

**ADMISSION TO TERRITORY AND
THE PRINCIPLE OF NON-
REFOULEMENT UNDER
INTERNATIONAL HUMAN RIGHTS
LAW**

**Border Management and Protection
of Refugees Conference
Budapest 24 November 2010**

Admission to territory- article 31

ARTICLE 31

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

WHAT FLOWS FROM THE ARTICLE AND WHAT NOT

- Right to leave a country – but no right to enter.
- If they could come legally they would.
- Art 31 – Does not make refugee protection conditional on direct flight.
- Coming directly only matters for non-penalising unauthorised entry.
- Does not entail a limitation on the asylum seeker's choice
 - no first country of asylum or
 - safe third country rules can be derived from it

If there were no borders, illegal entry would not exist!

LACK OF CLARITY CONCERNING THE OBLIGATION ENTAILED IN ART. 31

UNHCR, 1986:

„ only few States have taken any steps to ensure that the principles defined in Article 31 are fully reflected in their national legislation. In addition, it frequently occurs that the necessary distinction is not made either in law or in administrative practice between asylum-seekers and ordinary aliens seeking to enter the territory. The absence of such a distinction may, and in many cases does, lead to asylum-seekers being punished and detained for illegal entry in the same manner as ordinary aliens.”

Adimi, 1999

„The respondents acknowledge that, until these challenges were brought, no arm of State, neither the Secretary of State, the DPP, nor anyone else, had apparently given the least thought to the United Kingdom’s obligations arising under Article 31.”

BENEFICIARIES OF ARTICLE 31

Adimi, para 16:

„That Article 31 extends not merely to those ultimately accorded refugee status but **also to those claiming asylum** in good faith (presumptive refugees) is not in doubt.

Nor is it disputed that Article 31's protection can apply equally to those **using false documents** as to those (characteristically the refugees of earlier times) **who enter a country clandestinely.**”

COMING DIRECTLY

Guy Goodwin-Gill, 2003 „Refugees are not required to have come ‘directly’ from their country of origin.” p.194 reasons for not remaining there:

- threat of persecution
- refusal of recognition as refugee or granting asylum there
- no access to protection because of safe third country or safe country of origin principles or time limits

Adimi, para 18

I am persuaded by the applicants’ . . . submission, drawing as it does on the travaux préparatoires, various conclusions adopted by UNHCR’s executive committee (ExCom), and the writings of well respected academics and commentators (most notably *Professor Guy Goodwin-Gill, Atle Grahl-Madsen, Professor James Hathaway and Dr Paul Weis*), that **some element of choice is indeed open to refugees as to where they may properly claim asylum.**

COMING DIRECTLY

Adimi, para 18 (cont'd)

„I conclude that **any merely short term stopover en route** to such intended sanctuary **cannot forfeit** the protection of the article, and that 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 or not the refugee **sought or found there protection *de jure* or *de facto*** from the persecution they were fleeing.”

„ even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on”

COMING DIRECTLY

UNHCR 1999 revised guidelines on detention

„The expression ‘coming directly’ in Article 31(1), ...also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept ‘coming directly’ and each case must be judged on its merits.”
(para 4)

TRANSIT COUNTRY

Not reporting in the transit country - different from not reporting in the (intended) country of refuge.

R. v. Asfaw House of Lords on transit (trying to leave Britain with a false passport)

Art. 31 of the 1951 Convention „**should provide immunity**, if the other conditions are fulfilled, from the imposition of criminal penalties **for offences attributable to the attempt of a refugee to leave the country** in the continuing course of a flight from persecution even after a short stopover in transit” [2008] UKHL 31

ENTERING TERRITORY

Airport transit /internationalised zones: still state territory (*Amuur*, ECtHR., 1996)

Territorial waters: also state territory (max 12 nautical miles) Interception: within territorial waters - *if not in innocent passage* - entering

Interception in the contiguous zone or on – high seas: ≠ illegal entry

Attributable to intercepting state.
Non-refoulement applies!

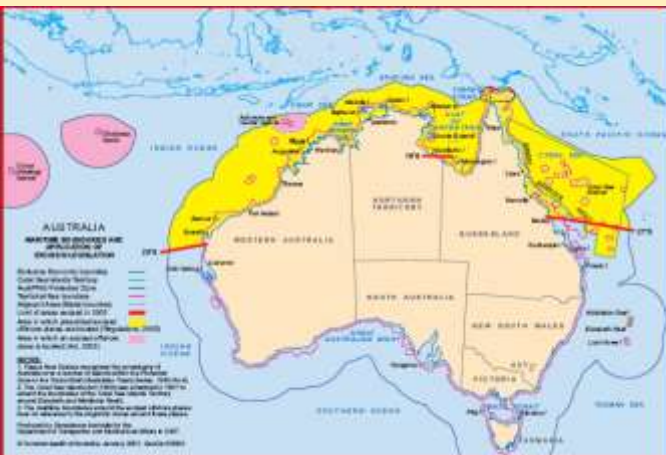
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Taking back or taking over under Dublin regulation ≠ illegal entry

„Excision of territory” – Australia - irrelevant from international legal point of view

EXCISION OF TERRITORY

Excision = unauthorised arrivals so called „offshore entry persons” who arrive (normally by boat) at excised territories in the north of Australia are banned from applying for a so called protection visa



9,43 km

2650 km

GOOD/VALID CAUSE FOR ENTERING ILLEGALLY

- Not: simply being a refugee – but why not legally
- No legal access:
 - Inaccessibility of travel document (home authorities deny)
 - Visas not issued to person
 - Danger entailed in trying to get legal access
 - Persecution/threat of harm while awaiting visa
 - Threat of being identified by authorities (queuing before embassy)
 - No need to prove that protection is not available elsewhere (French proposal to that effect refused at the Conference)

WITHOUT DELAY

Not: immediately. Reasons/circumstances making a delay reasonable

- linguistic + cultural barriers
- trauma
- (physically) unable to present himself/herself
- fear of summary rejection at the border
- apprehended right around entry

Firm deadlines with loss of right to apply –
illegal (*Jabari, ECtHR, 2000!*)

- Hathaway, 2005, 391-92, UNHCR Revised Guidelines 1999

NO PENALTY UNLESS ACTUAL PROTECTION ENJOYED ELSEWHERE

Global Consultations outcome (conclusions) „The drafters only intended that **immunity** from penalty should **not** apply to refugees **who found asylum, or who were settled**, temporarily or permanently, in another country.”

Proposal by Gregor Noll:

The benefit of Art. 31, para. 1 must be accorded to *any* refugee, with the exception of those who have been accorded refugee status and lawful residence in a transit State to which they can safely return.

PENALTY

Only criminal or administrative too? (Is detention ordered after illegal entry/presence a penalty?)

Manfred Nowak: 'every sanction that has not only a preventive but also a retributive and/or deterrent character is . . . to be termed a penalty, regardless of its severity or the formal qualification by law and by the organ imposing it' (quoted in Goodwin Gill, G.,2003, 195)

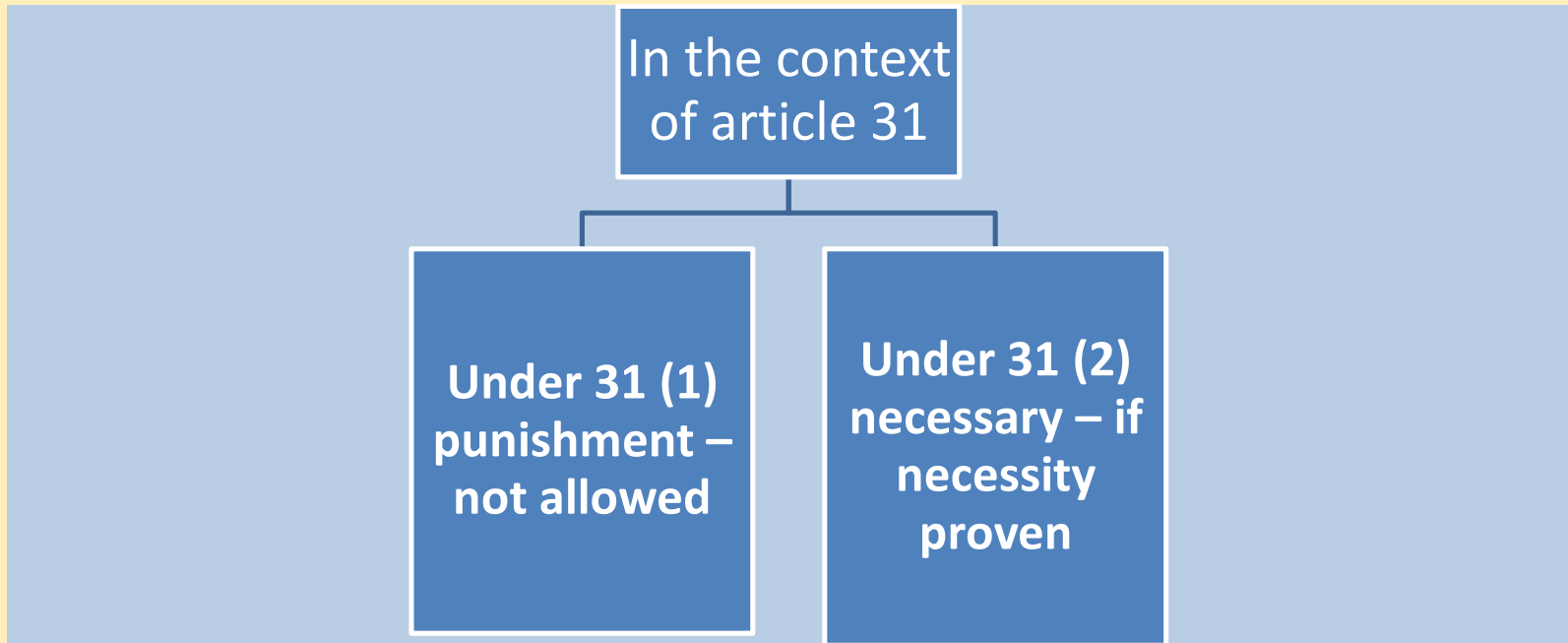
Penalty = wider than criminal sanction – any measure with a dominantly retributive and/or deterrent aim

Even the denial of economic or social rights to refugees illegally entering or being present may have a punitive character.

In a British case on social security it was accepted by the appeal commissioner that: „any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty within Art. 31 unless objectively justifiable on administrative grounds”

Not imposing: not starting the penal procedure or not convicting/punishing ?
Not starting (e.g. US) Shifting the burden of proof (*Adimi*: the prosecution has to prove that article 31 does not apply)

DETENTION



Goodwin-Gill, G.: „The Conference records indicate that, **apart from a few days for investigation**, further detention would be necessary only in cases involving **threats to security or a great or sudden influx.**”

DETENTION AS PUNISHMENT

The use of detention as a deterrent is not allowed

Revised Guidelines:

„UNHCR considers detention as: confinement within a narrowly bounded or restricted location, including prisons, closed camps, **detention facilities or airport transit zones**, where **freedom of movement is substantially curtailed**, and where the only opportunity to leave this limited area is to leave the territory”

Council of Europe, Council of Ministers:

„The aim of detention is not to penalise asylum seekers.”

Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers, point 3

DETENTION UNDER 31(2)

If procedure started: lawful presence (see, e.g. UNHCR submission in the Saadi v UK case)

Detention: only to establish identity and basis of claim. If *prima facie* refugee – no longer necessary

Are necessary ≠ “as it may deem necessary” – that proposed text was discarded by the Conference drafting the convention

Are necessary – objective test, not state subjective precaution

Thereafter Art 26 GC prevails – freedom of movement

**THE PRINCIPLE OF NON-
REFOULEMENT
– ARTICLE 33 AND
BEYOND**

NON-REFOULEMENT

The principle of non-refoulement describes, broadly, that no refugee should be returned to any country where he or she is likely to face persecution or torture

Guy Goodwin-Gill: The refugee in international law, 2nd ed. p.117

NON-REFOULEMENT

Three possible meanings

- (Recognised) refugee

- Within the country

- Asylum seeker + refugee

- At the border or within the territory

- Anyone

- Anywhere

Against persecution

On five grounds

Against torture, inhuman or degrading treatment or punishment

On any ground

NON-REFOULEMENT

Geneva Convention Art 33:

Article 33. Prohibition of expulsion or return ("refoulement")

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

LEGAL STATUS –CUSTOMARY LAW?

Yes, both for refugees and those protected by human rights treaties (e.g. Lauterpacht - Betlehem, Goodwin-Gill-McAdam, Kälin)

UNHCR : several ExCom conclusions: non-derogable principle

States: Declaration of States Parties to The 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees, 2001:

Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its **core the principle** of *non-refoulement*, whose applicability **is embedded in customary international law**

Doubting: Hathaway (as an obligation beyond the Convention) (HR treaties protect from different threats + some specifically affected states not parties to GC)

Real question: what is the role of state practice of refoulement

- violation of the principle (confirming the rule)
- evidence of lack of uniform state practice

(see further mass influx)

NON-REFOULEMENT –INTERPRETATION

1. Who is bound?
attribution to the contracting state
2. Who is protected?
3. What is prohibited?
return in any manner whatsoever
4. The place to which refoulement is prohibited
5. Threat to life and freedom

WHO IS BOUND?

ATTRIBUTION TO THE CONTRACTING STATE

Rules of attribution (based on the 2001 UN ILC Draft articles on responsibility of states for internationally wrongful acts,)

1. state organs at all levels of centralized, federal, or local
2. individuals acting in an official capacity even if they are exceeding their official authority;
3. private persons or entities empowered to perform public functions;
4. person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities (de facto state organs)
5. actors put at the disposal of the Contracting state by another state or international organisation if they exercise elements of governmental authority
6. non-State actors in an armed conflict taking place in another state if they are *de facto* agents of the Contracting State (*i.e.* under its control or direction)
7. private actors whose acts are subsequently acknowledged and accepted by a State as its own;
8. insurgent groups if, they take over control of the State or manage to create a new one.

WHO IS BOUND?

ATTRIBUTION TO THE CONTRACTING STATE

Territory – border – jurisdiction – control

Acts committed outside the territory and beyond the border also are attributable

- If within jurisdiction
- If exercising effective (overall) control
 - (Amuur v. France, Loizidou v Turkey, Ilascu and others v Moldova and Russia, T.I v U.K.)
- ---

Diplomatic representation: not territory, - asylum seeker is not outside the country – not a refugee
- Diplomatic asylum – not customary law
- ---

„Excision of territory” - irrelevant from the international legal point of view – still responsible

WHO IS PROTECTED?

a) Asylum seekers and recognised refugees

Convention does not use the term „asylum seeker” –
asylum seeker = refugee not yet recognised by the
state

Simple presence is enough! (not: „lawful”)

See also broader (human rights based) meaning -
everyone!

b) Individual procedure on denying / withdrawing the benefit of non-refoulement

- individualised procedure (no group refoulement)
- procedural guarantees, including effective remedy

WHO IS PROTECTED?

c) Mass influx situations ExCom conclusion No 100, 2004

„mass influx situations may, inter alia, have some or all of the following characteristics:

- (i) **considerable numbers** of people arriving over an international border;
- (ii) a **rapid rate** of arrival;
- (iii) **inadequate absorption or response capacity** in host States, particularly during the emergency;
- (iv) **individual asylum procedures**, where they exist, which are **unable to deal** with the assessment of such large numbers”

Who is protected? Is mass influx an exception from non-refoulement?

Exception

- National security or public order arguments at the 1951 Conference
- Some authors (.e.g. Coleman, 2003;)
- „refoulement” –always individual step
- Incidents in state practice (Thailand before 1979, Turkey, 1991, Macedonia, 1999, Pakistan, 2000)

Not an exception

- Convention text does not include reference
- Prevailing doctrinal view: not an exception to non-refoulement (exception as to the rights to be guaranteed)
- 33/2 refers only to individual threats to national security
- EU Temporary protection Directive: duty to admit
- ExCom Conclusion 22 (1981) Non-ref. even in mass influx
- Contradicting state: excuse

WHO IS PROTECTED? IS MASS INFLUX AN EXCEPTION FROM NON-REFOULEMENT?

Possible resolution of the dilemma:

- Non-refoulement applies – duty to admit is unconditional, but
 - Legal claim to assistance by the international community
 - Entitlement to withhold certain rights of refugees
 - In cases when the survival of the nation is at stake: arguing state of necessity

WHAT IS PROHIBITED?

RETURN IN ANY MANNER WHATSOEVER

Extradition

- To potentially persecuting: prohibited (unless GC 33/2 applicable and no absolute prohibition to return)
 - GC *lex specialis* + principles of extradition law
 - *aut dedere aut judicare* helps against non-extraditable criminals
- To third countries - allowed unless danger of *refoulement* from there

WHAT IS PROHIBITED?

RETURN IN ANY MANNER WHATSOEVER

- Expulsion – return –refoulement
- Expulsion – formal order to leave territory (and prohibiting return)
- Return – in any form –factual
- Refouler (French and Belgian administrative law – measure of bringing back to the frontier of a neighbouring country)
- Rejection: see next slide on border

WHAT IS PROHIBITED?

RETURN IN ANY MANNER WHATSOEVER

Border

Grahl-Madsen: not included

But: an asylum seeker who gets into contact with the border guard is within the jurisdiction of the state to be entered – no longer in the persecuting country

Turning away = returning to (the frontiers) of a territory

Duty of letting entry \neq asylum

WHAT IS PROHIBITED?

RETURN IN ANY MANNER WHATSOEVER

Seas

Distress or not? (Right to visit: only flag state)

Prevailing view: non-refoulement applies even in distress rescue
(Sale v Haitian Council, US Supreme Court: bad decision)

Question: flag state should conduct RSD or first port of call (Tampa, 2001)!

„The non-refoulement obligations prohibit European border officials from turning back, escorting back, preventing the continuation of a journey, towing back or transferring vessels to non-EU coastal regions in the case of any person in potential need of protection, as long as the administrative and judicial examination of the asylum application has not been completed on European territory. European border officials are bound by this obligation even when operating extraterritorially. In the case of measures at sea, this applies inside the 12 mile zone, as well as in the contiguous zone, on the high seas and inside the coastal waters of third countries.”

A Fischer-Lescano, T Löhr, and T Tohidipur, p. 296

THE PLACE TO WHICH REFOULEMENT IS PROHIBITED

Frontier of territory

- not necessarily a state (Gaza?!)
- not necessarily country of origin (threat to life or freedom in country of /first/ refuge)

Debates on the concept of safe third country

- not more than rebuttable presumption
- European list never adopted

THREAT TO LIFE OR FREEDOM

Persecution - threat to life or freedom
Same?

Prevailing view (e.g. Weis, Grahl-Madsen, Kälin) : **yes**
(otherwise some refugees not protected from
refoulement)

Drafters: not only to refer where well founded
fear but anywhere

Standard of probability – also the same

Would be threatened = well founded fear of
persecution

NON-REFOULEMENT - BROAD MEANING

Art. 3 ECHR, Art 3 CAT

Broader, because

Protects every person, not only refugees

There are no exceptions → It can apply even in case GC 33/2 would allow *refoulement*

The threatening harm is not linked to any ground (race, religion, nationality, political opinion, belonging to a particular social group)

Question: absolute or not? *Chahal v UK* (1996) and *Saadi v Italy* (2008)
UK in *Saadi* ↔ *Suresh* (Supreme Court of Canada) (2002), intervention of

SAADI V. ITALY ECTHR, 2008

„ Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation” (para 127)

SAADI – INHUMAN TREATMENT TORTURE

Inhuman or degrading treatment or punishment = „the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment”

Torture: „deliberate inhuman treatment causing very serious and cruel suffering”

(paras 135-136)

SAADI V. ITALY, 2008

„[E]xpulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, **where substantial grounds have been shown** for believing that the person concerned, **if deported**, faces a **real risk of being subjected to treatment contrary to Article 3**. In such a case **Article 3 implies an obligation not to deport** the person in question to that country”

Para 125

No balancing between severity of ill treatment and threat to host country allowed

Para 139

WHY NOT REFOULE

Not only because of the absolute legal obligation

but

because **it is part of our moral convictions!**

We protect our chosen values by not exposing persons to refoulement, by not handing them over to torturers and persecutors

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THANKS!

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