observed, "[o]ne object of a travel document [is] to allow a refugee to go out and find his feet in another country."[594] The facilitation of onward movement was, indeed, the primary goal of earlier refugee treaties, some of which provided refugees with few benefits beyond a travel document.[595]

In line with most earlier treaties, states are only obliged to issue a travel document to a refugee who is lawfully staying in their territory. The practice of states such as Britain and Switzerland, which issue the CTD only after formal status verification, is therefore in compliance with the Convention. So too may be the Nigerian decision to deny CTDs to refugees with no more than a temporary right to stay in that country. But the importance attached to enabling refugees to seek a home beyond the first asylum country is particularly clear from the decision taken to grant states the right – though not to impose a duty upon them – to issue CTDs even to refugees not "lawfully staying" in their territory, and therefore not able formally to claim the benefit of Art. 28. The authorization of states to issue travel documents to "any other refugee in their territory" was a departure from predecessor agreements, which allowed no more than transitional exceptions to the rule that only refugees who were "lawfully staying" in a state party were entitled to receive a travel document.[596]

The origin of the expanded authority was an intervention by the Danish representative to the Ad Hoc Committee, who raised the question of travel documents for refugees "who had just arrived in the initial reception country":[597]

[594] Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.39, Aug. 21, 1950, at 10.

[595] "The problem of travel documents was the one with which the concern of the comity of nations for refugees actually began. The July 5, 1922 Arrangement . . . , that of May 31, 1924 . . . , [and] the Arrangements of May 12, 1926, June 30, 1928, and July 30, 1935, dealt exclusively with travel documents. The 1933 and 1938 Conventions also imposed on the Contracting Parties the obligations to issue travel documents, and the first post-World War II agreement, that of October 15, 1946, again treated of travel documents only": Robinson, *History*, at 135.

[596] Under the Agreement relating to the issue of a travel document to refugees who are the concern of the Inter-Governmental Committee on Refugees, 11 UNTS 150, at 73 (London Agreement), at Art. 2, there was only a transitional exception for refugees already present in a state party (though not "lawfully staying" there) as of the date the agreement entered into force. The same approach was taken in the 1938 Refugee Convention, at Art. 3(1)(b). The 1933 Refugee Convention, however, took a more general liberal stance, requiring the issuance of a refugee travel document to any refugee "residing regularly" in a state's territory: 1933 Refugee Convention, at Art. 2.

[597] Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 11. Interestingly, though, the Secretary-General had proposed a lower general standard of attachment for issuance of a CTD, namely that a refugee be only "regularly resident" in the territory of a state party: Secretary-General, "Memorandum," at 41. See also France,

> He took as an example the hypothetical case of a German refugee arriving clandestinely in Denmark, without identity papers, and anxious to travel to the United States for family or other reasons. In accordance with paragraph 1 of article [28] as adopted, Denmark would not issue him travel documents, because he did not reside regularly in that country. If, therefore, the real objective was to protect the interests of refugees effectively, it seemed expedient to make some provision whereby Denmark would be able to grant such a refugee a travel document . . .
>
> He therefore proposed that article [28] should be so amended that the High Contracting Parties would be able to grant travel documents to all refugees in their territory, whatever their status in the eyes of the law, with the sole stipulation that they should not be regularly resident in another country.[598]

Mr. Larsen concluded his plea by noting the critical importance of travel documents to enabling refugees to "test the waters" in their intended country of asylum:

> A refugee who arrived in Denmark, for example, and was immediately granted a travel document, could go for a certain period of time to the country where he intended to settle; while there, he could obtain authorization to reside there regularly. On the other hand, if such a refugee had no freedom of movement but was confined to Denmark owing to the lack of a travel document, it would be very difficult for him to study the possibility of settling elsewhere.[599]

It was therefore agreed that in the interest of promoting freedom of onward movement, the authority to issue travel documents should extend to all refugees in a state's territory,[600] even if there only for a brief period of

"Draft Convention," at 7. Thus, the decision to adopt a higher mandatory standard (lawful stay) together with a lower optional standard (any refugee) was in some sense reflective of a more general desire among some delegates to liberalize access to the CTD system overall.

598 Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 11–12.

599 Ibid. at 14.

600 States are not, however, entitled to issue a CTD to a refugee not physically present on their territory. At the Conference of Plenipotentiaries, the President opined that "the phrase 'in their territory' . . . was unnecessarily restrictive. He failed to see why a Contracting State should be prevented from issuing a travel document to a refugee outside its borders": Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.12, July 9, 1951, at 5. No other state expressed support for this view, and no relevant amendment to the text of Art. 28 was proposed. The insistence on a territorial connection may reflect the view, articulated in the Ad Hoc Committee, that "the article would be weakened if it were framed [by deleting the words 'in their territory'] so as to permit Contracting States to issue travel documents to refugees who were in no way connected with them . . . [There were] obvious difficulties of obtaining reliable certificates of identity": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 6.

time,[601] and whether their refugee status has been formally verified or not.[602] Indeed, it was subsequently decided that any state party might rely on this discretionary authority to issue travel documents to a refugee faced with practical impediments to obtaining them from his or her country of usual residence,[603] as well as to refugee seamen who in many cases lack a sufficient territorial connection to any country to entitle them to a travel document.[604] But each state is entitled to decide for itself[605] whether it wishes to issue a CTD to a refugee not

[601] The representative of the International Refugee Organization "warmly supported the opinion of the representative of Denmark. If the High Contracting Parties could grant travel documents to refugees not regularly resident in their territory, that would give many refugees an opportunity to settle permanently, in full knowledge of the circumstances, and therefore in the best possible conditions": Statement of Mr. Weis of the IRO, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 14–15.

[602] Robinson opines that a state may issue travel documents to, for example, refugees who "are there on a temporary basis only or even illegally": Robinson, *History*, at 136. See also Weis, *Travaux*, at 266; and Grahl-Madsen, *Commentary*, at 128–129. UNHCR also clearly views it as permissible to issue a CTD before recognition of refugee status, as it has observed that "*[s]ome states restrict the issue of CTDs to persons who have been formally determined by them to be Convention refugees* . . . Thus persons who have been allowed to remain in the country under 'humanitarian' programmes or who have been admitted under non-refugee quotas are not eligible for CTDs, even though they may, in fact, fulfil the criteria for refugee status. These persons are normally granted certificates of identity or other aliens travel documents, which may have . . . disadvantages[emphasis added]": UNHCR, "Travel Documents Follow-Up," at para. 5.

[603] "Under the recommendation, if a person were in the United Kingdom, for example, he could, though lawfully resident elsewhere, apply to the United Kingdom for travel documents": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 20.

[604] "It was . . . suggested that the time spent by seamen serving in a ship belonging to a given country should count towards the period of residence necessary to secure the right to travel documents. He realized that it might be difficult for many governments represented at the Conference to enter into a specific commitment of that kind; if so, perhaps the suggestion might be incorporated in a separate recommendation": Statement of Mr. Mowat of the International Labor Organization, UN Doc. A/CONF.2/SR.12, July 9, 1951, at 5. When the ILO again raised this issue, it was determined that "the issue it raised was wider than that dealt with in article [28], and should perhaps form the subject of a special general article": Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.17, July 12, 1951, at 16. In response to a French proposal, it was agreed that time spent aboard a state party's vessel "would count" towards establishing lawful stay, but not if the seaman "had never set foot on [the state party's] soil": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.30, July 20, 1951, at 9–10. To enable refugee seamen to establish at least this minimum physical connection to the primary territory of the vessel's flag state, Art. 11 as ultimately approved recommends "their temporary admission to [the flag state's] territory particularly with a view to facilitating their establishment in another country": Refugee Convention, at Art. 11.

[605] "It would, however, be going too far to make such a thing obligatory, since to do so would involve States in the further obligation of re-admitting refugees, who might have spent only a few weeks in their territory, if they were unable to remain in the country to which they went": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.16, Jan. 30, 1950,

able to meet the lawful stay requirement[606] because of the duty, described below, to readmit any refugee to whom a travel document has been issued.[607]

This broader discretionary authority under Art. 28(1) may today be of value to states in a way not initially considered. Since the drafting of the Refugee Convention, states have adopted Art. 12(2) of the Civil and Political Covenant, which provides that "[e]veryone shall be free to leave any country, including his own." Recognizing that the right to leave one's country is essentially meaningless without access to the documentation required for travel abroad, the Human Rights Committee has determined that Art. 12(2) entails a positive duty on the part of a state to issue its citizens with travel documents, unless there is valid justification to withhold same.[608] While the Committee's relevant holdings to date have been addressed only to the rights of citizens, Nowak correctly observes that "[f]reedom to leave and emigrate is available to *everyone*, i.e. to nationals and aliens alike, and is not conditioned on lawful residency within the territory of a State Party."[609] It thus follows

at 12–13. He subsequently successfully proposed the use of the word "may" in the second sentence of Art. 28(1), making it clear that the authority is strictly permissive: ibid. at 15.

606 A difficult issue is whether a state may exercise its discretion to issue a CTD to a refugee denied a CTD in his or her country of lawful stay on grounds of a threat to public order or national security (as is expressly authorized by Art. 28). In Grahl-Madsen's view, the discretionary authority to issue a CTD to a refugee who is physically present, though not lawfully staying, in a country's territory "applies if the country of lawful residence is not a party to the Refugee Convention or any of the other arrangements relating to travel documents for refugees ... or if the country of lawful residence has made reservations to the effect that it will not issue travel documents to refugees ... But what if the country of lawful residence has refused to issue travel documents by invoking 'compelling reasons of national security or public order'? The question was, possibly by an oversight, not discussed by the Conference ... [But] if a person is considered a 'security risk' or worse in one country, another State may consider him otherwise, and two different States do not necessarily have to see eye to eye on matters listed under the admittedly vague term 'public order.' Very often one State will not be able to know why a travel document has not been issued by another State ... [Therefore] if a country chooses to issue a travel document under any of these provisions, it seems that it has every right to do so, and that the validity of the travel document will not be the least affected by the fact that the issue of a travel document has been refused for cogent reasons by the country of lawful residence": Grahl-Madsen, *Commentary*, at 129–130. There is, however, no duty on the second state to issue a travel document in such circumstances. "It could hardly be the intention of the Conference to request one state to issue a travel document to a resident of another state if the latter refuses to issue the document for compelling reasons of national security or public order": Robinson, *History*, at 137.

607 See text below, at pp. 865–870.

608 M. Mubanga-Chipoya, "Analysis of the current trends and developments regarding the right to leave any country including one's own, and to return to one's own country, and to some other rights or considerations arising therefrom," UN Doc. E/CN.4/Sub.2/1987/10, at 21 ff.

609 M. Nowak, *UN Covenant on Civil and Political Rights* (1993) (Nowak, *ICCPR Commentary*), at 204.

logically that a state in which a refugee is present (even if not lawfully staying there) must find some means by which to enable him or her to travel beyond its borders. To this end, the discretionary authority under Art. 28(1) of the Refugee Convention to issue CTDs to any refugee physically present on a state party's territory[610] affords a useful means by which to implement duties under Art. 12(2) of the Civil and Political Covenant in relation to any refugee.[611]

As this flexibility demonstrates, the issuance of a CTD is conceived in purely functional terms – specifically, to enable refugees to travel for business or pleasure, and most particularly to seek out opportunities for resettlement in a preferred country of asylum.[612] It does not entitle the holder to the diplomatic protection of the issuing state, nor does it even authorize that state to assert protective authority.[613] More controversially, the travel document does not amount to documentation of refugee status as such.[614] State practice, however, has often been to "recognize the Convention Travel Document not only as a document on which a visa may be given but also as evidence of the holder's refugee status."[615] At one level, this practice bespeaks a liberal preparedness to defer to the judgement of a fellow state party's interpretation of entitlement to protection. Moreover, some support for

[610] See text above, at pp. 847–851.

[611] This more general duty to facilitate international movement may, however, be restricted for a broader range of concerns than can be invoked in relation to refugees lawfully staying in a state party to the Refugee Convention. National security and public order concerns need not rise to the level of "compelling" reasons for restriction, and other considerations – "public health or morals or the rights and freedoms of others" – may also be invoked to deny the right to leave a country. See text below, at pp. 860–865, regarding the scope of permissible limits on the duty to issue refugees with a CTD under Art. 28(1) of the Refugee Convention.

[612] The UN High Commissioner for Refugees "emphasized the great importance of travel documents both to refugees and to States. Even countries of resettlement were in favour of travel documents": Statement of Mr. van Heuven Goedhart of UNHCR, UN Doc. A/CONF.2/SR.18, July 12, 1951, at 14.

[613] "The issue of the document does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not confer on these authorities a right of protection": Refugee Convention, at Schedule, para. 16. The primary rationale for this rule, imported from the London Agreement, was "that the Contracting Parties wished to avoid disputes over protection": Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 5. This goal leads Weis to conclude that para. 16 "does not preclude the State which has issued the travel document [from granting] such protection to a refugee, provided the State vis à vis which this protection is to be exercised admits such protection": Weis, *Travaux*, at 267.

[614] "Neither the issue of the document nor the entries made thereon determine or affect the status of the holder, particularly as regards nationality": Refugee Convention, at Schedule, para. 15.

[615] UNHCR, "Note on Travel Documents for Refugees," UN Doc. EC/SCP/10, Aug. 30, 1978 (UNHCR, "Travel Documents"), at para. 23.

this view can be garnered from Art. 27 of the Convention, which requires states to issue identity papers – which *are* intended to be treated as at least provisional evidence of refugee status[616] – to "any refugee in their territory *who does not possess a valid travel document* [emphasis added]." If the CTD were not understood to be evidence of refugee status, why would a person holding a travel document not also be entitled to receive identity papers?

A plausible answer is that because identity papers are intended only to enable an individual to claim the benefits of refugee status *inside the asylum state*,[617] they are of little net value to the holder of a CTD. This is because there is little practical likelihood that a given government would issue an individual with a CTD (or grant entry on that basis), yet treat him or her in other respects as a non-refugee. In truth, however, the drafters' decision not to require the issuance of identity documents to refugees already holding a travel document seems really to have been predicated on expediency. At the time of the Convention's drafting there were already many refugees resident in state parties who held one of the earlier refugee travel documents – which *were* specifically designed to serve both as a form of domestic identification and to facilitate international travel[618] – to whom states did not wish to be obliged to issue new documentation.[619] Art. 27's exclusion of refugees holding a travel document from the beneficiary class for identity paper purposes was intended essentially to promote administrative simplicity in circumstances understood not to pose a risk to refugees.

This explanation has the advantage of avoiding a genuine hardship to a segment of the refugee population clearly intended to benefit from access to the CTD, namely those recent arrivals who wish to seek protection in a state other than that in which they first arrived.[620] By seeing the travel document only as a means of facilitating international movement (rather than as a means of certifying Convention refugee status), the intended flexibility of the travel document system is safeguarded. This purely pragmatic position is in line with the views advocated by Grahl-Madsen:

[616] See chapter 4.9 above, at p. 620. [617] Ibid. at p. 619. [618] Ibid. at pp. 618–619.

[619] Indeed, the drafters were at one point inclined to decide that the CTD should be issued only in French and the issuing state's language "in order to use up the stocks of travel documents already printed in French": Statement of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.39, Aug. 21, 1950, at 5. Even the representative of the IRO argued against including a second mandatory language on the CTD, since "it would be necessary to print new [CTDs], which would involve waste of time and expenditure": Statement of Mr. Weis of the IRO, ibid. at 6. The solution – insisting that use of *either* French or English, in addition to the language of the issuing state, would be adequate – was in part fashioned in order to allow "all stocks [to be] used": Statement of Mr. Juvigny of France, ibid. at 7. As this exchange makes clear, what should arguably have been a principled decision was, in fact, driven by a determination to avoid a short-term administrative concern.

[620] See text above, at pp. 847–850.

> The travel document is issued for the purpose of travelling outside the issuing country. It is not designed to be a proof of refugee status or any other status, and it is not at all certain that the holder of a travel document at any given time is a refugee according to the definition in Article 1 of the Refugee Convention. It is noteworthy that in contrast with the *London* travel document [of 1946], which sets out that the holder "is the concern of the Intergovernmental Committee of Refugees," the Convention travel document contains no confirmation of the holder's eligibility under the Convention or the Statute of the High Commissioner's Office. If some authority ... wants to ascertain whether a person is a refugee according to some relevant definition, that authority would be well advised not to make its decision solely on the basis of the travel document presented to it.[621]

A CTD may not be denied on the grounds that the refugee seeking it already possesses, or could secure, an alternative form of travel documentation from the host or another country. Much less can it be denied on the grounds, as is the case in Zambia, that the host government is prepared to issue an internal certificate of identity. While some governments would have preferred each country to issue refugees special travel documents of purely national authority,[622] most of the drafters shared the view of the Chairman of the Ad Hoc Committee that "even if all Governments had adopted some such practice, it would be an advantage to adopt [a] unified system."[623] The establishment of a single, uniform system of refugee travel documents was thought important to avoid the risk of non-recognition of purely national documents by destination and transit states.[624] The fundamental goal of the CTD system was to provide

[621] Grahl-Madsen, *Commentary*, at 160. It is noteworthy that the text of Art. 28 as proposed by the Secretary-General did not expressly define the purpose to be served by a CTD: Secretary-General, "Memorandum," at 41. The present language of Art. 28, which makes clear that travel documents are issued "for the purpose of travel outside [the issuing state's] territory," was inserted on the motion of the United Kingdom: "United Kingdom: Draft Proposal for Article [28]," UN Doc. E/AC.32/L.17, Jan. 30, 1950, at 1.

[622] "Chile ... already has a special passport which is issued not only to refugees, but to any other foreigner not in possession of the usual documents. This passport is issued for the specific purpose of facilitating travel ... There would in consequence be no advantage in replacing our present legislation by the provisions of the proposed Convention": United Nations, "Compilation of Comments," at 51–52.

[623] Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.39, Aug. 21, 1950, at 4. See also Statement of Mr. Henkin of the United States, ibid., who "hoped that countries like Chile would accept the provisions of article [28], both for the reasons given by the Chairman and because he doubted whether the kind of document provided by such countries contained any provisions permitting the holder to re-enter the country." Weis succinctly concludes that "if the applicant is a refugee ... the Contracting State must issue him or her with a Convention travel document and not with any other document such as an aliens passport": Weis, *Travaux*, at 265.

[624] "The Nansen certificate and the travel document established pursuant to the London Agreement are completely satisfactory, while the other documents ['the various travel

refugees with a more broadly based alternative to a patchwork of nationally issued travel documents which "would prevent the bearer being asked to produce special credentials during the journey."[625] Moreover,

> There was no need to stress the practical advantages which would result from the standardization of travel documents for refugees. The work of passport control and immigration officers would be considerably simplified if all such documents were based on a single model.[626]

In the interests of "achieving uniformity,"[627] the drafters adopted a very detailed Schedule setting out binding formal and operational details of the CTD system, which all agreed to respect.[628] Most critically, they established a system of reciprocal recognition of travel documents, under which all state parties commit themselves to honor a CTD issued by any other state party[629]

documents issued by the administrative authorities of certain countries'] are not accepted by many countries": Secretary-General, "Memorandum," at 42.

625 Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 10. UNHCR reports that this goal has been effectively attained, since the CTD "is accepted for visa purposes, not only by States parties to the 1951 Convention and/or the 1967 Protocol, but in practice by all countries to which refugees wish to travel": UNHCR, "Travel Documents," at para. 11.

626 Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 7.

627 Ibid. at 3.

628 The Schedule is incorporated by reference in Art. 28. It was essentially drawn from the London Agreement: "United Kingdom: Draft Proposal for Article [28]," UN Doc. E/AC.32/L.17, Jan. 30, 1950. "The 1946 Agreement had been signed and put into effect by a large number of countries. It therefore seemed that its provisions might be acceptable to the future contracting parties of the new convention": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 4. On the suggestion of the French representative, these details were moved to a Schedule, as "[t]o include [them] in the convention itself would be to destroy its harmony, for then it would contain, side by side with articles setting forth the principles of administrative solutions, one single article containing very detailed rules to cover one specific point": Statement of Mr. Rain of France, ibid. at 5.

629 Once issued, all state parties are bound to "recognize the validity" of any CTD issued "in accordance with the provisions of article 28 of this Convention": Refugee Convention, at Schedule, para. 7. The French draft of Art. 28 had proposed a more explicit reference in the body of the primary article itself, specifically that "[e]ach of the High Contracting Parties shall recognize the documents issued by the other High Contracting Parties": France, "Draft Convention," at 8. Similarly, Israel pressed for formal incorporation of the duty of mutual recognition in the text of Art. 28: Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.39, Aug. 21, 1950, at 13. But while ultimately included in the Schedule, there seems to have been a general view that the obligation of mutual recognition was inherent in the system established. The representative of the International Refugee Organization, for example, "thought that, though from a purely legal point of view, paragraph 7 was perhaps unnecessary, it might have some psychological value in stimulating recognition of travel documents issued under the present and previous agreements": Statement of Mr. Weis of the IRO, ibid. at 13.

(including pursuant to its expanded discretionary authority[630]). Indeed, the drafters even agreed that state parties to the Refugee Convention would treat all refugee travel documents issued under any of the predecessor treaties as though they had been issued under the terms of the Refugee Convention[631] – including documents issued by a state that might choose not to accede to the Refugee Convention.[632] There can therefore be little doubt about the depth of the commitment to "replac[ing] all previous instruments, the

[630] "[O]ther parties cannot question the right of a Contracting State to issue a document if this is done under the powers granted to it by Art. 28, even if, in their estimation, the person is not a 'refugee' in the sense of the Convention, so long as the document was issued legally": Robinson, *History*, at 143. See also Goodwin-Gill, *Refugee in International Law*, at 156. This deference to the decision of the issuing state to issue a CTD to refugees who did not meet the "lawful stay" requirement was possible by virtue of the correlative duty of the issuing state to receive back the holder of *any* CTD issued by it during the validity of that document: see text below, at pp. 865–870. See also Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 13: "All travel documents ... would be subject to the provisions of paragraph 13 of the schedule ... That provided the country in which the refugee wished to travel with a safeguard that would apply in all cases: the country issuing a travel document to a refugee would be responsible for him and would be obliged to readmit him, whatever his legal status in that country, if he was not accepted elsewhere." Grahl-Madsen takes a somewhat more cautious approach to this issue, basing his opinion that all states should respect CTDs issued to refugees broadly conceived on Recommendation E of the Final Conference that adopted the Refugee Convention, in which the signatories express their hope that the Convention "will have value as an example exceeding its contractual scope." He observes that "[t]he recommendation, which was unanimously adopted by the Conference, is not legally binding on any government; nevertheless it may be said to express the spirit of the Convention, and if governments do issue Convention travel documents to certain extra-Convention refugees, they may claim to be acting in keeping with that spirit ... On the other hand, whereas Paragraph 7 of the Schedule must be interpreted so broadly as to include all travel documents issued in accordance with the Convention or the Schedule, and not only those issued pursuant to the express provisions in Article 28, it can hardly be stretched so far as to compel governments to recognize the validity of Convention travel documents issued to refugees who are clearly outside the scope of Article 1 of the Convention. However, if the issue of Convention travel documents to extra-Convention refugees is not against international law, it is not either based on international law, but is outside the scope of international law. The recognition of such travel documents therefore comes within the sphere of comity": Grahl-Madsen, *Commentary*, at 124–125. In his more detailed analysis of para. 7 of the Schedule, however, Grahl-Madsen agrees with the dominant view set out above that "[t]he conclusion seems inevitably to be that the Contracting States are obliged to recognize on an equal footing travel documents issued under any of the cited provisions [Art. 28, Art. 11, or para. 6(3)]": ibid. at 145.

[631] Refugee Convention, at Art. 28(2).

[632] "[P]aragraph 2 ... provided for recognition of the validity of travel documents which would continue to be issued by countries signatories of previous conventions which were not parties to the new convention: that was a provision of a lasting nature": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 9. There was,

diversity and vaguely defined field of application of which merely served to confuse the issue."[633]

While, as previously described, any state party *may* choose to issue a CTD to a refugee simply physically present in its territory,[634] the Convention sets a presumptive duty[635] on the state with which a given refugee has the strongest territorial connection – namely, the country of his or her lawful stay – to issue

however, some confusion on this point at the Conference of Plenipotentiaries, where comments made by the French representative suggested a duty to recognize travel documents issued under prior treaties *only* to the extent that the state party to the 1951 Convention was also a party to the relevant earlier treaty, or where the issuing state was also a party to the 1951 Convention: Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.17, July 12, 1951, at 14. On the other hand, the British representative was emphatic that "[t]he meaning of paragraph 2 was surely perfectly clear. It stated that parties to the Convention undertook to recognize all travel documents issued under previous agreements by the parties to those agreements": Statement of Mr. Hoare of the United Kingdom, ibid. at 13. The President agreed, observing that "at least for some time to come, certain States parties to the previous agreements would not be parties to the present Convention . . . He was ready to admit that from a strictly juridical point of view it might be somewhat unorthodox to allow a refugee to enter with a travel document in which reference was made to an international instrument to which the State of entry was not a party. But he believed that on the whole the advantages of paragraph 2 outweighed its slight legal disadvantages": Statement of the President, Mr. Larsen of Denmark, ibid. at 15. On the basis of this interpretation, paragraph 2 was immediately adopted on a 23–1 vote: ibid. See also Robinson, *History*, at 137–138: "[P]ara. 2 is a 'one-way' provision, imposing an obligation on the parties to this Convention to recognize travel documents issued by non-parties thereto, while the latter are not bound to do the same in regard to signatories of this Convention, not parties to the earlier agreements." In point of fact, seven state parties to the 1946 London Agreement did not ratify the Refugee Convention until at least the 1960s: Brazil (1960), Chile (1972), Dominican Republic (1978), Greece (1960), Liberia (1964), South Africa (1996), and Venezuela (1986: Protocol only). Moreover, one party to the London Agreement, India, is still not a party to either the Refugee Convention or Protocol, raising the interesting question of whether India could today still issue a travel document under the London Agreement which state parties to the Refugee Convention would be obliged to recognize. (As among state parties to the Refugee Convention, that treaty replaces the London Agreement: Refugee Convention, at Art. 37.) See also Recommendation A of the Final Act of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 189 UNTS 37, in which governments participating in earlier refugee travel document systems were urged "to continue to issue or to recognize such travel documents, and to extend the issue of such documents to refugees as defined in article 1 of the Convention . . . or to recognize the travel documents so issued to such persons."

633 Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 5.

634 See text above, at pp. 847–851.

635 "[A] Contracting State may not refuse to issue a travel document to a refugee if, for example, it regards the proposed travel as inappropriate . . . [A] refugee is not required to 'justify' the proposed travel in order to receive a travel document to which he is entitled 'for travel purposes'": UNHCR, "Travel Documents," at para. 14.

a travel document.[636] The language of Art. 28(1), providing that a state party "*shall* issue [a CTD] to refugees lawfully staying in their territory [emphasis added]," was adopted in preference to a proposal from Yugoslavia to leave open the question of which state, if any, was expected to issue a CTD to a particular refugee.[637] As the British representative to the Conference of Plenipotentiaries pointed out, this territorially based principle is critical to ensure that, at some point, every refugee can hold at least one state party accountable to issue him or her with a travel document.[638] The locus of responsibility automatically changes if and when a refugee may be said to be lawfully staying in a new country.[639]

[636] At the Conference of Plenipotentiaries, the French representative voiced his concern that para. 11 of the Schedule – which then granted "the power" to issue a CTD to the country of lawful residence – might be read to preclude other countries from issuing a CTD to a refugee simply physically present in their territory. He therefore proposed that para. 11 be amended in a way that left the broader discretionary authority of other state parties intact, but which assigned "the obligation" to issue a CTD to the state of lawful residence: Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.32, July 24, 1951, at 9. Because Venezuela felt that the term "obligation" might unduly tie the hands of the state of lawful stay, para. 11 was amended both to reference the scope of the duty under the text of Art. 28 itself, and to refer to the state of lawful stay's "responsibility," rather than to its obligation: Statements of Mr. Montoya of Venezuela, Mr. Rochefort of France, and Mr. Hoare of the United Kingdom, ibid. at 9–12.

[637] The Belgian representative "was unable to accept the Yugoslav amendment; the substitution of the words 'may issue' for the words 'shall issue' would deprive paragraph 1 of all force": Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.12, July 9, 1951, at 7.

[638] In response to a proposal that would have amended Art. 28 to provide simply for a general right of state parties to issue a CTD to any refugee, including those outside its borders, but which would not have required any particular state to take responsibility for the issuance of a CTD to any given refugee, the British representative appropriately insisted "that adoption of that suggestion would weaken article [28] by making it no longer the primary obligation of the Contracting State in whose territory the refugee was resident to issue travel documents": Statement of Mr. Hoare of the United Kingdom, ibid. at 8.

[639] Refugee Convention, at Schedule, para. 11. Detailed rules for ascertaining the time at which this transfer of responsibility occurs may be agreed between states, e.g. pursuant to the European Agreement on Transfer of Responsibility for Refugees, at Art. 2. In proposing the amendment of para. 11, the American representative suggested that "[s]ome such phrase as 'becomes transferred' should be employed [in contrast to the language of the draft then under discussion, 'will be transferred'] to show that the transfer was automatic and required no action on the part of anyone": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.39, Aug. 21, 1950, at 13. The automatic nature of the transfer contemplated in the revised text of para. 11 was confirmed by the Belgian representative to the Conference of Plenipotentiaries who, in response to a Venezuelan proposal to delete the word "désormais" from the French language version of para. 11 of the Schedule, noted that "[t]he retention of the word 'désormais' was necessary so that there would be a transfer of responsibility under the terms of paragraph 11": Statement of

The state which issues a CTD is allowed substantial administrative autonomy.[640] While the CTD issued must conform to the specimen travel document included in the Convention,[641] it is for the issuing country to decide whether it is valid for a period of one or two years,[642] and which refugee children are to be included on the passport of a parental refugee or other adult refugee.[643] The issuing government also determines the scope of its geographical validity, though the Schedule encourages state parties to make the travel document "valid for the largest possible number of countries."[644] As such, the Convention is not breached by the many states, including Belgium, which issue a CTD which is not valid for travel to the refugee's

Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.33, July 24, 1951, at 6. It was hoped that having a single state designated as the holder of the responsibility to issue a CTD to any given refugee would "prevent the issue of several travel documents to one and the same refugee by different authorities of different countries": Robinson, *History*, at 144. Yet this reasoning was not entirely sound since any state remains *entitled* (though not required) to issue a CTD to a refugee in its territory, thereby providing a means by which a single refugee could obtain more than one travel document. It is moreover ironic that the Conference of Plenipotentiaries elected to omit one requirement for issuance of a CTD approved by the Ad Hoc Committee, namely that the applicant "not possess a valid travel document issued pursuant to article [28]": Ad Hoc Committee, "Second Session Report," at 23. This omission was the result of a Belgian amendment (UN Doc. A/CONF.2/61). The only delegate to speak to the matter supported the omission on the rather simplistic basis that "there would obviously be no need to issue a document if the refugee already had one": Statement of Mr. Arff of Norway, UN Doc. A/CONF/2/SR.17, July 12, 1951, at 5.

640 For an extremely detailed analysis of the provisions of the various paragraphs of the Schedule, see Grahl-Madsen, *Commentary*, at 132–161.

641 Refugee Convention, at Schedule, para. 1.

642 Refugee Convention, at Schedule, para. 5. An effort was made to authorize CTDs with a validity of less than one year: Statements of Mr. Herment of Belgium and Mr. Makiedo of Yugoslavia, UN Doc. A/CONF.2/SR.18, July 12, 1951, at 4. This proposal was rejected on a 15–4 (6 abstentions) vote, ibid. at 5, though it was conceded that an issuing state might achieve much the same end by invoking its authority under para. 13(3) "in exceptional cases, or in cases where the refugee's stay is authorized for a specific period ... to limit the period during which the refugee may return [to the issuing country] to a period of not less than three months": Statement of Mr. Zutter of Switzerland, ibid. at 4.

643 Refugee Convention, at Schedule, para. 2. "[I]t would be wise for the Conference to take a liberal attitude in the matter. The families of refugees were often scattered, and it might be that a child would have to travel in the company of a grandparent or a relative": Statement of Mr. Hoeg of Denmark, UN Doc. A/CONF.2/SR.17, July 12, 1951, at 17. Thus, "[p]ara. 2 leaves it to individual countries to define the word 'children,' i.e. to prescribe the age at which a person may obtain his own document and below which he may be included in the travel document of another, adult refugee": Robinson, *History*, at 141.

644 Refugee Convention, at Schedule, para. 4. "[T]he vast majority of States ... endorse the CTD as valid for all countries with the exception of the country of origin. A few States, however, restrict the geographical validity of CTDs to certain named countries, usually for political or security reasons": UNHCR, "Travel Documents Follow-Up," at para. 8.

country of origin, nor even by the American prohibition of travel on a refugee travel document to countries it deems enemy states. And while an effort was made to require the issuing government to renew a CTD, at least if the refugee had no state of lawful stay at the date of its expiration,[645] para. 6(3) of the Schedule as finally adopted merely directs state parties to "give sympathetic consideration" to renewing, extending, or replacing travel documents in the case of persons unable to secure them from the country in which they are lawfully residing.[646]

A particularly important form of authority reposed in the territorial state is the right to withhold travel documents from a refugee. The Conference of Plenipotentiaries was clear that not every refugee lawfully staying in a state party has an absolute right to be issued a travel document. To the contrary, it was felt that a balance should be struck between the usual duty of the state of lawful stay to issue a travel document and the fact that there were some "cases in which Contracting States could legitimately refuse to do so."[647] As the High Commissioner for Refugees advised,

> The issue of travel documents was one of the most essential aspects of the treatment accorded to refugees ... The adoption of the Yugoslav

[645] The American representative to the Ad Hoc Committee "was also afraid that situations might arise in which one country was not willing to extend any longer the validity of a travel document issued to a refugee, while the country of his new residence was not yet prepared to issue him one for the first time. To prevent the refugee from thus falling between the stools, he proposed the addition to paragraph 6(1) of the following words: 'No travel document shall be cancelled or its prolongation refused so long as a refugee should not have received a new one from the country of his new residence'": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.39, Aug. 21, 1950, at 10.

[646] Refugee Convention, at Schedule, para. 6(3). The British representative argued "that the United States proposal went too far ... If the country of his first residence was forced to wait until a document had been issued by the country of new residence before cancelling its own document, it would probably never be released from its obligations": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.39, Aug. 21, 1950, at 10–11. As Grahl-Madsen writes, the duty to "give sympathetic consideration" "means that the authorities of the country concerned are obliged not to reject out of hand, without considering the merits, or to make it their policy to reject such applications. On the other hand, a State is not obliged to issue travel documents to persons covered by the provisions here considered. The obligation entered into is only to consider applications fairly and with understanding for the difficult situation of the persons involved": Grahl-Madsen, *Commentary*, at 129. Regrettably, UNHCR is therefore in error to suggest that "[t]he State which first issued the CTD retains responsibility for the refugee and for the renewal of the travel documents until such time as this responsibility is effectively transferred to another State": UNHCR, "Travel Documents Follow-Up," at para. 13. The notion of "residing" used in para. 6(3) should be understood to identify refugees who are lawfully present in another state, many of whom will not also be lawfully staying there and hence entitled to claim the benefit of Art. 28: see chapter 3.1.4 above, at p. 188.

[647] Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.12, July 9, 1951, at 8.

> amendment, for example, would virtually vitiate its intention, for the article would then mean that refugees would have no guarantee that they would be able to secure travel documents. However, he realized the cogency of the objections raised by certain representatives concerning the mandatory obligation by the first sentence of article [28]. They might be disposed of by substituting the words "undertakes to issue to refugees" for the words "shall issue, on request, to a refugee." The principle would then be more clearly stated, and the acquisition of travel documents would not be defined as a right belonging to the individual . . . [But] [h]e earnestly appealed to representatives to refrain from weakening the article as a whole.[648]

The approach adopted by the Conference closely parallels this recommendation. The mandatory language contained in the Ad Hoc Committee's draft, "shall issue," was retained, though without the additional phrase approved by the Ad Hoc Committee, "on request."[649] More fundamentally, the Conference added an express caveat to Art. 28(1), the effect of which is to set a legal duty on the country of lawful stay to issue a CTD "unless compelling reasons of national security or public order otherwise require."

There was a great deal of discussion about this qualifying phrase. While Austria argued that there was no need for the Convention to address the circumstances in which a CTD might be withheld,[650] the general preference was to be clear about the grounds for non-issuance to avoid "a risk of lowering the status of refugees vis à vis national authorities."[651] The British representative successfully persuaded the Conference that "[i]f modifications were to be introduced . . . their proper place was in article [28], where the circumstances in which refugees had a right to acquire travel documents were broadly defined."[652] This approach was adopted.

One view was that states should be entitled to withhold issuance of a refugee travel document only on the same grounds that would justify denial

[648] Statement of Mr. van Heuven Goedhart of UNHCR, ibid. at 9.

[649] In the version of Art. 28 originally presented to the Conference of Plenipotentiaries, Art. 28 read, "The Contracting States shall issue, on request . . . a travel document": "Texts of the Draft Convention and the Draft Protocol to be Considered by the Conference," UN Doc. A/CONF.2/1, Mar. 12, 1951, at 15.

[650] "[E]ach country had specific legislation or regulations governing the issue of passports, which stipulated, no doubt, the cases in which issue could be refused. Such regulations presumably extended to the issue of passports to refugees. No provision in the Convention could impair that sovereign right of States. He therefore believed that article [28] should prove acceptable as it stood": Statement of Mr. Fritzer of Austria, UN Doc. A/CONF.2/SR.12, July 9, 1951, at 11.

[651] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.17, July 12, 1951, at 8.

[652] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.12, July 9, 1951, at 13.

of a passport to a citizen.[653] Under an amendment presented jointly by Australia and Canada, states might "as an exceptional measure" elect to withhold issue of a travel document from a refugee "if the circumstances are such that the issue of a passport would be withheld from a national of that state."[654] As the Australian delegate observed,

> The issue of travel documents was a matter for the discretion of each government. There might be cases where a Contracting State, for good reason, refused a passport to one of its own nationals to travel for a certain purpose. It would be anomalous in the extreme if a refugee wishing to travel for a similar purpose was entitled to be issued with a travel document.[655]

Canada similarly insisted that the assimilation of refugees to nationals for purposes of travel document eligibility was a clear matter of basic fairness:

> Passports were issued in pursuance of the royal prerogative, and no citizen had an inalienable right to receive a passport ... It was obvious that refugees could not be given preferential treatment over nationals in that respect.[656]

This approach was not adopted, based on opposition rooted in both liberal and restrictionist thinking. On the one hand, it was argued that reliance on the same criteria applied to the issuance of a passport to citizens would pose a risk to refugees. The Belgian representative made the case that refugees "could not be expected to conform to the same conditions as nationals,"[657] and should therefore be denied travel documents only for reasons of "national security or public order."[658] He insisted that this approach

> was more in the interests of refugees than was the joint amendment [proposed by Australia and Canada]. The Norwegian representative had mentioned the case of a government refusing to issue passports to persons who had not paid their taxes. Such a case was one of the "circumstances" in

[653] "The general obligation laid on States would be interpreted as being to respect a right to which the individual refugee was entitled, and refugees might thus be in a position to claim something which was denied to nationals": Statement of Mr. Shaw of Australia, ibid. at 10. See also Statement of Mr. Zutter of Switzerland, ibid.

[654] UN Doc. A/CONF.2/66. This approach received the grudging support of the representative of the United Kingdom who conceded that "there would be circumstances in which it would be desirable to allow states a certain amount of latitude. The joint Australian/Canadian amendment was preferable ... inasmuch as it provided for the application to the issue of travel documents to refugees of the same criteria as were applied in the issue of passports": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.17, July 12, 1951, at 5. See also Statement of Mr. Hoeg of Denmark, ibid.

[655] Statement of Mr. Shaw of Australia, UN Doc. A/CONF.2/SR.12, July 9, 1951, at 7.

[656] Statement of Mr. Chance of Canada, UN Doc. A/CONF.2/SR.12, July 9, 1951, at 7.

[657] Statement of Mr. Herment of Belgium, ibid.

[658] UN Doc. A/CONF.2/61.

> which a State withheld the issue of passports to its own nationals and, if the joint amendment was adopted, it would be possible to invoke a similar reason for denying the issue of travel documents to a refugee. In the same way, if the national of a State had not done his military service, his application for a passport was usually refused. Logically, therefore, such an application should also be refused if made by a refugee in the same position. Hence it was clear that the text of the joint amendment submitted by the delegations of Australia and Canada allowed of a very wide interpretation. The Belgian delegation therefore preferred its own text.[659]

On the other hand, and perhaps more candidly, the case for the "national security or public order" test was made on the basis of a need to grant states more flexibility to deny travel documents to refugees on grounds not applicable to their own citizens.[660] France insisted that "circumstances might make it necessary for her to keep a check on the movements of refugees and aliens."[661] To adopt the approach envisaged by the joint amendment proposed by Australia and Canada "would simply be tying the hands of the French government so far as the issue of travel documents was concerned."[662] Indeed, France went so far as to claim that while "the fact that a French citizen [who] expressed extremist views did not preclude him from holding a passport . . . [i]t might, however, be necessary in certain cases to treat refugees differently."[663] Even when this position was soundly denounced by the British representative as "tantamount to discrimination on the grounds of political opinion,"[664] the French government was not moved, insisting that if it were to grant a travel document to a refugee with extremist views, the refugee's state of destination would likely deport him or her back to France.[665]

The compromise which emerged reflects substantial deference to the French position. The text as adopted allows a CTD to be denied on public order or national security grounds, even if such concerns do not govern the issuance of a passport to citizens. But because Art. 28 allows a CTD to be denied to refugees *only* on these grounds, it follows that a travel document

[659] Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.17, July 12, 1951, at 6–7.
[660] The first state to propose this approach was Italy, which suggested that states retain the right, also expressed as "a purely exceptional measure," to withhold travel documents from a refugee "suspected on reasonable grounds of engaging in illicit traffic": UN Doc. A/CONF.2/56.
[661] Statement of Mr. Colemar of France, UN Doc. A/CONF.2/SR.12, July 9, 1951, at 6.
[662] Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.17, July 12, 1951, at 6. He concluded that "[t]he Belgian amendment was, therefore, the only one which the French delegation could support": ibid.
[663] Statement of Mr. Rochefort of France, ibid. at 9.
[664] Statement of Mr. Hoare of the United Kingdom, ibid. at 9.
[665] Statement of Mr. Rochefort of France, ibid. at 9–10.

may not be refused to refugees for the sorts of reasons, e.g. insolvency, or failure to perform military service or to pay taxes, argued by the proponents of the "public order and national security" approach to be uniquely applicable to citizens.[666] As Weis concludes,

> There is . . . a difference between nationals and refugees in favour of the latter. While the issuance of a passport to a national is often a matter of discretion, the issue of a travel document is an obligation, unless compelling reasons of public security or public order justify a refusal. There is good reason for this distinction between nationals and refugees, since refugees may have to travel, for example, from the country of first asylum to a country of resettlement.[667]

Moreover, not any public order or national security reason is sufficient to deny a CTD. Responding to British concerns that these concepts could justify excessive restrictions,[668] states agreed to emphasize the exceptional nature of any refusal to grant refugees a travel document,[669] and to authorize such refusal only in situations in which there are *compelling* reasons of national

[666] See text above, at pp. 861–862.

[667] Weis, *Travaux*, at 265. See also Grahl-Madsen, *Commentary*, at 127: "[I]t seems clear, on the basis of the firm statement of the Belgian representative, that the Belgian proposal would not justify the refusal of issuing a travel document in the cases enumerated by the Norwegian delegate, viz. 'for reasons of insolvency, failure to pay taxes and so on.'" Yet "'public order' (*ordre public*) still remains a relatively fluid concept, and certain states have not excluded the possibility of applying to the issue of Convention travel documents the same restrictions as they would apply with regard to national passports": Goodwin-Gill, *Refugee in International Law*, at 155.

[668] "If the holding of extremist views was accepted as a valid ground for not issuing travel documents, certain States might take advantage of that facility in order to put obstacles in the way of legitimate travel on the part of a refugee, and that would be a marked deterioration in the status of refugee from the position obtaining under the London Agreement of 1946": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.17, July 12, 1951, at 10.

[669] Under the Belgian draft, consideration of public order and national security concerns would have been a routine and intrinsic part of the decision about whether to issue a refugee travel document. "*Subject to the requirements of national security or public order*, the Contracting States shall issue to refugees [emphasis added]": UN Doc. A/CONF.2/61. In contrast, the text as adopted makes clear that the starting point is the duty to issue the travel document, subject only to clear exceptions. "The Contracting States shall issue to refugees lawfully staying in their territory travel documents . . . unless compelling reasons of national security or public order otherwise require": Refugee Convention, at Art. 28(1). The exceptional nature of this authority includes a temporal dimension. As the Belgian representative insisted, "the limiting clause . . . did not mean that the issue of travel documents to refugees would be categorically refused. It was merely intended to allow for the temporary discontinuance of the issue of such documents. That action would no longer be necessary once the consideration of national security or public order which had led States to suspend the issue of travel documents had ceased to hold": Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.17, July 12, 1951, at 5.

security or public order which *require* non-issuance of the travel document.[670] As Grahl-Madsen concludes, this means "that it is only in grave and exceptional circumstances that a Contracting State may refuse to issue a travel document to a refugee lawfully staying in its territory."[671]

The specific reason for including reference in Art. 28 to the "public order" ground was to authorize denial of a travel document to a refugee "who was being prosecuted for an offence under civil law."[672] As explained by the Danish representative,

> [T]ravel documents were used not only for immigration purposes, but also to allow a person to travel on business or on holiday. It might well be that, if in possession of a travel document, a refugee suspected of having committed a crime in a particular country would be able to obtain a visa from the Consul of another country without the Consul being aware of the facts of the case. It would consequently be undesirable to issue a travel document to such a person before the alleged offence had been fully investigated.[673]

This justification is very much in line with thinking on the notion of public order employed in Art. 32 of the Convention, said in that context to justify restrictions in the interests of internal security, particularly to the safety and security of the host country's citizens.[674] The logic of refusing a travel document to a refugee on national security grounds is perhaps less clear, since that expression was traditionally understood to relate to a threat to the host country emanating from outside the host state's borders.[675] But under

[670] "[T]he United Kingdom fully appreciated the French representative's difficulties, and the need for doing something to meet his point. In order, however, to avoid any abuse of the formula finally adopted, he would suggest that the phrase, 'Subject to the requirements of national security and public order' in the Belgian amendment ... should be replaced by the words 'Except where imperative reasons of national security or public order otherwise require'": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.17, July 12, 1951, at 11. "The word 'imperative' was changed [to] 'compelling' by the style committee without any reason being given, and it was clearly nobody's intent that this change of words should imply a change of substance": Grahl-Madsen, *Commentary*, at 128. As Robinson observes, "[t]he words 'compelling reasons' are to be understood as a restriction upon 'reason of national security and public order,' i.e. not every case which would ordinarily fall under the latter concept could be used to refuse a document, but only very serious cases": Robinson, *History*, at 136.

[671] Grahl-Madsen, *Commentary*, at 128.

[672] Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.17, July 12, 1951, at 7.

[673] Statement of Mr. Hoeg of Denmark, ibid. at 9.

[674] See chapter 5.1 above, at pp. 679–690.

[675] It might be that denying a refugee the right to leave the host country would, for example, prevent him or her from consorting with persons abroad who might intend to do damage to the basic institutions of the host country. But such circumstances would, one presumes, be rare. To the contrary, denial of departure to a refugee in some sense posing a

more recent understandings of national security – in which it is recognized that national security may be implicated even in distant events which may have an indirect impact on the host state[676] – there may be greater scope to deny refugees a travel document on this basis. For example, if a refugee is traveling to raise funds for, or otherwise to contribute to the endeavors of, a terrorist organization, the state in which he or she lawfully resides would be justified in refusing a travel document.

Underlying the determination of states to enjoy some right to refuse travel documents to "risky" refugees seems to be a recognition that a unified travel document system can only survive if care is taken by the issuing state not to facilitate the international movement of refugees who could jeopardize the interests of a transit or destination state – even though the logical alternative, effectively requiring the refugee to remain in the country,[677] at least pending lawful removal under Arts. 32 and 33, is hardly in the immediate self-interest of the issuing state.[678] Governments were prepared to shoulder additional burdens at the time of considering the issuance of a CTD out of a recognition that some vetting was essential to safeguard the safety and security of partner states whose cooperation was required to make the travel document system workable. Because the country in which the refugee was resident was usually in a better position to know whether he or she posed a risk, the credibility of the travel document system depended in part on that state's knowledge being brought to bear.

It is important, however, not to overstate the level of confidence reposed in the issuing country. Fundamentally, the practical viability of a common travel document system which left so much discretion to the issuing state rested on two decisions which left significant authority to both destination and transit states. First, it was agreed that the issuing government would be under a clear duty to readmit the holder of a CTD issued by it, subject only to temporal limitations set out in the document itself. Second, both countries of destination and of passage – while

threat to the host country would normally be thought counterproductive to that country's security.

676 See chapter 3.5.1 above, at pp. 263–266.

677 "Since ordinarily a refugee cannot leave the country without a travel document ... [the right to withhold issuance of a travel document] means in essence that every Contracting State may forbid the egress of a refugee if this prohibition appears to be in the interest of national security or public order": Robinson, *History*, at 135.

678 It is noteworthy that the original draft of para. 13(1) of the Schedule, drawn from the 1946 London Agreement, specifically "entitle[d] the holder to leave the country where it had been issued": "United Kingdom: Draft Proposal for Article [28]," UN Doc. E/AC.32/L.17, Jan. 30, 1950, at 3. With the omission of this language from the final text of para. 13, the issuing state is entitled, in accordance with para. 14 of the Schedule, to apply its general "laws and regulations" to govern "departure from" its territory: Refugee Convention, at Schedule, para. 14.

required to honor every CTD as the equivalent of a valid passport[679] – were nonetheless entitled to apply their usual rules with respect to the issuance of visas. With these safeguards in hand, governments felt that their interests were adequately protected.

At the very start of debate on the travel document system, the British representative opined that the goal of the regime had to be "to enable a refugee who had no passport to return within a given period to the country that issued his travel document. Without that provision, the refugee would probably not be allowed to enter other countries, for they would hesitate to admit him for fear that they might be obliged to keep him permanently on their territory."[680] More bluntly, the Chairman of the Ad Hoc Committee warned that

> When a refugee ... travelled out of his country of residence, the first question which rose in the minds of the authorities of any country which admitted him was whether it would be possible to get rid of him. They knew that if they kept him after his travel document had expired, the country which had issued that document could disclaim any further responsibility for him, but as long as that travel document remained valid he would be admitted on the understanding that at least one country would accept him again. If that last protection for countries admitting refugees in possession of travel documents issued by their country of residence was removed, entry visas would be supplied only after careful study of the probability of the refugee being permitted to return to his country of residence. The purpose of article [28] was to make it possible for a refugee to travel away from his country of residence with the same relative facility as nationals of most countries, and, if the countries in which he travelled were deprived of their only safeguard, his travel document would become worthless.[681]

The approach adopted therefore enshrined the principle of presumptive duty to readmit[682] during the period of the travel document's validity (either one or two years[683]):

[679] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.42, Aug. 23, 1950, at 20.

[680] Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 4. The practical importance of codifying this principle is clear from the view expressed by the Chairman of the Ad Hoc Committee that, as a matter of general law, he had "doubt concerning the principle that the country issuing the travel document was under an obligation to readmit the refugee if the country of destination would not permit him to remain there": Statement of the Chairman, Mr. Chance of Canada, ibid. at 12.

[681] Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.39, Aug. 21, 1950, at 14.

[682] "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

> [T]he country issuing a travel document to a refugee would be responsible for him and would be obliged to readmit him, whatever his legal status in that country, if he was not accepted elsewhere.[684]

As such, state parties may not lawfully issue only a "one-way" travel document with no return clause, as has been the case in Kenya, Tanzania, and Uganda. Governments concerned that they may be subject to readmission obligations of an unacceptably long duration[685] can exercise the option "in exceptional cases, or in cases where the refugee's stay is authorized for a specific period" to limit the right of reentry to a period not less than three months from the date of issue.[686] But any such limitation must be noted explicitly in clause 1(2) of the CTD, thus ensuring that there is no question of

time during the period of its validity": Refugee Convention, at Schedule, para. 13(1). This was in line with prevailing state practice. "[A]ny holder of a Danish travel document was entitled to re-enter Denmark, provided the document was still valid": Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.18, July 12, 1951, at 11. See also Statement of Mr. Rochefort of France, ibid. at 14: "In point of fact, the travel document conferred the right both of exit and of re-entry"; and Statement of Mr. Herment of Belgium, ibid. at 11: "[T]he terms on which the document was conceived implicitly covered authorization to return."

683 "The document shall have a validity of either one or two years, at the discretion of the issuing authority": Refugee Convention, at Schedule, para. 5.

684 Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 13. When a refugee reenters the issuing state, "the refugee need be accorded no better status than he had before he left. For example, a refugee authorized to remain in a country for a limited period who leaves that country with a travel document could, on his return, claim to remain only for the unexpired period granted in the original permission, unless the government concerned decided to extend the period": Ad Hoc Committee, "First Session Report," at Annex II.

685 Canada, for example, was worried about "the question of [refugees'] return ... The re-admission clause, as proposed, might raise certain difficulties. Nevertheless Canada would be ready to accept provisionally a solution whereby the proposed travel document would, during the period of validity, give the bearer considerable possibility of returning to the country of residence": Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 7–8.

686 "The 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": Refugee Convention, at Schedule, para. 13(3). "These 'exceptional cases' are not defined. In view, however, of the basic purpose of issuing travel documents to refugees (i.e. to facilitate their movement), it is evident that such exceptions should be limited to cases where there are very special reasons for restricting the validity of the return clause to a period less than that of the validity of the travel document": UNHCR, "Travel Documents," at para. 22. See also Grahl-Madsen, *Commentary*, at 156: "[T]he word 'exceptional' makes it quite clear that the provision of subparagraph 3 is not one which should be easily invoked, and a Contracting State cannot make it its practice or policy to issue travel documents with a limited return clause."

the admitting state being taken unawares by any special temporal limitation on reentry to the issuing country.[687]

Apart from such an express limitation, the right of a refugee holding a CTD to reenter the issuing country may only be subjected to compliance with return "formalities."[688] The language proposed by the Ad Hoc Committee, under which the issuing state might have conditioned reentry on compliance with "those regulations which apply to returning resident aliens bearing duly visaed passports or re-entry permits,"[689] as well as a more far-ranging French effort that would have subjected reentering refugees to the possibility of substantive visa controls,[690] were rejected by the Conference of Plenipotentiaries on grounds that these approaches "would raise doubts as to whether holders of travel documents could, in fact, return."[691] As the British delegate cautioned,

[687] This approach resulted from an amendment proposed by Canada: Statement of Mr. Chance of Canada, UN Doc. A/CONF.2/SR.18, July 12, 1951, at 11. As the President of the Conference of Plenipotentiaries observed, adoption of this approach ensured that "[i]t would then be perfectly clear what the possession of a travel document entailed": Statement of the President, Mr. Larsen of Denmark, ibid. at 12.

[688] "[A] Contracting State may require the holder of the document to comply with such formalities as may be prescribed in regard to exit from or return to its territory": Refugee Convention, at Schedule, para. 13(2). Nor may the issuing state rely on the general authority under para. 14 to apply its laws and regulations governing admission to its territory to impose substantive visa controls on returning CTD holders, as para. 14 is expressly made "[s]ubject ... to the terms of paragraph 13": Refugee Convention, at Schedule, para. 14.

[689] Ad Hoc Committee, "Second Session Report," at Schedule, para. 13(1). This language, in turn, had replaced a provision that would have subjected refugees to "those laws and regulations which apply to the bearers of duly visaed passports": Ad Hoc Committee, "First Session Report," at Schedule, para. 13(1). The amendment at the second session of the Ad Hoc Committee was prompted by concern that it might otherwise have allowed the denial of entry to a refugee "if they were penniless or suffering from infectious disease": Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.39, Aug. 21, 1950, at 16.

[690] France proposed the deletion of the language in the Ad Hoc Committee's draft that expressly granted a right of return "without a visa from the authorities of that country": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.18, July 12, 1951, at 9.

[691] Statement of Mr. Warren of the United States, ibid. at 12. A similar preoccupation was expressed in the Ad Hoc Committee by its Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.39, Aug, 21, 1950, at 14, who "feared that paragraph 13 in its present form might lead to something in the nature of mental reservations on the part of the authorities issuing travel documents." Even the French representative to the Conference of Plenipotentiaries conceded that it was important to signal that "exit implied subsequent return. As things were at present, a travel document which had no return clause would be completely meaningless": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.18, July 12, 1951, at 12.

> [T]he Conference should consider further the implications of the French amendment. The basic principle underlying the provisions of paragraph 13 [of the Schedule] was that States issuing travel documents to refugees resident within their territory would bind themselves to allow such refugees re-entry during the period of validity of the document. He was anxious that that principle not be tampered with.[692]

Indeed, even a less wide-ranging provision that would have allowed the readmission of refugees to be subject to the same requirements as those imposed on returning citizens[693] was deleted on the motion of its Turkish proponent.[694]

In the end, it was decided that an issuing state should be entitled to "exercise supervision over the comings and goings of the refugees in its territory,"[695] including by requiring them to obtain a reentry visa. But the right to exercise such supervisory authority must not rebound to the detriment of the states that relied on a CTD to admit a refugee to their territory:

> [T]wo considerations were involved: the respective obligations of the issuing country and those of the country admitting the refugees for temporary sojourn; and the relations between the issuing country and the holder of the travel document. Issuing countries could impose any regulations they wished covering the exit and entry of refugees, but what he was concerned to ensure was that they should assume an unconditional commitment to re-admit holders of their own travel documents. He did not think that such a principle was incompatible with a certain amount of supervision, such as was envisaged by the French representative, but care

[692] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.18, July 12, 1951, at 13. In the Ad Hoc Committee, the Chairman had expressed a comparable concern. "A refugee would not take out a travel document unless he intended to travel abroad and there was no reason why the return visa should not be supplied when the document was issued. If the refugee was obliged to apply for the visa after leaving the country, his passport might perhaps have expired when the visa was issued, and again the responsibility would pass to another country": Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.39, Aug. 21, 1950, at 16.

[693] "Where a visa is required of a returning national, a visa may be required of a returning refugee, but shall be issued to him on request and without delay": Ad Hoc Committee, "Second Session Report," at Schedule, para. 13(1).

[694] Statement of Mr. Miras of Turkey, UN Doc. A/CONF.2/SR.18, July 12, 1951, at 15. The clause had originally been inserted to avoid conflict with Turkish law, amended prior to the conclusion of the Refugee Convention, which imposed a visa requirement on returning Turkish citizens: Statement of Mr. Weis of the IRO, UN Doc. E/AC.32/SR.39, Aug. 21, 1950, at 16. While there was substantial support even in the Ad Hoc Committee for the deletion of this clause, it was left in the draft out of consideration for the views of the Venezuelan representative, whose country also imposed a visa requirement on returning citizens: see Statements of Mr. Perez Perozo of Venezuela, ibid. at 17, and Sir Leslie Brass of the United Kingdom, ibid. at 18.

[695] Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.18, July 12, 1951, at 10.

> should be taken to ensure that countries admitting refugees for short periods were not penalized or placed in difficulties by the regulations of the States issuing the travel documents.[696]

The Conference therefore adopted the proposal of a working group for the present language of para. 13 of the Schedule.[697] It stipulates the duty of the issuing state to readmit the holder of a CTD issued by it during the period of its validity, subject only to compliance with any "formalities" for return. This authority allows the issuing state to impose requirements that enable it to monitor the international travel of refugees, but disallows any substantive requirement which could result in a denial of reentry.[698]

In addition to the duty of readmission, the CTD system was made palatable to potential destination and transit states by its explicit recognition of their right to apply general visa policies to the holders of refugee travel documents. Importantly, this authority does not include a right to scrutinize the underlying refugee status of the holder of a CTD:

> Because there is no international eligibility procedure and it is left to each State to decide whether it considers a particular person as a refugee within the meaning of Article 1 . . . there may be differences of opinion between governments with regard to factual circumstances, as well as on points of law. A person who is considered a bona fide refugee in one country may on factual or legal grounds be considered ineligible in another country. Paragraph 7 of the Schedule [which requires states to recognize the validity of documents issued under Art. 28] must be considered in view of the fact that the drafters were fully aware that such differences of opinion might occur; nevertheless they made it an unconditional obligation on the part of Contracting States to recognize travel documents issued by one of them.[699]

On the other hand, para. 14 of the Schedule grants states a broad-ranging right to apply their usual "laws and regulations" to holders of a CTD seeking "admission, transit through, residence and establishment in, and departure

[696] Statement of the President, Mr. Larsen of Denmark, ibid. at 15. This understanding was expressly endorsed by the French delegate, who had previously promoted greater restrictions: Statement of Mr. Rochefort of France, ibid. at 15.

[697] "Report of the Working Group appointed to study paragraph 13 of the Schedule," UN Doc. A/CONF.2/95, July 19, 1951, adopted by the Conference on an 18–0 vote: UN Doc. A/CONF.2/SR.31, July 20, 1951, at 4.

[698] This is clear from the text of para. 13. The authorization of the state of issue to require compliance with exit or return formalities, set out in sub-paragraph (2), is expressly "subject to the provision of the preceding sub-paragraph," in which state parties undertake to readmit the holder of a CTD issued by them "at any time during the period of its validity."

[699] Grahl-Madsen, *Commentary*, at 122–123.

from" its territory.[700] As the British delegate to the Ad Hoc Committee observed, "the issue of a travel document imposed an obligation on the State of issue only. No other State assumed any obligation whatsoever until it affixed a visa to that document."[701] As set out in detail in paras. 8 and 9 of the Schedule, states are, in particular, fully entitled to apply their usual criteria for the issue of either an entry or a transit visa.[702]

There was little discussion of the right of destination countries to require an entry visa, the only amendment to the draft of para. 8 of the Schedule being to make clear that whether an entry visa is required or not is strictly a matter for the destination state to decide. That is, it may choose to admit the holder of a CTD without a visa if it wishes to do so.[703] The issue of transit visas, however, elicited more discussion. The primary concern was "the serious difficulties which would arise if a refugee applied for a transit visa to a certain country, and then, instead of proceeding to the country of final destination, remained in the territory for which he had been granted a transit visa

[700] Refugee Convention, at Schedule, para. 14. In explaining the net value of this general authority, the British representative to the Conference of Plenipotentiaries suggested that para. 14's right of a state to apply its "'laws and regulations' [was] of far broader application than formalities": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.33, July 24, 1951, at 4. The only reference to the ability to apply "formalities," however, is contained in para. 13(2)'s grant to the issuing state of the right to supervise conditions of reentry. Because para. 14 is expressly stated to be "[s]ubject only to the terms of paragraph 13," the British representative's remarks are inaccurate if meant to suggest that the issuing state can apply its laws and regulations to condition reentry in other than the purely formal and supervisory sense authorized by para. 13. Thus, para. 14 adds nothing to that authority. The issuing state may, however, apply its usual laws and regulations to govern other matters covered by para. 14, e.g. residence and establishment in its territory.

[701] Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 14.

[702] Refugee Convention, at Schedule, paras. 8, 9. In discussion of the right of states to insist on visa requirements in the Ad Hoc Committee, the Belgian representative "drew attention to paragraph 7 of the schedule ... under the terms of which the High Contracting Parties would recognize the validity of travel documents issued in accordance with the provisions of article [28]": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 14. The British proponent of the Schedule "admitted that the text of the paragraph could be made more explicit: it should be understood that the High Contracting Parties would not be required to recognize travel documents which did not bear their visa": Statement of Sir Leslie Brass of the United Kingdom, ibid. It is nonetheless regrettable that no effort was made to revise the text of para. 7 clearly to indicate its qualification by paras. 8 and 9.

[703] Refugee Convention, at Schedule, para. 8. As originally proposed, the phrase "and if a visa is required" was not contained in para. 8, which could therefore have been read to suggest a duty to issue a visa to the holder of a CTD allowed to enter a state party: "United Kingdom: Draft Proposal for Article [28]," UN Doc. E/AC.32/L.17, Jan. 30, 1950, at para. 8. The language was amended to its present form without debate at the first session of the Ad Hoc Committee: Ad Hoc Committee, "First Session Report," at para. 8.

only."[704] In the result, state parties "could not assume an unconditional obligation" to issue transit visas to all CTD holders.[705]

To safeguard the interests of transit states, Venezuela wanted to be able to require "firm evidence that they possessed the means of reaching their countries of destination,"[706] for example, "an air or sea ticket to his country of final destination as evidence of his good faith."[707] Denmark sought the right to apply its usual rule that a transit visa would only be issued upon presentation of a valid travel document with a duration of at least two months beyond the expiry of the entry visa to the state of destination.[708] Most generally, Egypt argued for some latitude in the issuance of transit visas in the event that public security in the transit state were threatened by a mass influx of refugees.[709]

The agreement reached sets a presumptive right of the refugee to pass through the territory of any state party as required. In keeping with the mandatory system of mutual recognition,[710] a state party through which a refugee has to pass en route to a "territory of final destination"[711] is generally obliged by para. 9 of the Schedule to honor a validly issued CTD.[712] But the transit country may refuse a transit visa to the holder of a CTD on the same grounds that might be invoked to justify refusal of a transit visa to non-citizens in general.[713] A state party will thus need to rely on generic rules or

[704] Statement of Mr. Montoya of Venezuela, UN Doc. A/CONF.2/SR.32, July 24, 1951, at 7.
[705] Statement of Mr. Makiedo of Yugoslavia, UN Doc. A/CONF.2/SR.18, July 12, 1951, at 5.
[706] Statement of Mr. Montoya of Venezuela, ibid. at 7. [707] Ibid. at 6.
[708] Statement of Mr. Hoeg of Denmark, ibid. at 6–7.
[709] "Where such immigration occurred, transit countries might experience difficulties in applying the provisions of the paragraph, which should therefore include certain limitations based upon considerations of public security": Statement of Mr. Mostafa of Egypt, ibid. at 6.
[710] See text above, at pp. 854–856.
[711] Grahl-Madsen reads the "final destination" language to suggest that a transit visa need only be issued in the case of a refugee seeking resettlement "or some serious travel purpose, not for holiday trips or other pleasure travels": Grahl-Madsen, *Commentary*, at 147–148. There is, however, nothing in the *travaux* that requires this meaning. Moreover, in view of the general goals of the CTD system, which include the facilitation of business and holiday travel (see text above, at p. 846), there is no good reason to conceive the notion of "final destination" as meaning other than the final destination for the particular travel intended (which may or may not be a permanent destination).
[712] "The Contracting States undertake to issue transit visas to refugees who have obtained visas for a territory of final destination": Refugee Convention, at Schedule, para. 9(1). Since destination states are entitled to authorize entry without a visa (see text above, at pp. 870–871), the presumptive duty to issue a transit visa logically arises as well once it is established that no visa is required to enter the country of final destination.
[713] An amendment proposed by Yugoslavia (UN Doc. A/CONF.2/31) was adopted in part by the Ad Hoc Committee, which resulted in the addition of the second sentence of para. 9 of the Schedule ("The issue of such visas may be refused on grounds which would justify refusal of a visa to any alien"): UN Doc. A/CONF.2/SR.18, July 12, 1951, at 7.

standards to limit or restrict the issuance of transit visas to the holders of a CTD, and may not impose refugee-specific constraints.[714]

The Egyptian delegate seems clearly to have believed that this approach precludes a decision to suspend the issuance of transit visas in the case of a mass influx of refugees. After passage of the amended text of para. 9, he indicated that the rule adopted "did not fully meet his point."[715] At one level, this seems right: the existence of a mass influx may have little bearing on whether the transit state is likely to face the risk of non-departure from its territory of refugees who gain entry on the basis of an intention to travel onward. But despite the primary motivation for its adoption, the text of the second sentence of para. 9 of the Schedule is not limited to the authorization of measures necessary to ensure the departure of refugees in transit. If a state were comprehensively to curtail the issuance of transit visas in the event of a public security threat (of any kind), there would be no impediment to relying upon that generic authority to suspend the issuance of transit visas to the holders of CTDs (including where public security was threatened by a mass influx of refugees). This may explain the view of the Colombian representative that he "appreciated the difficulties of the Egyptian and Venezuelan representatives, but felt they were met by the Yugoslav amendment."[716] This understanding moreover allows para. 9(2) to be read in consonance with the general rule in para. 14, pursuant to which state parties are entitled to apply their usual migration control rules governing, *inter alia*, "transit through" their territory.[717]

In sum, the CTD system codified in Art. 28 and its Schedule is not only a critical means of facilitating ordinary, short-term travel by refugees, but is of fundamental value in providing refugees with the documentation often required to seek out opportunities for onward movement in search of their preferred durable solution. In this sense, it is the practical complement to

[714] "[A] State cannot refuse to grant a transit visa simply because it considers such a visa as a privilege which it may grant or refuse at will without having to give reasons for a refusal. The State in question must show grounds which can justify its refusal in the individual case or in the special circumstances. That is to say that the refusal must refer to a specific exclusion ground in its Aliens Law or pertinent regulations, or at least be rooted in a general policy": Grahl-Madsen, *Commentary*, at 148.

[715] Statement of Mr. Mostafa of Egypt, UN Doc. A/CONF.2/SR.18, July 12, 1951, at 7.

[716] Statement of Mr. Giraldo-Jaramillo of Colombia, ibid. at 7.

[717] Indeed, the view was expressed that para. 9(2) was superfluous in view of para. 14: Statement of Mr. van Heuven Goedhart of UNHCR, UN Doc. A/CONF.2/SR.32, July 24, 1951, at 7. It seems to have been retained essentially to avoid any ambiguity on this point. "[T]he second sentence in paragraph 9 was a natural corollary to the first. It was impossible to envisage the unconditional granting of transit visas, but that was what paragraph 9 could mean, in the present context, if the second sentence were deleted": Statement of Mr. Rochefort of France, ibid.

Art. 31(2)'s express contemplation of resettlement beyond the state of first reception.[718]

The workability of the CTD system is attributable to a careful balance between the rights of individual states, and a shared commitment to making the sorts of compromise needed for a collective regime to work in practice. On the one hand, there is extraordinary flexibility and autonomy in the system. Subject only to the presumptive responsibility to issue travel documents to refugees lawfully staying in their territory, states may issue travel documents to a broader class of refugees if they wish; they decide independently whether the test for withholding of issuance on public order or national security grounds is met; and they are largely responsible for determining the terms of validity and renewal of the travel documents issued. Yet because this independence of action is neatly balanced by a commitment to readmit the holders of any CTD issued by them, it has been possible to secure the commitment of all state parties to recognize the validity of any refugee travel document issued by a partner state, and to regulate the transit and entry of CTD holders on the basis of only their usual migration control policies. In the result, most refugees are entitled to enjoy international freedom of movement on terms that are not appreciably different from those that govern the more general, passport-based system of travel.

6.7 Freedom of expression and association

In the liberal tradition, freedom of expression is thought to be "an indispensable prerequisite for life in society based on the principles of rationality and mutual respect for human dignity."[719] Individuals are allowed to participate in a two-way flow of information and ideas, and then to stimulate both attention to, and discussion of, their views. As a practical matter, meaningful

[718] See chapter 4.2.4 above, at p. 414. More generally, Executive Committee Conclusion No. 15 requires that even efforts among states to avoid gaps in the assignment of protective responsibility should observe the principle that "[t]he intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account": UNHCR Executive Committee Conclusion No. 15, "Refugees Without an Asylum Country" (1979), at para. (h)(iii), available at www.unhcr.ch (accessed Nov. 20, 2004). These principles are not reflected in regimes such as the European Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 30 ILM 425 (1991) (Dublin Convention) and the Agreement between the Government of Canada and the Government of the United States Regarding Asylum Claims Made at Land Borders, Aug. 30, 2002, (2002) 79(37) *Interpreter Releases* 1446 (Canada–US Agreement), an express goal of which is to prohibit asylum-seekers from seeking protection in other than the country of first arrival.

[719] Nowak, *ICCPR Commentary*, at 337.

engagement in this process of exchange is often possible only where there is scope for individuals to act collectively. As Jayawickrama explains,

> [T]he attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and co-operation of others. Uniting protects individuals from the vulnerability of isolation. It enables those who would otherwise be ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.[720]

The motivation to organize is found no less among refugees. In fact, the circumstances of their flight and exile often lead refugees to value their expressive rights particularly highly:

> Exiles are under enormous pressure to organize politically, and their status alone is proof of their political disenfranchisement at home. Within the asylum country as well, exiles are likely to be politically, economically, and socially vulnerable. They rarely have representation within the asylum State's political system, and the national and international agencies chartered to assist them typically give inadequate consideration to their views. Members of an exile community will also likely share a racial, national, religious, or social characteristic which marked them as a target for persecution in the country of origin. Such circumstances make some level of political organization inevitable.[721]

In practice, refugees organize for many reasons. Participation in associations may help them counteract feelings of isolation, increase their self-esteem, and lessen their sense of alienation.[722] Refugee associations may also play a role in preserving values and elements of identity of the refugee community within the context of a dominant host culture – for example, language, family structure, and religious beliefs. Such associations, while obviously incapable of rendering refugees impervious to acculturation, may nonetheless play a critical role in allowing refugees better to position themselves for successful readjustment in the event repatriation proves ultimately to be possible.[723]

One of the most fundamental reasons leading refugees to form associations is the need to work collectively to provide for their necessities of

[720] N. Jayawickrama, *The Judicial Application of Human Rights Law* (2002) (Jayawickrama, *Judicial Application*), at 738–739.

[721] S. Corliss, "Asylum State Responsibility for the Hostile Acts of Foreign Exiles," (1990) 2(2) *International Journal of Refugee Law* 181 (Corliss, "Hostile Acts"), at 192.

[722] J. Sorenson, "Opposition, Exile and Identity: The Eritrean Case," (1990) 3 *Journal of Refugee Studies* 298, at 313.

[723] M. Castillo and J. Hathaway, "Temporary Protection," in J. Hathaway ed., *Reconceiving International Refugee Law* 1 (1997), at 11. See also R. Hofmann, *International Academy of Comparative Law National Report for Germany* (1994), at 30–31.

life.[724] Refugee groups which have successfully organized to achieve significant self-reliance include Tibetan refugees in India, Angolan refugees in Zambia, and Mozambican refugees in Swaziland, to name only a few examples.[725] Refugees have also organized so as to be represented before host country and international authorities, and to facilitate the establishment and delivery of education, healthcare, and other social services. Bhutanese refugees in Nepal, for example, formed groups to advocate for refugee education and healthcare, to establish professional and technical organizations, to aid victims of violence, and to provide opportunities for sub-populations such as women, young people, and students to share concerns and devise coping strategies.[726] Salvadoran refugees in Honduras created a structure of elected representatives to self-govern their camps, including the running of health campaigns, workshops, and schools, the distribution of food and clothing, and delivery of pastoral services.[727] Eritrean nationalist groups represented the refugee population before the Sudanese government and international relief organizations, operated health clinics and schools, and orchestrated community development initiatives.[728]

Most states do not restrict such activities by refugee associations.[729] To the contrary, they often find such organizations helpful in facilitating the provision of assistance and services to the refugee community.[730] The United States, for example, determined in the mid-1970s that there was value in funding Southeast Asian refugee organizations to provide employment, language, vocational, and other services to refugees from Vietnam.[731] Not all host governments welcome refugee participation, however. For example, the Meheba Management Committee was excluded from the planning of projects

[724] See generally P. Van Arsdale, "The Role of Mutual Assistance Associations in Refugee Acculturation and Service Delivery," in M. Hopkins and N. Donnelly eds., *Selected Papers on Refugee Issues II* 156 (1993).

[725] D. Keen, *Refugees: Rationing the Right to Life* (1992), at 60–61.

[726] These organizations included the Bhutanese Refugees Educational Coordinating Committee, Bhutan Health Organization, Association of Bhutanese Professionals and Technicians, Bhutanese Refugees Aiding Victims of Violence, Bhutan Women's Association, Refugee Women Committee, Youth Organization of Bhutan, Students Union of Bhutan, as well as several Bhutanese human rights organizations: G. Siwakoti, *International Academy of Comparative Law National Report for Nepal* (2002), at 10.

[727] J. Hammond, "War-Uprooting and the Political Mobilization of Central American Refugees," (1993) 6(2) *Journal of Refugee Studies* 105, at 110.

[728] Corliss, "Hostile Acts," at 192.

[729] UNHCR, "Implementation," at para. 76.

[730] Corliss, "Hostile Acts," at 192.

[731] C. Mortland, "Patron–Client Relations and the Evolution of Mutual Assistance Associations," in P. Van Arsdale ed., *Refugee Empowerment and Organizational Change: A Systems Perspective* 15 (1993), at 16.

with UNHCR implementing partners in Zambia.[732] The participation of refugees in economic associations, particularly trade unions, may also be strictly regulated by way of special registration requirements, limitations on the number of non-citizens in a union, or the expulsion of refugees who participate in an unlawful strike.[733] In the more explicitly political realm, the main concern of host states is generally that refugee associations not raise the risk of destabilization. For example, while Switzerland has scrapped its formal ban on refugees engaging in political activities, it nonetheless adopted a policy of requiring refugees to secure special authorization to make a political speech in order to ensure that refugees not interfere in Swiss internal affairs.[734] Namibian authorities ordered the arrest of several refugee members of a musical group on the grounds that they had illicitly participated in domestic politics by performing at a Congress of Democrats function.[735] And in Zimbabwe, refugees accused of funding political parties opposed to the government have been expelled.[736]

Refugee organizations have at times engaged in efforts to overthrow the government of their country of origin. As Corliss notes, "[f]ew exiles want to remain exiles, and a change in the political *status quo* is usually the only truly secure way to return home."[737] Such activities may be non-violent, including the establishment of opposition groups, or the conduct of public awareness campaigns such as those organized by Kurdish refugees in the United Kingdom.[738] But refugees may also establish armed bands, terrorist attacks, assassinations, and outright invasions – for example, the mobilization of

[732] E. Brooks, "The Social Consequences of the Legal Dilemma of Refugees in Zambia" (1988), at 8. Ten years later, however, progress had been made on this front. Refugees were allowed to select Road Chairmen to present their views to a tripartite administration comprised of government, UNHCR, and the lead non-governmental partner, Lutheran World Foundation: M. Barrett, "Tuvosena: 'Let's Go Everybody': Identity and Ambition Among Refugees in Zambia," Uppsala University Department of Cultural Anthropology Working Paper (1998), at 14.

[733] UNHCR, "Implementation," at para. 76.

[734] W. Kälin, *International Academy of Comparative Law National Report for Switzerland* (1994), at 16.

[735] *Namibian*, June 16, 2000. While the Namibian courts subsequently intervened to prohibit the government from punishing the refugees by detaining or deporting them, the Minister of Home Affairs "responded to the order ... by issuing statements attacking the judiciary, and to the effect that despite the order he would seek to arrest [the refugees] ... Following a few tense weeks, an agreement was reached [providing that the refugees] would apply for work permits while returning to Osire [refugee camp] voluntarily": Legal Assistance Centre, "Constitutional and Human Rights Unit Annual Report" (2000), at 5–6.

[736] LCHR, *African Exodus*, at 95.

[737] Corliss, "Hostile Acts," at 195.

[738] O. Wahlbeck, "Community Work and Exile Politics: Kurdish Refugee Associations in London," (1998) 11(3) *Journal of Refugee Studies* 215, at 226.

Rwandese refugees in Uganda prior to the invasion of 1990,[739] and the repeated violation of Cuban airspace by refugees from that country based in the United States.[740]

State responses to political activity directed at the refugees' country of origin range from toleration or even support of the refugees, to harsh "crack-downs." It has been noted that "[w]hether or not a host government restricts the political activities of refugees depends almost entirely on its own alignments and preferences."[741] For example, Kenya has alternated between restricting and allowing the political activities of successive generations of Ugandan refugees, depending upon whether the party benefiting from their support was in domestic political favor.[742] The same has been true for Liberian refugees in Côte d'Ivoire.[743] In some situations, refugees have even played key roles in advancing the international political goals of their host state. Pakistan actively supported the use of its territory by Afghan rebels engaged in anti-Soviet assaults, even to the point of delivering military aid from the United States to the refugee fighters.[744] Similarly,

[739] C. Watson and US Committee for Refugees, "Exile from Rwanda: Background to an Invasion," Feb. 1991. See also Corliss, "Hostile Acts," at 199: "The use of external bases to mount an actual insurgency has ... become more pervasive in recent decades. Foreign sanctuaries permit an otherwise unviable insurgent movement to mature and gain strength. Without the burden of having to maintain territorial control, the insurgents can train, expand their numbers, and develop international political and material support links without hindrance."

[740] "The Cuban attack on the unarmed civilian planes used by 'Brothers to the Rescue,' a refugee organization, is one more sad chapter in Castro's 35-year antagonistic relationship with the United States. In the past, Brothers pilots have blatantly violated US and international law by crossing into Cuban airspace. But even if they did so again last weekend, as the Cuban government claims, shooting them down was inexcusable. However, blame must be shared by rabid expatriates determined to overthrow Castro's communist government. [The US government] must rein in these forces – or at least make sure they don't use the United States as the launching pad for their incursions": "Retaliation by force is not answer in Cuba," *Chicago Sun–Times*, Feb. 28, 1996, at 25.

[741] LCHR, *African Exodus*, at 94.

[742] Ibid. Of perhaps greater concern, the local UNHCR representative, Reinier Thiadens, is reported to have declared that "our position is that political activities should not take place within the refugee camps": R. Oduol, "Ethiopian refugees need not fear harassment in camps," *East African*, July 2, 2001.

[743] LCHR, *African Exodus*, at 94.

[744] N. Ahmad, *International Academy of Comparative Law National Report for Pakistan* (1994), at 10. "Pakistan offered not only generous humanitarian assistance to the Afghan refugees, but also military aid and training to the mujahiddin – allowing its territory to be used as an arms pipeline – and diplomatic support for the resistance ... The multinational aid effort led by the US and Pakistan gave the Afghan resistance the support it needed to continue to fight, thus creating a refugee-based insurgency along the Pakistan–Afghanistan border": L. Goodson, *Afghanistan's Endless War: State Failure, Regional Politics, and the Rise of the Taliban* (2001), at 147.

Honduras allowed its territory to be used as a staging ground for attacks on Nicaragua by exiles from the Sandinista government supported by the United States.[745]

Conversely, while the Indian government initially tolerated the subversive activities of the Tamil refugees who arrived from Sri Lanka in the mid-1980s,[746] militant groups were disarmed and the LTTE banned after the assassination of Rajiv Gandhi.[747] Thai police arrested Burmese refugees for planning a peaceful protest in front of the Burmese Embassy against the unlawful detention by that country's military junta of opposition leader Aung San Suu Kyi. In doing so, they explicitly cited "the Prime Minister's policy to keep order in the country by restricting the political activities of Burmese refugees in Thailand."[748] Tanzania detained Burundian refugees engaged in a campaign for Hutu majority rule in their country because they had "assembled and drilled unlawfully with political intent which could create disharmony between Tanzania and its neighbouring countries."[749] Indeed, such is the intensity of concern about the risk to interstate relations in Africa that the 1969 OAU Refugee Convention requires refugees to "abstain from any subversive activities against any Member State of the OAU"; signatory governments moreover "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."[750]

[745] E. Ferris, *The Central American Refugees* (1987), at 106. "[W]hen the United States in 1979 lost Nicaragua, its closest ally in Central America, to a regime that favored ties to Havana and Moscow over Washington ... Honduras was transformed into a 'Pentagon Republic,' a military sanctuary from which to launch a covert war against Nicaragua": F. Terry, *Condemned to Repeat? The Paradox of Humanitarian Action* (2002), at 86.

[746] Indira Gandhi's administration was accused of actively assisting Sri Lankan guerrillas with aid and training, as well as turning a blind eye to smuggling and other illegal activities: B. Bastiampillai, "Sri Lankan Tamil Refugees in Tamilnadu: Trouble to the Host," paper presented at the International Seminar on Refugees and Internal Security in South Asia, Colombo, July 1994 (Bastiampillai, "Tamil Refugees"), at 10.

[747] Ibid. at 12; US Committee for Refugees, *World Refugee Survey 1993* (1993), at 93. Even today, "[t]he LTTE is banned in India ... and its leader is among those wanted by Indian courts to stand trial in the case [of the assassination of Rajiv Gandhi]": V. Sambandan, "India, US urged to 'rethink' on LTTE," *Hindu*, Apr. 10, 2003.

[748] S. Phasuk, "Old habits die hard," *Irrawaddy*, July 4, 2003. The Prime Minister had earlier "threatened to repatriate pro-democracy activists after openly acknowledging that most would be persecuted on arrival in military-ruled Burma": ibid.

[749] Amnesty International, "Tanzania: Burundi Nationals Detained in Tanzania," Sept. 1990.

[750] Convention governing the Specific Aspects of Refugee Problems in Africa, UNTS 14691, done Sept. 10, 1969, entered into force June 20, 1974 (OAU Refugee Convention), at Art. III.

Refugee Convention, Art. 15 Right of association
As regards non-political and non-profit-making associations and trade unions, the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

Civil and Political Covenant, Art. 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Civil and Political Covenant, Art. 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Civil and Political Covenant, Art. 21
The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Civil and Political Covenant, Art. 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are

necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others . . .

Economic, Social and Cultural Covenant, Art. 8

1. The States Parties to the present Covenant undertake to ensure:

(a) the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

. . .

(d) the right to strike, provided that it is exercised in conformity with the laws of the particular country.

. . .

The wording initially proposed by the Secretary-General for Art. 15 of the Refugee Convention provided that "[r]efugees . . . shall have the right to join non-profit-making associations, including trade unions."[751] This was a clear advance on the rather narrow approach taken in predecessor treaties, which had authorized refugees to establish only "associations for mutual relief and assistance."[752] So framed, the provision would have been subject to no contingency, and would have inhered in all refugees without qualification. The more inclusive formulation proposed was said to have been based upon a desire to bring the Refugee Convention into line with Art. 20(1) of the Universal Declaration of Human Rights, a broadly framed provision acknowledging that "[e]veryone has the right to freedom of peaceful assembly and association."[753]

Yet it must be conceded that even the initial formulation of Art. 15 fell significantly short of the standard which the drafters cited as their inspiration. Not only did the first draft of Art. 15 fail to make any mention of the

[751] Secretary-General, "Memorandum," at 27.

[752] 1933 Refugee Convention, at Art. 11; 1938 Refugee Convention, at Art. 13.

[753] Universal Declaration, at Art. 20(1). "The ordinary law of the democratic countries includes freedom of association which, in principle, is enjoyed by foreigners as well as by nationals . . . [as set out in] Article 20 of the Universal Declaration of Human Rights . . . In these circumstances, there can be no objection to [refugees] joining non-profit-making associations": Secretary-General, "Memorandum," at 27–28.

branch of Art. 20 of the Universal Declaration requiring freedom of peaceful assembly, but it made no attempt to codify the Declaration's Art. 19, stipulating the arguably more basic right to freedom of opinion and expression.[754] Even the content of the right to freedom of association proposed for the Refugee Convention was narrowly conceived: refugees would have been granted the right to join only "non-profit-making associations, including trade unions," said to include "associations pursuing cultural, sports, social or philanthropic aims, as distinct from associations 'for pecuniary gain,' whose aim is the making of profits."[755] Yet the cognate provisions in general human rights law are generally understood to include the right to belong to all forms of association.[756]

The lack of consonance between Art. 15 and the principles of the Universal Declaration intensified over the course of the drafting process. Most critically, the decision was taken not to guarantee the right of refugees to belong to political associations. And even though the Universal Declaration's guarantee inheres in "everyone," the Refugee Convention's right to freedom of association extends only to refugees who are lawfully staying in a state party, and even then must be honored only to the same extent that such rights are granted to most-favored foreigners.

The reluctance of the drafters to establish a comprehensive right of refugees to freedom of association appears to have been driven by genuine concern about the risk of political destabilization, both in receiving states and internationally. As the Belgian delegate remarked, refugees were seen to present a political risk which distinguished them from other non-citizens:

> [T]he position of some Governments *vis à vis* foreigners generally was essentially different from their attitude towards refugees. It was not too difficult to ask a foreign national to leave the country, but it was often virtually impossible to expel a refugee. Different measures had to be taken

[754] "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers": Universal Declaration, at Art. 19. As Jayawickrama observes, the freedoms of opinion, assembly, and association combine in practice to "require[ ] the acceptance of the public airing of disagreements and the refusal to silence unpopular views": Jayawickrama, *Judicial Application*, at 666.

[755] Secretary-General, "Memorandum," at 28. Oddly, the Secretary-General's draft assumed that "[p]rofit-making associations are covered by the provisions dealing with the exercise of the professions": ibid. Yet this approach seems to leave out the right to join a non-professional profit-making association, e.g. a business council or non-unionized workers' collective.

[756] Specifically, Art. 22 of the Civil and Political Covenant, which is the legally binding codification of Art. 20 of the Universal Declaration, has a "protective scope [which] is broad. Religious societies, political parties, commercial undertakings and trade unions are as protected by Art. 22 as cultural or human rights organizations, soccer clubs or associations of stamp collectors": Nowak, *ICCPR Commentary*, at 386.

> for the two groups. Moreover, it had been the experience of some States that foreign nationals rarely engaged in political activity, while refugees frequently did so.[757]

Indeed, the constrained approach taken to the associational rights of refugees was explicitly defended by the French government on the grounds that "[w]hile it was embarrassing to favour the withdrawal of rights from a group of people, it would be better to do that than to expose that group of people – refugees – to the more drastic alternative of deportation (on grounds of national security or public order)."[758] The denial of a complete right to freedom of association was therefore said to be "a warning to refugees in their own interest."[759]

The international political concerns of states derived in part from a fear that refugees might prove to be infiltrators determined "to serve the interests of some other country."[760] Thus, Denmark, Egypt, and France expressly invoked national security concerns to justify the denial of freedom of political association to refugees.[761] More generally, Austria expressed its worry that "recognition of the right of refugees to form associations could readily cause strained or aggravated relations between the countries of residence and those of origin."[762] While amendments based on such concerns did not garner majority support in the Ad Hoc Committee,[763] the Conference of

[757] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 10–11.

[758] Statement of Mr. Devinat of France, ibid. at 9.

[759] Statement of Mr. Cuvelier of Belgium, ibid. at 11.

[760] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 10.

[761] "[T]he French amendment should not be regarded as a discriminatory measure against refugees, but rather as a security measure": Statement of Mr. Devinat of France, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 9. See also Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 10: "[R]efugees who had found freedom and security in another country should not be permitted to engage in political activity which might endanger that country"; and Statement of Mr. Mostafa of Egypt, UN Doc. A/CONF.2/SR.8, July 5, 1951, at 10: "Refugees admitted to a country should not be in a position to engage in political activities prejudicial to the security of that country."

[762] United Nations, "Compilation of Comments," at 41. The Austrian government concluded that "[i]t would be preferable, therefore, to leave as a matter of principle to the administrative authorities in the country of refuge the decision as to the right of refugees to form associations": ibid.

[763] "The Chairman feared that the Committee was reopening questions discussed at the first session, when a proposal of the French delegation to allow, in providing for freedom of association, for the possibility of forbidding political activities had found small favour as it had been felt that article 2 covered the point sufficiently. Many delegates, moreover, remembering that the Universal Declaration of Human Rights imposed no conditions on the right of association, had thought that in some countries, especially those proud of their democratic institutions, the Committee might be suspected of a desire to limit actions which were certainly legal": Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 9.

Plenipotentiaries formally amended Art. 15 to exclude political associations from its ambit.[764] The rationale for doing so was the determination of Switzerland to ensure that refugees did not jeopardize its position of international political neutrality:

> In principle, aliens in Switzerland enjoyed freedom of association as one of the basic rights guaranteed by the Swiss Federal Constitution. [But] past experience had shown that the policy of neutrality pursued by Switzerland in implementation of her international obligations made it necessary to impose certain limits on the political activity of aliens resident in the country . . . They also applied to political groups of aliens. It had proved necessary to establish a slightly stricter regulation in respect of refugees. In principle, the regulations . . . debarred refugees from engaging in any political activity of any kind while in Switzerland: hence refugees had no right to participate in the activity of political groups or to form such groups themselves. That was just one of the conditions attached to the granting of asylum, and its justification could not be disputed.[765]

Similar concerns to avoid interstate tension are evident today in, for example, Tanzania's detention of activist Hutu refugees from Burundi, and Thailand's arrest of pro-democracy Burmese refugees. More generally, the duty of state parties to the OAU Convention to ensure that refugees are prohibited from engaging in "any activity likely to cause tension between Member States" shows the continuing salience of this preoccupation.

Even though interstate concerns were the express reason for the successful effort to exclude political associations from the scope of Art. 15, the broadly framed amendment appealed also to governments anxious to deny refugees the right to participate in domestic political associations of absolutely no international significance. From the beginning, concern was expressed that the Secretary-General's draft of Art. 15 "might even imply that refugees were to enjoy the unqualified right to [engage in] political activities,"[766] in which case "it might be conveniently invoked by [refugees] in order to sanction undesirable political activity."[767] In much the same way that Switzerland viewed abstention from internationally significant political activity as "just one of the conditions attached to the granting of asylum,"[768] so too other countries felt justified in withholding purely domestic political rights from

[764] The amendment to insert the words "non-political" into the definition of protected associational activities was adopted on a 10–0 (9 abstentions) vote: UN Doc. A/CONF.2/SR.8, July 5, 1951, at 11.
[765] Statement of Mr. Schurch of Switzerland, ibid. at 8–9.
[766] Statement of Mr. Kural of Turkey, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 9.
[767] Statement of Mr. Kural of Turkey, UN Doc. A/AC.32/SR.23, Feb. 3, 1950, at 11.
[768] Statement of Mr. Schurch of Switzerland, UN Doc. A/CONF.2/SR.8, July 5, 1951, at 9.

refugees as the *quid pro quo* for the granting of protection. France, in particular, argued that

> [a]lthough France had always taken a very liberal attitude towards the many refugees who had found shelter and protection within its borders, it felt that in return they were under an obligation to refrain from taking part in its internal politics until they had become naturalized citizens. In the meantime, they had neither the full duties nor the full rights of nationals.[769]

The Refugee Convention does not, therefore, prevent Zimbabwe from denying refugees the right to fund domestic political parties. While that country may not implement such a ban on a discriminatory basis (that is, applied only against those who fund opposition parties),[770] or violate the duty either of non-expulsion[771] or of *non-refoulement*[772] in enforcing it, the Convention affords refugees no presumptive right to join or otherwise support their host state's political associations. On the other hand, the Namibian arrest of members of a musical group simply because they had performed at a political gathering is surely at odds with even a broad understanding of the prohibition of political association.

This concern to exclude refugees from the internal politics of asylum states is evident also in the debates regarding the scope of permissible trade union activities. While there was no dissent from the view that refugees should be entitled to join existing national trade unions,[773] there was disagreement about whether refugees should also be allowed to engage in the more

[769] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 10.

[770] Art. 26 of the Civil and Political Covenant prohibits discrimination on the grounds of *inter alia* political opinion: see chapter 2.5.5 above, at p. 125.

[771] See chapter 5.1 above. While states have the right to expel refugees on "public order" grounds, this notion does *not* include all concerns within the civil law understanding of *ordre public*: ibid. at pp. 685–690. Moreover, lawful expulsion under Art. 32 requires scrupulous attention to due process norms: ibid. at pp. 670–677.

[772] See chapters 4.1.2 and 4.1.4 above.

[773] "It will be noted that the text expressly refers to trade unions, in order that there should be no doubt with respect to them": Secretary-General, "Memorandum," at 28. For example, even as it proposed restrictive amendments to Art. 15, the Belgian representative "wished to emphasize that his Government's reservation referred precisely to non-profit-making associations other than trade unions. If only trade unions were in question, it was quite clear that the Belgian delegation would approve of the provision, but there were other associations involved whose activities might give rise to legitimate concern": Statement of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 9. The French representative similarly observed that "he was glad to see that [Art. 15] contained the words 'trade unions'": Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 26. Reflecting this view, the Second Session of the Ad Hoc Committee adopted the portion of Art. 15 referring to trade union rights on a 7–0 (4 abstentions) vote, even as the article as a whole passed by a less powerful 7–4 (0 abstentions) margin: UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 10.

politicized acts of assuming leadership roles within unions,[774] or establishing unions of their own.[775] In the end, the rather vague language of Art. 15 – in which refugees are granted rights "[a]s regards ... trade unions" – was adopted as a means of encouraging (but not requiring) states to grant broad associational rights to refugees.[776] But if and when a refugee's role in

[774] For example, "[i]n France, refugees could join trade unions, but they could not assume leadership or hold executive positions. He thought the problem could be solved by suitable drafting": Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 9.

[775] The original language proposed by the Secretary-General referred only to the right "to join" trade unions: Secretary-General, "Memorandum," at 27. Denmark proposed the amendment of Art. 15 to provide that refugees would have the right "to form and to join" trade unions: Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 10. As explained by the supportive Belgian representative, the amendment "would then conform to the Universal Declaration of Human Rights, which accorded both rights to everyone": Statement of Mr. Cuvelier of Belgium, ibid. at 11. But the American Federation of Labor sought to justify a withholding of this right on the grounds that "in practice, it might well work to [refugees'] disadvantage, as the existing trade unions in various countries might grow suspicious and possibly hostile ... Trade unions in Canada and the United States might hesitate to allow refugees to join if they were also permitted to form their own trade unions": Statement of Mr. Stolz of the American Federation of Labor, ibid. at 11. While the amendment expressly referring to a right "to form" as well as to join trade unions was thereupon defeated, the Chairman adopted an American interpretation "that the negative vote on the Danish amendment did not mean that refugees should be prohibited from forming either trade unions or other non-profit-making associations": Statement of Mr. Henkin of the United States, ibid. at 12, affirmed by the Chairman, Mr. Chance of Canada, ibid.

[776] As remarked by the French representative, "[t]he very general formula used left open the question whether membership or organization of a trade union was meant, and left room for whatever interpretation might be put upon it by the various national legislations": Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 26. The drafting history set out at note 775 above affirms the lack of a clear consensus on this question. The ambiguity inherent in the framing of Art. 15 was also remarked upon by the Israeli representative, who observed that he "saw a notable disparity between article [15] and the comment of the Committee [on its content]. If that comment [suggesting that 'although not expressly stated, this article recognizes the right of refugees to form as well as to join associations': Ad Hoc Committee, 'First Session Report,' at Annex II] correctly set forth the intention of the article, the words 'As regards non-profit-making associations' should be replaced by the words 'As regards their right to form or join non-profit-making associations'": Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 24. The Chairman replied that "the suggestion of the representative of Israel recalled one he himself had made during the first session. His suggestion had not been favourably received by the Committee, which had seen in it the suggestion of encouraging refugees to establish special trade unions instead of joining the regular trade unions of their countries of residence": Statement of the Chairman, Mr. Larsen of Denmark, ibid. at 25. While the American representative maintained his position that "the article ... covered both types of activity," even he conceded the diversity of views on the issue and opposed

a union (or other association) becomes more political than strictly associational, governments have the right under the Refugee Convention to circumscribe the scope of the refugee's activities.[777]

The same determination to constrain the involvement of refugees in the internal politics of receiving states can be seen in the decision taken to impose a high level of attachment – lawful stay – before even the fairly constrained right to freedom of association is granted to refugees. While less exigent than the French representative's view that refugees should be "under an obligation to refrain from taking part in its internal politics until they had become naturalized citizens,"[778] the increasingly strict standard set – which evolved from no attachment in the original draft, to a requirement that a refugee be "lawfully in" a state's territory as the result of the Ad Hoc Committee's work, to the eventual decision of the Conference of Plenipotentiaries to require "lawful stay" before the granting of associational

any effort to amend its wording expressly to refer to a right "to form" (as well as to join) trade unions: Statement of Mr. Henkin of the United States, ibid. at 25. Yet the issue arose again at the Conference of Plenipotentiaries, where the British representative observed that it was not "clear whether the article related to joining associations alone, or to forming them also": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.8, July 5, 1951, at 10. The President – arguably inaccurately, in light of the French representative's statements above – "recalled that the Ad Hoc Committee had changed the text of article [15] in order to make it consistent with Article 23(4) of the Universal Declaration of Human Rights [which protects both the rights to form and to join trade unions]. That was why the words 'As regards' had been used": Statement of the President, Mr. Larsen of Denmark, ibid. There is thus a conflict between the actual decision taken by the Ad Hoc Committee – which was neither to protect nor to prohibit refugees from forming trade unions – and the report of that decision to the Conference of Plenipotentiaries, upon which representatives may well have based their vote in favor of the adoption of Art. 15.

[777] "It was common knowledge that some countries did not allow refugees to engage in any sort of political activity . . . The non-profit-making associations to which article [15] referred might often be political in character": Statement of Mr. Perez Perozo of Venezuela, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 6. The reluctance of the drafters to sanction overt political activity by refugees is evident as well from the debate about whether the Refugee Convention should codify Art. 19 of the Universal Declaration, which guarantees freedom of opinion and expression. In (successfully) advocating that no such right be included, the French representative observed that "refugees, residing in a country which was not their own, might wish, under article 19, to engage in political activities which it would be difficult to allow. If article 19 were mentioned in the convention, many States would have to make reservations, which would greatly weaken the scope of the article not only in the convention, but also in the Declaration itself": Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 9.

[778] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 10. The same approach had been proposed in the French government's draft of the Refugee Convention, which would have limited associational rights to refugees "permanently settled" in a state's territory: France, "Draft Convention," at 4.

rights[779] – is consistent with a determination to delay as much as possible the acquisition of the only essentially political right contained in the Refugee Convention.

This distancing of the approach to freedom of association in the Refugee Convention from the more liberal standard set by the Universal Declaration of Human Rights was clearly troubling to some delegates. As proposals were tabled to exclude political associations from the scope of Art. 15, the American representative protested that constraints on freedom of association "did not seem to be in keeping with the principles of the United Nations":[780]

> It might, in fact, be interpreted as forbidding refugees even to express political opinions, and would certainly deny them access to an area of human activity in which they should have at least as much right to engage as any other aliens ... Like all other residents of a country, they would be forbidden to engage in illegal political activity, and should not be singled out and denied the right to engage in legal activity.[781]

The American representative insisted that it was clearly "undesirable to include in a United Nations document a clause prohibiting political activities – a very broad and vague concept indeed."[782] He argued that the legitimate concerns of states could readily be met by reliance on the general duty of refugees to obey the laws of the host state,[783] coupled with judicious resort to the right to expel refugees for reasons of public order.[784] Yet only

[779] Interestingly, neither of the shifts to require a higher level of attachment appears to have been formally debated in plenary session. The shift to require lawful presence first appeared in Ad Hoc Committee, "First Session Report," at Annex I. While the comments of the Committee helpfully define the notion to "exclude a refugee who, while lawfully admitted, has over-stayed the period for which he was admitted or was authorized to stay or who has violated any other conditions attached to his admission or stay" (ibid. at Annex II), no indication of the precise reason for the shift is provided. Similarly, the Conference of Plenipotentiaries did not formally debate the increase in the level of attachment to require lawful stay.

[780] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 10.

[781] Ibid.

[782] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 8.

[783] "[N]othing in the draft convention prohibited a state from exercising its authority in respect of the political activity of its residents": Statement of Mr. Henkin of the United States, ibid. at 10. Clearly, the American delegate did not feel that Arts. 19 and 20 of the Universal Declaration were a significant constraint on this authority, suggesting as he did that "[i]n the absence of any specific clause on the subject, [host states] would still have the right to restrict political activities of refugees as of any other foreigners": ibid. at 8. The Chinese representative was even more adamant, insisting that "[n]othing in the draft convention could be construed as a derogation of the sovereign right of a State to restrict political activity": Statement of Mr. Cha of China, ibid. at 10.

[784] "Perhaps the points raised by the French and Turkish representatives were already met in the clause recognizing the right to expel refugees for violations of public order. While 'public order' was likewise a vague term, and one not to be invoked indiscriminately, it

the Canadian representative voiced any support for these highly principled views.[785]

Nor can the decision to grant only a minimalist freedom of association to refugees be ascribed simply to a reluctance on the part of the drafters to be the first to codify in law the liberal standard set by the Universal Declaration. To the contrary, the representative of the International Labor Organization drew their attention to the fact that state parties to the Migration for Employment Convention had already committed themselves to grant migrant workers the same trade union rights as enjoyed by national workers.[786] This led the American representative to suggest that "if an international organization affiliated with the United Nations had decided to give special treatment to migrant workers, the Committee should ... consider whether refugees might be in even greater need."[787] Only the Italian delegate responded, noting simply that his government "felt that refugees should not receive preferential treatment, but [only] the same treatment normally accorded to aliens in general."[788]

In fact, the sole liberalizing concession which the American representative was able to wrest from his colleagues was rejection of the "aliens generally" contingent standard[789] in favor of a duty to assimilate refugees' right to freedom of association to that granted to the nationals of most-favored states[790] – this having been the contingent standard which had governed associational rights under both the 1933 and 1938 refugee conventions.[791] While Belgium[792] and

would probably cover most of the cases envisaged by the French amendment": Statement of Mr. Henkin of the United States, ibid. at 8.

785 "The Chairman, speaking as the Canadian representative, said that he fully shared Mr. Henkin's views": Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 10.

786 Statement of Mr. Oblath of the International Labor Organization, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 23–24.

787 Statement of Mr. Henkin of the United States, ibid. at 27.

788 Statement of Mr. Theodoli of Italy, ibid. at 27.

789 This standard had been provisionally adopted at the first session of the Ad Hoc Committee, on the motion of the Chairman, in an effort to meet the concerns expressed, in particular, by France and Turkey: Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 9; unanimously adopted, ibid. at 12. A working group formed to revise the draft for approval by the Committee opted nonetheless to reinsert the "most-favored-national" standard: "Decisions of the Working Group Taken on 9 February 1950," UN Doc. E/AC.32/L.32, Feb. 9, 1950, at 5.

790 The American representative "emphasized that when the Convention gave refugees the same privileges as aliens in general, it was not giving them very much": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 7.

791 This precedent was noted in Ad Hoc Committee, "First Session Report," at Annex II, n. 9.

792 "[H]is Government would like the words 'nationals of foreign countries' to be replaced by the words 'aliens in general'": Statement of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 23.

Venezuela[793] joined Italy[794] in pressing for a less generous contingent standard, the American representative prevailed upon those unwilling to extend to refugees the benefits afforded the citizens of special partner states simply to enter a reservation to the article on freedom of association.[795] As a general matter, he persuaded his colleagues that the "most-favored-national" standard was a fair compromise between the competing views of states:

> He questioned whether, with regard to the right of association, most governments were really not prepared to grant better treatment to refugees than to aliens in general ... The Committee would recall that at the previous meeting, the representative of the International Labor Organization had proposed that refugees be granted even better treatment in connection with trade union membership than was laid down in article 10, that they should receive in fact the same treatment as was guaranteed to nationals, as was provided under the *Migration for Employment Convention*. The representatives of Venezuela and Belgium were proposing to amend the article in the opposite direction. It might be possible to arrive at a compromise, but he hoped that more consideration would first be given to the proposal of the International Labor Organization.[796]

France rejected the American representative's suggestion to align the Refugee Convention with the ILO's national treatment standard, accurately asserting that the right to freedom of association in general was a significantly broader right than the ILO's guarantee of trade union rights.[797] The most-favored-national standard was retained by the slimmest of margins upon final consideration by the Ad Hoc Committee,[798] and not reconsidered at the Conference of Plenipotentiaries. The Refugee Convention is therefore infringed, for example, if refugees are not granted the same dispensation

[793] "There was no need in any case to provide for most-favoured-nation treatment under article [15] since the privileges granted under that article would only very rarely be made subject to reciprocity, even more rarely to treaty reciprocity": Statement of Mr. Perez Perozo, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 6.

[794] Statement of Mr. Theodoli of Italy, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 27.

[795] "[T]he reservation mentioned by the Belgian representative was exactly the kind that the Committee had recognized that some countries might find it necessary to make, especially with regard to other countries with which they had entered into specially close relationship. Benelux had in fact been cited as an example": Statement of Mr. Henkin of the United States, ibid.

[796] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 7.

[797] "The right to form a trade union and the right of association were two very different things. Trade union rights were derived from a more general right, that of association, but the purposes of a trade union and those of an association were different ... The orbit of associations and that of trade unions did not therefore exactly coincide and in national legislation they were often governed by different laws. He did not consider it superfluous to make special mention of the right of association. Article [15] had its place in the Convention": Statement of Mr. Juvigny of France, ibid. at 8.

[798] A Belgian proposal to revert to the "aliens generally" standard was rejected on a 6–5 (0 abstentions) vote: UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 11.

from citizenship quotas on trade union membership that is afforded the nationals of any partner or other favored state.

Overall, the best that can be said for Art. 15 is that it is an important affirmation of the right of refugees – at least once they are lawfully staying, and to the same extent as most-favored foreigners – to undertake quite a broad range of associational activities, including not only the right to join trade unions, but also to participate in the activities of a diverse array of associations, including those with cultural, sporting, social, or philanthropic aims. For example, in view of the drafters' clear aim to improve upon the associational rights granted in the conventions of 1933 and 1938 – which already allowed refugees to establish "associations for mutual relief and assistance" – there can be no doubt that the self-help associations established by Tibetan refugees in India, Angolan refugees in Zambia, and Mozambican refugees in Swaziland are protected by Art. 15. And while the disinclination of the drafters to sanction the participation of refugees in political associations means that the Refugee Convention falls short of the goals set by the Universal Declaration,[799] the drafters did not seek to limit purely individuated forms of political expression[800] (though neither did they opt expressly to protect such rights[801]).

Because of its critical deficiencies, however, the right of refugees to freedom of association – and to its closely related rights to freedom of opinion, expression, and assembly – is more effectively vindicated by reliance upon the subsequently

[799] Robinson correctly observes that the right to participate in the work of political associations is "not covered by Art. 15 but would come under Art. 7(1) [pursuant to which refugees must receive treatment not less favorable than that granted to aliens generally]": Robinson, *History*, at 108–109.

[800] The Venezuelan representative affirmed that Art. 15 "did not apply to political activity which might be carried on outside of associations": Statement of Mr. Perez Perozo of Venezuela, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 11.

[801] In debates regarding codification in the Refugee Convention of Arts. 18 and 19 of the Universal Declaration of Human Rights [dealing with freedom of thought, opinion, and expression], the Belgian representative argued that "[i]n his opinion, provisions relating to freedom of opinion would be most appropriate in a convention on refugees, as the latter, as a rule, had abandoned their country of origin because they no longer enjoyed that freedom there": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 8. But the French representative countered that "[f]reedom of opinion and expression was no doubt a right which should be granted to all, but the exercise of that right might sometimes lead to serious difficulties. For instance, refugees residing in a country which was not their own might wish, under article 19, to engage in political activities which it would be difficult to allow": Statement of Mr. Rain of France, ibid. at 9. Some comfort may nonetheless be taken from the view of the British representative, who opined that "a convention relating to refugees could not include an outline of all the articles of the Universal Declaration of Human Rights; furthermore, by its universal character, the Declaration applied to all human groups without exception and it was pointless to specify that its provisions applied also to refugees": Statement of Sir Leslie Brass of the United Kingdom, ibid. at 8. The Brazilian representative and the Canadian Chairman expressly concurred in the views of the British delegate: Statements of Mr. Guerreiro of Brazil and the Chairman, Mr. Chance of Canada, ibid. at 8–9.

codified Arts. 19–22 of the Civil and Political Covenant. Critically, and in contrast to the rather grudging approach taken by the Refugee Convention, the UN Human Rights Committee has expressly affirmed that non-citizens have

> the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association ... There shall be no discrimination between aliens and citizens in the application of these rights.[802]

The foundational right is Art. 19(1) of the Covenant, which guarantees the "right to hold opinions without interference." Because freedom to hold opinions is a purely private matter, it is an absolute right "to which the Covenant permits no exception or restriction."[803] Importantly, the drafters of Art. 19(1) rejected a proposal to frame the right as simply one to hold opinions "without *governmental* interference,"[804] in favor of the more general right to freedom of opinion "without interference." As such, Art. 19(1) not only prohibits official efforts to force individuals to change their opinions, but also sets an affirmative duty of states to prevent private parties from coercing individuals to renounce their views.[805]

Not only may individuals freely hold opinions, but they are simultaneously entitled under Art. 19(2) to "seek, receive and impart information and ideas of all kinds." This article "requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views,"[806] and extends to

[802] UN Human Rights Committee, "General Comment No. 15: The position of aliens under the Covenant" (1986), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at para. 7.

[803] UN Human Rights Committee, "General Comment No. 10: Freedom of expression" (1983), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 133, para. 1. As Nowak observes, "[t]he private freedom to have and form opinions thus overlaps with freedom of thought guaranteed by Art. 18": Nowak, *ICCPR Commentary*, at 339. Partsch suggests that "'[t]hought' may be nearer to religion or other beliefs, 'opinion' nearer to political convictions. 'Thought' may be used in connection with faith and creed, 'opinion' for conviction in secular and civil matters": K. Partsch, "Freedom of Conscience and Expression, and Political Freedoms," in L. Henkin ed., *The International Bill of Rights* 208 (1981) (Partsch, "Freedom of Conscience"), at 217. With regard to freedom of thought and conscience, see generally chapter 4.7 above.

[804] This wording was proposed by the British government in UN Doc. E/CN.4/365.

[805] The narrower approach "floundered in the [Commission] due to the support voiced by the majority of the delegates for protection against every form of interference. This recognition of horizontal effects implies that State Parties are also obligated pursuant to Art. 2(1) to protect freedom of opinion against interference by third parties ... Normally it is possible to speak of an interference with the right of freedom of opinion only when an individual is influenced against his (her) will or at least without his (her) implicit approval, and when this is effected by coercion, threat or similar, unallowed means": Nowak, *ICCPR Commentary*, at 340.

[806] Jayawickrama, *Judicial Application*, at 666, citing in this regard the decision of the Constitutional Court of South Africa in *South African National Defence Union v. Minister of Defence*, [2000] LRC 152 (SA CC, May 26, 1999).

"every form of subjective idea[ ] and opinion[ ] capable of transmission to others."[807] As Nowak observes, "[i]t is thus impossible to attempt to close out undesirable content, such as pornography or blasphemy, by restrictively defining the scope of protection."[808] Unless the information or idea in question either breaches the duty of states to prohibit war propaganda and hate speech, or can be brought under one of the explicit limitations allowed by Art. 19(3),[809] it must be protected. The duty of protection does not mean that there can be no regulation of freedom of expression, but a regulatory regime may not be unduly onerous.[810] Thus, a regime such as that implemented by Switzerland – requiring refugees to secure authorization to make a political speech – is not inherently unlawful so long as the grounds for denial of authorization are based upon the terms of Art. 19(3) or 21, and the nature of the approval procedure itself does not pose an unreasonable impediment to exercise of freedom of expression.[811]

The forms of protected expression include not only communications made orally, in writing, or in print, but also those transmitted by "any ... media of [the individual's] choice." The Human Rights Committee has thus held, for example, that the raising of a banner condemning human rights abuse is a form of protected expression.[812] Of particular importance to refugees, the right to freedom of expression is guaranteed "regardless of frontiers," in consequence of which the transmission of information and opinions across national borders cannot lawfully be prohibited.[813] Thus, the broad-ranging prohibition set by Art. III of the OAU Refugee Convention – under which state parties "undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity

[807] *Ballantyne and Davidson v. Canada* and *McIntyre v. Canada*, UNHRC Comm. Nos. 359/1989 and 385/1989 (joined on Oct. 18, 1990), UN Docs. CCPR/C/40/D/359/1989 and CCPR/C/40/D/385/1989, decided Mar. 31, 1993.

[808] Nowak, *ICCPR Commentary*, at 341.

[809] The scope of permissible limitation is discussed below, at pp. 897–903.

[810] *Laptsevich v. Belarus*, UNHRC Comm. No. 780/1997, UN Doc. CCPR/C/68/D/780/1997, decided Mar. 20, 2000.

[811] The duty of non-discrimination could be invoked to argue the inappropriateness of requiring authorization in the case of non-citizens only. But in view of the substantial margin of appreciation traditionally afforded states in deciding whether distinctions between citizens and aliens are reasonable, it is not clear that such a challenge would succeed: see chapter 2.5.5 above, at pp. 129–133. If, on the other hand, the duty were imposed simply on refugees (but not all non-citizens), Art. 7(1) of the Refugee Convention could be relied upon to strike down the refugee-specific requirement: see chapter 3.2.1 above.

[812] *Kivenmaa v. Finland*, UNHRC Comm. No. 412/1990, UN Doc. CCPR/C/50/D/412/1990, decided Mar. 31, 1994.

[813] "The rights of freedom of opinion and expression may be exercised not only in one's own country but internationally. They are international rights": Partsch, "Freedom of Conscience," at 217.

likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio" – is not in conformity with duties under the Civil and Political Covenant. Because the communication of ideas by press or the radio, even across borders, is protected by Art. 19(2), the onus is on a state party seeking to prohibit such transmission of ideas to meet the standard for valid limitation of the right, considered below.[814]

Beyond the rights to hold and to communicate opinions and information, the Civil and Political Covenant also guarantees more collective forms of expressive freedom. The right to peaceful assembly, established by Art. 21, "brings the public into direct contact with those expressing opinions, and thereby stimulates both attention and discussion."[815] The requirement that an assembly be "peaceful" "refers exclusively to the conditions under which the assembly is held, i.e. 'without uproar, disturbance, or the use of arms,'"[816] and is not limited, for example, to pro-democratic assemblies.[817] The protected interests include the right to prepare, conduct, and participate in an assembly,[818] understood to be an "intentional, temporary gathering[ ] of several persons for a specific purpose."[819] States are obliged not only to allow peaceful assemblies, but also "to ensure through adequate police protection, perhaps also by the prohibition of counter-demonstrations, that clashes or riots do not occur."[820] While Art. 21, unlike Art. 19, does not expressly grant the right to freedom of assembly to "everyone,"[821] the Human Rights Committee has nonetheless affirmed that freedom of assembly must be granted "without discrimination between citizens and aliens."[822] Refugees are therefore entitled to undertake campaigns and to hold rallies intended to

[814] See text below, at pp. 897–903.

[815] Jayawickrama, *Judicial Application*, at 723.

[816] Partsch, "Freedom of Conscience," at 231, citing the statement of the Uruguayan representative, Eduardo Jimenez de Arechaga, UN Doc. A/C.3/SR.61.

[817] "[A] clear majority in the [Commission] rejected ... the patronizing tendencies of socialist States, which proposed that freedom of assembly be exercised only 'in the interests of democracy' and be prohibited for 'anti-democratic' purposes ... [B]ecause experiences in all corners of the world demonstrate that democracy is such a vague concept, its interests are too easily equated with those of the political power holders, which would mean that assemblies might only have been permissible when they supported the respective system": Nowak, *ICCPR Commentary*, at 371.

[818] Ibid. at 372.

[819] Ibid. at 373.

[820] Ibid. at 376. Nowak reports that "[w]hereas a US draft sought to limit this right to the negative freedom from State interference, the vast majority of the delegates ... were of the view that the individual should be protected against all kinds of interference with the exercise of his freedom of assembly": ibid.

[821] It merely provides that "[t]he right of peaceful assembly shall be recognized": Civil and Political Covenant, at Art. 21.

[822] UN Human Rights Committee, "General Comment No. 15: The position of aliens under the Covenant" (1986), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at paras. 2, 7.

raise awareness of conditions in their country of origin, even to the point of advocating the ouster of that country's government.[823]

Finally, Art. 22 of the Civil and Political Covenant addresses freedom of association. In contrast to the cognate right in Art. 15 of the Refugee Convention, this right explicitly inheres in "everyone" without qualification, and extends to all forms of association.[824] States must not only refrain from direct interference with associational freedom,[825] but are required both to implement a legal framework for the legal establishment of associations[826] and to take steps to prevent private parties from interfering with associational activities.[827] Freedom of association may also take a negative form, meaning that "no one may be forced, either directly or indirectly, by the State or by private parties, to join a political party, a religious society, a commercial undertaking or a sports club."[828]

Nor may freedom of association be constrained on the grounds that an association already exists to pursue a given interest or activity. Individuals have the right to choose between belonging to an existing association and forming one of their own design:

[823] "So long as exiles act within the scope of these broadly accepted rights [freedom of thought, expression, assembly, and association], they can injure no legally protected interest of the state of origin": Corliss, "Hostile Acts," at 193. The duty of states to prevent acts of aggression is discussed below, at pp. 903–905.

[824] "Religious societies, political parties, commercial undertakings and trade unions are as protected by Art. 22 as cultural or human rights organizations, soccer clubs or associations of stamp collectors. Moreover, the legal form of an association is basically unrestricted. In addition to such juridical persons as clubs, parties or societies under trade or civil law, mere *de facto* associations are likewise protected": Nowak, *ICCPR Commentary*, at 386–387.

[825] Art. 22 was, for example, found to have been violated by Uruguay in the context of official efforts to intimidate and persecute a trade union activist: *Burgos v. Uruguay*, UNHRC Comm. No. 52/1979, decided July 29, 1981.

[826] "That individuals should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association": Jayawickrama, *Judicial Application*, at 738. See also Nowak, *ICCPR Commentary*, at 387: "Because groups of persons usually seek to pursue their longer-term interests in a legally recognized form (usually as juridical persons), States Parties are also under a positive duty to provide the legal framework for founding juridical persons."

[827] "As with freedom of expression and assembly, the US was unsuccessful with its motion in the [Commission] to protect freedom of association only against 'governmental interference' [citing UN Doc. E/CN.4/365]": Nowak, *ICCPR Commentary*, at 387, n. 15.

[828] Ibid. at 388. "Although motions by France and Uruguay in the [Commission] and by Somalia in the Third Committee of the General Assembly to set down an express prohibition on compulsory membership modelled on Art. 20(2) of the Universal Declaration of Human Rights were defeated in both organs, the discussions surrounding them make clear that negative freedom of association was protected as well. The reasons why this prohibition was not adopted have solely to do with considerations for the interests of trade unions": ibid.

> When a country has only one organization for promoting human rights but I am not in agreement with its methods and objectives, my freedom of association is not exhausted simply because I am not forced to join this organization. On the contrary, Art. 22(1) also guarantees my right to found a second human rights organization with other, like-minded persons corresponding more to my liking. In other words, when a State Party creates an association (with or without compulsory membership) in a certain economic, political, cultural, etc. field, it has in no way fulfilled its duties under Art. 22(1). Subject to the limitations set down in para. 2, it must make it legally and factually possible for all persons to choose between existing (State and private) organizations and, should none of these appeal to them, to found a new one.[829]

As such, Bhutanese refugees in Nepal and Eritrean refugees in Sudan were entitled to form their own associations to advocate for their particular educational, health, and other interests. On the other hand, freedom of association is not tantamount to a right to self-govern. Because only citizens of a state have the right to take part in the conduct of public affairs, to vote, and to hold elected office,[830] Honduras was under no duty to allow Salvadoran refugees to govern their own camps, and Zambia was not required to include the refugees' Meheba Management Committee in refugee aid and development planning. While refugee self-governance often makes good practical and economic sense, it cannot be insisted upon as a matter of international law.

As under the Refugee Convention, the Civil and Political Covenant's provision on freedom of association specifically protects trade union rights. But in contrast to the Refugee Convention's vague formulation – intended to leave open the question of whether refugees are entitled not only to join unions, but also to lead and even to form them[831] – Art. 22 of the Covenant expressly guarantees "the right to form and join trade unions," and further stipulates that "[n]o restrictions" are presumptively to be placed on the exercise of this right.[832] Two possible qualifications may, however, be implied. First, the European Court of Human Rights has suggested that so-called "closed shop agreements" – under which there is legally sanctioned, compulsory membership in a trade union designated to represent workers at a given work site – may not infringe the right to freedom of association, at least where the sanction for refusal to join is reasonable.[833] Second, a

[829] Ibid. at 388. [830] Civil and Political Covenant, at Art. 25.
[831] See text above, at pp. 885–887.
[832] The scope of permissible restrictions is discussed below, at pp. 897–903.
[833] See *Gustafsson v. Sweden*, (1996) 22 EHRR 409 (ECHR, Apr. 25, 1996); *Sibson v. United Kingdom*, (1994) 17 EHRR 193 (ECHR, Apr. 20, 1993); and *Young, James and Webster v. United Kingdom*, (1981) 4 EHRR 38 (ECHR, Aug. 13, 1981). The UN Human Rights Committee has not yet specifically addressed this question.

controversial decision of the UN Human Rights Committee has held that the right to strike is not guaranteed under Art. 22.[834] While the right to strike is nonetheless expressly guaranteed by Art. 8(1)(d) of the Economic Covenant, this provision – unlike Art. 22 of the Civil and Political Covenant – admits of the possibility that, as an economic right, less developed countries may decide not to recognize this right in the case of non-citizens.[835]

Despite the fact that the expressive freedom provisions of the Covenant on Civil and Political Rights are generally broadly framed and guaranteed to non-citizens, including refugees, each of the interests protected by Arts. 19, 21, and 22 may be subject to restrictions. Most fundamentally, none of these provisions is immune from emergency derogation by state parties.[836] But more generally, these articles[837] authorize governments to limit expressive rights so long as that limitation is established by law, and can be objectively assessed as necessary to protect an enumerated interest.

The first requirement for restriction of an expressive freedom – that the limitation be provided or prescribed by law (in the case of the rights to freedom of expression, and of association) – is "designed to assure the rule of law, the principle of legality, a knowledge of the existence of the law and accessibility to it by those affected, and sufficient definiteness as to its content and meaning."[838] In Nowak's view, this standard is not met in the case of "[i]nterference based solely on an administrative provision or a vague statutory authorization."[839] The standard of lawfulness for limits on the right to freedom of assembly is, however, less exacting than that for limits on freedom of expression and association.[840] Because a constraint on freedom of

[834] *JB et al. v. Canada*, UNHRC Comm. No. 118/1982, decided July 18, 1986. This decision is, however, highly controversial. "[F]ive members of the committee disagreed. In their view, Civil and Political Covenant [Art.] 22 guaranteed the broad right of freedom of association. There is no mention not only of the right to strike but also of the various other activities, such as holding meetings, or collective bargaining, that a trade unionist may engage in to protect his interests. However, the exercise of this right requires that some measure of concerted activities be allowed; otherwise it could not serve its purposes": Jayawickrama, *Judicial Application*, at 753–754.

[835] See chapter 2.5.4 above, at p. 122.

[836] Civil and Political Covenant, at Art. 4(2). See chapter 2.5.4 above, at p. 121.

[837] As previously noted, only the purely private right to hold opinions without interference is not subject to limitations of this kind. See text above, at p. 892.

[838] Partsch, "Freedom of Conscience," at 220. Drawing on caselaw of the European Court of Human Rights, Partsch opines that this requirement may be satisfied either by statute or by unwritten common law: ibid.

[839] Nowak, *ICCPR Commentary*, at 351.

[840] The more flexible definition of lawfulness applies, however, only if the gathering is appropriately defined as an "assembly." The more rigorous standard ("provided by law") which governs Art. 19(2) is applicable to public expressions of opinion which fall short of the organized nature of an "assembly." For example, the Human Rights Committee did not agree that the presence of some twenty-five members of the Social

assembly need only be "imposed in conformity with the law," it is sufficient if it is ordered by administrative officials acting on the basis of some general statutory or common law authority.[841]

The second requirement is that the constraint be imposed in order to advance one of several enumerated interests. A restriction is only valid if its purpose is to protect the rights and freedoms of others; to ensure respect for national security, public order, public health, or morals; or, in the case of the rights to assembly and association, to ensure public safety. In addition, by virtue of the duty of state parties under Art. 20 to prohibit propaganda of war[842] and the advocacy of hatred,[843] a constraint on an expressive freedom necessary to meet either of those obligations is presumptively lawful.[844]

Democratic Youth Organization amidst a larger crowd of persons permitted by the state to gather near the Presidential Palace constituted a "demonstration" which could be constrained under the less exacting standards of Art. 21: *Kivenmaa v. Finland*, UNHRC Comm. No. 412/1990, UN Doc. CCPR/C/50/D/412/1990, decided Mar. 31, 1994.

841 "Elsewhere the restriction must be 'provided' or 'prescribed' by law; here it seems sufficient that restrictions are 'imposed in conformity with law,' doubtless in order to allow wider discretion to administrative authorities acting under general authorizations. Presumably, the police may act on the basis of a general clause authorizing them to act in the interests of public safety": Partsch, "Freedom of Conscience," at 232–233.

842 This includes "propaganda threatening or resulting in an act of aggression or breach of peace contrary to the Charter of the United Nations": UN Human Rights Committee, "General Comment No. 11: Prohibition of propaganda for war and advocacy of hatred" (1983), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 133, para. 2. Nowak thus concludes that "Art. 20(1) does not affect the right of individual or collective self-defence guaranteed in Art. 51 of the UN Charter and other measures consistent with chapter VII or the right of all peoples to self-determination and independence. Consequently, Art. 20(1) prohibits only propaganda for so-called 'wars of aggression' but not for wars waged out of merely defence or for liberation. In addition, internal 'civil wars' do not fall under its scope of application, so long as they do not develop into an international conflict ... [W]hat is decisive is that the propaganda aims at creating or reinforcing the willingness to conduct a war of aggression": Nowak, *ICCPR Commentary*, at 364.

843 The object of this part of the duty is to prohibit "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence": UN Human Rights Committee, "General Comment No. 11: Prohibition of propaganda for war and advocacy of hatred" (1983), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 133, para. 2. For example, it has been held that the failure to stop the dissemination of anti-Semitic tape-recorded messages by telephone was contrary to Art. 20's duty to prohibit hate speech: *Taylor and the Western Guard Party v. Canada*, UNHRC Comm. No. 104/1981, decided Apr. 6, 1983.

844 "In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities": UN Human Rights Committee, "General Comment No. 11: Prohibition of propaganda for war and advocacy of hatred" (1983), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 133, para. 2. As Nowak observes, "Art. 20 differs from the permissible purposes for interference ... only in that States Parties are internationally obligated to interfere in certain cases, whereas in others they are merely entitled to do so": Nowak, *ICCPR Commentary*, at 368.

One basis for restrictions on expressive freedoms is the need to protect the "rights and freedoms of others." This authority should not, however, be interpreted in a way that breaches the duty of non-discrimination by privileging the views or concerns of the majority, or of those in power.[845] In keeping with the overall goal of the Covenant, the purpose of any limitation should instead be to promote a more rights-regarding society. Thus, for example, the Human Rights Committee upheld a French law which prohibited speech denying that crimes against humanity had occurred during the Holocaust as a restriction necessary to allow the Jewish community to live free from the fear of anti-Semitism.[846] The additional authority under Art. 19(3) to limit freedom of expression where necessary to protect the "reputation of others" authorizes also the imposition of constraints on free speech where necessary to avoid "intentional infringement on honour and reputation by untrue assertions,"[847] e.g. by the enforcement of laws on defamation.

Expressive rights may also be constrained if required by considerations of national security. The contemporary meaning of this notion has already been developed in some detail.[848] In essence, the limitation imposed on expressive freedom must be in response to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions.[849] Importantly, the Human Rights Committee has not been willing simply to accept the assurances of states that restrictions are required to prevent "subversive activities,"[850] but has insisted on the presentation of specific information enabling it to evaluate the soundness of a state's claim that a restriction on national security grounds is necessary.[851]

[845] A helpful analogy may be made to the right to restrict freedom of religion under Art. 18(3) of the Covenant. In this context, the Human Rights Committee has observed that "[i]n interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26 ... Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner": UN Human Rights Committee, "General Comment No. 22: Freedom of thought, conscience or religion" (1993), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 155, para. 8.

[846] *Faurisson v. France*, UNHRC Comm. No. 550/1993, UN Doc. CCPR/C/58/D/550/1993, decided Nov. 8, 1996.

[847] Nowak, *ICCPR Commentary*, at 353.

[848] See chapter 3.5.1 above, at pp. 264–266.

[849] See chapter 3.5.1 above, at p. 266.

[850] *Weinberger v. Uruguay*, UNHRC Comm. No. 28/1978, decided Oct. 29, 1980; *Burgos v. Uruguay*, UNHRC Comm. No. 52/1979, decided July 29, 1981.

[851] "Bare information from the State party that [the applicant] was charged with subversive association ... is not in itself sufficient, without details of the alleged charges and copies

Third, limits may be set where necessary to ensure "public order (*ordre public*)." This is quite a broad-ranging notion, allowing restrictions beyond those authorized by the narrower concept of "public order" which is used, for example, to define the scope of permissible limitations on freedom of thought, conscience, and religion under Art. 18 of the Covenant.[852] The bilingual formulation employed in Arts. 19, 21, and 22 instead incorporates by reference the traditional civil law notion of "*ordre public*" – roughly equivalent to the common law construct of public policy.[853] The drafters of the Covenant were not prepared even to replace the notion of "public order (*ordre public*)" with that of "prevention of disorder or crime,"[854] leading Nowak to conclude that "in addition to prevention of disorder and crime, it is possible to include under the term *ordre public* all of those 'universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based.'"[855]

The Human Rights Committee has thus suggested that a fair and transparent restriction on the right of the media to seek and receive information could be justified on grounds of public order (*ordre public*) where necessary to ensure the effective operation of Parliament and the safety of its members.[856] On the other hand, not even *ordre public* was found to be a sufficiently fungible concept to justify Cameroon's efforts to stifle pro-democracy advocacy, allegedly in the interests of ensuring national unity under difficult circumstances.[857] Under this approach, the efforts of Kenya and Côte d'Ivoire to limit the activities of refugee populations based simply upon

of the court proceedings": *Pietraroia v. Uruguay*, UNHRC Comm. No. 44/1979, decided Mar. 27, 1981, at para. 15.

852 See chapter 4.7 above, at pp. 578–579.

853 In rejecting the civil law construct for purposes of the right of expulsion under the Refugee Convention (Art. 32), it was observed that "[i]n civil law countries, the concept of '*l'ordre public*' is a fundamental legal notion used principally as a basis for negating or restricting private agreements, the exercise of police power, or the application of foreign law. The common law counterpart of '*l'ordre public*' is not 'public order,' but rather 'public policy'": UN Doc. E/L.68, tabled at the Conference of Plenipotentiaries by its Executive Secretary, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 19–20.

854 This proposal was narrowly defeated on a 7–6 (2 abstentions) vote: UN Doc. E/CN.4/SR.167.

855 Nowak, *ICCPR Commentary*, at 356, citing the definition in Art. 4(e) of the Strasbourg Declaration on the Right to Leave and Return (1986), 1987 HRLJ 481.

856 *Gauthier v. Canada*, UNHRC Comm. No. 633/1995, UN Doc. CCPR/C/65/D/633/1995, decided Apr. 7, 1999. On the facts of the case, however, it was determined that the effective grant of a monopoly over access to parliamentary press facilities to a single organization, the Canadian Press Gallery Association, had not been shown to be a necessary and proportionate restriction.

857 *Mukong v. Cameroon*, UNHRC Comm. No. 458/1991, UN Doc. CCPR/C/51/D/458/1991, decided July 2, 1994.

whether the refugees' views corresponded with their host government's prevailing foreign policy preferences would also contravene the Covenant.

In view of the breadth of the public order (*ordre public*) exception, it may seem unnecessary that the drafters also authorized a fourth category of limitation on the rights of assembly and association, namely constraints required to ensure "public safety." The language derives from a British proposal intended to allow assemblies to be prohibited or broken up where there is a specific risk to persons or property.[858] By way of example, Partsch suggests that "[i]n a country where different groups of political refugees exiled from their homeland are fighting with each other, it would seem legitimate to impose some restrictions on their right of assembly in the interest of public safety."[859] Similarly, the duty of refugees living in camps and settlements "to abstain from any activity likely to detract from the exclusively civilian and humanitarian character of the camps and settlements"[860] might logically entail some constraints on expressive freedom to ensure public safety.

Fifth, expressive freedom may be limited for reasons of public health. While primarily of import in restricting commercial free speech (e.g. in the marketing of hazardous products), there is regional caselaw in Europe suggesting its applicability also to constrain the advocacy of euthanasia in order to protect the right to life of vulnerable persons.[861] One could similarly imagine the logic of invoking this ground to prohibit the advocacy of traditional practices known to pose a serious risk to health, including many forms of female genital mutilation, or to deny a right of assembly based on the need to prevent the spread of a serious airborne disease, such as SARS.

The final reason authorized for limiting expressive freedom is the protection of "public morals." The understanding of this notion embraced by the Human Rights Committee in the context of defining the scope of permissible restrictions on freedom of thought, conscience, and religion is instructive:

> [T]he concept of morals derives from many social, philosophical and religious traditions: consequently, limitations ... for the purpose of protecting morals must be based on principles not deriving from a single tradition ... [They must also be] directly related and proportionate to the specific need on which they are predicated.[862]

[858] UN Doc. E/CN.4/L.145. [859] Partsch, "Freedom of Conscience," at 234.

[860] UNHCR Executive Committee Conclusion No. 48, "Military or Armed Attacks on Refugee Camps and Settlements" (1987), at para. 4(a), available at www.unhcr.ch (accessed Nov. 20, 2004). States further commit themselves "to do all within their capacity to ensure that the civilian and humanitarian character of such camps and settlements is maintained": ibid. at para. 4(b).

[861] *Application No. 10083/82 v. United Kingdom*, (1983) 6 EHRR 140 (Eur. Comm. HR, July 4, 1983).

[862] UN Human Rights Committee, "General Comment No. 22: Freedom of thought, conscience or religion" (1993), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at para. 8.

The universalism of this standard is appropriate to a treaty intended to establish global standards,[863] while the insistence on a constrained application of this potentially all-encompassing ground is critical to ensuring that no limitation on expressive freedom may "put in jeopardy the right itself."[864]

Despite the breadth of some of these grounds, the possibility of fundamental erosion of expressive freedom by the imposition of relevant limitations is significantly constrained by the third general requirement set by the Covenant. It is not enough for a given restriction to be set by law and related to one of the permitted grounds of limitation; it must rather be demonstrably "necessary" (freedom of expression) or "necessary in a democratic society" (rights of assembly and association) to secure the enumerated interest. As previously described, the drafters of the Covenant conceived the necessity standard as requiring that a restriction be objectively justifiable as essential to the attainment of one of the approved purposes.[865] In the result, a right should not be abridged if some other, non-rights-violative option is available. Even where there is no alternative but to infringe a right, the abridgement should be kept to the absolute minimum required by the circumstances. Thus, "the restriction must be proportional in severity and intensity to the purpose being sought, and may not become the rule."[866] For example, the complete ban imposed by India on all LTTE-related activities of refugees after the assassination of Rajiv Gandhi might reasonably be deemed overly broad.

Moreover, any restriction on two forms of expressive freedom – the rights to freedom of assembly and association – must not only be "necessary," but be also demonstrably "necessary in a democratic society." The drafters did not define this notion with precision, opting instead to endorse a flexible but nonetheless internationalist standard:

> It was objected [by some members of the Commission on Human Rights] that it was impossible to discern a uniform understanding of democracy common to all countries of the world. On the other hand, it was submitted that freedom of assembly [and association] cannot be effectively protected if the limitations proviso is not applied in conformity with certain minimum democratic principles, which stem, *inter alia*, from the respect for the

[863] The approach in General Comment No. 22 may be contrasted with the more relativist perspective adopted by the Committee in its 1982 decision of *Hertzberg et al. v. Finland*, UNHRC Comm. No. 61/1979, decided Apr. 2, 1982. In dismissing a claim based on state efforts to censor the broadcast of material dealing with homosexuality, the Committee opined that "public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded national authorities": ibid. at para. 10.3.

[864] UN Human Rights Committee, "General Comment No. 10: Freedom of expression" (1983), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at para. 4.

[865] See chapter 5.2 above, at pp. 716–717.

[866] Nowak, *ICCPR Commentary*, at 351.

> principles of the UN Charter, the Universal Declaration of Human Rights, and the two Covenants.[867]

Thus, as Partsch concludes, "the government has a margin of appreciation, but the standards are international standards and a government's reliance on the limitation clause is subject to international scrutiny."[868] It would, for example, be difficult to imagine that this standard would be met in the case of Tanzania's detention of Burundian refugees simply because they were campaigning for majority rule in their home country, or when Burmese refugees were detained simply for calling attention to the internationally condemned detention of opposition leader Aung San Suu Kyi.

Beyond limitations imposed by international human rights law, the political activities of refugees, like those of all persons subject to the host state's authority, may also be constrained to meet that state's obligations to maintain international peace and security.[869] Regrettably, host states are unlikely to be inclined to take this obligation seriously when refugees are used as the instruments of the host state's own aggressive policies[870] – for example, Pakistan's arming of Afghan rebels in exile, or Honduras' support for Nicaraguan contras on its territory. Scenarios of this kind, however, represent the clearest example of a situation in which the host government is itself liable for the aggressive actions of refugees, and hence under a concomitant duty to restrain them.[871]

Where, in contrast, the host state is not itself the progenitor of the aggression – for example, when Rwandan refugees planned an invasion of their home country while enjoying refugee protection in Uganda, or when

[867] Ibid. at 378–379. More specifically, Nowak suggests that the litmus test for a valid limitation should be whether the constraint is "oriented along the basic democratic values of pluralism, tolerance, broad-mindedness, and peoples' sovereignty": ibid. at 394.

[868] Partsch, "Freedom of Conscience," at 233.

[869] All states are required by the Charter of the United Nations to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state": UN Charter, 1 UNTS 16, adopted June 26, 1945, at Art. 2(4).

[870] The UN General Assembly has affirmed that states are under a duty to prevent aggression, defined to include "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [aggression], or its substantial involvement therein": UNGA Res. 3314(XXIX), Dec. 14, 1974.

[871] As recently suggested by the International Law Commission, "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct": "Draft Articles on Responsibility of States for Internationally Wrongful Acts," UN Doc. A/56/10, Ch. IV.E.1, adopted Nov. 2001, at Art. 8. The duty to take corrective action follows from the principle that "[e]very internationally wrongful act of a State entails the international responsibility of that State": ibid. at Art. 1.

anti-communist Cuban refugees based in the United States sent harassing aircraft into Cuban airspace – the host state is liable for acts of aggression committed by private groups only "if and to the extent that the State acknowledges and adopts the conduct in question as its own."[872] There is moreover no responsibility of any kind where the actions undertaken by refugees do not amount to a form of international wrongdoing. For example, because it is generally accepted that there is no breach of international law in the case of an armed intervention necessary to ensure the right of a people to political self-determination, the host country of refugees undertaking attacks of this kind cannot be said to be under a duty to prevent such action.[873] All in all, the scope for limitation of expressive freedom based on the need to avoid international legal liability is thus fairly narrow.

Where the refugees' host state is not legally obligated to prevent the refugees' activities, any constraints on their freedom of expression, assembly, and association must be justified on the basis of the usual criteria described above.[874] So long as the limitations are set by law, and are truly necessary – including considerations of minimal intrusiveness and proportionality – considerations of national security may well be relevant, at least where the target state is able and disposed to retaliate against the host country. More generally, the host country may also in at least some circumstances assert public order (*ordre public*) considerations given the importance ascribed today to the principles of non-intervention in the affairs of other countries,[875] and more generally to the maintenance of friendly relations among

[872] Ibid. at Art. 11.

[873] Grahl-Madsen, "Political Rights and Freedoms of Refugees," in G. Melander and P. Nobel eds., *African Refugees and the Law* 47, (1978) at 54–55. See also O. Eze, *Human Rights in Africa* (1984), at 606: "[A]s a result of provisions of the UN Charter recognizing the right of self-determination of colonial peoples and subsequent United Nations General Assembly resolutions elaborating the content of this right, it is now well accepted that refugees from colonial territories who have decided to resort to armed struggle have a right to use force and that the country aiding them by, for example, granting them a base from which to operate, is in fact fulfilling its obligations under the UN Charter." Tacit support for this position can be located in *obiter dicta* of the decision of the International Court of Justice in *Military and Paramilitary Activities in and Against Nicaragua*, [1986] ICJ Rep 14, at para. 98, in which the Court was careful not to deem an attack necessary for self-determination to be unlawful: "The Court is not here concerned with the process of decolonization; this question is not an issue in the present case." But in view of the strong dissent of Judge Schwebel in that decision, Corliss concludes that "[t]he complex question of intervention in support of self-determination remains unsettled in international law. There is a fundamental conflict between the universalist and statist principles set forth in the United Nations Charter. The international legal order cannot simultaneously pay equal respect to self-determination and human rights on the one hand, and sovereignty and non-intervention on the other": Corliss, "Hostile Acts," at 205–206.

[874] See text above, at pp. 897–903.

[875] The Declaration on Territorial Asylum, UNGA. Res. 2312(XXII), adopted Dec. 14, 1967, provides at Art. 4 that "[s]tates granting asylum ... not permit persons who have

states.[876] While the absolutist nature of Art. III of the OAU Refugee Convention – under which there is a blanket duty on states "to *prohibit* refugees . . . from attacking *any* State Member of the OAU, by *any* activity likely to cause tension between Member States [emphasis added]" – makes that standard unlawful, a more selective and context-sensitive invocation of the public order (*ordre public*) limitation authority will allow states legitimately to constrain refugee activities at odds with basic international legal and political commitments.

6.8 Assistance to access the courts

As earlier described,[877] refugees are entitled to assert their rights before the courts[878] of any state party,[879] even before admission to a status

received asylum to engage in activities contrary to the principles and purposes of the United Nations." More generally, states have agreed "to ensure that [their] territory is not used in any manner which would violate the sovereignty, political independence, territorial integrity and national unity or disrupt the political, economic, and social stability of another State": Declaration on the Inadmissibility of Intervention in the Internal Affairs of States, UNGA. Res. 103(XXVI), adopted Dec. 9, 1981, at Art. II(b). While not binding as a matter of international law (see chapter 1.1.2 above, at pp. 26–27), these resolutions of the General Assembly nonetheless have significant political authority.

[876] By virtue of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, UNGA Res. 2625(XXV), adopted Nov. 4, 1970, governments have committed themselves not to "organize, assist, foment, finance, incite, or tolerate subversive terrorist or armed activities directed toward the violent overthrow of another State." This formally non-binding standard exceeds the legal duty described above: see text above, at pp. 903–904.

[877] See chapter 4.10 above.

[878] Grahl-Madsen opines that "[t]he paragraph is limited to courts of law and does, therefore, not apply to administrative authorities. However, in certain other articles of the Convention a right to appear before administrative authorities has been established": Grahl-Madsen, *Commentary*, at 66. Weis agrees with this position, and gives Art. 32 (duty of non-expulsion) as an example of a provision in which access to administrative authorities *is* expressly guaranteed: Weis, *Travaux*, at 134. In line with Weis' position on the right to access to tribunals by virtue of Art. 32, see UNHCR Executive Committee Conclusion No. 22, "Protection of Asylum Seekers in Situations of Large-Scale Influx" (1981), at para. II(B)(2)(f), available at www.unhcr.ch (accessed Nov. 20, 2004), which affirms that "asylum-seekers who have been temporarily admitted pending arrangements for a durable solution . . . are to be considered as persons before the law, enjoying free access to courts of law *and other competent administrative authorities* [emphasis added]." But the general understanding of Art. 14(1) of the Covenant on Civil and Political Rights – which also impliedly guarantees a right of access to the courts by everyone (see chapter 4.10 above, at pp. 647–650) – is that this right applies "to all courts and tribunals which determine criminal charges or rights and obligations in a suit at law, whether ordinary or specialized": Jayawickrama, *Judicial Application*, at 481.

[879] "[A]rticle [16] stipulated that a refugee should not only have free access to the courts in the country where he resided, but to the courts of all contracting states": Statement of the

determination procedure. The drafters agreed that even "persons who had only recently become refugees and therefore had no habitual residence were ... covered by the provisions of ... paragraph 1 [of Art. 16]."[880] The qualitative dimension of that access to the courts is now regulated by Art. 14(1) of the Civil and Political Covenant.[881] In brief, the body before which refugees are entitled to present their claims must be established by law, jurisdictionally competent, independent, and impartial. It must moreover be positioned to deliver a fair and public hearing, meaning that access is reasonably expeditious, the rules of natural justice are respected, there is procedural equality between the parties, it is possible reasonably to present one's case, and the hearing (or at least the judgment, where special circumstances exist) is accessible to all.

Yet the drafters were keenly aware that the basic guarantee of the right to bring a case to court could often prove illusive in practical terms:

> Although in principle the right of a refugee to sue and be sued is not challenged, in practice there are insurmountable difficulties to the exercise of this right by needy refugees: the obligation to furnish *cautio judicatum solvi* and the refusal to grant refugees the benefit of legal assistance makes the right illusory. In many countries, legal assistance is available solely to nationals and only foreigners who can invoke a treaty of reciprocity are granted the benefit of such assistance. Refugees should therefore be exempted, as was done in the Conventions of 1933 and 1938, from the obligation to furnish *cautio judicatum solvi* and should enjoy the benefit of legal assistance on the same conditions as nationals.[882]

President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.8, July 5, 1951, at 13. Furthermore, "[p]aragraph 1 applies to any refugee ... If he has his habitual residence in a non-Contracting State, he shall nevertheless have access to courts of law in any of the Contracting States, subject only to the rule that each Contracting State must determine for its own purposes whether a person is to be considered as a refugee or not": Grahl-Madsen, *Commentary*, at 64. As drafted, refugees are to have the right of access to courts, even if the citizens of the host state do not. Thus, Grahl-Madsen observes that "[t]he rule is interesting because it is of an absolute character and does not refer to any standard relating to nationals or most favoured aliens or any other group or category of aliens": Grahl-Madsen, *Commentary*, at 66.

[880] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.25, Feb. 10, 1950, at 6. This position was thought largely uncontroversial, since "[u]nder present day practice foreigners are usually granted the right to appear before courts of law as plaintiffs or defendants ... [But] [t]o avoid difficulties in such countries where free access to courts is not granted to all foreigners, the Convention explicitly imposes such an obligation on the Contracting States": Robinson, *History*, at 112. See chapter 4.10 above, at pp. 646–647.

[881] See chapter 4.10 above, at pp. 647–650.

[882] Secretary-General, "Memorandum," at 30.

These concerns persist in some jurisdictions to the present day. In Uganda, for example, there is no general legal aid system to which refugees may apply. UNHCR has, however, often assisted refugees to pay their lawyers' bills.[883] In Italy, refugees without independent means may access the general legal aid plan to assist them in presenting their cases for refugee status, but are entitled to legal assistance for other kinds of cases only after formal recognition of their claim.[884] Britain's decision to reduce legal aid for refugee claimants from a maximum of 100 hours to no more than 5 hours' work provoked a protest by UNHCR directly to the Lord Chancellor.[885] Under the European Union's Procedures Directive, state parties are required to provide free "legal assistance and/or representation" for purposes of at least the first review or appeal of a negative status determination.[886] They may, however, limit access to such assistance on the basis of financial need; limit its applicability to designated counsel; set monetary and/or time limits; and, perhaps most ominously, deny such assistance altogether where authorities determine that the appeal or review is not "likely to succeed."[887] In Belgium, refugees

[883] E. Khiddu-Makubuya, *International Academy of Comparative Law National Report for Uganda* (1994), at 9. Yet according to the Refugee Law Project at Makarere University, which provides some support to persons claiming refugee status, "asylum-seekers are not allowed legal representation in presenting their case. It has been argued by UNHCR that legal representation would infringe upon the confidentiality of the asylum-seeker": Refugee Law Project, "Refugees in the City: Status Determination, Resettlement, and the Changing Nature of Forced Migration in Uganda," Refugee Law Project Working Paper No. 6, July 2002, at 15.

[884] G. D'Orazio, *International Academy of Comparative Law National Report for Italy* (1994), at 29. Despite legislative change in 2001, a substantively inclusive right of access to legal aid has not been established for refugee claimants in Italy. "Under the 2001 Immigration and Asylum Bill, asylum-seekers are entitled to free legal aid when appealing the Commission's decision and can request this aid from the Commission for Free Legal Aid ... Other than these measures, there is no right to legal aid for asylum-seekers": Lawyers' Committee for Human Rights, "Country Review 2002," available at www.lchr.org/refugees/reports (accessed Oct. 19, 2003) (LCHR, "Country Review 2002").

[885] "The UN's high commissioner for refugees has written to the lord chancellor, Lord Falconer, warning that the proposal to limit the hours of legal advice will harm deserving and vulnerable asylum-seekers who have to navigate an unfamiliar legal system without English language skills ... The asylum changes which will restrict publicly funded advice to four hours for the initial decision and four hours for any subsequent appeal are designed to save £30 million a year": A. Travis, "UN attacks plans to limit legal aid for asylum-seekers," *Guardian*, Sept. 1, 2003, at 6.

[886] Council Directive on minimum standards of procedures in Member States for granting and withdrawing refugee status, Doc. 8771/04, Asile 33 (Apr. 29, 2004) (EU Procedures Directive), at Art. 13. Time limits for access to review are, however, allowed: ibid. at Art. 38(4).

[887] Ibid. at Art. 13(3)–(5). It is stipulated, however, that access to legal assistance "shall not be arbitrarily restricted" on the basis of a determination that an appeal or review is not likely to succeed: ibid. at Art. 13(3).

face the requirement to post security for costs under the doctrine of *cautio judicatum solvi* until and unless their claims to refugee status are recognized;[888] in France, on the other hand, all non-citizens, including refugees, are now exempt from the requirement.[889]

> **Refugee Convention, Art. 16 Access to courts**
>
> . . .
>
> **2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.**
>
> **3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.**

Over the course of the drafting debates, it was decided that the more sophisticated rights relevant to accessing the courts – in particular, eligibility for legal assistance, and exemption from *cautio judicatum solvi* – would be reserved for refugees who had established a "habitual residence" in some state. Thus, refugees who have yet to establish a habitual residence need only receive the benefit of Art. 16(1) in addition to whatever access to the courts is afforded non-citizens generally.[890] They may, for example, bring an action to secure a divorce[891] or recover a debt,[892] but need not be granted the forms of practical assistance in accessing the courts envisaged by paras. 2 and 3 of Art. 16.[893] Much less is there any duty to exempt refugees from the usual court or other fees to pursue a court action.[894]

[888] K. Leus and G. Vermeylen, *International Academy of Comparative Law National Report for Belgium* (1994), at 7.

[889] N. Guimezanes, *International Academy of Comparative Law National Report for France* (1994), at 18.

[890] See generally chapter 4.10 above, at pp. 644–656. At this point, the operative provisions of the Refugee Convention are Arts. 16(1) and 7(1), the latter stipulating that "[e]xcept where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally." See chapter 3.2.1 above.

[891] Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 7.

[892] Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.8, July 5, 1951, at 12.

[893] "[R]efugees who have not established habitual residence in any country will not benefit from the provisions of paragraphs 2 and 3": Grahl-Madsen, *Commentary*, at 67.

[894] "Free access" to the courts, as required by Art. 16(1), does not imply a right of refugees to access courts without the payment of the usual court fees. In the French government's proposal for the Convention, adopted as the working model for Art. 16, refugees were to have received "free and ready" access to the courts of law: France, "Draft Convention,"

The "habitual residence" requirement for access to the additional benefits set by paras. 2 and 3 of Art. 16 was not intended to limit those rights to refugees who are formally domiciled in a state party.[895] Instead, a refugee's presence need only be ongoing in practical terms.[896] But because mere lawful presence is insufficient to give rise to entitlement under Art. 16(2), that provision does not provide a basis to contest Italy's decision to delay general access to the legal aid system or Belgium's continued application of the *cautio judicatum solvi* regime until refugee status is formally recognized.[897] Indeed, even the British rules establishing reduced access to legal aid and the European Union requirements to provide free legal aid

at 4. This led the British representative to observe that "the first paragraph of the French draft spoke of 'free and ready access'; . . . in English the words 'free' and 'ready' were synonymous in the context if used alone, but in conjunction 'free' might mean without payment of court fees": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 7. On the motion of the Israeli delegate, the English language text was amended to refer solely to "free" access in order to avoid this interpretation: Statement of Mr. Robinson of Israel, ibid. However, "Article 16 should . . . be read in conjunction with Article 29, according to which refugees shall not be obliged to pay higher or other charges than nationals of the State concerned": Grahl-Madsen, *Commentary*, at 64. Thus, "'free access' to courts does not mean that a refugee is free from the payment of any fees which nationals have to pay in the same circumstances . . . [S]uch fees and charges may not be higher than those levied on nationals": Weis, *Travaux*, at 134.

[895] The drafters rejected the early draft which granted rights under Art. 16(2) and (3) on the basis of "domicile or regular residence" in favor of the present language of "habitual residence" based upon the view of the British representative that "the aim was to give refugees the right to sue and be sued in the country of their residence whether it was the country of their domicile or not": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 7. The revised draft adopted at the first session of the Ad Hoc Committee refers only to "habitual residence": Ad Hoc Committee, "First Session Report," at Annex I. Robinson observes that the "habitual residence" language was chosen "to denote that a stay of short duration was not sufficient. On the other hand, the exercise of the right was not made dependent on 'permanent residence' or on 'domicile' because it was felt that it was a too far-reaching concept for the enjoyment of civil rights. 'Habitual residence' means residence of a certain duration, but it implies much less than permanent residence": Robinson, *History*, at 107.

[896] The language of "habitual residence" was debated in the context of Art. 14, which establishes artistic rights and rights to industrial property: see chapter 6.5 above, at pp. 836–838. As Robinson affirms, "[t]he scope of the rights accorded to refugees under para. 2 is the same as in Art. 14": Robinson, *History*, at 113. See also Weis, *Travaux*, at 134. Because "habitual residence" is not intended to focus on legal status, "[w]ith the exception of new refugees who have not yet habitual residence anywhere, it is difficult to envisage a refugee having no habitual residence": Grahl-Madsen, *Commentary*, at 60.

[897] In certain extreme circumstances, economic barriers to accessing the courts may nonetheless amount to an infringement of the duty to provide a "fair hearing" under Art. 14(1) of the Civil and Political Covenant: see chapter 4.10 above, at pp. 654–655.

only on a review or appeal set standards in excess of what Art. 16(2) requires.[898]

The enhanced aspects of the right to access the courts which accrue at this point have both an internal and an external dimension.[899] Within the country of habitual residence, refugees are to enjoy the same practical means of accessing the courts as do citizens of their host country.[900] In other countries, refugees are to be treated as citizens of their host country.[901] Thus, whatever dispensations are afforded citizens of the host country, including by virtue of treaties of reciprocity, must be extended to refugees from that country as well.[902] This duty inheres even if the refugee seeking access to the courts is habitually resident in a state which is not a party to the Refugee Convention.[903]

While the enhanced obligations under paras. 2 and 3 are general in scope,[904] the two practical impediments of greatest concern to the drafters – the need for exemption from *cautio judicatum solvi*, and access to legal assistance – are expressly referenced in the text of Art. 16. First, under the rules of *cautio judicatum solvi* some "countries admit foreigners to their courts of law, but request them, in the absence of reciprocity, to deposit an amount at the court's discretion [which] is sufficient to cover the costs he will be compelled to pay the other party if he loses the case."[905] Thus, if treated on par with other non-citizens, refugees could be required to post security for costs in a civil action under a procedure not applicable to citizens of the host

[898] Issues may still arise, however, with respect to the cognate requirements of the Civil and Political Covenant. See text below, at pp. 911–912.

[899] The external dimension, found in para. 3, is a net addition over the cognate protections established by the 1933 and 1938 refugee conventions: Robinson, *History*, at 112.

[900] Refugees are to be "subject to the same conditions as nationals": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 7. Thus, "they will be considered more favourably than aliens who are not enjoying such favourable treatment": Grahl-Madsen, *Commentary*, at 67.

[901] "Refugees are to have free access to justice, not only in their country of residence but in any other country party to the convention": Secretary-General, "Memorandum," at 30.

[902] "They would be entitled in this respect to benefit under the system applied to nationals of the country of asylum in pursuance of the treaties in force": ibid.

[903] "Just as in paragraph 1, this paragraph also applies to refugees residing in non-Contracting States": Grahl-Madsen, *Commentary*, at 64.

[904] The Belgian representative, for example, observed that "the exemption from *cautio judicatum solvi* was already provided for under the first sentence of paragraph 2, which provided that a refugee should enjoy in that respect the same rights and privileges as a national": Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.8, July 5, 1951, at 13. Weis cites to Federal Court of Germany Decision No. ATF 83 (1951) I, at p. 16, as having relied on Art. 16(2) to reach the conclusion that it had competence to grant a refugee from Yugoslavia, resident in Germany, a divorce from her non-resident spouse on the same terms as it would for a German citizen: Weis, *Travaux*, at 135.

[905] Grahl-Madsen, *Commentary*, at 63.

state.[906] By virtue of Arts. 16(2) and (3), however, any such rules may no longer be invoked against refugees.[907] As a practical matter, however, the net benefit of this rule may be marginal. The Belgian representative to the Conference of Plenipotentiaries observed that even in 1951 "the practice of demanding *cautio judicatum solvi* was dying out,"[908] a view affirmed by more recent developments,[909] including the decision by France to end this requirement for all non-citizens.

Second, and of greater contemporary importance, refugees are to be assimilated to nationals of their country of residence with respect to "legal assistance."[910] This right to equal treatment is, of course, of no practical benefit to refugees where, as in Uganda, not even nationals benefit from a legal aid program. Yet for refugees living in countries where legal aid is generally available, Art. 16(2) may be of real value. Without the benefit of this provision (and this is still the case for refugees who have yet to establish an habitual residence), a refugee seeking to vindicate a right to legal aid would be required to rely upon the very general language of Art. 14 of the Civil and Political Covenant, in addition to the duty of non-discrimination. The difficulty is that Art. 14's guarantee to all persons of equality before courts

[906] The Court of Appeal of Paris has taken the position that while Art. 16(2) exempts refugees from the being the *object* of a request for *cautio judicatum solvi*, it is not a source of positive entitlement for refugees to seek *cautio judicatum solvi* in relation to a suit being brought against them by a non-citizen. Because the right to seek *cautio judicatum solvi* was determined to be "a privilege of nationality," a refugee resident in France was not allowed to seek *cautio judicatum solvi* against American plaintiffs: *Fliegelman*, reported at (1963) 90 *Journal du droit international* 723 (Fr. Cour d'Appel de Paris, 1ère Chambre, Nov. 29, 1961).

[907] The result under Art. 14(1) of the Civil and Political Covenant would be less clear. "The assessment of whether the deposit of security raises an unacceptable barrier to a person's access to court should be based on the total sum required as security": Jayawickrama, *Judicial Application*, at 484. The duty to post security for costs is not, therefore, impermissible *per se*. Whether an otherwise valid requirement applied only to non-citizens is allowable would be determined by reference to the duty of non-discrimination. See chapter 2.5.5 above, at pp. 129–133, for a discussion of the margin of appreciation enjoyed by states in providing enhanced benefits to their own citizens.

[908] Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.8, July 5, 1951, at 13.

[909] In the draft of the ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure (Discussion Draft No. 4, 2003), Principle 3.3 provides that "[a] person should not be required to provide security for costs, or security for liability for pursuing provisional measures, solely because that person is not a national or resident of the forum state." Draft Rule 32.9 similarly provides that "[s]ecurity should not be required solely because a party is not domiciled in the forum state."

[910] "With regard to legal aid or legal assistance, it is clear that the Article can only apply to such benefits which are granted by the State under a State-supported scheme. In countries where legal aid is solely granted by bar associations, the Article will certainly not apply": Grahl-Madsen, *Commentary*, at 67.

and tribunals is exceedingly general,[911] in consequence of which "[a] state has a free choice of the means to be used towards guaranteeing to litigants an effective right of access to the courts. The institution of a legal aid scheme constitutes one of those means, but there are others."[912] Still, a host country which has opted to establish a system of legal aid would be under a significant burden by virtue of Arts. 2(1) and 26 of the Civil and Political Covenant to explain why the failure to extend the benefit of the system to refugees is justifiable differentiation, rather than impermissible discrimination.[913] The risk is that it might be determined that the margin of appreciation regularly afforded states with regard to the treatment of non-citizens should prevail.[914]

The clear strength of the Refugee Convention is that, at least once habitual residence has been established, none of these questions needs to be addressed. If a system of legal aid is in place in the host country, refugees must have access to it on precisely the same terms as citizens. And in any other state party to the Convention, refugees must receive legal aid under the same conditions as do citizens of their country of habitual residence. Arguments concerning the scope of the duty to provide access to the courts and the difficult issue of establishing discrimination are avoided by virtue of the clear language of paras. 2 and 3 of Art. 16.

[911] See chapter 4.10 above, at pp. 647–655.

[912] Jayawickrama, *Judicial Application*, at 488, citing in support the decision of the European Court of Human Rights in *Andronicus and Constantinou v. Cyprus*, (1997) 25 EHRR 491 (ECHR, Oct. 9, 1997). But "[w]hile the right to free legal aid in civil cases is not expressly guaranteed, its denial may, in certain circumstances, infringe the principle of 'equality of arms' and [therefore] constitute a violation of the right to a fair hearing": ibid. at 507.

[913] See generally chapter 2.5.5 above, and in particular *Avellanal v. Peru*, UNHRC Comm. No. 202/1986, decided Oct. 28, 1988, at para. 10.2, in which the right to a fair trial was deemed to have been contravened by a procedure predicated on sex discrimination.

[914] See chapter 2.5.5 above, at pp. 129–133.

7

Rights of solution

There is increasing impatience with the duty simply to honor the rights of persons who are Convention refugees. The focus of much contemporary discourse is instead on the importance of defining and pursuing so-called "durable solutions" to refugee flight.[1] The main goal of a refugee protection regime oriented towards durable solutions is effectively to find a way to bring refugee status to an end – whether by means of return to the country of origin, resettlement elsewhere, or naturalization in the host country. Indeed, those who focus on achieving durable solutions increasingly regard respect for refugee rights as little more than a "second best" option, to be pursued only until a durable solution can be implemented. UNHCR's Executive Committee, for example, has recently endorsed a conclusion

> Recognizing the need for Governments, UNHCR and the international community to continue to respond to the asylum and assistance needs of refugees *until durable solutions are found* [emphasis added].[2]

[1] UNHCR records more than fifty resolutions of the General Assembly between 1959 and 2000 which call upon states to find "durable solutions" to refugee situations; it provides by way of a "sample text" GA Res. 38/121, para. 8, which "[u]rges all States to support the High Commissioner in his efforts to find durable solutions to refugee problems, primarily through voluntary repatriation, including assistance to returnees, as appropriate, or, wherever appropriate, through integration in countries of asylum or resettlement in third countries": UNHCR, "Durable Solutions," available at www.unhcr.ch (accessed Nov. 20, 2004). In response to these and similar calls, including the mandate set by the Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/MMSP/2001/09, Dec. 13, 2001, incorporated in Executive Committee of the High Commissioner's Program, "Agenda for Protection," UN Doc. EC/52/SC/CRP.9/Rev.1, June 26, 2002, the agency released a "Framework for Durable Solutions for Refugees and Persons of Concern" in May 2003.

[2] UNHCR Executive Committee Conclusion No. 89, "Conclusion on International Protection" (2000), at Preamble, available at www.unhcr.ch (accessed Nov. 20, 2004). The special concern of UNHCR to promote durable solutions is arguably compelled by its Statute, which requires UNHCR to "seek[ ] permanent solutions for the problem of refugees by assisting Governments . . . to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities": Statute of the Office of

In contrast to this emphasis on the pursuit of durable solutions, the Refugee Convention gives priority to allowing refugees to make their own decisions about how best to respond to their predicament. As a non-governmental advocate astutely observed, one of the strengths of the refugee rights regime is that it eschews "the false notion of 'durable solutions' to refugee problems, especially as refugees [may] have no idea as to how long they are likely to stay in a particular country."[3] Rather than propelling refugees towards some means of ending their stay abroad, the Refugee Convention emphasizes instead the right of refugees to take the time they need to decide when and if they wish to pursue a durable solution. In some cases, refugees will choose not to pursue any solution right away, but will prefer simply to establish a reasonably normal life in the state party where they sought protection. This is a fully respectable alternative, which may not lawfully be interfered with by either governments or international agencies. Because refugee rights inhere as the result of the individual's predicament and consequent status – rather than as a result of any formal process of adjudication by a state – they provide refugees with a critical, self-executing arsenal of entitlements which may be invoked in any of the state parties to the Refugee Convention. They afford refugees a real measure of autonomy and security to devise the solutions which they judge most suited to their own circumstances and ambitions, and to vary those decisions over time.[4]

the United Nations High Commissioner for Refugees, UNGA Res. 428(V), adopted Dec. 14, 1950 (UNHCR Statute), at Art. 1(1).

[3] Comments of M. Barber of the British Refugee Council, "Final Report: Implementation of the OAU/UN Conventions and Domestic Legislation Concerning the Rights and Obligations of Refugees in Africa, 14–28 September 1986," Refugee Studies Programme, Oxford University (1988), at 34.

[4] The alternative of simply respecting refugee rights is moreover practical because it is not one-sided. As shown in previous chapters, the structure of the refugee rights regime neatly reconciles the interest of refugees in having an array of protection options to the legitimate concerns of the states and communities called upon to receive them. For example, the qualitative measure of respect for refugee rights is absolute in relation to only a few, truly essential rights. Otherwise, it is measured by reference to the protection afforded others residing in the host country, resulting in a flexible, but nonetheless quantifiable, standard of compliance. See generally chapters 3.2 and 3.3 above. Equally important, the Refugee Convention embraces the sensible proposition that not all rights are immediately due upon arrival in the territory of a state party. Instead, enhanced rights accrue to refugees as a function of the passage of time, and the establishment of a deeper connection between them and their hosts: see generally chapter 3.1 above. On the other hand, these two sources of flexibility for receiving states are themselves constrained by basic principles required to ensure fairness to refugees: refugees may not be the objects of discrimination, they must be exempted from expectations which they are inherently unable to fulfill, they may not be penalized by exceptional measures applied against the citizens of their state of origin, and they must not lose their basic rights even in times of war or serious emergency. See generally chapters 2.5.5, 3.4, and 3.5 above. All in all, the careful balance struck by the Refugee Convention remains in many ways an ideal mechanism for reconciling the

This is not to suggest that there is any inherent contradiction between a commitment to honoring refugee rights and the pursuit of durable solutions to refugeehood. As analysed in detail below, each of the options described as a durable solution is, to a greater or lesser degree, reconcilable to the requirements of the Refugee Convention. The concern is rather that much current practice reverses the emphasis of refugee law on the primacy of respect for refugee rights in favor of the pursuit of durable solutions. For example, a senior official of the United Nations High Commissioner for Refugees (UNHCR) opined that

> protection should be seen as a temporary holding arrangement between the departure and return to the original community, or as a bridge between one community and another. Legal protection is the formal structure of that temporary holding arrangement or bridge.[5]

Despite the technical accuracy of the view that protection is a duty which inheres only for the duration of risk, that duty may be inadvertently degraded by referring to it as simply an "arrangement or bridge" rather than as a fully legitimate alternative to the pursuit of a durable solution to refugee status. This very simple notion – that the recognition and honoring of refugee rights is itself a fully respectable, indeed often quite a desirable response to involuntary migration – can too easily be eclipsed by the rush to locate and implement so-called durable solutions.[6]

Under the Refugee Convention, the refugee himself or herself normally determines whether a solution beyond respect for refugee rights is to be pursued. Indeed, the only circumstance under which a solution to refugee

refugee's individual autonomy to communal expectations and capacities in receiving states. The broader issue of modern challenges to the viability of the refugee rights regime is briefly taken up below in the Epilogue. In considering responses to refugeehood, the most basic answer of all is therefore simply to honor the requirements of refugee law itself. Particularly where the standard of protection is derived by a synthesis of refugee law and cognate norms of international human rights law (as the analysis in preceding chapters has proposed), many, perhaps most, refugees will require no more. If refugees are genuinely able freely to access a place where they are allowed to remain for the duration of risk and are granted a solid array of both civil and socioeconomic rights that enable them to live in dignity there, that may well be all that is required by way of an international response to their predicament.

[5] G. Arnaout, "International Protection of Refugees' Rights," remarks delivered at the Training Course on International Norms and Standards in the Field of Human Rights, Moscow, 1989 (Arnaout, "Refugees' Rights"), at 7. Arnaout was at the time the Director of the Division of Law and Doctrine of UNHCR.

[6] See, for example, Arnaout, "Refugees' Rights," at 7: "It is not adequate to consider as a solution to the [refugee] problem ... mere 'self-sufficiency.' The problem of the refugee has always been seen as *de iure* or *de facto* statelessness, and the solution to this problem, therefore, must be either the reacquiring of the normal 'community' benefits of the original nationality or the acquisition of a new nationality with all its normal benefits ... Without a community, the individual is isolated, deprived and vulnerable."

status may lawfully be undertaken without the consent of the refugee is where there has been a fundamental change of circumstances in the refugee's state of origin, which change has eliminated the refugee's need for surrogate protection. Refugee status comes to an end in such a case, and the former refugee may be mandatorily repatriated to the country of origin. So long as the requirements of international human rights law are met, there is no requirement that repatriation in such circumstances be voluntary. The label often attached to this option – "voluntary repatriation" – is thus not appropriate. For reasons set out below, the solution of requiring a refugee's departure once the need for protection comes to an end is better referred to simply as *repatriation*, thus avoiding confusion with the second solution, *voluntary reestablishment*.

While repatriation involves the return of a person who is no longer a refugee (and hence need not be voluntary), a person who remains a refugee may voluntarily decide to reestablish himself or herself in the country of origin despite the risk of being persecuted there. A refugee is, of course, always free in law to opt for return to his or her own country. Return under such circumstances must, however, be the result of the refugee's free choice if the state of asylum is to avoid breach of the duty of *non-refoulement*. Once there is evidence of both a genuinely voluntary return and of the refugee's de facto reestablishment in his or her own country, the Refugee Convention deems refugee status to have come to an end. This is so because the refugee's own clear actions signal that he or she no longer wishes to benefit from the surrogate protection of an asylum country that is the concern of refugee law.

Beyond repatriation and voluntary reestablishment, the third solution to refugee status is resettlement. This solution acknowledges the reality that time spent in an asylum state may afford a refugee the opportunity to explore and secure access to durable protection options better suited to his or her needs. The Refugee Convention explicitly envisages the possibility of onward movement by way of resettlement from the first country of arrival, and requires the government in the refugee's initial host state to facilitate that process. Once resettlement has occurred, the continuing need for refugee protection is, of course, at an end.

Fourth, and as a logical extension of the Convention's core commitment to affording refugees greater rights as their attachment to the asylum country increases over time, a point may be reached where the refugee and the authorities of that country agree to the refugee's formal naturalization by the host state. If a refugee opts to accept an offer of citizenship there, with entitlement fully to participate in all aspects of that state's public life, his or her need for the surrogate protection of refugee law comes to an end. There is no need for surrogate protection in such a case, as the refugee is able and entitled to benefit from the protection of his or her new country of nationality.

Having focused in chapters 4–6 on the primary duty of states to respect refugee rights for the duration of risk, this chapter now takes up the question of the rights of refugees when a decision is made to pursue their repatriation, or when the refugee opts for voluntary reestablishment, resettlement, or naturalization.

7.1 Repatriation

There is strong support for regarding repatriation as the best solution to refugeehood. UNHCR's Executive Committee, for example, has "not[ed] that [while] voluntary repatriation, local integration and resettlement are the traditional durable solutions for refugees, ... voluntary repatriation is *the preferred solution*, when feasible [emphasis added]."[7] As the language of the Executive Committee makes clear, support is not normally expressed for "repatriation" as a solution to refugeehood, but rather for "voluntary repatriation."[8] The routine use of this terminology is, however, problematic. While anchored in the language of the UNHCR Statute,[9] and hence logically taken into account in determining the focus of *institutional* practice,[10] the rights of state parties to the Refugee Convention are quite differently conceived. Whereas UNHCR is mandated to promote voluntary repatriation, the Convention posits two distinct options to bring refugee status to an end:

[7] UNHCR Executive Committee Conclusion No. 89, "Conclusion on International Protection" (2000), at Preamble, available at www.unhcr.ch (accessed Nov. 20, 2004).

[8] See e.g. UNHCR Executive Committee Conclusions Nos. 18, "Voluntary Repatriation" (1980); 41, "General Conclusion on International Protection" (1986); 46, "General Conclusion on International Protection" (1987); 55, "General Conclusion on International Protection" (1989); 62, "Note on International Protection" (1990); 68, "General Conclusion on International Protection" (1992); 74, "General Conclusion on International Protection" (1994); 79, "General Conclusion on International Protection" (1996); 81, "General Conclusion on International Protection" (1997); 85, "Conclusion on International Protection" (1998); 87, "General Conclusion on International Protection" (1999); and 89, "Conclusion on International Protection" (2000), all available at www.unhcr.ch (accessed Nov. 20, 2004). The Executive Committee has recently "[r]eaffirm[ed] the voluntary character of refugee repatriation, which involves the individual making a free and informed choice through, *inter alia*, the availability of complete, accurate and objective information on the situation in the country of origin": UNHCR Executive Committee Conclusion No. 101, "Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees" (2004), at Preamble, available at www.unhcr.ch (accessed Nov. 20, 2004).

[9] "The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by ... [a]ssisting governmental and private efforts to promote *voluntary* repatriation [emphasis added]": UNHCR Statute, at Art. 8(d).

[10] See e.g. UNHCR, "Handbook: Voluntary Repatriation: International Protection" (1996) (UNHCR, "Voluntary Repatriation Handbook").

voluntary reestablishment, and repatriation consequent to a fundamental change of circumstances. Neither is the same as voluntary repatriation.[11]

On the one hand, it may be the case that a person who is a refugee – that is, who continues to be objectively at risk of being persecuted – nonetheless decides to go back to the country where that risk exists. In so doing, the refugee is simply exercising the right of every person to return to his or her own country.[12] But as a matter of refugee law, refugee status comes to an end by operation of Art. 1(C)(4) of the Convention if the voluntary return amounts to reestablishment in the country of origin.[13] As a matter of logic, this must be so: the refugee's actions signal that an essential requirement of refugee status, the presence of the putative refugee *outside* the territory of his or her own country, will no longer be satisfied.[14] But this voluntary act of return and reestablishment is not appropriately referred to as "repatriation," since there is no requirement at law that the result of the return home be the restoration of a normal relationship between the (former) refugee and the government of the home state. As Stein has rightly insisted, "In many situations, 'repatriation' is the wrong term, because there has been no restoration of the bond between citizen and fatherland. 'Return' is a better term because it relates to the fact of going home without judging its content."[15]

Critically, state parties are not entitled to rely upon the simple fact of return to the home country, even if clearly voluntary, to terminate Convention refugee

[11] See M. Barutciski, "Involuntary Repatriation when Refugee Protection is no Longer Necessary: Moving Forward after the 48th Session of the Executive Committee," (1998) 10(1/2) *International Journal of Refugee Law* 236 (Barutciski, "Involuntary Repatriation"), at 249: "[T]he concept of voluntary repatriation is incoherent if taken as a legally binding standard. Its value appears in terms of recommending that a State take into account the individual's desire to return home. Although this is undoubtedly a reasonable recommendation, it cannot be a coherent legally binding standard according to international principles of refugee protection."

[12] "No one shall be arbitrarily deprived of the right to enter his own country": International Covenant on Civil and Political Rights, UNGA Res. 2200A(XXI), adopted Dec. 16, 1966, entered into force Mar. 23, 1976 (Civil and Political Covenant), at Art. 12(4).

[13] "The Convention shall cease to apply to any person falling under the terms of section A if . . . [h]e has voluntarily re-established himself in the country which he left or outside [of] which he remained owing to fear of persecution": Convention relating to the Status of Refugees, 189 UNTS 2545, done July 28, 1951, entered into force Apr. 22, 1954 (Refugee Convention), at Art. 1(C)(4).

[14] The refugee definition limits protection to a person "*outside* the country of his nationality . . . [or in the case of a stateless person] *outside* the country of his former habitual residence" owing to a well-founded fear of being persecuted for a Convention reason: Refugee Convention, at Art. 1(A)(2).

[15] B. Stein, "Policy Challenges Regarding Repatriation in the 1990s: Is 1992 the Year for Voluntary Repatriation?," paper presented at the Conference on Global Refugee Policy: An Agenda for the 1990s, at the Aspen Institute, Feb. 1992, at 2.

status. Under Art. 1(C)(4), it is only if and when the refugee is *reestablished* in the country of origin that refugee status comes to an end. As analyzed below,[16] this more demanding test provides refugees with significant protection not available under the voluntary repatriation paradigm.[17]

> **Refugee Convention, Art. 1(C)(5)–(6)**
> **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 is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; [or]**
> **(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.**

The other notion generally subsumed under the label of "voluntary repatriation," the subject of this section, is more sensibly referred to simply as repatriation. Because refugee protection is conceived as protection for the

[16] See chapter 7.2 below.

[17] In brief, under Art. 1(C)(4), the voluntariness of the return and subsequent reestablishment is an essential element of this solution, both because it is part of the test for cessation of refugee status under Art. 1(C)(4), and more fundamentally because any involuntary return may amount to a breach of the host state's duty of *non-refoulement*. In view of the right of all individuals to return to their country of citizenship, the truly voluntary decision of a refugee to become reestablished in his or her state of origin – including to risk his or her life in so doing – does not violate any duty of the state which has granted protection. But if return is not really based on the refugee's free consent, including in situations where it has been coerced by threat of sanction or the withdrawal of rights, the duty of *non-refoulement* is infringed. As such, the voluntariness of the decision to return must be considered in assessing the legality of any return in circumstances where refugee status has not come to an end. The question of voluntariness of return has accordingly been taken up in the earlier analysis of the duty of *non-refoulement*: see chapter 4.1.2 above. An effort is made to build on that understanding and to develop the further requirement of reestablishment in the country of origin in the next section: see chapter 7.2 below.

duration of risk in the country of origin,[18] state parties are not obliged to honor refugee rights when the underlying risk comes to an end. Under Art. 1(C)(5)–(6) of the Refugee Convention, refugee status is lost once the refugee can no longer claim surrogate international protection "because the circumstances in connection with which he has been recognized as a refugee have ceased to exist."[19] When this standard is met, the host government is ordinarily entitled to require the former refugee to depart its territory, even if the only option is return to his or her state of origin.[20] Without the protection

[18] As recently observed in the House of Lords, "[r]efugee status is a temporary status for as long as the risk of persecution remains": *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36 (UK HL, Oct. 17, 2002), per Lord Scott. More explicitly, the English Court of Appeal has noted "that the Convention only requires this country to grant asylum for so long as the person granted asylum remains a refugee. It would be enough to satisfy the Convention if the Secretary of State were to grant refugees temporary leave to remain for so long as their refugee status persisted": *Saad v. Secretary of State for the Home Department*, [2001] EWCA Civ 2008 (Eng. CA, Dec. 19, 2001). See generally J. Hathaway, "The Meaning of Repatriation," (1997) 9(4) *International Journal of Refugee Law* 551; also published in European University Institute ed., *Legal and Policy Issues Concerning Refugees from the Former Yugoslavia* 4 (1997) (Hathaway, "Repatriation").

[19] "We should not lose sight of the fact that international law concerns the imposition of obligations on States. It may be in the individual's best interest actually to remain in the host country and continue his or her life in exile, but is the State obliged to provide refuge if conditions in the country of origin have become safe within a reasonable time period? Clearly, States never agreed to such legal obligations": Barutciski, "Involuntary Repatriation," at 245.

[20] While the range of issues to be considered in initially assessing the existence of a well-founded fear and at the cessation stages is similar, Art. 1(C)(5)–(6) nonetheless insists upon a higher standard of scrutiny in the context of adjudicating cessation. The Canadian Federal Court has sensibly taken the view that while the criteria for cessation due to changed circumstances are not technically binding at the time of initial status assessment, nonetheless "when a panel is weighing changed country conditions, together with all the evidence in an applicant's case, factors such as durability, effectiveness and substantiality are still relevant. The more durable the changes are demonstrated to be, the heavier they will weigh against granting the applicant's claim": *Penate v. Canada*, [1994] 2 FC 79 (Can. FCA, Nov. 26, 1993). See also *Villalta v. Canada*, [1993] FCJ 1025 (Can. FC, Oct. 8, 1993), holding that the cessation criteria "are a small subset of a larger circle of circumstances in which status will not be found to exist. This small subset is what must be proven by the government if it wishes to take status away from someone but it does not control the framework of the analysis ... in determining whether status exists ... I do not mean to suggest that in assessing the significance of changed country conditions, for the purposes of deciding whether to grant status, the [decision-maker] should not consider factors such as the significance, the likely effectiveness and likely durability of the changed conditions. But I do not think the [decision-maker] needs to apply the *more demanding criteria*, which it is necessary to meet when one is considering removal of status [emphasis added]." But see *Minister for Immigration and Multicultural Affairs v. Betkhoshabeh*, 55 ALD 609 (Aus. FFC, July 20, 1999), in which the court took the view that there is no difference between the initial test for determining the existence of a well-founded fear and that for the cessation of refugee status under Art. 1(C). Because cessation involves the withdrawal of

of refugee law, the former refugee is in the same position as any other non-citizen: he or she is subject to removal, so long as the removal can be accomplished without breach of any relevant norm of international human rights law.[21]

Because the rationale for cessation due to a fundamental change of circumstances is the existence of a government in the home state able and willing to protect the refugee,[22] it makes sense to refer to return in this context as "repatriation." That is, the legal basis for deeming refugee status to have ended is precisely the restoration of a bond or social contract between citizen and state. It follows that where the state of origin is shown to be able and willing to protect the individual concerned, there is no legal basis to insist that repatriation consequent to cessation of status under Art. 1(C)(5)–(6) also be *voluntary*.[23] Because the repatriation of the former refugee cannot by

an acquired status from a refugee – based upon an already proved or assumed risk of being persecuted – the refugee should be subjected to uprooting and enforced departure only where there is particularly clear evidence that protection is no longer required. To similar effect, see UNHCR, "Note on the Cessation Clauses," UN Doc. EC/47/SC/CRP.30 (1997) (UNHCR, "Cessation"), at paras. 8–9: "Given that the application of the cessation clauses would result in the withdrawal of refugee status, the clauses should be interpreted in a restrictive way ... UNHCR recommends that in deciding whether to invoke the cessation clauses, States should take into account the consequences of cessation of refugee status. Difficulties which may follow from the invocation of the cessation clauses should be considered in both the decision and the timing of cessation. In particular, States should avoid a situation where the former refugee remains in the country of asylum without a definite legal status or with an illegal status. Human rights factors should be taken into account as well as previously acquired rights of refugees, particularly in regard to those who, due to their long stay in the country of asylum, have developed strong family, social and economic links there."

[21] The limitations on lawful repatriation set by international human rights law are discussed below, at pp. 944–952.

[22] This is most clear in the case of (the overwhelming majority of) refugees who hold the citizenship of that country, who lose their refugee status only if the change of circumstances means that the refugee "can no longer ... continue to refuse to avail himself of the protection of the country of his nationality": Refugee Convention, at Art. 1(C)(5). In the case of stateless refugees, only the ability to return to the country of former habitual residence is required for cessation to ensue: ibid. at Art. 1(C)(6). Cessation under Art. 1(C)(1)–(2), while less common, is similarly predicated on the reestablishment of a protective bond between the refugee and his or her country of origin. See generally J. Hathaway, *The Law of Refugee Status* (1991) (Hathaway, *Refugee Status*), at 191–197.

[23] The situation is somewhat more ambiguous for state parties to the Convention governing the Specific Aspects of Refugee Problems in Africa, 10011 UNTS 14691, done Sept. 10, 1969, entered into force June 20, 1974 (OAU Refugee Convention). While Art. I(4)(e) of this treaty is largely comparable to the right of cessation due to a fundamental change of circumstances found in the Refugee Convention, Art. V(1) of the OAU Refugee Convention expressly provides that "[t]he essentially voluntary character of repatriation shall be respected *in all cases* and *no refugee* shall be repatriated against his will [emphasis added]." The OAU Refugee Convention does not make clear how this provision is to be related to the cessation clauses. On the one hand, the reference to the duty to respect the voluntary character of repatriation "in all cases" could be read to limit the right of states to

definition involve a risk of *refoulement* (it having been found that there is no longer an objective risk of being persecuted in the country of origin), repatriation does not require the former refugee's consent.[24]

There are three requirements for invocation of the change of circumstances cessation clause of Art. 1(C)(5)–(6).[25] As advocated by the UNHCR, the first requirement is that the change in the country of origin be genuinely *fundamental*.[26] Second, it must be *enduring*.[27] Third, it must result not just in the eradication of a well-founded fear of being persecuted, but also in the *restoration of protection*.[28] Taken together, these tests give substance to the UNHCR Executive Committee's view that the cessation of refugee status is warranted only "where a change of circumstances in a country is of such a profound and enduring nature that refugees from that country no longer require international protection and can no longer

repatriate even a person who is no longer a refugee by virtue of cessation of status. On the other hand, the final clause more clearly stipulates that the requirement of voluntarism may in fact be invoked only by a person who is a "refugee," thereby excluding a (former) refugee whose status has validly ceased. If read to apply only to (present) refugees, then the OAU provision can not only be reconciled to its own cessation clauses, but also applied in consonance with Art. 1(C)(4) of the Refugee Convention, which does require voluntary reestablishment by a person otherwise entitled to refugee status before the duty to protect him or her comes to an end: see chapter 7.2 below.

[24] Insistence on consent to repatriation could easily grant (former) refugees what amounts to a veto over their return to the home state, based on reasons which may have nothing to do with the criteria for cessation under Art. 1(C)(5)–(6). For example, spokespersons for Chakma refugees from Bangladesh articulated a thirteen-point charter of demands before they would agree to go back to Chittagong (in Bangladesh). While many of the demands related to cessation criteria, others – including compensation for the refugees, and the eviction of Muslim settlers from traditional tribal lands – did not: *Times of India*, Jan. 17, 1994, cited in B. S. Chimni, *International Academy of Comparative Law National Report for India* (1994), at 12. Moreover, even in the context of decisions regarding the UNHCR mandate itself, it has been noted that "the means do not yet exist to enable the wishes and choices of the refugees themselves to play a decisive part in determining their own future": "Refugees Returning Home: Report of the Symposium for the Horn of Africa on the Social and Economic Aspects of Mass Voluntary Return Movements of Refugees, Addis Ababa, 15–17 September 1992" (1993), at 14. See UNHCR, "Guidelines on International Protection No. 3: Cessation of Refugee Status under Articles 1(C)(5) and (6) of the 1951 Convention relating to the Status of Refugees (the 'Ceased Circumstances Clauses')," UN Doc. HCR/GIP/03/03, Feb. 10, 2003 (UNHCR, "Ceased Circumstances Guidelines"), at para. 7: "Cessation under Article 1C(5) and 1C(6) does not require the consent of or a voluntary act by the refugee. Cessation of refugee status terminates rights that accompany that status."

[25] UNHCR, "Ceased Circumstances Guidelines," at paras. 10–16. This language is an overall improvement on the test proposed in Hathaway, *Refugee Status*, at 200–202, requiring that the change be "of substantial political significance . . . truly effective . . . [and] shown to be durable." In particular, UNHCR's insistence on a restoration of protection affords valuable clarity on the meaning of effectiveness.

[26] UNHCR, "Ceased Circumstances Guidelines," at paras. 10–12.

[27] Ibid. at paras. 13–14. [28] Ibid. at paras. 15–16.

continue to refuse to avail themselves of the protection of their country."[29] This restrictive approach to cessation is very much in line with the intentions of the drafters of the Refugee Convention, who showed no inclination to authorize the withdrawal of refugee status on the basis of changes that are insufficiently fundamental to justify the conclusion that "the circumstances in connection with which [a refugee] has been recognized ... *have ceased to exist* [emphasis added]." Indeed, the type of circumstance which they had in mind in proposing Art. 1(C)(5)–(6) was the reversion of a totalitarian state to democratic governance:

> To take the case of the aged belonging to the "hard core" of refugees, it could hardly be agreed that the government of a country which had returned to democratic ways should fail to take over the burden of that category of refugees ... [France] was quite prepared to continue to assist such refugees so long as such assistance was necessary. But if their country reverted to a democratic regime, the obligation to assist them should not fall perforce upon the French Government ... France merely said that she did not wish to be under an obligation to continue to provide assistance to refugees who could seek the protection of their country of origin.[30]

To meet the first requirement of "fundamental change," UNHCR has opined that "[a] complete political change remains the most typical situation in which this cessation clause has been applied. Depending on the grounds for flight, significant reforms altering the basic legal or social structure of the State may also amount to fundamental change, as may democratic elections, declarations of amnesties, repeal of oppressive laws and dismantling of former security services."[31] Caution of this kind is appropriate in order to ensure that a refugee's life not be disturbed simply because there is evidence of movement in a peaceful or rights-regarding direction: the basic reforms must rather be in place before cessation is contemplated. Thus, for example, the German Administrative Court in 1992 refused to recognize a fundamental change of circumstances in Romania – where the Communist era secret police had been reestablished – in contrast to the more radical structural reforms undertaken in Poland, Czechoslovakia, and Hungary, which were appropriately considered of sufficient magnitude to justify a cessation inquiry.[32]

[29] UNHCR Executive Committee Conclusion No. 65, "General Conclusion on International Protection" (1991), at para. (q), affirmed in Executive Committee Conclusion No. 69, "Cessation of Status" (1992), both available at www.unhcr.ch (accessed Nov. 20, 2004).

[30] Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.28, July 19, 1951, at 12–14.

[31] UNHCR, "Cessation," at para. 20.

[32] *An 17 K 91 42844; An 17 K 91 42845* (Ger. AC, Ansbach), reported as Abstract No. IJRL/0193 in (1994) 6(2) *International Journal of Refugee Law* 282. See also *Nkosi v. Canada*, (1993) FCJ 629 (Can. FC, June 23, 1993), declining to refuse refugee status on the basis of a "hesitant and equivocal finding that certain limited changes in circumstances in Zaïre had occurred."

The fundamental nature of a reform is moreover not a function simply of its social and political significance. Rather, it must also be determined that whatever changes have occurred genuinely "address the causes of displacement which led to the recognition of refugee status."[33] Even major political reforms do not warrant cessation unless they are causally connected to the risk upon which refugee status was recognized, or could presently be justified. Clearly, whatever general view may be taken of the significance of a change of circumstances must be tested by reference to the particularized circumstances of the applicant:

> [W]hen one says that "change" in circumstances is an important consideration, one is not speaking of any change. The [decision-maker] must not be content in simply noting that changes have taken place, but must assess the impact of those changes on the person of the applicant.[34]

The importance of contemplating cessation only when there is evidence of fundamental change – in the sense that it is both truly significant and substantively relevant – is closely connected to the second requirement: the reform must be shown to be enduring. In the case of an Indian Sikh at risk under the regime of Indira Gandhi, for example, a reviewing court was satisfied that a relevant change of circumstances had occurred because "six years had passed since the assassination of Indira Gandhi and the incidents of alleged persecution, and ... a new government was in place in India."[35] While twelve to eighteen months since a fundamental reform is argued by UNHCR to be the minimum time which should elapse before cessation is contemplated,[36] the more basic rule is "that all developments which would appear to evidence significant and profound changes be given time to consolidate before any decision on cessation is made."[37] Because the process of consolidation is context-specific, the time required to establish the durability of change will inevitably be longer where the reform was the result of

[33] UNHCR, "Ceased Circumstances Guidelines," at para. 10. "Fundamental changes are considered as effective only if they remove the basis of the fear of persecution; therefore, such changes must be assessed in light of the particular cause of fear, so as to ensure that the situation which warranted the grant of refugee status has ceased to exist": UNHCR, "Cessation," at para. 19.

[34] *Arugello Garcia v. Canada*, (1993) FCJ 635 (Can. FC, June 23, 1993).

[35] *Virk v. Canada*, (1992) FCJ 119 (Can. FC, Feb. 14, 1992).

[36] "In the *Discussion Note on the Application of the "ceased circumstances" cessation clause in the 1951 Convention* (EC/SCP/1992/CRP.1), it was advocated that a period of twelve to eighteen months elapse after the occurrence of profound changes before such a decision is made. It is UNHCR's recommendation that this period be regarded as a minimum for assessment purposes. Recent applications of the cessation clause by UNHCR show that the average period is around four to five years from the time fundamental changes commenced": UNHCR, "Cessation," at para. 21.

[37] Ibid.

conflict,[38] and hence less likely to be quickly and whole-heartedly embraced by all:

> Occasionally, an evaluation as to whether fundamental changes have taken place on a durable basis can be made after a relatively short time has elapsed. This is so in situations where, for example, the changes are peaceful and take place under a constitutional process, where there are free and fair elections with a real change of government committed to respecting fundamental human rights, and where there is relative political and economic stability in the country. A longer period of time will need to have elapsed before the durability of change can be tested where the changes have taken place violently, for instance, through the overthrow of a regime. Under the latter circumstances, the human rights situation needs to be especially carefully assessed. The process of national reconstruction must be given sufficient time to take hold and any peace arrangements with opposing militant groups must be carefully monitored.[39]

Third and most important, the fundamental and durable reform must be shown to have dependable, practical protection consequences. In many cases, courts have shown an unhealthy willingness to defer to formal evidence of fundamental change without carefully assessing the resultant ground reality.[40] For example, the fall of the Mengistu regime in Ethiopia,[41] the existence

[38] As such, cessation should clearly not be contemplated simply because there is presently peace in an area previously prone to conflict. This point was neatly made by the Federal Court of Canada. "The very article in *The Economist* cited by the [decision-maker] states merely, 'for now there is peace . . . ', leaving it an open question to the reader how long this *status quo* will last. Given this result, we do not find it necessary to consider the other matters raised": *Abarajithan v. Canada*, (1992) FCJ 54 (Can. FC, Jan. 28, 1992).

[39] UNHCR, "Ceased Circumstances Guidelines," at paras. 13–14. In contrast, for example, refugees from the Democratic Republic of Congo were told to prepare for return only two months after the signing of a peace accord: "DRC refugees reluctant to go home," *Daily News*, Oct. 1, 2002. The result of a premature termination of refugee status can simply be that refugees end up coming back to the former host state, as was the case for many Burundians removed from Tanzania who were forced once more to flee fighting between the government and rebel forces: "Hundreds more flee Burundi as conflict escalates," *UN Integrated Regional Information Networks*, Oct. 2, 2002. Alternatively, they may feel compelled to seek protection in another state party, as was the case for Rwandans deported from Tanzania, many of whom then sought asylum in Zimbabwe: "Zimbabwe hit by influx of refugees," *Daily News*, Feb. 15, 2003.

[40] Governments may also focus unduly on the formalities of change. Australian immigration minister Philip Ruddock was quoted in April 2003 as having said that "Australia has no obligation to take into account the safety of [Iraq] when it comes to returning the refugees," despite the fact that the military victory there was of recent date and the political transition barely commenced: G. Barns, "Sheik's advice for Howard and Bush," *Canberra Times*, Apr. 25, 2003, at A-15.

[41] "The Mengistu regime has fallen. The successor government stated that its aim was a 'broad-based transitional government, representative of Ethiopia's various tribes and factions, as a prelude to fair elections and multi-party democracy'": *U91–05190* (Can. IRB, Feb. 21, 1992), reported at (1992) *RefLex* 113–114.

of a formal cease-fire in Somalia,[42] as well as the signing of peace accords in El Salvador[43] and Guatemala[44] have all been treated as a sufficient basis to find the need for refugee status to have dissipated. Other courts, however, have properly insisted on the need for patience before finding a fundamental reform to be relevant to the cessation of refugee status.[45] The Federal Court of Canada thus reversed a decision to deny refugee status to an Iranian applicant on the basis of political reforms in that country, it having been determined that the reforms had not, in fact, put an end to the practice of politically inspired arrests and executions.[46]

[42] Despite its recognition of the need to avoid the premature determination of durability of change, the Full Federal Court of Australia nonetheless deferred to a determination by the tribunal that a Somali claim could be dismissed on the grounds that a cease-fire in the civil war in that country had been announced by warlords eleven days prior to the hearing: *Ahmed v. Minister for Immigration and Multicultural Affairs*, 55 ALD 618 (Aus. FFC, June 21, 1999). Justice Branson, however, took serious issue with this approach: "First, the cease-fire upon which the Tribunal placed reliance was of recent origin ... A conclusion by a decision-maker as to the likely effectiveness of the cease-fire, having regard to the preceding seven years of civil war in Somalia, called for some caution. Secondly, the material before the Tribunal upon which it based its conclusion that peace had existed in Somalia since January 31, 1998 was, at best, tentative in character": ibid.

[43] "The documentary evidence describes the peace accord and provides details with respect to its implementation and progress. It is a fact that some documentary evidence also shows that the changes in El Salvador are conservative in nature and that human rights abuses continue. However, it is apparent to me that the Board concluded that as a result of the changed circumstances, the applicant as a union member no longer had cause for a well-founded fear of persecution, and I believe it was open to the Board on the evidence before it to conclude as it did": *Caballos v. Canada*, (1993) FCJ 623 (Can. FC, June 22, 1993).

[44] See e.g. *Gomez Garcia v. Immigration and Naturalization Service*, 1999 US App. Lexis 12096 (US CA8, June 11, 1999); *Mazariegos v. Immigration and Naturalization Service*, 241 F 3d 320 (US CA11, Feb. 12, 2001).

[45] In assessing the claim of a Ugandan Arab, the Canadian Immigration and Refugee Board had determined that the Ugandan government "intended to restore democracy, the rule of law and respect for human rights." In response, the Federal Court noted succinctly that "[t]hese may well have been Museveni's intentions, but these intentions have not materialized": *Ahmed v. Canada*, (1993) FCJ 1035 (Can. FC, Oct. 8, 1993). Similarly, in rejecting the sufficiency of the fall of the Siad Barré regime in Somalia as a basis for finding there to have been a fundamental and durable change of circumstances, the same court observed that "[t]hat finding ... must be linked with the further finding that the country continues to be divided along tribal lines and to be torn by civil war": *Abdulle v. Canada*, (1992) FCJ 67 (Can. FC, Jan. 27, 1992). In a particularly succinct admonishment of the official propensity to seek premature revocation of status, the Federal Court of Canada observed that "[i]f the political climate in a country changes to the extent that it adversely affects the status of a refugee, the Minister may make an application to ... determine whether the person has ceased to be a Convention refugee. Presumably, the Minister would only seek such a determination after monitoring the effects of any political change in the subject country": *Salinas v. Canada*, (1992) FCJ 231 (Can. FC, Mar. 20, 1992).

[46] *Oskoy v. Canada*, (1993) FCJ 644 (Can. FC, June 25, 1993).

This qualitative dimension of effective reform has recently been helpfully described by UNHCR as linked to the core concern of the refugee definition itself, namely whether it can truly be said that the refugee can presently "avail himself [or herself] of the protection" of his or her home state:

> In determining whether circumstances have changed so as to justify cessation under Article 1C(5) or (6), another crucial question is whether the refugee can effectively re-avail him- or herself of the protection of his or her own country. Such protection must therefore be effective and available. It requires more than mere physical security or safety. It needs to include the existence of a functioning government and basic administrative structures, as evidenced for instance through a functioning system of law and justice, as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood. An important indicator in this respect is the general human rights situation in the country.[47]

As such, it is not sufficient to find simply that the fundamental and durable reform has eliminated the particular well-founded fear of the refugee. Cessation is warranted only if and when an affirmative situation has been established,[48] namely the "restoration of protection"[49] to the refugee.[50] In line with this approach, the UN Committee on the Elimination of Racial Discrimination has adopted the view that "refugees ... have, after their return to their homes of origin, the right to participate fully and equally in public affairs at all levels and to have equal access to public services and to receive rehabilitation assistance."[51] Equally important, the principle that

[47] UNHCR, "Ceased Circumstances Guidelines," at paras. 15–16.

[48] In line with this understanding, four of the nineteen signatories to the Burundi peace agreement prevailed upon Tanzania to avoid the premature repatriation of refugees to Burundi, arguing that "tension was still high in Burundi, in spite of [the] recent installation of a transitional government as a formula for lasting peace conceived by the leaders of the Great Lakes region. They ... call[ed] for the formation of a special protection unit to protect all Burundians as [a] pre-condition[ ] for [repatriation]": "Dar es Salaam urged not to repatriate Bujumbura refugees," *TOMRIC*, Nov. 12, 2001.

[49] UNHCR, "Ceased Circumstances Guidelines," at paras. 15–16.

[50] The Executive Committee of UNHCR has endorsed the agency's Agenda for Protection, which calls upon "[c]ountries of origin ... to commit themselves to respecting the right to return and [to] receiving back their refugees within an acceptable framework of physical, legal and material safety, achievable, for example, through amnesties, human rights guarantees, and measures to enable the restitution of property, all of which should be appropriately communicated to refugees": Executive Committee of the High Commissioner's Program, "Agenda for Protection," UN Doc. EC/52/SC/CRP.9/Rev.1, June 26, 2002 (UNHCR Executive Committee, "Agenda for Protection"), at Part III, Goal 5, Point 2.

[51] UN Committee on the Elimination of Racial Discrimination, "General Recommendation No. XXII: Refugees and displaced persons" (1996), UN Doc. HRI/GEN/1/Rev.7, May 12,

protection must actually be "available" ensures that refugee status cannot be withdrawn in circumstances where the country of origin refuses to readmit the individual concerned.[52] For example, Bhutan has questioned the citizenship of many Bhutanese refugees awaiting repatriation from Nepal, in consequence of which they have been unable to return for more than a decade.[53] There clearly has been no restoration of protection in such circumstances, and hence refugee status should not be deemed to have come to an end.

Despite the clarity of its views on when cessation due to a fundamental change of circumstances is justified, UNHCR has not made the obvious – but critical – linkage between satisfaction of the test for cessation of status under Art. 1(C)(5)–(6) and the right of state parties mandatorily to repatriate former refugees to their country of origin.[54] While it is perhaps understandable that the agency is uncomfortable being seen to encourage governments to promote mandated repatriation, the failure to be explicit about the lawful consequence of valid cessation is intellectually disingenuous.[55] Because

2004, at 214, para. 2(d). Thus, for example, it is doubtful that protection was reestablished while reliance continued to be placed on Bosnian wartime property legislation which effectively precluded the return by refugees to their pre-1992 homes: "Two Years after Dayton: A View from Bosnia's Ombudsperson," (1988) 22 *Forced Migration Monitor* 1.

[52] "In some cases, persons who are not in need of international protection can, nonetheless, not be returned to their country. Return may be impossible even for those who did not leave for refugee-related reasons. Countries of origin may refuse to readmit nationals who do not volunteer to return, or who do not apply for travel documents; in some cases, the authorities may deny that the individual is their national, a dispute which may be difficult to resolve": UNHCR, "Return of Persons Not in Need of International Protection," UN Doc. EC/46/SC/CRP.36, May 28, 1996, at para. 7. In the context of Bosnia, the International High Representative reported that the rate of refugee return was dramatically slowed by both legal and bureaucratic impediments. "Closing loopholes in property legislation and firing foot-dragging officials (I removed 22 in one day alone) boosted the rate of minority returns": W. Petritsch, "In Bosnia, an 'entry strategy,'" *Washington Post*, July 2, 2002, at A-15.

[53] After many rounds of talks, only about 2.5 percent of the population seeking repatriation has been recognized by Bhutan as having its citizenship, and hence entitled to return: Human Rights Watch, "Nepal: Bhutanese refugees rendered stateless, leading global NGOs criticize screening process," June 18, 2003. As the Jesuit Refugee Service explained, "[m]ore than 70% [of the refugees] were classed as Category 2 or voluntary migrants, who would have to re-apply for citizenship if they wished to return; and this would involve a two-year probation period, following which their chances of being accepted as Bhutanese citizens are unclear": (2003) 135 *JRS Dispatches* (July 1, 2003).

[54] UNHCR indirectly recognizes the legality of enforced repatriation by observing that valid cessation of refugee status under Art. 1(C)(5)–(6) involves "loss of refugee status and the rights that accompany that status, and it may contemplate the return of persons to their countries of origin": UNHCR, "Ceased Circumstances Guidelines," at para. 25.

[55] "The promotion of involuntary repatriation if and when refugee protection ceases to be necessary is a pragmatic approach that represents an acceptable compromise between legitimate State concerns and the protection needs of refugees": Barutciski, "Involuntary Repatriation," at 254.

refugee status is a transitory status which survives only for the duration of risk, the right of states to require persons no longer in need of protection to return home needs explicitly to be acknowledged.[56] Not only is the failure to do so intellectually dishonest but, as elaborated below, it can have negative protection consequences for persons who remain refugees, as well as for former refugees subject to removal to their country of origin.

The rules which govern mandated repatriation are in fact fairly simple. Once the criteria for valid cessation of refugee status under Art. 1(C)(5)–(6) are satisfied, state parties are entitled to enforce the departure from their territory of any person who previously benefited from Convention refugee status. The only qualification on this right is the duty of the state to meet other requirements of international human rights law. In particular, account must be taken of the former refugee's rights to security of person; to be free from cruel, inhuman, or degrading treatment; and not to be subjected to arbitrary or unlawful interference with his or her family life.[57]

In contrast, however, UNHCR routinely insists that repatriation is lawful only if it is "voluntary,"[58] and if it can be accomplished "in safety, and with dignity."[59] This approach likely reflects a failure to distinguish between the right of states to undertake repatriation under the terms of the Convention (which is constrained principally by considerations of risk and the availability of protection, but not of voluntariness) and the institutional mandate of the UNHCR. In contrast to the Convention, UNHCR as an agency is expressly authorized to take part only in repatriation efforts which are "voluntary."[60] Because its mandate does not clearly distinguish between different kinds of

[56] This approach is readily reconcilable to respect for all rights set by the Refugee Convention: see J. Hathaway and A. Neve, "Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection," (1997) 10 *Harvard Human Rights Journal* 115.

[57] The implications of these duties are elaborated below, at pp. 944–952.

[58] See e.g. Lawyers' Committee for Human Rights, "General Principles Relating to the Promotion of Refugee Repatriation" (1992), at Principle 3, which erroneously insists that "[r]efugee repatriations must be voluntary." Rather than insisting on voluntariness as a legal requirement, the more defensible position is to refer to its logic as a barometer of protection. Amnesty International, for example, has sensibly suggested that a focus on voluntariness "helps ensure that refugees' rights and dignity are respected. It increases the likelihood that the returning population will be able to successfully reintegrate and rebuild. Voluntariness also recognizes that it is refugees themselves who are generally the best judges of whether conditions have become sufficiently safe in the country of origin. In that respect it plays an important protection role": Amnesty International, "Great Lakes Region: Still in Need of Protection: Repatriation, *Refoulement* and the Safety of Refugees and the Internally Displaced," Doc. No. AFR/02/07/97 (1997) (Amnesty, "Great Lakes Report"), at 4.

[59] UNHCR, "Voluntary Repatriation Handbook," at 11. See text below, at pp. 944–945.

[60] "The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by ... [a]ssisting governmental and private efforts to promote

repatriation – namely, those of persons who remain refugees, and those who have ceased to be refugees – UNHCR has opted to err on the side of caution, adopting the view that it will only become involved with repatriation (of any population) if there is consent by the persons to be repatriated.[61]

Because the overwhelming majority of repatriations of former refugees have to date involved returns from one less developed country to another,[62] this institutional position – setting voluntariness as the core criterion for UNHCR involvement in the return of any population, including both refugees and persons whose refugee status has ceased – has eclipsed the development of a clear understanding of the rules of repatriation rooted in the principles of the Refugee Convention. Lacking the resources to effectuate repatriation on their own, poorer countries have generally turned to UNHCR to underwrite and/or conduct the repatriation effort.[63] When it chooses to participate, UNHCR understandably takes the view that it must operate in

voluntary repatriation": UNHCR Statute, at Art. 8(c). Beyond this authority, UNHCR may engage in other repatriation activities only with the authorization of the General Assembly of the United Nations: UNHCR Statute, at Art. 9. The Executive Committee of UNHCR has recently gone beyond this constraint in a modest way, calling upon the agency to "tak[e] clear public positions on the acceptability of return of persons found not to be in need of international protection": UNHCR Executive Committee Conclusion No. 96, "Conclusion on the Return of Persons Found Not to be in Need of International Protection" (2003), at para. (j)(ii), available at www.unhcr.ch (accessed Nov. 20, 2004). The reference to persons not in need of international protection refers, however, only to persons not initially entitled to recognition of Convention refugee status.

[61] See UNHCR, "Voluntary Repatriation Handbook," at 5–8. While this is undoubtedly a very cautious reading of its authority, UNHCR's disinclination to become involved in mandatory repatriation may well be critical to its ability to secure and maintain the trust of refugees, and more generally to avoid any possible conflict of interest with its overarching responsibility to champion the protection of refugees. Art. 8(c) of its Statute clearly does not prohibit participation by UNHCR in the mandated repatriation of persons who are no longer refugees, since these persons presumptively cease to be persons under the competence of UNHCR: UNHCR Statute, at Art. 6. But neither is the agency expressly authorized to lend its assistance to mandated repatriation efforts absent authorization from the General Assembly under Art. 9.

[62] For example, in 2002 more than 2,250,000 Afghans returned home from Pakistan and Iran. Other large-scale returns in that year included those of more than 80,000 Angolans from Zambia and the Democratic Republic of Congo; more than 50,000 Burundians returning from Tanzania; over 75,000 Sierra Leoneans from Guinea and Liberia; and more than 30,000 East Timorese from Indonesia. In the same year, the only developed country to achieve five-figure return statistics was Bosnia Herzegovina, which effected nearly 17,000 returns to Serbia and Montenegro: UNHCR, "2002 UNHCR Population Statistics," Aug. 4, 2003, at Table 10.

[63] In 2002, for example, the governments of Burundi and Tanzania announced that they would "send a delegation to UNHCR headquarters in Geneva to petition for allowing repatriation to all areas in Burundi ... [A UNHCR spokesperson] said that at a recent tripartite meeting, a request had been made to the UN for funding to allow both governments to conduct the repatriations themselves": *UN Integrated Regional Information Networks*, July 8, 2002.

line with what it reads as its statutory mandate to effect only *voluntary* repatriation. As such, fiscal reality in much of the South has meant that the dominant standard for repatriation is not truly Convention-based at all, but is rather structured to meet the requirements of UNHCR's institutional mandate to undertake only "voluntary repatriation."[64]

It might be thought that the resultant absence of a Convention-based understanding of the norms governing repatriation would be of little more than academic interest. If anything, reliance on the voluntary repatriation standard might be thought to compel the host country to recognize a continuing duty to protect a person whose refugee status had ceased, but who refused to be repatriated. While arguably unfair to state parties, insistence on compliance with UNHCR's institutional precondition to repatriation would at least have the virtue of erring on the side of protection. But in practice, this is not necessarily so.

Most fundamentally, state practice in the less developed world is not simply to inject a voluntarism requirement into the inquiry under Art. 1(C)(5)–(6) regarding whether refugee status can lawfully be withdrawn due to a fundamental change of circumstances in the country of origin. Instead, the pattern is for governments in most of the less developed world to take UNHCR involvement in a given repatriation effort as a sufficient *imprimatur* for the termination of their own duty to protect the refugees in question, without any real attention being paid to the criteria for cessation of status. This practice can result in the de facto premature termination of refugee status.[65] This confusion occurs because UNHCR as an agency

[64] As Zieck has observed, "[i]n comparison to the time when 'voluntary repatriation' functioned predominantly in the form of the possibility to refuse repatriation, as an eligibility criterion in order to protect those who were considered to have valid reasons against returning, 'voluntary repatriation' now functions as a mode of cessation of refugee status": M. Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (1997) (Zieck, *Voluntary Repatriation*), at 430. The historical reasons for undue attention being paid to UNHCR's approach to repatriation, in contrast to the development of an authentic understanding of repatriation based upon the terms of the Refugee Convention itself, are set out in Hathaway, "Repatriation."

[65] "UNHCR has organized itself to facilitate repatriation ... As evidenced by its healthy and thoroughgoing debate over how far it could venture toward repatriation without violating refugee rights, UNHCR was no mere plaything in the hands of states, but rather had the capacity for reasoned reflection and exhibited some relative autonomy ... But soon there developed a repatriation culture that left refugees at greater risk ... [A] repatriation culture means that UNHCR is oriented around concepts, symbols, and discourse that elevates the desirability of repatriation, coats it in ethical luster, and makes it more likely that repatriation will occur under more permissive conditions": M. Barnett, "UNHCR and Involuntary Repatriation: Environmental Developments, the Repatriation Culture, and the Rohingya Refugees," paper presented at the 41st Annual Convention of the International Studies Association, Los Angeles, Mar. 14–18, 2000, available at www.ciaonet.org/isa (accessed Nov. 22, 2003).

frequently becomes involved with repatriation before the requirements of the Convention's change of circumstances cessation clause are met.[66] Indeed, its Executive Committee has instructed UNHCR that "[f]rom the outset of a refugee situation, the High Commissioner should at all times keep the possibility of voluntary repatriation for all or part of a group under active review and the High Commissioner, whenever he deems that the prevailing circumstances are appropriate, should actively pursue the promotion of this solution."[67] In reliance on this instruction, UNHCR has adopted a spectrum of institutional positions on repatriation, which explicitly includes the facilitation of return "even where UNHCR does not consider that, objectively, it is safe for most refugees to return":[68]

> While the condition of fundamental change of circumstances in the country of origin will usually not be met in such situations, UNHCR may consider facilitating return in order to have a positive impact on the safety of refugees/returnees as well as to render assistance which the refugees may require in order to return. Such assistance may have to be given in the absence of formal guarantees or assurances by the country of origin for the safety of repatriating refugees, and without any agreement or understanding having been concluded as to the basic terms and conditions of return.[69]

Critically, this *institutional* preparedness to facilitate repatriation before cessation due to change of circumstances is established is explicitly predicated on ascertainment that the refugees themselves understand the risks of going home, but are nonetheless determined to do so. Because no UNHCR

[66] For example, UNHCR justified its facilitation of repatriation to northern Burundi in 2002 on the grounds that the region (though not the country as a whole) was "deemed relatively secure": "Dwindling numbers of refugees opting for repatriation," *UN Integrated Regional Information Networks*, July 8, 2002. The agency launched a repatriation exercise for refugees in Zambia "because the peace process[es] in war-torn neighbouring countries are progressing well": "UNHCR to begin repatriation of refugees in Zambia," *Zambezi Times*, Sept. 17, 2002, quoting UNHCR Country Representative Ahmed Gubartala.

[67] UNHCR Executive Committee Conclusion No. 40, "Voluntary Repatriation" (1985), at para. (e), available at www.unhcr.ch (accessed Nov. 20, 2004). See also UNHCR Executive Committee Conclusion No. 101, "Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees" (2004), at para. (e), available at www.unhcr.ch (accessed Nov. 20, 2004), in which it is "[r]eaffirm[ed] that voluntary repatriation should not necessarily be conditioned on the accomplishment of political solutions in the country of origin in order not to impede the exercise of the refugees' right to return."

[68] UNHCR, "Voluntary Repatriation Handbook," at 15.

[69] Ibid. Indeed, the Executive Committee has "[e]mphasiz[ed] that some legal or administrative issues may only be addressed over time; and recogniz[ed] that voluntary repatriation can and does take place without all of the legal and administrative issues . . . having first been resolved": UNHCR Executive Committee Conclusion No. 101, "Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees" (2004), at Preamble, available at www.unhcr.ch (accessed Nov. 20, 2004).

repatriation can lawfully occur absent the refugee's free and informed consent, it cannot sensibly be suggested that UNHCR's facilitation of what is arguably premature repatriation is rights-violative. Indeed, particularly where it is clear that refugees will in any event go home, UNHCR assistance may well be key to avoiding unnecessary risks to their safety or security.[70] But governments accustomed to taking their cue on repatriation from UNHCR – or, less charitably, anxious to exploit an opportunity for rationalization provided by UNHCR – have invoked the agency's participation in the repatriation of a given refugee population to justify their own less-than-truly-voluntary repatriation initiatives.

In an extreme case, the Tanzanian government announced in early December 1996 that "all Rwandese refugees in Tanzania are expected to return home by 31 December 1996."[71] This announcement, "endorsed and co-signed by the UNHCR,"[72] resulted in the return of more than 500,000 refugees within the month.[73] Yet the criteria for cessation under Art. 1(C)(5)–(6) could not possibly have been met in the circumstances: fair trials were only beginning in Rwanda, disappearances and deliberate killings were continuing there, and there was no reason to believe that Rwanda could meet

[70] "For UNHCR, charged with protecting refugees and finding durable solutions for their problems, the standard criteria for return are 'voluntary repatriation in safety and dignity,' preferably in an organized fashion and with the co-operation of the governments of both the host country and the country of origin. But refugees often decide to return independently, according to their own pace and criteria. UNHCR is then left with the choice of refusing to assist in the process, which would undermine the refugees' autonomy and jeopardize their chances of successful return, or of facilitating it despite reservations. In practice, the only forms of repatriation that UNHCR refuses to assist are those that are enforced": UNHCR, *The State of the World's Refugees 1993* (1993), 104–106.

[71] Amnesty, "Great Lakes Report", at 2.

[72] "On December 5, 1996 ... UNHCR distributed information sheets to refugees about the repatriation exercise, including the immediate suspension of economic and agricultural activities in the camps ... During the repatriation exercise, UNHCR provided both financial and logistical assistance to the Tanzanian government": B. Whitaker, "Changing Priorities in Refugee Protection: The Rwandan Repatriation from Tanzania," UNHCR New Issues in Refugee Research Working Paper No. 53, Feb. 2002, at 1–2. UNHCR pronounced itself satisfied that the returns were in fact voluntary despite solid evidence to the contrary. See Amnesty, "Great Lakes Report," at 2; US Committee for Refugees, *World Refugee Survey 1997* (1997), at 99–100.

[73] "Initially tens of thousands of refugees fled the [Tanzanian] camps and attempted to move further into Tanzania, in the hope of reaching neighbouring countries. The Tanzanian security forces intercepted the fleeing refugees and 'redirected' them towards the Rwandese border ... Reports now indicate that some refugees who refuse to go back are being arrested and held in a detention camp ... Other refugees who wished to remain were undoubtedly forced back in the rush": Amnesty, "Great Lakes Report," at 2. Importantly, it was only *after* the returns occurred that UNHCR "expressed hope that Tanzania [would] institute a screening procedure to evaluate the claims of individuals too fearful to return": ibid.

the basic needs of the returning refugees.[74] Again, in 2002, UNHCR announced that it had received "assurances [from] the Tanzanian and Rwandan governments that security in Rwanda *had improved* [emphasis added],"[75] and sanctioned the *voluntary* repatriation of the remaining 20,000 Rwandan refugees living in Tanzania.[76] Yet even the spokesperson for a partner agency participating in the ensuing "voluntary" repatriation conceded that the repatriation actually conducted by Tanzania relied upon an "impetus" in the form of "verbal pressure"[77] – in particular, a firm year-end deadline for the refugees' departure.[78] In at least some instances, officials implementing the program used brute force to compel even long-term Rwandan residents to leave the country.[79]

[74] Ibid. at 5–6.

[75] It is noteworthy that at this time, the training of judges who would preside over the trial of persons accused of all but the highest category of genocide crimes had only been commenced. It was therefore not surprising that Rwandan refugees continued to express grave reservations about the practical efficacy of commitments to protect them from retaliation: "Focus on Rwanda refugees in Tanzania," *UN Integrated Regional Information Networks*, May 9, 2002.

[76] "Rwandan refugees to be out by December 31," *East African*, Oct. 14, 2002.

[77] "Thousands more refugees seek repatriation," *UN Integrated Regional Information Networks*, Jan. 9, 2002, quoting Mark Wigley, deputy director of Norwegian People's Aid. In the context of a subsequent effort by Tanzania to repatriate refugees to Burundi, a consortium of US-based non-governmental organizations called upon the Tanzanian government to "cease placing political and psychological pressure" on the refugees to return: "NGOs concerned over voluntary repatriation of refugees," *UN Integrated Regional Information Networks*, May 15, 2002.

[78] "In late September 2002, UNHCR and the governments of Tanzania and Rwanda convened a tripartite meeting in Geneva ... to discuss durable solutions for refugees living in Tanzania. The officials ... found that, *inter alia*, '[p]ressure exerted by the governments of Tanzania and Rwanda on Rwandan refugees living in Tanzania and on UNHCR officials in Tanzania and Rwanda played a significant role in unnecessarily hurrying the voluntary repatriation program'": J. Frushone, "Repatriation of Rwandan Refugees Living in Tanzania," US Committee for Refugees, Jan. 10, 2003. Indeed, "[n]ewspapers in Eastern Africa have reported that Tanzania will forcibly send 2,000 Rwandan refugees living in the camps in western Tanzania back to Rwanda. The 2,000 are those who refused to return home during the recent voluntary repatriation, citing insecurity in their home country as the reason for remaining ... The feeling in the Tanzanian government is that there is no need for the refugees to remain because the security situation in Rwanda is now stable. Earlier this month, Tanzania's Home Affairs Minister, Mr. Omar Ramadhan Mapuri, warned that Tanzania might be forced to repatriate all the refugees living in the country if the international community does not intervene in the serious food crisis facing the refugees": (2003) 127 *JRS Dispatches* (Feb. 28, 2003).

[79] "The President of the National Repatriation Commission ... [said] that the move by the Tanzanian government had caught more than the evictees by surprise. 'We had not anticipated this. We asked them to stop the process for some time so that we can talk with them and work out the modalities of how it should be done' ... [Tanzanian ambassador to Rwanda] Mwakalindile admits that the forced repatriation may not have

In short, because of the failure clearly to articulate the standards which govern mandated repatriation – indeed, because of what amounts to a conflation of the rules for what are substantively distinct frameworks for return under the singular rubric of "voluntary repatriation"[80] – it is too easy for governments simplistically to invoke UNHCR repatriation activities as authorization for repatriation in general, thereby avoiding the more exacting requirements for cessation of status which in fact bind them.[81]

Second, even host states not seeking to avoid their protection obligations may be misled by the failure clearly to distinguish between UNHCR's institutional policies on repatriation and the repatriation authority of state parties. In particular, the existence of a large-scale UNHCR-authorized repatriation effort can be taken to suggest the propriety of repatriation as a general policy, equally open to state parties.[82] Despite the formal requirements of the Refugee Convention for cessation of refugee status, there is in practice a

been handled appropriately": "Forced to go home: Rwandan immigrants in Tanzania," *Internews*, Apr. 15, 2003. "The last convoy [of Rwandan refugees] to depart Tanzania carried refugees who alleged that Tanzanian authorities threatened to burn down their homes if they refused to leave the country. UNHCR insisted, however, that 'those repatriated were refugees who had voluntarily signed up ... to return home'": US Committee for Refugees, *World Refugee Survey 2003* (2003), at 100.

[80] The confusion on this point is reinforced by UNHCR itself. For example, in its discussion of repatriation consequent to the application of Art. 1(C)(5)–(6), the agency notes that the "Convention does not address the question of *voluntary* repatriation of refugees directly [emphasis added]": UNHCR, "Voluntary Repatriation Handbook," at 8–10. Not only is there no explicit recognition of the right of states to enforce involuntary repatriation when the criteria of Art. 1(C)(5)–(6) are met, but the Handbook obfuscates by making the (technically accurate) general assertion that "[t]he principle of voluntariness is the cornerstone of international protection with respect to the return of refugees" (ibid. at 10) without simultaneously acknowledging its non-applicability to persons who have ceased to be refugees. Despite a recent and more candid approach to the issue of cessation itself (see UNHCR, "Ceased Circumstances Guidelines," at para. 7), no comparable frankness on the consequential right of mandated repatriation has been forthcoming.

[81] Even as UNHCR has acknowledged the difference between its own standards for voluntary repatriation and the right of states to invoke the cessation clauses, its own language contributes to confusion on this point. See e.g. UNHCR, "Ceased Circumstances Guidelines," at para. 29: "Voluntary repatriation can take place at a lower threshold of change in the country of origin, occurring as it does at the express wish of the refugee, who may also have personal reasons for repatriating, regardless of the situation prevailing in the country of origin. Therefore, the facilitation or promotion of voluntary repatriation by UNHCR does not necessarily mean that the cessation clause should be applied. However, where large-scale voluntary repatriation is organized against a backdrop of fundamental changes and providing that such fundamental changes stabilize and can eventually be considered as durable, the cessation clause may be invoked at an appropriate later time."

[82] The point is not that UNHCR intends to provide comfort to states anxious to avoid the strictures of Art. 1(C)(5)–(6); to the contrary, as discussed above, at pp. 922–928, its formal positions clearly adumbrate strict requirements for cessation. But because these requirements are not linked to the right of states to effect mandated repatriation, the opportunity for confusion and obfuscation arises.

common assumption that state parties should look to UNHCR's positions to determine when refugee status may legitimately be ended. For example, the Zambian Home Affairs Permanent Secretary was quoted as having said that his country was "not in a hurry to repatriate the more than 5,000 Rwandan refugees currently in the country until the United Nations signs a cessation clause *to strip them of their status* . . . He said the repatriation procedures and endorsement were done by the international community and the host nation *only gave a helping hand* to the UNHCR [emphasis added]."[83]

The difficulty with deference of this kind is that UNHCR as an agency will on occasion be under pressure to proceed quickly to repatriate refugees – albeit on a voluntary basis – particularly where there is a perceived need to be supportive of more broadly based political and social transitions. For example, Mafwe refugees from Namibia anxious for their security by reason of their pro-secessionist activities were assured by UNHCR that they should accept repatriation because the situation in Namibia was "calm," and the Namibian government deserved "a pat on the back."[84] Similarly, UNHCR launched a regional initiative in 2003 to promote the voluntary repatriation of some 500,000 Angolan refugees from Zambia, Namibia, and the Democratic Republic of Congo. The exercise – referred to as "organized voluntary repatriation"[85] – was predicated on the existence of "current peace"[86] in a country just emerging from more than a quarter of a century of civil war, and UNHCR's view that "acceptable conditions"[87] prevailed there. While promoted as integral to the success of a national reconstruction

[83] "Repatriation of Rwandan refugees voluntary," *Times of Zambia*, Mar. 3, 2003.

[84] "Scared refugees reluctant to return home," *African Church Information Service*, Mar. 24, 2003, quoting Cosmos Chanda, UNHCR representative to Botswana.

[85] "Authorities sign repatriation accords with Zambia and Namibia," *Angola Press Agency*, Nov. 28, 2002.

[86] "Angolan refugees leave for home in May," *Times of Zambia*, Mar. 5–13, 2003, quoting Zambian Home Affairs Permanent Secretary Peter Mumba. Not even UNHCR appears to have believed that a definitive peace had been established when the promotion of repatriation was agreed to. UNHCR spokesperson Lucia Teoli observed that "[p]revious attempts to bring people back home failed because of the ongoing war, but since the cease-fire in April, most people and leaders believe that peace is irreversible in the country. *The UNHCR is optimistic about this attempt* [emphasis added]": "First wave of Angolan refugees to go home next year," *UN Integrated Regional Information Networks*, Nov. 28, 2002.

[87] "UNHCR prepares to start repatriating Angolans," *Namibian*, Apr. 23, 2003, quoting an interview with UNHCR Senior Protection Officer Magda Medina and Public Information Officer David Nthengwe. "The regional coordinator for the Angolan Refugees Repatriation Operations, Kallu Kalumiya, who is based in Geneva . . . said despite progress made so far, there was still insecurity in Angola and also millions of land mines were laid during Angola's long civil war": "Angolan refugees to head home," *Namibian Economist*, Dec. 6, 2002.

program for Angola,[88] some refugees were deeply opposed to the initiative, particularly in view of the disastrous attempt to promote their repatriation based upon another cease-fire in 1994.[89] Clearly, no sound case could be made that conditions in either Namibia or Angola were such as to allow state parties validly to deem their refugee status to have come to an end. Yet this point was not made to governments, which enthusiastically embraced repatriation as the right response in the circumstances.

Even less happily, UNHCR's determination to end its mandate in relation to particular refugee groups, and to promote their repatriation, may at times reflect no more than the need to reduce long-term-care expenditures in an era of shrinking budgets, financial insecurity, and increased political pressure from states.[90] Indeed, the Angolan repatriation was reported to have been driven in part by concerns "to ease logistical pressure on both the [host] government[s] and UNHCR, which have had to look after a rapidly expanding refugee population in a time of dwindling resources."[91] More clearly still, UNHCR's decision to end assistance to, and step up the "voluntary" repatriation of, Muslim Rohingya refugees to Burma – despite the continued reality of grave and systematic discrimination, including the denial to them of citizenship – really cannot be explained on protection grounds.[92] Particularly

[88] "UNHCR addresses returnee concerns," *UN Integrated Regional Information Networks*, Mar. 14, 2003, quoting UNHCR regional spokesperson Fidelis Swai.

[89] "Most refugees from the former Portuguese colony are reluctant to go back to the land of their forefathers unless they are assured of a durable cease-fire between Unita and the MPLA government. Even the news that former Unita leader Jonas Savimbi is dead and buried, and [that] the country is on a reconstruction course, is not good enough to convince them. But you would not blame them entirely for dragging their feet over their return to their homeland. Their fears may be well-founded ... [Some] are jittery [because] someone told them in 1994, shortly after the Lusaka Peace Protocol was signed between Unita and the MPLA government, that there was peace in Angola and they, therefore, could return to their country. They are fearful because most of those, if not all, who returned received a rude shock when they were greeted with barrels of guns": "Angolan refugees reluctant to return home," *Times of Zambia*, Mar. 18–26, 2003.

[90] As Amnesty International noted in a stinging critique of UNHCR's decision to assist Tanzania's December 1996 enforced repatriation of Rwandans, "[t]hat [protection] oversights were possible, were legitimized by UNHCR, and were so readily accepted by the international community speaks volumes. Does the world remain committed to protecting refugees, or do we now emphasize return, for political and financial reasons, over safety?": Amnesty, "Great Lakes Report," at 3.

[91] "40,000 refugees return home from Zambia," *Zambezi Times*, Apr. 16, 2003.

[92] "While conditions for Rohingya inside Burma have hardly changed in the last decade, what appears to have changed is UNHCR's policy towards Rohingya concerning rights to UNHCR protection and support. By stepping up repatriation efforts and reducing assistance to refugees ... UNHCR has created an environment in which protection for the Rohingya is virtually untenable": Refugees International, "Lack of Protection Plagues Burma's Rohingya Refugees in Bangladesh," May 30, 2003. "The aid group Doctors Without Borders (MSF) has accused Bangladesh's government of harassing thousands

when the language of enthusiasm for return is embraced by UNHCR – for example, its decision in early 2003 to "change its policy from merely facilitating to *actively promoting* repatriation to Rwanda ... [under a plan] *harmonised and implemented across Africa* [emphasis added]"[93] – a signal is sent to governments that repatriation is really the appropriate course of action for states themselves to pursue.

In sum, the importation of UNHCR's more fungible voluntary repatriation standard into what should be decisions about repatriation consequent to a change of circumstances in countries of origin has in many cases proved a less than sanguine development. While the reliance on voluntarism – whether or not there has been a fundamental change of circumstances in the country of origin – may well be appropriate as a standard for agency involvement in repatriation, a clear line needs to be drawn between the standard governing UNHCR institutional efforts and that which sets the contours for repatriation conducted by state parties. Whether expressly or by tacit implication, the institutional standard has in practice been relied upon to justify the premature repatriation of refugees by state parties without full benefit of the safeguards upon which UNHCR insists for the conduct of its own repatriation work.

In fairness to host governments, it must be said that UNHCR has recently taken positions which suggest that governments *should be* guided by its institutional decisions about when to pursue repatriation. Indeed, such deference is now said by UNHCR to be part of the "responsibilities of the host country."[94] Against the backdrop of such pronouncements, even host governments firmly committed to protection may on occasion feel under pressure to acquiesce in the agency's repatriation plans. For example, Zambia raised concerns about the risks of land mines for Angolan refugees slated for repatriation by UNHCR, but was reportedly lobbied by UNHCR to acquiesce

of Muslim refugees from Myanmar in an attempt to force them to return home. 'In recent months, staff from MSF received over 550 complaints of coercion from the refugees,' MSF said in a statement, adding that complaints ranged from 'incidents of intimidation to outright threats of physical abuse to push people to repatriate.' The aid agency also called into question the voluntary nature of the repatriation of the remaining 19,000 refugees from Myanmar's Rohingya minority, which is being supervised by the UN refugee agency": "Bangladesh forcing out Myanmar refugees: MSF," *Agence France Presse*, Sept. 18, 2003.

[93] "5,000 refugees to be repatriated from Zambia," *UN Integrated Regional Information Networks*, Jan. 20, 2003, quoting UNHCR's Regional Coordinator for the Great Lakes Region, Wairimu Karago. This policy shift was apparently justified on the basis of a belief that the Rwandan justice system was positioned to deal with genocide allegations more quickly and fairly: ibid.

[94] UNHCR, "Voluntary Repatriation Handbook," at 12. Specifically, UNHCR asserts that "[t]he country of asylum should respect the leading role of UNHCR in promoting, facilitating and coordinating voluntary repatriation": ibid.

in the return. The agency sought to reassure Zambia that even though many areas were "heavily mined . . . '[w]ith the funding UNHCR has received, we will be expanding our presence in those areas of resettlement to ensure that people are *reminded of the threat* of land mines. So the problem *is addressed* [emphasis added].'"[95]

The blurring of the line between the circumstances under which UNHCR may legitimately promote the genuinely voluntary return of refugees and the conditions which justify the withdrawal of protection by a state party is most intense when UNHCR opts not simply to withdraw its assistance from a group of refugees, or even to encourage their repatriation, but instead to issue what it refers to as a "formal declaration of general cessation."[96] The legal relevance of such declarations is understandably ambiguous to states and others. Subject to the views of the Economic and Social Council, UNHCR may apply the changed circumstances cessation clause to refugees in receipt of its institutional protection or assistance.[97] On the other hand, states – and only states – are entrusted with the responsibility conscientiously to apply the cessation clause to refugees in receipt of their protection.[98] Despite this clear

[95] "UNHCR addresses returnee concerns," *UN Integrated Regional Information Networks*, Mar. 14, 2003, quoting UNHCR regional spokesperson Fidelis Swai; see also "Zambia: Plans for return of refugees finalised," *Africa News*, Mar. 17, 2003, confirming UNHCR's efforts to downplay Zambian concerns regarding the safety and security of conditions for return in Angola. In fact, even after UNHCR had announced that the road linking Maheba refugee settlement in Zambia with Cazombo in Angola was free of mines, "the return of more than 400 Angolan refugees . . . was postponed due to the discovery of a mine on June 10, two days before the beginning of the planned repatriation": "Angola: Preparations for the Beginning of the Organised Repatriation of Refugees," (2003) 135 *JRS Dispatches* (July 1, 2003).

[96] UNHCR, "Ceased Circumstances Guidelines," at n. 3. Historical examples include "Applicability of the Cessation Clauses to Refugees from Poland, Czechoslovakia and Hungary," Nov. 15, 1991, "Applicability of Cessation Clauses to Refugees from Chile," Mar. 28, 1994, "Applicability of the Cessation Clauses to Refugees from the Republics of Malawi and Mozambique," Dec. 31, 1996, "Applicability of the Cessation Clauses to Refugees from Bulgaria and Romania," Oct. 1, 1997, "Applicability of the Ceased Circumstances Cessation Clauses to pre-1991 Refugees from Ethiopia," Sept. 23, 1999, and "Declaration of Cessation – Timor Leste," Dec. 20, 2002: ibid.

[97] But despite prevailing practice, the UNHCR's Statute does not actually foresee the possibility of an *en bloc* withdrawal of protection by the agency from an entire group of refugees, at least where the refugees concerned fall within its core competence. To the contrary, it is provided simply that "[t]he competence of the High Commissioner shall cease to apply to *any person* [emphasis added]" who falls within one of six cessation clauses, all expressly framed in individuated terms: UNHCR Statute, at Art. 6(A)(ii).

[98] In the same year during which they debated the issue of legal standards for repatriation, the states that make up UNHCR's Executive Committee affirmed that "refugee protection is primarily the responsibility of States, and . . . UNHCR's mandated role in this regard cannot substitute for effective action, political will, and full cooperation on the part of States": UNHCR Executive Committee Conclusion No. 81, "General Conclusion on

delineation of responsibilities, the agency has recently sought to give more weight to its own institutional positions on cessation:

> The Executive Committee Conclusion 69 affirms that any declarations by UNHCR that its competence ceases to apply in relation to certain refugees may be useful to States in connection with the application of the cessation clauses. Where UNHCR has made a declaration of cessation of its competence in relation to any specified group of refugees, States may resort to the cessation clauses for a similar group of refugees if they deem it appropriate and useful for resolving the situation of these refugees in their territory.[99]

This ambition effectively to determine the issue of cessation for state parties is most clearly seen in the way in which UNHCR speaks about changes to the application of its institutional mandate. For example, the High Commissioner for Refugees is reported to have stated during a visit to Africa that "Rwanda is safe for refugees in Tanzania and Uganda . . . 'In Tanzania, we informed the refugees that they could return to Rwanda. Some have returned, but many remain,' he said . . . Such people, he said, *were 'not refugees anymore* [emphasis added].'"[100] A similar elision of institutional and Convention-based determinations can be seen even in UNHCR's more formal statements. For example, a press release of May 8, 2002 was headed, "UNHCR Declares Cessation of Refugee Status for Eritreans," and stated:

> UNHCR announced . . . that it is ending refugee status for all Eritreans who fled their country as a result of the war of independence or the recent border conflict between Ethiopia and Eritrea. The world-wide cessation will take effect on December 31 and will affect hundreds of thousands of Eritreans in neighbouring countries.[101]

Only near the end of the statement is the true scope of the declaration made clear, though still in language which suggests the logic of its more general applicability, and followed immediately by a reference to the process of cessation under the Refugee Convention:

International Protection" (1997), at para. (d), available at www.unhcr.ch (accessed Nov. 20, 2004).

[99] UNHCR, "Cessation," at para. 33. The same document candidly recognized, however, that "[t]he decision to apply the 'ceased circumstances' cessation clause lies with the State of asylum concerned": ibid. at para. 36. Its most recent statement on the issue, however, fails even to note that cessation decisions are, in fact, the duty of state parties to adjudicate: UNHCR, "Ceased Circumstances Guidelines."

[100] "Rwanda is safe for returning refugees, says UNHCR head," *UN Integrated Regional Information Networks*, Apr. 16, 2003.

[101] UNHCR, "UNHCR declares cessation of refugee status for Eritreans," Press Release, May 8, 2002, available at www.unhcr.ch (accessed July 14, 2003).

> "I believe that these two groups of refugees from Eritrea should no longer have a fear of persecution or other reasons to continue to be regarded as refugees," said Ruud Lubbers, UN High Commissioner for Refugees. "They will, therefore, cease to be regarded as refugees by my Office with effect from the end of this year."[102]

The critical point, however, is that there is no legal basis for state parties simply to defer to UNHCR's views on cessation as an alternative to domestic adjudication of the issue.

Perhaps ironically, reliance on UNHCR views regarding cessation of refugee status may also result in continued protection for persons no longer entitled to refugee status under the Convention. This dissonance follows from the fact that the cessation criteria which govern the work of UNHCR as an agency are very similar to, but not identical with, those which apply to the actions of state parties to the Refugee Convention. UNHCR enjoys a broader authority to retain under its competence persons who no longer face the risk of being persecuted so long as their reasons for refusing to accept the renewed protection of their own country are not simply rooted in economic or other considerations of personal convenience.[103] Under the Refugee Convention, in contrast, cessation of status is to follow once the changed circumstances test is met.[104] By virtue of an explicit compromise between the majority of drafters who favored a purely objective test of risk for refugee status and the minority who wished to allow refugees to retain their status based upon purely emotional or psychological reasons,[105] pre-1951 refugees were granted the right to invoke a proviso regarding "compelling reasons arising out of previous persecution" to retain their refugee status even after a relevant change of circumstances.[106] But for the future, refugee status was

[102] Ibid. The immediate next paragraph reads, "Both the 1951 Refugee Convention and the 1969 OAU Convention, which is applied in Africa, stipulate that the convention shall cease to apply to any refugee '. . . if he can no longer, because the circumstances in connection with which he was recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality'": ibid.

[103] "The competence of the High Commissioner shall cease to apply to any person . . . if . . . [h]e can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, *claim grounds other than personal convenience* for continuing to refuse to avail himself of the protection of the country of his nationality. *Reasons of a purely economic nature may not be invoked* [emphasis added]": UNHCR Statute, at Art. 6(f).

[104] "This Convention shall cease to apply to any person . . . if . . . [h]e 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": Refugee Convention, at Art. 1(C)(5).

[105] Hathaway, *Refugee Status*, at 66–69.

[106] "Provided that this paragraph shall not apply to a refugee *falling under section A(1)* of this article and who is able to invoke *compelling reasons arising out of previous persecution* for

reserved for those able to show a continuing objective risk of being persecuted. Because refugee status requires the ability to show "a present fear of persecution,"[107] refugees must be able to show that they "are or may in the future be deprived of the protection of their country of origin."[108]

Despite the clarity of the text of the Refugee Convention on this point, UNHCR has regrettably invoked an unwieldy claim of customary international law to assert not only the duty of states to apply the "compelling reasons" proviso to modern refugees,[109] but also to suggest a responsibility (in principle, if not in law) to read the Convention as the effective equivalent of its own Statute.[110] While all states have the sovereign authority to allow any person they wish to remain on their territory, and while it will often be humane and right to extend such generosity,[111] this is not a matter fairly understood to be required by either the text or purposes of refugee law.[112]

refusing to avail himself of the protection of the country of nationality [emphasis added]": Refugee Convention, at Art. 1(C)(5).

[107] Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.18, Feb. 8, 1950, at 6.

[108] Statement of Mr. Rochefort of France, UN Doc. A/C.3/529, Nov. 2, 1949, at 4.

[109] "Application of the 'compelling reasons' exception is interpreted to extend beyond the actual words of the provision to apply to Article 1A(2) refugees. This reflects a general humanitarian principle that is now well-grounded in State practice": UNHCR, "Ceased Circumstances Guidelines," at para. 21. Yet in the same document, UNHCR concedes that there is, in fact, a paucity of relevant state practice upon which to draw. "Due to the fact that large numbers of refugees voluntarily repatriate without an official declaration that conditions in their countries of origin no longer justify international protection, declarations [of cessation due to changed conditions] are infrequent": ibid. at para. 3. It is therefore questionable whether there is truly a sound basis to assert a clear norm of customary international law which effectively supersedes the text of the Refugee Convention.

[110] "In addition [to exemption based upon the effects of past persecution], the Executive Committee, in Conclusion No. 69, recommends that States consider 'appropriate arrangements' for 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.' In such situations, countries of asylum are encouraged to provide, and often do provide, the individuals concerned with an alternative residence status, which retains previously acquired rights, though in some instances with refugee status being withdrawn. Adopting this approach for long-settled refugees is not required by the 1951 Convention per se, but it is consistent with the instrument's broad humanitarian purpose and with respect for previously acquired rights": UNHCR, "Ceased Circumstances Guidelines," at para. 22.

[111] For example, the rationale for the extension of the proviso in US law to all refugees has been stated to be as "an expression of humanitarian considerations that sometimes past persecution is so horrific that the march of time and the ebb and flow of political tides cannot efface the fear in the mind of the persecuted": *Lal v. Immigration and Naturalization Service*, 255 F 3d 998 (US CA9, July 3, 2001).

[112] UNHCR has at times recognized as much. "The underlying rationale for the cessation clauses was expressed to the Conference of Plenipotentiaries in the drafting of the 1951 Convention by the first United Nations High Commissioner for Refugees, G. J. van

This point was recently affirmed in a detailed decision of the English Court of Appeal:

> Aspirations are to be distinguished from legal obligations. It is significant that a number of the [arguments] relied upon by the appellants are expressed in terms of what "could" or "should" be done ... This is not the language which one would expect if there was a widespread and general practice establishing a legal obligation ...
>
> Where one has clear and express language imposing a restriction upon the scope of a particular provision, as is the case with the proviso to Art. 1(C)(5), it must require very convincing evidence of a widespread and general practice of the international community to establish that that restriction is no longer to be applied as a matter of international law ... A number of states do adopt a more generous approach towards Art. 1(C)(5) than is required by the terms of the Convention itself, but they represent ... a minority of the signatories ...
>
> Moreover, it must be seen as significant that the international community did not take the opportunity at the time of the 1967 Protocol to amend the proviso to Art. 1(C)(5) when it was considering the temporal scope of the 1951 Convention ...
>
> One might think it desirable that states should ... recognise the humanitarian purpose which would be served by ignoring the restriction on the proviso to Art. 1(C)(5). But that is not enough to establish a legal obligation binding upon all parties to the Convention.[113]

This analysis is clearly compelling as a matter of law. But because UNHCR has been unwilling to distinguish between its own institutional cessation and repatriation authority and that of state parties to the Convention, the

Heuven Goedhart, who stated that refugee status should 'not be granted for a day longer than was absolutely necessary, and should come to an end ... if, in accordance with the terms of the Convention or the Statute, a person had the status of de facto citizenship, that is to say, if he really had the rights and obligations of a citizen of a given country.' Cessation of refugee status therefore applies when the refugee, having secured or being able to secure national protection, either of the country of origin or of another country, no longer needs international protection": UNHCR, "Cessation," at para. 4. Indeed, a footnote to the same document recognizes the hortatory nature of the advice to extend the proviso clause beyond its textual ambit. "The proviso expressly covers only those refugees falling under section A(1) of Article 1 of the 1951 Convention, that is, those persons who are considered as refugees under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization. However, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status suggests that the exception reflects a more general humanitarian principle and could also be applied to refugees other than those in Article 1A(1) of the 1951 Convention (see paragraph 136 of the Handbook)": ibid. at n. 8.

[113] *R (Hoxha) v. Secretary of State for the Home Department*, [2002] EWCA Civ 1403 (Eng. CA, Oct. 14, 2002).

authentic scope of the Refugee Convention was unnecessarily and unhelpfully muddied.

The risks of conflating the principles which govern UNHCR's decisions regarding voluntary repatriation and the requirements of refugee law binding on states are clear also from an examination of the rules which circumscribe the authority mandatorily to repatriate persons whose refugee status has ceased. Of contemporary relevance not only to governments in the less developed world, but also to industrialized countries increasingly prone to order mandated repatriation, there is real ambiguity in UNHCR's positions regarding the standards which govern the actual process by which lawful repatriation may be effected.

Because this is not a subject expressly addressed by the Convention, the agency has devised a series of policies for the guidance of states. In an early formulation, UNHCR's Executive Committee opined that repatriation must "be carried out under conditions of absolute safety."[114] The requirement for "absolute" safety has not, however, featured in more recent agency standards, which have instead posited the bifurcated duty to carry out repatriation "in safety, and with dignity."[115]

The first part of this notion – safety – is said specifically to require that repatriation be conducted so as to avoid "harassment, arbitrary detention or physical threats during or after return."[116] UNHCR has more recently noted as well that safety requires analysis of "physical security [during the process of return] ... including protection from armed attacks, and mine-free routes."[117] The second branch of the UNHCR standard, requiring that return be "with dignity," is frankly acknowledged by the agency to be "less

[114] UNHCR Executive Committee Conclusion No. 40, "Voluntary Repatriation" (1985), at para. (b), available at www.unhcr.ch (accessed Nov. 20, 2004).

[115] UNHCR Executive Committee Conclusion No. 65, "General Conclusion on International Protection" (1991), at para. (j); and UNHCR Executive Committee Conclusion No. 101, "Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees" (2004), at para. (a), both available at www.unhcr.ch (accessed Nov. 20, 2004). This standard is firmly incorporated in agency practice: UNHCR, "Voluntary Repatriation Handbook," at 11.

[116] UNHCR Executive Committee Conclusion No. 65, "General Conclusion on International Protection" (1991), at para. (j), available at www.unhcr.ch (accessed Nov. 20, 2004).

[117] UNHCR, "Voluntary Repatriation Handbook," at 11. The same standard regrettably refers also to considerations actually relevant to the determination of cessation itself, not of the safety of repatriation ("legal safety (such as amnesties or public assurances of personal safety, integrity, non-discrimination and freedom from fear of persecution or punishment upon return ... [and of] if not mine-free then at least demarcated settlement sites"): ibid. It similarly places considerations of material security ("access to land or means of livelihood") under the safety rubric, matters which ought instead to be addressed in the context of the requirement of a dignified return: see text below, at pp. 948 and 951–952.

self-evident than that of safety."[118] UNHCR defines "return with dignity" to require that "refugees are not manhandled; that they can return unconditionally . . . ; that they are not arbitrarily separated from family members; and that they are treated with respect and full acceptance by their national authorities, including the full restoration of their rights."

In practice, however, the fungibility of the "in safety, and with dignity" standard – particularly the fact that this language is not directly rooted in any clear legal obligations of states – is likely to engender confusion.[119] Because the language stands apart from binding norms of human rights law, the "in safety, and with dignity" standard can inadvertently send the signal that UNHCR is merely recommending best practice to governments. As much is clear from the Executive Committee's most recent attempt comprehensively to address the "legal safety issues" involved in refugee repatriation.[120] The relevance of international human rights law is relegated to a brief preambular reference,[121] followed by a series of specific recommendations which are merely "recognized," "stressed," "encouraged," or "noted."[122] To ensure that they are taken seriously, protection concerns would be better served by an explicit linkage to binding legal standards. While these may not encompass every constraint seen as desirable by UNHCR or others, all core concerns are encompassed in a way that clearly commands the respect of governments.

[118] UNHCR, "Voluntary Repatriation Handbook," at 11.

[119] Even those who advocate reference to the "safety" standard impliedly concede its fungibility. See e.g. G. Goodwin-Gill, *The Refugee in International Law* (1996) (Goodwin-Gill, *Refugee in International Law*), at 276: "So far as safe return may have a role to play in the construction of policy, its minimum conditions include a transparent process based on credible information . . . These or equivalent means seem most likely to ensure that the element of risk is properly appreciated, so reducing the chance of States acting in breach of their protection obligations."

[120] UNHCR Executive Committee Conclusion No. 101, "Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees" (2004), available at www.unhcr.ch (accessed Nov. 20, 2004).

[121] The Executive Committee "[n]ot[ed] the relevance for voluntary repatriation of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women": UNHCR Executive Committee Conclusion No. 101, "Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees" (2004), at Preamble, available at www.unhcr.ch (accessed Nov. 20, 2004). None of the requirements of these key human rights treaties are, however, expressly referenced in any of twenty paragraphs of specific recommendations of the Conclusion.

[122] UNHCR Executive Committee Conclusion No. 101, "Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees" (2004), at paras. (a)–(t), available at www.unhcr.ch (accessed Nov. 20, 2004).

Specifically, the duty to effect repatriation in safety can be said to be a matter of legal obligation, particularly in view of the requirements of Arts. 7 and 9(1) of the Civil and Political Covenant.[123] These binding standards require respectively that states not engage in "torture, or ... cruel, inhuman or degrading treatment or punishment"[124] and that they affirmatively ensure "security of person."[125] Under the jurisprudence of the Human Rights Committee, a state party is liable for the actions of its agents – logically including those involved in the process of repatriation – even if those actions occur outside the state's own borders.[126] The rights to be protected from

[123] See generally UN Human Rights Committee, "General Comment No. 20: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment" (1992), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 150. The European Union has affirmed the centrality of human rights norms to defining the right of repatriation. In its Council Directive on minimum standards for giving protection in the event of a mass influx of displaced persons and on the measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Doc. 2001/55/EC (July 20, 2001) (EU Temporary Protection Directive), the European Union agreed that protection should be ended only when "the situation in the country of origin is such as to permit safe and durable return ... with due respect for human rights and fundamental freedoms": ibid. at Art. 6(2). In the official commentary included with the Directive, the Commission refers specifically to the importance of there being conditions "guaranteeing respect for ... the rule of law": ibid., Commentary accompanying Art. 6(2).

[124] Civil and Political Covenant, at Art. 7. See generally chapter 4.3.2 above.

[125] Civil and Political Covenant, at Art. 9. See generally chapter 4.3.3 above.

[126] Under the Civil and Political Covenant, obligations inhere in "all individuals within [a state's] territory and subject to its jurisdiction": Civil and Political Covenant, at Art. 2(1). Rather than adopting a literal construction of this standard, the Human Rights Committee has embraced an interpretation oriented to respect for the objects and purposes of the Covenant. "Article 2(1) of the Covenant ... does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it ... [I]t would be unconscionable to ... 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": *Casariego v. Uruguay*, UNHRC Comm. No. 56/1979, decided July 29, 1981, at para. 12.3. In an Individual Opinion, Committee member Tomuschat offered a helpful explanation of why this result was compelled despite the possibility of a literal construction to the contrary. "To construe the words 'within its territory' pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would ... lead to utterly absurd results. The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligations of States parties to their own territory. All of these factual patterns have in common, however, that they provide plausible grounds for