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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 86-8010
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MOISES GARCIA-MIR, ET AL.,
Plaintiffs-Appellees,

-against-

EDWIN MEESE, III, ET AL.,
Defendants-Appellants.

RAFAEL FERNANDEZ-ROQUE, ET AL.,
Petitioners-Appellees,

-against-

EDWIN MEESE, III, ET AL.,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

REPLY BRIEF OF AMICUS CURIAE IN
SUPPORT OF APPELLEES

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U.S. COURT OF APPEALS
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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	i
STATEMENT OF THE ISSUE.....	ii
PRELIMINARY STATEMENT.....	1
ARGUMENT.....	2
A. It is A Violation of Customary International Law for a State to Engage in Prolonged Arbitrary Detention.....	2
B. Customary International Law Provides A Claim for Relief Via Habeas Corpus.....	7
C. Plaintiffs Claims Do "Depend Upon" International Law For Their Resolution.....	9
CONCLUSION	11
APPENDIX	12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Fernandez-Roque v. Smith,</u> 734 F.2d 576 (11th Cir. 1984).....	10
<u>Leng May Ma v. Barber,</u> 357 U.S. 185.....	6
<u>The Paquete Habana,</u> 175 U.S. 677 (1900).....	9, 10
<u>Rodriguez-Fernandez v. Wilkinson,</u> 654 F.2d 1382 (10th Cir. 1981).....	7
<u>Sorosa-Gonzalez v. Civiletti,</u> 515 F.Supp. 1049 (N.D. Ga. 1981).....	7
<u>Tel-Oren v. Libyan Arab Republic,</u> 317 F.Supp. 542 (D.D.C. 1981).....	8
<u>Von Dardel v. U.S.S.R.,</u> Civil Action No. 84-0353 (D.D.C. 1985).....	8
<u>Statutes and Regulations</u>	
8 U.S.C. Sec. 1227(a).....	11
<u>Miscellaneous</u>	
G. Goodwin-Gill, <u>Study on the Detention of Refugees and</u> <u>Asylum Seekers</u>	4
Statement of U.S. Delegation, 13 G.A.O.R., C.3 (863rd meeting) A/C/.3 SR. 863 (1958).....	4
<u>Restatement of the Law of Foreign Relations</u>	
<u>Law of the United States</u> (<u>Revised</u>) Section 702(e) (Tent. Draft No. 3, 1982).....	7

STATEMENT OF THE ISSUE

Whether the actions of the attorney General resulting in the arbitrary and indefinite detention of class plaintiffs in violation of customary international law should be declared unlawful under the laws of the United States.

PRELIMINARY STATEMENT

This brief is submitted in reply to the international law issues raised in Appellants' Cross-Appeal and Reply Brief ("Defendants' Brief"). While it is submitted by amicus curiae, it constitutes the reply brief of appellees (plaintiffs) herein on issues of international law.

ARGUMENT

A. It is A Violation of Customary International Law for a State to Engage in Prolonged Arbitrary Detention

As the district court found, "[e]ven the government admits that customary international law of human rights contains at least a general principle prohibiting prolonged arbitrary detention". (Slip op. p. 32).

The defendants attempt on appeal to finesse this admission by arguing that "[t]here is no evidence of state practice to indicate that the detention in this case is either prolonged or arbitrary within the meaning of that general principle". (Defendant's Brief, p. 30). Instead of providing any insight into what a definition of "prolonged and arbitrary detention" might be, defendants merely argue that the burden should be shifted to plaintiffs to demonstrate that state practice establishes that the detention of these plaintiffs was arbitrary and prolonged. Stated another way, the defendants appear to argue that absent specific state practice establishing a prohibitory norm respecting arriving excludable aliens in the immigration area, that there is no "law" that could be found on the subject.

As plaintiff's expert, Professor Louis Henkin testified, the general principle is that a state may not engage in prolonged arbitrary detention, including detention in the immigration context. State practice in the immigration context is meaningful

only insofar as it does not exclude the general principle against arbitrary prolonged detention from application in that context (Tr. 43-44), hearing on the international law issue on July 1, 1985. Contrary to defendants' suggestion, the existence of the principle does not depend on evidence of specific state practice regarding the application of the principle to immigration detainees. Nor do defendants dispute that the basic international human rights instruments cited at fn. 29, p. 36 of the district court's opinion establish the principle against arbitrary prolonged detention, and do not exclude its application in the immigration area. Rather, they are left with an argument that plaintiffs have failed to demonstrate actual state practice which would establish that the undisputed indefinite detention plaintiffs are presently subjected to is a violation of the accepted customary international law principle.

In fact, actual state practice indicates that the detention of these plaintiffs is deviant and extreme. No other state detains for this long; very few other states detain for purposes other than deportation; no other states use prolonged detention against large groups without individual consideration as to whether the person is dangerous. See the results of a survey recently administered by Mr. Guy Goodwin-Gill, a noted international legal commentator, annexed hereto as Appendix A.

Plaintiffs need not demonstrate actual specific state practice for this Court to find whether their detention is arbitrary and prolonged in violation of customary international

law. After looking to the basic embodiments of state practice, the international human rights instruments, to establish the basic prohibition, this Court may properly conclude that plaintiffs' treatment herein offends any definition defendants would give to the term prolonged arbitrary detention.

Detention is arbitrary if "it is incompatible with the principles of justice or with the dignity of the human person." Statement of U.S. Delegation, 13 G.A.O.R., C.3 (863rd meeting) A/C/.3/SR.863 at 137 (1958). The comment to Section 702 of the draft Restatement provides additional clarification of the meaning of "arbitrary". It states:

Detention is arbitrary if it is not pursuant to law, but may also be arbitrary if 'it is incompatible with the principles of justice or with the dignity of the human person' Detention is arbitrary if it is supported only by a general warrant, or is not accompanied by notice of charges A single, brief, arbitrary detention would not violate provisions of the principal international agreements; arbitrary detention violates international law if it is prolonged and practiced as state policy.

Id., comment g [citation omitted].

Detention is arbitrary if it "takes place under the provision of law the purpose or application of which is incompatible with respect for the right to liberty and security of the person." G. Goodwin-Gill, Study on the Detention of Refugees and Asylum-Seekers, Working Group on the Treatment of Refugees with

Particular Reference to the Problem of Detention, 3-5. (June 1984). The meaning of "arbitrary" in the international context is no different from the concept of substantive due process in domestic law.

Defendants have harshly criticized the district court for reading its "own version of reasonableness" into the terms arbitrary and prolonged, where, as they suggest, there has been no evidence of state practice on the application of the principle. In effect, they argue that since there is no actual state practice to look to, or sufficiently similar violations of the general prohibition, the rule against arbitrary and prolonged detention can have no application. This is a bizarre convolution.

Defendants ignore the undisputed facts. Many of the plaintiffs have been incarcerated for more than five years; no reliable procedure exists or is being followed to determine whether and for how long plaintiffs will continue to be incarcerated; and the absence of any agreement between the United States and Cuba on the fate of plaintiffs virtually guarantees their continued indefinite detention. One must ask what additional elements of indefiniteness, purposelessness and unfairness would defendants suggest are necessary to fall within the prohibition of prolonged and arbitrary detention?

Simply to say, as defendants assert, that the Attorney General is empowered to determine which aliens shall be admitted to this country and under what conditions does not also imply that the Attorney General may violate the human rights of plaintiffs.

To require reliable individual determinations of whether continued detention is appropriate for the detainees clearly would not restrict in any way the sovereign power of the United States to decide which individuals will be admitted into this country. Leng May Ma v. Barber, 357 U.S. 185, 190 (1958). Rather, it will simply put the United States in compliance with the undisputable customary international law norm that detention should not be arbitrary and prolonged.

B. Customary International Law Provides
A Claim for Relief Via Habeas Corpus

Defendants argue at Point VI B of their brief that plaintiffs have established no cause of action which permits the enforcement of international legal principles directly in United States courts. This argument, however, is an attempted distraction which overlooks the obvious -- the broad reach of the habeas corpus provisions embodied in 28 U.S.C. §2241.

As the court made clear in Sorosa-Gonzales v. Civiletti, 515 F. Supp. 1049 (N.D. Ga 1981), all that is required to invoke the writ of habeas corpus is that a person be in custody "under or by color of the authority of the United States" and that a person is in custody in violation of the "law" of the United States. 28 U.S.C. §2241. It is basic that customary international law is part of United States law. The Paquete Habana, 175 U.S. 677, 700 (1900); The Nereide, 13 U.S.(Cranch) 388, 423 (1815). A violation of international legal norms, therefore, constitutes a violation of United States law. As prolonged arbitrary detention violates customary international law, it is therefore also a violation of U.S. "law", redressable via the Great Writ.

In Rodriguez-Fernandez v. Wilkerson, 654 F.2d 1382 (10th Cir.1981), the Tenth Circuit held that when an alien in detention tested the legality of prolonged detention by a writ of habeas corpus, "the burden is upon the government to show that the deten-

tion is still temporary pending expulsion and not simply incarceration as an alternative to departure." 654 F.2d at 1390. In the present case, defendants are relying on the discretion of the Attorney General to justify the detention of the plaintiffs. In response to this, the plaintiffs claim that this discretion has been exercised in violation of applicable customary international law.

Since plaintiffs are not attempting to devise a private right of action based directly on principles of international law, the objections which the defendants raise in this respect are irrelevant. The cases of Tel-Oren v. Libyan Arab Republic, 517 F.Supp. 542 (D.D.C. 1981), aff'd 726 F.2d 774 (D.C. Cir. 1984), and Von Dardel v. U.S.S.R., Civil Action No. 84-0353 (D.D.C. 1985) cited by defendants are clearly distinguishable on this point. In both cases, the plaintiffs were attempting to seek remedies for private tort claims and the court was interpreting 28 U.S.C. § 1350. These cases did not address the applicability of international law in any other context.

Plaintiffs can therefore invoke the jurisdiction of the federal courts based solely on the habeas corpus statute, 28 U.S.C. § 2241.

C. Plaintiffs Claims Do "Depend Upon"
International Law For Their Resolution

The opening Amicus brief has fully addressed and rebutted the argument of defendants that the actions of the Attorney General which have lead to the prolonged and indefinite imprisonment of plaintiffs constitutes a "controlling executive act" which can override customary international law within the meaning of The Paquete Habana. The Court is respectfully referred to pp. 11-17 of the opening brief of amicus for a complete discussion of why only the President, and not an appointed official purportedly acting pursuant to a vague delegation of authority, can override customary international law.

Somewhat surprisingly, Defendants' Brief focuses mainly on the district court's conclusion that there was no controlling "legislative act" (Defendants' Brief at 17) which authorized the indefinite and prolonged detention of plaintiffs. Defendants' assertions in this regard, however, are unavailing.

The statute that the government argues is "controlling" -- 8 U.S.C. § 1227(a), "Immediate deportation of aliens excluded from admission or entering in violation of law", makes no mention of or reference to indefinite detention. Yet, it is certainly a quantum leap in logic to suggest that merely because this statute does not affirmatively restrict the Attorney General's authority to detain excludable aliens indefinitely, such detention is therefore authorized by a "controlling" legislative act. As the district court stated:

Although that statute does not restrict the Attorney General's discretion in detaining excludable aliens, it expresses no clear intent by Congress to authorize a type of detention that would contravene customary international law. Relying on the principle that, whenever possible, statutes should not be construed to violate international law, courts have demanded such an expression of clear intent before concluding that Congress intended to supersede international law. See, Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 102, 118 (1804); Commodity Futures Trading Commissioner v. Nahas, 738 F.2d 487, 493 (D.C. Cir. 1984).

Defendants have clearly overstated this Court's holding in Fernandez-Roque v. Smith, 734 F.2d at 580, n.6. As the district court stated, this Court did not fully consider in Fernandez-Roque v. Smith, whether 8 U.S.C. 1227(a) is a "controlling" legislative act which would override customary international law. Slip Op. p.34, n.28. It is respectfully submitted that the district court's analysis that this statute was not a contrary "controlling" legislative act within the meaning of The Paquete Habana was correct, and should be followed by this Court. There is simply no support for the proposition that Congress, by enacting this statute in 1952, intended to authorize the type of prolonged detention to which these plaintiffs have been subjected.

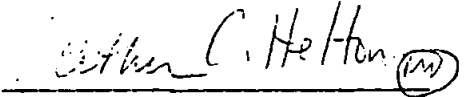
Indeed, in line with the rule cited by the district court that, where fairly possible, a domestic statute should be interpreted to avoid violating international law, 8 U.S.C. § 1227(a) could not be construed to authorize the Attorney General to detain forever for any purpose, regardless of circumstances. The statute provides no comfort to defendants; properly squared with international law, it provides another basis on which to invalidate the detention of plaintiffs.

CONCLUSION

For the reasons set forth herein, and in Amicus' opening brief, it is respectfully submitted that Order of the District Court be modified to the extent that it held that the Attorney General could act in violation of customary international law under the facts of this case, that this Court hold that plaintiffs' continued indefinite detention is unlawful and that this case be remanded to the District Court to fashion on an appropriate remedy consistent with this conclusion.

March 11, 1986

Respectfully submitted,



ARTHUR C. HELTON
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On the brief:

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CERTIFICATE OF SERVICE

This will certify that I have this day caused to be served a copy of the foregoing Reply Brief of Amici Curiae in Support of Plaintiffs-Appellees by regular mail postage prepaid, on

Laurie S. Filppu, Esq.
Department of Justice
Immigration Division
Rm 1042
550 Eleventh Street, N.W.
Washington, D.C. 20530

this 11th day of March, 1986.


Michael Delikat

State practice with regard to the detention of refugees and asylum seekers

In May 1984 a survey was undertaken of the law and practice relating to the detention of refugees and asylum-seekers. Correspondents were asked to provide information on the following:

- (1) the laws and regulations governing detention and the specific legal grounds which may be invoked (e.g. illegal entry, no documents, false documents, security threat, pending deportation, risk of absconding);
- (2) rights of appeal against or review of detention orders;
- (3) the authority making the decision on detention and the criteria normally applied;
- (4) whether the law distinguishes refugees and asylum-seekers from others, or whether such distinctions are made in practice;

- (5) the numbers of refugees and asylum-seekers known or estimated to be detained, with grounds of detention, typical or average length of detention, nationality or other significant characteristics of those detained;
- (6) types of detention facilities used (prison, immigration detention centres, closed camp, hostel, assigned residence);
- (7) whether refugees and asylum-seekers are detained with ordinary criminals;
- (8) the general conditions of detention;
- (9) whether release on parole or guarantee is available;
- (10) whether detainees have access to legal counsel, to free legal and, NGO advisory service, UNHCR or resettlement missions;
- (11) whether UNHCR is informed of the detention of refugees and asylum-seekers;
- (12) abuse of the detention process.

The results of this survey are summarised below, on a country by country basis, in the light of replies received and of other available information.

The situation of refugees and asylum-seekers is governed by provisions of the 1969 Grenzkontrollgesetz, the 1969 Passgesetz, the 1975 Fremdenpolizeigesetz, the 1968 Asylgesetz and the 1979 Auslieferungs- und Rechtshilfsgesetz.

Newly arrived asylum-seekers are confined in a closed part of the Traiskirchen refugee reception centre, for ten days on average. The federal aliens police and officials acting under the Ministry of Interior and provincial administrative authorities may order detention in cases involving an imminent danger to national security. A distinction is made between ordinary aliens and refugees and asylum-seekers and the detention may be appealed. The numbers detained fluctuate greatly and rough estimates are unavailable.

Detention in prison applies only to those suspected of criminal offences, conditions are close to the central European average, and detainees have access to legal counsel, legal aid if destitute, NGOs, UNHCR and resettlement missions. Release on parole or guarantee is possible, but the law makes such provision only in respect to criminal offences.

Although not mandatory, UNHCR is contacted wherever deportation or refoulement of a recognized refugee is contemplated.

(2) Belgium

The Belgian law of 15 December 1980 contains no general provision for the detention of asylum-seekers whose applications are under consideration. Those who arrive without passport or visa can obtain documents at the frontier or port of entry indicating that they have requested recognition of refugee status. On the other hand, refugees recognised elsewhere whose stay in Belgium becomes unlawful may be ordered to leave. If they fail to do so within the time required, they may be arrested and detained for a maximum period of thirty days, whereafter they will again be invited to leave. The process can be repeated, but UNHCR is advised of such cases and may intervene to obtain travel documents from the country of first asylum, to facilitate return there or admission to a third country. In the interim, individuals may be released and the expulsion order postponed. Other cases of detention occur in the context of extradition requests.

In the above-mentioned cases, detention is ordered by the Ministry of Justice and appeal or review is always available. Under the law, special provisions apply to refugees and asylum-seekers. UNHCR is informed of all cases (none was current at 31 May 1984), who are generally held in prison together with other detainees pending judicial proceedings. The possibility exists under the law of designating residence ('assignation à résidence'), though no cases are currently known. Conditions are the same as for other detainees; outside contacts are permitted and free legal aid is available.

There are no specific laws governing the detention of refugees and asylum-seekers. Detention can be ordered, however, as an administrative measure, rather than as a reaction to actual or suspected infringements of the criminal law. Such detention may take the form of 'garde à vue', pending decision by the Minister of Foreign Affairs on an asylum request; or pending resettlement or removal after a negative decision. In the absence of prescribed legal grounds, most detention orders appear to be founded on internal and external security considerations. These in turn appear to derive from apprehension regarding the spread of "subversive" ideas which derive from the very refugee character of the person concerned - i.e., the fact that he or she left their country of origin on political grounds. Possession of the nationality of a neighbouring state increases the risk of detention.

Decisions are taken by the directorate of the Centre National de Documentation, which forms part of the Sûreté Nationale and reports directly to the President. No right of appeal or review is formally available and there is no provision for release on parole or guarantee at present.

The law makes no distinction between refugees, asylum-seekers and others and, indeed, the 1980 decree governing the entry and residence of aliens makes no mention of refugees. However, some individual cases arriving without visas have been allowed to enter the country in order to contact UNHCR.

The place of detention is a prison reserved principally for cases related to national security. The conditions are strict, particularly with regard to meals, visits (none allowed), and disciplinary measures. Detainees may nevertheless receive financial assistance from UNHCR; conditions are tending to improve somewhat, and a UNHCR official is permitted to visit individual cases every month. UNHCR is informally advised of detention cases in Yaounde, the capital, but not with regard to possible cases in other parts of the country.

(4) Canada

Asylum-seekers may be detained under various provisions of the 1976 Immigration Act. Section 95, for example, specifies certain offences, including failure to report on entry, false documents, false statements, which are punishable by either a fine or imprisonment or both. Sections 101-108 make provision for the arrest and detention "on reasonable grounds" (section 104) of any person subject to an immigration inquiry (which includes the process of determination of refugee status) or a deportation order, who poses a danger to the public or is likely to abscond. Refugees lawfully in Canada may be the subject of an inquiry to determine their liability to deportation for criminal or subversive reasons; they are likewise liable to be detained (section 27).

A warrant for arrest under section 104 may be issued by a deputy minister or senior immigration officer; arrest without warrant may be ordered by any immigration or peace officer on the ground of threat to

the public or risk of absconding. Whether detention continues is decided by an adjudicator, and all cases are subject to weekly review.

The legal provisions relating to immigration offences make no distinction between refugees, asylum-seekers and others. Pursuant to article 31 of the 1951 Convention, asylum-seekers are no longer charged with offences under section 95. At any one time there between fifty and one hundred refugee claimants (in the Toronto area), mostly new airport arrivals; figures in Montreal and other cities are much lower. The length of detention varies from two or three weeks to two or three months, although a few exceptional cases exceeding a year have been reported. Recent detainees include Afghan and Iranian refugees who have travelled from countries of first asylum, often using false passports which they destroy on board the aircraft.

Save where criminal aspects arise, most asylum-seekers in Toronto and Montreal are detained in "security hotels" where conditions are good. If no room is available, then immigration detention centres are employed and in smaller towns only jail may be available.

Under section 104(3), an adjudicator may impose terms and conditions as to release, including the payment of a security deposit or posting a performance bond, failure to comply with which may result in re-detention. Detainees have access to legal counsel and advisory services, including UNHCR, but the latter is not formally advised of cases of detention. Though free legal aid is available, many detainees are unaware of this.

There are no special rules governing the detention of refugees and asylum-seekers, who are therefore subject to the general rules governing pre-trial confinement and detention pending deportation in respect of aliens. Pretrial confinement is applied in some federal Länder for illegal entry and/or entry with false or falsified documents, and on the ground or risk of absconding or of suppression of evidence. Detention pending deportation is applied in Berlin for illegal entry, and generally to secure implementation of removal if the alien is not willing to leave voluntarily and if there is a danger of he or she disappearing. Most of those affected are asylum-seekers whose requests have been rejected with legal effect.

The detainee may appeal against detention, which is reviewed by the competent court (either that dealing with criminal proceedings, or the local court, where detention pending deportation has been requested by the aliens authorities or the police). While the law on detention does not distinguish refugees and asylum-seekers from others, the expulsion of refugees is restricted. Asylum applicants must reside within the jurisdiction of the competent aliens authority; they may be required to live in camps or centres, and be subject to area and other restrictions under the 1982 Asylum Procedure Law.

Detention normally takes place in remand prisons, where conditions are normal, or, in Berlin, in special detention prisons,

where conditions are particularly bad. No statistics are available regarding numbers, length of detention or nationality of those detained. Access to legal counsel or other advisory services is left to the initiative of detainees themselves. UNHCR is not informed of detention cases.

(6) Hong Kong

Amendments to the Immigration Ordinance effective 2 July 1982 have resulted in Vietnamese refugees being detained in closed centres. Refugees of other nationalities may be detained in immigration detention centres on the basis of illegal entry or possession of false documents. Review of detention orders is available only to non-Vietnamese refugees, who alone may qualify for release on parole or guarantee.

The Secretary for Security may by order designate any place as a refugee centre for the residence or detention of Vietnamese refugees. In respect to non-Vietnamese, the Director of Immigration may at any time authorise a refugee who landed unlawfully in Hong Kong to remain, subject to conditions of stay or detention.

Under 1981 legislation a Vietnamese refugee is expressly defined as a person who (a) was previously resident in Vietnam and (b) is permitted to remain in Hong Kong as a refugee pending resettlement elsewhere. The term 'asylum-seeker' is not otherwise used and the 1951 Convention and 1967 Protocol have not been extended to the territory.

Refugees other than Vietnamese are thus classified as illegal immigrants, persons in transit or overstayers.

At 7 May 1984, 5,761 Vietnamese refugees were accommodated in closed centres, pending resettlement or other durable solution, on the basis of the Government's "humane deterrence" policy. Nine non-Vietnamese (all Iranians) were detained for illegal entry and possession of false documents, also pending resettlement.

The detention facilities have good standards of hygiene, food, shelter and clothing; medical attention and mail services are available. Detainees have access to legal counsel, free legal aid from the Government, to voluntary agencies and UNHCR. Resettlement missions have access to closed centres, where voluntary agencies have been designated to provide social services and to which UNHCR has unlimited access.

(7) Indonesia

At 30 April 1984 there were 6,292 Vietnamese refugees accommodated in closed camps, pending resettlement elsewhere. Voluntary agencies and UNHCR maintain a presence in such centres. A further 4,058 refugees were in the Refugee Processing Centre on Galang island.

Apart from the above-mentioned, there have been very few individual cases in Indonesia. Once their visas have expired, they are treated as illegal immigrants and assigned residence in premises close to Jakarta international airport. UNHCR is informally recognised as

having a role in finding solutions, while the individuals themselves enjoy nearly total freedom of movement. Free board and lodging is provided in the hostel for illegal immigrants.

(8) Kenya

No laws or regulations deal specifically with the detention of refugees and asylum-seekers. In accordance with constitutional guarantees regarding personal liberty, such persons in principle can only be detained in connection with and following conviction by a court for common offences, for example, offences under the Immigration Act or the Aliens Restriction Act. The former statute also provides for detention prior to deportation, while the Public Safety Act empowers the President to make regulations which may result in detention in general. No cases of detention of refugees or asylum-seekers are currently recorded.

(9) Lao People's Democratic Republic

There are no laws or regulations regarding refugees in the Lao People's Democratic Republic. No cases of detention of refugees (Kampuchians in Southern Laos) or of asylum-seekers are known.

(10) Malaysia

There are no specific laws applicable to refugees and asylum-seekers whose situation is consequently governed by the 1959

Immigration Act (revised 1975) and the 1963 Immigration Regulations. Prohibited immigrants (which includes those seeking unlawful entry, entry without travel documents or on forged or altered travel documents, and those who are a danger to public health) may be turned back at the frontier or detained in an immigration centre or other assigned place.

An appeal may be made to the Minister against refusal to allow entry. There is no specific right to appeal against detention, although the Director General of Immigration may issue a pass and order release, in his discretion. Such release may also be allowed where an individual has appealed against an order for removal. Whenever a person "is detained against his will and without just cause", application may be made to the High Court for habeas corpus, under sections 365-75 of the Malaysian Criminal Procedure Code.

While the law does not distinguish refugees from other immigrants, the Minister may "by order exempt any person or class of persons either absolutely or conditionally" (Immigration Act, section 55). For Vietnamese, Kampuchean moslems and Filipino moslem refugees/displaced persons, the Minister has ordered exemption from normal immigration rules, on certain conditions; thus, Vietnamese are confined in closed camps pending resettlement in the near future (9,459 at 30 April 1984); Kampucheans pending integration reside in an open camp; and Filipinos are confined to certain areas in Sabah, and require travel passes.

Apart from the Vietnamese, no other refugees or asylum-seekers are known to be detained, whether in prison or any detention centre. Camp conditions are satisfactory and UNHCR has general access.

THE NETHERLANDS

Detention of asylum-seekers is relatively rare, by comparison with aliens generally. In 1983, for example, 2,015 asylum applications were received and 84 applicants were detained, while the weekly average for other aliens was 300. Of the 84 detained, 44 were held on account of prolonged illegal stay, 36 because of false statements, and 4 because of criminal background.

Detention of asylum-seekers is based on article 26 of the 1965 Aliens Law and articles 82-87 of the 1966 Aliens Decree. Article 26 provides that, if the interests of public order or national security so require, then detention may be ordered of aliens ordered to be expelled, or it is reasonably expected will be ordered to be expelled, or who are not allowed to remain in the Netherlands, pending a decision on a request for a residence permit or for admission as a refugee. The principal reasons for detention are illegal stay, false statements, criminal background and risk of absconding.

Detention requires a written decision to this effect. There is a right of appeal to the President of the Court in the district where a person is detained. The authority generally responsible for ordering detention is the Head of Police who, in regard to asylum-seekers, must ask special permission from the Ministry of Justice. According to the law, detention is permitted only in the interests of public order or national security.

while the law on detention makes no distinction between asylum-seekers and other aliens, such distinctions are clearly made in practice. The Head of Police must seek special permission, while the Aliens Circular of February 1983 indicates that permission will be given only in exceptional cases; lack of travel documents or insufficient funds, for example, are not sufficient grounds.

At 31 May 1984 it was believed that less than five asylum-seekers were under detention, and detention itself does not generally exceed one month. Rejected applicants are not usually held longer than one week, prior to removal. Places of detention include police and prison cells, but asylum-seekers are not detained with accused criminals. General conditions are comparable to those of other detainees. Asylum-seekers may secure release if they express the wish to leave the country by their own means, or if they can be accommodated at a reliable address by a voluntary agency. Such release may be conditional on regular reporting to the aliens police.

Detainees have access to legal counsel and to free legal aid. UNHCR is not usually informed of detention cases, unless they involve refugees recognized in other states party to the 1951 Convention and/or the 1967 Protocol.

(12) Philippines

The detention of refugees is governed by regulations generally applicable to aliens, as contained in the 1940 Immigration Act.

Sections 26, 37 and 45 specify the main grounds as illegal entry, entry without documents, threat to security and pending deportation. The Commission for Immigration and Deportation is responsible for ordering detention, which may be appealed first to the Ministry of Justice and thereafter to the Bureau of the President.

While the law makes no distinction between refugees and others, the authorities show greater leniency towards the former. Immigration detention centres are used (where criminals are not detained) and while cells can be crowded, conditions are generally acceptable. Release on bail is available and for refugees a guarantee by UNHCR is usually accepted. Detainees have access to legal counsel and refugees to UNHCR, which is generally informed of detention cases.

At 30 April 1984, 1,739 Indochinese refugees were accommodated in closed camps awaiting resettlement. No other cases of detention were current.

(13) Portugal

While there are no specific laws or regulations governing the detention of refugees and asylum-seekers, they do benefit from certain exemptions, particularly as regards illegal entry. For example, asylum applicants who enter illegally and present themselves without delay are not to be brought before a court; instead, they may await a decision at liberty, though at the disposal of the aliens service (article 52, decree - law n.264-c/81). The law further provides that an asylum

request lodged promptly after irregular entry suspends any administrative or criminal proceedings in that regard. If asylum is granted, any such proceeding shall be discontinued if the offence in question is shown to result from the same circumstances (article 10, decree-law n. 415/83).

Otherwise, all detainees, regardless of status may lodge appeals, and the destitute have access to legal counsel free of charge. No cases of detained refugees or asylum-seekers are known to be current.

(14) Singapore

Refugees and asylum-seekers are subject to the general provisions of the 1970 Immigration Act (as amended in 1973 and 1977), including section 33 (removal of persons unlawfully remaining in Singapore), section 34 (detention of persons ordered to be removed), Section 35 (power to arrest persons liable to removal), and Section 38 (authority of immigration officer to arrest and prosecute). The grounds for detention usually involve illegal entry, expiry of visa, and the risk of absconding .

While there is a theoretical right of appeal, section 33 of the Act effectively derives this to "any person whose presence in Singapore is unlawful". Detention decisions affecting refugees and asylum-seekers are made in practice by the Ministry of Home Affairs. There is no legal distinction between such cases and ordinary aliens, although intervention by UNHCR has on occasion led to a more liberal exercise of

administrative discretion with regard to release, access and transfer from remand to immigration detention centres.

At 30 April 1984, 78 Vietnamese refugees rescued at sea were present in Singapore, disembarked under resettlement guarantees. They are accommodated in a closed camp to which UNHCR, resettlement missions and voluntary agencies have access. No other refugees or asylum-seekers were currently under detention. In earlier cases, detention usually lasted until the individual could be removed or UNHCR arranged resettlement. Illegal immigrants and longer term detainees are usually held in remand prison and moved to an immigration detention centre prior to departure conditions of cleanliness, sanitation, exercise, etc., are considered exemplary in the region.

Once a detention order has been confirmed, then release is generally possible only when departure has been finalised. In some cases release has been allowed after a short period of detention, with custody entrusted to UNHCR and subject to embassy guarantees. Both UNHCR and resettlement missions are usually granted access on request, although UNHCR is not generally informed of cases of detention.

(15) Sudan

The situation of refugees and asylum-seekers is governed by the 1974 Asylum Act and the State Security Law, by the Passports Act and by the Employees Discipline Acts. It is also affected by the current state of emergency and the martial law regulations. Detention may be ordered for

illegal entry, lack of documents or travel permit, and for security reasons.

Before the state of emergency, detention might be ordered by the Minister of Internal Affairs and the Chief of National Security and their delegates. Under the emergency any police officer, soldier or security agent is so empowered. There is no right of appeal, although review is possible if the Commission on Refugees and UNHCR are informed. Neither body, however, receives systematic information on detention cases. Refugees found illegally in urban areas are detained pending removal to their respective areas of residence, in accordance with Sudan's reservation to article 26 of the 1951 Convention; the majority of such refugees are Ethiopian. Refugees not involved in common offences are not detained with accused criminals, but in security premises; those rounded up for illegal movement, however, may be detained in civil prisons pending return. Conditions are the same as for nationals.

Release on parole or guarantee is not available and refugees detained for security reasons have no access to legal counsel or free legal aid. In cases brought to UNHCR attention, both UNHCR and resettlement missions may be allowed access. UNHCR has also been requested to assist in the return of refugees to their countries of first asylum, who have entered illegally and in the resettlement of sensitive security cases.

Under the state security law, the authorities may detain persons for up to three months, which may be renewed without limitation.

Screening of refugees detained in urban round-ups may last some days. The numbers detained are impossible to estimate, particularly in the present situation. While there is no indication of any change in the treatment of refugees, the powers of the emergency courts are far-reaching.

(16) Tanzania, United Republic of

The Refugee Control Act authorizes almost any authority to detain refugees who are acting in a manner prejudicial to peace and order, for a maximum of two weeks. The Minister for Home Affairs may order the indefinite detention of a refugee for the same reasons. No appeal or review is available and refugees are detained in prison with Tanzanian citizens held under the Preventive Detention Act. Release on parole or guarantee is not available; there is theoretical access to legal counsel, but no appeal is possible. UNHCR and resettlement missions may be given special permission for access, and UNHCR is generally informed of detention cases after about three months. Detainees in the past have included liberation movement dissidents.

(17) Thailand

Thai law, including the 1979 Immigration Act, does not differentiate refugees and asylum-seekers from other entrants. Consequently all refugees entering Thailand illegally are liable to prosecution. In practice, two different groups of refugees are acknowledged, and practical application of the law by the administration (the Ministry of the Interior) distinguishes between Indochinese and non-Indochinese.

The official policy of the Government is to grant temporary asylum to Indochinese refugees. Lao and Vietnamese are allowed asylum in UNHCR assisted camps while newly-arrived Khmers in principle are not allowed asylum in Thailand, except in border encampments serviced by the United Nations Border Relief Organisation (UNBRO) and the International Committee of the Red Cross (ICRC). Lao and Vietnamese refugees who enter Thailand and present themselves to the local authorities in the border provinces are not normally prosecuted under the Immigration Act, but subjected to screening by the area district officer or police. They are detained in the district or police offices for two to six weeks, pending the result of screening and Ministry of the Interior authorization to enter UNHCR - assisted camps. Those who do not so present themselves but pass on to other provinces are arrested and prosecuted when found.

Such cases are dealt with by provincial or district courts, which commonly find that refugees have violated the Immigration Act by entering Thailand without travel documents and without passing through an authorised check point. On conviction, they are liable to imprisonment up to two years and/or a fine not exceeding 20,000 baht. Trials are usually summary and do not involve legal counsel; UNHCR is not officially informed though it generally learns of such cases. In practice, courts tend to be most lenient with refugees, imposing an average fine of 1,000 baht. As most are unable to pay, this is converted to detention on the basis of 20 baht per day. On average, 50 days detention follow, either in a common provincial prison or, in Bangkok, in an immigration detention centre. Conditions are the same as for Thai detainees.

In addition to the sentence of fine or imprisonment, the courts also issue expulsion orders, effective on completion of sentence or payment of fine. However, following UNHCR intervention, refugees who have served their sentence are admitted to the refugee camps. At 30 April 1984, 127,209 refugees were in camps in Thailand, waiting third country resettlement or alternative solutions.

Non-Indochinese refugees have been granted temporary asylum on the basis that resettlement efforts will be made on their behalf. Entry into Thailand is relatively easy, as 15 day transit visas may be obtained at the airport. With UNHCR guarantees, visa extensions for three months have been routinely granted; further renewals are now uncertain in view of past security incidents. The majority of non-Indochinese refugees are currently without valid visas and are therefore liable to prosecution and expulsion, though this has so far been avoided.

(18) United States of America

Refugees and asylum-seekers are subject to the provisions of the Immigration and Nationality Act, as amended in particular by the 1980 Refugee Act. In May 1981, the United States Immigration and Naturalization Service (INS) began routinely detaining excludable aliens as part of the Administration's policy to discourage illegal immigration. Previously excludable aliens who were not considered a security risk or likely to abscond were generally paroled into the USA whilst waiting a decision on their claim to enter.

parole authority is vested by law in the Attorney General.

Section 235(b) of the Immigration and Nationality Act (INA) prescribes that aliens entering the U.S. who do not appear to the examining immigration officer to be clearly and beyond a doubt entitled to enter will be detained for further inquiry by a special inquiry officer. Section 212(d)(5) of the INA provides that the Attorney General may, in his discretion, parole detained aliens for "emergent reasons or for reasons deemed strictly in the public interest" and "under such conditions as he may prescribe." This authority has been delegated by regulation to the INS district directors in charge of ports of entry (8 CFR 212.5).

In December 1981 the INS Commissioner issued guidelines for district directors to use in granting parole. These generally recommend (the INS district directors retain discretion) that parole be granted only for humanitarian reasons, for example, to aliens with a serious medical condition, to pregnant women and to minors (the age of majority, however, varies between states). Various detention centres have been employed, including Krome North, near Miami, and Fort Allen, Puerto Rico, (for Haitians, in particular); federal penitentiaries; INS processing centres; and local jails. On 11 February 1983 the Attorney General announced plans to construct a new, 1,000 bed permanent detention facility at Oakdale, Louisiana (at a cost of \$ 17 million).

The policy and procedures of the INS with regard to the treatment of Haitians and Cubans, to asylum applications and to detention, have resulted in considerable litigation, with divergent results. In Fernandez-Roque v. Smith in 1981, for example, the court ordered the release on parole of some 226 Cubans held for fifteen months or so after arriving with the Mariel "boatlift" in 1980. In the view of the court, continued detention constituted an abuse of INS discretion when these detained were unlikely to abscond, posed no threat to national security or the public interest, and had committed no crimes in the United States (91.F.R.D.239). In Fernandez v. Wilkinson in 1980 the court said that "extended, indefinite confinement in a federal penitentiary is deleterious to the personal integrity of petitioner and can only be viewed as arbitrary detention" (505 F. Supp. 787,791; aff'd. sub nom. Rodriguez-Fernandez v. Wilkinson 654 F.20 1382 (1981)).

There has also been considerable debate regarding the standard of due process to be extended to those who seek entry and asylum. In one of the most recent decisions, the Court of Appeals ruled that aliens seeking entry do not benefit from U.S. Constitutional rights of due process, that there is no judicially imposed standard governing the length of time for which excludable aliens may be detained, and that they have no right to be informed of the opportunity to apply for asylum (Jean v. Nelson, Judgement of 28 February 1984).

It is current United States policy to detain refugees and asylum-seekers who enter or seek to enter the country illegally, for example, by using false passports. A further aspect of the policy is to

return, or to try to return, such individuals not to their country of origin, but to their country of first asylum or transit. Recent incidents have included the return or attempted return, of Iranians and Afghans to Pakistan and India. In the view of the U.S. authorities, to grant asylum in such cases of intentional circumvention of the law would have a serious impact on the U.S. refugee programme. The State Department, for example, has expressed the view that:

"Asylum in the United States is intended to provide a sanctuary for persons fleeing persecution. It is not intended to be a substitute for nor an alternative to the immigration laws and policies of this country, and should not become a vehicle or convenience for applicants who may wish to circumvent our immigration laws."

This policy has been endorsed by the Board of Immigration Appeals in a number of decisions. The board has noted that the grant of asylum is discretionary and that the use of fraudulently obtained documentation is a "strong negative discretionary factor." The Board has further expressed the view that "the fraudulent avoidance of the orderly refugee procedures ... is an extremely adverse factor which can only be overcome with the most unusual showing of countervailing equities." (Matter of Salim, Interim Decision No. 2922, 29 Sept. 1983)

It is estimated that there are some 2,000 asylum-seekers currently detained in ten centres in the U.S.A, with a few also in local prisons. Some have been detained for over two years; this includes a number of Afghans and Iranians held in Brooklyn Immigration Detention Centre, where conditions are particularly bad and those detained share accommodation with convicted aliens awaiting deportation.

(19) Zambia

The detention of refugees and asylum-seekers is governed by the 1965 Immigration and Deportation Act and the 1970 Refugee Control Act. In practice no distinction is made between the two laws in the treatment of the refugees concerned. Detention may be ordered for illegal entry, lack of documents, possession of firearms and weapons, unauthorised departure from reception areas or refugee settlements, pending implementation of deportation order, for breach of the rules governing law and order in refugee settlements, and for security reasons, for example, where the refugee is a threat to the public interest or a danger to peace and good order.

Under the Refugee Control Act, there is a right of appeal against deportation to the Minister of Home Affairs. Release on parole is possible if it can be shown that third country resettlement is available or that refugee status in Zambia is likely to be obtained. Most appeals for release are turned down and if a detained refugee has served a common law sentence and been declared a prohibited immigrant, deportation is mandatory.

Currently some 20 refugees are known to be detained; they are considered prohibited immigrants by the Government, but of concern to UNHCR. The periods of detention range from one to fourteen months. The place of detention is normally prison, but there are some examples of refugees being rounded up and kept in restricted centres under the supervision of either immigration officials or the army. While detained in prison, refugees are kept with accused criminals and there is no distinction in the treatment of the two categories. Conditions of detention give cause for concern; health problems result almost immediately and there is little food or water. UNHCR frequently provides basic necessities; several allegations of torture by prison officers and/or immigration officials have been made.

In principle, detainees may consult lawyers, but cost generally excludes this option. Likewise, access to UNHCR is in principle available, but may be restricted. Correspondence is occasionally smuggled out of prison. In some but not all cases UNHCR is informed of the detention of refugees. Overall numbers are difficult to. They are likely to exceed the twenty referred to above, and detention in the past has been common in connection with the repatriation of refugees to their countries of origin; more than one thousand on occasion have been detained on such occasions.

(20) Zimbabwe

The detention of refugees is governed by the 1983 Refugee Act, which amends the Immigration Act, and also provides that refugees

will not be punished for illegal entry, for failing to report to an immigration officer at a port of entry, or for failing to produce a valid travel document. Moreover, persons claiming to be refugees or their family members cannot be declared prohibited persons until they have been afforded an opportunity to apply for refugee status and until a final decision is reached. A like exemption applies to recognized refugees.

Under the Refugee Act, refugees can be arrested and detained only if their expulsion has been ordered by the Minister administering the Act, in consultation with the Minister of Home Affairs. Expulsion itself can only be ordered on the grounds of national security or public order. A similar rule applies to asylum-seekers, and while in detention both groups are to be allowed to seek admission to a country of their choice. The Emergency Powers Act, which overrides all other legislation, could also be used as the basis for the detention of refugees.

There is no right of appeal or review of detention as such (and no possibility of release on parole or guarantee), but representations to the Minister can be made, either directly or through a lawyer, and deal with the necessity of the expulsion order or the likely consequences for the expellee.

No refugees or asylum-seekers are currently known to be detained pending expulsion, although some recent arrivals have claimed they were detained (possibly illegally) for security screening. Under the Refugee Act, detention may take place in prison, a police cell or other

convenient place. In practice it is most likely to be the remand prison, where refugees and asylum-seekers can be separated from convicted criminals. Conditions are fair and detainees have access to lawyers, resettlement missions and UNHCR.

(21) Nicaragua

The only law applicable to refugees is the recently published implementing legislation Reglamento Ley Creadora Oficina Nacional Refugiados, and the specific legal ground normally invoked in detention cases is a threat to security. Lack of residence permit may also be used. Detention decisions are made by the migration services and in security cases review is generally possible only after intervention by UNHCR. Release may be ordered under UNHCR responsibility, usually pending resettlement.

Detainees are held in an immigration detention centre where conditions are good, and not with accused criminals. Access to legal counsel from recognised organizations is allowed and UNHCR is normally informed of all cases. No refugees or asylum-seekers are currently detained.

(22) India

The concepts of refugee and asylum-seeker are not known in the municipal law of India, which has not become a party to either the 1951 Convention or the 1967 Protocol. Provisions of the general law which

can result in the detention include: Section 41 of the Criminal Procedure Code, which permits detention of those suspected of violating particular laws, and can be applied in cases of illegal entry or residence or lack of travel documents (section 14 of the Foreign Act), or of the use of forged documents (Indian Penal Code).

Under sections 106-124 of the Criminal Procedure Code magistrates may jail persons unable to post a surety for good behaviour, when a breach of the peace is anticipated; such surety may be required for up to one year. Upon refusal of entry or pending deportation, aliens may be detained (section 3(2), Foreigners Act; para 3, Foreigners Order). The National Security Act also permits the detention of any person and of any alien with a view to expulsion or regularising stay; the period of detention may extend from these months to one year. In some states (for example, Bihar), preventive detention laws are in force.

Appeals depend upon the legislation authorising the particular detention. Under the penal code and the foreigners laws judicial review is available, and detention under the latter is also reviewable by superior administrative authority. Security detentions are theoretically subject to judicial review, but the courts' powers have been severely curtailed by statute. Nevertheless, such detention must be approved and periodically reviewed by advisory boards and/or state and central governments. Under the Criminal Procedure Code the detention power is vested in magistrates; police officers have powers of arrest, but detainees must be brought before a magistrate within

twenty-four hours and thereafter every fourteen days. Detention following refusal of entry may be ordered by an immigration officer and lasts usually until the next flight out. National security detention may be ordered by senior civil servants, but must be confirmed by state or central government advisory boards.

The law does not distinguish between refugees, asylum-seekers and others, but in practice the authorities have exercised their discretion not to prosecute UNHCR recognised refugees for non-possession of travel documents; it has also granted residence permits to such persons, even though formally ineligible. Some thirty Afghans and five Iranians are known currently to be detained in border districts for illegal entry. Pending prosecution, detention may last several months although bail is available. Also persons who have left India illegally and are then returned (see below, United States of America), are regularly detained while the authorities attempt to secure departure.

Common prisons (and occasionally airport transit lounges) are used for detention purposes, with conditions in the former the same as for other inmates. Detainees under the Criminal Procedure Code may apply for bail, while release from national security detention is at the discretion of the Government. In principle, destitute detainees are entitled to free legal aid, although the system is not entirely satisfactory (UNHCR has prepared a list of lawyers who charge modest fees; it may provide assistance in matters relating to the individuals' refugee situation, but not in regard to common crimes or avoidable

contravention). Access to UNHCR is at the discretion of prison and judicial authorities and information on detained cases is received through informal channels.

(23) Somalia

No specific laws govern the detention of refugees and asylum-seekers, who are subject to the general legislation in force. The Somali Constitution provides that no person shall be detained except when apprehended in flagrante delicto or pursuant to an act of the competent judicial authority in the manner prescribed by law (article 26(2)). Moreover, any person detained on security grounds must be brought before the judicial authority having competence over the offence in question (article 26(3)); and everyone deprived of liberty must be informed of the offence of which he is accused.

Appeals in ordinary criminal cases lie to the district and regional courts. Detention cases are heard by the district or regional councils, administrative bodies exercising quasi-judicial powers. All council decisions are subject to review and ratification by a judge of the national security court. Such decisions are final, although appeal may be made to the President questioning the legality of the detention, or for clemency.

The law does not distinguish refugees and asylum-seekers from others, although in practice they are not brought before the district or regional councils. The exercise of administrative discretion may nevertheless lead to refugees being detained for long periods upon suspicion of being a security threat. Some individuals, where refugee status remains to be determined, have also been held in prison on unknown grounds. On arrival refugees may be held temporarily at military camps or other investigation centres. In prisons, they are not separated from criminals and general conditions are not known. No release on parole or guarantee is formally available, and access remains at the discretion of the authorities.

3. Summary analysis of state practice

Though there are many divergences of detail in the law and practice, the foregoing survey allow's certain conclusions, some of which confirm the misgivings expressed earlier regarding current attitudes towards refugees and asylum-seekers.

Among the grounds for detention it is common to find, of course, immigration or immigration related offences. It is evident, however, that only a few states party to the 1951 Convention have taken steps to implement the exemption requirements set out in article 31 of that instrument. The application and scope of this provision is considered in more detail below. Also, despite the provisions of the Convention and the overall objective of the regime of protection, detention appears to be the common precedent to actual or attempted expulsion, again with little regard being paid to the requirements of international law.

In recent years, states have reacted negatively to increases in the numbers of asylum-seekers. This has resulted in restrictive measures designed to "stem the tide" and to deal summarily with so-called manifestly unfounded cases. In states which have established formal procedures for the determination of refugee status, such restrictions have included confinement or other limitations on freedom of movement, denial of the right to work, and reduction of assistance to the lowest possible level, often over long periods pending final decisions on status. In other states, it has been the overt and openly-declared policy to detain refugees and asylum-seekers indefinitely.

with no prospect of local integration or third country resettlement; such measures commonly apply to specific groups identifiable by reference to race or national origin, and already at that level appear tainted by breach of the principle of non-discrimination.

Finally, there is the problem of detention on political grounds, because of an actual or perceived threat to national security or the welfare of the community. This has both an individual and a group aspect; refugees may be feared personally as the carriers of subversive ideas, or as communities, because they are endowed with different racial, cultural or religious characteristics.

The conditions of detention vary greatly; refugee camps may be humanely run and subject to international supervision. Individual cells, however, may remain unseen and the fate of those detained unknown. Similarly, there is no uniform practice regarding appeal or review, while access to UNHCR is not as general as article 35 of the 1951 Convention or successive General Assembly resolutions on co-operation appear to require.

Despite some exceptions, however, there is widespread general recognition of the quality of refugee, of the existence of the legal concept and of consequential legal implications. There is thus continued support in practice for the principle of non-refoulement, notwithstanding the illegal immigration status which some refugees may have in some countries.