether it is taken in the limited domestic sense or in a more expansive, transnational one.

The right to leave one's country may not be made dependent on either the purpose of travel or the duration of stay abroad.<sup>64</sup> However, even if the necessity test would not fail, preventing departure could be barred under ICCPR article 5(2), which provides that the Covenant may not restrict or derogate from any rights pursuant to law, conventions, regulations or custom, if departure could be considered to constitute the exercise of a binding right to seek asylum.<sup>65</sup> If so, the purpose of departure would matter from a legal point of view. This question will be addressed in Section I.D *infra*.

The two remaining grounds—that of protecting public health or morals, and the rights and freedoms of others—may seem less relevant in the present context. With respect to public health, the prevention of the spread of communicable diseases would most likely be a justifiable reason to restrict departure. A restriction with a view to protecting public morals is more difficult to conceive.<sup>66</sup> As far as restrictions on the right to leave based on the protection of the rights and freedoms of others are con-

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60. Cf. Trafficking Protocol, *supra* note 30, arts. 5, 9, 11; Smuggling Protocol, *supra* note 30, arts. 4, 6, 7, 8.

61. Smuggling Protocol, *supra* note 30, art. 5.

62. Trafficking Protocol, *supra* note 30, ch. II.

63. *Id.* at 14(1); Smuggling Protocol, *supra* note 30, art. 19(1).

64. U.N. Human Rights Comm., *supra* note 1, ¶ 8.

65. Cf. GUY GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 358 (3d ed. 2007) who state that “[S]tates have a duty under international law not to obstruct the individual’s right to *seek* asylum” (emphasis in original); and at 370: “[T]he right to seek asylum, when read in conjunction with the right to freedom of movement and the totality of rights protected by the UDHR48 and ICCPR66, implies an obligation on States to respect the individual’s right to leave his or her country in search of protection.”

66. *Id.*

cerned, lastly, restrictions that seek to prevent the departure of those who are responsible for dependents, such as minors, are considered to be permissible.<sup>67</sup> However, condoning this restriction on departure appears to be based on the interests of those who would be left behind, in particular children, rather than on the decision to take them along. This raises a final question about the lawfulness of preventing the departure of minors when their parents or legal guardians decide to leave by unsafe means, such as rickety boats, thereby exposing the children to grave risks to their life. The answer depends on what would be in the best interests of the child and may require balancing an array of factors, including the age and maturity of the child, his own views, and his fate if prevented from leaving.

C. *Derogation: Restrictions Imposed by the Country of Origin Based on a Public Emergency*

Arguably, it is particularly in time of public emergency that people may need to leave their country of origin.<sup>68</sup> Provided it has been proclaimed publicly, it is precisely in such a time that further inroads can be made on the right to leave one's country.<sup>69</sup> The HRC observed that derogation in emergency situations is clearly distinct from restrictions or limitations that are allowed in normal times under several provisions of the Covenant.<sup>70</sup> Nonetheless, derogation in time of public emergency is subject to limits, too. Measures taken in such circumstances must not be inconsistent with other international obligations of the state invoking article 4 ICCPR, nor involve discrimination solely on the grounds of race, color, sex, language, religion, or social origin. Moreover, since article 4 subjects the possibility of derogation to what is required by the exigencies of the situation, any restrictive measures are also in time of public emergency constrained by the requirement of necessity.

Article 4 prohibits discrimination on a limited number of grounds. When those grounds are compared to those included in the 1951 Convention's definition of "refugee," article 4 is distinct in that it omits prohibiting discrimination on account of membership of a particular social group or political opinion. The relevant General Comment does not include comments on the grounds that are enumerated in article 4,<sup>71</sup> but it does highlight the state's other international obligations that may restrict derogation in time of a public emergency.<sup>72</sup> The HRC is of the opinion, for instance, that the international protection of the rights of persons belonging to minorities includes elements that must be respected in all circum-

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67. *Id.* at 281.

68. *Cf.* the judicial crack down—the suspension and detention of over 3,450 judges and prosecutors—in Turkey following the failed military coup on 15 July 2016.

69. Nearly all notifications for derogations mention its suspension, BOSSUYT, *supra* note 22.

70. U.N. Human Rights Comm., *supra* note 22, ¶ 4.

71. *Cf. id.* ¶ 8.

72. *Id.* ¶ 9; particularly the rules of international humanitarian law, those will be reviewed in Section V *infra* in the context of external freedom of movement.



stances, such as the prohibition against genocide.<sup>73</sup> The lack of a reference to membership of a particular social group among the enumerated grounds in article 4 thus appears to (at least to some extent) be offset by the constraint of other international obligations. It may mean that preventing the departure of a particular minority violates the terms under which derogation is justified. In practice, of course, the opposite occurs: minorities are often forced to flee rather than prevented from leaving.

“Political opinion” is not included among the grounds of article 4 either, and the right to hold opinions without interference (article 19) is a derogable human right. The question is whether this internal consonance may have adverse consequences for those who want to leave their country of origin in time of public emergency on account of a well-founded fear of persecution for reasons of the political opinion they (are considered to) hold, in particular, when this emergency causes the state to impose restrictions on the right to leave one’s country. It would seem so,<sup>74</sup> unless the right to seek asylum from persecution can be construed to be part of the “other international obligations” to which article 4 refers that restrict derogation.

*JD. Does the Purpose of Departure Matter from a Legal Point of View?*

The last suggestion could be rephrased in terms of the question whether the right to seek asylum from persecution would trump restrictions of the right to leave one’s country under ICCPR article 5(2), which prohibits restrictions on or derogation from any of the fundamental human rights recognized or existing in any state party to the Covenant pursuant to law, conventions, regulations or custom, and article 4, which requires that any measures that derogate from obligations under the ICCPR in time of public emergency are consistent with the other obligations the state concerned has under international law. The answer depends on the legal status of the right to seek—as distinguished from “enjoy”—asylum.

The right to seek and enjoy asylum from persecution as laid down in the 1948 Universal Declaration of Human Rights<sup>75</sup> excludes those who are prosecuted for non-political crimes or acts contrary to the purposes and

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73. *Id.* ¶ 13(c).

74. The Strasbourg Declaration on the Right to Leave and Return, adopted on 26 November 1986 by a meeting of experts convened by the International Institute of Human Rights in Strasbourg, does include political opinion among the prohibited distinctions in Art. 1: “Everyone has the right to leave any country, including one’s own [ . . . ] without distinction as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, marriage, age [ . . . ] or other status”. The text of the declaration is included in HURST HANNAM, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* 154–58 (1987).

75. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14(1) (Dec. 10, 1948). For a brief overview of the drafting history, see Sibylle Kapferer, *Article 14(2) of the Universal Declaration of Human Rights and Exclusion from International Refugee Protection*, 27 *REFUGEE SURV. Q.* 53, 61–65 (2008); Thomas Gammeltoft-Hansen & Hans Gammeltoft-Hansen, *The Right to Seek — Revisited. On the UN Human Rights Declaration Article 14 and*

principles of the United Nations<sup>76</sup>—an exclusion that is mirrored and expanded in Article 1F of the 1951 Convention—and the question should therefore be rephrased to accommodate this particular exclusion. What is the legal status of the right to seek asylum from persecution for those who may seek asylum?

The Preamble to the Universal Declaration underlines the importance of the protection of human rights by rule of law “if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression.”<sup>77</sup> Although drafts of the Universal Declaration provided for the possibility of rebellion,<sup>78</sup> the adopted version does not, and arguably gave way to the right to leave and seek asylum,<sup>79</sup> entitling the individual to renounce the social contract with his country of origin (“[A] State may not claim to ‘own’ its nationals or residents”).<sup>80</sup>

As far as the right to seek asylum is concerned, the drafters focused much more on the implications of the right to seek asylum for the prospective countries of refuge than those of origin. Their concerns were the reason the right was given very weak wording (“artificial to the point of flippancy”<sup>81</sup>) with a view to precluding states from being bound to grant asylum to those who would exercise the right to seek asylum. From this point of view, the status of this right is irrelevant: even if binding,<sup>82</sup> the right would only be a mere right to *ask* for asylum.<sup>83</sup> However, when the right to seek asylum is viewed from the point of view of departure, its legal

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*Access to Asylum Procedures in the EU*, 10 EUR. J. MIGRATION & L. 439, 442-47 (2008) (but not in terms of or relating to leaving one’s country of origin).

76. Universal Declaration of Human Rights, *supra* note 75, art. 14(2).

77. MARJOLEINE ZIECK, UNHCR AND VOLUNTARY REPATRIATION OF REFUGEES, A LEGAL ANALYSIS 23-26 (1997).

78. See Rep. of the Drafting Comm. on an Int’l Bill of Human Rights Draft Outline of an Int’l Bill of Human Rights First Session, U.N. Doc. E/CN.4/21 Annex A (1947).

79. *Cf.* the recommendation of the drafting Committee of the Commission on Human Rights: “Everyone has the right to *escape* persecution on grounds of political or other beliefs or on grounds of racial prejudice . . .”, cited in Gammeltoft-Hansen & Gammeltoft-Hansen, *supra* note 75, at 442-43 (emphasis added).

80. 2 ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW, ASYLUM, ENTRY AND SOJOURN 26 (1972).

81. H. Lauterpacht, *The Universal Declaration of Human Rights*, 25 BRIT. Y.B. INT’L L. 354, 373-74 (1948).

82. At the universal level, the right to seek asylum only figures in non-binding instruments. See Universal Declaration of Human Rights, *supra* note 75, Preamble; G.A. Res. 2312 (XXII), Declaration on Territorial Asylum, Preamble and art. 1 (Dec. 14, 1967); World Conference on Human Rights, *Vienna Declaration and Programme of Action*, art. I ¶ 23, U.N. Doc. A/CONF.157/23 (June 25, 1993). The binding EU Charter of Fundamental Rights comprises in Art. 18 a right to asylum but it is wholly cast in terms of the perspective of the receiving state. 2012 O.J. (C 326/02), Charter of Fundamental Rights of the European Union art. 18.

83. The same desire led in 1967 to the Declaration on Territorial Asylum: “Great pains were taken to make it clear that asylum was not a right of the individual but the right of States to grant asylum, first, by deleting the word ‘right’ from the title of the Declaration, and also by declaring in Article 1(1): Asylum granted by a State *in the exercise of its sovereignty* to persons entitled to invoke Article 14 of the Universal Declaration.” Paul Weis, *The Draft*

status would arguably be relevant since it could trump restrictions on departure in the sense indicated earlier.

The question is, what is the legal status of the right to seek asylum from the perspective of departure, rather than from the perspective of granting asylum? It simply is not clear: as part of the Universal Declaration it may or may not have developed into a rule of customary international law.<sup>84</sup> Part of the problem is that both seeking and enjoying asylum are conjoined in the right concerned, while the enjoyment, or rather granting asylum, was and still is considered to be the prerogative of states.

Nonetheless, the 1951 Convention implies the right to seek asylum and proceeds from that right. Denying the right to seek asylum would therefore appear to be incongruous. This incongruity is magnified when the consequences of denying the existence of this right are taken into consideration, since it could entail, in the language of the Universal Declaration, suffering “tyranny and oppression” for those who have a well-founded fear of persecution.

When considered in terms of coherency of the relevant international norms, the right to seek asylum is clearly implied. However, this logic does not *per se* carry any implications regarding the legal status of the right itself. In order to be able to qualify the right to seek asylum as a norm of customary international law, consistent and general state practice is required, as well as evidence of the belief on the part of the states concerned that this practice is legally required (*opinio juris*) by the norm concerned.

State practice pertaining to the right to seek asylum appears to be Janus-faced. On the one hand, it appears to be geared toward preventing arrivals, as will be set out in the next paragraph, rather than focus on departure. Although this practice results in impairing, perchance nullifying, the right to seek asylum of those who attempt to leave, it only serves to demonstrate that the right to seek asylum is an incomplete right. On the other hand, once refugees actually seek asylum in those states, the states generally observe the principle of *non-refoulement*,<sup>85</sup> and accordingly refrain from returning them to the frontiers of territories where their lives or

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*United Nations Convention on Territorial Asylum*, 50 BRIT. Y.B. INT'L. L. 151, 152 (1979) (emphasis added).

84. A number of scholars argue that it may or has already been developed into a norm of customary international law. See Subrata Roy Chowdhury, *A Response to the Refugee Problems in Post Cold War Era: Some Exiting and Emerging Norms of International Law*, 7 INT'L J. REFUGEE L. 100, 105 (1995) (“[A]n important emerging norm of customary international law.”); Alice Edwards, *Human Rights, Refugees, and the Right “To Enjoy” Asylum*, 17 INT'L J. REFUGEE L. 293, 301 (2005) (quoting Chowdhury, recognizing it as an emerging norm of customary international law); but see GOODWIN-GILL & McADAM, *supra* note 65, at 358 (denying this is already or shortly the case); Chowdhury, *supra*, at 104 (referring to the fact that the 1994 ILA conference did not identify this right as a norm of customary international law); Jane McAdam, *Introduction: Asylum and the Universal Declaration of Human Rights*, 27 REFUGEE SURV. Q. 3, 5 (2008) (stating that relevant developments in regional and national law “may eventually lead to the emergency of a new rule of customary international law on the right to asylum”).

85. But see *infra* note 128 and accompanying text.

freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, and thus acknowledge the legitimacy of seeking asylum. It is a moot point whether this practice warrants the inference that the right to seek asylum has developed into a norm of customary international law.

#### E. *Restrictions Imposed by Other States*

Does the right to leave one's country include obligations for states other than the country of departure? Does it impose obligations not to act on the part of other states? Does it more in particular prohibit acts that intend to prevent people from leaving and reaching those other states?<sup>86</sup>

States may act with a view to preventing arrivals from within their own territory (or proceeding from their territory), from outside their own territory, so extraterritorially,<sup>87</sup> or even within the country of origin (or transit). Their capacity to do so effectively is enhanced by increasingly sophisticated technology. Examples of the first category are the relatively invisible *non-entrée*<sup>88</sup> measures that either contribute to or result in preventing departure. These include visa requirements,<sup>89</sup> the suspension of visa waiver programs (for instance, in response to rising numbers of refugees from particular states, or in response to a sudden increase of unfounded asylum requests from those countries),<sup>90</sup> and the more visible imposition of a travel ban.<sup>91</sup> Bilateral readmission agreements may have a

86. Cf. MÉDECINS SANS FRONTIÈRES, *OBSTACLE COURSE TO EUROPE: A POLICY-MADE HUMANITARIAN CRISIS AT EU BORDERS*, (2016).

87. Also referred to in terms of "interception," defined by UNHCR as "all measures applied by a state, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination," U.N. High Comm'r for Refugees, *Interception of Asylum seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, at 2, U.N. Doc. EC/50/SC/CRP.17 (2000); see also U.N. High Comm'r for Refugees, *Conclusion on Protection Safeguards in Interception Measures*, ¶ 22, U.N. Doc. A/AC.96/987 (2003).

88. A term that was coined by James Hathaway to describe the array of legalized policies adopted by states to stymie access by refugees to their territories. James C. Hathaway, "L'Émergence d'une Politique de Non-Entrée," in *FRONTIÈRES DU DROIT, FRONTIÈRES DES DROITS: L'INTROUVABLE STATUT DE LA 'ZONE INTERNATIONALE'* 65 (1993). On the logic behind *non-entrée*, see James Hathaway, *Crisis in International Refugee Law*, 39 *INDIAN J. INT'L L.* 4, 9-10 (1999).

89. See Gammeltoft-Hansen & Gammeltoft-Hansen, *supra* note 75, at 449 (discussing the EU visa regime). It appears that the introduction of visa restrictions may follow an increase in asylum applications to thus stop particular refugees from reaching the country concerned. See SILE REYNOLDS & HELEN MUGGERIDGE, *REMOTE CONTROLS: HOW UK BORDER CONTROLS ARE ENDANGERING THE LIVES OF REFUGEES* 25-26 (2008).

90. COMM'R FOR HUMAN RIGHTS, COUNCIL OF EUR., *ISSUE PAPER: THE RIGHT TO LEAVE A COUNTRY* 42-43, 54 (2013); Violeta Moreno Lax, *Must EU Borders Have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States Obligations to Provide International Protection for Refugees*, 10 *EUR. J. MIGRATION AND L.* 315, 322-28, 337, 356-57 (2008).

91. US President Trump's second executive order of March 6, 2017 directed the entry of refugees and immigrants from Iran, Libya, Somalia, Sudan, Syria and Yemen from travel-

comparable barring effect.<sup>92</sup> The same applies to the practice of demanding advance passenger information and clearance before boarding an airline to travel to the country concerned,<sup>93</sup> and the imposition of carrier sanctions on private airlines that carry passengers without the requisite travel documents.<sup>94</sup>

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ling to the United States to be suspended for 90 days from that date. After the expiration of the 90-day period, the Order authorizes Homeland Security, in consultation with the Secretary of State and the Attorney General, to recommend the inclusion of additional countries to the President, prohibiting the entry of “appropriate categories of foreign nationals.” Executive Order No. 13780, 82 Fed. Reg. 13,209, 13,213 (Mar. 6, 2017). This (second) order, followed Executive Order 13769 of 27 January 2017 which lowered the number of refugees allowed entry to the US to 50,000 in 2017, suspended the US Refugee Admission Programme for 120 days, placed an indefinite suspension on the entry of Syrian refugees, and authorized selected cabinet secretaries to suspend entry of persons from states whose countries did not meet the standards under US Immigration law for 90 days, which included the following 6 states on the Homeland Security list: Iran, Iraq, Libya, Yemen, Sudan, and Somalia. Executive Order No. 13769, 82 Fed. Reg. 8977, 8979 (Jan. 27, 2017).

92. See Carole Billet, *EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight Against Irregular Immigration. An Assessment After Ten Years of Practice*, 12 EUR. J. MIGRATION AND L. 45 (2010). The readmission agreement concluded by Spain and Morocco in 1992 allows Spain to return both Moroccans and third-country nationals who travelled through Morocco: the agreement does not include protection against *refoulement*. AMNESTY INT'L, FEAR AND FENCES, EUROPE'S APPROACH TO KEEPING REFUGEES AT BAY 20-21 (November 2015). Whilst not all readmission agreements appear to violate international obligations regarding refugees *per se*—for example, the readmission agreement between the EU and Turkey is explicit about the rights of asylum seekers, see 2014 O.J. (L 134) 3, at 3—their implementation may. See Mariagiulia Giuffr , *Readmission Agreements and Refugee Rights: From a Critique to a Proposal*, 32 REFUGEE SURV. Q. 79 (2013).

93. Cf. the US ESTA program, an electronic advance information system. See *About the Electronic System for Travel Authorization (ESTA)*, U.S. CUSTOMS AND BORDER PROTECTION, (Oct. 5, 2017), [https://help.cbp.gov/app/answers/detail/a\\_id/1072/kw/esta/session/L3RpbWUvMTQ2MjQ1NDkwMy9zaWQvMU5PdWJLUG0%3D](https://help.cbp.gov/app/answers/detail/a_id/1072/kw/esta/session/L3RpbWUvMTQ2MjQ1NDkwMy9zaWQvMU5PdWJLUG0%3D); Bureau of Consular Affairs, *Visa Waiver Program*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html> (last visited Nov. 19, 2017); see also the Advance Passenger Processing Scheme that was introduced by New Zealand in 2004; following its introduction, the number of asylum applications dropped significantly. Susan Glazebrook, *From Zaoui to Today: A Review of Recent Developments in New Zealand's Refugee and Protected Persons Law*, CT. OF N.Z. (Mar. 23, 2013), <https://www.courtsofnz.govt.nz/speechpapers/From%20Zaoui%20to%20Today%20a%20Review%20of%20Recent%20Developments%20in%20NZs%20Refugee%20and%20Protected%20Persons%20Law.pdf>; see also Council Directive 2004/82, 2004 O.J. (L261) 24 (EC) (discussing the obligation of carriers to communicate passenger data in the European context); OJ L 134/1, May 7, 2014, and particularly the more intrusive Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, 2016 O.J. (L 119) 89.

94. Various states impose carrier sanctions, see, e.g., Tilman Rodenh user, *Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration*, 26 INT'L J. OF REFUGEE L. 223 (2014); Sophie Scholten & Paul Minderhoud, *Regulating Immigration Control: Carrier Sanctions in the Netherlands*, 10 EUR. J. OF MIGRATION AND L. 123 (2008). Carrier sanctions are often based on treaties such as the Palermo Protocols. See Trafficking Protocol, *supra* note 30; Smuggling Protocol, *supra* note 30; Convention Implementing the Schengen

Examples of extraterritorial acts committed by states are physical pushbacks and interdiction on the high seas,<sup>95</sup> as well as taking all necessary measures against vessels on the high seas suspected of being used for smuggling or trafficking persons, including capture, rendering them inoperable, and disposing of them altogether.<sup>96</sup>

Examples of the third category—acts taking place within the country of origin, including its territorial waters—are joint patrolling by the countries of origin and other states in the territorial waters of the former with

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Agreement of June 14, 1985, art. 26, 2000 O.J. (L239), supplemented by Council Directive (EC) Directive 2001/51, art. 4, 2001 O.J. (L187) 45 (EC).

95. Push-backs occur in many places; e.g. the push-back of Rohingya boat refugees. See *Southeast Asia: End Rohingya Boat Pushbacks. Thailand, Malaysia, Indonesia Should Act Urgently to Save Lives*, HUMAN RIGHTS WATCH (May 14, 2015, 12:00 AM, <https://www.hrw.org/news/2015/05/14/southeast-asia-end-rohingya-boat-pushbacks>); *Malaysia and Thailand Turn Away Hundreds of Migrant Boats*, THE GUARDIAN (May 14, 2015) <http://www.theguardian.com/world/2015/may/14/malaysia-turns-back-migrant-boat-with-more-than-500-aboard>. On departure prevention by states in the service of the EU, see Nora Markard, *The Right to Leave by Sea. Legal Limits on EU Migration Control by Third Countries*, 27 EUR. J. OF INT'L L. 591 (2016). On Australia's interdiction policy, see Andreas Schloenhardt & Colin Craig, *'Turning Back the Boats': Australia's Interdiction of Irregular Migrants at Sea*, 27 INT'L J. OF REFUGEE L. 536 (2015). Lastly, the US practice regarding the interdiction of Haitian refugees should be mentioned, see David E. Ralph, *Haitian Interdiction on the High Seas: The Continuing Saga of the Rights of Aliens Outside United States Territory*, 17 MD. J. INT'L L. 227 (1993); Stephen H. Legomsky, *The USA and the Caribbean Interdiction Program*, 18 INT'L J. OF REFUGEE L. 677 (2006).

96. The EU military operation EUNAVFOR MED was set up to disrupt human smuggling and trafficking networks in the Southern Central Mediterranean through the identification, capture and disposal of vessels suspected of being used by smugglers. Council Decision (CFSP) 2015/778 of 18 May 2015 on a EU military operation in the Southern Central Mediterranean (EUNAVFOR MED), art. 1, 2015 O.J. (L122) 31. It was launched on 22 June 2015 by Council Decision 2015/972 and its mandate consists of three phases: detecting and monitoring migration networks by patrolling the high seas and gathering information (Phase I), boarding, searching, seizing and diverting vessels suspected of being used for human smuggling or trafficking on the high seas in accordance with international law, applicable UNSC Resolutions or consent by the coastal State concerned (Phase II), and finally, taking "all necessary measures against a vessel . . . including through disposing of them or rendering them inoperable" in accordance applicable UNSC Resolutions or consent of the concerned coastal state. *Id.* at art. 2. The Operation moved into Phase II on October 7, 2015 and was renamed "Operation Sophia." On October 9, 2015, the Security Council adopted Resolution 2240/2015 in which it authorized the EU to use "all measures commensurate to the specific circumstances" that are required to inspect, seize and dispose of vessels on the high seas suspected of being used for migrant smuggling or trafficking from Libya. S.C. Res. 2240/2015, ¶¶ 7, 8, 10. On July 25, 2017, the Council extended the mandate of the operation until December 31, 2018: The Council amended the mandate. The new mandate sets up a monitoring mechanism for the Libyan Coastguards that were trained; conducting new surveillance and information gathering on illegal trafficking of oil exports from Libya in accordance with S.C. Res. 2146 (2014) and S.C. Res. 2362 (2017); and enhancing information sharing on human trafficking member states' law enforcement agencies, FRONTEX and EUROPOL. See Council Decision (CFSP) 2017/1385 of 25 July 2017 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA), art. 1, 2017 O.J. (L194) 61.

a view to preventing people from leaving by sea.<sup>97</sup> Examples of acts that take place on the territory of the country of origin are the deployment of representatives in countries of origin with a view to preventing or reducing irregular migration; some measures are specifically geared toward preventing the arrival of refugees, but most of them accomplish that result only by way of side effect, focused as they are on indiscriminately combating illegal immigration indiscriminately. An example of the first is the pre-clearance of passengers boarding flights by foreign immigration officials in the country of departure and refusing those who are suspected of claiming asylum upon arrival with the object of stemming the flow of asylum seekers from that country.<sup>98</sup> As to the latter type of measures, the deployment of Immigration Liaison Officers (ILOs) is one illustration. ILOs are representatives of EU member states who are posted in third states to contribute to prevent and combat illegal immigration, return of illegal immigrants, and the management of legal migration.<sup>99</sup> The Canadian Immigration Control Officer (ICO) network serves similar purposes: these officers are located abroad and are an integral part of the screening, iden-

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97. An example of this are the Frontex Joint operations “Hera.” There have been 11 Hera operations—Hera I, II and III—in the years 2006-2007, six Hera operations in 2007-2012, two EPN Hera operations in the years 2013-2014 and one EPN Hera operation in 2015. All Hera operations aimed to reduce the number of non-identified migrants arriving at the Canary Islands, conducting joint-patrols and surveillance of the EU’s Atlantic maritime borders to combat illegal migration from West African countries, prevent loss of life at sea, and identify the routes taken by criminal networks. *Archive of Operations*, FRONTEX, <http://frontex.europa.eu/operations/archive-of-operations/?p=3&type=Sea> (last visited Nov. 19, 2017). The Hera operations are based on Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2004 O.J. (L349) 1 and two subsequent Regulations adopted in 2007 and 2011. Art. 3(1) of Council Regulation (EC) No 2007/2004 grants the Agency the authority to “launch initiatives for joint operations and pilot projects in cooperation with Member States” on the Member States’ external borders. *Id.* at art. 3(1). It should be added that the Agency must carry out these operations in “full compliance with . . . relevant international law, including the Convention Relating to the Status of Refugees . . . obligations related to access to international protection, in particular the principle of *non-refoulement*; and fundamental rights.” Regulation (EU) No. 1168/2011 amending Council Regulation (EC) No. 2007/2004, art. 1, 2011 O.J. (L304) 1. Art. (3)(b) of EU Regulation 1168/2011 further requires that “no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle.” *Id.* art. 3(b).

98. See *R v. Immigration Officer at Prague Airport* [2004]. UKHL 55 (U.K.).

99. The network of ILOs and their role was established by Regulation (EC) No 377/2004 of February 19, 2004 on the creation of an immigration liaison officers network, 2004 O.J. (L64) 1; 2000 O.J. (L 316) (amended in 2011); Regulation (EU) No. 493/2011 of April 5, 2011 amending Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network 2011 O.J. (L 141) 13. For a general overview of their functions, see MAARTEN DEN HEIJER, *EUROPE AND EXTRATERRITORIAL ASYLUM* 187-88 (2012). For examples of ILOs from specific states, see Andrew Brouwer & Judith Kumin, *Interception and Asylum: When Migration Control and Human Rights Collide*, 21 *REFUGEE* 6, 10-11 (2003); REYNOLDS & MUGGERIDGE, *supra* note 89; *External Borders Fund*, IMMIGRATION AND ASYLUM OFFICE (Aug. 26, 2014) (Hung.), [http://www.bmbah.hu/index.php?option=com\\_k2&view=item&id=618:external-borders-fund&Itemid=1349&lang=en](http://www.bmbah.hu/index.php?option=com_k2&view=item&id=618:external-borders-fund&Itemid=1349&lang=en).

tification, and interception of undocumented or improperly-documented persons trying to enter Canada.<sup>100</sup> The designation also covers Airline Liaison Officers (ALOs), who are posted in international airports abroad, aiding carriers to prevent the embarkation of improperly-documented passengers.<sup>101</sup> The United Kingdom similarly deploys Migration Delivery Officers (MDOs) in a number of states.<sup>102</sup>

The question is whether these acts, all geared toward preventing departure with a view to precluding entry in other states, are lawful. As to acts originating abroad that may prevent individuals from leaving their own country, it would be hard to argue that these are *per se* violations of the right to leave one's country. First, the duty bearer of this right is the country of origin or departure rather than any other state: it is that country that has to allow and enable the right to leave the country.<sup>103</sup> Second, the acts prevent traveling to a particular third state, as opposed to each and any other state.<sup>104</sup>

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100. Office of the Auditor General, *Citizenship and Immigration Canada — Control and Enforcement*, in 2003 REPORT OF THE AUDITOR GENERAL OF CANADA TO THE HOUSE OF COMMONS, ¶ 5.5 (2003) (Can.), <http://www.oag-bvg.gc.ca/internet/docs/20030405ce.pdf>.

101. In 2013, Canada stationed sixty-three ALOs in forty-nine locations world-wide, intercepting 73,000 persons between 2001-2012. EFRAT ARBEL & ALLETTA BRENNER, *BORDERING ON FAILURE: CANADA-US BORDER POLICY AND THE POLITICS OF REFUGEE EXCLUSION* 4, 29-30, 34 (2013), <https://harvardimmigrationclinic.files.wordpress.com/2013/11/bordering-on-failure-harvard-immigration-and-refugee-law-clinical-program1.pdf> (last visited 4 August 2017). For an overview of the powers of ALOs, see DEPARTMENT OF CITIZENSHIP AND IMMIGRATION, *INSTRUMENT OF DESIGNATION AND DELEGATION: IMMIGRATION AND REFUGEE PROTECTION ACT AND REGULATIONS* (June 22, 2016) (Can.), <http://www.cic.gc.ca/english/resources/manuals/il/il3-eng.pdf>. As of November 2014, Canadian Airline Liaison Officers have intercepted over 86,000 persons offshore, including potential refugees. Efrat Arbel, *Bordering the Constitution, Constituting the Border*, 53 *OSGOODE HALL L.J.* 824, 839 (2016); *STANDING S. COMM. ON NAT'L SEC. AND DEF., VIGILANCE, ACCOUNTABILITY AND SECURITY AT CANADA'S BORDERS* (Comm. Print 2015) (Hon. D. Land & Hon. G. Mitchell) (Can.), <https://sencanada.ca/content/sen/Committee/412/secd/rep/rep16jun15a-e.pdf>. Between 2015-2016, the percentage of CBSA Liaison Officer recommendations to airlines that lead to the interception of improperly documented travelers prior to their arrival by air to Canada was 83% (measured against improperly documented arrivals to Canada). CANADA BORDER SERVICES AGENCY, *DEPARTMENTAL PLAN 2017-2018: SUB-PROGRAMS*, (Can.), <http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/rpp/2017-2018/subprogram-sousprog-eng.html?wbdisable=true> (last modified Aug. 4, 2017).

102. Migration Delivery Officers (MDOs) are employees of British High Commissions that operate as "overseas missions" in Commonwealth capitals, employing over 1350 staff who assist with processing entry clearance applications. *British High Commission Information*, U.K. VISA BUREAU, <http://www.visabureau.com/uk/british-high-commission.aspx> (last accessed Aug. 4, 2017). Previously, 20 MDOs were posted to British Embassies overseas including Ethiopia, Kenya, the Democratic Republic of Congo, Sri Lanka, Pakistan and Turkey; countries were chosen based on internal intelligence and flow of migrants, and "all appear to be key countries of origin and transit for irregular migrants." See REYNOLDS & MUGGERIDGE, *supra* note 89, at 39-40.

103. See *supra* note 23.

104. The Human Rights Committee raised nonetheless concerns regarding carrier sanctions particularly their effect on the right to leave in its observations on Austria. U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 11, U.N. Doc. CCPR/C/79/Add. 103 (Nov. 19, 1998). It also requested states to



Even if that would be the case—for instance, if the other state borders on the country of origin and preventing departure to bar entry would be tantamount to preventing departure all together—the question is whether the neighboring state violates the right to leave of those who find themselves in their country of origin. Disregarding any other obligation that may require the third country to open its border in such a situation,<sup>105</sup> it does not: it is the sovereign right of that state to control entry into its territory, and exercising this control may indeed entail that the right to leave of inhabitants of the neighboring state is as a result nullified. The right to leave one’s country is in this respect clearly an incomplete right: “Article 12 [. . .] confers no right for a person to enter a country other than his own.”<sup>106</sup>

A similar conclusion was reached by the European Court of Human Rights in the case of *Xhavara and others v. Italy*. The case concerned an interception of Albanian nationals at sea, at a distance of thirty-five nautical miles from the Italian coast, following a collision of an Italian naval vessel with an Albanian boat that carried Albanians who wanted to enter Italy clandestinely.<sup>107</sup> The Court took the view that interception activities extending into international waters and the territorial waters of Albania—on the basis of an agreement with Albania—were not aimed at preventing the Albanians from leaving their country but rather at preventing them from entering Italian territory.<sup>108</sup> Their claim as to a breach of the right to leave—in *casu* under article 2(2) of Protocol 4 to the 1950 European Convention on Human Rights and Fundamental Freedoms<sup>109</sup>—was consequently declared inadmissible.<sup>110</sup> It would seem, therefore, that preventing

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include information in their reports on measures that impose sanctions on international carriers that bring to their territory persons without required documents, where those measures affect the right to leave another country. U.N. Human Rights Comm., *supra* note 1, ¶ 10. It has so far (up until the timing of writing, June 2017) refrained from stating that carrier sanctions would be incompatible with Art. 12(2). See also Martin Scheinin, *The Right to Leave Any Country as a Human Right — Implications for Carrier Sanctions and Other Forms of Pre-Frontier Control*, 2 TURKU L. J. 127, 132 (2000).

105. On which, see *infra* Section II, fourth paragraph.

106. U.N. Human Rights Comm., *Carlos Varela Núñez v. Uruguay*, Comm’n No. 108/1981, ¶ 9.3, U.N. Doc. CCPR/C/OP/2 (July 22, 1983); U.N. Human Rights Comm., *Samuel Lichtenstejn v. Uruguay*, Comm’n No. 77/1980, ¶ 9.3, U.N. Doc. CCPR/OP/2 (Mar. 31, 1983).

107. *Xhavara et Quinze Autres v. l’Italie et l’Albanie*, App. No. 39473/98, Eur. Ct. H.R. (2001). The decision is only available in French; a summary in English of the decision is included in U.N. High Comm’r for Refugees, *Part 5 — Biannual Updates on Relevant Case Law of the European Court of Human Rights*, in UNHCR Manual on Refugee Protection and the ECHR, at 9 (2001).

108. “La Cour relève que les mesures mises en cause par les requérants ne visaient pas à les priver du droit de quitter l’Albanie, mais à les empêcher d’entrer sur le territoire italien,” *Xhavara*, *supra* note 107, at 6.

109. “Everyone shall be free to leave any country, including his own.” Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2(2), E.T.S. No. 46 (May 2, 1968).

110. The European Court of Human Rights has in many cases observed that the right of freedom of movement as guaranteed by Art. 2(1) and (2) of Protocol No. 4 is intended to

persons from leaving their country would breach their right to leave one's country only when the interference is not aimed at preventing the persons from entering a particular foreign territory.

What would be the outcome if the focus were on effective control exercised by a foreign state over the persons concerned? As the HRC observed in its General Comment on the Nature of the General Legal Obligation Imposed on States Parties to the ICCPR, state parties

are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to its jurisdiction. This 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.<sup>111</sup>

The various measures another state may take to prevent arrivals were categorized on the basis of the place where they originated: within its territory, outside its territory, and within the territory of the country of origin or departure, arguably a differentiation that corresponds to the likelihood that the other state exercises effective control over the individuals whom it prevents from leaving their country of origin.<sup>112</sup> In the case of the Albanians, again focusing exclusively on the right to leave one's country,<sup>113</sup> the exercise of effective control would lead to the same outcome as in the case of a closed border between two neighboring states: the right to leave one's country is frustrated, but it is not violated since the right does not include entry elsewhere. Are there nonetheless instances in which a state may violate this right?

Arguably, yes. In cases of joint operations of the country of origin or departure and a foreign state that result in the prevention of departure, the acts on the part of the country of origin should be provided for by law, and satisfy all other criteria set by Article 12(3) of the ICCPR. If they do not satisfy the relevant criteria, the country of origin or departure breaches Article 12(2) of the ICCPR. By aiding or assisting the country of origin, the foreign state involved in the joint operations may be held internationally responsible for the commission of the wrongful act by the country of origin if it did so with knowledge of the circumstances of the

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secure to any person a right to liberty of movement within a territory and to leave that territory, "which implies a right to leave for such a country of the person's choice to which he may be admitted." *Napijalo v. Croatia*, App. No. 66485/01, Eur. Ct. H.R. ¶ 68 (2003); *Baumann v. France*, App. No. 33592/96, Eur. Ct. H.R., ¶ 61 (2001); *Peltonen v. Finland*, App. No. 19583/92, Eur. Ct. H.R., ¶ 31 (1995).

111. U.N. Human Rights Comm., *supra* note 23, ¶ 10.

112. For an analysis of jurisdiction based on the exercise of public powers in third states, see James C. Hathaway & Thomas Gammeltoft-Hansen, *Non-refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT'L L. 235 (2015).

113. Whether other international obligations are breached is addressed below, see *infra* Section II.D.

wrongful act and if the act would be internationally wrongful if committed by that state.<sup>114</sup> It may in addition be in violation of article 12(2) when it is preventing departure rather than arrival in its own territory.

The overall conclusion is that other states may frustrate the right of individuals to leave their country of origin, albeit only with a view to controlling entry into their territories, and provided doing so does not involve complicity in the unlawful prevention of departure on the part of the country of origin. However, once these individuals have left their country of origin with a view to seek asylum—and thus satisfy the criterion of alienage, part of the definition of refugee<sup>115</sup>—their legal status changes to “refugees” (assuming the other criteria of this definition are also met). From that moment onward, controlling entry gives way to other obligations, as will be set out in the next section, and that affects the legality of the acts committed by states outside their own territory with a view to preventing arrivals in their territories (such as the physical pushbacks and interdiction on the high seas, as described earlier).<sup>116</sup> If, for instance, the interception of the Albanians of the *Xhavara* case took place outside Albanian territorial waters—or rather, outside the area of Albanian jurisdiction<sup>117</sup>—and the Albanians concerned had been asylum seekers,<sup>118</sup> they could not have been returned upon interception. In short, the right to prevent arrival and

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114. *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. No. 10, art. 16, at 27, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 20, U.N. Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter Draft Articles on Responsibility of States for Internationally Wrongful Acts] (defining as aid or assistance in the commission of an internationally wrongful act). The ILC articles are not formally binding, but Art. 16 appears to be part of customary international law. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro) Judgment*, I.C.J. Reports 2007 43, ¶¶ 419-20. Other commentators agree. See Roger Clark, *State Obligations Under the Genocide Convention in Light of the ICJ's Decision in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 61 RUTGERS L. REV. 75, 100 (2008); Gammeltoft-Hansen & Hathaway, *supra* note 112, at 277-78; HELMUTH PHILIPP AUST, *COMPLICITY AND THE ROLE OF STATE RESPONSIBILITY* 186, 191 (2011); MILES JACKSON, *COMPLICITY IN INTERNATIONAL LAW* 149, 151-153 (2015) (considering the rule itself “a sort of primary meta-rule.”).

115. See 1951 Convention, *supra* note 2, art. 1 A(2) (defining the term as someone who “is outside of his country of nationality”, “or who, not having a nationality and being outside of his country of his former habitual residence.”) On the criterion of alienage, see J.C. Hathaway & Michelle Foster, *Alienage*, in *THE LAW OF REFUGEE STATUS* 17 (2nd ed. 2014). Of relevance in the present context is the delimitation of “territory.” The territory of a state includes its territorial waters, yet the jurisdiction of the state may extend into adjacent zones such as the contiguous zone and, if claimed an exclusive economic zone: if the extended jurisdiction includes the right to regulate the movement of persons in those zones, refugees within such zones find themselves within the jurisdiction of the territorial state concerned, and hence do not satisfy the criterion of alienage. *Id.* at 25, n. 49.

116. It does not affect the legality of the acts geared to preventing arrivals from within their own territory described at the beginning of this paragraph. The same applies to acts committed in the country of origin.

117. See *Xhavara*, *supra* note 107.

118. The word “asylum-seeker” seems to imply that refugee status is dependent on recognition, which it is not, see *infra* note 119, and is used here only to emphasize that the persons leaving a state are doing so with a view to seeking asylum.

thus control entry is not absolute when refugees are involved and affected, regardless of whether their status has been recognized or even claimed.<sup>119</sup>

## II. THE RIGHT TO ENTER AN ASYLUM STATE, OR THE RIGHT TO ACCESS PROTECTION

### A. Introduction

The previous section focused on measures, taken by either a refugee's country of origin or other states, designed to prevent refugees from leaving their country of origin to seek asylum. This section proceeds from the assumption that those measures came to naught and the refugee managed to leave his country of origin. On his journey, he may nonetheless be prevented from reaching the border of another state: his boat, may, for instance, be pushed back into the sea; he may be intercepted and returned to his point of departure; or he might reach a state but face a closed border.

The legal issues that are addressed in this section follow the journey of the refugee. The analysis includes a review of possible exceptions to any obligations the state of refuge may have *vis-à-vis* refugees in those circumstances.

### B. *The Right to Seek Asylum: Corresponding Obligations?*

The right to leave one's country is an incomplete right; in a world carved up into nation states—no *terra nullius* left—leaving one's country necessarily requires entry into another. The same applies to departure in search of asylum<sup>120</sup>: it is obvious that protection as a refugee requires “admission, somewhere” “as the first step,”<sup>121</sup> and that admission will rarely be secured preceding departure.<sup>122</sup> Assuming that the right to seek asylum

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119. U.N. High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, ¶ 28, UN Doc. HCR/IP/4/Eng/REV.3 (2011); Hathaway & Foster, *supra* note 115, at 25.

120. Worth mentioning are the Bajau refugees who failed to access protection and built their homes off-shore in the ocean. See Belinda Grant Geary, *The Incredible Bajau refugees who built their homes in the ocean*, DAILY MAIL AUSTRALIA, (May 1, 2015), <http://www.dailymail.co.uk/news/article-3063691/The-incredible-Bajau-refugee-community-told-not-allowed-live-Malaysian-land-built-homes-ocean.html>.

121. U.N. High Comm'r for Refugees, Note on International Protection, ¶ 10, U.N. Doc. A/AC.96/728 (Aug. 2, 1989).

122. Refugees *sur place*, of course, have secured entry already. Switzerland used to have an embassy procedure that enabled filing an asylum application at Swiss representations abroad. It was abolished in September 2012, and replaced by that of a humanitarian visa for foreign nationals located abroad. *Humanitarian Visas*, SWISS REFUGEE COUNCIL, <https://www.refugeecouncil.ch/asylum-law/asylum-procedure/humanitarian-visas.html> (last visited Aug. 7, 2017). Worth mentioning in this respect is the CJEU Judgement C 638/16 PPU X and X of 7 March 2017 concerning a visa request of Syrian nationals with a view to making an asylum application in Belgium upon arrival. The CJEU ruled that the issue fell outside EU law and within the scope of domestic law, and it in addition observed that concluding otherwise would be tantamount to allowing third-country nationals to lodge applications for visas to obtain international protection in the EU member state of their choice. Case C-638/16 PPU, X & X v. État belge, ECLI:EU:C:2017:173. Visas are not always required; disregarding

does not correspond with a legal obligation to grant asylum—since granting asylum still is essentially a discretionary power<sup>123</sup>—the question then becomes, what obligations, if any, do correspond with the right to seek asylum?

It is generally accepted that the first and foremost corresponding obligation is the prohibition of (direct and indirect) refoulement.<sup>124</sup> From the point of view of the refugee, this prohibition constitutes an indispensable form of protection, albeit a negative one, while he is also clearly in need of positive forms of protection. The former of these protections will be the subject of this section, and the latter, albeit confined to freedom of movement, of the next.

### C. *The Principle of Non-refoulement: Extraterritorial Reach*

The prohibition of refoulement is laid down in article 33(1), 1951 Convention:

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.<sup>125</sup>

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the fact that Turkey confined its obligations under the 1951 Convention to European refugees, no visas were required for Syrian nationals who could simply fly to Turkey until 8 January 2016 when a new entry visa requirement on Syrian nationals wishing to travel to Turkey became effective. See Turkish Embassy in Kuwait, *Visa Regulation Update for Syrian Citizens*, (Dec. 30, 2015), <http://kuwait.emb.mfa.gov.tr/ShowAnnouncement.aspx?ID=247840> (last visited on Aug. 27, 2017).

123. See Kay Hailbronner, Comments On: *The Right to Leave, the Right to Return and the Question of a Right to Remain*, in *THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES* 109, 113-14 (V. Gowland-Debbas ed., 1996); GOODWIN-GILL & MCADAM, *supra* note 65, at 358-65. However, this traditional discretion is frequently coupled to a subjective domestic right to be granted asylum. See María-Teresa Gil-Bazo, *Asylum as a General Principle of International Law*, 27 *INT’L J. REFUGEE L.* 3 (2015) (in terms of “a right of individuals to be granted asylum of constitutional rank.”).

124. According to Hailbronner, this is the only exception to the principle that states may restrict the admission of foreigners to their territory. See Hailbronner, *supra* note 123, at 114; see also Walter Kälin et al., *Article 33, para. 1*, in *THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL* 1327, 1335 (Andreas Zimmermann ed., 2011) (the principle of *non-refoulement* is an essential corollary to the right to seek asylum). For the text of the prohibition, see *infra* Section II.C.

125. Many human rights treaties comprise comparable prohibitions. See, e.g. ICCPR, *supra* note 10, art. 7; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Rights of the Child art. 22(1), Nov. 20, 1989 1577 U.N.T.S. 3; Comparable prohibitions are present at the regional level. See, e.g. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222; American Convention on Human Rights: Pact of San Jose, Costa Rica art. 22(8), Nov. 22, 1969, 1144 U.N.T.S. 144.

The principle may have developed into a norm of customary international law,<sup>126</sup> but it is a moot point as to whether state practice—which is not consistent and uniform—supports this, particularly when breaches are not justified in terms of a breach of the norm. In view of the lack of consistent state practice pertaining to its observance, either the principle has not yet developed into a norm of customary international law or it has.<sup>127</sup> If it has, present-day state practice—which increasingly consists of acts that are in breach of the principle of non-refoulement<sup>128</sup>—and the lack of justifications for those acts in terms of this norm, may be indicative of the modification of the principle. Identifying when a norm (assuming there is one) gives way to a new, possibly contrary norm is complex and not readily ascertainable.<sup>129</sup>

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126. This is the position of states parties to the 1951 Convention. See Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, ¶ 4, UN Doc. HCR/MMSP/2001/09 (Dec. 13, 2001). This is also the position of UNHCR. See U.N. High Comm’r for Refugees, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, ¶ 15 (Jan. 26, 2007), <http://www.refworld.org/docid/45f17a1a4.html>; U.N. High Comm’r for Refugees, 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) <http://www.refworld.org/docid/437b6db64.html>. This is also the position of most contemporary scholars. See Sir Elihu Lauterpacht & Daniel Bethlehem, *Non-Refoulement (Article 33 of the 1951 Convention)*, in REFUGEE PROTECTION IN INTERNATIONAL LAW. UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, 143 (Erika Feller et. al eds., 2003); see also Kälin et al., *supra* note 124, at 1345-46; but see HATHAWAY, *supra* note 14, at 364-65; James C. Hathaway, *Leveraging Asylum*, 45 TEX. INT’L L.J. 503, 508, 536 (2010) (contesting this position). Some claim the principle has even evolved into a norm of *ius cogens*. See Exec. Comm. of the High Comm’r’s Programme, General Conclusion on International Protection, ¶ (b), U.N. Doc. No. 25 (XXXIII) (Oct. 20, 1982); Exec. Comm. of the High Comm’r’s Programme, General Conclusion on International Protection, ¶ I, U.N. Doc. No. 79 (XLVII) (Oct. 11, 1996); J. Allain, *The jus cogens nature of non-refoulement*, 13 INT’L J. REFUGEE L. 533 (2001); but see Aoife Duffy, *Expulsion to Face Torture? Non-Refoulement in International Law*, 20 INT’L J. REFUGEE L. 373 (2008) (contending the evidence for this claim is not convincing.).

127. See *supra* note 126 (most would maintain it has evolved into a norm of customary international law).

128. In that respect, reference should in particular be made to the practice of states not parties to the 1951 Convention and/or the 1967 Protocol (states parties simply have to comply with Art. 33(1)); see for instance, the practice of Asian states with respect to Rohingya refugees. See *Bangladesh pushes back Rohingya refugees amid collective punishment in Myanmar*, AMNESTY INT’L, (Nov. 24, 2016) <https://www.amnesty.org/en/latest/news/2016/11/bangladesh-pushes-back-rohingya-refugees-amid-collective-punishment-in-myanmar/>; Southeast Asia: Accounts from Rohingya Boat People, HUM. RTS. WATCH (May 27, 2015), <https://www.hrw.org/news/2015/05/27/southeast-asia-accounts-rohingya-boat-people>; *Pakistan Coercion, UN Complicity. The Mass Forced Return of Afghan Refugees*, HUM. RTS. WATCH (Feb. 13, 2017); see also *infra* Section II.D.

129. Cf. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, (“The significance for the Court of cases of State conduct prima facie inconsistent with the principle of [*in casu*] non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented

The analysis will henceforth proceed from the principle of non-refoulement as laid down in article 33(1) of the 1951 Convention, so in terms of a binding treaty obligation. In view of the stage of the journey of the refugee—who left his country of origin but has not yet reached another country—the physical reach of the principle of non-refoulement must be identified first.<sup>130</sup>

Since measures that states take to prevent refugees from arriving in their countries continue after the refugees have managed to physically leave their country of origin - boats are pushed back at sea, and intercepted refugees are returned to countries where their lives and freedom are threatened, either directly or indirectly, on account of onward removal<sup>131</sup> - the main question is whether the principle of non-refoulement has extraterritorial reach (assuming that those who would be subjected to forced return would indeed end up in territories where their lives or freedoms would be threatened in the sense described in article 33(1)). That question may not have yielded a clear-cut affirmative answer in the past,<sup>132</sup> but developments in international human rights law regarding the extraterritorial exercise of jurisdiction have since made themselves felt.

In the previous section, reference was made to the view of the HRC pertaining to the legal consequences of having effective control over persons regardless of location.<sup>133</sup> An early and clear example of this is the view of the Committee in the case of *López Burgos v. Uruguay*<sup>134</sup> regarding acts undertaken by Uruguayan security and intelligence forces in Argentina—including kidnapping and secret detention—with respect to a national who had fled to that country for political reasons (and had been recognized as a refugee by UNHCR).<sup>135</sup> With a reference to the obligations of states under ICCPR article 2(1),<sup>136</sup> the HRC observed that “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”<sup>137</sup>

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exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.”).

130. Throughout assuming that the asylum seeker satisfies the definition of refugee laid down in the 1951 Convention. Refugee status is not dependent on status determination: an asylum seeker is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. U.N. Refugee Agency, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, §1.28, U.N. Doc. HCR/1P/4/ENG/Rev.3 (2011).

131. See *id.* § 1.5; see also *supra* Section I.E.

132. See *id.* § 2.4; see also *infra* Section II.D.

133. U.N. Human Rights Comm., *supra* note 23, ¶ 10.

134. U.N. Human Rights Comm., Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, at 176, U.N. Doc. A/36/40 (June 6, 1979).

135. *Id.*

136. U.N. Human Rights Comm., *supra* note 22.

137. U.N. Human Rights Comm., *supra* note 134, at 182-83.

A more recent, regional, example is the case of *Hirsi Jamaa v. Italy*, which came before the European Court of Human Rights.<sup>138</sup> The case concerned Somali and Eritrean migrants travelling from Libya who had been intercepted on the high seas by Italian state agents and were returned to Libya.<sup>139</sup> According to the court, “in the period between boarding the ships of the Italian armed forces and 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.”<sup>140</sup>

Accordingly, the acts of the Italian authorities fell within Italy’s jurisdiction in the sense of article 1 of the 1950 European Convention on Human Rights and Fundamental Freedoms (European Convention), a provision that is similar to article 2(1) ICCPR.<sup>141</sup>

The reasoning in those cases that persons fall within the jurisdiction of a state when they find themselves within the effective control of that state regardless of physical location has been applied to the prohibition of refoulement.<sup>142</sup> However, the reasoning in these cases mentioned above is predicated on the explicit obligation included in the ICCPR and the European Convention respectively, to the effect that these instruments apply to those who find themselves either within the territory and subject to the jurisdiction of the contracting state (ICCPR)<sup>143</sup> or simply within the jurisdiction of the state concerned (European Convention),<sup>144</sup> and then proceed to argue that “jurisdiction” is not necessarily territorially based. There is no provision to this effect in the 1951 Convention, and the argument, therefore, cannot simply be replicated.

Whereas most of the rights that are included in the 1951 Convention are explicitly predicated on the physical presence of the refugee in the

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138. *Hirsi Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 107.

139. *Id.*

140. *Id.*, ¶ 81.

141. *Id.*, ¶ 82. Art. 1 runs as follows: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

142. *Lauterpacht & Bethlehem*, *supra* note 126 at 111. (“It follows that the principle of *non-refoulement* will apply to the conduct of State officials or those acting on behalf of the State *wherever this occurs*, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc.”) (emphasis in original).

143. As indicated earlier, in Section I.E, the Human Rights Committee takes this in a disjunctive sense. *See supra* note 126 and accompanying text.

144. *See* Eur. Convention for the Prot. of Hum. Rts. and Fundamental Freedoms, *supra* note 125, at 2a. *Cf. Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 1, ¶ 62 (1995) (“the concept of ‘jurisdiction’ under this provision [Article 1 of the European Convention on Human Rights and Fundamental Freedoms] is not restricted to the national territory of the High Contracting Parties.”). Nonetheless, the European Court has emphasized more than once that “jurisdiction” is essentially territorial, and is presumed to be exercised normally throughout the state’s territory. *See Hirsi Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 107, 131; *see also* *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 16–18; *see also* *Ilascu v. Moldova*, 2004-VII Eur. Ct. H.R. 73; *see also* *Assanidze v. Georgia*, 2004-II Eur. Ct. H.R. 31.



country of refuge, the principle of non-refoulement is not.<sup>145</sup> This has been adduced as an argument to assume the principle applies whenever a state has jurisdiction over persons, regardless of location, on the basis of the default position regarding jurisdiction in public international law.<sup>146</sup> Supporting this inference are the object and purpose of the 1951 Convention—assuring refugees the widest possible exercise of fundamental rights and freedoms—which would be compromised if a refugee could be handed over to his persecutors simply because the returning state acted outside its own territory.<sup>147</sup> Recalling the observation of the HRC quoted earlier, such a consequence would be unconscionable and hard to reconcile with the prohibition itself, as it provides that no contracting State shall expel or return a refugee “in any manner” whatsoever to the frontiers of territories where his life or freedom would be threatened.

As a result, states are not at liberty to ignore the principle of non-refoulement outside their territory but are bound to observe it whenever they exercise effective control and hence jurisdiction over refugees.<sup>148</sup> It also means that states cannot evade their obligations by erecting borders just outside their territory in an attempt to avoid their responsibilities.<sup>149</sup> Illustrative of this attempt at evasion is the construction of three parallel fences by Spain around Melilla, a Spanish enclave situated in North Africa; only those who manage to cross the first two fences will have their claims heard, while the others will be sent back.<sup>150</sup>

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145. In particular, modes of physical presence govern the entitlements of refugees under the 1951 Convention; see *infra* Section 4.B.

146. HATHAWAY, *supra* note 14, at 169. UNHCR infers the extraterritorial reach of the principle of *non-refoulement* from the text of art. 33(1); 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, ¶ 26 (Jan. 26, 2007): (“The extraterritorial applicability of the non-refoulement obligation under Article 33(1) is clear from the text of the provision itself.”).

147. KÄLIN, ET AL., *supra* note 124, at 1361–62.

148. The United States does not accept extraterritorial application of human rights obligations, including that of *non-refoulement*. Illustrative for this position is the US practice of interdicting Haitian refugees, on which see *Sale, Acting Commissioner, Immigration and Naturalization Service v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993); overruled by *The Haitian Centre for Human Rights v. United States*, Judgment, Inter-Am. Ct. H.R. No. 10.675 (Mar. 13, 1997), and *supra* note 95. For a critical review of this position — “increasingly out-of-step with the established jurisprudence” — see Beth Van Schaack, *The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INT’L. L. STUD. 20, 20–65 (2014).

149. Pretending parts of the territory are not their territory is to no avail either, on which see *infra* Section II.E.

150. JONES, *supra* note 4, at 14. At the time of writing a complaint has been filed at the European Court of Human Rights by two refugees; *N.D. and N.T. v. Spain*, App. Nos. 8675/15 & 8697/15, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-156743> (a Malian and Ivorian national who were immediately and summarily arrested and returned to Moroccan territory after they had crossed all three fences). U.N.H.C.R. has been granted leave to intervene by the Court. In an open letter addressed to the Spanish Minister of Interior, a coalition of 85 Spanish NGOs demanded clarification over the potential push-backs of over 1000 people who tried to climb over the border fence between the second Spanish enclave of Ceuta

#### D. *Unresponsive Borders and the Principle of Non-refoulement*

The finding that the prohibition of refoulement has extraterritorial reach in case of effective control over a refugee means that returning the refugee to the frontiers of territories where his life or freedom would be threatened—i.e., exercising jurisdiction—breaches the principle of non-refoulement, regardless of where it takes place. By implication, this finding would also apply to rejection at the border. This may include failing to hear, or respond to, a protection claim—not necessarily as an instance of exercising extraterritorial jurisdiction, but rather an instance of exercising territorial jurisdiction. Still there remain questions particularly with respect to the increasingly popular practice of erecting walls and fences.<sup>151</sup> For example, does the principle of non-refoulement apply in the case of a migration barrier—fence, wall or electronic device—that fails to identify and respond to refugees? That is, does it apply with respect to unresponsive borders?<sup>152</sup>

For a long time, the answer to the question of whether article 33(1) also prohibited rejection at the border (when such rejection would result in return to the frontiers of territories as described in this provision), was not clear-cut. This lack of clarity is paradoxical considering that the French verb “*refouler*” was inserted even into the English text to dispel any doubts about the scope of the prohibition. At the time of drafting, the administrative measure of “refoulement” reportedly only existed in

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and Morocco earlier this year; *Coalition of 85 Spanish NGOs demand clarification of potential push backs of over thousand people at Spanish-Moroccan border*, EUR. COUNCIL ON REFUGEES AND EXILES (Jan. 13, 2017), <https://www.ecre.org/coalition-of-85-spanish-ngos-demand-clarification-of-potential-push-backs-of-over-thousand-people-at-spanish-moroccan-border/>.

151. There are an estimated 63 or 70 barriers located around the world, which are aimed at stemming migration/refugee flows; cf. Samuel Granados et al., *Raising Barriers, A New Age of Walls (Episode 1)*, THE WASHINGTON POST (Oct. 12, 2016), <https://www.washingtonpost.com/graphics/world/border-barriers/global-illegal-immigration-prevention/>; Ann Simmons, *Border walls aren't unheard of, but today they increasingly divide friends, not enemies*, L.A. TIMES (Jan. 31, 2017), <http://www.latimes.com/world/mexico-americas/la-fg-border-barriers-snap-20170131-story.html>; both sources cite that at the fall of the Berlin Wall, there were 15 barriers remaining globally; see also Samuel Granados et al., *Fenced Out, A New Age of Walls (Episode 2)*, THE WASHINGTON POST (Oct. 14, 2016), <https://www.washingtonpost.com/graphics/world/border-barriers/europe-refugee-crisis-border-control/>. For an overview of contemporary fences, see *More neighbors make more fences*, THE ECONOMIST (Jan. 7, 2016), <https://www.economist.com/blogs/graphicdetail/2016/01/daily-chart-5>. In Europe, the total length of barriers is estimated to stretch 1200km and is estimated to have cost 570 million euros as of the end of 2016. Gabriela Baczynska & Sara Ledwith, *How Europe Built Fences to Keep People Out*, REUTERS (Apr. 4, 2016), <http://www.reuters.com/article/us-europe-migrants-fences-insight-idUSKCN0X10U7>. On walls and international law, see Florian Couveinhes, *Les murs et le droit international*, 56, 1, ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL (Jean-Marc Sorel ed., 2010).

152. By way of illustration, the Israeli West Bank Barrier is made of prefabricated concrete sections, 5 meters high with a wire and mesh superstructure. Parts consist of an 8-meter high solid concrete wall, and when completed the wall will be 400 miles long. *Q&A: What is the West Bank Barrier?*, BBC NEWS (Sept. 15, 2005), [http://news.bbc.co.uk/2/hi/middle\\_east/3111159.stm](http://news.bbc.co.uk/2/hi/middle_east/3111159.stm).

Belgium and France, and the drafters agreed that it meant either deportation as a police measure or non-admission at the frontier because the presence of the person in the country was considered to be undesirable.<sup>153</sup> It would thus seem that the French verb was inserted precisely to include rejection at the border.<sup>154</sup> However, “in view of the fact that Art. 33 does not deal with admission”<sup>155</sup>—nor does the Convention, for that matter: “[t]he Committee had, it was true, decided to delete the chapter on admittance, considering that the convention should not deal with the right of asylum and that it should merely provide for a certain number of improvements in the position of refugees”<sup>156</sup> - Article 33 was considered to concern only refugees who had gained entry into the territory of a contracting state, not refugees who sought entrance into that territory<sup>157</sup>:

In other words, Art. 33 lays down the principle that once a refugee has gained asylum (legally or illegally) from persecution, he cannot be deprived of it by ordering him to leave for, or by forcibly returning him to, the place where he was threatened with persecution, or by sending him to another place where the threat exists, but that no Contracting State is prevented from refusing entry in this territory to refugees at the frontier.<sup>158</sup>

The paradoxical result was summarized as follows: “[I]f a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck.”<sup>159</sup>

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153. ROBINSON, *supra* note 14 at 162; *but see* GRAHL-MADSEN, *supra* note 80, at 99; ATLE GRAHL-MADSEN, *TERRITORIAL ASYLUM* 40 (1980).

154. *Cf.* Convention Relating to the International Status of Refugees art. 3, Oct. 28, 1933, 3663 L.N.T.S. 201, by virtue of which: “Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), *refugees who have been authorized to reside there regularly*, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin. [. . .]” (emphasis added).

155. ROBINSON, *supra* note 14, at 162.

156. U.N. GAOR, 2nd Sess., 20th mtg. ¶ 54, U.N. Doc. E/AC.3/SR.20 (Feb. 10, 1950) (US representative Henkin. The failed conference on territorial asylum in 1977 was meant to establish an individual right to be granted asylum. *See* Weis, *supra* note 83, at 151–71. Beverly Ann West, *The Elusive Convention - A Study of the Issues Involved in the 1977 U.N. Conference on Territorial Asylum* (Spring 1983) (Dissertation, The Fletcher School of Law and Diplomacy), [http://repository.forcedmigration.org/show\\_metadata.jsp?pid=fmo:3375](http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:3375).

157. ROBINSON, *supra* note 14, at 163.

158. *Id.*

159. *Id.* at 163. Nonetheless, Hungary amended its Asylum Act and the Act on the State Border, effective per 5 July 2016, with a view to enabling push-backs of asylum seekers who are apprehended *on* Hungarian territory within 8 kilometers from either the Serbian-Hungarian or the Croatian-Hungarian border. *Hungary: Latest amendments legalise extrajudicial push-back of asylum seekers*, EUR. COUNCIL ON REFUGEES AND EXILES (July 8, 2016), <https://www.ecre.org/hungary-latest-amendments-legalise-extrajudicial-push-back-of-asylum-seekers/>. On 17 May 2017, the European Commission decided to move forward the infringement procedure against Hungary concerning its asylum legislation including Hungary’s com-

Nonetheless, already in 1967, the unanimously adopted Declaration on Territorial Asylum simply stated that those seeking asylum would not be subjected to measures such as rejection at the frontier.<sup>160</sup> The reach of the prohibition was consequently extended to comprise rejection at the border if such rejection would result in the direct or indirect refoulement of the refugee. The question is whether this implies responsibility for any breach of the principle of non-refoulement on account of having unresponsive borders,<sup>161</sup> or whether that would be too exacting an obligation.

Having an impenetrable or unresponsive border should be distinguished from the situation that was described by Grahl-Madsen in terms of a state placing its frontier guards right at the frontier and fencing off its territory, so that no one can set foot in it without permission to do so,<sup>162</sup> since that would be tantamount to rejection at the border by those exercising border control, and should be taken a step further: a sealed-off country without any frontier guards, which relies solely on border fences.<sup>163</sup> It is the (far from) hypothetical situation that has been described by Grahl-Madsen in terms of people only seen as shadows or moving figures on the other side of the fence<sup>164</sup>—an image evocative of Plato’s Allegory of the Cave.

Once the principle of non-refoulement includes rejection at the border, it becomes legally irrelevant how a state would breach this principle,

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promising the right to effective access to asylum procedures. *Commission follows up on infringement procedure against Hungary concerning its asylum law*, EUR. COMM’N (May 17, 2017), [http://europa.eu/rapid/press-release\\_IP-17-1285\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1285_en.htm).

160. G.A. Res. 2312 (XXII), at art. 3(1), Declaration on Territorial Asylum, (Dec. 14, 1967). See also Weis, *supra* note 83, *passim* on the deliberations on the scope of *non-refoulement* during the drafting of a Convention on Territorial Asylum: only with great difficulty was rejection at the border was included. See also OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, art. II(3), *opened for signature* Sept. 10, 1969, 14691 U.N.T.S. (entered into force June 20, 1974).

161. The reference is solely to land borders, since airports are located within the territory of states, and those who arrive in airports and are kept in transit zones find themselves both within the territory of the country concerned and within its jurisdiction. KÄLIN, ET AL., *supra* note 124, at 1367; see also *infra* Section II.E.1.

162. GRAHL-MADSEN, *supra* note 16, art. 33.

163. In case it concerns the border of a neighboring country, those who want to seek asylum are trapped in their own country (e.g. Syrian refugees who face a 911 km Turkish wall sealing off the Syrian border, ECRE. *Refugees have their backs against the Turkey-Syria border wall: First phase of construction finalized*, EUR. COUNCIL ON REFUGEES AND EXILES (Apr. 28, 2017), <https://www.ecre.org/refugees-has-their-backs-against-the-turkey-syria-border-wall-first-phase-of-construction-finalized/>. That would in turn mean that the criterion of alienage is not satisfied. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status ¶ 88 at 18 (2011); HATHAWAY, *supra* note 14 at 367; HATHAWAY, FOSTER, *supra* note 115 at 29 (“the alienage requirement is only met when the at-risk individual physically departs her country of origin”). But see Kälin, et al., *supra* note 124, at 1376 (arguing that “[a] refugee who has approached a border guard at the frontier of the country of refuge has already left the country of persecution despite the fact that he or she cannot enter the territory of the country where he or she expects to find safety”). So, what if there are no border guards, but merely a hermetically sealed-off border?

164. GRAHL-MADSEN, *supra* note 16, art. 33.

whether it be by physically pushing refugees away or by maintaining hermetically sealed-off (i.e., unresponsive) borders that accomplish the same goal.<sup>165</sup> Yet it would seem that a strict liability standard would be too exacting,<sup>166</sup> especially in view of the fact that the border's unresponsiveness may also be caused by natural barriers, such as mountain ranges or rivers. What, then, can be expected of states without compromising the obligation of non-refoulement? A due diligence standard—albeit taken as an objective standard of behavior, in the sense of a strict concept of diligence along objective international standards (rather than a subjective fault-oriented standard)<sup>167</sup>—may be a more appropriate standard by which to measure compliance with article 33(1) (and hence a good faith implementation of the 1951 Convention) when taken as the minimum level of efforts that should be undertaken to ensure compliance with article 33(1).<sup>168</sup> The requisite level of efforts would consist of ensuring that the border is a responsive one, in that it both provides for reasonable access to the state's territory, measured by the immediacy of the risk, and affords the opportunity for a protection claim to be made.<sup>169</sup> Introducing the due diligence standard does not entail any watering down of the primary rule—that is, the principle of non-refoulement—but rather serves to identify what is required by states with respect to their control of their own territorial borders.<sup>170</sup>

The obligation to provide reasonable access and opportunity is, moreover, subject to the principle of non-discrimination as provided in article 3 of the 1951 Convention: “The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion

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165. See *Fear and Fences: Europe's Approach to Keeping Refugees at Bay*, AMNESTY INT'L (Nov. 17, 2015), <https://www.amnesty.org/en/documents/eur03/2544/2015/en/>.

166. Strict liability as too onerous a standard came up during the sessions of the Eighth Colloquium, on which see *supra* note 1.

167. Cf. Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERMAN Y.B. INT'L L. 9, 42–44 (1992).

168. “Due diligence” is indicative of what a responsible state ought to do under normal conditions in a situation with its best practicable and available means with a view to fulfilling its international obligation. Pierre Dupuy, *Due Diligence in the International Law of Liability*, in LEGAL ASPECTS OF TRANSFRONTIER POLLUTION 369-79 (Org. for Econ. Cooperation and Dev., ed. 1977).

169. The fact that a wall or comparable barrier may have been erected for other purposes would not excuse the state concerned from exercising due diligence and ensuring reasonable access and opportunity for a protection claim to be made. If security is a concern, status determination procedures that include 1F reviews are called for. Hungary was criticized for “automatic rejections of asylum applications at the border” by the Working Group on the Universal Periodic Review Hungary, see U.N. Human Rights Council (UNHRC), Report of Working Group on the Universal Periodic Review Hungary, ¶ 64, U.N. Doc. A/HRC/33/9 (July 8, 2016).

170. Arming “border hunters” to secure unresponsiveness clearly is in breach of this obligation. Cf. Krisztina Than, *Hungary to arm new 'border hunters' after six-month crash course*, REUTERS (Mar. 9, 2017), <https://www.reuters.com/article/us-europe-migrants-hungary-borderhunters/hungary-to-arm-new-border-hunters-after-six-month-crash-course-idUSKBN16G2ED>.

or country of origin.”<sup>171</sup> Consequently, the contemporary practice of states foreclosing reasonable access and opportunity to refugees who come from particular states is a violation of the prohibition of refoulement.<sup>172</sup>

#### E. *Exceptions to the Principle of Non-refoulement*

Reservations are not allowed to article 33(1),<sup>173</sup> but that does not mean the prohibition is absolute. Article 33(2) provides the following exception:

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 judgement of a particularly serious crime, constitutes a danger to the community of that country.

UNHCR emphasizes that this exception must be interpreted restrictively; although states have a margin of discretion in applying article 33(2), that margin is limited.<sup>174</sup> Moreover, it appears that the threshold is high: acts that are considered to endanger national security, such as espionage, sabotage of military installations, and terrorist activities, must be of a particularly serious nature.<sup>175</sup> The danger to national security must constitute a serious danger rather than a danger of some lesser order.<sup>176</sup> With respect

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171. Art. 3 has, moreover, extraterritorial reach, just like Art. 33(1), see Hathaway, *supra* note 14, at 163.

172. Several Balkan states—Slovenia, Croatia, Serbia, and Macedonia—prevent the entry of all refugees except for Syrian and Iraqi refugees, see *inter alia* Lydia Gall, *Dispatches: Discrimination at Western Balkan Borders Puts People at Risk*, HUM. RTS. WATCH (Nov. 20, 2015), <https://www.hrw.org/news/2015/11/20/dispatches-discrimination-western-balkan-borders-puts-people-risk>; UNHCR, IOM, and UNICEF statement on new border restrictions in the Balkans, UNICEF (Nov. 20, 2015), [https://www.unicef.org/media/media\\_86431.html](https://www.unicef.org/media/media_86431.html). Since February 2016, additional restrictions have been placed on Afghan refugees, who are banned from entering their territories, see *EU/Balkans/Greece: Border Curbs Threaten Rights*, HUM. RTS. WATCH (Mar. 1, 2016), <https://www.hrw.org/news/2016/03/01/eu/balkans/greece-border-curbs-threaten-rights>.

173. 1951 Convention *supra* note 2, art. 42(1).

174. Cf. U.N. High Commissioner for Refugees (UNHCR), Advisory Opinion on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees (Jan. 6, 2006), <http://www.refworld.org/docid/43de2da94.html>. See also ANDREAS ZIMMERMANN & PHILIPP WENNHOLZ, *Article 33, para. 2, in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL*, *supra* note 124, at 1399.

175. Zimmermann & Wennholz, *supra* note 174, at 1415; Lauterpacht & Bethlehem, *supra* note 126 at 136. “The need for the danger to be of some magnitude rather follows from the ordinary meaning of the provision (‘security of the country’), since anything such as a minor or trivial danger to national security is hardly imaginable”, Zimmermann & Wennholz, *supra* note 174, at 1417.

176. Lauterpacht & Bethlehem, *supra* note 126, at 136; “The need for the danger to be of some magnitude rather follows from the ordinary meaning of the provision (‘security of the country’), since anything such as a minor or trivial danger to national security is hardly imaginable”, Zimmermann & Wennholz, in Zimmermann, *supra* note 174, at 1417.

to the second reason for denying the protection of non-refoulement to a refugee, article 33(2) is quite clear in requiring a final judgment of conviction for a particularly serious crime—that is, a crime that justifies the inference that the refugee constitutes a danger to the community of the state concerned. The level of “danger” should be interpreted in accordance with the national security exception in the same provision.<sup>177</sup>

In short, only in clear and extreme cases—either when the refugee is a danger to national security, or when a refugee who is a serious criminal poses a danger to the safety of the community of that country—is refoulement permitted.<sup>178</sup> However, Robinson cautions that this particular exception must be read in connection with articles 31 and 32 of the 1951 Convention, which entails that return under article 33(2) is conditioned on the obligation of the state to grant the refugee a reasonable period of time and all the necessary facilities to obtain admission into another country. Only if that fails, return to the country of origin may take place.<sup>179</sup> This caution can be justified by the fact that the application of article 33(2) does not lead to loss of refugee status; it is confined to authorizing the host state to divest itself of its protective responsibilities.<sup>180</sup>

The 1951 Convention does not provide any other exception to the prohibition of refoulement, but a number of exceptions have nonetheless been suggested, including territorially-based and numerically-based exceptions, as well as legal constructs that in essence serve to deflect the responsibility for observing the principle of non-refoulement to other states. These exceptions are discussed below.

### 1. Territorially-based Exceptions

States have been rather ingenious in their attempts to evade the obligation of article 33(1). For instance, France tried to excise part of its airport in Paris, and Australia part of its territory (Christmas Island),<sup>181</sup> in both cases with a view to evading their international obligations with respect to refugees, but to no avail. The European Court of Justice held that the international zone in the Paris airport did not, despite its name, have extraterritorial status,<sup>182</sup> and the Australian High Court quashed the Aus-

177. Zimmermann & Wennholz, *supra* note 174, at 1421.

178. See Hathaway, *supra* note 14, at 353: in such cases, there is no additional proportionality requirement that must be met, *i.e.* no balancing of an individuated risk of persecution and the security interests of the state concerned. For a contrary view, see *inter alia* U.N. High Commissioner for Refugees (UNHCR), *supra* note 174.

179. ROBINSON, *supra* note 14, at 165. See also Zimmermann & Wennholz, *supra* note 174, at 1401 (recalling the drafting history and referring to the UK representative who intimated that every assistance would have to be provided to enable such a refugee to enter another country, even to the extent of helping him to obtain an entry permit).

180. Hathaway, *supra* note 14, at 344.

181. GOODWIN-GILL & JANE McADAM, *supra* note 65, at 256 estimate that “around 4,891 places have been excised from Australia’s migration zone.”

182. See *Amuur v. France*, App. No. 19776/92, 22 Eur. H.R. Rep. 533, at ¶ 52 (1996) (the Court notes that holding the applicants —Somali refugees—in the international zone of Paris-Orly Airport made them subject to French law). Russia too advanced this particular

australian excision attempt.<sup>183</sup> Australia nonetheless pressed an earlier, partial excision to its extreme in 2013—after an earlier attempt to do so failed in 2006—by excising its entire mainland from the reach of its migration law with respect to refugees arriving in Australia by boat.<sup>184</sup> Instead, refugees are moved to offshore processing centers in Nauru and Manus Island (Papua New Guinea), where they are detained in abysmal conditions.<sup>185</sup> In April 2016, the Supreme Court of Papua New Guinea held that the detention of the refugees on Manus Island is unconstitutional and therefore illegal.<sup>186</sup> Australia subsequently announced that the detention center

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argument, years later, and argued that the transit zone of Sheremetyevo Airport in Chimki, Russian Federation, is not the territory of the Russian Federation and is outside its jurisdiction, an argument that was rejected by the European Court of Human Rights in a case that concerned the detention of refugees in that transit zone, *Amuur v. France*, App. No. 19776/92, 22 Eur. H.R. Rep. 533, at ¶ 52 (1996).

183. *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth* (2010) 243 CLR 319 (High Court) (Austl.). On this case, see Hannah Stewart-Weeks, Note, *Out of Sight but Not out of Mind: Plaintiff M61/2010E v Commonwealth*, 33 SYDNEY L. REV. 831, 831–47 (2011).

184. See Anthea Vogel, *Over the Borderline: A Critical Inquiry into the Geography of Territorial Excision and the Securitisation of the Australian Border*, 38 U. NEW S. WALES L. J. 114, 114–45 (2015). On Australia's interdiction practices from 2001 onwards, see Schloenhardt & Craig, *supra* note 95.

185. See with respect to Nauru, *see inter alia*, Michael Garcia Bochenek, *Leaked Nauru Files Show Horrors of Australia's Refugee Detention System*, HUM. RTS. WATCH (Aug. 10, 2016), <https://www.hrw.org/news/2016/08/10/leaked-nauru-files-show-horrors-australias-refugee-detention-system>; *Australia: Appalling Abuse, Neglect of Refugees on Nauru. Investigation on Remote Pacific Island Finds Deliberate Abuse Hidden Behind Wall of Secrecy*, HUM. RTS. WATCH (Aug. 2, 2016), <https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru>. In the summer of 2016, more than 2,000 incident reports from Australia's detention camp on Nauru were leaked. Paul Farrell, Nick Evershed, & Helen Davidson, *The Nauru Files: cache of 2,000 leaked reports reveal scale of abuse of children in Australian offshore detention*, THE GUARDIAN (Aug. 10, 2016), <https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention>. With respect to Manus Island, see *Australia/Papua New Guinea: The Pacific Non-Solution*, HUM. RTS. WATCH (July 15, 2015), <https://www.hrw.org/news/2015/07/15/australia/papua-new-guinea-pacific-non-solution>. For a recent overview of both, see *Submission by Human Rights Watch on the Situation in Australia to the Committee on Economic, Social and Cultural Rights*, HUM. RTS. WATCH (May 2, 2017), <https://www.hrw.org/news/2017/05/02/submission-human-rights-watch-australia-committee-economic-social-and-cultural>).

186. In *Namah v. Pato* [2016] PJSC 13, ¶ 39 (Papua N.G.) between Belden Norman Namah, MP Leader of the Opposition, applicant, and Rimbink Pato, Minister for Foreign Affairs & Immigrations, National Executive Council and the Independent state of Papua New Guinea, “the forceful bringing into and detention of the asylum seekers on MIPC [Manus Island Processing Centre] is unconstitutional and is therefore illegal”. On 14 June, the Australian government and its contractors settled a class action suit on behalf of the refugees held at Manus island by offering 70 million Australian dollars, thus avoiding a trial on the illegal detention, yet continuing to deny liability. Pia Akerman, *Manus Island Class Action Settled by Government*, THE AUSTRALIAN (June 14, 2017), <http://www.theaustralian.com.au/national-affairs/immigration/manus-island-class-action-settled/news-story/efc8d2d274442459f3d90343f16d01c3>.



on Manus Island will be closed, albeit at an unspecified time.<sup>187</sup>

The recurrent attempts made by states to excise (parts of) territory from their jurisdiction and thus from the reach of international obligations are to no avail; they remain part of the territory of a state, and subject to the jurisdiction of that state.<sup>188</sup> Neither the excision of parts nor whole of an entire country can relieve a state from its responsibilities under international law, including international refugee law;<sup>189</sup> only cession of territorial sovereignty over (part of) its territory would achieve the desired result.<sup>190</sup>

## 2. A Numerically-based Exception

A categorically different exception consists of denying the applicability of non-refoulement in cases of mass influx, and so numbers would defy the applicability of article 33(1). A preliminary question is what constitutes a “mass influx”?

UNHCR’s Executive Committee defines “mass influx” in terms of considerable numbers of persons arriving at a rapid pace, to which it adds inadequate reception capacity, and the impossibility of proceeding with individual status determination procedures to assess such large numbers.<sup>191</sup> Therefore, “mass influx” is a variable notion. In the absence of a

187. Australia indicated in August 2016 that it would close its detention center in Papua New Guinea. *Australia agrees to close controversial Papua New Guinea refugee detention centre*, THE TELEGRAPH (Aug. 17, 2016), <http://www.telegraph.co.uk/news/2016/08/17/australia-agrees-to-close-controversial-papua-new-guinea-refugee/>. Apparently, the closure is now set to start within weeks and be concluded by 31 October 2017. *The future of refugees in the Manus Island detention center remains unclear*, EUR. COUNCIL ON REFUGEES AND EXILES (May 19, 2017), <https://www.ecre.org/the-future-of-refugees-in-the-manus-island-detention-centre-remains-unclear/>.

188. HATHAWAY & FOSTER, *supra* note 115, at 27 (“No form of words and no domestic law can change that”).

189. *New “excision” law does not relieve Australia of its responsibilities toward asylum seekers - UNHCR*, U.N. High Comm’r for Refugees (May 22, 2013), <http://www.unhcr.org/afr/news/press/2013/5/519ccec96/new-excision-law-relieve-australia-its-responsibilities-towards-asylum.html>.

190. Venice (Italy), which portrays itself as an “asylum city” (*Venezia Città dell’asilo*), was once ceded by Austria to France as a gift in 1866. See 1 OPPENHEIM’S INTERNATIONAL LAW, 679–82 (Robert Y. Jennings & Arthur Watts eds., 9th ed. 1996).

191. UNHCR Exec. Comm. of the High Comm’r’s Programme, Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations, U.N. Doc. A/AC.96/1003 (Oct. 8, 2004). The last point—the impossibility of proceeding with individual status determination procedures—is not convincing. First, the status of most refugees in the world is assessed on a collective basis (individual status determination is the exception rather than the rule). See *cf.* U.N. High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status, ¶ 4, HCR/GIP/15/11 (June 24, 2015). Secondly, a mass influx tends to consist of a single nationality, which makes collective recognition practicable. In the EU, the issue of a mass influx gave rise to Council Directive 2001/55/EC, 2001 O.J. (L 212/12) (EC) on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof; on the definition of “mass influx” see Council Directive 2001/55/EC, arts. 2(d), 5, 2001 O.J. (L 212/12) (EC) on the criteria that will be used by the Council

more precise yardstick, however, the notion appears to be prone to subjective assessments and, consequently, arbitrariness.<sup>192</sup>

By way of illustration, reference can be made to two states that introduced restrictions on account of a mass influx of refugees.<sup>193</sup> Lebanon hosts more than one million refugees, which means that a quarter of the population in Lebanon are refugees.<sup>194</sup> It introduced restrictions on the entry of Syrian refugees at the end of 2014<sup>195</sup> and closed its border to Syrian refugees on January 5, 2015.<sup>196</sup> The second state that introduced restrictions is Austria, a country that is eight times larger than Lebanon, with a smaller population than Lebanon and a GDP per capita in 2015 of USD 43,636.8 (Lebanon: USD 8,045.6).<sup>197</sup> Austria received nearly 90,000 new asylum applications in 2015—a threefold increase over the previous

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with a view to establishing the existence of a mass influx. It has so far never been implemented.

192. In May 2016, the European commission presented proposals to reform the Common European Asylum System by creating a fairer system for allocating asylum applications among EU member states. The new system will automatically establish when a country is handling a disproportionate number of asylum applications by comparison to the overall number of asylum claims made in the EU, by reference to a country's size and wealth in terms of the total GDP; if one country is receiving disproportionate numbers above that reference (150% of the reference number), all further new applicants in that country will be relocated across the EU following an admissibility verification of their claim. If a state decides not to take part in the reallocation, it must make a "solidarity contribution" of € 250,000 for each applicant for whom it would otherwise have been responsible. *Towards a sustainable and fair Common European Asylum System*, EUR. COMM'N (May 4, 2016), [http://europa.eu/rapid/press-release\\_IP-16-1620\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1620_en.htm). Asylum applicants would have the duty to remain in the member state responsible for their claim, and will only be entitled to material reception rights in the country where they are required to be present. *Id.*

193. Another state that took measures based on "mass migration", or rather "the dangers presented by mass migration" is Hungary which proclaimed a state of emergency. *See inter alia, Hungary maintains "state of emergency" and builds second anti-migrant fence on border with Serbia —update!*, HUNGARY TODAY (Mar. 3, 2017), <http://hungarytoday.intra.comp.hu/news/hungary-maintains-state-emergency-builds-second-anti-migrant-fence-border-serbia-53843>.

194. *PM Hariri: Lebanon at 'breaking point' due to refugees*, AL JAZEERA (Apr. 1, 2017), <http://www.aljazeera.com/news/2017/04/saad-al-hariri-lebanon-big-refugee-camp-170401045951087.html>.

195. *Lebanon sharply limits Syrian refugee entry*, AL ARABIYA (Oct. 19, 2014), <http://english.alarabiya.net/en/News/middle-east/2014/10/18/Lebanon-sharply-limits-Syrian-refugee-entry-.html> (last visited Nov. 19, 2017).

196. Issam Abdallah, *Lebanon implements new controls at Syrian border*, REUTERS (Jan. 5, 2015), <http://www.reuters.com/article/us-mideast-crisis-lebanon-refugees-idUSKBN0KE10C20150105>.

197. Austria is 83,871 square kilometers with a population of approximately 8.6 million, while Lebanon is 10,452 square kilometers with a population of approximately 5.9 million. *See UNdata: Austria*, U.N. STAT. DIVISION (Aug. 5, 2017), <http://data.un.org/CountryProfile.aspx?crName=AUSTRIA>; *UNdata: Lebanon*, U.N. STAT. DIVISION, <http://data.un.org/CountryProfile.aspx?crName=LEBANON>. On their comparative GDPs per capita, *see GDP per Capita (current US \$)*, THE WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=LB-AT>.

year.<sup>198</sup> It thereupon limited the number of refugees allowed to enter the country as of February 19, 2016: 3,200 per day either to travel to Germany or apply for asylum in Austria, and a daily limit of eighty asylum claims.<sup>199</sup>

Does a mass influx, however defined, allow derogating from article 33(1)? The wording of the text is clear in that it does not include an exception for a mass influx. It has therefore been argued that the principle must apply unless its application is clearly excluded.<sup>200</sup> According to the rules of treaty interpretation enshrined in the Vienna Convention on the Law of Treaties, recourse may be had to supplementary means of interpretation, including the preparatory work of a treaty and the circumstances of its drafting, in order to confirm the meaning resulting from the application of article 31, that is, the general rule of interpretation.<sup>201</sup> In this respect, it is worth noting that the issue of mass influxes was raised by the drafters.<sup>202</sup> The next question is whether the *travaux* support the inference that derogation from article 33(1) would be unlawful.

First, it has been suggested that the French verb “*refouler*” was added to article 33(1) to ensure that the duty of non-return would not have a wider meaning 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.”<sup>203</sup> Some states were in favor of a general exemption from article 33(1) in situations of mass influx that would seriously threaten national security or public order,<sup>204</sup> but there were others who considered such an exemption highly undesirable.<sup>205</sup> Nonetheless, the Dutch request “to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by arti-

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198. *Austria: Drastic, Unjustified Measures Against Asylum Seekers*, HUM. RTS. WATCH (Apr. 27, 2016), <https://www.hrw.org/news/2016/04/27/austria-drastic-unjustified-measures-against-asylum-seekers>.

199. The Austrian Parliament approved amendments to the Asylum Act that enables the government to declare a state of emergency in the case of a mass refugee influx, which could be a threat to national security. Cf. *ÄNDERUNG DES ASYLGESETZES 2005, DES FREMDENPOLIZEIGESETZES 2005 UND DES BFA-VERFAHRENSGESETZES* [Amendments to the Asylum Act 2005, the Aliens Police Act 2005 and the BFA Procedural Law] BUNDESGESETZBLATT [BGBl] No. 24/2016, ¶ 36, [https://www.ris.bka.gv.at/. . . 2016\\_I\\_24/BG-BLA\\_2016\\_I\\_24.rtf](https://www.ris.bka.gv.at/. . . 2016_I_24/BG-BLA_2016_I_24.rtf) (Austria). Applications made at the border would be subject to a fast-track admissibility procedure. See *Austrian Parliament approves law repudiating right to asylum*, EUR. COUNCIL ON REFUGEES AND EXILES (Apr. 20, 2016), <https://www.ecre.org/austrian-parliament-approves-law-repudiating-right-to-asylum/>. See also Wolfgang Benedek, *Recent Developments in Austrian Asylum Law: A Race to the Bottom?*, 17 GERMAN L. J. 6, 950–65 (2016).

200. LAUTERPACHT & BETHLEHEM, *supra* note 126, at 119 (adducing the humanitarian object of the treaty and the fundamental character of the principle).

201. See the introduction, *supra*, at 22–23.

202. See KÄLIN, ET AL., *supra* note 124, at 1341.

203. HATHAWAY, *supra* note 14, at 357; KÄLIN, ET AL., *supra* note 124, at 1341.

204. KÄLIN, ET AL., *supra* note 124, at 1377.

205. *Id.*

cle 33” was accommodated.<sup>206</sup> As a result, the outcome is a clear text that does *not* include an exception for mass influxes,<sup>207</sup> but it did not have to, since the drafters arguably considered it to be already covered by the inclusion of the French verb “*refouler*.”<sup>208</sup>

In the light of the drafting history of article 33(1), it is not surprising that the Declaration on Territorial Asylum, which was adopted unanimously in 1967, includes the possibility of exception to non-refoulement, albeit “only for overriding reasons of national security or in order to safeguard the population, as in case of a mass influx of persons,”<sup>209</sup> since this, in essence, repeats what had been clear to the drafters of the 1951 Convention.

The next question is whether this understanding of the prohibition of refoulement is still tenable. It is remarkable that the acknowledgement by UNHCR, particularly its Executive Committee (which after all consists of nearly one hundred states), that large influxes of refugees may pose practical problems to the country of refuge,<sup>210</sup> has not resulted in its confirming this particular understanding. To the contrary, the Executive Committee does not recommend a watering-down of non-refoulement. In its conclusion on situations of large influx, it explicitly provides that “[i]n all cases the fundamental principle of non-refoulement—including non-rejection at the frontier—must be scrupulously observed.”<sup>211</sup> The Executive Committee thus advocates strict compliance with article 33(1), but it simultaneously undercuts this compliance by softening the standard of protection that should be granted those who are admitted, “at least on a temporary basis.”<sup>212</sup> Their entitlements are reduced to “basic minimum standards”

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206. U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 35th mtg. ¶ 21, U.N. Doc. A/CONF.2/SR.35 (Dec. 3, 1951). Since it is not an official interpretation, it is nonetheless from a legal point of view meaningless, GOODWIN-GILL & MACADAM, *supra* note 65, at 206.

207. But see HATHAWAY, *supra* note 14, at 362, 376; the principle of *non-refoulement* does not bind a state faced with a mass influx of refugees insofar as the arrival of refugees truly threatens its ability to protect its most basic interests.

208. However, on the basis of the *travaux*, Egli concludes there is no exception for mass influxes, ANN VIBEKE EGGI, MASS REFUGEE INFLUX AND THE LIMITS OF PUBLIC INTERNATIONAL LAW, 171 (2002); Gammeltoft-Hansen that there is insufficient evidence that there was consensus about this issue among the drafters, THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL, 52 (2013); and Durieux & MacAdam that they do not reveal any intention to exclude collective persecution, Jean-François Durieux & Jane MacAdam, *Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies*, 16 INT'L J. OF REFUGEE L. 4, 9 (2004).

209. G.A. Res. 2312 (XXII), art. 3(2), Declaration on Territorial Asylum (Dec. 14, 1967).

210. UNHCR Exec. Comm. of the High Comm'r's Program, Conclusion on Protection of Asylum seekers in Situations of Large-Scale Influx, at I(2), U.N. Doc. A/36/12/Add.1 (Oct. 21, 1981) (“Large-scale influxes frequently create serious problems for States”).

211. *Id.* at II(A)(2).

212. Admittance on a temporary basis is arguably the second way to soften strict compliance with Art. 33(1). “In situations of large-scale influx, asylum seekers should be admit-

“pending arrangements for a durable solution,”<sup>213</sup> which will more often than not mean indefinitely.<sup>214</sup>

Leaving aside the watering down of entitlements, can strict compliance with article 33(1) be required of states when faced with a mass influx, even if article 33(1) would not allow derogation? Returning to the case of Lebanon mentioned above, the influx of Syrian refugees would, by all possible definitions, qualify as a mass influx. Lebanon clearly is overwhelmed, and can hardly cope.<sup>215</sup> In this particular case, assuming for sake of argument that Lebanon is a party to the 1951 Convention and/or 1967 Protocol (it is party to neither<sup>216</sup>), Lebanon could invoke the principle of necessity<sup>217</sup>:

Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for

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ted to the State in which they first seek asylum and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis [ . . . ].” UNHCR Exec. Comm. of the High Comm’r’s Program, *supra* note 210, at (II)(A)(1).

213. *Id.* at (I)(3) (“It is therefore imperative to ensure that asylum seekers are fully protected in large-scale influx situations, to reaffirm the basic minimum standards for their treatment pending arrangements for a durable solution, and to establish effective arrangements in the context of international solidarity and burden-sharing for assisting countries which receive large numbers of asylum seekers”). Those minimum standards are enumerated in the Conclusion—sub II B (2)—and are not cast in terms of the rights listed in the 1951 Convention, see *e.g.*, the last one “all steps should be taken to facilitate voluntary repatriation”. Comparable, and regarding a specific refugee situation—the former Yugoslavia—see UNHCR Exec. Comm. of the High Comm’r’s Program, Conclusion on International Protection, at (r), U.N. Doc. A/49/12/Add.1 (Oct. 7, 1994). It has been observed that the price states have demanded in admitting large numbers of refugees is a *de facto* suspension of 1951 Convention protection; see Durieux & MacAdam, *supra* note 208, at 4. In that respect, it is worth adding that 3 of the top 6 refugee hosting countries (Turkey, Pakistan, Lebanon, Jordan) are not parties to the 1951 Convention and/or 1967 Protocol whilst the fourth—Turkey—is but confines its obligations to European refugees.

214. The present-day reality is that less than one per cent of all refugees can be resettled, and less than one per cent can voluntarily return to their respective countries of origin. In case of large refugee populations, states rarely if ever naturalize the refugees concerned.

215. It calls for international assistance; see generally HUNGARY TODAY, *supra* note 193. Neither the 1951 Convention nor the 1967 Protocol, whilst acknowledging—Preamble 1951 Convention—that some states may be unduly heavily burdened (*cf. supra* note 6), comprise a mechanism on sharing responsibilities among states. *Cf.* U.N. High Commissioner for Refugees (UNHCR), Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations, U.N. Doc. EC/GC/01/7 (Feb. 19, 2001). Recent attempts to share responsibilities in Europe by way of relocation of asylum seekers from Italy and Greece came to naught: only 16,340 persons out of the target-commitment of 98,255 have been relocated from Greece and Italy. The target-commitment has been revised to just over 33,000 persons in total. See also *Commission report reveals downscaled ambition on relocation*, EUR. COUNCIL ON REFUGEES AND EXILES (Apr. 14, 2017), <https://www.ecre.org/commission-report-reveals-downscaled-ambition-on-relocation/>.

216. The same reasoning applies to obligations of customary international law.

217. Recourse to circumstances precluding wrongfulness came up during the sessions of the Eighth Colloquium, on which see *supra* note \*.

the State to safeguard an essential interest against a grave and imminent peril . . .<sup>218</sup>

Necessity may not be invoked by a state as a ground for precluding wrongfulness if the state contributed to the situation of necessity.<sup>219</sup> It also may not be invoked if the international obligation—*in casu* article 33(1) of the 1951 Convention—precludes reliance on necessity.<sup>220</sup> In view of the drafting history of article 33(1), article 33(1) likely does not preclude reliance on necessity.

Unlike the rather fuzzy and variable definition of “mass influx” suggested by UNHCR’s Executive Committee, the possibility of invoking necessity has the advantage that it is only available in exceptional cases:

It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.<sup>221</sup>

Derogation would remain subject to the criterion of necessity, and hence require a continuous assessment of the grave and imminent peril that justifies derogation from article 33(1) and other rights of the Convention<sup>222</sup> yet not necessarily all other rights.<sup>223</sup> However, in the absence of a binding system of responsibility sharing,<sup>224</sup> it cannot be ruled out that a state of necessity may be a protracted one.

218. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 114, art. 25. The peril must be objectively established and not merely be apprehended or contingent, *id.* at 83.

219. *Id.* art. 25(2)(b), at 84.

220. *Id.* art. 25(2)(a), at 80.

221. *Id.*

222. Rather than the suggested indefinite diminishing of entitlements by ExCom, see *id.*, at 74, 80.

223. The focus of this paragraph was on possible exceptions to the principle of *non-refoulement*; the question as to what rights could be “frozen” based on a plea of necessity is one that is geared to the rights of those who have gained access. Of importance is art. 3, of the 1951 Convention, *supra* note 2—non-discrimination—that would remain applicable. But-tressing this inference is art. 20, of the 1951 Convention, *supra* note 2 on Rationing: “Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.” Beyond the rights that accrue to refugees by being within the jurisdiction of the country of refuge, and being physically present in that state, the next question that would have to be addressed is what invoking the plea of necessity would entail in terms of the next levels of attachment and the concomitant rights.

224. See *supra* note 210. Very little progress is made in this respect. Cf. *Towards a global compact on refugees*, UNHCR, <http://www.unhcr.org/en-us/towards-a-global-compact-on-refugees.html> (last visited Nov. 20, 2017); Volker Türk & Madeline Garlick, *From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees*, 28 INT’L J. OF REFUGEE L. 656 (2016). See also G.A.

### 3. Legal Constructs: First Country of Asylum, “Dublin,” Safe Third Country

States apply quite a few legal constructs to avoid being responsible for processing asylum claims. These constructs include: “first country of asylum,”<sup>225</sup> “Dublin III,”<sup>226</sup> and “safe third country.”<sup>227</sup> These (predominantly procedural) legal constructs serve to identify the state responsible for processing asylum claims, and result, if applicable, in rendering these claims inadmissible. Leaving their compatibility—and hence lawfulness—with the 1951 Convention and 1967 Protocol aside,<sup>228</sup> these constructs

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Res. 71/1, ¶ 8(f), 11, 68, 69 New York Declaration (Sept. 19, 2016), in which states acknowledged “a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centered manner” and underlined “the centrality of international cooperation to the refugee protection regime” and recognize “the burdens that large movements of refugees place on national resources, especially in the case of developing countries” and “commit to a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees [ . . . ],” resulting in the belief that a comprehensive refugee response should be developed and initiated by UNHCR for each situation involving large movements of refugees, but it falls short of even suggesting how equitable sharing of responsibilities could be realized. The coming years a “global compact for safe, orderly and regular migration” will be developed—Annex II to the Declaration—and that compact “could” include “The scope for greater international cooperation, with a view to improving migration governance” and is scheduled for adoption in 2018.

225. See U.N. High Commissioner for Refugees (UNHCR), Background Note on the Safe Country Concept and Refugees Status, § B, U.N. Doc. EC/SCP/68 (July 26, 1991) [hereinafter *Background Note*] (in terms of “safe country of asylum”); see also Morten Kjaerum, *The Concept of Country of First Asylum*, 4 INT’L J. OF REFUGEE L. 514 (1992). The notion is also codified in EU Directive 2013/32/EU. See Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on the Common Procedures for Granting and Withdrawing International Protection (recast) 2013 O.J. (L 180) art. 35.

226. See Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or Stateless Person (recast) 2013 O.J. (L 180). The Dublin system has been qualified as “dysfunctional”, and its operation in practice as having an “unacceptably high cost for asylum applicants and resource costs to participating States in complying with its lengthy and complicated procedures, whilst only aggravating the unfair repartition of responsibility” by the Parliamentary Assembly of the Council of Europe. *Resolution 2072: After Dublin – the Urgent Need for a Real European Asylum System*, EUR. PARL. ASS., ¶ 8 (2015).

227. See Directive 2013/32/EU, *supra* note 225, art. 38.

228. See in particular James C. Hathaway, *The Michigan Guidelines on Protection Elsewhere*, adopted January 3, 2007, 28 MICH. J. INT’L L. 207, n. 2 (2007). The 1951 Convention and 1967 Protocol neither expressly authorize nor prohibit reliance on protection elsewhere policies, and as such protection elsewhere policies are compatible with the 1951 Convention, provided they ensure that refugees defined in Art. 1 enjoy the rights set by Arts. 2-34 of the 1951 Convention. Reliance on a protection elsewhere policy must be preceded by a good faith empirical assessment by the state which proposes to affect the transfer (sending state) that refugees defined by Art. 1 will in practice enjoy the rights set by Arts. 2-34 of the Convention in the receiving state. Formal agreements and assurances are relevant to this inquiry, but do not amount to a sufficient basis for a lawful transfer under a protection elsewhere policy. A sending state must rather inform itself of all facts and decisions relevant to the availability of protection in the receiving state. *Id.*

cannot be considered to be exceptions to the principle of non-refoulement. To the contrary, they merely serve to allocate the responsibility for observance of the principle to other states and thus confirm the applicability of the principle of non-refoulement.

The constructs assume that protection elsewhere is available (in particular “first country of asylum”) and hence justify return to that particular elsewhere has been inferred from article 31(1) of the 1951 Convention that exempts refugees from penalization for irregular entry provided they come directly from a territory where their life or freedom was threatened in the sense of article 1.<sup>229</sup> Article 31 will be addressed in the next section.

### III. FREEDOM OF MOVEMENT UPON ARRIVAL

#### A. Introduction

Assuming the refugee somehow gained entry to a state, is he entitled to freedom of movement within that state? The answer varies along with the lawfulness of his presence in the country concerned. The 1951 Convention differentiates between unlawful and lawful presence with respect to freedom of movement. The 1951 Convention addresses freedom of movement of refugees who are *unlawfully* in the country of refuge in article 31(2), and that of refugees who are *lawfully* in the country of refuge in article 26. The liberty of movement and freedom to choose one’s residence as set out in article 12(1) of the ICCPR is also predicated on *lawful* presence within the territory of the contracting state. This section will discuss the freedom of movement—or lack thereof—of refugees who are unlawfully in their country of refuge; section 4 will address the freedom of movement of those who are lawfully present in their country of refuge. As to those who are unlawfully in the country of refuge, the analysis will start with the lack of freedom of movement because of detention.

As will be set out below, article 31(2) is confined to refugees who are unlawfully in their country of refuge; come directly from a territory where their life or freedom was threatened in the sense of article 1 of the 1951 Convention; present themselves without delay to the authorities; and show good cause for their illegal entry or presence. Unlike article 31(2) of the 1951 Convention, article 9 of the ICCPR applies to everyone, including refugees and asylum seekers.<sup>230</sup> Article 9(1) provides that:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

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229. See *Background Note*, *supra* note 225, ¶ 12; Kjaerum, *supra* note 225, at 515.

230. U.N. Human Rights Comm., *General Comment No. 35: Article 9 (Liberty and Security of Person)*, ¶ 3, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).



In view of the fact that article 9 applies to everyone, article 9 will be addressed first; subsequently article 31(2), including the question as to the added value of this provision in relation to article 9.

### B. ICCPR Article 9 and the Detention of Refugees

Article 9(1) addresses both liberty and security of person; this paragraph discusses only liberty of person—that is, freedom from confinement of the body.<sup>231</sup> Deprivation of liberty includes police custody, remand detention, administrative detention, confinement to a restricted area of an airport, and imprisonment.<sup>232</sup> Actual deprivation of liberty is subject to the requirements that it is not arbitrary and is authorized by domestic law.<sup>233</sup>

The ICCPR does not provide an enumeration of permissible reasons for depriving a person of liberty, but the HRC addressed detention during proceedings for the control of immigration in its General Comment on article 9. It deems such detention not *per se* arbitrary, but detention “must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.”<sup>234</sup> As to refugees— asylum seekers—who unlawfully enter a state’s territory, the HRC observed that they

may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.<sup>235</sup>

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231. *Id.* (“Security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity.”).

232. *Id.*, ¶ 5. For an interesting analysis of the difference between deprivation of liberty and restriction on movement and place of residence, see also *Guzzardi v. Italy*, 39 Eur. Ct. H.R. (ser. A) (1980) (discussing the difference between deprivation of liberty and restriction on movement and place of residence). The case concerned the banishment for a period of three years to the island of Asinara on which the applicant—a terrorist and Mafioso—was assigned a house and was restricted to an area where he could live a normal life except that he could not leave it without permission and was for that purpose put under surveillance. *Id.*

233. The Human Rights Committee cautions that the latter does not automatically entail the former, *i.e.* detention may be legally permitted yet be arbitrary, U.N. Human Rights Comm., *supra* note 230, ¶ 11.

234. *Id.* ¶ 18.

235. *Id.* As to the risk of absconding, the CJEU found detention under Dublin III in order to secure a transfer to a responsible EU member state in the absence of objective

The HRC reviewed many complaints related to immigration detention, most of which concerned Australian detention practices.<sup>236</sup> It deemed the Australian blanket policy of detaining unlawful arrivals for extended periods of time arbitrary.<sup>237</sup>

By way of conclusion, detention can only take place on an individual basis; individual circumstances must be examined,<sup>238</sup> and group-based detention decisions are prohibited.<sup>239</sup> Detention is not inherently arbi-

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criteria to determine a risk of absconding is unlawful: any measure on deprivation of liberty must be accessible, precise and foreseeable as required by Art. 6 of the EU Charter of Fundamental Rights (“Everyone has the right to liberty and security of person”), Case C-528/15 Al Chodor, 2017 E.C.R. 213.

236. See Satvinder Juss, *Detention and Delusion in Australia’s Kafkaesque Refugee Law*, 36 REFUGEE SURV. Q. 146 (2017) for an analysis of Australia’s refugee laws.

237. See, e.g., U.N. Human Rights Comm., *A. v. Australia*, Comm. No. 560/1993, ¶ 9.6, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997); U.N. Human Rights Comm., *C. v. Australia*, Comm. No. 900/1999, ¶ 8.2, U.N. Doc. CCPR/C/76/D/900/1999 (Oct. 28, 2002); U.N. Human Rights Comm., *Baban v. Australia*, Comm. No. 1014/2001, ¶ 7.2, U.N. Doc. CCPR/C/78/D/1014/2003 (Sept. 18, 2003); U.N. Human Rights Comm., *D and E v. Australia*, Comm. No. 1050/2002, U.N. Doc. CCPR/C/87/DD/1050/2002 (Aug. 9, 2006); U.N. Human Rights Comm., *Shafiq v. Australia*, Comm. No. 1324/2004, U.N. Doc. CCPR/C88/D/1324/2004 (Nov. 13, 2006); U.N. Human Rights Comm., *Shams and ors v. Australia*, Comm. No. 1255/2004, U.N. Doc. CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 (July 20, 2007); U.N. Human Rights Comm., *F.K.A.G. et al v. Australia*, Comm. No. 2094/2011, U.N. Doc. CCPR/C/108D/2094/2011 (Oct. 28, 2013); U.N. Human Rights Comm., *M.M.M. v. Australia*, Comm. No. 2136/2012, U.N. Doc. CCPR/C/108/D/2136/2012 (Oct. 28, 2013).

238. The Hungarian law that was adopted in March 2017 under which asylum seekers will automatically be detained in container camps at the borders is consequently unlawful; see Lizzie Dearden, *Hungarian parliament approves law allowing all asylum seekers to be detained*, THE INDEPENDENT (Mar. 7, 2017), <http://www.independent.co.uk/news/world/europe/hungary-parliament-asylum-seekers-detain-law-approve-refugees-immigration-crisis-arrests-border-a7615486.htm>. Personal circumstances include taking vulnerable characteristics into consideration; see *O.M. v Hungary*, App. No. 9912/15, Eur. Ct. H.R., ¶ 53 (2016), [https://hudoc.echr.coe.int/eng#{"itemid":\["001-164466"\]}](https://hudoc.echr.coe.int/eng#{) (regarding the detention of an Iranian LGBT asylum seeker: the Court considered that “in the course of placement of asylum seekers who claim to be part of a vulnerable group in the country which they had to leave, the authorities should exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place. In the present case, the authorities failed to do so when they ordered the applicant’s detention without considering the extent to which vulnerable individuals—for instance, LGBT people like the applicant—were safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons.”).

239. The Human Rights Committee has consistently affirmed that while immigration detention is not per se arbitrary, every decision to keep an individual detained must be justified by the State on grounds of the individual’s case, and open to periodic review. The Committee has been particularly concerned with blanket detention policies, emphasizing the need to ensure detained asylum seekers are afforded individual consideration with respect to the need for their detention. See generally SARAH JOSEPH AND MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY* (Oxford U. Press 3d ed. 2013). See, e.g., *A. v. Australia*, *supra* note 237, ¶ 9.3-9.4; *C. v. Australia*, *supra* note 237, ¶ 8.2; *Baban v. Australia*, *supra* note 237, ¶ 7.2; *Shams and ors v. Australia*, *supra* note 237, ¶ 7.2; U.N. Human Rights Comm., *Bakhtiyari v. Australia*, Comm. No. 1069/2002, ¶ 8.2, U.N. Doc. CCPR/C/79/D/1069/2002 (Nov. 6, 2003); *D and E v. Australia*, *supra* note 237, ¶ 6.3.

trary,<sup>240</sup> but it may become arbitrary when factors particular to the detained individual—such as the likelihood of absconding and the lack of cooperation—are not considered, and when the decision to detain is not open to periodic review so that the grounds justifying the detention can be assessed.<sup>241</sup> Lastly, detention should not continue beyond the period for which the state party can provide appropriate justification.<sup>242</sup>

C. *Freedom of Movement of Unlawfully Present Refugees: Article 31(2), 1951 Convention*

Both detention and measures short of detention that nonetheless restrict the movement of refugees are covered by article 31(2) of the 1951 Convention:<sup>243</sup>

The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country . . .<sup>244</sup>

A first question concerns the meaning of the reference to “such refugees”: who are the beneficiaries of the restricted limitations on freedom of movement? The answer is not obvious, since the title of article 31 merely refers to refugees who are “unlawfully in the country of refuge,” while article 31(1), on the exemption from penalties for illegal entry or presence, includes a more detailed description of refugees who find themselves unlawfully in the country of refuge:

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

240. The Committee appears to condemn the blanket policy of detaining unlawful arrivals for extended periods of time, see *supra* note 237, but accept it when it for a short period of time, see JOSEPH & CASTAN, *supra* note 239 at 354, 356.

241. See *inter alia* A. v. Australia, *supra* note 237, ¶ 9.4; see also *infra* Section III.D. See also U.N. Human Rights Comm., *supra* note 230, ¶¶ 12, 14, 18 (explaining that detention may be arbitrary if detainee treatment does not correspond with the purpose for detention).

242. See *inter alia* A. v. Australia, *supra* note 237, ¶ 9.4.

243. See *infra* Section III.D.

244. The 1951 Convention, *supra* note 2, allows reservations to Art. 31. Few states have made reservations: Papua New Guinea does not accept the obligations laid down in Art. 31 at all; Honduras reserved the right to, *inter alia*, restrict the freedom of movement of “certain refugees or groups of refugees” when national or international considerations so warrant; and Mexico reserved the right to establish the conditions for moving within the national territory.

the authorities and show good cause for their illegal entry or presence.<sup>245</sup>

This particular description of the beneficiaries of the exemption was inserted by the drafters after article 31(2) had been completed, and it had been induced by concerns regarding subsequent movements of refugees once they reached safety.<sup>246</sup> It perchance inadvertently limited the beneficiaries of the circumscribed restrictions on freedom of movement addressed in paragraph 2

Who is entitled to benefit from article 31(2)? The text arguably allows for two interpretations. The first simply reverts to the title of article 31 “Refugees unlawfully in the country of refuge,” *inter alia* on the basis of the drafting history of the relevant provisions in the sense described above,<sup>247</sup> while the second one interprets “such refugees” in paragraph 2 as a short-hand reference to the refugees as described in article 31(1).<sup>248</sup> The question is, which interpretation should prevail?

Proceeding from the basic rule of treaty interpretation, set out in the 1969 Vienna Convention on the Law of Treaties,<sup>249</sup> the focus should be on the object and purpose of article 31.<sup>250</sup> Article 31 seems to be primarily focused on providing immunity from penalties for irregular entry and presence on the one hand, and limiting restrictions to freedom of movement on the other. UNHCR identifies—or rather confines, since it only refers to paragraph 1—the “goal” of article 31 as providing an incentive for unauthorized entrants, with *bona fide* reasons for entering unlawfully, to regu-

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245. “Penalties” should be taken literally: Art. 31(1) does not exclude practices such as administrative detention and other restrictions addressed in Art. 31(2); see GRAHL-MADSEN, *supra* note 16, art. 31, ¶ 1.

246. Grahl-Madsen, *supra* note 80, at 419, 420. Safety is a crucial element in this respect: refugees whose illegal entry or presence is due to the risk of persecution in a country of asylum also benefit from the exemption of penalties, ROBINSON, *supra* note 14 at 151; Hathaway, *supra* note 14, at 400.

247. Gregor Noll, *Article 31, in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL*, *supra* note 124, at 1268.

248. *Global Consultations on International Protection: Summary Conclusions on Article 31 of the 1951 Convention — Revised*, ¶ 5, UNHCR (Nov. 8–9, 2001), <http://www.unhcr.org/en-us/protection/migration/49632375a/316-global-consultations-international-protection-summary-conclusions-article.html> [hereinafter UNHCR Summary Conclusions on Article 31 of the 1951 Convention — Revised]; Hathaway *supra* note 14, at 389.

249. See Section I.D *supra* for the text of the relevant provision.

250. According to art. 32 of the Vienna Convention on the Law of Treaties, the *travaux préparatoires* of the treaty are a supplementary means of interpretation to which recourse may be had to confirm the meaning resulting from the application of Art. 31 of this Convention, or to determine the meaning when the interpretation according to Art. 31 leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable. See *id.* This would mean that even if the drafters inadvertently limited the beneficiaries of Art. 31(2) of the 1951 Convention as suggested earlier, this oversight should be ignored if the interpretation according to Art. 31 does not result in ambiguity or absurdity.

larize their status with the officials of the state.<sup>251</sup> This particular “goal” presupposes that refugees have an implausibly intimate knowledge of the 1951 Convention. It would rather seem that article 31 reflects the recognition of the drafters that most refugees will not be able to gain entry in a regular manner,<sup>252</sup> and that states should therefore refrain from penalizing all who thus gain entry and are as a result unlawfully in the country.<sup>253</sup> Article 31 consequently is a restriction of the usual powers regarding penalization for illegal entry and limiting freedom of movement. It is not plausible to expect states to observe such restrictions with respect to those who are neither lawfully present nor present themselves to the authorities.

Substantive coherence would also favor this interpretation. The first paragraph— article 31(1)—identifying the beneficiaries of the immunity from penalties for illegal entry or presence, and the second paragraph — article 31(2)—continuing to spell out what else states should refrain from doing regarding the same persons, that is, not applying any other restrictions to their movements than those which are strictly necessary. If the relationship between the two paragraphs is thus taken to be a conjunctive rather than a disjunctive one, article 31 would, from the perspective of the refugee, imply presenting himself forthwith to the authorities with a view to regularizing his status with the officials of the state concerned.<sup>254</sup> Although article 31(1) does not impose an obligation on the country of refuge to regularize the refugee who duly presents himself as required,<sup>255</sup> article 31(2) sets limits to restrictions the state concerned may apply to the freedom of movement of those who subjected themselves to the authorities in conformity with article 31(1).

It is remarkable that article 31 is cast in plural terms— “refugees”— considering that penalties and restriction on freedom of movement are generally speaking not collective measures.<sup>256</sup> Naturally, the plural in this case singles out a particular defined category of beneficiaries.<sup>257</sup> Nonetheless, in case of mass influx, individual refugees may not have the opportunity to present themselves forthwith to the authorities; their *bona fides* in

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251. Saadi v. United Kingdom, Written Submissions on Behalf of the U.N. High Comm'r for Refugees, 346 Eur. Ct. H.R. 111, ¶ 25 (2007); see also Hathaway, *supra* note 14, at 388, 390, 417.

252. See, e.g., Noll, *supra* note 247, at 1248–49; Goodwin-Gill & McAdam, *supra* note 65, at 384; Hathaway, *supra* note 14, at 387–388. It also confirms the incomplete character of the right to seek asylum, see *supra* Section II.B.

253. Noll, *supra* note 247, at 1246, 1269 (“The wording of Art. 31, para. 2, sentence 1 of the 1951 Convention assumes the perspective of the State implementing the 1951 Convention.”).

254. See Saadi v. United Kingdom, Written Submissions on Behalf of the U.N. High Comm'r for Refugees, 346 Eur. Ct. H.R. 111, ¶ 25 (2007).

255. ROBINSON, *supra* note 14, at 153.

256. Cf. 1951 Convention, *supra* note 2, arts. 32, 33 (both cast in terms of an individual refugee).

257. It would seem the 1951 Convention is not consistent in this respect; Art. 17 on wage-earning employment, for instance, refers to lawfully staying refugees, Art. 18 on self-employment, to a lawfully present refugee singular. *Id.* arts. 17, 18.

this respect should be assumed. In practice, article 31 requires immediate application if its purpose is not to be frustrated, and that means it cannot be made dependent on prior verification as to whether the refugees concerned satisfy the conditions enumerated in article 31(1). It therefore calls for a presumption of eligibility for the benefits of article 31(2), which can be rebutted if those who benefit from it are subsequently determined not to satisfy the conditions of article 31(1).

As to individual refugees, they must satisfy the various qualifying criteria enumerated in article 31(1): coming directly from a territory where their life or freedom was threatened, presenting themselves to the authorities without delay, and showing good cause for their illegal entry or presence.

Article 31 was analyzed during UNHCR's Global Consultations on International Protection. With respect to the first requirement (that of "coming directly from"), it was concluded that article 31(1) was intended to—presumably: also<sup>258</sup>—apply to persons who have briefly transited other countries or who are unable to find effective protection in the first country or countries to which they flee.<sup>259</sup> The possibility of a brief transit implies a degree of choice, albeit a limited one, on the part of the refugee regarding the prospective country of refuge, and therefore entails that a refugee is not obliged to seek protection in any such intermediate country.<sup>260</sup> As to the duration of "brief transit," UNHCR provides that no strict time limit can be applied, and that each case must be judged on its specific merits.<sup>261</sup>

As to the second requirement, that of presenting oneself without delay to the authorities, the Global Consultations merely addressed the meaning

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258. "Coming directly" naturally also covers those who come directly from the country of origin or another country where their life or freedom were threatened in the sense of Art. 1, of the 1951 Convention. *Id.* art. 1.

259. *Global Consultations on International Protection*, *supra* note 248, ¶ 10(c).

260. See Grahl-Madsen, *supra* note 80 at 206-207; HATHAWAY, *supra* note 14 at 394, 396; GUY S. GOODWIN-GILL, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, in *REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION*, *supra* note 126, at 216 ("no duty is imposed on the asylum seeker travelling irregularly or with false travel documents to lodge an asylum application at any particular stage of the flight from danger"). See also *R v. Uxbridge Magistrates' Court*, CO/2533/98, ¶ 18 (2001) (UK) ("the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there [ . . . ], and whether the refugee sought or found their protection or de jure from the persecution they were fleeing", para. 18); *R v. Asfaw* [2008] UKHL 31; *R v. MMH* [2008] EWCA Crim 3117, ¶¶ 14, 15.

261. UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum seekers, UNHCR, ¶ 4 (Feb. 1999), <http://www.refworld.org/docid/3e2b3f844.html> [hereinafter UNHCR Detention Guidelines (1999)]. These Guidelines were replaced in 2012 by a new set of guidelines, but these new guidelines do not address the issue of a brief transit; Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum seekers and Alternatives to Detention, UNHCR (2012), <http://www.unhcr.org/en-us/publications/legal/505b10ee9/unhcr-detention-guidelines.html> [hereinafter UNHCR Detention Guidelines (2012)].

of “without delay”, which was considered to be a matter of fact and degree, depending on the circumstances of the case, including the availability of advice.<sup>262</sup> Preceding the consultations, UNHCR indicated that “there is no time limit which can be mechanically applied or associated with the expression ‘without delay.’ ”<sup>263</sup> Similarly, it has been observed that this particular requirement must not be interpreted as a strict temporal requirement but “will always depend on the refugee’s understanding of to which authority he or she is to report.”<sup>264</sup> This understanding should not be equated with an obligation to identify the “right authority,” as there is no such obligation<sup>265</sup>, an absence that corresponds with the implicit sense in which article 31(1) is concerned with those who claim asylum in good faith. In short, it would seem this second requirement is a temporal one, albeit one that should not be applied mechanically but should rather take the particular plight of refugees into consideration.<sup>266</sup>

The last requirement, that of showing good cause, or rather reasons recognized as valid,<sup>267</sup> for illegal entry or presence, buttresses that sense of good faith. It requires a consideration of the circumstances under which the refugee fled.<sup>268</sup> The Global Consultations considered that having a well-founded fear of persecution is in itself good cause for illegal entry.<sup>269</sup>

262. *Global Consultations on International Protection*, *supra* note 248, ¶ 10(f).

263. UNHCR’s Guidelines (1999), *supra* note 261, ¶ 4 (“given the special situation of asylum seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum-seeker to another”). In UNHCR’s 2012 Detention Guidelines, the need to take special circumstances and need for particular asylum seekers into account is addressed but not in the context of this particular requirement of Art. 31(1) of the 1951 Convention, see UNHCR Guidelines (2012), *supra* note 261, Guideline 9. See *Jabari v. Turkey*, App. No. 40035/98, Eur. Ct. H.R., ¶ 40 (2000) (regarding a five-day registration requirement: the automatic and mechanical application of such a short time-limit for submitting an asylum application was a violation of Art. 3 of the 1950 European Convention on Human Rights and Fundamental Freedoms).

264. Noll, *supra* note 247 at 1259.

265. GRAHL-MADSEN, *supra* note 80, at 219 (“Article 31(1) does not require that a refugee shall present himself to any particular authority”, nor that he does so at the nearest frontier control point or local authority in the border zone); HATHAWAY, *supra* note 14, at 390 (referring to a refugee who mistakenly reports to officials of the wrong level or branch of government, and giving the example of a refugee who advises officials of the city where he is staying of his situation as having discharged himself of the duty concerned even if only national authorities have jurisdiction regarding immigration or refugee protection).

266. See *supra* note 260.

267. ROBINSON, *supra* note 14, at 152 (regarding the French text that speaks of “raisons reconnues valables”).

268. UNCHR Guidelines (1999), *supra* note 261, ¶ 4 (this issue is not addressed in UNCHR Guidelines (2012), *supra* note 261).

269. *Global Consultations on International Protection*, *supra* note 248, ¶ 10(c). This is exactly what the President of the Conference had observed during the drafting: ROBINSON, *supra* note 14, at 153 (statement of the President of the Conference) (“no penalty was justified if the refugee could prove that his entry was due to the fact that his life or freedom would otherwise have been in jeopardy.”) See also HATHAWAY, *supra* note 14, at 405 (this

Beyond this rather obvious good cause, questions arise regarding those who transited other states before reaching the intended country of asylum. Although the refugees concerned may still be considered to have come directly from a territory where their life or freedom were threatened in the sense of article 1 of the 1951 Convention, their transient presence in a third state may be taken into consideration when assessing good cause for illegal entry or presence.<sup>270</sup> Such a presence may entail that the refugee who, following a transient presence in a third state, proceeds to the desired country of asylum is lawfully penalized for illegal entry or presence in that state.<sup>271</sup> This in turn, explains why refugees, as indicated earlier, only have a limited degree of choice regarding the country of asylum.<sup>272</sup>

#### D. *Nature of the Restrictions to Freedom of Movement*

Article 31(2) concerns the possibility of restricting the freedom of movement of refugees defined in article 31(1). Anything that may restrict the freedom of movement of refugees comes within the scope of this provision, so not just the most obvious and far-reaching form of restriction, detention.<sup>273</sup>

Restrictions are allowed, provided they are “necessary”: “[t]he Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary.”<sup>274</sup> Since the text does not specify anything in this respect, the first question is: *necessary for what purpose?*

The drafters contemplated restrictions required to cover considerations of security or special circumstances such as a great and sudden influx of refugees or any other reason which might necessitate restrictions on the movement of refugees.<sup>275</sup> Detention for the purpose of investigating the identity of the refugee whose entry or presence is unauthorized has been cited in this context<sup>276</sup>, which, incidentally, does not mean detention may

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requirement will always be met where the breach of migration control laws is the result of flight from risk of being persecuted.).

270. HATHAWAY, *supra* note 14, at 397–99.

271. *Id.* at 398–99.

272. Although penalization for illegal entry because of a presence in transit elsewhere may be justified, that does not mean that the mere possibility of protection in the transit state justifies refusing asylum: asylum should not be refused solely on the ground that it could be sought from another state. U.N. High Commissioner for Refugees, Conclusions Adopted by the Executive Committee on the International Protection of Refugees, 1975-2009 (Conclusion No. 1-109), Conclusion No. 15(h)(iv) (Dec. 2009).

273. Noll, *supra* note 247, at 1268.

274. 1951 Convention, *supra* note 2, art. 31(2).

275. ROBINSON, *supra* note 14, at 154.

276. GRAHL-MADSEN, *supra* note 16, Art. 31, ¶ 10; PAUL WEIS, THE REFUGEE CONVENTION, 1951. THE TRAVAUX PRÉPARATOIRES ANALYSÉS, 357 (stating that: “[i]t results from the history of the provision that refugees should not be kept behind barbed wire. A short period of custody may be necessary in order to investigate the identity of the person”); *see also*, HATHAWAY, *supra* note 14, at 419-20; 421 (referring to allowing “host states time to complete a basic inquiry into the identity and circumstances of unauthorized refugees before



be resorted to just for the convenience of the police or immigration authorities.<sup>277</sup> Other examples are restrictions to safeguard national security, public order, or public health.<sup>278</sup> As to public order, UNHCR mentions detention to prevent absconding or other kinds of refusal to cooperate with the authorities, and in the case of manifestly unfounded or clearly abusive asylum claims.<sup>279</sup> It should be added that the reference to national security in this context arguably falls short of national security in time of war or of other grave circumstances. In such time, article 9 of the 1951 Convention provides that the state may take those provisional measures which it considers to be essential to the national security of state with regard to a particular person pending a determination that this person is in fact a refugee and that the continuation of such measures is necessary in his case in the interests of national security. Those provisional measures

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releasing them into the community”). Cf. U.N. High Commissioner for Refugees, *supra* note 272, Conclusion No. 44(b) (providing that “detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim of refugee status or asylum is based; to deal with cases where refugees have destroyed their travel and/or identify documents or have used fraudulent documents; or to protect national security or public order.”).

277. GRAHL-MADSEN, *supra* note 16, Art. 31, ¶ 10 “[T]he authorities have to accept inconvenience, as long as it does not prevent them from carrying out their task.”; *see also* Helen O’Nions, *No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience*, 10 EUROPEAN JOURNAL OF MIGRATION AND LAW 149 (2008); *Attorney-General v. Refugee Council of N. Z., Inc.*, (2003) 2 NZLR 577 (CA) ¶ 284.

278. GRAHL-MADSEN, *supra* note 16, Art. 31, at ¶ 10.

279. UNHCR Detention Guidelines (2012), *supra* note 261, ¶¶ 22, 23 (in the context of accelerated procedures). The question is whether UNHCR does not qualify certain acts and omissions too facile as falling under the heading of protecting public order; some concerns had better be addressed under the heading of identification purposes (compare this with Directive 2013/33, art. 8, 2013 O.J. (L 180) 101, which lays down standards for the reception of applicants for international protection) rather than grand concepts that, in order not to turn into catch-all blanket ones, would require a strictly circumscribed framework. The CJEU in Case C-601/15, *J.N. v. Staatssecretaris voor Veiligheid en Justitie*, EU:C:2016:85 (2016) interpreted the notions of “national security” and “public order” in the context of the detention of asylum seekers on the basis of Directive 2013/33/EU (recast) that prescribes that detention should be in accordance with, *inter alia*, Art. 31, 1951 Convention. Regarding the concept of “public order,” the Court stated that it entails in any event, “the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.” *Id.* ¶ 65. As far as the concept of “public security” is concerned, the Court provided that “this concept covers both the internal security of a Member State and its external security and that, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interest, may affect public security.” *Id.* ¶ 66. The Court went on to say: “on that point, it can be seen both from the wording and context of Article 8 of Directive 2013/33 and from its legislative history that the possibility [. . .] of detaining an applicant for reasons relating to the protection of national security or public order is subject to compliance with a series of conditions whose aim is to create a strictly circumscribed framework in which such a measure may be used.” *Id.* ¶ 57.

may partake of those envisaged in article 31(2), e.g., internment,<sup>280</sup> but the bar appears to be significantly higher.

Coming back to the question of what purpose renders a restriction “necessary” in the sense of article 31(2), it is worth noting that the drafters had suggested restrictions to cover “security” and “special circumstances.” These are quite indeterminate notions that may consequently cover a variety of reasons to restrict the movements of unlawfully present refugees as long as the restrictive measures can be considered necessary to serve the purpose that is to be served by those restrictions.<sup>281</sup> This, in turn, implies that such restrictions should be proportional to the purpose that needs to be served.<sup>282</sup> Proportionality may thus restrict the nature of any restrictive measures taken under article 31(2).

Another restriction can be derived from article 31(2), which provides that any measures taken under article 31(2) may only be applied until the status of the refugees is regularized or until they obtain admission into another country. With respect to the latter, the drafters were thinking of the refugee taking an active role in the process of seeking and obtaining admission elsewhere.<sup>283</sup> This implies that restrictions that would make this active role impossible would not be in accordance with article 31(2). This inference is buttressed by the last sentence of article 31(2): “The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.” Robinson observes that “the necessary facilities” “will as a rule exclude confinement in a camp or prison or in remote places and require the state to permit the refugee to travel and to communicate with the outside world and such bodies or organizations are likely to assist him in obtaining admission into a country.”<sup>284</sup>

A third restriction is that any restrictive measures that are taken should not be of a discriminatory nature: the 1951 Convention prescribes in article 3 that the provisions of the Convention shall be applied without discrimination as to race, religion, or country of origin. Nonetheless, if restrictions are induced by considerations of public health, for instance, when a group of refugees has been exposed to a contagious disease in their country of origin, it would seem this requirement would have to yield.

A fourth limitation that has been suggested is of a procedural nature. Noll observes that the semantic construction of the provision concerned

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280. GRAHL-MADSEN, *supra* note 16, art. 9, ¶ 4; Ulrike Davy, *Article 9*, in ZIMMERMANN, *supra* note 124, 781, at 798. Art. 8 restricts the possibility given in Art. 9 in that the exceptional measures taken against nationals of a foreign state shall not be applied to a refugee who is formally a national of that state solely on account of that nationality.

281. With a view to enabling assessing whether measures are indeed necessary, Noll has argued that the purpose that is being served by restrictive measures should be included in domestic legislation, which would also prevent arbitrariness. Noll, *supra* note 247, at 1269.

282. GRAHL-MADSEN, *supra* note 16, art. 31, ¶ 10; *see also* WEIS, *supra* note 276, at 357 (observing that refugees may be placed in a camp, particularly in cases of mass influx).

283. Noll, *supra* note 247, at 1273.

284. ROBINSON, *supra* note 14 at 155.

has as procedural consequence that a decision on restrictions—not just the most severe one of detention—must be based on the individual case.<sup>285</sup> This consequence is difficult to reconcile with the intention of the drafters to cover special circumstances, such as a mass influx.<sup>286</sup> Nonetheless, this particular intention should not be allowed to function as a pretext for collective detention, which would be contrary to article 9(1) ICCPR. Perhaps both the intention and the rights of the individuals making up the mass influx can be reconciled by giving the refugees concerned the right to obtain a review of the decision to detain, or subject them to any other restrictive measure.

In case of detention, the right to take proceedings before a court in order that the court may decide without delay on the lawfulness of detention is part of the right to liberty of person provided by article 9 of the ICCPR.<sup>287</sup> The HRC does not consider detaining individuals requesting asylum *per se* arbitrary,<sup>288</sup> but it does consider detention arbitrary when periodical review of the decision to detain is withheld. For instance, the detention of a Cambodian refugee who was detained for a period of four years—on account of unlawful entry and the risk of absconding if left at liberty—without being afforded individual consideration of the reasons for his detention was considered to be arbitrary:<sup>289</sup> “[E]very decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed.”<sup>290</sup> Article 9 thus supplements the measures states may take under article 31(2) with judicial review, and may thus restrict the application of article 31(2). Since the safeguards provided by article 9 are confined to deprivation of liberty,<sup>291</sup> less intrusive restrictive measures regarding the freedom of move-

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285. Noll, *supra* note 247 at 1268 (stating that “[a]utomatic detention on a collective basis would be hard to reconcile with the exceptional nature of restrictions on movements.”).

286. HATHAWAY, *supra* note 14, at 419-420 (the primary objective of Art. 31(2)).

287. ICCPR, *supra* note 10, art. 9: (for the text of paragraph 1, see *supra*)

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. [. . .] [this provision only applies in connection with criminal charges]
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

288. The Committee appears to condemn the blanket policy of detaining unlawful arrivals for extended periods of time but accept it when it for a short period of time. See Joseph & Castan, *supra* note 239 at 354, 356.

289. *A. v. Australia*, *supra* note 237, ¶ 9.4. See also U.N. Human Rights Comm., *supra* note 230, ¶¶ 12, 18; see also *id.*, ¶ 14 (“Although conditions of detention are addressed primarily by Arts. 7 and 10 [ICCPR], detention may also be arbitrary if the way the detainees are treated does not relate to the purpose for which they are ostensibly being detained.”).

290. *A. v. Australia*, *supra* note 237, ¶ 9.4.

291. Art. 9 does not apply to “mere interference with liberty of movement under article 12.” U.N. Human Rights Comm., *supra* note 230, ¶ 5.

ment of unlawfully present refugees taken under article 31(2) are not supplemented by the procedural safeguards provided by article 9.

Apart from ICCPR article 9, other human rights law obligations may affect the application of article 31(2),<sup>292</sup> particularly with respect to detention, the most intrusive form of restriction. For example, detention is a measure that is unlikely to be in the best interest of a refugee child and would therefore be incompatible with the 1989 Convention on the Rights of the Child.<sup>293</sup>

#### E. *Duration of Restrictions to Freedom of Movement*

Any measure taken to restrict the freedom of movement of refugees under article 31(2) can only be of a temporary nature since “restrictions shall only be applied *until* their status in the country is regularized or they obtain admission into another country” (emphasis added). The restrictions, in other words, end when a particular result has been realized, albeit without subjecting the realization thereof to a particular time limit.<sup>294</sup> But what does regularization mean? What does admission into another country mean? And, is there a timeframe within which either one of those two options should be realized?

Robinson recalls that the drafters intended “regularized” to mean “acceptance of a refugee for permanent settlement” and not the mere issue of a document prior to a final decision as to the duration of his stay.<sup>295</sup> However, he adds that this interpretation is unnecessarily restrictive because of the wording of article 26, which deals with refugees who are lawfully in the country<sup>296</sup> (on which, see Section IV *infra*). The better view, therefore, appears to be that “regularization” is confined to lifting the unlawfulness of the illegal entry or presence of the refugee concerned,<sup>297</sup> exchanging the unauthorized presence for an authorized one, rather than a full-fledged and completed status determination procedure.<sup>298</sup> This would en-

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292. Noll, *supra* note 247, at 1269.

293. See Convention on the Rights of the Child, art. 22, Nov. 20, 1989, 1577 U.N.T.S. 3; see also, G.S. Goodwin-Gill, *supra* note 260, at 232 (suggesting “guarantor requirements, supervised group accommodation, quality extra-familial care services through fostering or residential care arrangements” as appropriate alternatives).

294. Hathaway refers nonetheless to Art. 31(2) authorizing the provisional detention of refugees who arrive in the context of a mass influx “for a period of days”, HATHAWAY, *supra* note 14, at 707.

295. ROBINSON, *supra* note 14, at 154; see also GRAHL-MADSEN, *supra* note 16, Art. 31(2), at ¶ 11.

296. ROBINSON, *supra* note 14, at 154.

297. GRAHL-MADSEN, *supra* note 16, Art 31(2), at ¶ 11. If regularization is not addressed, the presence of refugees may be rendered lawful by the mere passage of time (“after a reasonable period of time has passed”). HATHAWAY, *supra* note 14 at 420.

298. Noll, *supra* note 247, at 1272; see also UNHCR Detention Guidelines (2012), *supra* note 261, at ¶ 24 (referring in this context to minimal periods in detention); see also U.N. High Commissioner for Refugees, Written Submissions on Behalf of the United Nations High Commissioner for Refugees, Saadi v. United Kingdom, App. No. 13229/03, 47 Eur. H.R. Rep. 17, ¶ 30 (2007) (referring to UNHCR Detention Guidelines (2012), *supra* note

tail that the institutionalized practice of detaining asylum seekers during an initial determination of the validity of their asylum claims is, in the absence of other valid reasons, not lawful.<sup>299</sup> The HRC observed in its General Comment on ICCPR article 9 that detention of refugees beyond a brief initial period in order to document their entry, record their claims, and determine their identity “would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others, or a risk of acts against national security.”<sup>300</sup> As to the “initial brief period” referred to, UNHCR cautioned that strict time limits should be imposed— after all, article 31 does not set a time limit—on detention for the purposes of identity verification, as lack of documentation is one of the main causes of indefinite or prolonged detention.<sup>301</sup>

The alternative end to any restrictive measures taken under article 31(2) consists of refugees obtaining admission into another country. It has been suggested that this phrase should be taken to mean the actual moment of departure for the third state<sup>302</sup>, and it is a moot point whether this position can be sustained. The issue was at any rate explicitly discussed in the drafting process, and the present wording should be taken to reflect the fear that refugees would seize the mere fact of admission in a third state—and an end to restrictive measures—to stay illegally in the country of refuge.<sup>303</sup> However, earlier it was observed that granting refugees the necessary facilities to obtain admission into another country, as article 31(2) requires from states, as a rule excludes detention.<sup>304</sup> This, in turn, implies that restrictions would only be allowed for the purpose of regularization taken in the sense described earlier that is, as lifting the unlawfulness of illegal entry or presence by means of submission to the laws of the host state, including the investigation of the identity of the refugee and his

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261). This point is repeated in the present 2012 Guidelines on Detention. UNHCR Detention Guidelines (2012), *supra* note 261, ¶ 28 (detention for a limited initial period for recording, within the context of a preliminary interview, the elements of their claim to international protection; “However, such detention can only be justified where that information could not be obtained in the absence of detention”). *Cf.* HATHAWAY, *supra* note 14, at 416-17.

299. On this practice, see Stephen Meili, *Do Human Rights Treaties Matter? Judicial Responses to the Detention of Asylum Seekers in the United States and the United Kingdom*, 48 NYU J. OF INT’L L. AND POL. 209 (2015); see Michael Welch & Liza Schuster, *Detention of Asylum Seekers in the US, UK, France, Germany, and Italy: A Critical View of the Globalizing Culture of Control*, 5 CRIMINAL JUSTICE 331 (2005). See UNHCR Detention Guidelines (2012), *supra* note 261, ¶ 28 (concerning an unjustifiable practice).

300. U.N. Human Rights Comm., *supra* note 230, ¶ 18. See also *Bakhtiyari v. Australia*, *supra* note 239, ¶¶ 9.2-9.3; U.N. Human Rights Comm., *Tarlué v. Canada*, Comm. No. 1551/2007, UN Doc. CCPR/C/95/D/1551/2007, ¶¶ 3.3, 7.6 (Apr. 28, 2009); U.N. Human Rights Comm., *Ahani v. Canada*, Comm. No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002, ¶ 10.2 (Mar. 29, 2004); see *A. v. Australia*, *supra* note 237, ¶ 9.4 (“Detention, first, should not continue beyond the period for which the state party can provide appropriate justification.”).

301. UNHCR Detention Guidelines (2012), *supra* note 261, ¶ 26.

302. GRAHL-MADSEN, *supra* note 16, Art 31(2), ¶ 11.

303. *Id.*

304. See *supra* Section III.C.

circumstances. If regularization would indeed be confined to, in short, registration, the duration of any restrictive measure would need to end immediately upon registration, regardless of whether the refugee has found admission elsewhere.

As to admission into another country, it is likely that the drafters contemplated the possibility of resettlement in a third state—after all, the IRO had just resettled over a million refugees at the time<sup>305</sup>—rather than any other options, such as the contemporary phenomenon of removal to a third state deemed responsible for processing the refugee’s asylum claim.<sup>306</sup> The position of a refugee subject to such removal would most likely justify restrictions on the basis of public order considerations—in particular, to prevent absconding.<sup>307</sup>

#### IV. FREEDOM OF MOVEMENT IN THE COUNTRY OF ASYLUM

##### A. Introduction

This section too focuses on the refugee’s freedom of movement within the country of asylum. Unlike the previous section, this section focuses on refugees who are lawfully in the country of refuge. Lawfully present refugees are entitled to freedom of movement in that country under article 26 of the 1951 Convention and article 12(1) of the ICCPR. Article 26 provides that

[e]ach Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances,<sup>308</sup>

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305. See W.H. HOLBORN, *THE INTERNATIONAL REFUGEE ORGANIZATION, A SPECIALIZED AGENCY OF THE UNITED NATIONS: ITS HISTORY AND WORK 1946-1952* (1956).

306. Noll, *supra* note 247, at 1273, ventures that if the refugee wishes this removal to take place, the removal does not decisively differ from resettlement for the purposes of Art. 31(2), and would thus signal the end of restrictive measures. Since the refugee decided not to apply for asylum in the country of arrival but proceeded to another state, it is far from likely that the refugee would want this removal.

307. See *supra* Section III.B.

308. Per art. 42, states may make reservation to this Article and quite a few have done so, *inter alia*, to restrict the freedom of movement of refugees when “national or international order make it advisable to do so” or for reasons of “public security (*ordre public*). These include: Angola, Latvia, Malawi, Moldova, Mozambique, Namibia and Rwanda. Sudan, Zambia, and Zimbabwe have made unconditional reservations to Art. 26, and Iran considers it to be merely recommendations. Two states have also made declarations, formulated akin to a reservation. The Netherlands “reserves the right to designate a place of principal residence for certain refugees or groups of refugees in the public interest”, while Spain requires Art. 26 to be interpreted as “not precluding the adoption of special measures concerning the place of residence of particular refugees, in accordance with Spanish law”. Honduras reserved the right, *inter alia*, to restrict the freedom of movement of “certain refugees or groups of refugees” when national or international considerations so warrant. Mexico has reserved the right to establish conditions for moving within the national territory. Papua New Guinea does not accept the obligations stipulated in Art. 26. Botswana also made a reservation to

and article 12(1) of the ICCPR that

[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

The first question pertains to the requirement of lawful presence: when exactly is a refugee lawfully present, thus entitled to choose his place of residence and move freely within the country of refuge? Does lawful presence follow seamlessly upon regularization of status in the sense of article 31(2), so that any restrictions on freedom of movement imposed by virtue of that provision immediately give way to the freedoms set out in article 26? Does “lawful presence” on which freedom of movement is predicated in both the 1951 Convention and the ICCPR mean the same? To what extent may the freedom of movement of lawfully present refugees nonetheless be restricted? Can this freedom be restricted beyond regulations that apply to aliens generally in the same circumstances? For instance, can it be restricted to ensure that refugees do not stay too close to the border of their country of origin, or to ensure that responsibilities regarding refugees, for instance pertaining to social benefits, are spread evenly in the country of refuge, or to facilitate their integration?

B. *The Beneficiaries of Articles 26 of the 1951 Convention, and Article 12 of the ICCPR: Lawfully Present Refugees*

The 1951 Convention distinguishes between, albeit fails to define, different modes of attachment to the country of refuge, each of which corresponds to particular entitlements. Confined to those who are physically present in the country of refuge,<sup>309</sup> the Convention predicates entitlements on simple presence, lawful presence, lawful stay, and durable residence.<sup>310</sup> Apart from article 26, article 18 on self-employment and article 32 on expulsion are also predicated on “lawful presence.”

Various interpretations of the meaning of “lawful presence” have been offered: the first, in essence, qualifies presence as any presence that is not unlawful<sup>311</sup>; the second suggests presence on “a more or less indefinite basis”<sup>312</sup>; and the third points to that “what is to be treated as lawful ac-

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Art. 26 but it is not clear what it consists of. U.N. TREATY COLLECTION, [https://treaties.un.org/pages/Home.aspx?clang=\\_En](https://treaties.un.org/pages/Home.aspx?clang=_En) (last visited Nov. 20, 2017).

309. The first mode of attachment is not necessarily territorially based. *See supra* Section II (third paragraph on the prohibition of *refoulement*).

310. *See HATHAWAY, supra* note 14, at 156-92.

311. *Id.* at 174 (“if admitted to a state party’s territory for a fixed period of time . . . so long as it is officially sanctioned”); *Id.* at 175 (“the stage between ‘irregular’ presence and the recognition or denial of refugee status, including the time required for exhaustion of any appeals or reviews”); *Id.* at 178 (those who seek “recognition of refugee status and meet the requirements of Art. 31”); *Id.* at 183 (“an intermediate category . . . between illegal presence on the one hand, and a right to stay on the other”).

312. GOODWIN-GILL & McADAM, *supra* note 65, at 525 (expressed in relation to Art. 32 which too is predicated on lawful presence). *But see id.* at 524, (“[L]awful presence” is

ording to the domestic laws of the contracting state regardless of the 1951 Convention.”<sup>313</sup>

Taking resort to the text of article 26 is to no avail, while its context<sup>314</sup>—in particular, provisions that include other modes of attachment—merely suggests that the meaning attached to each mode should keep the fact of differentiation of levels in the Convention intact—assuming that the drafters did differentiate those levels of attachment on purpose. There is no reason to assume this is not the case.<sup>315</sup>

Robinson suggests that wherever the Convention requires “lawful presence,” “the mere fact of lawfully being in the territory, even without intention of permanence, must suffice.”<sup>316</sup> Grahl-Madsen similarly includes those who are temporary present:

A refugee may be “lawfully in the territory of a Contracting State,” even if he is not “lawfully staying there.” The expression used in the present Article [18], and also in Articles 26 and 32, comprises all refugees who are physically present in the territory, provided that their presence is not unlawful. It includes short-time visitors and even persons merely travelling through the country.<sup>317</sup>

In a later publication, Grahl-Madsen explains this understanding of lawful presence by taking recourse to municipal laws dealing with the status of aliens, since those laws were the background the drafters took for granted.<sup>318</sup> A background that seems to buttress the first interpretation of “lawful presence” is mentioned earlier<sup>319</sup>: it is simply about presence that is not unlawful.

This condition can be realized in various ways, varying along with the particular the case at hand; formal admission to a refugee status determination procedure, or regularization of status in the sense of article 31(2),<sup>320</sup> provided the relevant domestic laws that govern the lawfulness of presence in the territory are constrained by the presence the 1951 Conven-

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stated to “impl[y] admission in accordance with the applicable immigration law, for a temporary purpose.” The examples that are subsequently given do not include refugees.).

313. See, e.g., *R v. Sec. of State for the Home Dep’t* [2012] UKSC 12, ¶ 40.

314. Cf. Vienna Convention on the Law of Treaties art. 31(1), *supra* note 9 (“A treaty should be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty *in their context* and in light of its object and purpose.”) (emphasis added).

315. See ROBINSON, *supra* note 14, at 117, who refers to the fact that the drafters used the expression “lawful stay” rather than “lawful presence” wherever higher requirements regarding the presence of refugees in the country were made.

316. *Id.*, at 117, 133.

317. GRAHL-MADSEN, *supra* note 16, Art.18, ¶ 2.

318. GRAHL-MADSEN, *supra* note 80, at 344-57.

319. See note 306 and its accompanying text; see also Reinhard Marx, *Article 26, in Zimmermann, supra* note 124, 1147, 1158-59.

320. U.N. High Commissioner for Refugees, *supra* note 298, ¶ 27. *But see* Grahl-Madsen, *supra* note 16, Art. 26, ¶ 3, and GRAHL-MADSEN, *supra* note 80, at 363-64.



tion deems lawful.<sup>321</sup> The last-mentioned condition should, in order to avoid circular reasoning, be taken to require that the layered structure in terms of levels of attachment of the Convention is observed (rather than obliterated).<sup>322</sup>

The right to freedom of movement guaranteed in article 12(1) of the ICCPR is also predicated on lawful presence, and the question is what “lawful presence” should be taken to mean under the ICCPR? Presence is lawful when an alien has entered a state’s territory in accordance with its legal system and/or is in possession of a valid residence permit; the presence of an alien who entered the state illegally,<sup>323</sup> but whose status is regularized, is lawful too.<sup>324</sup> The HRC explicitly stated that the question of whether an alien is “lawfully” within the territory of a state is a matter governed by domestic law, which may subject the entry of an alien to restrictions, which need to be in compliance with the state’s international obligations,<sup>325</sup> such as for instance the 1951 Convention. The notion of “lawful presence” in article 12 appears consequently to be identical to that used in the 1951 Convention: a presence that is not unlawful.

The next question is whether the scope of the right to freedom of movement under both instruments is the same, in particular—since both provide freedom of movement and the freedom to choose residence—whether the restrictions under both instruments are of a similar scope and nature (to be addressed in Section IV.D *infra*).

### C. *Restrictions to the Rights Granted in Article 26 of the 1951 Convention*

Article 26 provides two rights—the right to freedom of movement and the right to choose one’s place of residence, and subjects both rights to “any regulations applicable to aliens generally in the same circumstances.” A first question pertains to the puzzling phrase “aliens generally in the same circumstances,” for who find themselves in the same circumstances as refugees?

The use of the yardstick “in the same circumstances” is the subject of article 6 of the 1951 Convention, which defines this recurring phrase as follows:

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321. HATHAWAY, *supra* note 14, at 177 (“in most cases a minimalist constraint on the scope of domestic discretion”).

322. Which is what the British Supreme Court did in *R v. Sec. of State for the Home Dep’t*, [2012] UKSC 12 (blending “lawful presence” and “lawful stay” predominantly to avoid incurring the obligations regarding expulsion (Art. 32) and freedom of movement (Art. 26) to those who have not formally been admitted, as a result, a refugee who is given temporary admission to stay in the country pending determination of her status is not lawfully present in the UK).

323. NOWAK, *supra* note 12, at 264.

324. U.N. Human Rights Comm., *supra* note 1, ¶ 4 (referring to U.N. Human Rights Comm., *Celepli v. Sweden*, Comm. No. 456/1991, UN doc. CCPR/C/51/D/456/1991 (Jul. 26, 1994)).

325. *Id.*

For the purposes of this Convention, the term “in the same circumstances” implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

Although article 6 does not refer to aliens,

[t]he net result is a fair balance between a general principle of assimilating refugees to other aliens . . . and the equally obvious need to render substantive justice to refugees in the application of those principles.<sup>326</sup>

As far as the exception is concerned, the reference is to such requirements as producing a certificate of nationality or a diploma acquired in the country of origin.<sup>327</sup> It is a moot point whether this exception is applicable in the context of article 26; it is hard to see why it would be, and, as Robinson explains the intent of article 26 as assimilating refugees to aliens in general without making observation regarding the possibility of exceptions that would apply to refugees in this particular respect.<sup>328</sup>

The conclusion is therefore that refugees and other aliens are to be treated on par with respect to freedom of movement and choice of residence. Article 26 prescribes equal treatment as aliens; in case particular restrictions apply to “certain classes of aliens,” these may apply to refugees as well, provided they find themselves in the same circumstances as those aliens.<sup>329</sup> From the perspective of refugees: article 26 grants freedom of movement and choice of residence to refugees, but allows restrictions provided these also apply to other aliens in the country of refuge. It does not, in other words, indicate whether particular restrictions are compatible with the rights granted in article 26 as long as they apply, in essence, in a non-discriminatory manner to refugees and other aliens alike, if their presence in the country is lawful. (This is quite unlike paragraphs 1 and 3 of

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326. HATHAWAY, *supra* note 14, at 208; repeated by Reinhard Marx & Felix Machts, *Article 6*, in Zimmermann, *supra* note 124, 707-08.

327. GRAHL-MADSEN, *supra* note 16, Art. 6, ¶ 3.

328. ROBINSON, *supra* note 14, at 133 explaining that Art. 26 is in substance a reproduction of the corresponding article in the 1938 Convention concerning the Status of Refugees coming from Germany. It concerns Art. 2: “Without prejudice to the power of the High Contracting Party to regulate the right of sojourn and residence, a refugee shall be entitled to move about freely, to sojourn or reside in the territory to which the present Convention applies, in accordance with the laws and internal regulations applying therein.” The right to freedom of movement in the latter is, however, not subject to regulations applicable to aliens generally in the same circumstances, and hence not checked by the contemporary non-discrimination safeguard.

329. GRAHL-MADSEN, *supra* note 16, Art. 26, ¶ 6. *Cf.* 1951 Convention, *supra* note 2, art. 7(1) (“Except where this Convention contains more favorable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.”).

article 12 of the ICCPR, which provide conditions that must be met before any restrictions on the rights granted are deemed permissible.)

The regulations that may restrict freedom of movement under article 26 appear to have been drafted particularly with “frontier or strategic zones” in mind, “access to which is forbidden to aliens.”<sup>330</sup> This restriction has been qualified by Grahl-Madsen as “entirely reasonable” and:

The same seems to apply if admission to an area is forbidden for some other reason, e.g. because of a natural catastrophe, or because of a rebellion, civil war or large-scale police operations, that is to say, areas where strangers may be in the way, or where their safety cannot be guaranteed.<sup>331</sup>

As to restrictions regarding residence, reference is made to the practice of admission of “immigrant workers” to specified occupations or specified regions of the country,<sup>332</sup> and if these are applied by the country to aliens, these may be applied to refugees in the same circumstances, provided they are not applied in a discriminatory manner.<sup>333</sup> Robinson nonetheless observes that article 26

would [. . .] not conflict with special situations where refugees have to be accommodated in special camps or in special areas *even if this does not apply to aliens generally.*<sup>334</sup>

It would conflict with article 26, both with respect to freedom of movement and to securing identical treatment with other aliens since article 26 requires equal treatment with aliens regarding restrictive measures. The *travaux* are equally clear: refugee-specific constraints, including indirect ones such as terms and conditions of admission (e.g., residence in return for work in a specific location and for a specific amount of time), were explicitly rejected by the drafters since such constraints would provide few safeguards for refugees unless they are generally applied to all non-citizens.<sup>335</sup>

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330. GRAHL-MADSEN, *supra* note 16, Art. 26, ¶ 6. *See also* ROBINSON, *supra* note 14, at 133.

331. GRAHL-MADSEN, *supra* note 16, art. 26, ¶ 6. A related example would be the prohibition of admission or settlement close to the border with the country of origin—provided it would apply to all aliens—with a view to preventing the use of such settlements as rear bases for attacks on the country of origin—compromising the civilian nature of those settlements—and for recruitment purposes. *Cf.* OAU Convention Governing the Specific Aspects of Refugee Problems in Africa art. III(2), Jun. 20, 1974, CAB/LEG/24.3 (“Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio”).

332. GRAHL-MADSEN, *supra* note 16, art. 26, ¶ 6. *See also* ROBINSON, *supra* note 14, at 133.

333. GRAHL-MADSEN, *supra* note 16, art. 26, ¶ 6.

334. ROBINSON, *supra* note 14, at 133 (emphasis added).

335. HATHAWAY, *supra* note 14, at 709-10. *See also infra.*

A comparable exception to article 26, which has been suggested by a contemporary commentator, is to confine the freedom of movement of asylum seekers to an assigned area if it is restricted to “situations of mass influx, or to the procedural situation of investigating the identity of, and possibly security threat posed by an individual seeking recognition of refugee status.”<sup>336</sup> This—and the same applies *ipso facto* to the unsettling example given by Robinson on the confinement of refugees in camps—seems plainly wrong, since these two specific concerns were addressed by the drafters and accommodated in article 31(2).<sup>337</sup>

The issue of taking up residence in an allotted area was the subject of a ruling by the European Court of Justice.<sup>338</sup> The Court was requested to give a preliminary ruling on the question of whether requiring a refugee to take up residence in a geographically limited area (such as a municipality, district, or region) constituted an unlawful restriction of freedom of movement under article 33 of the Qualification Directive on the freedom of movement of refugees and persons who have been granted subsidiary protection status, under the same conditions and restrictions as those provided for other third-country nationals legally residing in the territories of member states.<sup>339</sup> The Court ruled that this was indeed the case, with a reference to article 26 of the 1951 Convention.<sup>340</sup>

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336. Marx, *supra* note 319, at 1164. Marx refers to EU law—the Reception Directive (of 2003)—that entitles EU member states to restrict the right to move freely within their territory. The relevant Directive has been superseded by a recast version: Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) of 26 June 2013. Directive 2013/33, *supra* note 279. Art. 7 thereof—on Residence and Freedom of Movement—allows for several restrictions:

- “1. Applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State. [. . .]
2. Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection. [. . .]
3. >Member States may make provision of the material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. [. . .]”. *Id.*

337. Compellingly set out by HATHAWAY, *supra* note 14, at 707; *see also id.*, 705–06 regarding these two specific concerns of the drafters.

338. Joined Cases C-443/14 & C-444/14, *Warendorf v Ibrahim Alo v. Region Hannover*, EU:C:2016:127 (2016). The case concerned the entitlements of persons granted subsidiary protection status rather than refugees, *see infra*.

339. Art. 33 of the Qualification Directive provides that: “Member States shall allow freedom of movement within their territory to beneficiaries of international protection, under the same conditions and restrictions as those provided for other third-country nationals legally resident in their territories.” Directive 2011/95, art. 33, 2011 O.J. (L 337) 9. The beneficiaries of international protection are defined in Art. 2 sub (b) as “a person who has been granted refugee status or subsidiary protection status [. . .]”.

340. Joined Cases C-443/14 and C-444/14, *supra* note 338, ¶¶ 35–40. In addition, it ruled that the Directive precludes the imposition of a residence condition exclusively on beneficiaries of subsidiary protection status for the purpose of achieving an appropriate distribution of the burden connected with the benefits in question. *Id.* ¶ 56. However, the Court did not

In short, article 26 does not exclude restrictions to refugees lawfully in its territory regarding choice of place of residence and ability to move freely within its territory, provided these restrictions affect refugees and other aliens in the country alike. Beyond that, any whim regarding restrictions, provided it is applied in a non-discriminatory manner, would go, unless, of course, the restrictions would violate article 12 paragraphs (1) and (3) of the ICCPR.

#### D. *Restrictions on Freedom of Movement Based on ICCPR Article 12*

The main question is how any restrictions on the right of liberty of movement and the freedom to choose residence that are justified under article 12(3) and, in times of a public emergency, under article 4 ICCPR, would affect the scope of the same rights given in article 26 of the 1951 Convention.

Article 12(3) allows states to restrict internal freedom of movement and the freedom to choose residence when necessary to protect national security, public order (*ordre public*), public health or morals, or the rights or freedoms of others, provided these restrictions are consistent with the other rights recognized in the Covenant. With respect to those other rights, of particular relevance in the present context is ICCPR article 2(1), which prohibits discrimination on virtually any ground including national origin.<sup>341</sup> The HRC explicitly addressed the issue of freedom of movement in this respect:

Once an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave that territory may only be restricted in accordance with article 12, paragraph 3. Differences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified under article 12, paragraph 3.<sup>342</sup>

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preclude subjecting beneficiaries of subsidiary protection status to a residence condition for the purpose of facilitating their integration if they are not in a situation that is objectively comparable, in so far as that objective is concerned, with the situation of third-country nationals legally resident in the member state concerned. *Id.* ¶ 64.

341. Cf. Human Rights Comm., *General Comment No. 15: The Position of Aliens Under the Covenant*, U.N. Doc. HRI/GEN/1/Rev.6 at 140, ¶ 2 (1986); see also NOWAK, *supra* note 12, at 54. (“Unequal treatment of aliens is permissible only with respect to rights limited to nationals.”). See also ICCPR, *supra* note 10, art. 26 and U.N. Human Rights Comm., *supra* note 36, ¶ 12 (“[T]he application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.”).

342. U.N. Human Rights Comm., *supra* note 36, ¶ 8. In U.N. Human Rights Comm., *Karker v. France*, Comm. No. 833/1998, U.N. Doc. CCPR/C/70/D/833/1998, ¶ 9.2 (2000), Karker, a refugee from Tunisia, was ordered to compulsory residence in the department of Finistère for reasons of public security (on account of suspicion that he actively supported a terrorist movement) after an expulsion order proved impossible to implement. The Human Rights Committee did not elaborate these issues beyond reviewing the circumstances and the materials before it, which “do not allow it to conclude that the State Party has misapplied the restrictions in article 12, paragraph 3.” *Id.* ¶ 9.2.

Any such differences in treatment would, however, be incompatible with article 26. In the absence of a substantive bar against restrictions to the rights concerned in article 26, any measure that restricts the freedoms granted in ICCPR article 12(1) that can be considered to be lawful in the sense of article 12(3) would also be lawful under article 26 unless the measure taken is refugee-specific in which case the measure could be deemed lawful under the ICCPR but not under the 1951 Convention.

Article 26 may thus ward off any measure that does not treat refugees and aliens alike, but in the absence of any other delimitation, in principle virtually any restrictive measure short of denying rights altogether could be taken, provided it affects aliens and refugees alike. The absence of a substantive delimitation may be countered by the safeguards comprised in article 12(3), which requires that any restriction should be provided by law, and satisfy a number of other conditions.<sup>343</sup> The same applies to the more intrusive restrictions that would be allowed in times of public emergency under ICCPR article 4. These too are strictly delimited.

## V. EXTERNAL FREEDOM OF MOVEMENT

### A. Introduction

Besides having freedom of movement within the country of asylum, the refugee may wish to leave the country of asylum to visit family in other states, to resettle in a third state, or achieve any other purpose. The 1951 Convention does not address the right to external movement as such. It is confined to the issuing of travel documents for refugees who are lawfully staying in the country and thus assumes their right to external freedom of movement.<sup>344</sup>

Article 12(2) of the ICCPR provides the right to leave any country. A first question is whether this right is likewise predicated on a particular mode of attachment with the country concerned. A second one is whether “any country” includes the country of refuge. If so, does the right to leave impose positive obligations to enable the refugee to leave the country? As discussed above, the right to leave is not absolute; it is subject to the restrictions of article 12(3) and, beyond that, to derogation in time of public emergency in the sense of ICCPR article 4. If that public emergency is a non-international or international armed conflict in the country of refuge, what does that signify for the refugees residing there in terms of their right to leave the country concerned? What if the country of refuge is occupied territory? These questions are regulated by international humanitarian law and will be addressed below.

This section will first focus on the right to leave one’s country as provided in article 12(2) of the ICCPR, both in time of peace, and during a public emergency, which may involve non-international and international armed conflicts, with a view to identifying the scope of the right to leave

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343. See *supra* Section I.B.

344. See Art. 28 and the provisions of the Schedule to the 1951 Convention, *supra* note 2.

one's country. Subsequently, this section will address article 28 of the 1951 Convention with a view to identifying those who are entitled to a Convention Travel Document (CTD). Entitlement to a CTD is predicated on a "lawful stay" and this invites the question as to what constitutes "lawful stay". In addition, article 28 calls on states parties to give sympathetic consideration to the issue of travel documents to other refugees in their territory who are unable to obtain travel documents from the country of their lawful residence, which requires identification of those other refugees. The right to be issued a CTD is not an absolute right, and another question pertains to the limitations given in article 28: compelling reasons of national security or public order may bar the issue of a CTD and hence, travel. The nature of this restriction will be analyzed, also in relation to ICCPR article 12.

B. *The Beneficiaries of ICCPR article 12(2): The Right to Leave  
"any Country"*

ICCPR article 12(2) provides that "everyone" has the right to leave "any" country including his own; this should indeed be taken to literally mean everyone, nationals and aliens alike, without conditions of lawful residency: "the scope of article 12, paragraph 2, is not restricted to persons lawfully within the territory of a State."<sup>345</sup> It therefore applies to refugees too, regardless of their legal status in their country of refuge.

In order to be able to exercise this right - in a regular manner - travel documents are required.<sup>346</sup> The HRC has addressed this issue in a number of cases, most notably in the so-called "passport cases," and has recognized that the right to leave includes the positive obligation to issue travel documents, so that the right to leave can actually be exercised.<sup>347</sup> In its

345. U.N. Human Rights Comm., *supra* note 1, ¶ 8.

346. Sometimes even an exit visa is required. Turkey requires that all refugees who have been selected for resettlement in third countries obtain an exit visa. Temporary Protection Regulation, enacted Oct. 22, 2014, Art. 44(1) (Turk.) ("Temporary or permanent departure of the foreigners under this Regulation to a third country shall be subject to the permission of the Directorate General"). See also Refugee Rights Turkey, *Resettlement and Family Reunification, Departures of Beneficiaries: Turkey*, ASYLUM INFO. DATABASE (2015), <http://www.asylumineurope.org/reports/country/turkey/resettlement-and-family-reunification-departures-beneficiaries>. 2016 saw a change in practice, under which some refugees were denied exit visas based on their levels of academic qualification. Refugees with university qualifications in particular found their cases rejected or left pending for unusual periods of time. *Turkey 'Denying Educated Syrians' Travel to Germany*, THE LOCAL, Jun. 21, 2016, <https://www.thelocal.de/20160621/turkey-wont-let-syrians-travel-even-with-german-visas>; Patrick Kingsley, *Turkey Blocks Syrian Refugees from Resettlement in the US — for Having University Degrees*, THE GUARDIAN, Sep. 19, 2016, <https://www.theguardian.com/world/2016/sep/19/turkey-syrian-refugees-resettlement-blocked-us-degrees>. Statements of politicians referred to the importance of preventing brain drain among the refugee population as a justification for this approach, Emily Feldman, *Turkey Hoards Well-Educated Syrians*, POLITICO, Mar. 10, 2016, <http://www.politico.eu/article/turkey-prevent-well-educated-syrian-refugees-from-leaving-migration/>.

347. Many views could be mentioned, but see, for instance, U.N. Human Rights Comm., *Martins v. Uruguay*, Comm. No 57/1979, U.N. Doc. CCPR/C/15/D/57/1979; U.N. Human Rights Comm., *Montero v. Uruguay*, Comm. No 106/1981, U.N. Doc. CCPR/C/18/D/

General Comment regarding article 12, the HRC phrased it as follows: “Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents.”<sup>348</sup>

However, none of the considerable number of communications of the HRC regarding the refusal to issue passports addressed the right to travel documents of anyone other than nationals and habitual residents. The relevant General Comment consequently only mentions the state of nationality and the state of residence as having a positive obligation to issue travel documents under article 12(2),<sup>349</sup> and does not specifically mention the country of refuge. The question is, therefore, whether states are obligated, under article 12(2) and the implied obligation to issue travel documents, to issue travel documents to refugees and other aliens within their territories.

In view of the fact that the right to leave as set out in article 12(2) is not confined to nationals of the state concerned but accrues to anyone - not even restricted to those who are lawfully present -, the obligations to issue travel documents to aliens must be considered to be part of this right.<sup>350</sup> It would consequently seem that the only requirement for establishing the right to a travel document under ICCPR article 12(2) is that the person finds himself within the territory and the jurisdiction of the state concerned.<sup>351</sup> Since the right to leave must include the right to obtain the necessary travel documents, to argue otherwise would be to argue that the right to leave as set out in article 12(2) is, after all, *not* a right that accrues to anyone. For refugees, it means they make invoke article 12(2) to obtain a travel document, *regardless* of the nature of their stay in the country of refuge.

This entitlement is vital for refugees, since they are barred from requesting a travel document—passport—from their country of origin (or, rather, nationality) because doing so, would signify that they are voluntarily re-availing themselves of the protection of that country and that, in

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106/1981; U.N. Human Rights Comm., *Bwalya v. Zambia*, Comm. No 314/1988, U.N. Doc. CCPR/C/48/D/314/1988; U.N. Human Rights Comm., *Kalenga v. Zambia*, Comm. No 326/1988, U.N. Doc. CCPR/C/48/D/1988; U.N. Human Rights Comm., *Lichtensztein v. Uruguay*, *supra* note 106; U.N. Human Rights Comm., *Dernawi v. Libya*, Comm. No 1143/2000, U.N. Doc. CCPR/C/90/D/1143/2002; U.N. Human Rights Comm., *El Ghar v. Libya*, Comm. No 1107/2000, U.N. Doc. CCPR/C/104/D/1782/2008.

348. U.N. Human Rights Comm., *supra* note 1, ¶ 9. Presumably also the granting of exit visa if required by the country. *See* U.N. Human Rights Comm., *supra* note 342.

349. U.N. Human Rights Comm., *supra* note 1, ¶ 9.

350. This inference corresponds with the practice of states to issue so-called “aliens passports” to stateless persons, those of undefined citizenship, and those with a residence permit in the country. *See* JOHN TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE* 161(2000) (states offering passports to “denizens,” *i.e.* non-citizen nationals such as resident aliens, refugees, asylees, non-citizen populations over which they hold dominion). Those who are entitled to subsidiary protection in the EU are entitled to be issued travel documents when they are unable to obtain a national passport unless compelling reasons of national security or public order otherwise require it. Directive 2011/95, *supra* note 339, art. 25(2).

351. ICCPR, *supra* note 10, art. 2(1).



turn, would justify loss of refugee status under article 1C(1) of the 1951 Convention.<sup>352</sup>

### C. *The Right to Leave in Time of Peace and During a State of Emergency*

The right to leave the country may, under article 12(3) of the ICCPR, be restricted by measures provided by law, which are necessary to protect national security, public order (*ordre public*), public health or morals, or the rights and freedoms of others. Those restrictions were addressed earlier, and a final question that needs to be raised is whether such restrictions affect refugees in the same way they would affect nationals and habitual residents, or anyone else for that matter, in the relevant country. Arguably so by virtue of ICCPR article 2(1), which prescribes that each state party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, including “national origin,” which covers alienage.<sup>353</sup>

However, additional restrictions may apply in times of public emergency which threatens the life of the nation provided its existence is officially proclaimed.<sup>354</sup> ICCPR article 4 is invoked by states with a disturbing frequency—and states of emergency may in addition last an equally disturbingly long time<sup>355</sup>—in situations which vary from a hazardous situation caused by a hurricane, the spread of bird flu, acts of subversion and armed uprising, acts of violence, civil unrest, terrorism, criminality, strikes and economic crises, non-international and international armed conflict.<sup>356</sup> A recent example is Turkey, a state that hosts millions of predominantly Syrian refugees, which proclaimed a state of emergency following an aborted *coup d'état* on 15 July 2016. The state of emergency has since been extended several times, and continues at the time of this writing.<sup>357</sup>

352. Art. 1C(1) refers to refugees who retained the nationality of the country of origin: the Convention shall cease to apply when the refugee “has voluntarily re-availed himself of the protection of his country of nationality.” in the absence of proof to the contrary). U.N. High Commissioner for Refugees, *supra* note 119, ¶¶ 100, 121.

353. See *supra* note 341.

354. ICCPR, *supra* note 10, art. 4; U.N. Human Rights Comm., *supra* note 22, ¶ 2.

355. Israel, for instance, proclaimed a state of emergency in May 1948, and has maintained it ever since: once it acceded to the ICCPR in 1991, it notified the U.N.S.G. of its invoking Art. 4 UNTC, accessed on 17 January 2017.

356. See U.N. TREATY COLLECTION, *supra* note 308.

357. Following the aborted coup, Turkey invoked Art. 4 ICCPR. Cf. U.N. Experts Urge Turkey to Adhere to its Human Rights Obligations Even in Time of Declared Emergency, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER (Aug. 19, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20394>; see also Başak Bağlayan, *The Turkish State of Emergency Under Turkish Constitutional Law and International Human Rights Law*, ASIL INSIGHT (Jan. 20, 2017), <https://www.asil.org/insights/volume/21/issue/1/turkish-state-emergency-under-turkish-constitutional-law-and>. On 17 July 2017, the state of emergency was extended for the fourth time, for another 3 months. *Turkish Government Extends State of Emergency Rule for Another 3 Months*, REUTERS (Jul. 17, 2017), <http://www.reuters.com/article/us-turkey-security-emergency-idUSKBN1A212S?il=0>.

Another example is France, which proclaimed a state of emergency after terrorist attacks were committed in Paris on 13 November 2015, a state of emergency that has also been extended several times and continues too at the time of writing.<sup>358</sup>

Provided the public emergency has officially been proclaimed, the right to leave may be curtailed by virtue of ICCPR article 4.<sup>359</sup> To a certain extent, that is: states parties may take measures derogating from their obligations under the Covenant to the extent strictly required by the exigencies of the situation, “provided that such measures are not inconsistent with their other obligations under international law, and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”<sup>360</sup> In other words, the extensive prohibition on discrimination provided in ICCPR article 2(1) gives way to a more limited one in time of public emergency.<sup>361</sup> The exclusion of “national origin” was intentional<sup>362</sup>, and as a result, refugees and other foreigners may be specifically affected by measures that derogate from article 12, provided those measures are not inconsistent with other obligations under international law. One such obligation is article 8 of the 1951 Convention addressing possible exceptional measures—which may besides many other restrictions include restrictions on freedom of movement<sup>363</sup>—that may be taken against the person, property, or interests of nationals of a foreign state but exempts refugees who are formally nationals of that foreign state from such measures:<sup>364</sup> the formal legal bond between a refugee and his country of na-

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358. France declared a state of emergency following the November 13, 2015 terrorist attacks in Paris. It amended and expanded its 1955 state of emergency law in an accelerated procedure on 20 November. The new law grants the French government broad grounds to restrict liberty of movement. *France: New Emergency Powers Threaten Rights*, Human Rights Watch (Nov. 24, 2015), <https://www.hrw.org/news/2015/11/24/france-new-emergency-powers-threaten-rights>. The state of emergency in France has been renewed several times and extended until November 2017. See INT’L FED’N FOR HUMAN RIGHTS, COUNTER-TERRORISM MEASURES & HUMAN RIGHTS: WHEN THE EXCEPTION BECOMES THE NORM (2016); Yasmeen Serhan, Will France’s State of Emergency Become Permanent?, THE ATLANTIC (Jul. 11, 2017), <https://www.theatlantic.com/international/archive/2017/07/will-frances-state-of-emergency-become-permanent/532848/>.

359. France notified the U.N.S.G. of its invoking Art. 4 ICCPR in accordance with Art. 4(3) ICCPR on 25 November 2015 (including the possibility of derogation from Art. 12 ICCPR), and of its extending the state of emergency on 26 February 2016, and again on 22 July 2016, on 21 December 2016, and on 14 July 2017. U.N. TREATY COLLECTION, *supra* note 308. Turkey too notified the U.N.S.G. of its invoking Art. 4 ICCPR in accordance with Art. 4(3) ICCPR on 2 August 2016 (including the possibility of derogation from Art. 12 ICCPR), and of its extending the state of emergency on 14 October 2016, and again on 9 January 2017, and on 19 April 2017. U.N. TREATY COLLECTION, *supra* note 308.

360. ICCPR, *supra* note 10, art. 4(1).

361. Art. 26, ICCPR, *supra* note 10, on non-discrimination, does include “national origin” but is to no avail since that right may be derogated from by Art. 4(2).

362. NOWAK, *supra* note 12, at 99–100 (“[S]ince in time of war, nationals of enemy States are often discriminated against.”).

363. Davy, *supra* note 280, at 772.

364. *But see infra* Section V.E.

tionality “does not sufficiently legitimize measures intrinsically based on the supposition that there is, in addition to the legal bond, also a strong bond of loyalty” with the country concerned.<sup>365</sup> Put differently, article 8 acknowledges that the formal nationality of the refugee is *de facto* an ineffective one (as a result of which any such exceptional measures would not be able to achieve the intended effect of enhancing national security or pressuring the foreign state concerned to act or refrain from acting in a certain way either).<sup>366</sup>

A public emergency may involve an armed conflict.<sup>367</sup> The HRC observed about this type of emergency that “[d]uring armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant to prevent the abuse of a State’s emergency powers.”<sup>368</sup> The next two paragraphs will address those additional safeguards provided by international humanitarian law.

#### D. *The Right to Leave in Time of a Non-international Armed Conflict*

In a situation of a non-international armed conflict,<sup>369</sup> when the state’s armed forces are confronted with armed opposition groups within its territory,<sup>370</sup> international humanitarian law applies, more in particular,

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365. Davy, *supra* note 280, at 757.

366. HATHAWAY, *supra* note 14, at 272; Davy, *supra* note 280, at 758.

367. See *General Comment No. 29, supra* note 22, at ¶¶ 2, 3. Art. 4 itself does not refer to “war” to prevent the impression that the U.N., established to prevent war, accepted war. NOWAK, *supra* note 12, at 89.

368. See U.N. Human Rights Comm., *supra* note 22, ¶ 3. Art. 5(1) ICCPR provides that: “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.” ICCPR, *supra* note 10, art. 5(1). Art. 4 also applies when the public emergency consists of an international armed conflict, “the prototype of a public emergency that threatens the life of the nation.” NOWAK, *supra* note 12, at 89. *General Comment No. 31, supra* note 23, with a reference to *General Comment No. 22, ¶ 11* reiterates this: “the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres are complementary, not mutually exclusive.” For more in general about the relation between international human rights law and international humanitarian law, see HANDBOOK ON THE LAW OF INTERNATIONAL MILITARY OPERATIONS 57 (Terry Gill & Dieter Fleck eds., 2d ed. 2015) (“When applicable simultaneously, international humanitarian law and human rights law are complementary . . .”). See also Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310 (2007).

369. A synonym for “civil war.” Cf. PIETRO VERRI, *DICTIONARY OF THE INTERNATIONAL LAW OF ARMED CONFLICT* 35 (Edward Markee & Susan Mutti trans., 1992).

370. This is a very simple and short summary. For the complexities involved, see in particular OSCAR UHLER ET AL., *COMMENTARY IV GENEVA CONVENTION: RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR* 25-45 (Jean Pictet ed., 1958); *INTERNATIONAL COMMITTEE OF THE RED CROSS, CONVENTION (I) FOR THE AMELIORATION*

common article 3, the provision that is identical in each of the four Geneva Conventions of 1949,<sup>371</sup> and rules of customary international humanitarian law apply.

Common article 3(1) provides that:

Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person . . .
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment . . .

The question is whether common article 3 affords additional safeguards regarding the right to leave in particular with respect to refugees who are no longer safe in their country of refuge. Illustrative for such a situation are the African refugees who were living in or transiting through Libya, and found themselves caught in the civil war in Libya in 2011.<sup>372</sup> They not only found themselves in a war zone, but even became targets themselves - sub-Saharan refugees were suspected and accused of being mercenaries

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OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD COMMENTARY OF 2016: ARTICLE 3 ¶ 393 (2016) (“[A]rmed conflicts not of an international character are first of all armed conflicts which oppose the government of a State Party and one or more non-State Parties”); Dieter Fleck, *The Law of Non-International Armed Conflicts*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 605 (Dieter Fleck eds., 3rd ed., 2013); see also Noëlle Quénivet, *Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict*, in *APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES* 31 (D. Jinks et al. eds., 2014).

371. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art 3, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art 3, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention (III) relative to the Treatment of Prisoners of War art 3, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

372. See generally Sybilla Wilkes, *Sub-Saharan Africans Fleeing Libya Report Serious Intimidation, Violence*, U.N. HIGH COMMISSIONER FOR REFUGEES (Mar. 8, 2011), <http://www.unhcr.org/news/latest/2011/3/4d7658719/sub-saharan-africans-fleeing-libya-report-serious-intimidation-violence.html>; AMNESTY INT’L, EUROPE, NOW IT IS YOUR TURN TO ACT. REFUGEES FORCED OUT OF LIBYA URGENTLY NEED RESETTLEMENT (2011); AL-JAZEERA, *African Migrants Targeted in Libya Rights Groups Fear Dozens Killed in Violent Backlash Against Supposed Gaddafi-Hired Mercenaries from Sub-Saharan Africa* (Feb. 28, 2011), <http://www.aljazeera.com/news/africa/2011/02/201122865814378541.html>.

hired by ousted leader Muammar Gaddafi<sup>373</sup> - and were thus compelled to leave Libya in search of asylum elsewhere.<sup>374</sup>

Common article 3 does not include nationality or national origin among the prohibited distinctions,<sup>375</sup> nor does it address freedom of movement. Yet it “does prohibit humiliating and degrading treatment, which may arguably be violated if civilians are prevented from leaving a territory where they may face ill-treatment.”<sup>376</sup> Protocol II,<sup>377</sup> which develops and supplements common article 3, is confined to protecting civilians against forced departure from their own territory for reasons connected to the conflict<sup>378</sup>, and does not address voluntary departure.

It would therefore seem that the ICCPR, that is article 12(2) and (3) *jo.* article 4, provides, also in a time of non-international armed conflict, the best safeguard for refugees with respect to the right to leave, subject to the extent to which restrictive measures may be discriminatory *vis-à-vis* refugees.<sup>379</sup> The ICCPR is simply much more specific regarding both the right to external movement and the restrictions to which this right may be subjected, restrictions that must be consistent with other obligations states have under international law, which include the exemption from excep-

373. *African Migrants Targeted in Libya, supra* note.

374. Their right to leave the country turned, once more, into the right to seek asylum, and they were, thus, back at square one. *See* Chapter 1, *supra*. On their fate, see IRIN, *Hundreds in limbo at camp on the Tunisian-Libyan border*, (Jan. 16, 2013), <http://www.irinnews.org/report/97254/hundreds-limbo-camp-tunisian-libyan-border>; Dalia Al Aichi, *UNHCR Closes Camp in South Tunisia, Moves Services to Urban Areas*, U.N. HIGH COMMISSIONER FOR REFUGEES (Jul. 2, 2013), <http://www.unhcr.org/news/latest/2013/7/51d2a40e9/unhcr-closes-camp-south-tunisia-moves-services-urban-areas.html>. *But see* Lamia Ledrisi, *Tunisia, the Humanitarian Emergency of the Choucha Refugee Camp*, MEDITERRANEAN AFFAIRS (Jun. 15, 2015), <http://mediterraneanaffairs.com/tunisia-the-humanitarian-emergency-of-the-choucha-refugee-camp/>.

375. In his Commentary, Pictet refers to other articles that elaborate aspects of Art. 3, such as Art. 27 that does not include nationality either. Pictet says that this “does not in any way mean that people of a given nationality may be treated in an arbitrary manner; everyone, whatever his nationality, is entitled to humane treatment. On the other hand, it is quite possible that special security measures may be taken in the case of civilians of a given nationality . . .” UHLER, *supra* note 370, at 40. The omission of nationality in Art. 27 is a conscious one, “and the discussions at the Diplomatic Conference make it clear that it cannot be regarded as implicitly included.” *Id.* at 206.

376. Pamela Hylton, *The Right to Leave*, in *THE 1949 GENEVA CONVENTIONS: A COMMENTARY* 1173, ¶ 31 (Andrew Clapham et. al. eds., 2015). A similar prohibition is included in the ICCPR, *supra* note 10, art. 7, from which derogation is not allowed provides that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. [. . .]” (*cf. id.* art. 4(2)).

377. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

378. *Id.* art. 17(2) (“Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.”).

379. *See infra* Section V.D on Art. 9 of the 1951 Convention.

tional measures comprised in article 8 of the 1951 Convention,<sup>380</sup> and “particularly the rules of international humanitarian law.”<sup>381</sup>

E. *The Right to Leave in Time of International Armed Conflict*

In time of war, that is, declared war or any other armed conflict that may arise between states, or partial or total occupation, yet other restrictions to the freedom of movement may become applicable. Both the Fourth Geneva Convention<sup>382</sup> and the 1951 Convention<sup>383</sup> protect foreign nationals and refugees respectively from being treated as “enemy aliens” exclusively based on their nationality of an enemy state. Unlike non-refugee foreign nationals, treating refugees from the country concerned as enemy aliens does not, as indicated earlier, make much sense in view of their wholly ineffective nationality.<sup>384</sup> The question is whether refugees would nonetheless, in cases of an international armed conflict, be subject to restrictions on the right to leave the country concerned.

Article 73 of the Protocol Additional to the Geneva Conventions of 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I)<sup>385</sup> provides that persons who before the beginning of hostilities were considered as stateless persons or refugees under the relevant international instruments, shall be protected persons within the meaning of Parts I and III of the Fourth Geneva Convention, in all circumstances and without any adverse distinction. Article 48 of the Fourth Geneva Convention, which is included in Part III, provides that “[p]rotected persons who are not nationals of the Power whose territory is occupied, may avail themselves of the right to leave the territory subject to the provisions of article 35 . . .”,<sup>386</sup>

380. On which, art. 8 also applies in time of non-international armed conflict and international armed conflict. HATHAWAY, *supra* note 14, at 271–72.

381. U.N. Human Rights Comm., *supra* note 22, ¶ 9; NOWAK, *supra* note 12, at 99 (“One is particularly reminded in this context of the minimum guarantees of the rule of law contained in Art. 3 of the four Geneva Conventions of 1949 as well as in the two Additional Protocols of 1977.”).

382. Article 44 of the Geneva Convention (IV) states: “In applying the measures of control in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively based on their nationality “de jure” of an enemy State, refugees who do not, in fact, enjoy the protection of any government.” Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *supra* note 371, art. 44.

383. Article 8 of the 1951 Convention: “With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. [. . .].” 1951 Convention, *supra* note 2. *See also supra* note 366 and accompanying text.

384. *See supra* Section V.C.

385. Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 73, June 8, 1977, 1125 U.N.T.S. 609.

386. Art. 48 addresses repatriation (its title is *Special cases of repatriation*). However, the specific reference to Part III in Art. 73 “reveals a willingness to grant refugees the best possible protection and allows each article of the Convention to be interpreted in the most favorable light for refugees. This means, for example, that refugees . . . may also avail them-

By virtue of Protocol I, this right also applies to protected persons, and hence to refugees, when the occupying state is the country of origin of the refugees concerned: “[t]his Section in particular gives them the right to leave occupied territory (article 48).”<sup>387</sup> As indicated, the right of departure outlined in article 48 is subject to article 35, which provides that “[a]ll protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State . . .”. Thus, national interests may prevent departure.

The question then becomes when departure can properly be deemed to be contrary to the national interests of the state. The 1958 Commentary to the Fourth Geneva Convention refers in this respect to in particular men at an age to bear arms who are thus likely to be mobilized (by the country origin), and persons whose departure is regarded as dangerous to the security of the state where they have been residing.<sup>388</sup> The possibility of mobilization of refugees is highly unlikely since they would, upon departure, not return to their country of origin. However, article 35 may also be invoked to object to someone’s departure when the national economy would suffer as a result; “[t]he Conference had in mind, in particular, the case of countries of immigration, where the departure of too large a proportion of aliens might prejudice national interests by creating manpower or economic problems.”<sup>389</sup> This is quite an extensive, and rather utilitarian, interpretation.<sup>390</sup> In a situation of international armed conflict, during which, presumably, ICCPR article 4 has been invoked and hence allows derogation from article 12(2),<sup>391</sup> it would seem there is no legal bar to prevent a state from invoking such national interests. Article 8 of the 1951 Convention does not apply when such interests are invoked with respect to aliens without discrimination.<sup>392</sup>

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selves of the right to leave the territory as set out in Article 48 in order to go to a third country, despite the heading of that article, which refers to repatriation.” COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 2982 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987). The headings of the Conventions have in any case no official character. They were added by the Secretariat of the 1949 Conference and were not adopted by the Diplomatic Conference itself. *Id.*

387. *Id.*, ¶ 2985.

388. UHLER, *supra* note 370, at 234–36; *see also* G.I.A.D. DRAPER, *THE RED CROSS CONVENTIONS* 36–7 (1958).

389. UHLER, *supra* note 370, at 236.

390. Robert Gehring, *Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I*, 90 MIL. L. R. 49, 84 (1980) (“‘National interest’ is so broad, in fact, that virtually any action resulting from governmental policy, other than bureaucratic whimsy, can be justified by its terms.”). *See also id.* at 85.

391. *See supra* Section V.C.

392. Grahl-Madsen, *supra* note 14, art. 8, ¶ 3.

F. *Article 28 of the 1951 Convention*

So far, this section has focused on the right to leave every country under the ICCPR, both in times of peace and in times of, to summarize it thus, serious upheaval. The ICCPR implies that departure requires the issue of a travel document,<sup>393</sup> and the 1951 Convention instead focuses on the issuance of a travel document. Article 28(1) provides that “[t]he Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require . . .” Article 28, in other words, proceeds from a travel document, and thus implies external movement. This right is predicated on “lawful stay,” and the obvious first question pertains to this requirement: when is a refugee lawfully staying in the country of refuge?

Lawful stay is, at any rate, a more demanding level of attachment to the host state than lawful presence.<sup>394</sup> Robinson points to the fact that the notion should be taken to mean the equivalent of the French phrase, “*résidant régulièrement*,”<sup>395</sup> which, in turn, means living in the country of refuge “on a more or less permanent basis” that may nonetheless signify a “temporary” kind of residence.<sup>396</sup> Vedsted-Hansen observes that this particular requirement does not depend on formal recognition of refugee status.<sup>397</sup> It appears the notion “lawful stay” is explained predominantly by what it is not or does not require; it cannot be identified by determining a specific minimum length of stay but should be determined in the light of the protected activity and circumstances of the stay of the refugee in the host country: it is more than a short period of stay but merely passing through or temporary visit do not qualify. False<sup>398</sup> Since the French designation was considered to be the authoritative one,<sup>399</sup> the qualification of “lawful stay” consequently refers to “officially sanctioned, ongoing presence in a state party, whether or not there has been a formal declaration of refugee status, which grants of the right of permanent residence, or establishment of domicile there.”<sup>400</sup>

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393. See *supra* Section V.B.

394. See *supra* Section IV.B.

395. ROBINSON, *supra* note 14, at 111.

396. *Id.* at 111–12.

397. Jens Vedsted-Hansen, *Article 28/Schedule*, in Zimmermann, *supra* note 124, 1177, 1204.

398. Michael Teichmann, *Article 15*, in Zimmermann, *supra* note 124, 909, 923; see also HATHAWAY *supra* note 14, at 186.

399. U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Draft Convention Relating to the Status of Refugees*, ¶ 5, UN doc. A/CONF.2/102 (Jul. 24, 1951).

400. HATHAWAY *supra* note 14, at 189. This explanation has the advantage that it is consistent with the idea that the 1951 Convention does not *per se* require status determination and that the lack of status determination procedures cannot stand in the way of refugees acquiring more rights along with the passage of time, on which, see *id.* at 180–81.



The responsibility to issue a new CTD shifts to another state (that is also a party to the 1951 Convention) once the refugee has “lawfully taken up residence” in that state.<sup>401</sup> Although “lawful residence” may seem to be more demanding than “lawful stay,” a “commonsensical interpretation” has been suggested by Grahl-Madsen, which will be adopted here, to the effect that it would signify a shift of lawful stay from one state to another.<sup>402</sup>

The travel documents are issued “for the purpose of travel.”<sup>403</sup> A state may not refuse to issue a travel document merely because it regards the proposed travel as inappropriate.<sup>404</sup> Nor does the refugee have to justify the proposed travel to receive a travel document.<sup>405</sup>

The article 28 right to a CTD is not absolute in that “compelling reasons of national security or public order” may bar the issue of travel documents. These “compelling reasons” should be taken to mean a temporary restriction with respect to “reasons of national security and public order,” so that “not every case that would ordinarily fall under the latter concept could be used to refuse a document but only very serious cases.”<sup>406</sup> The adjective “compelling” was added by the drafters precisely to prevent abuse of this restriction, and thus prevent that, for instance, “the holding of extremist views was accepted as a valid ground for not issuing travel documents”.<sup>407</sup>

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401. 1951 Convention, *supra* note 2, Schedule, ¶ 11 (the same term figures in paragraph 6). Cf. Council of Europe Agreement on Transfer of Responsibility for Refugees, of Oct. 16, 1980, ETS No. 107 (aims to secure the adoption of minimum standards to determine which state is to assume responsibility for a refugee, in particular in connection with the issue of travel documents).

402. GRAHL-MADSEN, *supra* note 16, Schedule, ¶ 11; GRAHL-MADSEN, *supra* note 80, at 351-352 (“[I]t seems justified . . . not to ponder too much over the difference between the expressions ‘lawfully staying’ and ‘lawfully resident’ used in the English texts. Both expressions apparently mean the same thing.”). The Council of Europe, with a view to facilitating the application of Art. 28 of the 1951 Convention, and ¶¶ 6, 11 of the Schedule in particular regarding the situation where a refugee has lawfully taken up residence in another state, has provided in Art. 2, European Agreement on Transfer of Responsibility for Refugees, *supra* note 401 that: “Responsibility shall be considered to be transferred on the expiry of a period of two years of actual and continuous stay in the second State with the agreement of its authorities or earlier if the second State has permitted the refugee to remain in its territory either on a permanent basis or for a period exceeding the validity of the travel document.” On the validity of the Convention Travel Document, see *infra*.

403. 1951 Convention, *supra* note 2, art. 28(1).

404. U.N. High Commissioner for Refugees: Division of Internal Protection, *Note on Convention Travel Documents and ICAO Standards*, 23 INT’L J. OF REFUGEE L. 133, ¶ 5 (2011).

405. *Id.* at 134, n.5.

406. ROBINSON, *supra* note 14, at 136.

407. GRAHL-MADSEN, *supra* note 16, art. 28 ¶ 5 (The original adjective had been “imperative” but that was changed to “compelling” by the style committee.). See also *infra*.

In order to determine eligibility for a CTD, the national authorities will need to verify the identity of the applicant,<sup>408</sup> and the question of whether uncertain identity may be considered to fall under the categories of “national security” and “public order” was addressed in 2017 by the Borgarting Court of Appeal in Norway. The Court did not consider general doubt regarding identity to qualify as compelling reasons in the sense of article 28 of the 1951 Convention, but it added that it could not be excluded it would when issuing a CTD to refugees whose identity is being doubted would entail that the Norwegian CTD would no longer be approved by the authorities of other states.<sup>409</sup>

The relevant restrictions to which departure (including the means to enable departure) may be subjected to by virtue of different treaties—the ICCPR and the 1951 Convention—should be considered in terms of their either being or not being interrelated. It has been contended that since the refusal to issue a CTD constitutes interference with the right to leave the country, it must comply with the criteria that apply to any restriction set out in article 12(3) of the ICCPR.<sup>410</sup> It would seem, as will be set out below, that this contention is correct when no other travel document is issued, and hence actual departure is frustrated.

The question of restrictions under both provisions is complex, not in the least because the two rights are not identical. Whereas the ICCPR grants the right to leave one’s country in article 12(2), regardless of mode of presence in the country concerned (subject to specific restrictive measures provided in article 12(3)) and implies the issue of the requisite travel documents, the 1951 Convention confines itself to the issue of travel documents, albeit only to those who lawfully stay in the territory of the state concerned (on other refugees who may be issued a CTD, see Section V.G *infra*) subject only to compelling reasons of national security or public order, and implies departure.<sup>411</sup> Strictly speaking therefore, the denial of a CTD is only by implication denying the right to leave (and more importantly, the right to return).

The right granted in article 12(2) is subject to, in theory, more restrictions than the right granted in article 28. However, the former must comply with an objective minimum standard,<sup>412</sup> whilst the latter has a more

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408. U.N. High Commissioner for Refugees, *Guide for Issuing Machine Readable Convention Travel Documents for Refugees and Stateless Persons* 11 (Feb. 2017), <http://www.refworld.org/docid/52b166a34.html>.

409. *Aron & Others v. The Immigration Appeals Board*, Borgarting Court of Appeal Feb. 13, 2017, No. LB-2016-3734, ¶ 64 (Nor.), <https://www.udiregelverk.no/no/rettskilder/un-derrettsavgjorelser/lb-2016-3734>.

410. Vedsted-Hansen, *supra* note 397, at 1207.

411. But see, GRAHL-MADSEN, *supra* note 16, Schedule, ¶ 13(2) under which the state may require the holder of the travel document to comply with formalities as may be prescribed regarding exit from its territory. Grahl-Madsen explains that this does not allow the issuing state to refuse the holder of a valid travel document to leave the country except in such cases where the issue of a travel document could be refused. *Id.* ¶ 2. The same provision refers to cases in where the refugee’s stay is authorized for a specific period.

412. NOWAK, *supra* note 12, at 274–75.

subjective ring to it in the sense that what is “compelling”, although in itself a high bar, is determined in light of particularized circumstances,<sup>413</sup> and is in that sense inherently prone to arbitrariness. Although the right given in article 28 should not be subject to more and other restrictions than those set out in article 28 itself, the denial of a CTD, and consequently travel, may constitute a violation of ICCPR article 12(2) if no other travel document is issued. Whether that actually will be the case is dependent on whether or not the resulting denial of departure is in conformity with the criteria regarding restrictive measures set out in article 12(3). However, the mere fact that the implicit denial of departure may be challenged in the context of article 12(3) may in itself counterbalance any arbitrariness in the application of article 28 of the 1951 Convention.<sup>414</sup>

G. *Travel Documents for any Other Refugee: Freedom of Onward Movement*

Article 28 of the 1951 Convention is not confined to issuing travel documents to refugees who are lawfully staying in their territory; it also includes the rather surprising suggestion that states issue travel documents to any other refugee in their territory, that is, a discretionary power to issue CTDs to other refugees, in particular those who lawfully reside elsewhere:

The Contracting States may issue such a travel document to any other refugee in their territory: they shall in particular give sympathetic consideration to the issue of such travel documents to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

It would seem that any other refugee, besides those who qualify for the issuance of a CTD by virtue of lawful stay in the country concerned, may be eligible for a CTD at the discretion of the state in whose territory he

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413. Cf. Case C-373/13, *H. T. v Land Baden-Württemberg*, 2014 E.C.L.I. 2014-2218, ¶ 86 (Advocate General Sharpston explains the phrase “compelling reasons of national security or public order” as included in Art. 24(1) of Directive 2004/38/EC regarding residence permits in the CJEU Case C-373/13, “[C]ompelling reasons of national security and public order’ must always include an objective element. There must be plausible evidence demonstrating that the reason invoked can fairly be ‘compelling.’ At the same time, the use of the term ‘compelling’ suggests a degree of subjectivity, inasmuch as those reasons are considered to be compelling by the Member State concerned at the point when it takes action. It follows that the same reasons will not necessarily be ‘compelling’ in each and every case”); Directive 2004/38, of the European Parliament and of the Council, art. 24(1), 2004 O.J. (L 158) (“As soon as possible after their status has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years and renewable unless *compelling reasons of national security or public order* otherwise require, and without prejudice to Article 21(3)”) (emphasis added).

414. See ICCPR, *supra* note 10, art. 12(3), at 176. (on an effective remedy and beyond that, to the possibility of communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant under the (First) Optional Protocol to the ICCPR. As at 30 July 2017, 116 states are parties to this Protocol.)

finds himself by simply being present, even if illegally.<sup>415</sup> Robinson explains the remarkable suggestion to issue travel documents to illegally present refugees by observing that previous agreements provided for the issuance of documents to refugees not staying lawfully in the country, albeit only as a transitional measure.<sup>416</sup>

However, the Schedule to which article 28 refers, appears to retract from this largesse in defining the category of the relevant beneficiaries in a more limited manner in paragraph 6(3). Paragraph 6(3) of the Schedule states that “[t]he Contracting States shall give sympathetic consideration to renewing or extending the validity of travel documents *or issuing new documents to refugees no longer lawfully resident in their territory* who are unable to obtain a travel document from the country of their lawful residence.”<sup>417</sup> The Schedule appears to qualify those referred to in article 28 by requiring a past form of attachment with the issuing country, and hence reduce the number of beneficiaries. This particular qualification corresponds with the fear expressed by the delegate of the United Kingdom that article 28 would permit contracting states to issue travel documents to refugees who were in no way connected with them.<sup>418</sup> Grahl-Madsen, therefore, considers the adoption of paragraph 6(3) as a - conscious - compromise.<sup>419</sup>

It is an unsatisfactory outcome in the sense that the text of article 28 is clear, and reading this particular limitation into article 28 merely on account of an annex that focuses on the Convention travel document itself is from the point of view of treaty interpretation hardly sustainable. First, article 28 clearly states that the provisions of the Schedule shall apply to the travel document, i.e. the Schedule has no bearing on the obligation to issue travel documents. Second, the 1951 Convention does not indicate that the attachment is an integral component of it.<sup>420</sup> Lastly, this interpretation is difficult to reconcile with the intention to ensure the external freedom of—onward—movement of refugees.

The question is whether the limitation implied in the Schedule matters from a legal point of view. First of all, the issuance of CTDs to “any other refugee” is phrased in terms of a discretionary power. States are merely asked to give sympathetic consideration on the issue of CTDs to those who otherwise would have difficulty obtaining one. Another question is whether this discretion has not given way to an obligation on the part of

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415. ROBINSON, *supra* note 14, at 136; GRAHL-MADSEN, *supra* note 16, art. 28, § 8. This is quite extraordinary since the Convention Travel Document entitles the holder to be readmitted to the state that issued it, at any time during the period of its validity, 1951 Convention, *supra* note 2, Schedule, ¶ 13(1), on which see Section VI *infra*.

416. ROBINSON, *supra* note 14, at 136.

417. 1951 Convention, *supra* note 2, Schedule, ¶ 6(3) (emphasis added).

418. GRAHL-MADSEN, *supra* note 16, Schedule, ¶¶ 3, 6.

419. *Id.*; but see ROBINSON, *supra* note 14, at 142 (contending that the relevant phrase should be taken to refer to refugees who had been residing lawfully in the country, forfeited their lawful residence, and continue to reside there unlawfully).

420. See ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 377 (3rd ed. 2013).

states that are parties to both the 1951 Convention and the ICCPR to issue travel documents.<sup>421</sup> After all, article 2(1) of the ICCPR requires each state to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the ICCPR, including the right to leave one's country—which, in turn, as set out above, implies the issuance of travel documents. It moreover carries the benefit of an effective remedy—lacking in article 28 and the 1951 Convention at large—that is required by article 2(3) of the ICCPR since even if the requirement to give sympathetic consideration to a travel document request is interpreted to require a duty of process (in the sense of taking a request to that end into favorable consideration), it cannot be extended to encompass giving reasons for a denial, let alone a remedy to contest the negative decision made.

The value of the CTD is not confined to the possibility of travel as departure only. The value of the CTD is that it entitles the holder to return to the country that has issued it. The right of return to the country of refuge will be addressed in the next section.

#### H. *Readmission to the Country of Refuge*

The CTD entitles the holder to return, as follows: “Each Contracting State undertakes that the holder of a travel document issued by it in accordance with article 28 of this Convention shall be readmitted to its territory at any time during the period of its validity.”<sup>422</sup> Readmission is hence predicated on the possession of a travel document that is usually issued to lawfully staying refugees, but may be issued to other refugees who are not necessarily lawfully staying in the country as well,<sup>423</sup> and related to the period of validity of the CTD. The validity of a CTD is one or two years, at the discretion of the issuing authority.<sup>424</sup> However, this period may be limited by the issuing state. The Schedule provides in Paragraph 13(3) that “[t]he Contracting States reserve the right, in exceptional cases, or in cases where the refugee's stay is authorized for a specific period, when issuing the document, to limit the period during which the refugee may return to a period of not less than three months.”<sup>425</sup>

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421. All states parties to the 1951 Convention and/or 1967 Protocol are party to the ICCPR except for Antigua and Barbuda, Fiji, Holy See, St Kitts and Nevis, Solomon Islands, and Tuvalu; St Lucia signed but not ratified the ICCPR. U.N. TREATY COLLECTION, *supra* note 308.

422. 1951 Convention, *supra* note 2, Schedule, ¶ 13(1); *see also* European Council on Refugees and Exiles, *Unravelling Travelling: Travel Documents for Beneficiaries of International Protection 5* (Oct. 2016), <https://www.ecre.org/wp-content/uploads/2016/10/AIDA-Brief-Travel-Documents.pdf>.

423. 1951 Convention, *supra* note 2, Schedule, ¶ 5(7).

424. 1951 Convention, *supra* note 2, Schedule, ¶ 5. In practice, the actual duration of validity appears to vary greatly, for an overview of a number of European states that issue CTDs, see Annex 1 to AIDA (Asylum Information Database), *Unravelling Travelling*, *supra* note 422, at 12.

425. 1951 Convention, *supra* note 2, Schedule, ¶ 13(3). The Schedule requires the holder, in Paragraph 13(2), to comply with such formalities the state may prescribe regarding return to its territory. Robinson gives the example of visa: the refugee must be admitted

However, the period of re-entry may be shortened if the refugee's stay in the country of refuge had been authorized only for a specific period<sup>426</sup>, and in —not defined—exceptional cases. Examples of such exceptional cases include refugees who have been expelled but nonetheless received a CTD with a view to resettling elsewhere; refugees whose movements the issuing state chooses to control more closely than others; and the return of refugees who were resettled in a third state but could not smoothly integrate in the country of resettlement.<sup>427</sup> It is a moot point whether the last instance still exists; it belongs to the time, still tangible when the 1951 Convention was drafted, when the IRO resettled a million refugees in the wake of the Second World War: the agreements the IRO concluded with resettlement states included return clauses precisely to accommodate the eventuality that the resettled refugees could not be absorbed in the economy of the resettlement state,<sup>428</sup> that is, could not provide for themselves in that state. Grahl-Madsen appears to confine this possibility to the return of “vast” and “important numbers of refugees who for some reason or other could not be smoothly integrated in the country of resettlement.”<sup>429</sup> In short, a numerical exception to protect the state from which the refugees resettled against a massive return influx. Apart from the fact that it is not logical to shorten the possibility of return to the state that issued the CTD in case integration upon resettlement does not work out, since that conclusion one can presumably only reach after the passage of a considerable period of time, it is a moot point whether this particular exceptional case has not been outdated. First of all, the number of annually available resettlement places is relatively small—less than one percent of the

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without visa unless a visa is required from own nationals, yet the state may not refuse to grant an entry visa as long as return is permitted because otherwise the purpose of Paragraph 13(1) would be defeated, ROBINSON, *supra* note 14, at 144. The requirement of Paragraph 13(2) does not in any way limit the obligation of the issuing state to readmit the holder of the CTD, Grahl-Madsen, *supra* note 16, Schedule, ¶ 13, § 2.

426. Grahl-Madsen gives the example of refugees whose status has not yet been regularized in the country of refuge and who are advised to seek admission to another country, GRAHL-MADSEN, *supra* note 16, Schedule, ¶ 13, § 3.

427. *See id.*; U.N. High Commissioner for Refugees, Note on Travel Documents for Refugees, ¶ 22, U.N. Soc. EC/SCP/10 (Aug. 30, 1978) (emphasizing that the right to restrict the period during which a refugee may return “should be limited to cases where there are very special reasons for restricting the validity of the return clause to a period of less than that of the validity of the travel document”).

428. Those who could not be “absorbed into the economic structure” of the resettlement country could be returned (not to their country of origin but the country from which they were resettled) within a set period. *Cf.* Additional Protocol to the Supplementary Agreement Between the Italian Government and the IRO art. IX (29), Dec. 31, 1952; HOLBORN, *supra* note 305 at 737. Another example is included in Art. 10 of the Agreement Between the Government of the French Republic and the PCIRO Concerning the Selection of Refugees and Displaced Persons for France (Home Territory) and Algeria of 13 January 1948, text included in *id.* at 613: refugees who prove unsuited to any work in France may be returned (provided it takes place within 15 months from the date of their admission into French territory).

429. GRAHL-MADSEN, *supra* note 16, Schedule, ¶ 13, § 3.

world's refugees can be resettled.<sup>430</sup> Second, resettlement is nowadays not so much used in the classical sense of a permanent solution—which is geared to integration in the resettlement state—but rather consists of substituting the country of asylum that is not capable of providing the requisite protection for another state,<sup>431</sup> in which case integration is not an issue, that is, not more or other than it would be for any other refugee regardless of mode of entry.

## VI. THE RIGHT TO RETURN TO ONE'S COUNTRY OF ORIGIN

### A. Introduction

At some point in time, the refugee may wish to return to his country of origin.<sup>432</sup> Article 12(4) of the ICCPR provides that “[n]o one shall be arbitrarily deprived of the right to enter his own country.” Can the refugee simply invoke this right and return? Does the notion of “one’s own country” include both the country of nationality and that of former habitual residence? Refugee status is meant to be a temporary status, and from that perspective, return to the country of nationality or former habitual residence is probably not problematic *per se*. But what about those whose ties to that country have become tangential, and hence tenuous along with the passage of time?

A large percentage of the world’s refugees—an estimated number of 11.6 million, that is two-thirds of all refugees (as of the end of 2016), and in addition, the 5.3 million Palestinian refugees in the care of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA),<sup>433</sup> live in so-called “protracted refugee situations.”<sup>434</sup> A protracted refugee situation has been defined by UNHCR as a situation in which 25,000 or more refugees from the same nationality have been in exile for five or more years in a given asylum country.<sup>435</sup>

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430. On average 80,000 refugees can be resettled per year. As to the number of resettlement places required, see U.N. High Commissioner for Refugees, *Projected Resettlement Needs 2018*, at 9 (June 2017), <http://www.unhcr.org/en-us/protection/resettlement/593a88f27/unhcr-projected-global-resettlement-needs-2018.html> (stating that 1.2 million places are needed. The U.N. study finds the number of people in need of resettlement far surpasses the opportunities for placement in a third country.).

431. Only those whose protection cannot be secured in the country of refuge are resettled, *cf.* U.N. High Commissioner for Refugees, *Handbook on Resettlement*, 9 (2d ed. 2011), <http://www.unhcr.org/46f7c0ee2.pdf>; *see also id.* Chapter 6.

432. Country of origin” here means either the country of nationality or the country of former habitual residence. *Cf.* 1951 Convention, *supra* note 2, art. 1A(2).

433. On UNRWA, *see generally* BENJAMIN SCHIFF, *REFUGEES UNTO THE THIRD GENERATION: U.N. AID TO PALESTINIANS*; ALEX TAKKENBERG, *THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW* 29-33 (1997).

434. U.N. HIGH COMMISSIONER FOR REFUGEES, *GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016*, 22 (2017).

435. U.S. DEP’T OF STATE HUMANITARIAN INFORMATION UNIT, *GLOBAL PROTRACTED REFUGEE SITUATIONS*, (2017), <https://www.state.gov/documents/organization/266018.pdf>; *see also* Exec. Comm. of the High Comm’r Programme, *Protracted Refugee Situations*, U.N. Doc. EC/54/SC/CRP.14, ¶ 5. UNHCR now considers that definition too limited: “This criterion

Quite a number, far too many, of those protracted refugee situations exist already for decades. For 9.4 million (or fifty-six percent) of the 16.9 million refugees caught in protracted refugee situations, this protracted situation already lasts for twenty years or more,<sup>436</sup> and some refugees live in such situations for considerably more time. Palestinian refugees in the Middle East, Afghan refugees in Pakistan and Iran, and Western Saharan refugees in Algeria are cases in point.<sup>437</sup> Such extreme protracted situations mean that children and grandchildren are born as refugees, as if it is a hereditary trait. If they want to return to their country of origin, does that country—i.e., the country of their ancestors—still qualify as such? Even more complex is the comparable question regarding those who were not nationals of the country of origin but former habitual residents without the formal nationality of the state concerned: does that country still “count” as “one’s own country,” or has the country of refuge meanwhile become their country of habitual residence? And what about the children of those who were habitual residents of the country of origin? Do they have any relevant legal connection to that country?

Even if a right of return can be established, the right itself is not absolute. It may be denied, provided the denial is not of an arbitrary nature, and it may be derogated from in time of a public emergency and that raises two final questions: when can return actually, lawfully, be denied? And is the country of origin entitled to delay returns and require phased returns with a view to be able to accommodate the return of large numbers of returnees?

#### B. *Return to the Country of Origin.*

Article 12(4) of the ICCPR provides that no one shall be arbitrarily deprived of his right to enter his own country. As far as the meaning of “one’s own country” is concerned, the HRC, in its General Comment on Freedom of Movement, provided that

[the phrase “his own country”] is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.<sup>438</sup>

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clearly has limitations, as displacement situations are dynamic: Refugee populations change due to new arrivals and returns that are not captured under this definition. Furthermore, smaller refugee situations might not be included even if the displacement is prolonged, especially if refugees from one nationality are in various countries of asylum,” UNHCR, *Global Trends Forced Displacement in 2016* at 22.

436. U.N. HIGH COMMISSIONER FOR REFUGEES, *supra* note 435 at 22.

437. See e.g., U.S. DEP’T OF STATE HUMANITARIAN INFORMATION UNIT, *supra* note 435.

438. U.N. Human Rights Comm., *supra* note 1, ¶ 20. General Comment No. 27, *supra* note 1, incorporates the minority decision of U.N. Human Rights Comm., *Stewart v. Canada*, Comm. No. 538/1993, U.N. Doc. CCPR/C/58/D/538/1993 (1996), at para. 6. Dissenting Judges Evatt, Quiroga, and Aguilar Urbina observed that “there are factors other than nationality



Moreover, [t]he language of article 12, paragraph 4 [. . .] permits a broader interpretation that may embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.<sup>439</sup> Focusing first on those who have the nationality of the country of origin, regardless of whether they are first-, second-, or even third-generation refugees, it is submitted that all those who retained (or acquired at birth) the formal nationality of their country of origin while in exile may be presumed to have the right of entry;<sup>440</sup> it is, even apart from article 12(4), inherent to having a nationality. Put differently, it is an incident of citizenship.<sup>441</sup>

The concept of nationality is—still—cast somewhat archaically, true to its historic origin, in the notion of allegiance owed by the subject to his king,<sup>442</sup> in terms of

a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments [. . .] It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred [. . .] is in fact more closely connected with the population of the State conferring nationality than with than of any other State.<sup>443</sup>

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which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. After all, a person may have several nationalities, and yet have only the slightest or no actual connections of home and family with one or more of the States in question. The words “his own country” on the face of it invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain (as well as to the absence of such ties elsewhere).”

439. U.N. Human Rights Comm., *supra* note 1, ¶ 20. In his commentary, Nowak favors a comparable broad interpretation: applying the concept of “one’s own country” “to nationals and to those aliens (stateless persons, recognized refugees and foreign nationals) who, as long-term residents, have acquired such a strong personal and emotional relationship to their country of residence that it has become their “home country’,” NOWAK, 2005, *supra* note 12, at 287.

440. The right to enter one’s country includes not only the right to return after having left one’s own country, but also entitle a person to come to the country for the first time if he or she was born outside the country, U.N. Human Rights Comm., *supra* note 1, ¶ 19; *cf.* U.N. ESCOR, 6th Sess., 150th mtg. U.N. Doc. E/CN.4/SR.150, ¶ 2 (Apr. 10, 1950) (“[T]he United States amendment was intended to extend the right accorded by guaranteeing to persons born abroad the right to enter the country of which they were nationals”).

441. Inglès, *supra* note 1, at 1-5; PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW, 45-49 (1956); HANNUM, *supra* note 74 at 60-61; GUY S. GOODWIN-GILL, *The Right to Leave, Return and Remain in THE PROBLEM OF REFUGEES IN LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES*, 93-108 (Vera Gowlland-Debbas ed., 1994); GUY S. GOODWIN-GILL, *The Right to Leave, Return and Remain in THE PROBLEM OF REFUGEES IN LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES*, 93-108 (Vera Gowlland-Debbas ed., 1994); Oliver Dörr, *Nationality*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L., *supra* note 25, ¶¶ 50, 51; ROSALYN HIGGINS, THEMES AND THEORIES, 447-48 (Oxford Univ. Press; 1st ed. 2009) (explaining a right to re-entry to nationals “normally resident”).

442. JENNINGS & WATTS, *supra* note 190, at 854.

443. Nottebohm (Liechtenstein v. Guat.), Judgment, 1955 I.C.J. 23 (Apr. 6).

The question must therefore be raised whether this legal bond, which is based on such a genuine connection, may be superseded by a similar genuine connection that was forged with the country of refuge during exile (short of naturalization)?

The question whether a genuine connection may trump formal nationality has come before the HRC in a number of cases concerning expulsion to a mere formal country of nationality.<sup>444</sup> The HRC decided that strong ties to a country of habitual residence may qualify that country as “one’s own country,” and outweigh the mere formal tie with the country of nationality. These views give rise to the question of whether an effective bond with the country of refuge may affect the right to enter one’s country of nationality.

It is submitted that such an effective bond with the country of refuge—short of naturalization—cannot outweigh that of formal nationality, and hence cannot be adduced by the country of origin to prevent entry; the formal bond of nationality prevails.<sup>445</sup> If this were not the case, the paradoxical result would be that a refugee who successfully integrated into the country of refuge—wholly in conformity with the substance of the 1951 Convention, which is geared toward enabling the refugee to build a normal, economically independent life in the country of refuge—would be barred from entering his country of nationality because of his special ties to the country of refuge. It would also mean that the country of refuge would have to accept the refugees it hosts indefinitely since return would cease to be an option even when the circumstances in the country of origin would allow return, justifying cessation of refugee status<sup>446</sup> and subse-

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444. Of course, the views of the Human Rights Committee were preceded by the decision of the ICJ in *Nottebohm*, in which the formal nationality of Liechtenstein—the state that moreover exercised diplomatic protection—was superseded by the effective—not formal—nationality of Guatemala. See *Nottebohm*, Judgment, 1955 I.C.J. 23.

445. The right of entry in cases of minor children who did not perchance acquire the nationality of the country of their parents in exile must be construed in terms of the right to family life and the best interests of the children. Cf. ICCPR, *supra* note 10, art. 23(1) (stating that the family unit is “entitled to protection by the society and the State”); Convention on the Rights of the Child arts. 3(1), 9(1), 10(1), 16, Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasizing that the best interests of the child shall be a “primary consideration” in all State action); However, in practice this right may be frustrated by evidentiary problems that may occur due to non-registration of children. It is estimated, for instance, that 70% of the Syrian children who are born in Lebanon are not registered. Jannie Schipper, *Als je in de chaos wordt geboren, besta je niet [If you are born in the chaos, you do not exist]*, NRC Handelsblad (Aug. 15, 2016), <https://www.nrc.nl/nieuws/2016/08/14/als-je-in-de-chaos-wordt-geboren-besta-je-niet-3746927-a1516239>.

446. On cessation, 1951 Convention, *supra* note 2, arts. 1C (5) and (6) provide:

“This Convention shall cease to apply to any person falling under the terms of section A if:

[. . .]

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this article who can in-

quent enforced return,<sup>447</sup> provided it takes place on an individual basis,<sup>448</sup> to the country of nationality. This would be contrary to the object and purpose of the 1951 Convention of ensuring protection only for the duration of risk in the country of origin.<sup>449</sup> The relevant cessation clauses accordingly assume return: when the circumstances in connection with which the refugees had been recognized as refugees cease to exist, they can no longer continue to refuse to avail themselves of the protection of their country of nationality.

Loss of status and the prospect of return may cause considerable hardship for the (former) refugee. UNHCR's Executive Committee has therefore recommended that asylum states consider an appropriate status "for those persons who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links there,"<sup>450</sup> as a result of which they are more closely connected with the population of the country of refuge than their formal country of

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voke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of his country or nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence".

447. Cf. U.N. High Commissioner for Refugees, *Status of Uruguayans Abroad* (Nov. 13, 1984) ("As far as UNHCR is concerned, persons . . . have in principle ceased to be refugees. Former refugees who still find themselves outside Uruguay will henceforth have the status of ordinary aliens whose continued stay in the asylum country will depend upon the authorization of the Government concerned"); see also, U.N. High Commissioner for Refugees, *Status of Argentines Abroad* (Nov. 13, 1984), <http://www.refworld.org/docid/44c7878e4.html>; U.N. High Commissioner for Refugees, *Applicability of the Cessation Clauses to Refugees From Chile* (Mar. 28, 1994), <http://www.refworld.org/docid/4165716d10.html>; U.N. High Commissioner for Refugees, *Applicability of the Cessation Clauses to Cite as Refugees From the Republics of Malawi and Mozambique* (Dec. 31, 1996), <http://www.refworld.org/docid/4165775d4.html>; U.N. High Commissioner for Refugees, *Declaration of Cessation - Timor Leste* (Dec. 22, 2002), <http://www.refworld.org/docid/41657a7e4.html>.

448. The collective expulsion of aliens is prohibited, see generally JEAN-MARIE HENCKAERTS, *MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE* 8-49 (1995); JUAN FERNANDO DURAN ALBA, *Prohibition on the Collective Expulsion of Aliens (Article 4 of Protocol 4)*, in *EUROPE OF RIGHTS: A COMPENDIUM ON THE EUROPEAN CONVENTION OF HUMAN RIGHTS* 629 (Javier García Roca & Pablo Santolaya eds., 2012); Protocol No. 4 to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4, Sept. 16, 1963, ETS 46. American Convention on Human Rights "Pact of San Jose, Costa Rica," art. 29(9), Nov. 22, 1969, <http://www.refworld.org/docid/3ae6b36510.html>; Organisation of African Unity [OAU], African Charter on Human and People's Rights, "Banjul Charter," art. 12(5), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (June 27, 1981).

449. U.N. High Commissioner for Refugees, *supra* note 119, ¶ 111; U.N. High Commissioner for Refugees, *The Cessation Clauses: Guidelines on their Application*, ¶ 1 (Apr. 1999), <http://www.refworld.org/pdfid/3c06138c4.pdf>. See also HATHAWAY & FOSTER, *supra* note 115, at 447.

450. U.N. High Commissioner for Refugees, *Conclusion Executive Committee No. 69 (XLIII) Cessation of Status*, § e (1992).

nationality. In more adversarial terms: a former refugee subject to repatriation could contest his removal from the country of refuge based on his effective ties to this country.<sup>451</sup> However, such a claim should not ordinarily prevail since article 12(4) of the ICCPR only prohibits the arbitrary deprivation of the right to enter (which implies the right to remain in) his own country.<sup>452</sup> The repatriation of a person whose refugee status has ceased in accordance with the requirements of the 1951 Convention cannot, as indicated earlier, be qualified as an arbitrary deprivation of the right to remain in the sense of article 12(4) in view of the object and purpose of the Convention to ensure protection only for the duration of risk in the country of origin rather than altogether relinquishing immigration control.<sup>453</sup>

The situation of refugees who were habitual residents of the country of origin without the nationality of that country is more complex,<sup>454</sup> since their effective ties to the country of origin, which were not saved—and arrested, for that matter—in the nationality of that state, may over time be outweighed by those that are developed with the country of refuge. This may not be the case for first-generation refugees in non-protracted refugee situations, but could be the case for refugees whose exile is of a protracted nature, and even more so for those who are second- or third-generation refugees from forbears who were themselves merely habitual residents rather than nationals of the country of origin. Past ties may fade along with the passage of time and give way to new ties, which point to the country of refuge as the country of habitual residence.

Like refugees who have—and retained—the nationality of their country of origin, stateless refugees are supposed to return when the cessation clauses pertaining to changed circumstances are applicable. However, in the case of stateless refugees - and their offspring -, this particular clause requires that they are *able* to return to their country of former habitual

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451. Factors that could be taken into consideration are the length of stay in the country of refuge, the age of the refugee when arriving in the country of refuge, whether he speaks the language of his country of nationality, and so on.

452. U.N. Human Rights Comm., *supra* note 1, ¶ 19.

453. For the text of the cessation clauses on ceased circumstances—arts. 1C (5) and (6)—see *supra* note 446. Worth adding is that states do not consider themselves bound to refrain from applying the exception comprised in those two clauses (regarding compelling reasons arising out of previous persecution) to other refugees than those defined in Art. A(1) (Statutory refugees) as has been suggested by UNHCR. U.N. High Commissioner for Refugees, Guidelines on International Protection: Cessation of Refugee Status Under Article 1C (5) and (6) of the 1951 Convention Relating to the Status of Refugees [hereinafter “Ceased Circumstances Clauses”], U.N. Doc. HCR/GIP/03/03, ¶ 21 (Feb. 10, 2003). See also *In Re B (FC)* (Appellant); *Regina v Special Adjudication ex parte Hoxha (FC)* [2005] UKHL 19, [2002] EWCA Civ. 1403 (appeal taken from Eng.).

454. Particularly tragic in this respect is the plight of the Rohingya, stateless habitual residents of Myanmar but denied the nationality of Myanmar and forced to flee. The Committee of the Rights of the Child expressed its deep concern about the prohibition on the return of Rohingya people, including children who fled Myanmar, and strongly recommends that they be allowed to return to Myanmar. U.N. CRC, 59th Sess., ¶¶ 79-80, U.N. Doc. CRC/C/MMR/CO/3-4 (Mar. 14, 2012).

residence.<sup>455</sup> This condition is arguably only fulfilled when that country makes known its willingness to re-admit them.<sup>456</sup> The next question is whether that country has a legal obligation to make known its willingness to re-admit its former habitual residents and their children and actually allow return. In the absence of nationality, which entails the obligation to receive one's (expelled) nationals,<sup>457</sup> any such obligation can only be construed in terms of state responsibility, as an obligation of the country of origin owed to the country of refuge.<sup>458</sup>

In practice, the lack of relevant ties with the country of origin, which could frustrate entry, may be overcome by voluntary repatriation operations<sup>459</sup>—that is about return preceding the application of the cessation clauses pertaining to changed circumstances—in particular those that are governed by agreements concluded between the country of refuge, the country of origin, and UNHCR.<sup>460</sup> It is remarkable in this context that these agreements tend not to focus explicitly on questions of legal ties to the country of origin, but rather assume the entitlement to return of the entire community that fled from the country of origin including generations of offspring.<sup>461</sup> Possibly this practice is related to the fact that voluntary repatriation operations usually follow on, or are connected with, a political solution to the root cause of flight.<sup>462</sup>

In this respect, reference should be made to the fact that there are refugees who properly speaking, do not have a country of origin anymore,

455. For the text of the relevant cessation clause, see *supra* note 446. UNHCR's Guidelines on Cessation, *supra* note 453, do not address this requirement.

456. 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW: REFUGEE CHARACTER*, 406 (1966); see also HATHAWAY & FOSTER, *supra* note 115, at 488–89 (arguing that refugees do not have the responsibility to find out whether their state of nationality is now safe to return to). UNHCR emphasizes that, apart from the changed circumstances in his country of former habitual residence, the person must be able return there, and adds “This, in the case of a stateless person, may not always be possible.” Handbook on Procedures and Criteria for Determining Refugee Status, *supra* note 119, ¶ 139.

457. JENNINGS & WATTS, *supra* note 190, at 858.

458. Following a breach of the customary principle of *sic utere tuo ut alienum non laedas*: a state must not use its territory, or knowingly allow it to be used, in such a way that causes significant harm to another state. This principle was adduced already in 1949 by Sir Robert Jennings in the context of the flooding of other states with refugees from Nazi Germany. See Robert Y. Jennings, *Some International Law Aspects of the Refugee Question*, 20 Brit. Y.B. Int'l L. 98, 112 (1939); see also Alan Dowty & Gil Loescher, *Refugee Flows as Grounds for International Action*, 21 INT'L SEC. 43, 71 (1996). On the legal status of this principle, cf. JENNINGS & WATTS *supra* note 190, at 408 (“one of those general principles of law recognized by civilized states which the International Court of Justice is bound to apply by virtue of Article 38 of its Statute”).

459. U.N. Human Rights Comm., *supra* note 1, ¶ 19 (“The right to return is of the utmost importance for refugees seeking voluntary repatriation.”).

460. See ZIECK, *supra* note 77.

461. Cf. U.N. High Commissioner for Refugees, *Handbook Voluntary Repatriation: International Protection*, Annex 4 (1996) (making no reference to the applicant's nationality).

462. See ZIECK, *supra* note 77, 23–26; see also Marjoleine Zieck, *Voluntary Repatriation: Paradigm, Pitfalls, Progress*, 23 Refugee Survey Quarterly, 33, 46 (2004).

that is, in the common sense of the term, in that their exile is connected to a root cause related to issues of statehood and the resulting impossibility of return: Palestinian and Western Saharan refugees are cases in point. Their return is consequently wholly dependent on a political solution to the root cause at hand.<sup>463</sup>

### C. *Constraints on Return to the Country of Origin*

Article 12(4) of the ICCPR prohibits arbitrary deprivation of the right to enter one's country. The first question is, what this particular prohibition means, and the second whether it allows a state to prevent refugees from returning when large numbers of returnees would threaten its political or economic fabric, or when it simply does not have sufficient absorption capacity to cater for a large-scale return and is as a result incapable of meeting the basic needs of the returnees and securing their basic rights.<sup>464</sup>

The background of the prohibition of arbitrary deprivation of the right to enter one's country in article 12(4) is lawful exile as punishment for a crime.<sup>465</sup> After the proposed prohibition of exile was struck down in the

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463. See generally *supra* note 423 (discussing Palestinian refugees); Danielle van Brunt Smith, *Western Sahara*, Forced Migration Online (Aug. 2004), <http://www.forcedmigration.org/research-resources/expert-guides/western-sahara/alldocuments> (last visited Aug. 2, 2017) (addressing Western Sahara refugees); Randa Farah, *Sovereignty on Borrowed Territory: Sahrawi Identity in Algeria*, 11 GA. J. OF INT'L AFFAIRS 59, 63 (2010) (discussing Sahrawi refugees).

464. Illustrative for such a situation is the current (forced) return of Afghan refugees from Pakistan to Afghanistan, on which see Human Rights Watch, *supra* note 128 (explaining the current forced return of Afghan refugees from Pakistan to Afghanistan). On the limited absorption capacity of Afghanistan, see Fazal Muzhary, *Resettling Nearly Half a Million Afghans in Nangrahar: The consequences of the mass return of refugees*, Afghanistan Analysts Network, (May 12, 2017), <https://www.afghanistan-analysts.org/resettling-nearly-half-a-million-afghans-in-nangrahar-the-consequences-of-the-mass-return-of-refugees/>; see also U.N. High Commissioner for Refugees, *Repatriation of Afghan Refugees From Pakistan: Supplementary Appeal. September - December 2016*, 4-5, <http://www.unhcr.org/581713917.pdf> ("The resulting high levels of vulnerability of refugee returnees are adding to the already overstretched absorption capacity in Afghanistan, especially in urban centers. This is coupled with the challenges returnees face in accessing basic services, securing land tenure, and adequate shelter and job opportunities, particularly for youth"). It therefore does not come as a surprise that the tripartite commission governing the repatriation of Afghan refugees to Afghanistan "underscored the importance of gradual voluntary return in a context of enduring conflict and limited absorption capacity in Afghanistan." Conclusions of the 18th Tripartite Commission Meeting Between the Governments of the Islamic Republic of Afg.-Pak.-UNHCR, Feb. 15, 2017, UNHCR, ¶ 2, <http://unhcrpk.org/wp-content/uploads/2013/12/Conclusion-of-the-28th-Tripartite-Commission-meeting-February.pdf>; Another example is the pending closure of camp Dadaab, and the consequent return of about quarter of a million Somali refugees from Kenya to a politically and otherwise very fragile Somalia. see *Nowhere Else to Go: Forced Returns of Somali Refugees from Dadaab Refugee Camp, Kenya*, 21-23, Amnesty Int'l., (2016), <http://www.refworld.org/docid/582b17bf4.html>; see also, U.N. High Commissioner for Refugees, *Position Paper on Returns to Southern and Central Somalia (Update I)*, May 30, 2016, <http://www.refworld.org/pdfid/573de9fe4.pdf>.

465. NOWAK, *supra* note 12, at 283. During the drafting process, the observation was made that the Covenant did not contain a single article on the right to political asylum, and merely comprised the prohibition of arbitrary exile without stating where a person could be exiled if such exile was not arbitrary, a "grave oversight," according to the representative of

drafting process, a solution had to be found to accommodate the fact that some states still provided for this form of punishment.<sup>466</sup> The solution was found in the present wording of article 12(4), which signifies, according to Nowak, that “there can be no doubt that the limitation on the right to entry expressed with the word ‘arbitrarily’ (*arbitrairement*) is to relate exclusively to cases of *lawful exile as punishment* for a crime, whether this is accompanied by loss of nationality or not,”<sup>467</sup> who added that every other restriction on the right to entry would represent a violation of article 12(4).<sup>468</sup> This strict interpretation would entail that everyone has the right to enter his country except when lawfully exiled as punishment for a crime. In its General Comment, the HRC considers “that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable.”<sup>469</sup>

The HRC had to address the issue of exile in a few cases.<sup>470</sup> From these cases, the inference can be drawn that denying entry as a penalty for a crime to the state that qualifies *de facto* as one’s own country on account of strong ties to that country, even where the person has the formal nationality of another state, is disproportionate (to the legitimate aim of preventing the commission of further crimes) and therefore arbitrary.<sup>471</sup> This means that even when exile is lawfully imposed as punishment for a crime, its legality founders on the fact that its execution results in permanently severing the effective ties with the state concerned and is therefore arbitrary. These views of the HRC are consequently tantamount to outlawing exile altogether.

The HRC reviewed two cases that specifically concerned the return of refugees from exile. The first case concerned a citizen of Cameroon, an opponent of the one-party system in his country.<sup>472</sup> Despite the fact that

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the Philippines, UN doc. U.N. ESCOR, 6th Sess., 199th mtg. ¶ 122, U.N. Doc. E/CN.4/SR.199 (May 31, 1950).

466. NOWAK, *supra* note 12, at 283.

467. *Id.* (emphasis in original).

468. *Id.* at 284.

469. U.N. Human Rights Comm., *supra* note 1, ¶ 21.

470. See U.N. Human Rights Comm., *Jama Warsame v. Canada*, Comm. No. 1959/2010, U.N. Doc. CCPR/C/102/D/1959/2010 (Sept. 1, 2011); U.N. Human Rights Comm., *Nystrom v. Australia*, Comm. No. 1557/2007, U.N. Doc. CCPR/C/102/D/1557/2007 (Sept. 1, 2011); U.N. Human Rights Comm., *Stewart v. Canada*, *supra* note 438; U.N. Human Rights Comm., *Canepa v. Canada*, Comm. No. 558/1993, U.N. Doc. CCPR/C/59/D/558/1993 (Apr. 3, 1997); U.N. Human Rights Comm., *Madafferi v. Australia*, Comm. No. 1011/2001, U.N. Doc. CCPR/C/81/D/1011/2001 (July 26, 2004).

471. See U.N. Human Rights Comm., *Jama Warsame v. Canada*, *supra* note 470, ¶ 8.6 (on the effective ties with the country of habitual residence); see also U.N. Human Rights Comm., *Nystrom v. Australia*, *supra* note 470, ¶ 7.6 (on the effective ties with the country of habitual residence). These views constitute a change from earlier ones, see e.g., U.N. Human Rights Comm., *Stewart v. Canada*, *supra* note 438; U.N. Human Rights Comm., *Canepa v. Canada*, *supra* note 470; U.N. Human Rights Comm., *Madafferi v. Australia*, *supra* note 470.

472. U.N. Human Rights Comm., *Albert Womah Mukong v. Cameroon*, Comm. No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (Aug. 10, 1994).

he had been arrested several times and subjected to inhuman and degrading treatment, the Committee concluded that he had not been “forced into exile by the State party’s authorities in the summer of 1990 but left the country voluntarily, and that no laws or regulations or State practice prevented him from returning to Cameroon.”<sup>473</sup> In fact, he was able to return from exile in April 1992, so the conclusion was drawn that there had been no violation of article 12(4) of the ICCPR.<sup>474</sup> The second case concerned a national from Colombia, living in exile since 1988.<sup>475</sup> The author claimed *inter alia* a violation of article 12(4); “although there is no express ban by the Colombian authorities on his entering the country, he is denied this right as he constitutes a military objective.”<sup>476</sup> The Committee concluded that article 12(4) was violated since there were no effective domestic remedies allowing him to return from involuntary exile in safety, as a result of which “the State party has not ensured to the author his right to remain in, return to and reside in his own country.”<sup>477</sup> Both cases do not add or detract from the conclusion drawn earlier regarding the outlawing of exile.

The second question is whether states are allowed, under article 12(4), to prevent return, or rather, require a phased return, based on the number of returnees and/or the state’s limited absorption capacity. Although it cannot be excluded that such - temporary - denial could qualify as “reasonable,”<sup>478</sup> article 12(4) is not about a temporary denial of entry. Moreover, in conformity with its peculiar background of a penalty for a crime, it is predicated on individuals rather than a collective. Any temporary derogation from article 12(4) can only be justified in the context of ICCPR article 4(1), which allows derogation in time of public emergency which threatens the life of the nation, provided it has been proclaimed publicly.<sup>479</sup> Either the mass return poses a threat to the life of the nation in the sense of ICCPR article 4(1) or, more convincingly, the state of the infrastructure is in a condition that cannot support a major population increase, for instance, when the basic infrastructure has been decimated by war<sup>480</sup> and the country of origin is hence not able to meet the basic needs

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473. *Id.*, ¶ 9.10.

474. *Id.*

475. U.N. Human Rights Comm., *Jiménez Vaca v. Colombia*, Comm. No. 859/1999, U.N. Doc. CCPR/C/74/D/859/1999 (Mar. 25, 2002).

476. *Id.* ¶ 3.5.

477. *Id.* ¶ 7.4.

478. U.N. Human Rights Comm., *supra* note 1, ¶ 21.

479. On Art. 4(1), see *supra* Sections I.A, I.C and V.C.

480. See the examples given in *supra* note 464. The extent of destruction in Syria is illustrative and it is hard to imagine how that state can sustain any return, let alone the return of the presently more than 5 million Syrians in exile. Nonetheless, the de-escalation agreement that was concluded on 4 May 2017 between Russia, Iran, and Turkey means to attract return, Memorandum on the Creation and De-Escalation Areas in the Syrian Arab Republic, Iran-Russ.-Turk., art. 2, May 6, 2017, R.D.M., and appears to invite advocacy of return on the part of a few host states, see Shaza Zafer Al Jundi, *UNs position on refugees return to Syria*, Ahewar, (July 14, 2017), <http://www.ahewar.org/eng/show.art.asp?aid=2390>; see also David Enders, Return of Syrian refugees signals shift in Lebanese policy, NATIONAL (Aug. 2, 2017),



and observe the human rights of the returnees. Such a derogation would be of a temporary nature and would not justify an indefinite bar to entry. It would, of course, prolong the involuntary exile of the refugees concerned, and it would preclude the country of asylum from applying the cessation clauses as long as the derogation entails the impossibility that the refugees re-avail themselves of the protection of the country of their nationality, and the inability of former habitual residents to return.<sup>481</sup>

## VII. CONCLUDING OBSERVATIONS

The contemporary legal framework pertaining to the status of refugees started with the adoption of the 1948 Universal Declaration of Human Rights, which included the right to seek and enjoy asylum from persecution. It was followed by the first human rights treaty, the 1951 Convention relating to the Status of Refugees. Yet a gap between the two instruments remained, for the first constituted a non-binding common standard of achievement—and its right to asylum a mere right to ask—and the second was initially only applied to those who found themselves miraculously within the territory of another state,<sup>482</sup> the country of refuge. This framework was supplemented, years later, by the 1966 Covenant on Civil and Political Rights, not written specifically for refugees but for “everyone.” Even though their plight is unusual, refugees exercise the right to freedom of movement just like everybody else. Put differently, many of their needs correspond with a larger legal framework than those that are specifically covered by the 1951 Convention, for which the right to freedom of movement is illustrative.

If the spatial journey of refugees is viewed from the perspective of the applicable law, it starts with the right provided by the ICCPR: the right to leave one’s country. It continues with entering a country of refuge, and, once there, with freedom of movement upon arrival, internal freedom of movement, and external freedom of movement: three phases that are covered by both instruments. It ends with the right to return to the country of origin, where the applicability of the 1951 Convention fades out.<sup>483</sup> Two

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<https://www.thenational.ae/world/mena/return-of-syrian-refugees-signals-shift-in-lebanese-government-policy-1.616451>. On the state of destruction in Syria, see generally Ishaan Tharoor, *The Destruction of a Nation: Syria’s War Revealed in Satellite Imagery*, TIME (Mar. 15, 2013), <http://world.time.com/2013/03/15/the-destruction-of-a-nation-syrias-war-revealed-in-satellite-imagery/>; Sam Webb, *Bombed to Oblivion: Incredible satellite images show the staggering scale of destruction in Aleppo after four years of brutal street fighting and air strikes*, SUN (Dec. 23, 2016) <https://www.thesun.co.uk/news/2465593/incredible-satellite-images-show-the-staggering-scale-of-destruction-in-aleppo-after-four-years-of-brutal-street-fighting-and-air-strikes/>; see also generally *Maps and Data*, UNITAR, <http://www.unitar.org/unosat/maps/SYR> (providing graphics and statistics on the extent of the damage and shelters in Syria).

481. For the text of the relevant cessation clauses, see *supra* note 446.

482. See *supra* note 159 and accompanying text.

483. Although the cessation clauses do or do not apply, and in that sense, there is no question of “fading out,” it should be added that mere return—preceding cessation on account of changed circumstances in the country of origin, does not necessarily entail loss of

basic questions should be raised at this point: does this legal framework that consists of categorically different instruments—a generic one and a specific one—constitute a seamless whole with respect to the freedom of movement of refugees? If not, what gaps can be identified? Second, does the dual applicability enhance the right to freedom of movement, and hence reinforce the legal position of refugees?

As far as the first question is concerned—whether the two instruments form a normative continuum with respect to freedom of movement of refugees—the answer must be negative in the sense that they do in all respects with the exception of entry: the right to leave one’s country does not correspond with the right to entry elsewhere, nor, more specifically, the right to seek asylum does not correspond with the right to be granted asylum for those who satisfy the 1951 Convention definition of refugee. Asylum is still only secured by means of negative obligations, such as in particular the prohibition of *refoulement* as set out in the 1951 Convention and comparable prohibitions in human rights instruments.

As far as the second question is concerned, the dual applicability enhances the rights pertaining to freedom of movement included in the 1951 Convention and consequently reinforces the legal position of the refugee. The right to freedom of movement is not an absolute right but is subject, in both instruments, to restrictions. The restrictions are in most cases more precise and delimited in the ICCPR in the sense that they need to satisfy quite clear criteria, also in time of a public emergency, including non-international and international armed conflict. Those criteria contribute to safeguarding aspects of the right that are included in the 1951 Convention, not in the least by the obligation states have under the ICCPR to ensure that any person whose rights or freedoms are violated has an effective remedy, to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative, or legislative authorities, and to ensure that the competent authorities shall enforce such remedies when granted.<sup>484</sup>

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refugee status. 1951 Convention, *supra* note 2, art. 1C(4) (“He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution”). Art. 1C(4) is clearly about re-establishment, and hence requires an *animus manendi*.

484. ICCPR, *supra* note 10, art. 2(3) (The complete text is as follows:

“Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To Ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted”).

Beyond Art. 2(3), there is the possibility of communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant under the (First) Optional Protocol to the ICCPR in case the state is party to this Protocol, see *supra* note 404.

This background paper is about the state of the relevant law. However, from the state practice that was adduced, it is clear that many states fail to live up to the obligations they have incurred and instead close their borders, build walls, erect barbed wire fences on a massive scale, and detain and warehouse refugees, sometimes indefinitely, in camps.<sup>485</sup> It seems that the reason why the 1951 Convention was once drafted and adopted—”born out of the Holocaust,” as one High Commissioner summarized it<sup>486</sup>—has been forgotten; the result is that the extent to which refugees actually enjoy freedom of movement falls far too short of that to which they are legally entitled.

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485. A survey performed by Lilla Dittrich (research master’s student, Amsterdam Law School) of encampment policies of states suggests there are a variety of ways in which states restrict the right of refugees to move and live where they choose. For the survey, “camp” was defined as any location where refugees reside overseen or managed, in whole or in part, by an entity other than the refugees, where there is some degree of reliance by the refugees on the body overseeing or managing the camp, and the camp is not of a transitory nature. About 40 countries have such camps, and only few of those give refugees freedom—in law and practice—to live out of camps and move freely such as Ghana, Niger, and Burkina Faso, see e.g., U.N. High Commissioner for Refugees, Submission by the UNHCR for the Office of the High Commissioner for Human Rights’ Compilation Report—Universal Periodic Review (2012), <http://www.unhcr.org/en-us/protection/basic/5756ed787/submission-by-the-united-nations-high-commissioner-for-refugees-for-the.html>; see also *Refugees*, UNITED NATIONS IN GHANA (2016), <http://gh.one.un.org/content/unct/ghana/en/home/our-work/cross-cutting-themes/refugees.html>; see also *Country Reports on Human Rights Practices for 2016: Niger*, U.S. DEP’T OF STATE, <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> (92% of refugees live outside of camps or settlements); see also *Country Reports on Human Rights Practices for 2016: Burkina Faso*, U.S. DEP’T OF STATE, <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>. Many states practice some form of encampment or detention: e.g. Zambia, Sudan, and Zimbabwe follow policies of encampment where the government is authorized to determine where refugees reside, the conditions under which they may leave, and to detain them if found outside of camps. See e.g., UNHCR, “Beyond Detention: A Global Strategy to support governments to end the detention of asylum seekers and refugees,” 2016 at 83; see also *Country Reports on Human Rights Practices for 2016: Sudan*, U.S. DEP’T OF STATE, <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>; see also *Country Reports on Human Rights Practices for 2016: Zimbabwe*, U.S. DEP’T OF STATE, <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>. These camps are either explicitly forms of detention or differ little from it. Other states - Kenya, Ethiopia and Thailand - follow unofficial encampment policies but incentivize camp-based living; either by arresting those residing in urban areas or providing essential services and documentation in camps. *Country Reports on Human Rights Practices for 2016: Thailand*, U.S. DEP’T OF STATE, <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>; see also *Country Reports on Human Rights Practices for 2016: Kenya*, U.S. DEP’T OF STATE, <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>; see also *Country Reports on Human Rights Practices for 2016: Ethiopia*, U.S. DEP’T OF STATE, <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>. It is common for refugee movements to be tightly controlled; both Kenya and Ethiopia require refugees to obtain permission to leave the camp, granting it on limited grounds such as education, specialized medical care, or security needs, and the imposition of curfews is not uncommon. The survey shows that there appears to be—increasingly—a trend toward encamping and detaining refugees.

486. Sadako Ogata, U.N. High Comm’r for Refugees, United Nations Preventing Future Genocide and Protecting Refugees, Address at the Holocaust Memorial Museum, Washington D.C. (Apr. 30, 1997).