with any standards.[113] It is in this political sense that a broad range of international human rights have standing *erga omnes*:[114] states must submit to scrutiny by the General Assembly and specialized human rights bodies, since human rights are legitimately matters of concern to all.[115] There is, however, no reason to equate this *droit de regard* with a legally binding obligation of states to comply with human rights norms that have neither attained status as universally binding norms, nor been specifically adhered to.[116]

Taken together, the dispositions of the Charter establish only a skeletal legal regime to enforce universal human rights. There are situation-specific duties to respect human rights that flow from fiduciary duties assumed by trustee states under Chapter XII, and consequential human rights duties set by the Security Council under its Chapter VII peace and security jurisdiction. In the absence of accession to more specific treaties, however, a more broadly based duty to respect human rights is in essence a function simply of a given state's vulnerability to whatever particular forms of international political pressure may be generated by the General Assembly and its subsidiary bodies.

In sum, and despite its intuitive appeal, there is little reason to believe that the human dignity of refugees can be adequately safeguarded simply by reliance on universally applicable norms of human rights law. Customary

[113] "[I]t is the Security Council which, exclusively, may order coercive action ... The word 'action' must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make ... because the General Assembly under Article 11 has a comparable power": *Certain Expenses of the United Nations*, [1962] ICJ Rep 151, at 163–165.

[114] As Ragazzi concludes in his comprehensive study of the subject of obligations *erga omnes*, the legal notion is more carefully constrained to include only a narrowly defined set of norms which set prohibitive duties, which bespeak basic instrumental principles, and which have already met the *jus cogens* standard: Ragazzi, *Erga Omnes*, at 215. But see J.-A. Carillo Salcedo, "Book Review: The Concept of International Obligations *Erga Omnes*," (1998) 92(4) *American Journal of International Law* 791, arguing for the effective merger of the legal and more broad-ranging notions of a norm *erga omnes*.

[115] "[T]he most interesting feature of this development is that the growing acceptance of the *erga omnes* character of human rights has not been limited to the basic rights of the human person only ... [T]he UN Assistant Secretary-General for Human Rights ... has emphasized that one of the accomplishments of the United Nations has been to consolidate the principle that human rights are a matter of international concern *that the international community is entitled to discuss* [emphasis added]": Meron, *Human Rights*, at 187–189.

[116] While the Court in *Barcelona Traction* affirmed that all states have a legal interest in the protection of "basic rights of the human person" (para. 34), it equally clearly denied that all rights affirmed in the Universal Declaration of Human Rights give rise to *erga omnes* enforceability. The right to protection against denial of justice (stipulated in Universal Declaration Arts. 7–11), for example, does "not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality" (para. 91): *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, [1970] ICJ Rep 3, at paras. 34, 91.

international law likely protects refugees from systemic racial discrimination, as well as from subjection to genocide or the most basic forms of slavery. General principles of law likely confirm these rights, and establish in addition the right to be protected from arbitrary deprivation of life, torture, and a broader range of discriminatory practices. The UN Charter, even if viewed as a general source of human rights, adds little if anything to this list. In short, without reference to treaty-based human rights law, and most specifically to the Refugee Convention and the Covenants on Human Rights, refugees would be entitled to no more than a bare minimum of rights.

1.3 An interactive approach to treaty interpretation

Even as much of the international law academy has embraced an extraordinarily expansionist understanding of both custom and general principles of law, there has been a failure adequately to develop the potential for treaty law to play a genuinely transformative role in the international system. The better place for liberality is not in defining what amounts to law – where state resistance can both be expected, and be dispositive in practical terms – but rather in the elaboration of the approach to be taken by courts and tribunals in the interpretation of rules of undisputed authority. Without doubt, the rules of treaty interpretation formally embraced by states afford significant room to secure many of the gains presumably of interest to those who posit expansionist theories of the sources of universally applicable law. And because the process of treaty interpretation operates in more formal and rule-oriented settings, it is better positioned to generate dependable and rights-regarding results.

To this end, the discussion here seeks to explain how the Vienna Convention's codification of the rules of treaty interpretation[117] should be applied in the context of human rights treaties generally, and in relation to the Refugee

[117] The Vienna Convention approach has been recognized by the International Court of Justice as embodying customary norms of treaty interpretation: *Kasikili/Seduda Island (Botswana v. Namibia), Preliminary Objections*, [1996] ICJ Rep 803, at 812; *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, [1994] ICJ Rep 6, at 21; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, [1991] ICJ Rep 53, at 69. Thus, for example, "[t]he WTO Panels and the Appellate Body rely on the treaty interpretation rules expressed in the Vienna Convention on the Law of Treaties as the basic rules for interpreting WTO instruments. This is because those rules are generally regarded as a codification of the public international law rules of treaty interpretation as a matter of general (or customary) international law": M. Lennard, "Navigating by the Stars: Interpreting the WTO Agreements," (2002) 5 *Journal of International Economic Law* 17 (Lennard, "Navigating by the Stars"), at 17–18. See also I. Sinclair, *The Vienna Convention and the Law of Treaties* (1984) (Sinclair, *Vienna Convention*), at 153: "There is no doubt that Articles 31 to 33 of the [Vienna] Convention constitute a general expression of the principles of customary international law relating to treaty interpretation."

Convention and Protocol in particular. There has for too long been an anachronistic fixation with literalism, with insufficient attention paid to the duty to read text in line with the context, object, and purpose of a treaty. It is suggested here that this approach misreads the authentic rules of treaty interpretation, and bespeaks a lack of creativity within the bounds expressly sanctioned by states.

While not seeking to promote a wholly teleological approach to treaty interpretation, the view advanced here is that account must be more rigorously taken of the clear duty to read the text of treaties in consonance with their fundamental purposes. To this end, courts charged with interpretation of the Refugee Convention have increasingly recognized that particular assistance is likely to be gleaned from the drafting history (largely as recorded in the *travaux préparatoires*) and by seeking to locate refugee law principles within the broader complex of general human rights obligations.

1.3.1 The perils of "ordinary meaning"

The well-known general rule of treaty interpretation, codified in Art. 31(1) of the Vienna Convention, is that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[118] Paragraph 2 of Art. 31 defines the "context" relevant to treaty interpretation; paragraph 3 requires that this understanding of a treaty's "context" be supplemented by interpretive agreements between the parties, subsequent practice in application of the treaty, and relevant rules of international law; and paragraph 4 validates special meanings intended to be given to treaty terms by the parties.[119] As emphasized by the International Law Commission, which drafted the provision,[120] this rather complex formulation was adopted in order

> to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus [Art. 31] is entitled "General *rule* of interpretation" in the singular, not "General *rules*" in the plural, because the Commission desired to emphasize that the

[118] Vienna Convention, at Art. 31(1).

[119] "Article 31(4) . . . was nearly deleted by the International Law Commission in a late draft of what became the Vienna Convention, on the basis that the so-called 'special' meaning would in any case be the 'ordinary' meaning in the particular context, in terms of the Article 31(1) rules. The reference to a special meaning does not seem to add much to the other provisions, probably only emphasizing the burden of proof resting on those claiming such a meaning": Lennard, "Navigating by the Stars," at 44–45.

[120] "The Commission's proposals . . . were adopted virtually without change by the Conference and are now reflected in Articles 31 and 32 of the Convention": Sinclair, *Vienna Convention*, at 115.

> process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.[121]

Art. 31(1) therefore embodies what is termed here an *interactive understanding* of treaty interpretation.[122] As Aust makes clear, "[a]though at first sight paragraphs 1, 2 and 3 might appear to create a hierarchy of legal norms, this is not so: the three paragraphs represent a logical progression, nothing more."[123] More specifically, Bos affirms that the article "refers the interpreter to the *concurrent* use of no less than three methods, *viz*., the grammatical (ordinary meaning to be given to the terms of the treaty), the systematic (in their context) and the teleological method (in the light of its object and purpose)."[124]

The guidance afforded by the International Court of Justice is similarly supportive of an interactive understanding of the basic rule of treaty interpretation.[125] The Court has determined that

> one must certainly start ... from the "ordinary meaning" of the terms used ... but not in isolation. For treaty interpretation rules there is no "ordinary meaning" in the absolute or the abstract. That is why Article 31 of the Vienna Convention refers to "good faith" and to the ordinary meaning "to be given" to the terms of the treaty "in their context and in light of its object and purpose." It is, therefore, a fully qualified "ordinary meaning" ... The elucidation of the "ordinary meaning" of terms used in the treaty to be interpreted requires ... that due account be taken of those various interpretative principles and elements, and not only of the words or expressions used in the interpreted provisions in isolation.[126]

[121] [1966] 2 *Yearbook of the International Law Commission*, at 219–220.

[122] This is to be distinguished from a hierarchical approach under which context, object, and purpose are to be considered only where a treaty's text cannot be relied upon to disclose its "ordinary meaning." See e.g. M. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points," (1957) 33 *British Yearbook of International Law* 203, at 204–207; and D. O'Connell, *International Law* (1970), at 253: "In so far as [the logic inherent in the treaty] can be discovered by reference to the terms of the treaty itself, it is impermissible to depart from those terms. In so far as it cannot, it is permissible."

[123] A. Aust, *Modern Treaty Law and Practice* (2000) (Aust, *Treaty Law*), at 187.

[124] M. Bos, "Theory and Practice of Treaty Interpretation," (1980) 27 *Netherlands International Law Review* 135 (Bos, "Theory and Practice"), at 145. See also P. Reuter, *Introduction to the Law of Treaties* (1995) (Reuter, *Law of Treaties*), at 75: "These carefully and subtly graduated elements constitute, primarily and simultaneously, the basic guidelines of interpretation."

[125] To the same effect, the European Court of Human Rights has determined that "[i]n the way in which it is presented in the 'general rule' of Article 31 of the Vienna Convention on the Law of Treaties, the process of interpretation is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article": *Golder v. United Kingdom*, [1975] 1 EHRR 524 (ECHR, Feb. 21, 1975), at para. 30.

[126] *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, [1992] ICJ Rep 351, at 719 (Separate Opinion of Judge Torres Bernandez).

Thus, "[t]he word obtains its meaning from the context in which it was used";[127] indeed, "[w]ords communicate their meaning from the circumstances in which they are used. In a written instrument their meaning *primarily* is to be ascertained from the context, setting, in which they are found [emphasis added]."[128]

There is, however, no doubt that literalism continues to have real appeal, particularly to governments and courts anxious to simplify their own task, or to be seen to be making "more objective" decisions. There is an undeniable comfort in the possibility of simply looking up a disputed term in the dictionary.[129] Yet this is false objectivity at its worst,[130] since it is surely right that "[e]tymological and grammatical bases are arbitrary and unreliable; their use is of limited theoretical value and fruitless as a method of proof."[131] The risks of dictionary-shopping[132] and of serious interpretive inconsistency are moreover magnified when there is more than one authentic linguistic version of a treaty,[133] nearly always the case for refugee and other international human rights treaties.[134]

[127] *Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization (IMCO)*, [1960] ICJ Rep 150, at 158.

[128] *Certain Expenses of the United Nations*, [1962] ICJ Rep 151, at 184 (Separate Opinion of Judge Spender).

[129] As Merrills has succinctly observed, "[i]nterpreting a text involves more than looking up the meanings of words in a dictionary": J. Merrills, *The Development of International Law by the European Court of Human Rights* (1993) (Merrills, *European Court*), at 76.

[130] McNair was of the view that the duty to give treaty terms their "ordinary meaning" "begs the question whether the words are, or are not clear – a subjective matter because they may be clear to one man and not clear to another, and frequently to one or more judges and not to their colleagues": Lord McNair, *The Law of Treaties* (1961) (McNair, *Treaties*), at 372.

[131] Bos, "Theory and Practice," at 149.

[132] "[I]t is an approach which lends itself to an unseemly ransacking of dictionaries for the *mot juste* appropriate to the case at hand. This does not assist in a principled analysis of the issues": *Refugee Appeal 71427/99* (NZ RSAA, Aug. 16, 2000), at 11.

[133] "When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail": Vienna Convention, at Art. 33(1).

[134] In the case of the Refugee Convention, the English and French texts are equally authoritative: Convention relating to the Status of Refugees, 189 UNTS 2545, done July 28, 1951, entered into force Apr. 22, 1954 (Refugee Convention), at Conclusion. For the Refugee Protocol, as well as for the two Human Rights Covenants, the situation is still more complex, as the Chinese, English, French, Russian, and Spanish texts are equally authentic: Protocol relating to the Status of Refugees, 606 UNTS 8791, done Jan. 31, 1967, entered into force Oct. 4, 1967 (Refugee Protocol), at Art. XI; Civil and Political Covenant, at Art. 53; International Covenant on Economic, Social and Cultural Rights, UNGA Res. 2200A(XXI), adopted Dec. 16, 1966, entered into force Jan. 3, 1976 (Economic, Social and Cultural Covenant), at Art. 31. As Steiner and Alston have observed, "[s]ometimes corresponding words in different versions may shed more light on the intended meaning; at other times, they are plainly inconsistent": Steiner and Alston, *International Human Rights*, at 109.

In such circumstances, it is difficult to imagine how a coherent, transnational understanding of a treaty can emerge from a predominant focus on text.[135]

This is not to suggest that the inherent fungibility of language means that text should not be carefully considered in the construction of a treaty,[136] but simply that the results of a perusal of text must be synthesized with other considerations before arriving at a final interpretation of the treaty.[137] As Aust has cogently concluded, "[p]lacing undue emphasis on text, without regard to what the parties intended; or on what the parties are believed to have intended, regardless of the text; or on the perceived object and purpose in order to make the treaty more 'effective,' irrespective of the intentions of the parties, is unlikely to produce a satisfactory result."[138]

Interestingly, the rejection of literalism as the core of treaty interpretation has been specifically approved in the judicial review of refugee law decisions. One of the earliest clear commitments to a broad, interactive understanding of treaty interpretation was stated by Chief Justice Brennan of the High Court of Australia:

> In interpreting a treaty, it is erroneous to adopt a rigid priority in the application of interpretative rules ... Although the text of a treaty may itself reveal its object and purpose or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it relates, the history of its negotiations and comparison with earlier or amending instruments

[135] "Choosing to rely upon nothing else but the text of the treaty, one delivers onself up to all its possible shortcomings ... For, as one might have expected, it is not immediately clear what the implications of the concept are: what, indeed, is the ordinary sense of 'ordinary meaning'?": Bos, "Theory and Practice," at 147–149.

[136] In *European Roma Rights Centre v. Immigration Officer at Prague Airport*, [2002] EWCA 1989 (Eng. QBD, Oct. 8, 2002), for example, the court sensibly relied on the plain requirement of the Refugee Convention that a refugee must be "outside the country of his nationality" in order to dismiss an argument based on the Refugee Convention's object and purpose that refugee rights inhere also in persons still seeking to leave their own country. Much the same approach was taken by the Court of Appeal in *R (Hoxha) v. Secretary of State for the Home Department*, [2002] EWCA Civ 1403 (Eng. CA, Oct. 14, 2002), at para. 48, where the Court determined that the broad humanitarian aims of the treaty could not override the "agreed limitations which are contained within the terms of the Convention itself," specifically "the particular causes of persecution which have to be shown."

[137] For this reason, the goal of interpreting a treaty according to the natural and ordinary meaning of the words employed "is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can validly be placed on it": *South West Africa Case (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections*, [1962] ICJ Rep 319, at 336.

[138] Aust, *Treaty Law*, at 185.

> relating to the same subject may warrant consideration in arriving at the true interpretation of its text.[139]

The focus of the interpretive exercise is therefore an understanding of the text of the treaty, but text must be interpreted in context and purposively, rather than literally.

1.3.2 Context

In the case of the Refugee Convention, the treaty's "context," as defined in Art. 31(2) and supplemented by Art. 31(3) of the Vienna Convention, provides some important (thought largely issue-specific) interpretive assistance. For example, the Final Act of the conference which adopted the Refugee Convention[140] is a clear example of an "agreement relating to the treaty, which was made between all the parties in connexion with the conclusion of the treaty."[141] As described below, its commitments on such questions as family unity may therefore be invoked to interpret the formal text of the treaty.[142]

More generally, as Judge Weeramantry has noted,

> An obvious internal source of reference is the preamble to the treaty. The preamble is a principal and natural source from which indications can be gathered of a treaty's objects and purposes even though the preamble does not contain substantive provisions. Article 31(2) of the Vienna Convention sets this out specifically ... [and] this Court ... has made substantial use of it for interpretational purposes.[143]

As such, account should be taken of the fact that the first two operative paragraphs of the Preamble to the Refugee Convention unequivocally establish the human rights purposes of the treaty:

> *The High Contracting Parties*,
>
> *Considering* that the Charter of the United Nations and the Universal Declaration of Human Rights ... have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

[139] *Applicant "A" and Ano'r v. Minister for Immigration and Multicultural Affairs*, (1997) 190 CLR 225 (Aus. HC, Feb. 24, 1997), per Brennan CJ.

[140] "Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons," 189 UNTS 37.

[141] Vienna Convention, at Art. 31(2)(a).

[142] See chapter 4.6 below.

[143] *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, [1991] ICJ Rep 53, at 142 (Dissenting Opinion [on another point] of Judge Weeramantry). The decisions cited in which the International Court of Justice has relied upon the preamble to a treaty for interpretive purposes include *Rights of Nationals of the United States in Morocco*, [1952] ICJ Rep 176, at 196; and *Asylum Case (Colombia/Peru)*, [1950] ICJ Rep 266, at 282.

> *Considering* that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms, . . .
>
> *Have agreed* as follows.[144]

The Preamble to the Refugee Protocol similarly affirms the fundamental human rights purpose of the regime, and expressly stipulates the intention of state parties to ensure that "equal status should be enjoyed by all refugees," including those who became refugees as the result of "new refugee situations [that] have arisen since the [1951] Convention was adopted."[145]

Beyond matters formally recognized as part of the context for purposes of treaty interpretation, Art. 31(3) directs attention to several related sources of understanding. For example, the UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*, as well as many of the Conclusions on International Protection issued by the state members of UNHCR's Executive Committee, are to be taken into account as evidence of "subsequent agreement between the parties" on the meaning of the treaty.[146] Even more clearly, reliance may be placed on the recent Declaration of States Parties, issued at the December 2001 Ministerial Meeting of States Parties

[144] Refugee Convention, at Preamble, paras. 1, 2, 3, and 8. In the case of *European Roma Rights Centre v. Immigration Officer at Prague Airport*, [2002] EWCA 1989 (Eng. QBD, Oct. 8, 2002), portions of the Preamble to the Convention were invoked to contest the legality of efforts to prevent would-be refugees from departing their own country. On the facts of the case, however, the court reasonably held that the Refugee Convention's general commitment to respect for human rights could not compel an interpretation at odds with the ordinary meaning of the treaty, which plainly grants rights only to a person who is "outside the country of his nationality": ibid. at paras. 42–43.

[145] Refugee Protocol, at Preamble, paras. 3, 4.

[146] Clearly, however, the scope of agreement manifested should not be overstated. As the English Court of Appeal correctly observed in relation to the *Handbook*, "[a]spirations are to be distinguished from legal obligations. It is significant that a number of the passages [from the *Handbook*] relied on by the appellants are expressed in terms of what 'could' or 'should' be done": *R (Hoxha) v. Secretary of State for the Home Department*, [2002] EWCA Civ 1403 (Eng. CA, Oct. 14, 2002). More specifically, Aust treats the *Handbook* as part of the context of the treaty, appropriately referenced under Art. 31(2) of the Vienna Convention: Aust, *Treaty Law*, at 191. Conversely, a decision of the English Court of Appeal considered the *Handbook* instead to be evidence of "international practice within article 31(3)(b) of the Vienna Convention": *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer*, [1999] 3 WLR 1274 (Eng. CA, July 23, 1999, appeal to the House of Lords dismissed without comment on this issue). Neither of these positions seems entirely correct, as the *Handbook* and Conclusions on International Protection are logically viewed as "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions": Vienna Convention, at Art. 31(3)(a). It must be acknowledged, however, that not all state parties are members of the UNHCR Executive Committee at any given moment, and that not all members of the Executive Committee are parties to the Convention or Protocol. However, the

to mark the fiftieth anniversary of the Refugee Convention.[147] That Declaration of all state parties recognized, *inter alia*, that the 1951 Convention was of "enduring importance"; affirmed that all persons within its scope are entitled to "rights, including human rights, and minimum standards of treatment"; and specifically acknowledged "the continuing relevance and resilience of this international regime of rights and principles."

1.3.3 Object and purpose, conceived as effectiveness

In contrast to the fairly self-evident meaning of the duty to consider a treaty's text and Art. 31's specific definition of its context and related matters, there is no express guidance in the Vienna Convention on how to apply the third part of the general rule of interpretation, respect for the treaty's "object and purpose." This inquiry is complicated by unwarranted anxiety about reliance on the preparatory work of the treaty in order to discern object and purpose. But even if that concern is overcome, a more fundamental challenge remains. Since a treaty is to be understood as presently speaking rather than forever defined by the circumstances in which it was conceived, how can its historical "object and purpose" be authoritatively renewed in a way that does not invite speculation or the introduction of unbridled subjectivity? To this end, there is real value in a merger of the inquiry into a treaty's object and purpose with advancement of the more general duty to interpret a treaty in a way that ensures its effectiveness. Specifically, an interpretation of text made "in the light of [the treaty's] object and purpose" should take account of the historical intentions of its drafters, yet temper that analysis to ensure the treaty's effectiveness within its modern social and legal setting.

overwhelming majority of the more than sixty states represented on the Executive Committee are parties to the Convention or Protocol, and all state parties are invited to observe and to comment upon draft proposals under consideration by the Executive Committee. While this process is no doubt imperfect, it is difficult to imagine in practical terms how subsequent agreement among 145 state parties to the Refugee Convention could more fairly be generated. See generally chapter 2.5.2 below for a discussion of the legal relevance of these standards. It is not suggested, however, that the various institutional policy papers issued by UNHCR should be treated as evidence of subsequent agreement among the parties to the Convention, since there is no comparable deliberative process among states in their development.

147 "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 Declaration was welcomed by the UN General Assembly in UNGA Res. A/RES/57/187, Dec. 18, 2001, at para. 4. The December 2001 Ministerial Meeting has particular significance in that it was the first occasion on which a meeting at the ministerial level of all state parties to the Refugee Convention and Protocol was convened.

The starting point for analysis of a treaty's object and purpose should ordinarily be the historical record of the treaty's drafting.[148] So long as care is taken to distinguish between statements made which merely express one state's views and those which drive or capture consensus, the published records of the interstate drafting process that resulted in a treaty[149] (generally referred to as its *travaux préparatoires*)[150] can be a rich source of information about its object and purpose.[151] There is nonetheless a frequent reluctance to rely on the *travaux*,[152] motivated at least in part by the fact that the Vienna

[148] As Sinclair describes the process, "[t]he would-be interpreter is ... expected, when confronted with a problem of treaty interpretation (which, *ex hypothesi*, involves an argument as to the meaning of text), to have recourse to all the materials which will furnish him with evidence as to what is the meaning to be attributed to the text; such materials will naturally include the *travaux préparatoires* of the treaty, and all the circumstances of its conclusion. It is only when he has available to him all the necessary materials that he will be in a position to assess their relative value and weight in the light of the rules laid down in the Convention": Sinclair, *Vienna Convention*, at 117.

[149] This is not to endorse strong reliance on the full range of what might be considered to be the preparatory work of a treaty. Rather, "[t]he value of the material will depend on several factors, the most important being authenticity, completeness, and availability. The summary record of a conference prepared by an independent and skilled secretariat, such as that of the United Nations, will carry more weight than an unagreed record produced by a host state or a participating state": Aust, *Treaty Law*, at 198.

[150] "[T]here may however be cases where neither the text of the treaty nor the *travaux préparatoires* gives a sufficiently comprehensive view of the historical background and where recourse may therefore be had to extrinsic evidence": Sinclair, *Vienna Convention*, at 141.

[151] But see e.g. Reuter, *Law of Treaties*, at 97–98: "[R]ecourse to preparatory work means treading uncertain ground: its content is not precisely defined nor rigorously certified, and it reveals the shortcomings or potential blunders of the negotiators as well as their reluctance to confront true difficulties. Moreover, preparatory work is not always published, and even when it is there could be some misgivings about invoking it against States, even more numerous on account of the modern methods of accession, [involving states] which did not take part in the negotiations." In some cases, however – the Refugee Convention being one – the preparatory work is carefully defined, approved by states, and published. Moreover, evidence of "shortcomings and blunders," so long as it is recognized as such, may actually help to elucidate the meaning of provisions ultimately adopted. In these circumstances, resort to the *travaux* by states which choose to accede to a treaty without having participated in its negotiation enables them more clearly to understand the duties they are contemplating undertaking than would, for example, mere reliance on ambiguous text.

[152] See e.g. E. Lauterpacht and D. Bethlehem, "The Scope and Content of the Principle of *Non-Refoulement*," in Feller et al., *Refugee Protection* 87 (Lauterpacht and Bethlehem, "*Non-Refoulement*"), at para. 47: "While reference by international courts and tribunals to the *travaux préparatoires* of a treaty is common, it is a practice that has significant shortcomings particularly in the case of treaties negotiated at a time and in circumstances far distant from the point at which the question of interpretation and application arises. The *travaux préparatoires* of the 1951 Refugee Convention must, therefore ... be approached with care." The authors rely on this general position to reject parts of the

Convention treats the preparatory work of a treaty as a "supplementary means of interpretation" listed in Art. 32, rather than as part of the "general rule of interpretation" stated in Art. 31.[153] Yet this characterization of the role of the *travaux* as supplementary to the main duty to interpret text purposively and in context has been said by Judge Jessup to be more the result of habit than derived from principle:

> In my opinion, it is not necessary – as some utterances of the two international courts might suggest – to apologize for resorting to *travaux préparatoires* as an aid to interpretation. In many instances the historical record is valuable evidence to be taken into account in interpreting a treaty. It is tradition, rather than law or logic, which has at times led to judicial statements that the evidence is used merely to confirm an interpretation which is supposed to have already been derived from the bare words of the text or even of the text in its context.[154]

Indeed, the International Court of Justice has in practice relied on the *travaux*[155] not only to confirm the meaning of text,[156] but also to fill textual voids[157] and to

Refugee Convention's drafting history inconsistent with their preferred positions (ibid. at paras. 70, 103), yet invoke the *travaux* where these appear to support their favored views (ibid. at paras. 124, 150, 171). While the concern to ensure that account is taken of the modern circumstances in which a treaty must operate is, of course, well founded, this objective can be secured by a more broadly based, interactive interpretive structure oriented to reading treaties as living instruments: see text below at pp. 62–68. This approach takes nothing away from the real interpretive value of the *travaux préparatoires*, even as it insists on considering the *travaux* together with other sources of guidance.

153 "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable": Vienna Convention, at Art. 32.

154 *South West Africa Case (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase*, [1966] ICJ Rep 6, at 352 (Dissenting Opinion of Judge Jessup).

155 A broad range of *travaux* has been consulted by the International Court of Justice, including "negotiation records, minutes of commission proceedings, committee debates preceding the adoption of a convention, preliminary drafts of provisions, diplomatic exchanges, and government memoranda": M. Ris, "Treaty Interpretation and ICJ Recourse to *Travaux Préparatoires*: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties," (1991) 14(1) *Boston College International and Comparative Law Review* 111, at 133.

156 See e.g. *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, [1978] ICJ Rep 3, at 13–14; *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility*, [1988] ICJ Rep 69, at 90.

157 See e.g. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, [1951] ICJ Rep 15 (interpreting the Genocide Convention to determine the permissibility of reservations).

answer interpretive issues of first impression.[158] Even where there has been an effort to characterize reliance on the *travaux* as purely confirmatory of an interpretation reached on the basis of Art. 31 sources, Rosenne suggests that this may be more a matter of form than of substance:

> [T]hat case law would be much more convincing if from the outset the court or tribunal had refused to admit consideration of *travaux préparatoires* until it had first been established whether or not the text was clear, but in fact ... on all these occasions the *travaux préparatoires* had been fully and extensively placed before the court or the arbitral tribunal by one or other of the parties, if not by both. In the circumstances, to state that the *travaux préparatoires* had been used only to confirm an opinion already arrived at on the basis of the text of the treaty was coming close to a legal fiction.[159]

Sir Humphrey Waldock has similarly opined that "the reference to confirmation and, *a fortiori*, verification tended to undermine the text of a treaty in the sense that there was an express authorisation to interpret it in the light of something else; nevertheless, that was what happened in practice."[160]

Beyond the fact that the *travaux* appear in practice to figure prominently as a primary point of reference in the actual interpretation of treaties,[161] there is reason to doubt that it was ever intended that their characterization as supplementary means of interpretation was designed to discourage interpreters from relying upon them. Sir Ian Sinclair, actively involved in the drafting of the Vienna Convention, takes the view that "no rigid sequential limitation on resort to *travaux*, by their categorization as 'supplementary means,' was intended."[162] Waldock affirms that "there had certainly been no intention of discouraging *automatic recourse* to preparatory works for the general understanding of a treaty [emphasis added]."[163] Judge Schwebel goes

[158] See e.g. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Jurisdiction*, [1984] ICJ Rep 392, at 406 (interpreting the Statute of the International Court of Justice to determine the validity of a declaration of jurisdiction by the Permanent Court of International Justice).

[159] S. Rosenne, [1964] 1 *Yearbook of the International Law Commission*, at 292, para. 17.

[160] Sir Humphrey Waldock, [1964] 1 *Yearbook of the International Law Commission*, at 283, para. 65.

[161] "The European Court of Human Rights and the European Court of Justice have made use of *travaux préparatoires* for a variety of purposes and, on the evidence considered so far, it might be thought that they should be regarded as a major component in the courts' decisions": Merrills, *European Court*, at 92.

[162] Sinclair, *Vienna Convention*, at 116. He explains further that "[t]he distinction between the general rule of interpretation and the supplementary means of interpretation is intended rather to ensure that the supplementary means do not constitute an alternative, autonomous method of interpretation divorced from the general rule": ibid.

[163] "United Nations Conference on the Law of Treaties, Official Records of the First Session," UN Doc. CONF.39/11, at 184 (33rd Meeting), cited in Lennard, "Navigating by the Stars," at 24.

farther still, contending that the duty of good faith interpretation may at times require departure from an ordinary meaning thought to be "clear" in order to do justice to the drafters' intentions as disclosed by reference to the *travaux*.[164]

In short, there appears to be neither theory nor practice to justify the view that the designation of a treaty's preparatory work as a supplementary means of interpretation requires that it be relegated to an inherently subordinate or inferior place in a comprehensive, interactive process of treaty interpretation. The more sensible understanding of the *travaux*'s status as a supplementary means of interpretation is instead that they are to be treated as a means by which to achieve the interpretive goal set by Art. 31.[165] That is, the preparatory work is supplementary in the sense that its role is to provide *evidence of* the true meaning of a treaty's text construed purposively, in context, and with a view to ensuring its effectiveness.[166]

[164] "If, as Article 31 itself prescribes, a treaty is to be interpreted 'in good faith,' surely the provision of Article 32 regarding recourse to preparatory work must be understood to be meaningful rather than meaningless. If preparatory work may be invoked only when it confirms the ordinary meaning otherwise deduced, the provision for its application in Article 32 approaches the meaningless. But if preparatory work may be invoked to correct the ordinary meaning otherwise deduced (if not to inform and influence the interpretation of the treaty from the outset), it and the provisions of Article 32 are accorded a meaningful place": S. Schwebel, "May Preparatory Work be Used to Correct, Rather than Confirm, the 'Clear' Meaning of a Treaty Provision?," in L. Makasczyk ed., *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* 541 (1996) (Schwebel, "Preparatory Work"), at 546. Aust observes in this regard that "[t]his is no doubt how things work in practice; for example, the parties to a dispute will always refer the tribunal to the *travaux*, and the tribunal will inevitably consider them along with all the other material put before it. [Judge Schwebel's] suggestion is therefore a useful addition to the endless debate on the principles of interpretation": Aust, *Treaty Law*, at 197.

[165] See Sinclair, *Vienna Convention*, at 116: "The distinction between the general rule of interpretation and the supplementary means of interpretation is intended rather to ensure that the supplementary means do not constitute an alternative, autonomous method of interpretation divorced from the general rule."

[166] This understanding appears to be in line with the approach of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, decided July 9, 2004. Immediately after referring to the duty to interpret a treaty in good faith and in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, the Court cited the full text of Art. 32 of the Vienna Convention: ibid. at para. 94. It then relied extensively on the *travaux* to determine that Art. 2 of the Fourth Geneva Convention is applicable even during an occupation not involving armed conflict on the grounds that "[t]his interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power . . . That interpretation is confirmed by the Convention's *travaux préparatoires*": ibid. at para. 95.

In line with the understanding, there is quite a low threshold for deeming the text of a treaty to be "ambiguous or obscure," thus justifying resort to its preparatory work under the terms of Art. 32.[167] Indeed, it has been argued that the mere fact of an interpretive dispute triggers the right of reliance on the *travaux*:[168]

> It is undeniable that, when [the parties'] conflicting arguments are matched together, the meaning of some of the treaty's provisions are ambiguous or obscure; indeed each of the Parties maintained that the opposing interpretation led to results which, if not manifestly absurd, were unreasonable. Thus, according to the Vienna Convention, this is a case in which recourse to the preparatory work and circumstances of the Treaty's conclusion was eminently in order.[169]

To the same effect, Judge Spender opined that "[a]lthough the cardinal rule of interpretation is that words are to be read, if they may be read, in their ordinary and natural sense . . . ambiguity may be hidden in the plainest and most simple of words even in their ordinary and natural meaning."[170]

[167] Vienna Convention, at Art. 32(a). Thus, for example, the House of Lords looked to the drafting history of Art. 33 of the Refugee Convention, noting that the *travaux* are "a legitimate guide to interpretation if the effect of a provision is in doubt and the *travaux préparatoires* yield a clear and authoritative answer": *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at para. 17.

[168] "One can, almost by definition, assume that a dispute about the interpretation of a treaty provision which reaches the stage of international adjudication will have arisen because the text is ambiguous or obscure": Sinclair, *Vienna Convention*, at 142.

[169] *Elettronica Sicula (USA v. Italy)*, [1989] ICJ Rep 15, at 97 (Dissenting Opinion of Judge Schwebel). See also *Judgment No. 273 of the UN Administrative Tribunal*, [1982] ICJ Rep 325, at 463 (Dissenting Opinion of Judge Schwebel): "The Court should do exactly as it has done in prior cases in which the meaning of a treaty or legislative text has been at issue: examine the preparatory work which gave rise to it. If it is objected that resort to this supplementary means of interpretation is justified only where the text is not clear, it is submitted that the text's lack of clarity is sufficiently shown by the differences about its interpretation which are demonstrated as between the Court's opinion and dissenting opinions in this case." Judge Schwebel has developed this position in his scholarship, observing that "the terms of a treaty which come before the Court for interpretation, if not usually obscure, are often 'ambiguous.' If this were not so, that is, if they did not lend themselves to argument attaching different meaning to their terms, they would not likely be legally contested at all. Moreover, it is not infrequent that the 'ordinary meaning' of the terms of a treaty, even if found unambiguously such, leads to a result which, if not 'manifestly absurd' is 'unreasonable' – at any rate, in the view of one of the parties to the dispute": Schwebel, "Preparatory Work," at 543. To similar effect, the European Court of Human Rights determined in *James v. United Kingdom*, (1986) 8 EHRR 123 (ECHR, Feb. 21, 1986), at para. 64, that "confronted with a text whose interpretation has given rise to such disagreement, the court considers it proper to have recourse to the *travaux préparatoires* as a supplementary means of interpretation."

[170] *Northern Cameroons Case*, [1963] ICJ Rep 15, at 88 (Separate Opinion of Judge Spender).

More generally, the way in which Art. 32 is framed supports giving the *travaux* pride of place as a source of evidence regarding a treaty's purpose, context, and intended effects. In authorizing reliance on supplementary means of treaty interpretation, Art. 32 singles out only "the preparatory work of the treaty and the circumstances of its conclusion" as definitively relevant. This unique recognition of the value of the *travaux* is very much in line with the relatively routine resort by many domestic courts to them in order to assist in the process of treaty interpretation.[171] Indeed, the House of Lords recently made clear that a focus on words alone – without a serious effort to come to grips with the historical goals understood to underpin the Refugee Convention – is unlikely to yield a sound understanding of the treaty's language:

> Inevitably the final text will have been the product of a long period of negotiation and compromise . . . It follows that one is more likely to arrive at the true construction of Article 1(A)(2) by seeking a meaning which makes sense in the light of the Convention as a whole, and the purposes which the framers of the Convention were seeking to achieve, rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach.[172]

This observation neatly brings analysis of the role of a treaty's preparatory work full circle. The goal of interpretation is to discern a "true construction" of text. Yet such an understanding will only be possible when account is taken not only of words, but also of the treaty's object and purpose. A critical part of that interactive interpretive process – one which makes it "more likely" that a treaty will be accurately construed – is the careful consideration of the deliberations of the convention's drafters.

[171] See e.g. *Fothergill v. Monarch Airlines*, [1981] AC 251 (UK HL, July 10, 1980), per Diplock LJ at 283, in which the view is expressed that "an English court might well be under a constitutional obligation" to consider the *travaux* of a treaty where the text is ambiguous or obscure. American courts also make extensive use of the *travaux* in the construction of treaties: see e.g. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, (1988) 486 US 694 (US SC, June 15, 1988); *Eastern Airlines v. Floyd*, (1991) 499 US 530 (US SC, Apr. 17, 1991); and, in the context of refugee law, *Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc., et al.*, 509 US 155 (US SC, Jan. 12, 1993). As Sinclair concludes, "there is now a growing tendency, even in the municipal courts of States which do not permit recourse to *travaux préparatoires* in construing statutes or other domestic legislative instruments, to apply this supplementary means of interpretation in determining the meaning of those statutes which give the force of domestic law to the provisions of international treaties": Sinclair, *Vienna Convention*, at 144.

[172] *R v. Secretary of State for the Home Department, ex parte Adan*, [1999] 1 AC 293 (UK HL, Apr. 2, 1998). See also *INS v. Cardoza Fonseca*, (1987) 480 US 421 (US SC, Mar. 9, 1987), at 437–438, in which the United States Supreme Court took account of the *travaux préparatoires* in its analysis of the meaning of "well-founded fear" in the Convention refugee definition.

Yet not even the most careful review of a treaty's *travaux* can in and of itself accurately identify its "object and purpose." Despite the real deference owed to evidence of the objectives being pursued by the representatives of governments that drafted, negotiated, and bound themselves to the treaty,[173] a treaty's object and purpose cannot reasonably be forever locked in time. To the contrary, because treaties are living instruments, evidence of historical intent should be balanced against more contemporary evidence of the social and legal context within which original intentions are now to be implemented.[174] To quote Judge Lauterpacht, "the true intentions of the parties may on occasion be frustrated if exclusive importance is attached to the meaning of words divorced from the social and legal changes which have intervened in the long period following upon conclusion of those treaties."[175]

To this end, the obligation to interpret the text of a treaty in the light of its object and purpose should be conceived as incorporating the overarching duty to interpret a treaty in a way that ensures its effectiveness.[176] The duty to promote a treaty's effectiveness is, in turn, derived from the more general obligation of good faith treaty interpretation.[177] As framed by the International Law Commission, "[w]hen a treaty is open to two interpretations, one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty *demand* that the former interpretation should be adopted [emphasis added]."[178] To quote Judge Lauterpacht once more,

> The preponderant practice of the Court itself has ... been based on principles of interpretation which render the treaty effective, rather than

[173] In any event, good faith treaty interpretation requires fidelity to the intentions of the parties: [1966] 2 *Yearbook of the International Law Commission* 211.

[174] "An even more dynamic variant of the teleological approach is the so-called theory of 'emergent purpose' whereby the object and purpose itself is not regarded as fixed and static": Sinclair, *Vienna Convention*, at 131.

[175] Lauterpacht, *Collected Papers*, at 133.

[176] See Bos, "Theory and Practice," at 150: "In the International Law Commission's view, the 'object and purpose' phrase in Article 31, paragraph 1, is the consecration of the maxim *ut magis valeat quam pereat*."

[177] According to the International Law Commission, good faith implies the requirement to remain faithful to the intentions of the parties, refraining from defeating them by a literal interpretation: [1966] 2 *Yearbook of the International Law Commission* 211. The *pacta sunt servanda* principle is codified in the Vienna Convention, at Art. 26: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." As Aust observes, "[i]nterpretation is part of the performance of the treaty, and therefore the process of examining the relevant materials and assessing them must be done in good faith": Aust, *Treaty Law*, at 187. The obligation to construe treaties in good faith does not, however, amount to an independent source of substantive obligation: *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at paras. 19 (per Lord Bingham) and 57–62 (per Lord Hope).

[178] [1966] 2 *Yearbook of the International Law Commission* 219.

> ineffective. These principles are not easily reconcilable with restrictive interpretation conceived as the governing rule of construction.[179]

Yet despite the legal logic and common sense appeal of interpreting a treaty in a way that makes it effective[180] – thereby automatically renewing the treaty's historical object and purpose to take account of modern social and legal realities – there is nonetheless a real risk that this principle may simply provide cover for the imposition of a decision-maker's policy preferences. It is therefore important to constrain the process for identification of the "appropriate effects" of a treaty by reference to two types of objective criteria.

First, there will sometimes be important factual shifts in the social reality within which a treaty must function. In the context of refugee protection, for example, the current array of *non-entrée* policies,[181] designed to prevent refugees from accessing the territory of many states, simply did not exist when the Refugee Convention was concluded in 1951. Nor was the modern social welfare state then fully developed. Yet the Refugee Convention prohibits the *refoulement* of refugees, and grants refugees access to such rights as public relief, housing, and social security.[182] If the commitment of states to the regulation of modern refugee flows within the framework of the Refugee Convention is to be honored, it follows that an effort must be made to understand the ways in which the duties in force are to be applied within host societies as presently constructed.[183] The interpretive challenge – and

[179] H. Lauterpacht, *The Development of International Law by the International Court* (1958), at 304.

[180] The principle of effectiveness has been relied upon, for example, in *Corfu Channel Case (United Kingdom v. Albania), Merits*, [1949] ICJ Rep 4, at 24–26; and *Free Zones of Upper Savoy and the District of Gex Case*, [1929] PCIJ Rep, Series A, No. 22, at 13. More recently, the World Trade Organization Appellate Body invoked the duty to interpret treaties so as to advance their effectiveness in *Canada – Term of Patent Protection*, Dec. No. WT/DS170/R (WTO AB, Oct. 2000), at para. 6.49. The United States Supreme Court has recognized the effectiveness principle in e.g. *Bacardi Corp. of America v. Domenech*, (1940) 311 US 150 (US SC, Dec. 9, 1940), at 163; and *Jordan v. Tashiro*, (1928) 278 US 123 (US SC, Nov. 19, 1928), at 127.

[181] See generally J. Hathaway, "The Emerging Politics of *Non-Entrée*," (1992) 91 *Refugees* 40; also published as "L'émergence d'une politique de non-entrée," in F. Julien-Laferrière ed., *Frontières du droit, Frontières des droits* 65 (1993).

[182] These concerns are addressed at chapters 4.1, 4.4, 6.1.3, 6.3, and 6.4 below.

[183] See A. North and N. Bhuta, "The Future of Protection – The Role of the Judge," (2001) 15(3) *Georgetown Immigration Law Journal* 479, at 484, in which the authors affirm the critical importance of refugee law judges being "pragmatic and responsive to new realities." Indeed, as noted above, state parties to the Refugee Convention and Protocol have formally insisted upon precisely this understanding by recognizing "the continuing relevance and resilience of [the Convention's] regime of rights and principles, including at its core the principle of non-refoulement", even as they took note of the "complex features of the evolving environment in which refugee protection has to be provided, including ... mixed population flows, [and] the high costs of hosting large numbers of

duty – is thus to translate historical understanding of refugee rights in a way that positions them to meet the protection challenges presented by altered social and political circumstances.[184]

Second and more specifically, it is important that treaties be interpreted in a way that reconciles them to their contemporary international legal context.[185] Perhaps most obviously, the Refugee Convention was only the second binding human rights treaty promulgated by the United Nations, having come into force more than two decades before the Human Rights Covenants.[186] Yet because refugees are normally entitled to claim the benefit of general human rights treaties, and specifically because the subject matter of the Covenants overlaps frequently with that of the Refugee Convention, it is important that some coherence be given to cognate concepts under these treaties. The Supreme Court of Canada has made this point clearly:

> [T]he Refugee Convention itself expresses a "profound concern for refugees," and its principal purpose is to "assure refugees the widest possible exercise of ... fundamental rights and freedoms." This negates the suggestion that the provisions of the Refugee Convention should be used to deny rights that other legal instruments make universally available to everyone.[187]

Indeed, the fact that the Covenants are regularly interpreted by a legally authoritative process which requires engagement with real cases involving

refugees and asylum-seekers": "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 Declaration was welcomed by the UN General Assembly in Res. A/RES/57/187, Dec. 18, 2001, at para. 4. This Declaration is to be taken into account together with the context of the Refugee Convention in interpreting the provisions of the treaty: see text above, at pp. 54–55.

184 The unambiguous text of a treaty nonetheless sets a limit to the range of possible interpretations of a treaty so as to meet contemporary challenges. For example, the fact that refugee rights are limited to persons who are outside their own country was sensibly determined by the House of Lords to foreclose the possibility of granting Art. 33 rights to persons still within their own state. "[T]here is no want of good faith if a state interprets a treaty as meaning what it says and declines to do anything significantly greater than or different from what it agreed to do. The principle ... *pacta sunt servanda* cannot require departure from what has been agreed. This is more obviously true where a state or states very deliberately decided what they were and were not willing to undertake to do": *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec 9, 2004), at para. 19.

185 This understanding is analogous to the view that "it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accord with existing law and not in violation of it": *Rights of Passage over Indian Territory (Portugal v. India), Preliminary Objections*, [1957] ICJ Rep 125, at 142.

186 See chapters 2.4 and 2.5 below.

187 *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002).

real people (while the Refugee Convention is not)[188] gives additional impetus to the logic of ensuring a harmonious construction of rights and duties.[189]

The duty to interpret treaties as living instruments able to function as part of a complex and evolving legal environment is now widely accepted. While its origins are in European human rights law,[190] it has been embraced more broadly in, for example, both European economic law[191] and international trade law.[192] In the latter context, appellate jurisprudence has affirmed that

[188] See Epilogue below, at pp. 992–998.

[189] In a decision challenging the detention of a non-removable failed asylum-seeker, the Full Federal Court of Australia not only drew heavily on the Civil and Political Covenant, but expressly addressed the relevance of the views of the Human Rights Committee adopted under its authority to receive complaints of breach of that treaty. "Although the views of the Committee lack precedential authority in an Australian court, it is legitimate to have regard to them as the opinions of an expert body established by the treaty to further its objectives by performing functions that include reporting, receiving reports, [and] conciliating and considering claims that a state party is not fulfilling its obligations": *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Masri*, (2003) 197 ALR 241 (Aus. FFC, Apr. 15, 2003). More recently, a commitment to taking real account of the work of UN human rights supervisory bodies was expressed by Justice Kirby of the High Court of Australia, who noted that "[i]n ascertaining the meaning of the [International Covenant on Civil and Political Rights] ... it is permissible, and appropriate, to pay regard to the views of the [UN Human Rights Committee] ... Such views do not constitute legally binding rulings for the purposes of international law. However, they are available to municipal courts, such as this, as the opinions of independent experts in international law, to assist in the understanding of the requirements of that law for whatever weight the municipal legal system accords to it. In Australia, that is the weight of persuasive influence. No more; but no less": *Minister for Immigration and Multicultural and Indigenous Affairs v. B and B*, [2004] HCA 20 (Aus. HC, Apr. 29, 2004), per Kirby J, at para. 148.

[190] "[T]he Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present day conditions. In the case now before it, the court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe in this field": *Tyrer v. United Kingdom*, (1978) 2 EHRR 1 (ECHR, Apr. 25, 1978), at para. 31. Merrills concludes that "[t]he principle that the Convention must be interpreted as a 'living instrument' is now generally accepted": Merrills, *European Court*, at 79.

[191] The evolutionary approach is described as "particularly appropriate in Community law where ... the treaties provide mainly a broad programme or design rather than a detailed blueprint": L. Brown and T. Kennedy eds., *Brown and Jacobs: The Court of Justice in the European Communities* (2000), at 339.

[192] "The Appellate Body has accepted in its treaty interpretations that it may be evident from a treaty that a term has an evolutionary meaning, with some built-in 'elasticity' to accommodate new shades of meaning as they develop, while respecting the bargain that has been struck": Lennard, "Navigating by the Stars," at 75. As a general matter, "[t]he WTO Panels and the Appellate Body rely on the treaty interpretation rules expressed in the *Vienna Convention* ... as the basic rules for interpreting WTO instruments. This is because those rules are generally regarded as codification of the public international law rules of treaty interpretation": ibid. at 17.

> Interpretation cannot remain unaffected by the subsequent development of law . . . Moreover, an international instrument has to be interpreted and applied within the entire legal system prevailing at the time of interpretation.[193]

Members of the International Court of Justice have similarly pointed out the importance of seeking conceptual concordance among closely connected treaties. In the *North Sea Continental Shelf Cases*, for example, Judge Ammoun insisted that it was "imperative in the present case to interpret [the treaty] in the light of the formula adopted in the other three [related] conventions, in accordance with the method of integrating the four conventions by co-ordination."[194] Judge Mosler has opined that "[t]he method of interpreting a treaty by reference to another treaty, although it is sometimes contested, has rightly been admitted in the decisions of the Court."[195] Most generally, the International Court of Justice has determined that "an international instrument has to be interpreted and applied within the framework of the entire legal system *prevailing at the time of the interpretation* [emphasis added]"[196] – a principle expressly affirmed in the context of international human rights law.[197] Indeed, this approach is arguably compelled by Art. 31(3) of the Vienna Convention, which requires that treaty interpretation take account of "any relevant rules of international law applicable in the relations between the parties."[198]

[193] *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Dec. No. WT/DS58/AB/R (WTO AB, Oct. 12, 1998), at para. 130.

[194] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 3, at 125 (Separate Opinion of Judge Ammoun).

[195] *Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization (IMCO)*, [1960] ICJ Rep 73, at 126 (Separate Opinion of Judge Mosler).

[196] *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, [1971] ICJ Rep 6. Sinclair concludes that "there is scope for the narrow and limited proposition that the evolution and development of the law can be taken into account in interpreting certain terms in a treaty which are by their very nature expressed in such general terms as to lend themselves to an evolutionary interpretation. But this must always be on condition that such an evolutionary interpretation does not conflict with the intentions and expectations of the parties as they may have been expressed during the negotiations preceding the conclusion of the treaty": Sinclair, *Vienna Convention*, at 140.

[197] "Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application": *Gabcikovo–Nagymaros Project (Hungary/Slovakia)*, [1997] ICJ Rep 7, at 114–115 (Judge Weeramantry).

[198] Vienna Convention, at Art. 31(3). Sinclair explains that the paragraph as originally drafted by the International Law Commission initially referred only to "rules of international law *in force at the time of [the treaty's] conclusion* [emphasis added]." He observes

The evolutionary principle was recently applied by the House of Lords to refugee law in a way that blends it seamlessly with the duty to respect historical intentions:

> It is ... plain that the Convention must be seen as a living instrument in the sense that *while its meaning does not change over time, its application will.* I would agree with the observation [that] ... "[u]nless it is seen as a living thing, adopted by civilized countries for a humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism [emphasis added]."[199]

In line with this formulation, an interpretive approach that synthesizes foundational insights from analysis of the historical intentions of a treaty's drafters with understandings derived from the normative legal context and practical landscape within which treaty duties are now to be implemented is the most objective and legally credible means of identifying how best to make the treaty effective. It is an approach fully in line with the basic obligation of *pacta sunt servanda*, since it honors the original goals which prompted elaboration of the treaty even as it refuses to allow those commitments to

that the italicized words "were intended to reflect the general principle that a juridical fact must be appreciated in the light of the law contemporary with it. During the course of second reading in the Commission, some members suggested that the text as it then stood failed to deal with the problem of the effect of an evolution of the law on the interpretation of legal terms in a treaty and was therefore inadequate. For this reason, the Commission concluded that it should omit a temporal element and transfer this element of interpretation to paragraph 3 as being an element extrinsic both to the text and to the 'context' as defined in paragraph 2": Sinclair, *Vienna Convention*, at 138–139. Aust, in contrast, takes the view that cognate treaties are appropriately referenced as supplementary means of interpretation pursuant to Art. 32 of the Vienna Convention, writing that "[o]ne may also look at other treaties on the same subject matter adopted *either before or after* the one in question which use the same or similar terms [emphasis added]": Aust, *Treaty Law*, at 200.

[199] *Sepet and Bulbul v. Secretary of State for the Home Department*, [2003] UKHL 15 (UK HL, Mar. 20, 2003), per Lord Bingham. In reaching this conclusion, Lord Bingham adopted the reasoning of Sedley J in *R v. Immigration Appeal Tribunal, ex parte Shah*, [1997] Imm AR 145 (Eng. QBD, Nov. 11, 1996), at 152. He further approved of the observation of Laws LJ in *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer*, [1999] 3 WLR 1274 (UK CA, July 23, 1999), that "[i]t is clear that the signatory states intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view the Convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the European Convention on Human Rights is so regarded." More specifically, Lord Bingham observed that "the reach of an international human rights convention is not forever determined by the intentions of those who originally framed it. Thus ... the House was appropriately asked to consider a mass of material illustrating the movement of international opinion among those concerned with human rights and refugees in the period, now a very significant period, since the major relevant conventions were adopted": [2003] UKHL 15, at para. 11.

atrophy through passage of time.[200] It is moreover an approach to treaty interpretation that results in the marriage of the duty to advance a treaty's effectiveness with the more basic obligation to interpret text purposively, and in context.

1.3.4 But what about state practice?

One challenge to this understanding of the rules of treaty interpretation is rooted in Art. 31(3)(b) of the Vienna Convention, which provides that treaties are to be interpreted in the light of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[201] Since governments often seek to minimize the practical effect of their refugee law and other human rights commitments, it might be argued that this state practice should trump, or at least attenuate, the results of interpreting text purposively, in context, and with a view to ensuring the treaty's effectiveness. However, while state practice is often of clear value in the interpretation of bilateral treaties involving purely interstate interests, there are good reasons to read this provision narrowly as a guide to the construction of multilateral treaties in general, and of multilateral human rights treaties in particular.

The most basic concern arises from international law's commitment to the view that no grouping of states can impose obligations on a third state without the latter's express or implied consent thereto.[202] As such, reliance on less-than-unanimous practice by the parties to a treaty in order to interpret the obligations of *all* parties to that treaty raises a problem of consent to be bound by that practice-derived interpretation. As Judge Spender observed,

> In the case of multilateral treaties, the admissibility and value as evidence of subsequent conduct of one or more parties thereto encounter particular difficulties. If *all* the parties to a multilateral treaty where the parties are fixed and constant pursue a course of conduct in their attitude to the text of the treaty, and that course of conduct leads to an inference, and one

[200] "Given the freedoms guaranteed under the Universal Declaration of Human Rights and other international conventions, it could not have been consistent with the purpose of the Refugee Convention to require that persons claiming to be refugees be deprived of their fundamental human rights and freedoms in the country from [which] they are seeking protection": *Minister for Immigration and Multicultural Affairs v. Mohammed*, (2000) 98 FCR 405 (Aus. FFC, May 5, 2000), per French J.

[201] Vienna Convention, at Art. 31(3)(b).

[202] See Vienna Convention, at Arts. 34 ("A treaty does not create either obligations or rights for a third State without its consent") and 35 ("An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing").

> inference only, as to their common intention and understanding at the time they entered into the treaty as to the meaning of the text, the probative value of their conduct ... is manifest. If, however, only one or some but *not all* of them by subsequent conduct interpret the text in a certain manner, that conduct stands upon the same footing as the unilateral conduct of one party to a bilateral treaty. The conduct of such one or more could not of itself have any probative value or provide a criterion for judicial interpretation [emphasis added].[203]

While it is true that the International Law Commission did not accept a proposal to require the express consent of all parties to a treaty as a condition for the application of Art. 31(3)(b) of the Vienna Convention,[204] the International Court of Justice has thus far seemed disinclined to promote ease of reliance on Art. 31(3)(b) at the expense of overriding the views of state parties to a treaty which have not at least acquiesced in the allegedly interpretive practice.[205]

Even if the problem of reliance on non-unanimous practice to interpret the duties of all state parties to a treaty could be overcome, Art. 31(3)(b) gives less weight to state practice as an interpretive tool than is commonly assumed.

[203] *Certain Expenses of the United Nations*, [1962] ICJ Rep 151, at 191 (Separate Opinion of Judge Spender).

[204] [1966] 2 *Yearbook of the International Law Commission* 222. The rejection of this requirement may be read, however, as a rejection of the requirement for the *express* (rather than simply passive) assent of all parties to the interpretive practice in question. Thus, Sinclair employs rather fungible language, concluding that "paragraph 3(b) of Article 31 of the Convention does not cover subsequent practice in general, but only a specific form of subsequent practice – that is to say, *concordant subsequent practice* common to all the parties [emphasis added]": Sinclair, *Vienna Convention*, at 138. Aust similarly concludes that "[i]t is not necessary to show that each party has engaged in a practice, only that all have accepted it, albeit tacitly": Aust, *Treaty Law*, at 195.

[205] In the *Asylum Case*, for example, Judge Read indicated that the practice of all parties to a treaty should be taken into account (though in the case at hand lack of time, space and information compelled him to review only the practice of the disputing states): *Asylum Case (Colombia/Peru)*, [1950] ICJ Rep 266. Judge van Wyk observed that "[t]he weight to be attached to such conduct must necessarily depend on the circumstance of each case. Where for a relatively lengthy period after the execution of any agreement, *all* the parties by conduct accept the position that the agreement does not embody a particular obligation, then such conduct must bear considerable weight in a determination whether that obligation exists or not [emphasis added]": *South West Africa Case (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase*, [1966] ICJ Rep 6, at 135–136 (Separate Opinion of Judge van Wyk). And in the *Namibia Case*, Judge Spender reiterated his view that a treaty "cannot be altered by the will of the majority of the member states, no matter how often that will is expressed or asserted against a protesting minority and no matter by how large the majority – or how small the minority": *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, [1971] ICJ Rep 16, at 31. This view was affirmed in the case by Judge Bustamante (ibid. at 291), and by Judge Winiarski in his dissenting opinion (ibid. at 234).

The provision does not validate *all* state practice as part of the general rule of interpretation; rather, it expressly sanctions reliance only on a subset of state practice, namely "subsequent practice in the application of the treaty, which establishes the agreement of the parties regarding its interpretation."[206] The purposive nature of legally relevant practice requires, in effect, that the practice in question have been motivated by a sense of legal obligation (*opinio juris*).[207] As Judge Fitzmaurice summarized the rule, evidence of state practice is a useful tool for the construction of a treaty where "it is possible and reasonable to infer from the behavior of the parties that they have regarded the interpretation they have given the instrument in question as the legally correct one, and have tacitly recognized that, in consequence, certain behavior was legally incumbent upon them."[208] Thus, in Judge Winiarski's view, "[i]t is sometimes difficult to attribute any precise legal significance to the conduct of the contracting parties, because it is not always possible to know with certainty whether they have acted in a certain manner because they consider that the law so requires or allows, or for reasons of expediency."[209] In the context of refugee and other international human rights treaties, expedient or other self-interested conduct by governments is distressingly common,[210] thus taking much state practice under such accords outside the scope of Art. 31's general rule of interpretation.[211]

It is nonetheless true that state practice which does not meet the requirements of Art. 31(3)(b) may still be considered as a (non-enumerated)

[206] Vienna Convention, at Art. 31(3)(b). Indeed, the approach of the Permanent Court of International Justice was to validate only state practice which shed light on the intent of the parties *at the time they concluded the treaty*: *Treaty of Lausanne Case*, [1925] PCIJ Rep, Series B, No. 13, at 24.

[207] "[I]nterpretive conduct must have been motivated by a sense of legal obligation. For example, in the *Asylum Case*, the [International Court of Justice] thought that the granting of asylum in the cases referred to it may have been the product of political expediency rather than an indication of the existence of a legal obligation. This requirement is the same as that found for the development of a customary norm through the practice of states ... [T]he strength of evidence of practice will often lie in its inadvertent nature: the agent acts on a non-politically motivated interpretation of the provision in question, rather than consciously attempting to establish a practice": G. McGinley, "Practice as a Guide to Treaty Interpretation," [Winter 1985] *Fletcher Forum* 211 (McGinley, "Practice as a Guide"), at 218.

[208] *Certain Expenses of the United Nations*, [1962] ICJ Rep 151, at 201 (Separate Opinion of Judge Fitzmaurice).

[209] Ibid. at 232 (Dissenting Opinion – on another proposition – of Judge Winiarski).

[210] See the detailed empirical analysis of failures to respect refugee rights in chapters 4–7 below.

[211] See e.g. the approach of the European Court of Human Rights, which has taken the view that state practice is not within the bounds of Art. 31(3)(b) unless motivated by *opinio juris*: *Cruz Varas v. Sweden*, (1991) 14 EHRR 1 (ECHR, Mar. 20, 1991), at para. 100; *Soering v. United Kingdom*, (1989) 11 EHRR 439 (ECHR, July 7, 1989), at para. 103.

supplementary means of interpretation under Art. 32 of the Vienna Convention.[212] It may be admitted into evidence "because practice represents the common-sense practical interpretation of the treaty under the varied contingencies of its ongoing operation."[213] Like evidence of historical intent (also admitted under Art. 32), data on state practice may be an important means by which to come to grips with the challenges of a treaty's current operational setting, thereby advancing the process of interpreting a treaty so as to promote its effectiveness.[214] Yet even while promoting this understanding of the relevance of state practice, McGinley does not recommend that evidence of state practice be treated as inherently of value:

> The practice may be so vast as to make it virtually unavailable to the court of the parties. Or, much may be unrecorded or otherwise unavailable. It may be generated at will by the parties and be highly self-serving. Moreover, because practice is amenable to subjective interpretation, it may be readily bent to particular points of view. Finally, judicial selectivity is often a problem: acts ignored by one judge may be given special significance by another.[215]

Beyond these general concerns, particular caution is warranted before relying on general evidence of practice by state parties to interpret refugee and other international human rights treaties. These treaties are unique applications of international law, in that they are expressly designed to constrain state conduct for the benefit of actual human beings. This purpose could be fundamentally frustrated if the construction of the duties assumed by states were to be determined by the very state practices sought to be constrained. Indeed, if refugee and other human rights treaties are interpreted in ways that defer to contemporary state practice, there is a very real risk that state auto-determination of the scope of obligations will trump the existence of obligations at all. As the American representative to the Ad Hoc Committee which drafted the Refugee Convention observed, "the mere fact that the provisions of a convention required a change in the existing laws of any country was not a valid argument against them. If all national laws were to remain unchanged, why should there be a convention?"[216] Thus, at least when interpreting bodies of law specifically designed by states to limit state

[212] Sinclair, *Vienna Convention*, at 138; McGinley, "Practice as a Guide," at 221.
[213] McGinley, "Practice as a Guide," at 227.
[214] As noted above, the fact that a treaty's preparatory work and the circumstances of its conclusion are the only listed supplementary means of interpretation may suggest that they are worthy of special consideration in the interpretive process: see chapter 1.3.3 above, at p. 61.
[215] McGinley, "Practice as a Guide," at 219.
[216] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 15. See also Statement of Mr. Weis of the IRO, ibid. at 16.

autonomy for the benefit of third parties, Art. 31(3)(b) should be read quite narrowly.[217]

This constrained view of the relevance of state practice to interpreting refugee and other human rights treaties is very much in line with the classic approach taken to the construction of "lawmaking treaties," that is, treaties under which

> the Contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type, one cannot speak of individual advantages to States, or of the maintenance of a perfect balance between rights and duties.[218]

In the case of lawmaking treaties – of which refugee and other human rights accords are surely a paradigmatic example[219] – it is recognized that "the character of the treaty may affect the question whether the application of a particular [interpretive] principle, maxim or method is suitable in a particular case."[220] Specifically, where a treaty is "less a manifestation of free will than a calling to mind of principle obligatory for every civilized State, less a contract than universally valid regulation of objective law ... in the matter of interpretation, validity of the convention is placed outside the sphere of the will of the Contracting Parties."[221]

This notion that the interpretation of lawmaking treaties should not be directed solely or even principally to advancing the interests of the contracting parties has some fairly clear implications.[222] For example, an interpretive

[217] In line with this view, it is arguably appropriate that "[g]enerally speaking, human rights treaty interpretation is characterized by the 'teleological' approach": B. Simma, "How Distinctive Are Treaties Representing Collective Interest? The Case of Human Rights Treaties," in V. Gowland-Debbas ed., *Multilateral Treaty Making – The Current Status of and Reforms Needed in the International Legislative Process* 83 (2000), at 84.

[218] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, [1951] ICJ Rep 15, at 26. Judge de Visscher defined lawmaking treaties as treaties the object of which is the laying down of common rules of conduct (*normes de conduite communes*): C. de Visscher, *Problèmes d'interpretation judiciare en droit international public* (1963) (de Visscher, *Problèmes d'interpretation*), at 128.

[219] The remarks of the International Court of Justice – see text above, at note 218 – were made in the context of construction of the Genocide Convention.

[220] Remarks of Sir Humphrey Waldock, Chief Rapporteur of the International Law Commission for the Draft Articles on the Law of Treaties, [1964] 2 *Yearbook of the International Law Commission* 55.

[221] De Visscher, *Problèmes d'interpretation*, at 38 (translation).

[222] "[N]ot all treaties contain 'law.' Some ... instead of 'law' carry 'obligations.' The difference was said to be of importance precisely in the matter of interpretation, for treaties carrying 'obligations' may be expected to be interpreted with a very heavy emphasis on the will of the parties, in contrast with treaties containing 'law,' the construction of which to a degree may be influenced by the collective state-interest": Bos, "Theory and Practice," at 156.

principle such as *in dubio mitius*[223] is of limited value, since it is based on the assumption that governments negotiating treaties seek to secure particular benefits from other states at a minimal cost to their own sovereignty and self-interest. This background assumption is of doubtful currency in the case of a treaty designed precisely to limit state sovereignty in the interests of advancing more general goals for the international community as a whole. The pertinence of state practice as an aid in the interpretation of lawmaking treaties intended to promote refugee and other human rights is similarly suspect. Because these treaties are conceived to advance common "high purposes" by binding and constraining the autonomy of governments, their very nature compels a more particularized approach to interpretation. In the words of the European Court of Human Rights, it is necessary in such cases "to seek the interpretation that is most appropriate in order to realise the aim and achieve the objective of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the parties."[224]

In sum, Art. 31(3)(b) is not a significant impediment to the logic of interpreting refugee and other human rights treaties on the basis of an approach committed to interpreting text in context, purposively, and with a view to ensuring the treaty's effectiveness. Less-than-unanimous state practice is at best an awkward source of guidance on the meaning of multilateral treaties. Moreover, the Vienna Convention does not require deference to all state practice, but only to such practice as derives from a sense of legal obligation, rather than – as is most common in the human rights context – from state self-interest or expediency. Even where evidence of state practice is tendered not as relevant to establishing a treaty's context but more generally

[223] The principle of *in dubio mitius* posits that if the wording of a treaty provision is not clear, preference should be given to the interpretation that gives rise to a minimum of obligations for the parties. For example, the WTO Appellate Body has held that "[t]he principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of the term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties": *European Communities – Measures Affecting Meat and Meat Products (EC Hormones)*, WTO Dec. No. WT/DS26/AB/R (WTO AB, Jan. 16, 1998), at para. 154. While this reasoning makes clear why the principle ought not to govern the interpretation of lawmaking treaties, there are also more general reasons to be skeptical about its propriety. It has been questioned in McNair, *Treaties*, at 765, and in Jennings and Watts, *Oppenheim's*, at 1278: "[I]n applying this principle, regard must be had to the fact that the assumption of obligations constitutes the primary purpose of the treaty and that, in general, the parties must be presumed to have intended the treaty to be effective."

[224] *Wemhoff v. Germany*, (1968) 1 EHRR 55 (ECHR, June 27, 1968), at para. 23. See also *Klass v. Germany*, (1979) 2 EHRR 214 (ECHR, Sept. 6, 1978), at para. 42, where the Court determined that restrictions on human rights are to be narrowly construed in light of the fundamental human rights objectives of the European Convention on Human Rights.

as a supplementary means of interpretation, it is surely doubtful that practice which contests or limits the scope of refugee and other human rights is a helpful means of interpreting lawmaking treaties conceived in order to advance precisely those rights.

The interpretive approach adopted here can briefly be summarized. One should begin with the text of the Refugee Convention, and seek to understand it not on the basis of literal constructions but rather in a way that takes real account of its context, and which advances its object and purpose.[225] In addition to formal components of context, such as the Final Act of the conference that adopted the Convention and the Preambles to the Convention and its Protocol, the context includes subsequent interpretive agreement among the parties, in particular the relevant Conclusions issued by the state members of UNHCR's Executive Committee. The analysis here draws regularly as well on the primary indicia of the object and purpose of the refugee treaty, both historical and contemporary. The main record of the original goals of the drafters is accessible through the extensive and officially compiled *travaux* of the Convention's drafting.[226] The analysis here tests the historical understanding against evidence of contemporary factual challenges to the treaty's effectiveness, and synthesizes the interpretation so derived with analysis of the vast array of primary and secondary materials which elaborates the interpretation of cognate rights under general international human rights law. This interactive process is intended to yield a genuinely comprehensive understanding of the rights of refugees as presently conceived under international law.

[225] "[O]nly a broad approach to the text, and to the legal rights which the Convention affords, will fulfill its objectives": *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, (2000) 170 ALR 553 (Aus. HC, Apr. 13, 2000), per Kirby J.

[226] The *travaux préparatoires* of the Refugee Convention are helpfully collected in a three-volume looseleaf set: A. Takkenberg and C. Tahbaz eds., *The Collected Travaux Préparatoires of the 1951 Geneva Convention relating to the Status of Refugees* (1989). The main contributions to the Convention's development were made by the Ad Hoc Committee on Statelessness and Related Problems, which met at Lake Success, New York, during January–February 1950; by a reconvened Ad Hoc Committee on Refugees and Stateless Persons, which met again at Lake Success, New York, during August 1950; and by a Conference of Plenipotentiaries, which met in Geneva during July 1951. The analysis here draws heavily on discussions in these three fora.

2

The evolution of the refugee rights regime

The origins of refugee rights are closely intertwined with the emergence of the general system of international human rights law. Like international human rights, the refugee rights regime is a product of the twentieth century. Its contemporary codification by the United Nations took place just after the adoption of the Universal Declaration of Human Rights, and was strongly influenced by the Declaration's normative structure.

In a more fundamental sense, though, the refugee rights regime draws heavily on the earlier precedents of the law of responsibility for injuries to aliens and international efforts to protect national minorities. This chapter highlights the conceptual contributions made by each of these bodies of international law to the emergence of specific treaties to govern the human rights of refugees. It then introduces the essential structure of the 1951 Refugee Convention,[1] still the primary source of refugee-specific rights in international law. Finally, this chapter takes up the question of the relationship between the refugee rights regime and subsequently enacted treaties, particularly those that establish binding norms of international human rights law. The view is advanced that refugee rights should be understood as a mechanism by which to answer situation-specific vulnerabilities that would otherwise deny refugees meaningful benefit of the more general system of human rights protection. Refugee rights do not exist as an alternative to, or in competition with, general human rights. Nor, however, has the evolution of a broad-ranging system of general human rights treaties rendered the notion of refugee-specific rights redundant.

2.1 International aliens law

The process of governance is normally premised on a closed system of obligation. Rules are established to support the polity's functional interdependence, without expectation that outsiders will conduct themselves by those standards. There is therefore a potential conflict when foreigners seek

[1] Convention relating to the Status of Refugees, 189 UNTS 2545, done July 28, 1951, entered into force Apr. 22, 1954 (Refugee Convention).

entry into a territory governed by rules of conduct different from those that prevail in their home country. While it is generally conceded that the territorial sovereign may formally insist on compliance with prevailing standards as a condition of entry, there are often practical considerations which argue against such inflexibility.[2] Governments have long understood that it is sensible to attenuate otherwise valid laws to encourage the entry of desirable outsiders.

For example, the ancient Greeks accepted that their rules denying legal capacity to foreigners posed a barrier to the attraction of foreign craftsmen able to enrich the quality of their communal life. Their answer was the establishment of a separate legal regime to govern the conduct of skilled foreigners, the standards of which were sufficiently attractive to facilitate the desired level of settlement.[3] Similar practices evolved as part of the medieval law merchant. By the thirteenth century, it had become common for associations of traveling merchants to negotiate various forms of immunity and privilege with European rulers anxious to promote economic growth through foreign trade. These merchants were ultimately allowed to govern themselves, autonomously administering their own laws within the territory of foreign sovereigns.

The emergence of nation-states in the sixteenth century provided the context within which to formalize this ad hoc pattern of special rights granted to traders by various European rulers. Governments undertook the bilateral negotiation of treaties in which safe passage and basic civil rights were mutually guaranteed to merchants and others wishing to do business or to travel in the partner state. By the late nineteenth century, a network of "friendship, commerce, and navigation" treaties consistently guaranteed certain critical aspects of human dignity to aliens admitted to most trading states.[4] Because these agreements were pervasively implemented in the domestic laws of state parties, certain human rights universally guaranteed to aliens were identified as general principles of law.[5] These included recognition of the alien's juridical personality, respect for life and physical integrity, and personal and spiritual liberty within socially bearable limits. Aliens were afforded no political rights, though resident aliens were subject to reasonable public duties. In the economic sphere, there was a duty of

[2] See generally R. Lillich, *The Human Rights of Aliens in Contemporary International Law* (1984) (Lillich, *Rights of Aliens*), at 5–40.

[3] C. Phillipson, *The International Law and Custom of Ancient Greece and Rome* (1911), at 122–209.

[4] H. Walker, "Modern Treaties of Friendship, Commerce and Navigation," (1958) 42 *Minnesota Law Review* 805 (Walker, "Treaties of Friendship"), at 823.

[5] C. Amerasinghe, *State Responsibility for Injuries to Aliens* (1967) (Amerasinghe, *State Responsibility*), at 23; A. Roth, *The Minimum Standard of International Law Applied to Aliens* (1949) (Roth, *Minimum Standard*), at 113. See generally chapter 1.1.2 above.

non-discrimination among categories of aliens where they were allowed to engage in commercial activity. There was also an obligation to provide adequate compensation for denial of property rights where aliens were allowed to acquire private property. Finally, aliens were to be granted access to a fair and non-discriminatory judicial system to enforce these basic rights.[6]

The protection of aliens was not restricted to the few rights which attained the status of general principles of law. States heavily engaged in foreign commerce and investment were understandably anxious to garner additional protections for their nationals working abroad. They pursued this objective by continuing to negotiate bilateral treaties to supplement entitlements under the general alien rights regime. These particularized agreements allowed consenting governments mutually to accord a variety of rights to each other's citizens, to a degree befitting the importance attached to the bilateral relationship. An important innovation to emerge from this process of bilateral negotiation was the definition of aliens' rights by a combination of absolute and contingent standards of protection.[7]

The definition of rights in absolute terms, traditionally used at the national level, did not translate well to the framing of bilateral accords on alien protection. First, the meaning attributed to a particular entitlement (for example, freedom of internal movement) had always to be interpreted through the often divergent cultural and juridical lenses of each state party. The national state might, for example, assume that this right allowed the legally admitted alien to choose his or her place of residence in the receiving state, while the latter state intended it to mean only freedom to travel without restrictions. The definition of broad rights in absolute terms might therefore result not in strengthened protection, but instead in a lack of clarity.

Second, unambiguous, absolute standards could work to the long-term disadvantage of aliens residing in states in which rights were in evolution. Host states were not disposed continuously to renegotiate bilateral protection agreements, and were especially unlikely to entertain requests for amendment from foreign governments of modest influence. The citizens of less important states might therefore find themselves denied the benefits of protections extended to the nationals of more-favored countries. Even for the citizens of more influential countries, the definition of aliens' rights in absolute terms could be counter-productive: a static definition of rights would mean that new protections afforded citizens of the host country would not accrue automatically to even most-favored aliens.

To respond to these concerns, bilateral negotiations tended to couple absolute protection of a limited core of clearly understood rights with a

[6] This carefully constructed list of rights universally held by aliens was based on an empirical survey spanning 150 years: Roth, *Minimum Standard*, at 134–185.

[7] See generally Walker, "Treaties of Friendship," at 810–812.

broader range of entitlements loosely defined in contingent terms. The standard of protection for contingent rights was not discernible simply by reference to the literal scope of the treaty. It was set instead as a function of the relevant treatment accorded another group likely to secure maximum protection under the receiving state's laws, usually either the nationals of "most-favored" states, or the citizens of the state of residence itself. The precise content of the duty was therefore not fixed, but evolved in tandem with an exterior state of law and fact presumed to be a reliable benchmark of the best treatment that could be secured from the receiving state.

Walker aptly characterizes this system of contingent rights as providing for "built-in equalization and adjustment mechanisms."[8] The definition of aliens' rights by a combination of general principles of law and bilateral agreements of varying scope and rigor resulted in different classes of foreigners enjoying protection of sometimes different rights, and to differing degrees. All aliens, however, were in theory entitled to at least the benefit of the limited set of rights established by the general principles of aliens law. At first glance, international aliens law might therefore appear to be an important source of rights for refugees. After all, refugees are by definition persons who are outside the bounds of their own state.[9]

The general principles that emerged from the network of interstate arrangements on the protection of aliens do not, however, endow aliens themselves with rights and remedies. International aliens law was conceived very much within the traditional contours of international law: the rights created are the rights of national states, enforced at their discretion under the rules of diplomatic protection and international arbitration. While injured aliens may benefit indirectly from the assertion of claims by their national state, they can neither require action to be taken to vindicate their loss, nor even compel their state to share with them whatever damages are recovered in the event of a successful claim.[10] The theory underlying international aliens law is not the need to restore the alien to a pre-injury position. As summarized by Brierly, the system reflects "the plain truth that the injurious results of a denial of justice are not, or at any rate are not necessarily, confined to the

[8] Ibid. at 812.

[9] "[T]he term 'refugee' shall apply to any person who ... is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country": Refugee Convention, at Art. 1(A)(2). See generally A. Grahl-Madsen, *The Status of Refugees in International Law* (vol. I, 1966) (Grahl-Madsen, *Status of Refugees I*), at 150–154; G. Goodwin-Gill, *The Refugee in International Law* (1996) (Goodwin-Gill, *Refugee in International Law*), at 40; and J. Hathaway, *The Law of Refugee Status* (1991) (Hathaway, *Refugee Status*), at 29–63.

[10] "The fate of the individual is worse than secondary in this scheme: it is doctrinally non-existent, because the individual, in the eyes of traditional international law, like the alien of the Greek city-State regime, is a non-person": Lillich, *Rights of Aliens*, at 12.

individual sufferer or his family, but include such consequences as the mistrust and lack of safety felt by other foreigners similarly situated."[11]

In any event, refugees are unlikely to derive even indirect protection from the general principles of aliens law because they lack the relationship with a state of nationality legally empowered to advance a claim to protection.[12] Aliens law is essentially an attempt to reconcile the conflicting claims of governments that arise when persons formally under the protection of one state are physically present in the sovereign territory of another. Whatever benefit accrues to the injured alien is incidental to resolution of this potential for interstate conflict. The essential condition for application of aliens law to refugees and stateless persons is therefore absent, since they are without a national state likely to view injuries done to them as a matter of official concern.

The emergence of general principles of aliens law nonetheless signaled a critical conceptual breakthrough in international law, which laid the groundwork for the subsequent development of the refugee rights regime. First, aliens law recognizes the special vulnerabilities which attend persons outside the bounds of their national state. Aliens have no right to participate in, or to influence, a foreign state's lawmaking process, yet are subjected to its rigors. As such, the domestic laws of the foreign state might, in the absence of international law, make no or inadequate provision for the alien to access meaningful protection against harm:

> [T]he individual, when he leaves his home State, abandons certain rights and privileges, which he possessed according to the municipal law of his State and which, to a certain limited extent, especially in a modern democracy, gave him control over the organization of the State ... In a foreign State, he is at the mercy of the State and its institutions, at the mercy of the inhabitants of the territory, who in the last resort accord him those rights and privileges which they deem desirable. This is a situation which hardly corresponds to modern standards of justice.[13]

[11] Cited in Amerasinghe, *State Responsibility*, at 59. As Amerasinghe demonstrates, however, many of the rules governing the procedures for assertion of a claim and calculation of damages are intimately related to the position of the injured alien: ibid. at 61–65.

[12] While no longer sustainable in view of obligations assumed by adherence to the United Nations Charter and particular treaties, the classical predicament of persons without a nationality is captured by L. Oppenheim, *International Law: A Treatise* (1912), at 369: "It is through the medium of their nationality only that individuals can enjoy benefits from the existence of the Law of Nations ... Such individuals as do not possess any nationality enjoy no protection whatever, and if they are aggrieved by a State they have no way to redress, there being no State that would be competent to take their case in hand. As far as the Law of Nations is concerned, apart from morality, there is no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals."

[13] Roth, *Minimum Standard*, at 113.

Aliens law effects a minimalist accommodation of the most basic concerns of foreigners in the interest of continued international intercourse. It is a formal acknowledgment that commercial linkages and other aspects of national self-interest require legal systems to adapt to the reasonable expectations of non-nationals.

Second, the development of aliens law brought the vindication of particularized harms within the realm of international legal relations. A state which fails to live up to the minimum standards of protection owed to aliens can be forced to answer for its failures through the formal mechanisms of diplomatic protection and international arbitration. International law was transformed from a system focused solely on resolving the conflicting corporate interests of states, to a regime in which the particularized harms experienced by at least some individual human beings are subsumed within the definition of the national interest.

Third, given that international legal accountability would mean nothing without effective action, aliens law embraced surrogacy as the conceptual bridge between particularized harms and international enforceability. Because individuals are not recognized actors in international legal relations, all wrongs against a citizen are notionally transformed into harms done to the national state, which is deemed to enjoy a surrogate right to pursue accountability in its sole discretion.[14] This is not a trustee relationship, as national states are required neither to take the needs of the injured individual into account, nor to make restitution of any proceeds derived from enforcement. As unfair as it undoubtedly is that the persons who actually experience a loss abroad have so little control over process or recovery of damages, the surrogacy relationship implemented by international aliens law nonetheless serves the objective of forcing foreign states to take respect for the human dignity of aliens more seriously. As observed by Amerasinghe,

> International society as a whole is, perhaps, content to keep the law in a fairly undeveloped state. Thus, it has become more an instrument for keeping in check the powers of States vis à vis aliens, emanating from extreme theories of State sovereignty, than a reflection of the proper aspirations of an international society seeking to reconcile the conflicting interests of State and alien with a view to ensuring ideal justice for the individual.[15]

Fourth, and most specifically, the parallel system of bilateral agreements on the protection of aliens showed how rights could be defined across cultures, and

[14] "Nationality is a juridical and political link that unites an individual with a State and it is that link which enables a State to afford protection against all other States": L. Sohn and T. Buergenthal, *The Movement of Persons Across Borders* (1992) (Sohn and Buergenthal, *Movement of Persons*), at 39.

[15] Amerasinghe, *State Responsibility*, at 285.

in a way that maintained its currency in changing circumstances. Only a few clearly understood and established rights were normally phrased as absolute undertakings. For the most part, the standard of protection was set in contingent terms, effectively assimilating the aliens of the state parties either to "most-favored" foreigners or even to citizens of the territorial state. The objective of protection came therefore to be understood in terms of non-discrimination, extending to whatever core interests were viewed by the negotiating states as necessary to sustain the desired level of interstate relations.

2.2 International protection of minorities

A second body of law which influenced the structure of the international refugee rights regime was the League of Nations system for the protection of national minorities. Like aliens law, the Minorities Treaties which emerged after the First World War were intended to advance the interests of states. Their specific goal was to require vanquished states to respect the human dignity of resident ethnic and religious minorities, in the hope of limiting the potential for future international conflict:

> We are trying to make a peaceful settlement, that is to say, to eliminate those elements of disturbance, so far as possible, which may interfere with the peace of the world ... The chief burden of the war fell upon the greater Powers, and if it had not been for their action, their military action, we would not be here to settle these questions. And, therefore, we must not close our eyes to the fact that, in the last analysis, the military and naval strength of the Great Powers will be the final guarantee of the peace of the world ... Nothing, I venture to say, is more likely to disturb the peace of the world than the treatment which might in certain circumstances be meted out to minorities. And, therefore, if the Great Powers are to guarantee the peace of the world in any sense, is it unjust that they should be satisfied that the proper and necessary guarantee has been given?[16]

The Minorities Treaties marked a major advance over the conceptual framework of international aliens law. Whereas the concern under aliens law had been simply to set standards for the treatment abroad of a state's own nationals, the Minorities Treaties provided for external scrutiny of the relationship between foreign citizens and their own government. Minorities were guaranteed an extensive array of basic civil and political entitlements, access to public employment, the right to distinct social, cultural, and educational institutions, language rights, and an equitable share of public funding. The duty to respect these rights was imposed on the governments of defeated states as a condition precedent to the restoration of sovereign authority over their

[16] Speech by United States President Wilson to the Peace Conference, May 31, 1919, cited in L. Sohn and T. Buergenthal, *International Protection of Human Rights* (1973), at 216–217.

territories. While no formal international standing was granted to minority citizens themselves, enforcement of interstate obligations relied heavily on information garnered from petitions and other information provided by concerned individuals and associations. The welfare of particular human beings was thereby formally recognized as a legitimate matter of international attention.

Beyond their conceptual importance as limitations on state sovereignty over citizens, the Minorities Treaties also broke new ground in procedural terms. After the 1878 Treaty of Berlin, complaints had been made that victorious states took advantage of their right to supervise the protection of minorities to intervene oppressively in the vanquished states' internal affairs. Rather than overseeing the conduct of the defeated states directly, the Great Powers which emerged from the First World War therefore opted to establish the first international system of collectivized responsibility for the enforcement of human rights. The Great Powers requested the Council of the just-established League of Nations to serve as guarantor of the human rights obligations set by the Minorities Treaties. Once ratified, the treaties were submitted to the Council, which then resolved formally to take action in response to any risk of violation of the stipulated duties.[17] The League of Nations went on to establish an elaborate petition system to ensure that Council members had the benefit of the views of both minorities and respondent governments before taking action in a particular case.

This system was in no sense a universal mechanism to protect human rights. It was applicable only to states forced to accept minority rights provisions as part of the terms of peace, and to a smaller number of states that made general declarations to respect minority rights as a condition of admission to the League of Nations. Nor did the Minorities Treaties system challenge the hegemony of states as the only parties able to make and enforce international law. Petitions from minorities were a source of critical information to the League's Council, but did not enfranchise individuals or collectivities as participants in the enforcement process.

The minorities system nonetheless contributed in important ways to the evolution of both international human rights law and the refugee rights regime. The Minorities Treaties firmly established the propriety of international legal attention to the human rights of at-risk persons inside sovereign states. Whereas aliens law considered harms against individuals merely as evidence in the adjudication of competing claims by states, the system of minorities protection reversed the equation. The focus of concern became the well-being of the

[17] The Permanent Court of International Justice could be asked to render advisory opinions on contentious legal issues. See e.g. *Greco-Bulgarian Communities*, [1930] PCIJ Rep, Ser. B, No. 17; *Access to German Minority Schools in Upper Silesia*, [1931] PCIJ Rep, Ser. A/B, No. 40; *Minority Schools in Albania*, [1935] PCIJ Rep, Ser. A/B, No. 64.

minorities themselves, albeit a concern driven by the desire to avoid consequential harm to the peace and security of the international community.

Equally important, the Minorities Treaties provided the context for collectivization of international responsibility for supervision of human rights. They showed the viability of an enforcement process vested in the community of states, yet open to the voices of particular individuals and collectivities. In contrast to aliens law, the minorities system did not condition enforcement on the initiative of a particular state, but established a direct role for the international community itself in the assertion of human rights claims. This evolution was very important to refugees and stateless persons, who are by definition not in a position to look to their national state to protect their interests.

2.3 League of Nations codifications of refugee rights

Aliens law was the first legal system to deny the absolute right of states to treat persons within their jurisdiction in whatever manner they deemed appropriate. It recognized the special vulnerabilities of persons outside their national state, and established a combination of absolute and contingent duties owed to aliens. It was enforceable by a system of *interstate accountability*, operationalized at the bilateral level. The League of Nations system for protection of national minorities built on these achievements, but strengthened enforceability by replacing pure bilateral accountability with the first system of *collectivized surrogacy*. The concern of the international community was transformed from simply the facilitation of national protective efforts, to direct engagement as the source of residual protection for those whose interests were not adequately safeguarded by national governments. States were directly accountable to the international community for actions in disregard of human rights within their own borders. The legal framework for an international refugee rights regime draws on the progressive refinements achieved under these two systems.

The early efforts of the international community to protect refugees stemmed from a series of exoduses in the years following the end of the First World War: some 2 million Russians, Armenians, and others were forced to flee their countries between 1917 and 1926. The flight of these refugees unfortunately coincided with the emergence of modern systems of social organization throughout most of Europe. Governments began to regulate large parts of economic and social life, and to safeguard critical entitlements for the benefit of their own citizens. This commitment to enhanced investment in the well-being of their own citizenry led states to reassert the importance of definite boundaries between insiders and outsiders, seen most clearly in the reinforcement of passport and visa controls at their frontiers. Equally important, access to such important social goods as the right to work and public housing was often limited to persons able to prove citizenship.

The impact of this shift in European social organization was mitigated by the network of bilateral treaties of friendship, commerce, and navigation established under the rubric of international aliens law.[18] These agreements guaranteed the nationals of contracting states access while abroad to most of the benefits normally reserved for citizens. The essential precondition was reciprocity: the citizens of one state could expect benefits in the cooperating state only if their own government in turn ensured the rights of citizens of that partner state. If reciprocity was not respected, or if there was no bilateral arrangement between an individual's home state and the foreign country into which entry was sought, access to the territory, or at least to important social benefits, would likely be denied.

This reciprocity requirement was disastrous for early groups of refugees. Most had no valid identity or travel documents to prove their nationality in a cooperating state. Worse still, the 1.5 million Russian refugees who fled the Bolshevik Revolution were formally denationalized by the new Soviet government, and therefore clearly ineligible to benefit from any bilateral arrangement. Without documentation to establish their eligibility for entry and residence, refugees were either turned away or, if able to avoid border controls, barred from work and other regulated sectors. Lacking valid travel documents, they were not able to move onward from first asylum states in search of better living conditions. The result was many truly desperate people, often destitute and ill, unable either to return to their home state or to live decent lives abroad.

The first generation of refugee accords was an attempt to respond to the legally anomalous situation of refugees.[19] As observed by the League of Nations Advisory Commission for Refugees, "the characteristic and essential feature of the problem was that persons classed as 'refugees' have no regular nationality and are therefore deprived of the normal protection accorded to the regular citizens of a State."[20] Like all aliens, refugees were essentially at the mercy of the institutions of a foreign state. In contrast to other foreigners, however, refugees clearly could not seek the traditional remedy of diplomatic protection from their country of nationality:

> The refugee is an alien in any and every country to which he may go. He does not have the last resort which is always open to the "normal alien" – return to his own country. The man who is everywhere an alien has to live in unusually difficult material and psychological conditions. In most cases

[18] Bilateral aliens treaties are discussed above, at pp. 76–78.

[19] See generally J. Hathaway, "The Evolution of Refugee Status in International Law: 1920–1950," (1984) 33 *International and Comparative Law Quarterly* 348 (Hathaway, "Evolution of Refugee Status"), at 350–361.

[20] "Report by the Secretary-General on the Future Organisation of Refugee Work," LN Doc. 1930.XIII.2 (1930), at 3.

> he has lost his possessions, he is penniless and cannot fall back on the various forms of assistance which a State provides for its nationals. Moreover, the refugee is not only an alien wherever he goes, he is also an "unprotected alien" in the sense that he does not enjoy the protection of his country of origin. Lacking the protection of the Government of his country of origin, the refugee does not enjoy a clearly defined status based upon the principle of reciprocity, as enjoyed by those nationals of those states which maintain normal diplomatic relations. The rights which are conferred on such nationals by virtue of their status, which is dependent upon their nationality, are generally unavailable to him. A refugee is an anomaly in international law, and it is often impossible to deal with him in accordance with the legal provisions designed to apply to aliens who receive assistance from their national authorities.[21]

Confronted by largely unstoppable flows of desperate people who did not fit the assumptions of the international legal system, states agreed that it was in their mutual self-interest to enfranchise refugees within the ranks of protected aliens. To have decided otherwise would have exposed them to the continuing social chaos of unauthorized and desperate foreigners in their midst. Equally important, it was understood that the credibility of border controls and of the restriction of socioeconomic benefits to nationals was at stake: by legitimating and defining a needs-based exception to the norm of communal closure, refugee law sustained the protectionist norm. So long as the admission of refugees was understood to be formally sanctioned by states, their arrival would cease to be legally destabilizing.

The mechanisms adopted to address the plight of refugees followed from experience under predecessor systems. As under aliens law, the fundamental goal was to adapt to the reasonable expectations of non-nationals in the interest of the continued well-being of the international system. This objective was implemented through the collectivized surrogacy model developed by the Minorities Treaties regime: refugees did not become the holders of particular rights, but were entitled to benefit from actions taken for them by a succession of League of Nations high commissioners. In particular, the League of Nations was empowered by various treaties and arrangements to respond to the legal incapacity of refugees by providing them with substitute documentation, which states agreed to treat as the functional equivalent of national passports. A system of surrogate consular protection emerged as well. Representatives of the High Commissioner were authorized by states to perform tasks normally reserved to states of nationality, such as establishing identity and civil status, and certifying educational and professional qualifications.

[21] "Communication from the International Refugee Organization to the Economic and Social Council," UN Doc. E/1392, July 11, 1949, at App. I.

These first refugee agreements did not set specific responsibilities for states, other than cooperation in the recognition of League of Nations documentation. There was generally no need for greater precision, as most European states continued to afford relatively generous benefits to the nationals of "most-favored states" to whom refugees were effectively assimilated. The refugee problem was moreover perceived by states to be a passing phenomenon, which would resolve itself either through consensual naturalization in the state of residence or by return of the refugee to the state of origin when conditions normalized.[22] There was accordingly no need to do more than bring refugees within the ranks of admissible foreigners.

The 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees,[23] however, departed from this pattern. Increasing political and economic instability, coupled with the persistence of the "temporary" refugee problem, had led some states to refuse to assimilate refugees to most-favored foreigners. As generosity subsided, the League of Nations elected to standardize the range of rights that should be extended to refugees. While framed as a series of non-binding recommendations to states, the 1928 Arrangement set standards for the recognition of personal status, and emphasized the inappropriateness of conditioning refugee rights on respect for reciprocity by their home state. The Arrangement also addressed a number of more detailed concerns, such as access to the courts, the right to work, protection against expulsion, equality in taxation, and the nature of national responsibilities to honor League of Nations identity certificates.

Reliance on moral suasion alone to induce uniform respect for the human dignity of refugees did not, however, prove satisfactory:

> The results so far secured, however, leave something to be desired as regards both the legal status and conditions of life of refugees. The replies received [from states] to the enquiry into the application of the Arrangement ... show that there is still much to be done before the position of refugees in all countries is such as no longer to call for strong and continued international action. The striking feature of the replies and of the established known facts is the comparative inefficacity of the recommendations.[24]

[22] "A final solution of the refugees problem can accordingly only be furnished by naturalisation in the countries in which the refugees reside, or by restoring their original nationality to them. As neither of these alternatives is possible *at the moment*, it has been necessary to institute a *provisional system of protection* which is embodied in the Inter-Governmental Arrangements of 1922, 1924, 1926 and 1928 [emphasis added]": "Report by the Secretary-General on the Future Organisation of Refugee Work," LN Doc. 1930.XIII.2 (1930), at 3.

[23] Arrangement relating to the Legal Status of Russian and Armenian Refugees, 89 LNTS 53, done June 30, 1928.

[24] "Report by the Inter-Governmental Advisory Commission for Refugees on the Work of its Fourth Session," 12(2) LN OJ 2118 (1931), at 2119.

The Great Depression had understandably fortified the resolve of states to preserve scarce entitlements for their own citizens. Unlike other foreigners who responded by leaving, however, refugees could not return home.

The dilemma was sufficiently serious that in 1933 the League of Nations Intergovernmental Commission, charged with oversight of refugee protection, argued that "[t]he desirability of a convention aiming at securing a more stable legal status for refugees [was] unanimously recognized,"[25] and that "the stabilization of the legal status of refugees can only, owing to the very nature of the steps to be taken, be brought about by a formal agreement concluded by a certain number of States concerned."[26] The resultant 1933 Convention relating to the International Status of Refugees[27] is one of the earliest examples of states agreeing to codify human rights as matters of binding international law.[28] Equally important, it opened the door to a new way of thinking about the human rights of aliens. Aliens' rights had previously been conceived to respond to a fixed set of circumstances, namely those typically encountered by traders and other persons traveling or residing abroad in pursuit of commercial opportunities.[29] Many risks faced by refugees in foreign states were, however, different from those which typically confronted business travelers. The Refugee Convention of 1933 met this challenge by setting a rights regime for a subset of the alien population, tailored to its specific vulnerabilities.

Many rights set by the 1933 Convention simply formalized and amplified the recommendations set out in the 1928 Arrangement. An important addition was the explicit obligation of states not to expel authorized refugees, and to avoid *refoulement*, defined to include "non-admittance at the frontier."[30] Three key socioeconomic rights were also added to the 1928 list. First, the Convention granted refugees some relief from the stringency of foreign labor restrictions, and proscribed limitations of any kind after three

[25] "Report of the Intergovernmental Commission and Communication from the Governing Body of the Nansen International Office," LN Doc. C.311.1933 (1933), at 1.

[26] "Work of the Inter-Governmental Advisory Commission for Refugees during its Fifth Session and Communication from the International Nansen Office for Refugees," 5(1) LN OJ 854 (1933), at 855.

[27] 159 LNTS 3663, done Oct. 28, 1933, entered into force June 13, 1935 (1933 Refugee Convention).

[28] The 1933 Refugee Convention established the second voluntary system of international supervision of human rights (preceded only by the 1926 Slavery Convention, 60 LNTS 253, done Sept. 25, 1926, entered into force Mar. 9, 1927).

[29] See chapter 2.1 above, at pp. 76–77.

[30] "Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order": 1933 Refugee Convention, at Art. 3.

years' residence, where the refugee was married to or the parent of a national, or was an ex-combatant of the First World War. Second, refugees were granted access to the host state's welfare and relief system, including medical care and workers' compensation. Third, access to education was to be facilitated, including by the remission of fees. This enumeration was later said to have "confer[red] upon refugees the maximum legal advantages which it had been possible to afford them in practice."[31]

The 1933 Convention drew on the precedent of aliens law to establish a mixed absolute and contingent rights structure. Some rights, including recognition of legal status and access to the courts, were guaranteed absolutely. More commonly, one of three contingent rights formulations was used. Refugees were to have access to work, social welfare, and most other rights on the same terms as the nationals of most-favored nations. Exceptionally, as with liability to taxation, refugees were assimilated to citizens of the host state. Education rights, conversely, were mandated only to the extent provided to foreigners generally. This pattern of variant levels of obligation toward refugees continues to the present day.[32] It is noteworthy, however, that the 1933 Convention guaranteed almost all refugee rights either absolutely or on terms of equivalency with the citizens of most-favored states.

In practice, however, the 1933 Convention did not significantly expand refugee rights. Only eight states ratified the treaty, several with major reservations. The assimilation of refugees to most-favored foreigners in any event proved an inadequate guarantee of reasonable treatment, as the intensification of the unemployment crisis led states to deny critical social benefits, including the right to work, even to established foreigners:

> Some countries have found it necessary to introduce restrictions on the employment of foreign workers and, as a result, refugees who had been employed for years have been deprived of their livelihood, while in other countries, as a result of these restrictions, refugees have become vagrants, and this has been considered a sufficient reason for their expulsion. Unlike other foreigners in a similar position, these refugees could not be repatriated. Their lot has become a tragic one, since they have been obliged to enter first one country and then another illegally; many of them are thus compelled to live as outlaws.[33]

The strategy of assimilating refugees to aliens, while valuable in the earlier, more cosmopolitan era, now condemned refugees to real hardships. Yet

[31] "Work of the Inter-Governmental Advisory Commission for Refugees during its Eighth Session," LN Doc. C.17.1936.XII (1936), at 156.

[32] See chapters 3.2 and 3.3 below.

[33] "Report Submitted to the Sixth Committee to the Assembly of the League of Nations: Russian, Armenian, Assyrian, Assyro-Chaldean, Saar and Turkish Refugees," LN Doc. A.45.1935.XII (1935).

return home had not been possible for most refugees, and few European states had agreed to grant naturalization.[34]

One answer to this dilemma would have been to extend national treatment to refugees. The League of Nations, however, was engaged in a rearguard action intended simply to preserve the "most-favored alien" guarantees secured under the 1933 Convention. Some states were unwilling to grant refugees rights even at this level of obligation. Others declined to sign the accord for fear that the intensifying economic crisis might force them to renounce the Convention peremptorily, in breach of its one-year notice requirement. Rather than expanding rights, therefore, the international agenda was very much focused on easing the requirements of the 1933 Convention or even drafting a new, more flexible, accord to induce states to bind themselves to some standard of treatment, even if a less exigent one.[35] This was hardly the moment to make progress on a more inclusive rights regime for refugees.

The extent of the retreat from meaningful protection of refugees can be seen in the 1936 Provisional Arrangement concerning the Status of Refugees coming from Germany.[36] While continuing the approach of stipulating legally binding duties of states, no attempt was made to guarantee refugees more than identity certificates, protection from expulsion, recognition of personal status, and access to the courts. Even at that level, only seven states adhered. As it worked to establish a more definitive regime for refugees from the German Reich, the League of Nations was therefore drawn to two critical points of consensus. First, given the insecurity about economic and political circumstances, governments were likely to sign only if able quickly to renounce obligations. Second, and more profoundly, it was understood that truly adequate protection would be provided only if refugee rights were effectively assimilated to those of nationals, a proposition flatly rejected by most European states. Unlike the countries of Europe, however, most overseas countries of resettlement were "inclined to offer greater facilities for the naturalization of refugees."[37] The League of Nations therefore decided that

[34] "Unfortunately, for various reasons, [naturalisation] encountered considerable difficulties even before countries became reluctant, owing to their unemployment problems, to increase the number of workers ... [A] surprisingly small percentage of refugees had succeeded in obtaining naturalisation, and those modest results, combined with existing political and economic conditions, do not suggest that too much hope should be pinned to naturalisation as a general and early remedy for the refugee problem in Europe": ibid. at 2.

[35] "Work of the Inter-Governmental Advisory Commission for Refugees during its Eighth Session," LN Doc. C.17.1936.XII (1936), at 156–157.

[36] 3952 LNTS 77, done July 4, 1936.

[37] "Report Submitted by the Sixth Committee to the Assembly: Russian, Armenian, Assyrian, Assyro-Chaldean, Saar and Turkish Refugees," LN Doc. A.45.1935.XII (1935), at 2.

"[a] suitable distribution of refugees among the different countries might help to solve the problem."[38]

The resulting 1938 Convention concerning the Status of Refugees coming from Germany[39] reflected this shift. While most of the rights mirrored the comprehensive list established by the 1933 Convention, two new provisions of note were included. Art. 25 reversed the position of the predecessor 1933 Convention, allowing states to accede to the regime without committing themselves to give any notice before renouncing it. While it was hoped that this new flexibility would encourage states to adhere for as long as circumstances allowed, in fact only three states – Belgium, France, and the United Kingdom – ultimately agreed to be bound by it (none of which availed itself of the early renunciation option). The more prophetic novation of the 1938 Convention stipulated that "[w]ith a view of facilitating the emigration of refugees to oversea countries, every facility shall be granted to the refugees and to the organizations which deal with them for the establishment of schools for professional re-adaptation and technical training."[40] In light of the unwillingness of European states to grant meaningful rights to refugees, there was indeed no option other than to pursue the resettlement of refugees in states outside the region.

This adoption of what Coles has styled an "exilic bias" in refugee law[41] led to a de-emphasis on the elaboration of standards to govern refugee rights. Between 1938 and the adoption of the present Refugee Convention in 1951, the consistent emphasis of a succession of treaties and intergovernmental arrangements was to resettle overseas any refugees who could not be expected to integrate or repatriate within a reasonable time. As the countries to which refugees were relocated agreed to assimilate them to citizens, the traditional need to address the legal incapacity of refugees through the guarantee of a catalog of rights was considered no longer to exist.

The early refugee agreements, in particular the 1933 Convention, nonetheless provided the model for two conceptual transitions at the heart of the modern refugee rights regime. First, they introduced the idea of freely accepted international supervision of national compliance with human rights. This quiet revolution in thinking transformed collective supervision of human rights from a penalty to be paid by subordinate states, as under the League of Nations Minorities Treaties system, to a means of advancing the shared objectives of states through cooperation. Of equal importance, the

[38] "Work of the Inter-Governmental Advisory Commission for Refugees during its Eighth Session," LN Doc. C.17.1936.XII (1936), at 159.

[39] 192 LNTS 4461, done Feb. 10, 1938 (1938 Refugee Convention).

[40] Ibid. at Art. 15.

[41] G. Coles, "Approaching the Refugee Problem Today," in G. Loescher and L. Monahan eds., *Refugees and International Relations* 373 (1990).

1928 and subsequent accords reshaped the substance of the human rights guaranteed to aliens. Rather than simply enfranchising refugees within the traditional aliens law regime, states tailored and expanded those general principles to meet the real needs of refugees. The consequential decisions to waive reciprocity, and to guarantee basic civil and economic rights in law, served as a direct precedent for a variety of international human rights projects, including the modern refugee rights regime.

2.4 The Convention relating to the Status of Refugees

In the years immediately following the Second World War, the international community pursued the repatriation of European refugees when possible, failing which an effort was made to arrange for overseas resettlement. There was a fortuitous coalescence of interests, as the postwar economic boom in states of the New World had opened doors to new sources of labor. The scale of the resettlement project was massive: between 1947 and 1951, the International Refugee Organization (IRO) relocated more than 1 million Europeans to the Americas, Israel, Southern Africa, and Oceania. The IRO had its own specialized staff, a fleet of more than forty ships, and, most important, enjoyed the political and economic support of the developed world.[42]

As the June 1950 date for termination of the mandate of the IRO neared, it was clear that not all Second World War refugees could be either repatriated or resettled. A strategy was moreover needed to address impending refugee flows from the Communist states of the East Bloc. In this context, the United Nations proposed the effective assimilation of all stateless persons, including refugees, under a new international regime.[43] While political antagonism undermined realization of this holistic vision,[44] a process was initiated which led ultimately both to the establishment of the United Nations High Commissioner for Refugees (UNHCR), and to the preparation of the 1951 Refugee Convention. This Convention, which remains the cornerstone of modern international refugee law, resurrected the earlier commitment to codification of legally binding refugee rights.

[42] See generally L. Holborn, *The International Refugee Organization: A Specialized Agency of the United Nations* (1956); Independent Commission on International Humanitarian Issues, *Refugees: The Dynamics of Displacement* (1986), at 32–38.

[43] United Nations Department of Social Affairs, "A Study of Statelessness," UN Doc. E/1112, Feb. 1, 1949 (United Nations, "Statelessness").

[44] See J. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law," (1990) 31(1) *Harvard International Law Journal* 129, at 144–151.

In part, the desire of states to reach international agreement on the human rights of refugees was simply a return to pre-Depression traditions.[45] States had always understood that it was in their self-interest to ensure that the arrival and presence of refugees did not become a socially destabilizing force.[46] While desperate circumstances at the end of the Second World War had led to massive intergovernmental efforts to resettle refugees overseas, the restoration of relative normalcy now prompted states to demand a return to greater individuated control over the process of refugee protection.[47] It was argued that the appropriate level of interstate coordination of refugee protection could be secured through the moral suasion of a high commissioner armed with agreed common standards of conduct.[48] In most cases, however, states could again be counted on to facilitate the integration of those refugees who were unable to return home.[49]

This return to particularized responsibility would be feasible, however, only if it were possible simultaneously to consolidate the commitment of other states to accept a share of responsibility for the European refugee burden.[50] Born of political and strategic solidarity, and nourished by economic advantage, the postwar resettlement effort had proved extremely

[45] "If the General Council accepts the recommendation ... with regard to the termination of the [International Refugee] Organization's care and maintenance programme, the Director-General [of IRO] assumes that Governments will wish to revert to their traditional pre-war policy in granting material assistance to refugees. Thus individual Governments would undertake to provide for any necessary care and maintenance of refugees living on their territories": "Communication from the International Refugee Organization to the Economic and Social Council," UN Doc. E/1392, July 11, 1949, at 8.

[46] "The stateless person in the country he is able to reach and which is ready to admit him usually finds no encouragement to settle there. And yet, if he is not to remain beyond the pale of society and to become an 'international vagabond' he must be integrated in the economic life of the country and settle down": United Nations, "Statelessness," at 23. See generally chapter 2.3 above, at pp. 84–85.

[47] "[T]he proposal to set up a high commissioner's office would give that institution the functions of coordination and liaison, and would leave to States the political responsibility which should properly be theirs. The time had come to impose that responsibility on States. The principal States concerned in the refugee problem, in fact, were claiming it": Statement of Mr. Fenaux of Belgium, 9 UNESCOR (326th mtg.), at 618 (1949).

[48] "The French and Belgian Governments considered that an international convention was essential to settle the details of the measures which national authorities would have to put into effect": Statement of Mr. Rochefort of France, ibid.

[49] "Existing conventions which were limited in scope needed to be brought up-to-date and a new consolidated draft convention prepared ... The 1933 Convention could be used as a basis for the new convention": Statement of Mr. Rundall of the United Kingdom, ibid. at 623.

[50] "In effect, an appeal was made to all governments to accord the same treatment to all refugees, in order to reduce the burden on contracting governments whose geographical situation meant that the greater part of the responsibility fell on them": Statement of Mr. Desai of India, UN Doc. E/AC.7/SR.166, at 18 (1950). See also Statement of Mr. Rochefort

important to recovery efforts in Western Europe. Europeans were therefore anxious to enlist external support to insure against the prospect of purely European responsibility for refugee flows from Eastern and Central Europe. The experience of the IRO had shown that the willingness of refugees to resettle outside Europe was contingent on the establishment of a common denominator of basic entitlements in overseas states. The IRO had thus regularly negotiated bilateral agreements with resettlement states to ensure the protection of refugees, particularly during the period before they were naturalized. With the impending termination of the IRO's mandate, the establishment of a guaranteed core of refugee rights was therefore a critical element in maintaining the viability of overseas resettlement as a residual answer to refugee protection needs. Access by refugees to work and social security were especially crucial.[51]

The modern system of refugee rights was therefore conceived out of enlightened self-interest. To the prewar understanding of assimilation as a source of internal stability were added concerns to promote burden-sharing and to set the conditions within which states could independently control a problem of interstate dimensions:

> This phase, which will begin after the dissolution of the International Refugee Organization, will be characterized by the fact that the refugees will lead an independent life in the countries which have given them shelter. With the exception of the "hard core" cases, the refugees will no longer be maintained by an international organization as they are at present. They will be integrated in the economic system of the countries of asylum and will themselves provide for their own needs and for those of their families. This will be a phase of the settlement and assimilation of the refugees. Unless the refugee consents to repatriation, the final result of that phase will be his integration in the national community which has given him shelter. It is essential for the refugee to enjoy an equitable and stable status, if he is to lead a normal existence and become assimilated rapidly.[52]

2.4.1 Substantive rights

The substantive rights set by the Convention have their origins in two main sources. Most of the entitlements are derived from the 1933 Refugee

of France, 9 UNESCOR (326th mtg.), at 616 (1949): "Not the least of the merits of the International Refugee Organization was that it had enlisted many distant countries in the work of providing asylum for refugees, the burden of which had for long been supported by the countries of Europe alone."

[51] Communication from the International Refugee Organization to the Economic and Social Council, UN Doc. E/1392, July 11, 1949, at paras. 35–37.

[52] "Memorandum by the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems," UN Doc. E/AC.32/2, Jan. 3, 1950, at 6–7.

Convention, explicitly acknowledged to be the model for the 1951 agreement. A key secondary source, however, was the 1948 Universal Declaration of Human Rights.[53] It influenced the redrafting of the content of several rights found in the 1933 Refugee Convention, and accounted for six additions to the earlier formulation of refugee rights.[54] Of the four rights with no obvious predecessor, the cryptically named right to "administrative assistance" essentially codifies the assumption by state parties of the consular role previously played by the high commissioners for refugees of the League of Nations.[55] Three provisions, namely protection against penalization for illegal entry, exemption from exceptional measures applied against co-nationals, and the right to transfer externally acquired assets to a country of resettlement,[56] represent net additions to the conceptualization of refugee rights.

The rights set by the Refugee Convention include several critical protections which speak to the most basic aspects of the refugee experience, including the need to escape, to be accepted, and to be sheltered. Under the Convention, refugees are not to be penalized for seeking protection, nor exposed to the risk of return to their state of origin. They are entitled to a number of basic survival and dignity rights, as well as to documentation of their status and access to national courts for the enforcement of their rights.

Beyond these basic rights, refugees are also guaranteed a more expansive range of civil and socioeconomic rights. While falling short of the comprehensive list of civil rights promoted by the Universal Declaration of Human Rights, the Refugee Convention nonetheless pays significantly more attention to the definition of a sphere of personal freedom for refugees than did any of the earlier refugee agreements. The inability of states to make any reservations

[53] Universal Declaration of Human Rights, UNGA Res. 217A(III), Dec. 10, 1948 (Universal Declaration).

[54] These include the rights to non-discrimination, housing, naturalization, property, freedom of internal movement, and religious freedom. As a general matter, there was an assumption that rights declared in the Universal Declaration of Human Rights formed the clear backdrop to the Refugee Convention. In the words of the British delegate, "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, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 8. Yet it is equally clear that there was no appetite on the part of all delegates to codify in binding form all of the rights recognized in the Declaration. France, for example, was of the view that the Refugee Convention ought not to render binding the full notion of freedom of opinion and expression codified in Art. 19 of the Universal Declaration of Human Rights: Statement of Mr. Rain of France, ibid. at 9.

[55] Refugee Convention, at Art. 25. See chapter 2.3 above, at pp. 85–86.

[56] Refugee Convention, at Arts. 31 ("refugees unlawfully in the country of refuge"), 8 ("exemption from exceptional measures"), and 30 ("transfer of assets").

to their obligation to guarantee protection against discrimination, religious freedom, and access to the courts entrenches a universal minimum guarantee of basic liberties for refugees.[57]

Of particular importance are the guarantees of key socioeconomic rights that integrate refugees in the economic system of the country of asylum or settlement, enabling them to provide for their own needs. Basic rights to property and work are supplemented by a guarantee of access to the asylum country's social safety net. Refugees are also to be treated as citizens under labor and tax legislation. There are important parallels between these key socioeconomic rights and those negotiated under the 1939 and 1949 migrant labor conventions of the International Labor Organization (ILO).[58] The ILO pioneered international legal protections against economic vulnerability, challenging the assumption of aliens law that persons outside their own country require only guarantees of basic civil rights.[59] Recognizing that refugees, like migrant workers, face the risk of economic marginalization and exploitation, the 1951 Refugee Convention goes a substantial distance toward enfranchising refugees within the structures of the social welfare state.

Finally, the Convention establishes rights of solution, intended to assist refugees to bring their refugee status to an end. The promotion of repatriation is not addressed, consistent with the position of the drafters that return should result only from the voluntary decision of a particular refugee,[60] or in consequence of a determination by the asylum state that the basis for the individual's claim to protection has ceased to exist.[61] In contrast, provision is made for the issuance of travel documents and transfer of assets that would be necessary upon resettlement, and also for the alternative of naturalization in the asylum state.

2.4.2 Reservations

Refugee Convention, Art. 42 Reservations

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36–46 inclusive.

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation

[57] Ibid. at Art. 42(1). Protection against *refoulement* is similarly insulated from reservations by state parties.

[58] See chapter 2.5.4 below, at pp. 152–153. [59] See chapter 2.1 above, at pp. 76–77.

[60] See chapter 2.4 above, at p. 93; and generally chapter 7.2 below.

[61] Refugee Convention, at Art. 1(C). See generally Grahl-Madsen, *Status of Refugees I*, at 367–411; Hathaway, *Refugee Status*, at 189–214; and chapter 7.1 below.

by a communication to that effect addressed to the Secretary-General of the United Nations.

All substantive rights other than to non-discrimination, freedom of religion, access to the courts, and protection against *refoulement* may be excluded or modified by a state through reservation upon signature, ratification, or accession to the Convention.[62] An evaluation of refugee rights in any particular state therefore requires that account be taken of the terms of participation consented to by the state in question.[63] The requirement that refugees lawfully staying in an asylum state benefit from the same right to access wage-earning employment as most-favored foreigners has attracted the largest number of reservations.[64] There has also been a noticeable reluctance fully to embrace the rights of refugees to enrol in public schools, benefit from labor and social security legislation, and enjoy freedom of movement within the territory of the asylum state.[65]

2.4.3 *Temporal and geographical restrictions*

Refugee Convention, Art. 1 Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who: . . . (2) [a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to

[62] The Executive Committee of the High Commissioner's Program has, however, voted to endorse an Agenda for Protection which stipulates that "States Parties [are] to give consideration to withdrawing reservations lodged at the time of accession and, where appropriate, to work towards lifting the geographical reservation": "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, at Part III, Goal 1, Point 1. More generally, the International Law Commission is presently preparing a Guide to Practice on the question of reservations to treaties, including recommendations with respect to the withdrawal or modification of reservations and interpretive declarations: "Report of the International Law Commission on the Work of its 55th Session," UN Doc. A/CN.4/537, Jan. 21, 2004, at paras. 170–200.

[63] See generally S. Blay and M. Tsamenyi, "Reservations and Declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees," (1990) 2(4) *International Journal of Refugee Law* 527.

[64] Twenty-one governments have qualified their acceptance of at least some part of Art. 17 (wage-earning employment) of the Refugee Convention: UNHCR, "Declarations under section B of Article 1 of the Convention," available at www.unhcr.ch (accessed Apr. 13, 2004).

[65] Arts. 22 (public education), 24 (labor legislation and social security) and 26 (freedom of movement) have each attracted nine or more reservations: ibid.

such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it . . .

B. (1) for the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either

(a) "events occurring in Europe before 1 January 1951"; or

(b) "events occurring in Europe or elsewhere before 1 January 1951";

and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

It is moreover possible for a government to restrict its obligations on temporal or geographical grounds. As initially conceived, a state party to the 1951 Refugee Convention could elect to limit its obligations to persons whose fear of being persecuted was the result of events which occurred before January 1, 1951. The 1967 Protocol relating to the Status of Refugees[66] abolishes this temporal limitation for the overwhelming majority of states that have agreed also to be bound by its terms. However, four governments acceded to the Refugee Convention, but have not gone on to adopt the Protocol. Madagascar, Monaco, Namibia, and St. Kitts and Nevis are therefore under no legal duty to honor the Refugee Convention in respect to the claims of contemporary refugees.

Art. 1(B) of the Refugee Convention also allows a government to restrict its obligations on a geographical basis, specifically to protect only European refugees. In addition to availing themselves of the temporal limitation discussed in the preceding paragraph, Madagascar and Monaco have also chosen to invoke this prerogative to avoid legal responsibility toward non-European refugees. The terms of the Refugee Protocol also allow the governments of Congo, Malta, and Turkey to maintain in force a previously declared geographical restriction to European refugees, even while acceding to the Protocol. This option, however, is available only to states which had entered a geographical reservation under the Refugee Convention before the adoption of the Refugee Protocol in 1967.[67] Because Hungary acceded to the

[66] Protocol relating to the Status of Refugees, 606 UNTS 8791, done Jan. 31, 1967, entered into force Oct. 4, 1967 (Refugee Protocol).

[67] "The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that *existing declarations* made by States already Parties to the Convention in accordance with article 1B(1)(a) of the Convention, shall, unless extended under article 1B(2) thereof, apply also under the present Protocol [emphasis added]": Refugee Protocol, at Art. I(3).

Refugee Convention and Protocol only in 1989, it did not meet this requirement. Its attempt to sustain a geographical limitation upon accession to the Protocol was therefore legally invalid, perhaps explaining the withdrawal of the same in 1998.

2.4.4 Duties of refugees

Governments may legitimately expect refugees to comply with general laws, regulations, and public order measures. Such obligations may not, however, treat refugees less favorably than other resident aliens. Most important, there is no reciprocity of rights and obligations under the Refugee Convention. While refugees who breach valid laws of the host country are clearly subject to the usual range of penalties, states are prohibited from invoking the failure of refugees to comply with generally applicable duties as grounds for the withdrawal of rights established under the Convention.

> **Refugee Convention, Art. 2 General obligations**
> **Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.**

The original draft of the Refugee Convention contained a chapter that imposed three kinds of obligation on refugees: to obey laws, pay taxes, and perform military and other kinds of civic service.[68] The duty to respect the law was simply "a reminder of the essential duties common to nationals as well as to foreigners in general."[69] Liability to taxation and military conscription on the same terms as citizens was viewed as a fair contribution to expect from a refugee "residing in the country of asylum, enjoying a satisfactory status, and earning his living there."[70] Just as refugees should benefit from most of the advantages that accrue to nationals, so too should they assume reasonable duties toward the state that afforded them protection.

There were two quite different reactions to the proposal to codify the duties owed by refugees to an asylum state. A number of governments felt that such a provision was superfluous in view of the general duty of foreigners to obey the laws of their country of residence.[71] Moreover, as the American

[68] United Nations, "Memorandum by the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems," UN Doc. E/AC.32/2, Jan. 3, 1950, at 31–33. Chapter IV was entitled "Responsibilities of Refugees and Obligations Incumbent upon Them."

[69] Ibid. at 31. [70] Ibid. at 32.

[71] "[T]he article was unnecessary, as it contained nothing which was not obvious. Indeed, it was generally known that the laws of a country applied not only to its nationals but also to the foreigners residing in its territory, whether they were refugees or not": Statement of

representative argued, "refugees themselves would not be signing the Convention and would not be asked to do any more than anyone else in the country in which they took refuge."[72] In legal terms, "[i]t was impossible to write into a convention an obligation resting on persons who were not parties thereto."[73] It was therefore suggested that there was no need to include specific mention of the obligations of refugees.

However, France and several other states were adamant that

> such a provision [was] indispensable. It would have a moral application in all countries where there was no obligation on the immigrant alien to take an oath of loyalty or allegiance or to renounce [one's] former nationality. The purpose ... was not to bring about the forcible absorption of refugees into the community, but to ensure that their conduct and behavior was in keeping with the advantages granted them by the country of asylum.[74]

These countries had little patience for the argument that refugees were already obliged to respect the laws of their host states:

> [I]t should not be forgotten that what to some seemed obvious did not, unfortunately, square with the facts. That was proved by France's experience. The obligations of refugees should therefore be stressed and an appropriate clause inserted. Too often the refugee was far from conforming to the rules of the community ... Often, too, the refugee exploited the community.[75]

Largely out of respect for the significant refugee protection contributions made by France,[76] it was decided to include a specific reference in the Convention to the duties of refugees. The compromise was that while

Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 10. See also Statement of Mr. Guerreiro of Brazil, ibid., and Statement of Mr. Kural of Turkey, ibid. at 11. "Since an alien is subject to the territorial supremacy of the local state, it may apply its laws to aliens in its territory, and they must comply with and respect those laws": R. Jennings and A. Watts eds., *Oppenheim's International Law* (1992), at 905. See also chapter 2.1 above, at p. 76.

[72] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 7.

[73] Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.3, July 3, 1951, at 22.

[74] Statement of Mr. Rochefort of France, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 4. See also Statements of Mr. Perez Perozo of Venezuela and Mr. Herment of Belgium, ibid. at 5. A similarly exigent understanding of the duties owed by refugees is clear in remarks made by Mr. Robinson of Israel, UN Doc. E/AC.32/SR.12, Jan. 25, 1950, at 7: "[A] refugee was a foreigner *sui generis* to whom the draft convention accorded special status and in certain cases even equality with the nationals of the recipient country. The refugee thus obtained certain privileges and it was only fair to balance those by conferring upon him *greater* responsibilities [emphasis added]."

[75] Statement of Mr. Rochefort of France, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 7–8.

[76] See e.g. Statements of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 8 and UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 6–7; and Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 8.

refugees would not be subject to any particularized duties, the Convention would make clear that refugee status may not be invoked to avoid whatever general responsibilities are imposed upon other residents of the host country.[77] The notion of a specific enumeration of refugee duties was dropped.[78]

The unwillingness of the drafters to subject refugees to special duties can most clearly be seen in the debate about regulation of the political activities of refugees. It was argued that refugees tend to be more politically active than other immigrants,[79] and that their militancy could threaten the security interests of an asylum state.[80] The French government therefore proposed to allow governments "to restrict or prohibit political activity on the part of refugees."[81] Strong exception was taken to this proposal, both on grounds of general principle and because it suggested a right to treat refugees less favorably than other resident foreigners.[82] The result was agreement that while "laws prohibiting or restricting political activity for foreigners generally

[77] The essence of the French plea could be satisfied by the inclusion of "a moral *per contra*" falling short of an enforceable legal duty: Statement of Mr. Rochefort of France, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 4.

[78] "[T]he Committee had altered the structure of the draft convention, which was meant to cover the liabilities as well as the rights of refugees": Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.12, Jan. 25, 1950, at 10.

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

[80] A restriction of the political rights of refugees "should not be regarded as a discriminatory measure against refugees but rather as a security measure. While 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": Statement of Mr. Devinat of France, ibid. 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."

[81] France, "Proposal for a Draft Convention," UN Doc. E/AC.32/L.3, Jan. 17, 1950 (France, "Draft Convention"), at Art. 8, General Obligations. See also Statement of Mr. Kural of Turkey, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 11: "[S]ince the draft convention was to be a definitive document governing the status of refugees, it might conveniently be invoked by the latter in order to sanction undesirable political activity."

[82] "[H]e regarded it as undesirable to include in a United Nations document a clause prohibiting political activities – a very broad and vague concept indeed ... In the absence of a specific clause on the subject, [governments] would still have the right to restrict political activities of refugees as of any other foreigners. On the other hand, the inclusion of the clause might imply international sanction of such a restriction. The possibility of such an interpretation was undesirable": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 8. See also Statements of Mr. Chance of Canada and Mr. Larsen of Denmark, ibid. at 9.

would be equally applicable to refugees,"[83] the Convention would not authorize states to impose any additional restrictions on refugees.[84]

With the elimination of a specific chapter on the duties of refugees, the question of the liability of refugees to taxation was transferred to the "administrative measures" section of the Convention.[85] The reference to a duty of refugees to perform military or other service was deleted altogether, leaving this issue to the discretion of particular states.[86] This left only a general obligation to respect the laws and regulations of the host state, included in the draft Convention as a symbolic recognition of the basic responsibility of refugees:

[83] Statement of Mr. Perez Perozo of Venezuela, ibid. at 11. See also Statements by each of the representatives of the United States, Canada, Denmark, and China affirming a state's sovereign authority to limit the political rights of foreigners: ibid. at 8–9. This view is, of course, consonant with the traditional view under international aliens law, discussed in chapter 2.1 above, at p. 76. In view of the general applicability of Art. 19 of the subsequently enacted 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), however, it is questionable whether governments continue to enjoy a comparable discretion to limit the expression of political opinions by non-citizens. As observed by the Human Rights Committee, "the general rule is that each one of the rights must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike": 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 140, para. 2. See generally chapter 2.5.5 below.

[84] Robinson's comment that "Article 2 must be construed to mean that refugees not only must conform with the laws and general regulations of the country of their residence but are also subject to whatever curbs their reception country may consider necessary to impose *on their political activity* in the interest of the country's 'public order'[emphasis added]" is therefore not an accurate summary of the drafting history. See N. Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation* (1953) (Robinson, *History*), at 72; and P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (posthumously pub'd., 1995) (Weis, *Travaux*), at 38. To be valid under Article 2, curbs on political activity cannot be directed solely at refugees or a subset of the refugee population, but must apply generally, for example to aliens or all residents of the asylum state. The duty of non-discrimination must, of course, also be respected in the designation of the group to be denied political rights (see generally chapters 2.5.5 and 3.4 below). The interpretation of the duty to conform to "public order" measures, upon which Robinson and Weis base their arguments, is discussed below at pp. 102–103.

[85] See chapter 4.5.2 below.

[86] The vote to reject this provision was 4–3 (4 abstentions): UN Doc. A/AC.32/SR.12, Jan 25, 1950, at 9. "The Committee was not, however, the appropriate body to legislate on the very difficult question of military service. No provision regarding that question should be included in the convention; it should be solved by the operation of national legislation within the general framework of international law": Statement of Mr. Larsen of Denmark, ibid. at 8.

> [W]hen article 2 had been drafted, many representatives had felt that there was no need for it. It had been maintained that the laws of a given country obviously applied to refugees and aliens as well as to nationals of the country. Article 2 had been introduced for psychological reasons, and to maintain a balance, because the draft Convention tended to over-emphasize the rights and privileges of refugees. It was psychologically advantageous for a refugee, on consulting the Convention, to note his obligations towards his host country.[87]

This general obligation was subsequently strengthened in only one respect. The original formulation of Art. 2 imposed a duty on refugees "to conform to the [host state's] laws and regulations, *including* measures taken for the maintenance of public order [emphasis added]."[88] This wording suggested that only public order[89] measures codified in laws or regulations could legitimately be applied against refugees. Without any substantive discussion in the drafting committee, however, Art. 2 was amended to authorize a state to require refugees to "conform to its laws and regulations *as well as* to measures taken for the maintenance of public order [emphasis added]."[90] On the basis of the literal meaning of Art. 2, refugees are therefore *prima facie* bound by any general measures taken in the interest of public order, whether or not formalized by law or regulation.[91]

Importantly, Art. 2 cannot be relied upon to legitimate an otherwise invalid measure. Because it merely recognizes the duty of refugees to comply with valid laws, regulations, and public order measures established apart from the Refugee Convention, the legality of a particular constraint must be independently established, including by reference to any relevant requirements of the Refugee Convention itself or general international human rights law. For example, a domestic law or public order measure that purported to prevent refugees from practicing their religion would not be saved by Art. 2,

[87] Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.3, July 3, 1951, at 21.

[88] UN Doc. E/AC.32/L.32, Feb. 9, 1950, at 3.

[89] The term "public order" was selected to convey the meaning of the civil law concept of "*ordre public*": Robinson, *History*, at 72; Weis, *Travaux*, at 38.

[90] UN Doc. E/1850, Aug. 25, 1950, at 15. This language is identical to that included in the Convention as finally adopted.

[91] It is doubtful, however, that "public order" encompasses all measures viewed as necessary in the interest of public morality. The Egyptian delegation proposed a specific provision to this effect. "In any case, whether the Belgian amendment was adopted or not, the Egyptian delegation considered it necessary to add to the end of article 2 the words 'and of morality,' for morality was inseparable from public order": Statement of Mr. Mostafa of Egypt, UN Doc. A/CONF.2/SR.3, July 3, 1951, at 23. This suggestion attracted no interest, and was not proceeded with. But see Weis, *Travaux*, at 38: "Although this is not explicitly stated, refugees may be expected to behave in such a manner, for example, in their habits and dress, as not to create offence in the population of the country in which they find themselves."

as it would be contrary to the explicit requirements of Art. 4 of the Refugee Convention.[92] Similarly, while governments are free to impose conditions of admission on refugees by regulation or contract, these must be in compliance with the rights otherwise guaranteed to refugees under the Convention.[93] Particular care is called for to ensure that the *ordre public* provision is not invoked in defense of a clearly invidious distinction.[94] Nowak argues in the context of the Civil and Political Covenant that "the purpose for interference does not relate to the specific *ordre public* of the State concerned but rather to an international standard of the democratic society."[95] A comparable benchmark should govern resort to the public order authority under Art. 2 of the Refugee Convention, thereby ensuring that the common purpose of advancing refugee rights is not undermined.[96]

[92] See generally chapter 4.7 below.

[93] A proposal that would have required refugees, for example, to remain in the employment found for them by the host government was advanced by Australia: UN Doc. A/CONF.2/10. "The Australian Government was put to considerable expense in selecting migrants, in contributing to the cost of their journey to Australia, in arranging for their reception, and generally in helping them to adapt to their new place in the community. It had therefore been regarded as reasonable that migrants should recognize their obligations to their new country, and continue to do work for which they were most needed for a limited period": Statement of Mr. Shaw of Australia, UN Doc. A/CONF.2/SR.3, July 3, 1951, at 20. The United Nations High Commissioner replied that the Australian objective could best be met by enforcing the obligations against the refugee on the basis of domestic regulation or contract, rather than by a specific duty in the Refugee Convention itself: Statement of Mr. van Heuven Goedhart, UNHCR, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 4. More specifically, the British delegate observed that "[h]e believed that the Australian delegation was not so much concerned with the failure of a refugee to comply with conditions, as with the need for ensuring that the specific conditions imposed on entry to Australia conformed with the provisions of the draft Convention ... [I]t seemed to him that the question of whether the Australian practice was permissible must be considered in the light of other articles of the draft Convention which imposed certain conditions upon States. He would therefore suggest that the Australian representative should withdraw his amendment [to Art. 2]": Statement of Mr. Hoare of the United Kingdom, ibid. at 6. The Australian amendment to Art. 2 was subsequently withdrawn: ibid. at 7.

[94] *Ordre public* is a "highly dangerous civil law concept ... [which] covers at least as much ground as public policy in English-American law and perhaps much more": J. Humphrey, "Political and Related Rights," in T. Meron ed., *Human Rights in International Law: Legal and Policy Issues* 171 (1984) (Meron, *Human Rights in International Law*), at 185. The contentious nature of the notion of *ordre public* is discussed below in chapter 5.1, at pp. 679–690; in chapter 5.2, at pp. 715–716; and in chapter 6.7, at pp. 900–901.

[95] M. Nowak, *UN Covenant on Civil and Political Rights* (1993) (Nowak, *ICCPR Commentary*), at 213. Nowak makes specific reference to an attempt by South Africa to justify *apartheid*-era restrictions as necessary to its own particular *ordre public*.

[96] "Since *ordre public* may otherwise lead to a complete undermining of freedom of expression and information – or to a reversal of rule and exception – particularly strict requirements must be placed on the necessity (proportionality) of a given statutory restriction. Furthermore, the *minimum requirements* flowing from a common

Most important, there is no basis whatever to assert that Art. 2 authorizes a decision either to withdraw refugee status or to withhold rights from refugees on the grounds of the refugee's failure to respect laws, regulations, or public order measures. The Conference of Plenipotentiaries considered this question in the context of a Belgian proposal that would have transformed Art. 2 from a statement of principle to a condition of eligibility for continuing protection:

> Only such refugees as fulfil their duties toward the country in which they find themselves and in particular conform to its laws and regulations as well as to measures taken for the maintenance of public order, may claim the benefit of this Convention.[97]

This proposal met with serious disapproval. The representative of Israel asserted that the proposal "was a revolutionary departure from the original intention of article 2,"[98] which posed very serious dangers:

> If it were to be adopted, refugees who were guilty, for example, of minor infractions of the law would be deprived of all their rights and privileges. To try to make saints out of refugees would be to set the Convention at naught. Again, while he believed in the good faith of the countries that would sign the Convention, it could not be denied that xenophobia existed in certain countries, and junior officials who disliked refugees might seek pretexts to deprive them of their rights.[99]

The British delegate agreed that "[t]he Belgian amendment would confer on States full power to abolish refugee status for any infractions of the laws of the country concerned, which ... would, in fact, nullify all the rights conferred by the Convention."[100]

In an attempt to preserve the essence of the Belgian initiative, France suggested that refugee rights should be forfeited only consequent to a breach of the most serious duties owed to a host state, and on the basis of a fair procedure:

international standard for this human right, which is so essential for the maintenance of democracy, may not be set too low": ibid. at 357.

[97] UN Doc. A/CONF.2/10. The Belgian delegate insisted that his amendment raised no issue of substance, but was instead "mainly a question of form": Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.3, July 3, 1951, at 18. Later, however, he conceded that "[h]is amendment would permit Contracting States to withdraw the benefit of the provisions of the Convention from refugees contravening the laws and regulations of the receiving country, or failing to fulfil their duties towards that country or guilty of disturbing public order": ibid. at 22.

[98] Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.3, July 3, 1951, at 21.

[99] Ibid.

[100] Statement of Mr. Hoare of the United Kingdom, ibid. at 22. See also Statement of Mr. Chance of Canada, ibid. at 23: "[T]he inclusion of [the] clause might frustrate the purposes of the Convention"; and Statement of Baron van Boetzelaer of the Netherlands, ibid. at 24.

> Any refugee guilty of grave dereliction of duty and who constitutes a danger to the internal or external security of the receiving country may, by appropriate procedure assuring maximum safeguards for the person concerned, be declared to have forfeited the rights pertaining to the status of refugees, as defined in this Convention.[101]

As the President of the Conference observed, this more carefully framed amendment allowed the delegates to address the fundamental question of "whether a refugee who failed to fulfil certain conditions should forfeit the rights proclaimed in the draft Convention, even if his country of refuge did not expel him."[102] The proponents of the French amendment argued that this approach to Art. 2 was actually of benefit to refugees, since it would allow a host state to protect its vital interests without resorting to the more extreme alternatives of either withdrawing refugee status or expulsion.[103] Refugees would be deprived of the special benefits of the Refugee Convention, but would be subjected to no particular disabilities. Most important, the incorporation of a forfeiture provision in Art. 2 was said to be an important source of protection for the majority of refugees who might otherwise be stigmatized by the actions of a troublesome minority:

> It was actually a matter of fundamental interest to refugees generally that the measures advocated by the French delegation should be taken against such refugees as carried on activities constituting a danger to the security of the countries receiving them. If certain disturbances provoked by organized bands were allowed to increase in France, the final outcome would be a wave of xenophobia, and public opinion would demand not merely the

[101] UN Doc. A/CONF.2/18. "[T]he word 'duty' in the French amendment referred to the duties mentioned in the first line of article 2 itself, which were incumbent on the refugee as a resident in the receiving country ... [T]he concept of 'receiving country' ... covered ... both the 'receiving country' and what was meant by the 'country of selective immigration.' With regard to the procedure to be adopted in respect of the forfeiture by the refugee of the rights pertaining to his status, it should be noted that the measures in question related to extremely serious – and, incidentally, rare – cases, and came within the category of counter-espionage operations. No country could possibly be expected to expatiate in an international forum on the measures which it proposed to adopt in that connexion. 'Forfeiture' of his rights by the refugee would transfer him from the jurisdiction of the international convention to that of the legislation currently in force in the countries concerned": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 9.

[102] Statement of the President, Mr. Larsen, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 5. See also Statement of Mr. Hoare of the United Kingdom, ibid. at 6.

[103] "[T]he person subjected to [the measures contemplated] would preserve his status as [a] refugee; the pronouncement of his forfeiture of rights would in no way withdraw that status from him, but would simply have the effect of depriving him of all or some of the benefits granted by the Convention": Statement of Mr. Herment of Belgium, ibid. at 10.

> application of the measures laid down in the French proposal, but the expulsion of a great many innocent refugees.[104]

On the other side of the argument, UNHCR and the United Kingdom preferred that no restrictions on refugee rights be possible. Unless the risk posed was serious enough to meet the requirements for exclusion from refugee status[105] or expulsion from the country,[106] the host country should continue to respect all rights guaranteed by the Convention. It would be inappropriate to include in the Convention "a provision by virtue of which a State would be able to treat a refugee as a pariah."[107] This view prevailed, and the French amendment was withdrawn.[108]

The legal position is therefore clear: Art. 2 does not authorize the withdrawal of refugee rights for even the most serious breaches of a refugee's duty to the host state.[109] Because there is no reciprocity of rights and obligations under the Refugee Convention, refugees must be dealt with in the same ways as any other persons who violate a generally applicable law, regulation, or public order measure.[110] Refugees are subject only to the same penalties as

[104] Statement of Mr. Rochefort of France, ibid. at 11.

[105] "[W]hile some provision such as that proposed by the French delegation was desirable, it would more appropriately be placed in article 1, among the provisions relating to the exclusion from the benefits of the Convention of certain categories of refugees ... [A] refugee dealt with as proposed in the French amendment ... would cease to be a refugee for the purposes of the Convention": Statement of Mr. van Heuven Goedhart, UNHCR, ibid. at 9–10. The requirements for exclusion from refugee status are discussed in Grahl-Madsen, *Status of Refugees I*, at 262–304; Hathaway, *Refugee Status*, at 214–229; and Goodwin-Gill, *Refugee in International Law*, at 95–114.

[106] "In his view, it should be recognized that in the last resort a country might be obliged to return the offender to the country from which he came ... [but] [i]t would be wrong to exclude any such person from the benefits of the Convention while he still remained as a refugee in a particular country": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 10. See generally chapter 5.1 below.

[107] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 11.

[108] Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.24, July 17, 1951, at 19.

[109] "[N]on-observance [by a refugee] of his 'duties' according to Article 2 has no effect in international law": Grahl-Madsen, *Status of Refugees I*, at 58.

[110] "What was important was that the refugee should not constitute a problem, and that he should conform to the laws and regulations to which he was subject. When he failed to do so, appropriate sanctions should be applied, and repeated violations of the regulations might reasonably warrant expulsion. Until he was expelled, however, he should be treated in accordance with the provisions of the Convention and be subject only to such sanctions as were applicable to other law-breakers": Statement of Mr. Hoeg of Denmark, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 4–5. The only exception is the right of refugees to receive travel documents, which may be suspended under the explicit terms of the Convention where required by "compelling reasons of national security or public order": Refugee Convention, at Art. 28. See generally chapter 6.6 below.

others, and may not be threatened with withdrawal of the particular benefits of refugee status.[111] All rights under the Convention are to be respected in full until and unless refugee status is either validly withdrawn under Art. 1, or the strict requirements for expulsion or *refoulement* are met.[112]

The decision to reject a "middle ground" position that would have authorized the forfeiture of specific rights as an alternative to the withdrawal of refugee status or expulsion is conceptually important. The ability of the host state to enforce its laws and regulations in the usual ways, for example by incarceration, is in no sense compromised by the Refugee Convention. The argument that failure to allow states to withdraw Convention rights from refugees would compel them to resort to the withdrawal of status or expulsion is therefore fallacious. Even the specific concern of the French drafter to be in a position to deal with spies who might infiltrate the refugee population[113] can readily be addressed by generic counter-espionage legislation to which refugees would clearly be subject in common with the population at large.

The proposed right of forfeiture would have transformed Art. 2 from an affirmation of the duty of refugees to respect laws of general application to a mechanism for the differential treatment of refugees on the basis of their heightened vulnerability. Yet refugee rights are not rewards or bonuses; they are rather the means by which the international community has agreed to restore to refugees the basic ability to function within a new national community. The rights set by the Convention are the core minimum judged necessary to compensate refugees for the situation-specific disabilities to which involuntary migration has subjected them. To have sanctioned the withdrawal from refugees of some part of this restitutionary package of rights would therefore have injected a distinctively punitive dimension into the Refugee Convention. The position ultimately adopted, in contrast, requires refugees to comply with all general legal requirements of the host state and to pay the usual penalties for any breach of the law, but ensures that they are not denied the rights deemed necessary to offset the specific hardships of forced migration.

[111] Thus, for example, the threat of the Thai government in July 2003 to revoke the registration of any refugee who "break[s] any Thai laws" was clearly inconsistent with the requirements of the Refugee Convention: "Thais to intern 1,500 Burmese," *International Herald Tribune*, July 3, 2003, at 1. Swaziland also acted contrary to international law when it withdrew refugee status from thirty-seven refugees and ordered their "provisional isolation" because they had embarrassed Prince Sobandla by protesting during a visit to a refugee camp. The Prince justified the decision on the grounds of "gross misconduct and breach of refugee ethics": *Times of Swaziland*, July 19, 2002.

[112] Refugee Convention, at Arts. 32 and 33, discussed below at chapters 5.1 and 4.1 respectively.

[113] See text above, at p. 105, n. 101.

2.4.5 *Non-impairment of other rights*

Refugee Convention, Art. 5 Rights granted apart from this Convention
Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

The original purpose of Art. 5 was to safeguard the privileges of particular refugee classes that existed at the time the Convention came into force.[114] The provision as first adopted at the Second Session of the Ad Hoc Committee provided that "[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees *prior to or apart from* this Convention [emphasis added]."[115] At the Conference of Plenipotentiaries, however, the President declared that the words "prior to or" were "redundant," resulting in the decision to safeguard simply rights and benefits granted refugees "apart from" the Convention.[116] While there was no discussion on point, the literal meaning of the provision as adopted therefore requires states to honor not only preexisting obligations, but also whatever duties might accrue to refugees in the future.[117]

The basic goal of affirming preexisting rights is consistent with other parts of the Convention, for example the recognition of refugee status granted under earlier agreements, as well as the decision to insulate previously recognized refugees from the new rules for cessation of status due to change of circumstances.[118] The International Refugee Organization had sometimes negotiated agreements with particular states that provided for stronger rights than those codified in the Convention, which the drafters wished to ensure were not challenged on the basis of an assertion that the earlier rights were superseded by the provisions of the Refugee Convention.[119] The validity of

[114] "The committee also thought it advisable to make it clear that the adoption of the present Convention should not impair any greater rights which refugees might enjoy prior to or apart from this Convention": "Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session," UN Doc. E/1850, Aug. 25, 1950 (Ad Hoc Committee, "Second Session Report"), at 11.

[115] UN Doc. E/AC.32/L.42/Add.1, at 8, adopted by the Committee as Art. 3(a): UN Doc. E/AC.32/SR.43, Aug. 25, 1950, at 14.

[116] Statement of the President, Mr. Larsen, UN Doc. A/CONF.2/SR.5, Nov. 19, 1951, at 18.

[117] See also Weis, *Travaux*, at 44: "It resulted from the history of the Article that both rights and benefits granted prior to the Convention and subsequently to its entry into force are meant."

[118] Refugee Convention, at Arts. 1(A)(1) and 1(C)(5). See generally Grahl-Madsen, *Status of Refugees I*, at 108–119, 307–309, and 367–369; and Hathaway, *Refugee Status*, at 6 and 203–204.

[119] Robinson, *History*, at 79. See chapter 2.4.1 above, at p. 93.

rights granted by free-standing international agreement was instead to be determined by the terms of those agreements.

Second, refugees sometimes benefited from social legislation adopted in particular countries that was quite progressive relative to the "lowest common denominator" of rights guaranteed in the Refugee Convention. Art. 5 was intended to provide balance by signaling that the sometimes minimal rights it had been possible to secure for refugees in the cut and thrust of negotiation did not require the withdrawal from refugees of more generous protections granted under domestic law.[120] The Refugee Convention could not, of course, require governments to safeguard superior rights, but neither should it serve as a pretext to diminish the quality of protection already enjoyed by refugees.[121]

The express provision validating free-standing duties owed to refugees adds nothing to the legal enforceability of such duties. Nonetheless, it is a valuable affirmation of the concern of the drafters "to grant refugees as many rights as possible, not to restrict them."[122] As originally conceived, Art. 5 may even have been intended to authorize discrimination in favor of particular sub-groups of the refugee population, a matter now generally proscribed by general international human rights law.[123] The continuing importance of Art. 5, while largely symbolic, lies both in its encouragement to states to legislate domestically beyond the standards of the Refugee Convention and, particularly, in its insistence that state parties continue to accord refugees all advantages that accrue to them by virtue of other international agreements,[124] including under bilateral treaties with the refugee's country of origin.[125]

Most important, Art. 5 should be read as requiring governments to respect the array of important international human rights accords negotiated in recent

[120] Art. 5 is stated in peremptory terms ("*[n]othing* in this Convention shall be deemed to impair [emphasis added]"): Refugee Convention, at Art. 5.

[121] Weis, *Travaux*, at 44.

[122] Robinson, *History*, at 79.

[123] To the extent that the discrimination is both systematic and based on race, sex, language, or religion, it contravenes a universally binding human right established by the Charter of the United Nations: see chapter 1.2.3 above, at p. 44. More generally, there is now a pervasive norm of non-discrimination established by the Civil and Political Covenant that binds those states that have adhered to it: see chapter 2.5.5 below, at p. 125 ff. Differential treatment designed and carefully tailored to achieve substantive equality ("affirmative action") is not, however, discriminatory under international law: see chapter 2.5.5 below, at pp. 124–125.

[124] In relation to the comparable provision of the Civil and Political Covenant, Nowak argues that "the *savings clause* . . . gives expression to the principle that the rights of the Covenant merely represent *a minimum standard* and that the cumulation of various human rights conventions, domestic norms and customary international law may not be interpreted to the detriment of the individual": Nowak, *ICCPR Commentary*, at 95.

[125] See generally chapter 3.2.2 below.

years. These international human rights conventions generally regulate the treatment of all persons subject to a state's jurisdiction, and are therefore critical sources of enhanced protection for refugees. Art. 5 of the Refugee Convention makes clear that the drafters were aware that refugees would be protected by additional rights acquired under the terms of other international agreements, and that they specifically intended that this should be so. The next section examines the most important of these complementary sources of refugee rights that have come into existence since the drafting of the Refugee Convention.

2.5 Post-Convention sources of refugee rights

Apart from the minority of refugees who continued to benefit from special arrangements negotiated by the International Refugee Organization or codified in earlier treaties, the internationally defined rights of most refugees in 1951 were essentially limited to those set by the Refugee Convention. As shown above, international aliens law was of no real benefit to refugees, since refugees have no national state likely to view injuries done to them as a matter of official concern.[126] A general system of conventional international human rights law had yet to emerge. The scope of universal norms of human rights law, then as now, was decidedly minimalist.[127]

Since 1951, authoritative interpretations of rights set by the Refugee Convention have been issued, and some binding enhancements to refugee-specific rights secured at the regional level. Advances in refugee rights since 1951 have, however, largely occurred outside of refugee law itself. While aliens law has yet to evolve as a meaningful source of protection, the development of a pervasive treaty-based system of international human rights law has filled many critical gaps in the Refugee Convention's rights regime. Because treaty-based human rights are framed in generic terms, however, there is a continuing role for the Refugee Convention in responding to the particular disabilities that derive from involuntary migration. It is nonetheless clear that the evolution of human rights conventions that include refugees within their scope has resulted in a net level of legal protections significantly greater than envisaged by the Refugee Convention. By synthesizing refugee-specific and general human rights, it is now possible to respond to most critical threats to the human dignity of refugees.

2.5.1 Protocol relating to the Status of Refugees

There have been few formal changes to the refugee rights regime since the entry into force of the Refugee Convention. The 1967 Refugee Protocol is a

[126] See chapter 2.1 above, at p. 79. [127] See chapter 1.2 above.

treaty which incorporates the Refugee Convention's rights regime by reference,[128] and extends those protections to all refugees by prospectively eliminating the Convention's temporal and geographical limitations for those countries which choose to be bound by it. The Protocol is not, as is commonly believed, an amendment to the 1951 Convention: as Weis has observed, "[w]ith the entry into force of the Protocol there exist, in fact, two treaties dealing with the same subject matter."[129] The Full Federal Court of Australia has reached the same conclusion, noting that states may accede to the Protocol without first becoming a party to the Convention, and that those which do so are immediately bound to grant the rights described in the Convention to a broader class of persons – that is, to modern refugees from all parts of the world – than would have been the case by accession to the Convention itself.[130]

More ominously, and in contrast to the provisions of the Refugee Convention, countries which are bound only by the Protocol have the option at the time of accession to deny other state parties the right to refer a dispute regarding their interpretation or application of the Protocol to the International Court of Justice.[131] One of the two countries eligible to have made this election, Venezuela, has in fact excluded the Court's

[128] Refugee Protocol, Art. I(1).

[129] P. Weis, "The 1967 Protocol relating to the Status of Refugees and Some Questions relating to the Law of Treaties," (1967) *British Yearbook of International Law* 39, at 60. More specifically, "[t]he procedure for revision of the 1951 Convention, as provided for in its terms, was not resorted to in view of the urgency of extending its personal scope to new groups of refugees and of the fact that the amended treaty would have required fresh consent by the states parties to the Convention. Instead, a new instrument, the 1967 Protocol relating to the Status of Refugees, was established, which does not amend the 1951 Convention and modifies it only in the sense that States acceding to the Protocol accept the material obligations of the Convention in respect of a wider group of persons. As between the state parties to the Convention, it constitutes an *inter se* agreement by which they undertake obligations identical *ratione materiae* with those provided for in the Convention for additional groups of refugees not covered by the Convention on account of the dateline of 1 January 1951. As regards states not parties to the Convention, it constitutes a separate treaty under which they assume the material obligations laid down in the Convention in respect of refugees defined in Art. 1 of the Protocol, namely those covered by Art. 1 of the Convention and those not covered by reason of the dateline": ibid. at 59.

[130] *Minister for Immigration and Multicultural Affairs v. Savvin*, (2000) 171 ALR 483 (Aus. FFC, Apr. 12, 2000), per Katz J. Justice Katz thus concludes that "for parliament to describe the 1951 Convention as having been 'amended' by the 1967 Protocol is inaccurate. At the same time, however, for a state like Australia, which was already bound by the 1951 Convention before acceding to the 1967 Protocol, the error is one of no practical significance": ibid.

[131] Under Art. VII(1) of the Refugee Protocol, a state may enter a reservation regarding Art. IV of the Protocol, which establishes the right of other state parties to refer a dispute to the International Court of Justice. In contrast, Art. 42 of the Refugee Convention, which

jurisdiction.[132] Several other states which have acceded to the Protocol, but which are also parties to the Convention, have purported to make a similar election. Yet because of the mandatory provisions regarding the Court's jurisdiction contained in the Convention, a dispute involving one of these states – Angola, Botswana, China, Congo, El Salvador, Ghana, Jamaica, Rwanda, and Tanzania – may still be referred to the International Court of Justice so long as it involves the interpretation or application of the Convention, rather than of the Protocol. As the substantive content of the two treaties is largely identical, it would seem open to a state party to the Convention to refer a dispute involving interpretation of the refugee definition or of refugee rights, so long as the subject matter is not uniquely relevant to post-1951 refugees.

A decade after the advent of the Protocol, the United Nations Conference on Territorial Asylum considered, but ultimately rejected, the codification of a new treaty which would set a clear right to enduring protection for refugees. It reached agreement in principle to require states to facilitate the admission of a refugee's spouse and minor or dependent children, and explicitly to interpret the duty of *non-refoulement* to include "rejection at the frontier."[133] The Conference was also of the view that the enjoyment of refugee rights could legitimately be made contingent on compliance with the laws of the state of asylum. No effort has been made, however, either to resuscitate the asylum convention project, or to formalize as matters of law the consensus achieved on either family reunification or the scope of the duty of *non-refoulement*.

2.5.2 *Conclusions and guidelines on international protection*

Rather than formulate new refugee rights, the focus of effort since 1975 has been to elaborate the content of existing standards in non-binding resolutions adopted by the state members of the agency's governing body, the Executive Committee of the High Commissioner's Program. These "Conclusions on the International Protection of Refugees"[134] have addressed

addresses the scope of permissible reservations to that treaty, does not allow states to enter a reservation to Art. 38, the equivalent of Art. IV of the Protocol. "While the Convention provides for obligatory jurisdiction of the International Court of Justice in any dispute relating to its interpretation or application, one reason for the Protocol was for some States to be able to make reservations to this jurisdictional clause": Sohn and Buergenthal, *Movement of Persons*, at 113.

[132] The other eligible country, the United States of America, did not elect to exclude the jurisdiction of the International Court of Justice. Because the option is available only at the time of accession, the United States cannot make such an election in the future.

[133] UN Doc. A/CONF.78/12, Feb. 4, 1977. See generally A. Grahl-Madsen, *Territorial Asylum* (1980).

[134] These are periodically published in looseleaf form in UN Doc. HCR/IP/2, and are collected at www.unhcr.ch (accessed Nov. 20, 2004). UNHCR has also issued "A Thematic Compilation of Executive Committee Conclusions" (March 2001), which organizes relevant Executive Committee Conclusions under sixty major chapters.

such matters as non-rejection and *non-refoulement*,[135] exemption from penalties for illegal entry,[136] conditions of detention,[137] limits on expulsion and extradition,[138] family unity,[139] the provision of identification documents,[140] physical security,[141] and the rights to education[142] and to undertake employment.[143] An effort has also been made to interpret rights to respond to the special vulnerabilities of refugees who are children,[144] women,[145] elderly,[146] or caught up in a large-scale influx.[147] While not matters of law, these standards have strong political authority as consensus resolutions of a formal body of government representatives expressly responsible for "providing guidance and forging consensus on vital protection policies and practices."[148] The Canadian Federal Court of Appeal has thus appropriately recognized that Executive Committee Conclusions are deserving of real deference:

> [I]n Article 35 of the [Refugee] Convention the signatory states undertake to cooperate with the Office of the United Nations High Commissioner for Refugees (UNHCR) in the performance of its functions and, in particular, to facilitate the discharge of its duty of supervising the application of the Convention. Accordingly, considerable weight should be given to recommendations of the Executive Committee of the High Commissioner's Program on issues relating to refugee determination

[135] See UNHCR Executive Committee Conclusions Nos. 1 (1975), 5 (1977), 6 (1977), 17 (1990), 22 (1981), 29 (1983), 50 (1988), 52 (1988), 55 (1989), 62 (1990), 65 (1991), 68 (1992), 71 (1993), 74 (1994), 77 (1995), 81 (1997), 82 (1997), and 85 (1998), available at www.unhcr.ch (accessed Nov. 20, 2004).

[136] Ibid. at Nos. 44 (1986), 55 (1989), and 85 (1998).

[137] Ibid. at Nos. 3 (1977), 7 (1977), 36 (1985), 44 (1986), 46 (1987), 47 (1987), 50 (1988), 55 (1989), 65 (1991), 68 (1992), 71 (1993), 85 (1998), and 89 (2000).

[138] Ibid. at Nos. 7 (1977), 9 (1977), 17 (1980), 21 (1981), 44 (1986), 50 (1988), 55 (1989), 61 (1990), 68 (1992), 71 (1993), 79 (1996), and 85 (1998).

[139] Ibid. at Nos. 1 (1975), 9 (1977), 15 (1979), 22 (1989), 24 (1989), 47 (1987), 74 (1994), 84 (1997), 85 (1998), and 88 (1999).

[140] Ibid. at Nos. 8 (1977), 18 (1980), 24 (1981), 35 (1984), 64 (1990), 65 (1991), 72 (1993), 73 (1993), and 91 (2001).

[141] Ibid. at Nos. 20 (1980), 25 (1982), 29 (1983), 44 (1986), 45 (1986), 46 (1987), 48 (1987), 54 (1988), 55 (1989), 58 (1989), 72 (1993), 74 (1994), 77 (1995), 87 (1999), and 98 (2003).

[142] Ibid. at Nos. 47 (1987), 58 (1989), 59 (1989), 74 (1994), 77 (1995), 80 (1996), 84 (1997), and 85 (1998).

[143] Ibid. at Nos. 50 (1988), 58 (1989), 64 (1990), and 88 (1999).

[144] Ibid. at Nos. 47 (1987), 59 (1989), 72 (1993), 73 (1993), 74 (1994), 79 (1996), 85 (1998), 87 (1999), and 89 (2000).

[145] Ibid. at Nos. 32 (1983), 39 (1985), 46 (1987), 54 (1988), 60 (1989), 64 (1990), 68 (1992), 71 (1993), 73 (1993), 74 (1994), 77 (1995), 79 (1996), 81 (1997), 85 (1998), 87 (1999), and 89 (2000).

[146] Ibid. at Nos. 32 (1983), 85 (1998), 87 (1999), and 89 (2000).

[147] Ibid. at Nos. 19 (1980), 22 (1981), 25 (1982), 44 (1986), 81 (1997), 85 (1998), and 100 (2004).

[148] Ibid. at No. 81 (1997).

> and protection that are designed to go some way to fill the procedural void in the Convention itself.[149]

Specifically, UNHCR's authority under Article 35 of the Refugee Convention[150] is a sufficient basis for the agency to require state parties to explain treatment of refugees that does not conform to the Conclusions on Protection adopted by the agency's governing body. This authority to require the international community to engage in a dialogue of justification is comparable to the human rights *droit de regard* enjoyed by the General Assembly:[151] UNHCR may legitimately expect states to respond to concerns about the adequacy of refugee protection as measured by reference to Conclusions adopted by the state members of its Executive Committee, though it has no power to require compliance with those or any other standards.[152]

It is less clear, however, to what extent standards recommended by UNHCR, but which have not been adopted as a Conclusion of its Executive Committee, are to be afforded comparable deference. There is a traditional practice of giving particular weight to the UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*,[153] a comprehensive analysis of the basic precepts of refugee law prepared at the behest of the Executive Committee more than a quarter of a century ago.[154] The Supreme Court of

[149] *Rahaman v. Minister of Citizenship and Immigration*, 2002 ACWSJ Lexis 1026 (Can. FCA, Mar. 1, 2002), per Evans JA. To similar effect see *Attorney General v. E*, [2000] 3 NZLR 257 (NZ CA, July 11, 2000), at 269.

[150] "The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees ... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention": Refugee Convention, at Art. 35(1).

[151] See chapter 1.2.3 above, at pp. 46–47.

[152] States recently affirmed "the fundamental importance of UNHCR as the multilateral institution with the mandate to provide international protection to refugees ... and recall[ed] [their] obligations as States Parties to cooperate with UNHCR in the exercise of its functions; [and] [u]rge[d] all states to consider ways that may be required to strengthen the implementation of the 1951 Convention and/or 1967 Protocol and to ensure closer cooperation between States Parties and UNHCR to facilitate UNHCR's duty of supervising the application of the provisions of these instruments": "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, at Part I, paras. 8–9. The challenge of ensuring meaningful supervision and enforcement of the Refugee Convention is briefly taken up in the Epilogue below, at pp. 992–998.

[153] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, reedited 1992) (UNHCR, *Handbook*).

[154] In 1977, the Executive Committee "[r]equested the Office to consider the possibility of issuing – for the guidance of Governments – a handbook relating to procedures and criteria for determining refugee status": UNHCR Executive Committee Conclusion

the United States, for example, determined that "the Handbook provides significant guidance" on the interpretation of refugee law;[155] the British House of Lords has gone farther, acknowledging that by virtue of UNHCR's statutory authority, "[i]t is not surprising ... that the UNHCR Handbook, although not binding on states, has high persuasive authority, and is much relied on by domestic courts and tribunals."[156] Yet not even the *Handbook* is treated as a source of legal obligation. The House of Lords has warned that the *Handbook* "is of no binding force either in municipal or international law,"[157] while the New Zealand Court of Appeal has similarly insisted that the *Handbook* "cannot override the function of [the decision-maker] in determining the meaning of the words of [the Refugee] Convention."[158] Indeed, courts have recently become increasingly guarded in their appraisal of the *Handbook*'s authority,[159] finding, for example, that it is "more [of] a practical guide ... than ... a document purporting to interpret the meaning of relevant parts of the Convention."[160] In its most recent statement on point, the House of Lords observed only that the *Handbook* "is recognized as an important source of guidance on matters to which it relates"[161] – a significantly less enthusiastic endorsement than the same court issued just two years earlier.[162]

The decline in the deference afforded the *Handbook* is no doubt largely attributable to the increasing dissonance between some of its positions and

No. 8, "Determination of Refugee Status" (1977), at para. (g), available at www.unhcr.ch (accessed Nov. 20, 2004).

155 *Immigration and Naturalization Service v. Cardoza Fonseca*, (1987) 480 US 421 (US SC, Mar. 9, 1987), at 439, n. 22.

156 *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer*, [2001] 2 WLR 143 (UK HL, Dec. 19, 2000), per Lord Steyn. The *Handbook* has been treated as solid evidence of the current state of international practice on interpretation of refugee law: *R (Hoxha) v. Secretary of State for the Home Department*, [2002] EWCA Civ 1403 (Eng. CA, Oct. 14, 2002), at para. 36.

157 *R v. Secretary of State for the Home Department, ex parte Bugdaycay*, [1987] AC 514 (UK HL, Feb. 19, 1987), per Lord Bridge of Harwich at 525; cited with approval in *M v. Attorney General*, [2003] NZAR 614 (NZ HC, Feb. 19, 2003).

158 *S v. Refugee Status Appeals Authority*, [1998] 2 NZLR 291 (NZ CA, Apr. 2, 1998), at 300. See also *M v. Attorney General*, [2003] NZAR 614 (NZ HC, Feb. 19, 2003).

159 In *WAGO of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, 194 ALR 676 (Aus. FFC, Dec. 20, 2002), the Australian Full Federal Court declined to find any error in the determination that the provisions in the UNHCR *Handbook* "were not part of the law of Australia and did not provide grounds for legal review of the Tribunal's decision."

160 *NADB of 2001 v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 326 (Aus. FFC, Oct. 31, 2002). See also *Todea v. MIEA*, (1994) 20 AAR 470 (Aus. FC, Dec. 22, 1994), at 484.

161 *Sepet and Bulbul v. Secretary of State for the Home Department*, [2003] UKHL 15 (UK HL, Mar. 20, 2003), at para. 12.

162 See text above, at n. 156.

those which have resulted from the intensive period of judicial activism in refugee law, which began in the early 1990s. In contrast to earlier times when there were few authoritative decisions on the content of refugee law, many state parties today have developed their own, often quite comprehensive, judicial understandings of many aspects of international refugee law. Where no domestic precedent exists, courts are increasingly (and appropriately) inclined to seek guidance from the jurisprudence of other state parties to the Convention.[163] In this more mature legal environment, UNHCR's views on the substance of refugee law – at least where these are not formally codified through the authoritative process of Executive Committee decision-making – will inevitably not be treated as uniquely pertinent, but will instead be considered and weighed as part of a more holistic assessment of the current state of refugee law obligations.

Indeed, the recent proliferation of various forms of UNHCR position papers on the interpretation of refugee law has made it increasingly difficult for even state parties committed to a strong UNHCR voice to discern the precise agency position on many key protection issues. Of greatest concern, the agency's Department of International Protection has commenced release of "Guidelines on International Protection"[164] under a process approved in only the most general terms by its Executive Committee.[165] While explicitly intended to be "complementary" to the standards set out in the *Handbook*,[166] the standards at times appear to conflict with the advice of the *Handbook*.[167] Such conflicts have not gone unnoticed by courts: in a recent decision, for

[163] See J. Hathaway, "A Forum for the Transnational Development of Refugee Law: The IARLJ's Advanced Refugee Law Workshop," (2003) 15(3) *International Journal of Refugee Law* 418.

[164] As of September 2004, six sets of Guidelines had been issued by UNHCR: UN Docs. HCR/GIP/02/01 (gender-related persecution); HCR/GIP/02/02 (membership of a particular social group); HCR/GIP/03/03 (cessation); HCR/GIP/03/04 (internal relocation alternative); HCR/GIP/03/05 (exclusion); and HCR/GIP/04/06 (religion-based claims).

[165] At its fifty-third session, the UNHCR's Executive Committee requested UNHCR "to produce complementary guidelines to its *Handbook on Procedures and Criteria for Determining Refugee Status*, drawing on applicable international legal standards, on State practice, on jurisprudence and using, as appropriate, the inputs from the debates in the Global Consultations' expert roundtable discussions": Executive Committee of the High Commissioner's Program, "Agenda for Protection," UN Doc. EC/52/SC/CRP.9/Rev.1, June 26, 2002, at Part III, Goal 1, Point 6. The Executive Committee clearly did not intend that these guidelines should be the sole, or even the primary, means of advancing the development of refugee law, since it simultaneously agreed that the agency should "explore areas that would benefit from further standard-setting, such as [Executive Committee] Conclusions or other instruments to be identified at a later stage": ibid. at Goal 1, Point 7.

[166] Executive Committee of the High Commissioner's Program, "Agenda for Protection," UN Doc. EC/52/SC/CRP.9/Rev.1, June 26, 2002, at Part III, Goal 1, Point 6.

[167] For example, on the question of what has traditionally been referred to as the "internal flight alternative," the *Handbook* directs attention to the retrospective question of

example, the Full Federal Court of Australia declined to follow the approach to criminal law exclusion recommended in the *Handbook*, preferring to adopt the tack endorsed in the UNHCR's Global Consultations process and subsequently codified in a Guideline on International Protection.[168] Similarly, the Canadian Federal Court of Appeal relied upon the "less categorical" approach taken to the definition of a "manifestly unfounded claim" in UNHCR's Global Consultations process to conclude that there is no international consensus on the meaning of this term – even though the judgment acknowledged the existence of a formally adopted Executive Committee conclusion directly on point, characterized by the Court as providing for a "restricted meaning" to be given to the notion.[169] In contrast, the New Zealand Court of Appeal declined to give significant weight to the new wave of UNHCR institutional positions because of their questionable legal pedigree:

> The Guidelines do not, however, have a status in relation to interpretation of the Refugee Convention that is equal to that of the resolutions of the UNHCR Executive Committee ... I have focussed ... on the Executive Committee's views which in any event I regard as the most valuable guide for the Court.[170]

whether the applicant "could have sought refuge in another part of the same country": UNHCR, *Handbook*, at para. 91. Yet in its "Guideline on International Protection: Internal Flight or Relocation Alternative," UN Doc. HCR/GIP/03/04 – expressly said to be a "supplement" to the *Handbook* – UNHCR suggests that assessment should instead focus on "whether the proposed area provides a meaningful alternative in the future. The forward-looking assessment is all the more important": ibid. at para. 8. The point is not that the new standard is less appropriate than that set by the *Handbook*, but simply that the effort to promote inconsistent approaches will only engender confusion and lack of respect for UNHCR standard-setting. Adding to this concern, while the new Guidelines are in principle intended to "draw on" the expert advice received during the agency's Global Consultations process (Executive Committee of the High Commissioner's Program, "Agenda for Protection," UN Doc. EC/52/SC/CRP.9/Rev.1, June 26, 2002, at Part III, Goal 1, Point 6), the Guidelines at times diverge from even the formal conclusions reached through that process. See e.g. J. Hathaway and M. Foster, "Membership of a Particular Social Group," (2003) 15(3) *International Journal of Refugee Law* 477, at para. 44. Yet in at least one case, an appellate court gave weight to the new Guidelines on the express grounds that "[t]hey ... result from the Second Track of the Global Consultations on International Protection Process": *Minister for Immigration and Multicultural Affairs v. Applicant S*, [2002] FCAFC 244 (Aus. FFC, Aug. 21, 2002).

[168] "By consensus, it was agreed [at the Lisbon Expert Roundtable of the Global Consultations] on the question of balancing [the risks of return against the seriousness of the crime committed] ... [that] state practice indicates that the balancing test is no longer being used in common law and in some civil law jurisdictions": *NADB of 2001 v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 326 (Aus. FFC, Oct. 31, 2002).

[169] *Rahaman v. Minister of Citizenship and Immigration*, 2002 ACWSJ Lexis 1026 (Can. FCA, Mar. 1, 2002).

[170] *Attorney General v. Refugee Council of New Zealand Inc.*, [2003] 2 NZLR 577 (NZ CA, Apr. 16, 2003), per McGrath J. at para. 111. Justice Glazebrook gave the Guidelines somewhat greater weight, noting that "it is also appropriate to have regard to ... the

We thus find ourselves at a moment of significant normative confusion on the appropriate source of UNHCR institutional advice on the substance of international refugee law. The critical role of UNHCR in providing Art. 35 guidance to state parties is compromised not only by the sheer volume of less-than-fully-consistent advice now emanating from a multiplicity of UNHCR sources, but more fundamentally by recent efforts to draft institutional positions at such a highly detailed level that they simply cannot be reconciled with the binding jurisprudence of state parties. It would therefore be in the best interest of all that general principles of refugee law interpretation intended to be taken seriously by state parties be codified in formal, and clearly authoritative, resolutions of the UNHCR's Executive Committee. More detailed guidance may sensibly be gleaned from a compendium of norms prepared by the agency itself, but that advice should rather be presented in a unified form that does not risk the confusion or conflicts of the present array of the *Handbook*, Guidelines, and various other UNHCR position papers. More preliminary thinking is best presented as such, with any effort at codification by the agency delayed until there is truly a clear and principled consensus achieved in the jurisprudence of state parties.

2.5.3 Regional refugee rights regimes

Regional refugee law in Africa establishes auxiliary rights for refugees in that region. The Convention governing the Specific Aspects of Refugee Problems in Africa[171] requires participating states of the African Union (formerly the Organization of African Unity) to "use their best endeavors consistent with their respective legislation[ ] to receive refugees and to secure [their] settlement" until and unless voluntary repatriation is possible.[172] The duty of *non-refoulement* is explicitly recognized within the region to prohibit rejection at the frontier, and to apply whenever there is a risk to the refugee's "life, physical integrity, or liberty."[173] Equally important, states bind themselves to take account of the security needs of refugees, settling them away from the frontier with their country of origin.[174] In return, refugees are to respect the asylum state's laws and comply with public order measures. They are also prohibited from engaging in "subversive activities against any Member State of the OAU," and even from expressing political or other views if "likely to

Guidelines ... because the Immigration Service refers to them ... and cannot be seen to 'pick and choose' the parts it wishes to comply with. It is also relevant that New Zealand will be judged in the light of those Guidelines by the Office of UNHCR in its monitoring role": ibid. at para. 271.

[171] Convention governing the Specific Aspects of Refugee Problems in Africa, 10011 UNTS 14691, done Sept. 10, 1969, entered into force June 20, 1974 (OAU Convention).

[172] Ibid. at Arts. II(1) and V. [173] Ibid. at Art. II(3). [174] Ibid. at Art. II(6).

cause tension between Member States."[175] The African Convention therefore goes beyond the basic indifference of the Refugee Convention to the political rights of refugees,[176] and purports to deny some forms of political free speech as the cost of enhanced basic protection rights.[177]

The Cartagena Declaration of 1984[178] has been recommended to states in the Americas by the General Assembly of the Organization of American States.[179] Although it is not a binding agreement akin to the African Union's treaty, the Cartagena Declaration provides a clear statement of the region's optic on desirable protections for refugees. The inclusive African reading of the duty of *non-refoulement* and that region's undertaking to ensure the physical protection of refugees are adopted by the OAS.[180] There are moreover commitments to refugee integration, self-sufficiency, employment, and family reunification.[181] The Cartagena Declaration explicitly affirms the continuing value of the Refugee Convention's rights regime,[182] and does not condition its expanded definition of refugee rights on the renunciation of political or other activity. To date, however, it has not been formalized as a matter of binding law.

2.5.4 International human rights law

While there has been only modest evolution of the refugee rights regime since 1951, the broader field of international human rights law has undergone exponential change. The Refugee Convention was only the second major human rights convention adopted by the United Nations.[183] The only contemporaneous formulation of international human rights was the Universal Declaration of Human Rights, an unenforceable General Assembly resolution.[184] Today, on the other hand, binding international human rights law has been established by the 1966 Human Rights Covenants, specialized universal accords, and regional human rights regimes in Europe, Africa, and the Americas. As the UNHCR's Executive Committee has observed, the modern duty of protection therefore

[175] Ibid. at Art. III. [176] See chapter 2.4.4 above, at pp. 100–101.

[177] While the African treaty's failure to guarantee political rights to refugees is likely not in contravention of the Refugee Convention itself (see chapter 6.7 below, at pp. 882–885), its sweeping prohibition on political activities cannot be reconciled to duties under the Covenant on Civil and Political Rights: see chapter 6.7 below at pp. 897–905.

[178] OAS Doc. OEA/Ser.L/II.66, Doc.10, Rev.1, at 190–193 (OAS Cartagena Declaration).

[179] See UNHCR, "OAS General Assembly: an Inter-American Initiative on Refugees," (1986) 27 *Refugees* 5.

[180] OAS Cartagena Declaration, at Part III(5), (6), and (7).

[181] Ibid. at Part III(6), (11), and (13). [182] Ibid. at Part III(8).

[183] The Refugee Convention was preceded by the Convention on the Prevention and Punishment of the Crime of Genocide, UNGA Res. 260A(III), adopted Dec. 9, 1948, entered into force Jan. 12, 1951.

[184] See chapter 1.2.3 above, at p. 45.

goes beyond simply respecting the norms of refugee law; it includes also the obligation "to take all necessary measures to ensure that refugees are effectively protected, including through national legislation, and in compliance with their obligations under international human rights and humanitarian law instruments bearing directly on refugee protection."[185]

Indeed, the maturation of human rights law over the past half-century has to a certain extent filled the vacuum of protection that required the development of a refugee-specific rights regime in 1951. As a preliminary matter, it might therefore be asked whether the rights regime set by the Refugee Convention retains any independent value in the modern era of general guarantees of human rights.

It is certainly true that refugees will sometimes find it in their interests to rely on generally applicable norms of international human rights law, rather than on refugee-specific standards.[186] Of greatest significance to refugees, nearly all internationally recognized *civil rights* are declared to be universal and not subject to requirements of nationality.[187] The International Covenant on Civil and Political Rights generally extends its broad-ranging protection to "everyone" or to "all persons."[188] Each contracting state undertakes in Art. 2(1) to ensure the rights in the Covenant "to all individuals within its territory and subject to its jurisdiction ... without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." While nationality is not included in this illustrative list, it has been determined to be embraced by the residual category of "other status."[189] Thus, the Human Rights Committee has explicitly affirmed that "the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens must receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed by the Covenant."[190] More recently, the Committee has held that rights may not be

[185] UNHCR Executive Committee Conclusion No. 81, "General Conclusion on International Protection" (1997), at para. (e), available at www.unhcr.ch (accessed Nov. 20, 2004).

[186] The UNHCR Executive Committee has, for example, affirmed "that States must continue to be guided, in their treatment of refugees, by existing international law and humanitarian principles and practice bearing in mind the moral dimension of providing refugee protection": UNHCR Executive Committee Conclusion No. 50, "General Conclusion on International Protection" (1988), at para. (c), available at www.unhcr.ch (accessed Nov. 20, 2004).

[187] The exceptions are that only citizens are granted the rights to vote, to run for office, and to enter the public service: Civil and Political Covenant, at Art. 25.

[188] See chapter 2.5.5 below, at pp. 127–128.

[189] One commentator prefers to ground his analysis in the notion of nationality as a "distinction of any kind": Lillich, *Rights of Aliens*, at 46.

[190] 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 140, para. 2.

limited to citizens of a state, but "must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers [and] refugees."[191] The Civil and Political Covenant is therefore a critical source of rights for refugees, mandating attention to matters not addressed in the Refugee Convention, such as the rights to life and family, freedoms of opinion and expression, and protection from torture, inhuman or degrading treatment, and slavery.

On the other hand, because the Covenant on Civil and Political Rights is addressed primarily to persons who reside in their state of citizenship, it does not deal with refugee-specific concerns, including recognition of personal status, access to naturalization, immunity from penalization for illegal entry, the need for travel and other identity documents, and especially protection from *refoulement*. Moreover, even where the subject matter of the Civil and Political Covenant is relevant to refugees, the Covenant often formulates rights on the basis of inappropriate assumptions. For example, the Civil and Political Covenant sets guarantees of fairness in judicial proceedings, but does not deal with the more basic issue of access to a court system.[192] Yet refugees and other aliens, unlike citizens, are not always able freely to invoke judicial remedies. Perhaps most ominously, governments faced with genuine public emergencies are authorized to withdraw all but a few core civil rights from non-citizens,[193] even if the measures taken would ordinarily amount to impermissible discrimination on grounds of national origin, birth, or other status.[194] In the result, though the Covenant on Civil and Political Rights in

[191] UN Human Rights Committee, "General Comment No. 31: The nature of the general legal obligations of states parties to the Covenant" (2004), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 192, para. 10.

[192] Compare Civil and Political Covenant, at Arts. 14–16, with the Refugee Convention, at Art. 16.

[193] The rights which cannot be suspended are the rights to life; freedom from torture, cruel, inhuman, or degrading treatment or punishment; freedom from slavery; freedom from imprisonment for contractual breach; freedom from *ex post facto* criminal law; recognition as a person; and freedom of thought, conscience, and religion: Civil and Political Covenant, at Art. 4(2).

[194] Ordinarily, emergency derogation must not be imposed in a discriminatory way. However, the grounds of impermissible discrimination for emergency derogation purposes explicitly omit reference to several of the general grounds on which discrimination is prohibited under the Civil and Political Covenant. The omissions include discrimination on the grounds of political or other opinion; national origin; property; birth or other status. Compare Civil and Political Covenant, at Arts. 2(1) and 4(1). The UN Special Rapporteur on the Rights of Non-Citizens has suggested that "[t]his omission, according to the *travaux préparatoires*, was intentional because the drafters of the Covenant understood that States may, in time of national emergency, have to discriminate against non-citizens within their territory": UN Commission on Human Rights, "Preliminary Report of the Special Rapporteur on the Rights of Non-Citizens," UN Doc. E/CN.4/Sub.2/2001/20, June 6, 2001, at para. 37.

principle extends its protections to refugees, it does not dependably provide for all basic civil rights needed to address their predicament.

The continuing value of refugee-specific rights despite the advent of broad-ranging international human rights law is even more apparent in the field of *socioeconomic rights*. While the basic non-discrimination obligation under the International Covenant on Economic, Social and Cultural Rights[195] is essentially indistinguishable from that set by the Civil and Political Covenant,[196] developing countries are authorized to decide, considering their economic situation, the extent to which they will guarantee the economic rights of the Convention to non-nationals.[197] If subjected to this fundamental limitation, the vast majority of the world's refugees (who are located in the less developed world) might be denied employment or subsistence rights. The Refugee Convention, in contrast, sets absolute, if less exigent, expectations of states in the field of economic rights.

Second, as with the Civil and Political Covenant, the substantive formulation of general socioeconomic rights in the Economic, Social and Cultural Covenant does not always provide sufficient contextual specificity to ensure respect for the most critical interests of refugees. For example, while the Economic, Social and Cultural Covenant establishes a general right to an

[195] International Covenant on Economic, Social and Cultural Rights, UNGA Res. 2200A(XXI), adopted Dec. 16, 1966, entered into force Jan. 3, 1976 (Economic, Social and Cultural Covenant).

[196] Two kinds of distinction are sometimes asserted. First, while state parties to the Civil and Political Covenant agree to *grant* rights to all without discrimination, the contemporaneously drafted Economic, Social and Cultural Covenant requires only an undertaking that whatever rights are granted may be *exercised* without discrimination: compare Civil and Political Covenant, at Art. 2(1) and Economic, Social and Cultural Covenant, at Art. 2(2). Superficially, this would suggest that whereas the Civil and Political Covenant prohibits limitation of the category of rights holders, the formulation in the Economic, Social and Cultural Covenant does not. In fact, however, the various rights in the Economic, Social and Cultural Covenant are granted to "everyone" or "all," nullifying any practical distinction between the non-discrimination clauses in the two Covenants. Second, the non-discrimination provision in the Civil and Political Covenant seems to be more inclusively framed than its counterpart in the Economic, Social and Cultural Covenant. Whereas the former prohibits "distinction of any kind, such as" a distinction based on the listed forms of status, the Economic, Social and Cultural Covenant prohibits "discrimination of any kind as to" the enumerated types of status. But unless it is suggested that no differentiation, even on patently reasonable grounds, can ever be permissible in relation to rights under the Civil and Political Covenant, no concrete consequences flow from use of the word "distinction" rather than "discrimination." Nor does it matter that one Covenant prohibits discrimination "such as" that based on certain grounds, while the other proscribes discrimination "as to" those same grounds. Because the list under both Covenants includes the generic term "other status," the net result in each case is an inclusive duty of non-discrimination, including, for example, non-discrimination in relation to refugees and other aliens.

[197] Economic, Social and Cultural Covenant, at Art. 2(3).

adequate standard of living, it does not explicitly guarantee equal access to rationing systems, a matter of frequent immediate concern to involuntary migrants in war zones and other areas of crisis.[198]

Most critically, generally applicable socioeconomic rights are normally conceived simply as duties of progressive implementation.[199] Under the Economic, Social and Cultural Covenant, for example, states are required simply to "take steps" progressively to realize Economic, Social and Cultural rights to the extent possible within the limits of their resources.[200] The Refugee Convention, on the other hand, treats socioeconomic rights on par with civil and political rights. They are duties of result, and may not be avoided because of competition within the host state for scarce resources.

2.5.5 Duty of equal protection of non-citizens

As among the various protections now guaranteed by international human rights law, the duty of non-discrimination clearly has the potential to be of greatest value to refugees. Because it is an overarching principle governing the allocation of a wide array of, in particular, public goods, the legal duty of non-discrimination can be an effective means by which to address the need to enfranchise refugees on a multiplicity of fronts. To the extent that the main concern of refugees is to be accepted by a host community, a guarantee of non-discrimination might in fact be virtually the only legal guarantee that many refugees require.

The value of protection against discrimination is, of course, a function of how that duty is framed. As McCrudden has observed,

> There is no one legal meaning of equality or discrimination applicable in the different circumstances; the meanings of equality and discrimination are diverse. There is no consistency in the circumstances in which stronger or weaker concepts of equality and discrimination currently apply. There is no one organizing principle or purpose underlying the principles of equality and non-discrimination currently applicable; the justifications offered for the legal principles of equality and non-discrimination are diverse.[201]

[198] Compare Economic, Social and Cultural Covenant, at Art. 11, with Refugee Convention, at Art. 20.

[199] In the case of the Civil and Political Covenant, the Human Rights Committee has observed that "[t]he requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State": UN Human Rights Committee, "General Comment No. 31: The nature of the general legal obligations imposed on states parties to the Covenant" (2004), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 192, para. 14.

[200] Economic, Social and Cultural Covenant, at Art. 2(1).

[201] C. McCrudden, "Equality and Discrimination," in D. Feldman ed., *English Public Law* (vol. XI, 2004) (McCrudden, "Equality"), at para. 11.02.

Despite the breadth of possible applications, Fredman helpfully suggests that the common core of non-discrimination law is to ensure "that individuals should be judged according to their personal qualities. This basic tenet is contravened if individuals are subjected to detriment on the basis only of their status, their group membership, or irrelevant physical characteristics."[202]

The core understanding of non-discrimination thus requires simply that irrelevant criteria not be taken into account in making allocations: it is essentially a fairly formal prohibition of arbitrariness, which requires that any unequal treatment be "properly justified, according to consistently applied, persuasive, and acceptable criteria."[203] It follows, of course, that not every differential allocation is discriminatory: the concern is to draw a line between invidious (discriminatory) and socially acceptable (non-discriminatory) distinctions. While this can be a vexed question, international human rights law normally stipulates grounds on which distinctions are presumptively arbitrary, including where allocations are based on forms of status or personal characteristics which are either immutable or fundamental to one's identity. Because decisions predicated on such criteria are clearly prone to stereotypical and hence arbitrary assumptions, they undermine the duty to consider individuals on their own merits.

Non-discrimination law's insistence on non-arbitrariness is often more rigorously conceived where "prized public goods"[204] – including human rights – are at stake. This may, for example, take the form of heightened scrutiny or insistence on a proportionality test in the assessment of the rationality of the differential allocation under scrutiny. Critically, non-discrimination may also be conceived in a way that moves the principle beyond simply a prohibition of allocations shown to be based on irrelevant or otherwise arbitrary criteria (which requires often difficult, if not impossible, comparative assessments) to include also a prohibition of conduct which *in effect*, even if not by design, results in an arbitrary allocation at odds with the duty to ensure that individuals are treated in accordance with their particular merits. Indeed, formal equality of treatment may itself result in discrimination. As Fredman writes, "treating people in the same way regardless of their differing backgrounds frequently entrenches difference."[205] Most important of all, non-discrimination may also be understood to be not only a prohibition of arbitrary allocations – whether by design, or as measured by effects – but also an affirmative guarantee of equal opportunity. Under such an understanding, non-discrimination requires public authorities "to do more than ensure the absence of discrimination ... but also to act positively to promote equality of opportunity between different groups

[202] S. Fredman, *Discrimination Law* (2001) (Fredman, *Discrimination*), at 66.
[203] McCrudden, "Equality," at para. 11.71. [204] Ibid. at para. 11.76.
[205] Fredman, *Discrimination*, at 106.

throughout all policy making and in carrying out all those activities to which the duty applies."[206]

The core guarantee of non-discrimination in international human rights law is that found in Art. 26 of the Civil and Political Covenant. This unique and broadly applicable guarantee of non-discrimination provides that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[207]

While there are many other guarantees of non-discrimination – for example, Art. 2 in each of the Human Rights Covenants, and Art. 3 of the Refugee Convention – Art. 26 is unique in that its ambit is not limited to the allocation of simply the rights found in any one instrument. Art. 26 rather governs the allocation of all public goods, including rights not stipulated by the Covenant itself. As summarized in General Comment 18 of the Human Rights Committee,

> [A]rticle 26 does not merely duplicate the guarantee already provided for in article 2 [of the Civil and Political Covenant] but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.[208]

[206] McCrudden, "Equality," at para. 11.187. [207] Civil and Political Covenant, at Art. 26.

[208] UN Human Rights Committee, "General Comment No. 18: Non-discrimination" (1989), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 146, para. 12. This principle has been affirmed in the jurisprudence of the Human Rights Committee, including, for example, in *Pepels v. Netherlands*, UNHRC Comm. No. 484/1991, UN Doc. CCPR/C/51/D/484/1991, decided July 15, 1994, at para. 7.2; and *Pons v. Spain*, UNHRC Comm. No. 454/1991, UN Doc. CCPR/C/55/D/454/1991, decided Oct. 30, 1995, at para. 9.3. In *Teesdale v. Trinidad and Tobago*, UNHRC Comm. No. 677/1996, UN Doc. CCPR/C/74/D/677/1996, decided Apr. 1, 2002, for example, the Committee "recall[ed] its established jurisprudence that article 26 of the Covenant prohibits discrimination in law and in fact in any field regulated and protected by public authorities": ibid. at para. 9.8. It thus determined that it had the authority to determine whether the discretionary decision of the President regarding whether to commute a death sentence was exercised in a discriminatory way.

The first branch of Art. 26, equality before the law, is a relatively formal prohibition of negative conduct: it requires simply that there be no discrimination in the enforcement of existing laws. Several delegates to the Third Committee of the General Assembly argued that this guarantee of procedural non-discrimination, standing alone, was insufficient. For example, the representative of the Philippines observed that the obligation to ensure equality before the law would not preclude states from "providing for separate but equal facilities such as housing, schools and restaurants for different groups."[209] The Polish delegate agreed, pointing out that even much South African *apartheid*-era legislation could be reconciled to a guarantee of equality before the law.[210] These concerns suggested the need for a duty of non-discrimination addressed not just to the process of law enforcement, but to the *substance* of laws themselves.

The precedent drawn upon by the drafters of the Civil and Political Covenant was the principle advanced in the Universal Declaration of Human Rights of a right to *equal protection of the law*.[211] As reframed in the Covenant, the equal protection component of Art. 26 is an extraordinarily inclusive obligation, requiring that "the legislature must refrain from any discrimination when enacting laws ... [and] is also obligated to prohibit discrimination by enacting special laws and to afford effective protection against discrimination."[212] While commentators are not unanimous in their interpretation of Art. 26,[213] both the literal text of this article and an appreciation of its drafting history suggest that this provision was designed to be an extraordinarily robust guarantee of non-discrimination including, in particular, an affirmative duty to prohibit discrimination and effectively to protect all persons from discrimination.[214]

It is true that the provision was originally drafted as no more than a guarantee of "equality before the law," and that the second sentence's prohibition of discrimination was amended to reinforce this purpose by linking the duty of non-discrimination to the goal of equality before the

[209] UN Doc. A/C.3/SR.1098, at para. 25. [210] UN Doc. A/C.3/SR.1101, at para. 21.

[211] "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination": Universal Declaration, at Art. 7.

[212] Nowak, *ICCPR Commentary*, at 468.

[213] A narrow view of the scope of Art. 26 is argued by Vierdag, who concludes that "[t]he starting point was, and remained, to provide a guarantee of 'equality before the law.' All later additions were proposed and adopted with the strengthening of this principle in mind": E. Vierdag, *The Concept of Discrimination in International Law, with a Special Reference to Human Rights* (1973), at 126.

[214] See Nowak, *ICCPR Commentary*, at 462–465.

law through insertion of the words "[i]n this respect." As Nowak correctly observes, however, an intervening amendment expanded the scope of the first sentence's guarantee to include also the sweeping notion of "equal protection of the law." In the result, the correlative phrase "[i]n this respect" is logically read to require the prohibition of discrimination and the effective protection against discrimination in *both* senses stipulated in the first sentence, namely equality before the law *and* equal protection of the law.[215]

Refugees and other non-citizens are entitled to invoke Art. 26's duty to avoid arbitrary allocations and its affirmative duty to bring about non-arbitrary allocations since the Human Rights Committee has determined "that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens,"[216] a principle explicitly determined to extend to refugees and asylum-seekers.[217] Because the second branch of Art. 26 – the duty to ensure "equal protection of the law" – may reasonably be read to set an obligation to take the steps needed to offset the disadvantages which involuntary alienage creates for the enjoyment of rights,[218] it might even be thought that Art. 26 would be a sufficient basis

[215] "[S]ince the adoption of the Indian amendment, the passage 'in this respect' no longer relates only to equality before the law but also to equal protection of the law. That this involves two completely different aspects of the principle of equality was made unmistakably clear by the Indian delegate": ibid. at 464–465.

[216] 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 140, para. 2. In the Committee's decision of *Karakurt v. Austria*, UNHRC Comm. No. 965/2000, UN Doc. CCPR/C/74/D/965/2000, decided Apr. 4, 2002, two members of the Committee took the opportunity to affirm that "[i]n [their] view distinctions based on citizenship fall under the notion of 'other status' in article 26": ibid. at Individual Opinion of Members Rodley and Scheinen. While General Comment No. 15 interprets only the Civil and Political Covenant, it is reasonable to assume that the virtually identical prohibition of discrimination on the basis of "other status" in the Economic, Social and Cultural Covenant will be similarly interpreted to protect the entitlement of aliens to national treatment in relation to its catalog of rights.

[217] UN Human Rights Committee, "General Comment No. 31: The nature of the general legal obligation imposed on states parties to the Covenant" (2004), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, 192, at para. 10.

[218] In *Nahlik v. Austria*, UNHRC Comm. No. 608/1995, UN Doc. CCPR/C/57/D/608/1995, decided July 22, 1996, the Committee was faced with an objection by Austria that "the communication [was] inadmissible ... since it relates to alleged discrimination within a private agreement, over which the State party has no influence. The Committee observes that under articles 2 and 26 of the Covenant the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of States parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment": ibid. at

to require asylum states to bring an end to any laws or practices that set refugees apart from the rest of their community.[219]

Despite the apparent extraordinary potential of Art. 26, however, it is unlikely in practice to prove a sufficient mechanism for the full enfranchisement of refugees. This is because Art. 26, like common Art. 2 of the Covenants,

para. 8.2. In *Waldman v. Canada*, UNHRC Comm. No. 694/1996, UN Doc. CCPR/C/67/D/694/1996, decided Nov. 3, 1999, the Human Rights Committee observed that "[t]he material before the Committee does not show that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools. Accordingly, the Committee rejects the State party's argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation": ibid. at para. 10.4 – implying that differentiation which *was* directed to combating disadvantage would not likely be found to be discriminatory. Such a construction is in line with the jurisprudence of many developed states with respect to comparably framed domestic guarantees of non-discrimination. "What is required by Congress is the removal of artificial, arbitrary, unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification": *Griggs v. Duke Power Co*., 401 US 424 (US SC, Mar. 8, 1971), at 430–431. "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups": *President of the Republic of South Africa v. Hug CCT*, (1997) 4 SA 1 (SA CC, Apr. 8, 1997).

[219] But in *Sahak v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 215 (Aus. FFC, July 18, 2002), the Full Federal Court of Australia was called upon to consider whether there was a breach of the duty of non-discrimination contained in Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, UNGA Res. 2106A(XX), adopted Dec. 21, 1965, entered into force Jan. 4, 1969 (Racial Discrimination Convention). Under Art. 5, states "undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... [t]he right to equal treatment before the tribunals and all other organs administering justice": ibid. at Art. 5(a). The claim involved persons seeking recognition of their refugee status who did not speak English, and who were detained in a facility with only limited availability of interpreters. They had done everything in their power to meet the twenty-eight-day deadline for applying for judicial review of the rejection of their refugee claims but could not comply because of lack of documentation, interpreters, and lawyers in the detention facility. Their argument that the judicial review rules amounted, in effect, to race-based discrimination was, however, rejected on the formal grounds that "the Act does not deprive persons of one race of a right [to judicial review] that is enjoyed by another race, nor does it provide for differential operation depending on the race, color, or national or ethnic origin of the relevant applicant. For example, persons whose national origin is Afghani or Syrian are able to take advantage of the relevant right if their comprehension of the English language is sufficient, or if they have access to friends or professional interpreters so as to overcome the language barrier ... Any differential effect ... is not based on race, color, descent or national or ethnic origin, but rather on the individual personal circumstances of each applicant." North J, in dissent, opted for an effects-based understanding of the duty of non-

does not establish a simple guarantee of equal protection of the law for refugees or any other group.[220] While initially proposed as such, the right as ultimately adopted is in fact an entitlement "*without any discrimination* to the equal protection of the law [emphasis added]."[221] To give effect to this formulation, the Human Rights Committee inquires whether a differential allocation of rights is "reasonable and objective."[222] If the differentiation is found to meet this test, it is not discriminatory and there is accordingly no duty either to desist from differentiation or to take positive steps to equalize opportunity under Art. 26.

Three particular trends in the application of the "reasonable and objective" standard may work against the interests of refugees and other non-citizens. First, the Committee has too frequently been prepared to recognize

discrimination, writing that "to say that any differential impact is suffered not because of national origin, but rather as a result of individual personal circumstances, appears to me to adopt a verbal formula which avoids the real and practical discrimination." Invoking the decision of the US Supreme Court in *Griggs v. Duke Power Co*., 401 US 424 (US SC, 1971), at 430–431, he concluded that "[t]o approach anti-discrimination provisions in [a formal, intent-based] way would rob them of much of their intended force."

220 But see T. Clark and J. Niessen, "Equality Rights and Non-Citizens in Europe and America: The Promise, the Practice, and Some Remaining Issues," (1996) 14(3) *Netherlands Quarterly of Human Rights* 245, in which it is argued that the duty of non-discrimination requires the minimization of distinctions between aliens and nationals.

221 The original amendment of India to add to the first sentence the words "and are entitled to equal protection of the law" (UN Doc. A/C.3/L.945) was sub-amended by a proposal of Argentina and Chile (UN Doc. A/C.3/L.948) to insert between the words "are entitled" and "to equal protection of the law" the words "without any discrimination": UN Doc. A/5000, at para. 103 (1961).

222 For example, the Committee determined in *Broeks v. Netherlands*, UNHRC Comm. No. 172/1984, decided Apr. 9, 1987, at para. 13, that "[t]he right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26." See also *Danning v. Netherlands*, UNHRC Comm. No. 180/1984, decided Apr. 9, 1987; and *Zwaan-de Vries v. Netherlands*, UNHRC Comm. No. 182/1984, decided Apr. 9, 1987. At one point, the test appeared to have been watered down to a simple assessment of "reasonableness." In *Simunek et al. v. Czech Republic*, UNHRC Comm. No. 516/1992, UN Doc. CCPR/C/54/D/516/1992, decided July 19, 1995, the Committee held that "[a] differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination within the meaning of article 26": ibid. at para. 11.5. But the traditional "reasonable and objective" formulation has been affirmed in more recent jurisprudence: see e.g. *Oord v. Netherlands*, UNHRC Comm. No. 658/1995, UN Doc. CCPR/C/60/D/658/1995, decided July 23, 1997, at para. 8.5; *Foin v. France*, UNHRC Comm. No. 666/1995, UN Doc. CCPR/C/67/D/666/1995, decided Nov. 3, 1999, at para. 10.3; *Waldman v. Canada*, UNHRC Comm. No. 694/1996, UN Doc. CCPR/C/67/D/694/1996, decided Nov. 3, 1999, at para. 10.4; and *Wackenheim v. France*, UNHRC Comm. No. 854/1999, UN Doc. CCPR/C/67/D/854/1999, decided July 15, 2002, at para. 7.4.

differentiation on the basis of certain categories, including non-citizenship, as presumptively reasonable. Second and related, the Committee has paid insufficient attention to evidence that generally applicable standards may impact differently on differently situated groups, thereby failing to do justice to a substantive understanding of the right to equal protection of the law.[223] And third and most generally, the Human Rights Committee routinely affords governments an extraordinarily broad margin of appreciation rather than engaging in careful analysis of both the logic and extent of the differential treatment.

Turning to the first concern, some kinds of differentiation seem simply to be assumed to be reasonable by the Human Rights Committee. The Committee, for example, apparently feels that it is self-evidently reasonable to deny unmarried spouses the social welfare rights granted to married spouses,[224] or to withhold general guarantees of legal due process from

[223] "Fair equality of opportunity differs from the simple non-discrimination principle ... in being positive as well as negative in its requirements and in taking into account some of the prior existing disadvantages ... The two principles differ also in the conception of the social processes of inequality on which they tend to be grounded. A demand for fair equality of opportunity is more often than not based on a recognition of the structural sources of unequal opportunity and in particular on an acceptance of what has become known as 'institutional discrimination.' Finally, fair equality of opportunity, again unlike the simple non-discrimination principle, requires questions to be asked not only about the precise basis on which the good being distributed is deserved but also about the nature of the good being distributed": C. McCrudden, "Institutional Discrimination," (1982) 2(3) *Oxford Journal of Legal Studies* 303, at 344–345.

[224] "[T]he decision to enter into a legal status by marriage, which provides, in Netherlands law, both for certain benefits and for certain duties and responsibilities, lies entirely with the cohabiting persons. By choosing not to enter into marriage, Mr. Danning and his cohabitant have not, in law, assumed the full extent of the duties and responsibilities incumbent on married couples. *Consequently*, Mr. Danning does not receive the full benefits provided for in Netherlands law for married couples [emphasis added]": *Danning v. Netherlands*, UNHRC Comm. No. 180/1984, decided Apr. 9, 1987, at para. 14. See also *Sprenger v. Netherlands*, UNHRC Comm. No. 395/1990, UN Doc. CCPR/C/44/D/395/1990, decided Mar. 31, 1992. The use of the conjunction "consequently" erroneously suggests a logical nexus between the absence of the legal duties and responsibilities of married spouses and ineligibility for social welfare benefits. Whatever reasonable differentiation may be made between married and unmarried cohabitants, the needs of couples of both classes for income support consequent to the disability of one partner are not obviously distinct. The Human Rights Committee did not, however, even consider this question. The Committee has recently affirmed this approach in its decision of *Derksen v. Netherlands*, UNHRC Comm. No. 976/2001, UN Doc. CCPR/C/80/D/1976/2001, decided Apr. 1, 2004, at para. 9.2: "The Committee reiterates that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The Committee recalls that it has earlier found that a differentiation between married and unmarried couples does not amount to a violation of article 26 of the Covenant, since married and unmarried couples are subject to different legal regimes and the decision whether or not to enter into a legal status by marriage lies entirely with the [cohabiting] persons."

military conscripts.[225] On the basis of the drafting history of the Covenant, there is a clear risk that differentiation based on lack of citizenship may similarly be assumed to be reasonable, in at least some circumstances.

Specifically, several delegations, including the Indian representative who spearheaded the drive to include the guarantee of equality before the law, made it clear that they were not suggesting that all distinctions between nationals and aliens should be eradicated.[226] The non-discrimination clause was said not to prohibit measures to control aliens and their enterprises, particularly since Art. 1 of the Covenant guarantees the right of peoples to permanent sovereignty over their natural wealth and resources.[227] An effort to confine Art. 26's protection against discrimination to "citizens" rather than to "all persons" was not adopted,[228] but this decision was predicated on a general agreement that it is sometimes reasonable to distinguish between citizens and aliens.[229] The critical point is that the drafters of the Civil and Political Covenant recognized that states enjoy latitude to allocate some rights differentially on the basis of citizenship, without thereby running the risk of engaging in discriminatory conduct of the kind prohibited by Art. 26, or by common Art. 2 of the Covenants.

The extent to which the Human Rights Committee will deem differentiation based on citizenship to be the basis for objective and reasonable categorical differentiation remains unclear. On the one hand, the Committee has adopted the view that where particular categories of non-citizens are treated differently (both from each other, and from citizens) by virtue of the terms of a bilateral treaty based on reciprocity, the treaty-based origin of the distinction can justify a general finding that it is based on objective and reasonable

[225] "He merely alleges that he is being subjected to different treatment during the period of his military service because he cannot appeal against a summons like a civilian. The Committee observes that the Covenant does not preclude the institution of compulsory military service by States parties, even though this *means* that the rights of individuals may be restricted during military service, within the exigencies of such service [empahsis added]": *RTZ v. Netherlands*, UNHRC Comm. No. 245/1987, decided Nov. 5, 1987, at para. 3.2. See also *MJG v. Netherlands*, UNHRC Comm. No. 267/1987, decided Mar. 24, 1988; and *Brinkhof v. Netherlands*, UNHRC Comm. No. 402/1990, UN Doc. CCPR/C/48/D/402/1990, decided July 27, 1993, at para. 6.2. While the Committee suggests that military status "means" that due process rights may be restricted, it is incredible that the Human Rights Committee would not even ask *why* it was necessary to deprive all conscripts of their general legal right to contest a summons.

[226] See UN Docs. E/CN.4/SR.122, at 5–7; E/CN.4/SR.173, at paras. 46, 67, and 76; and E/CN.4/SR.327, at 7.

[227] Statement of the Representative of France, UN Doc. E/CN.4/SR.173, at para. 19.

[228] This oral proposal by the Representative of Indonesia (UN Doc. A/C.3/SR.1102, at para. 48) was ultimately withdrawn.

[229] See UN Docs. A/C.3/SR.1098, at paras. 10 and 55; A/C.3/SR.1099, at paras. 18, 26, 31, and 36; A/C.3/1100, at para. 10; A/C.3/SR.1101, at paras. 40, 43, and 53; A/C.3/SR.1102, at paras. 17, 24, 27, 29, and 51.

grounds, and is therefore non-discriminatory.[230] More recently, though, the Committee has insisted that a categorical approach to deeming differentiation based upon citizenship to be reasonable cannot always be justified:

> Although the Committee had found in one case ... that an international agreement that confers preferential treatment to nationals of a State party to that agreement might constitute an objective and reasonable ground for differentiation, no general rule can be drawn therefrom to the effect that such an agreement in itself constitutes a sufficient ground with regard to the requirements of article 26 of the Covenant.[231]

This second case involved a challenge to Austria's assertion that the applicant's status as a non-citizen of Austria or the European Economic Area barred him from holding a post on a work council to which he had been elected. In addressing the complaint of discrimination based on citizenship, the Committee helpfully determined that

> it is necessary to judge every case on its own facts. With regard to the case at hand, the Committee has to take into account the function of a member of a work council, i.e., to promote staff interests and to supervise compliance with work conditions ... In view of this, it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work council solely on their different nationality. Accordingly, the Committee finds that the author has been the subject of discrimination in violation of article 26.[232]

In the result, the Committee's position seems to be that while in some circumstances it will be reasonable to exclude non-citizens as a category from

[230] "The Committee observes ... that the categories of persons being compared are distinguishable and that the privileges at issue respond to separately negotiated bilateral treaties which necessarily reflect agreements based on reciprocity. The Committee recalls its jurisprudence that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26": *Oord v. Netherlands*, UNHRC Comm. No. 658/1995, UN Doc. CCPR/C/60/D/658/1995, decided July 23, 1997, at para. 8.5.

[231] *Karakurt v. Austria*, UNHRC Comm. No. 965/2000, UN Doc. CCPR/C/74/D/965/2000, decided Apr. 4, 2002, at para. 8.4.

[232] Ibid. The unwillingness to assume nationality to be a valid ground for differential treatment is clear also from an earlier decision of the Committee in response to a complaint brought by 743 Senegalese nationals who had served in the French army prior to independence in 1960. The Committee found that French legislation that froze their military pensions on the grounds of nationality (while simultaneously allowing for increases to the pensions of comparably situated retired soldiers of French citizenship) was not based on objective and reasonable criteria, and was therefore discriminatory. It observed that "[t]here has been a differentiation by reference to nationality acquired upon independence. In the Committee's opinion, this falls within the reference to 'other status' in the second sentence of article 26": *Gueye v. France*, UNHRC Comm. No. 196/1985, decided Apr. 3, 1989, at para. 9.4.

the enjoyment of rights, there are other situations in which citizenship (or lack thereof) cannot be deemed a valid ground of categorical differentiation. The present moment can thus be most accurately described as one of legal uncertainty on this point: until and unless the jurisprudence of the Human Rights Committee assesses the propriety of categorical differentiation based on citizenship across a broader range of issues, it will be difficult to know which forms of exclusion are likely to be found valid, and which are in breach of Art. 26.

A second and related concern is that the Human Rights Committee has traditionally shown only modest willingness to act on the principle that a rule that applies to everyone can nonetheless be discriminatory where the rule's application impacts differently on different groups of people. In *PPC v. Netherlands*,[233] for example, the issue was whether an income support law that determined eligibility for assistance on the basis of revenue during the month of September alone was discriminatory. The applicant had received an income in excess of the minimum wage during only two months of the year, of which September was one. On the basis of consideration of nothing other than his September income, PPC was denied access to the income support program. In considering his complaint, the Human Rights Committee, however, did not even consider the fact that the applicant was clearly in no different need than a person who had received identical income during a month other than September, and who would consequently have been granted benefits under the law:

> [T]he scope of article 26 does not extend to differences of results in the application of common rules in the allocation of benefits ... Such determination is ... uniform for all persons with a minimum income in the Netherlands. Thus, the Committee finds that the law in question is not *prima facie* discriminatory.[234]

The Committee's highly formalistic understanding of equality is also clear in its response to a challenge to the legality of a Quebec language law that denied merchants the right to advertise in other than the French language. The Committee found no evidence of discrimination against the English-speaking minority in that province on the grounds that the legislation

[233] UNHRC Comm. No. 212/1986, decided Mar. 24, 1988.

[234] *PPC v. Netherlands*, ibid. at para. 6.2. Like the Swedish school benefits cases, discussed below, at pp. 140–141, the facts in this case may not amount to discrimination, since the differential rights allocation was not the result of stigmatization on the grounds of actual or imputed group identity. This does not, however, make the differentiation "reasonable." As discussed below, the Committee's unwillingness to scrutinize the application of facially neutral rules on the basis of this skewed understanding of "reasonableness" has resulted in the failure to recognize discrimination against linguistic minorities, women, and immigrants.

contained only "general measures applicable to all those engaged in trade, regardless of their language."[235] The views of the Committee take no account of the fact that the impact of the language law on French and English speakers was in fact quite different. Whereas most French language merchants could continue to communicate with their majority clientele in their preferred language (French), the law prohibited most English language merchants from advertising to their principal customer base in its preferred language (English). The Human Rights Committee did not even inquire into whether there was *in fact* a difference in the impact of the law on English and French language merchants, noting simply that "[t]his prohibition applies to French speakers as well as to English speakers, so that a French speaking person wishing to advertise in English, in order to reach those of his or her clientele who are English speaking, may not do so. Accordingly the Committee finds that the [English-speaking merchant] authors have not been discriminated against on the ground of their language."[236]

The Human Rights Committee's reluctance to engage with the discriminatory ramifications of facially neutral laws has ironically led it to countenance real discrimination even against groups, such as women and minorities, whose equality rights it has otherwise insisted upon. For example, after the Committee declared discriminatory a Dutch unemployment benefits system that imposed tougher eligibility criteria for women than for men, the Netherlands government abolished the facially discriminatory requirement. Women who would have received benefits but for the subsequently abolished criterion were, however, prevented from making a retroactive claim on the grounds that they were not in fact unemployed on the date they made their claims for retroactive benefits. Finding that both men and

[235] *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, at para. 11.5. See also *Singer v. Canada*, UNHRC Comm. No. 455/1991, UN Doc. CCPR/C/51/D/455/1991, decided July 26, 1994.

[236] *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, at para. 11.5. This is a case that cried out for nuanced analysis under the affirmative action rubric. There are some important social reasons that suggest the need to reinforce the place of the French language in Quebec society, but the Committee ought logically to have given careful consideration to whether the particular approach adopted was reasonable in the sense of adequately taking account of the individuated capabilities and potentialities of persons outside the beneficiary group. Relevant issues would include whether the legislation impairs the rights of members of the non-beneficiary class more than is necessary to accomplish its objectives, and whether the negative impact of the affirmative action program on members of the non-beneficiary group is disproportionate to the good thereby sought to be achieved for those within the target group. See text below, at p. 139, n. 252.

women were allowed to claim retroactive benefits only if unemployed, the Human Rights Committee dismissed the allegation of discrimination.[237]

This result completely misses the salient point that limiting the ability to make a retroactive claim *in practice* had radically different consequences for men and women. Whereas men could have claimed the benefits at the time they were unemployed (because they were eligible to do so), women were legally prevented from receiving benefits because of the then-prevailing discriminatory eligibility requirement. The apparently neutral demand that all applicants be unemployed at the time of requesting retroactive benefits – when the state itself stood in the way of women complying with that facially neutral requirement – was most certainly discriminatory in its effect. A genuinely non-discriminatory retroactivity rule ought to have accommodated the legal disability formerly imposed on women.

Of greatest concern to refugees, a similar superficiality of analysis has unfortunately informed the Committee's consideration of cases involving allegations of discrimination against non-citizens. For example, restrictions on the right to family unity imposed by immigration controls have received short shrift. In *AS v. Canada*, the Committee ruled that the refusal to allow the applicant's daughter and grandson to join her in Canada because of their economic and professional status did not even raise an issue potentially cognizable as discrimination.[238] Yet surely it is clear that the family reunification rules impact disproportionately on recent immigrants and other non-citizens, and can – if not objective and reasonable – discriminate against them in relation to their human right to live with their families.

Similarly, in *Oulajin and Kaiss v. Netherlands*,[239] the Human Rights Committee upheld a Dutch law that paid child support in respect of the natural children of Dutch residents wherever the children might live, but which denied support for foster children who were not resident in the Netherlands. Dutch authorities argued that this distinction was reasonable because whereas a "close, exclusive relationship ... is presumed to exist in respect of one's own children ... it must be made plausible in respect of foster children."[240] In fact, however, the bar on payment to foster children

[237] *VdM v. Netherlands*, UNHRC Comm. No. 478/1991, UN Doc. CCPR/C/48/D/478/1991, decided July 26, 1993; *Araujo-Jongen v. Netherlands*, UNHRC Comm. No. 418/1990, UN Doc. CCPR/C/49/D/418/1990, decided Oct. 22, 1993; *JAMB-R v. Netherlands*, UNHRC Comm. No. 477/1991, UN Doc. CCPR/C/50/D/477/1991, decided Apr. 7, 1994.

[238] UNHRC Comm. No. 68/1980, decided Mar. 31, 1981. It was held that the negative resettlement assessment was "in conformity with the provisions of existing Canadian law, the application of which did not in the circumstances of the present case give rise to any question of discrimination": ibid. at para. 8.2(c).

[239] *Oulajin and Kaiss v. Netherlands*, UNHRC Comm. Nos. 406/1990 and 426/1990, UN Docs. CCPR/C/46/D/406/1990 and CCPR/C/46/D/426/1990, decided Oct. 23, 1992.

[240] Ibid. at para. 2.5.

resident abroad was absolute, and could not be dislodged by evidence of a de facto close and exclusive relationship. The migrant workers who appealed to the Committee pointed out that both their natural and foster children were being raised under precisely the same conditions in Morocco, and that the presumption of a weaker bond between parents and foster children that gave rise to the statutory prohibition of payments to non-resident foster children was rooted in a stereotypical Western understanding of family obligations. The separation of the migrant workers from their children, both natural and foster, was moreover a function of their limited rights as non-citizens. They had not wished to leave their children in Morocco, but were required to do so under the terms of their immigration authorizations.

Taking absolutely no account of the fundamentally different circumstances of migrant workers and Dutch citizens, the Committee found the support scheme to be non-discriminatory, as "applicants of Dutch nationality, residing in the Netherlands, are also deemed ineligible for child benefits for their foster children who are resident abroad."[241] More generally, four members appended an individual opinion in which they suggested that states should be free in all but the most egregious cases to allocate social benefits as they see fit, without fear of running afoul of Art. 26:

> With regard to the application of article 26 of the Covenant in the field of economic and social rights, it is evident that social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. It is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions made *are manifestly discriminatory or arbitrary*, it is not for the Committee to reevaluate the complex socio-economic data and substitute its judgment for that of the legislatures of States parties [emphasis added].[242]

This unwillingness to consider the ways in which foreign citizenship or residence abroad may give rise to the need for special accommodation in order to achieve substantive equality is also apparent from the decision in *SB v. New Zealand*.[243] Entitlement to a New Zealand government pension was reduced by the amount of any other government pension, but not by any sums payable under a private pension. The complainant, an immigrant to New Zealand, argued that he stood at a disadvantage relative to native New Zealanders since all pensions in his country of origin were accumulated in a state-administered fund. Because all of his pension benefits therefore derived

[241] Ibid. at para. 5.4.

[242] Ibid. at para. 3 of the Individual Opinion of Messrs. Kurt Herndl, Rein Müllerson, Birame N'Diaye, and Waleed Sadi.

[243] UNHRC Comm. No. 475/1991, UN Doc. CCPR/C/50/D/475/1991, decided Mar. 31, 1994.

from a government-administered plan, they were counted against his entitlement to a New Zealand pension. A New Zealand national, on the other hand, who was allowed to contribute the same monies to a private pension scheme, would see no reduction in his entitlement to a New Zealand government pension. The Human Rights Committee saw no arguable claim of discrimination, invoking its standard reasoning that the law was not explicitly discriminatory in relation to non-citizens.[244] As in the case of the migrant workers' application for benefits in respect of their foster children, the Committee showed no sensitivity to the different way in which a facially neutral law can impact on persons who are not, or who have not always been, citizens of the country in question.

There is, however, cause for optimism in a series of cases contesting the validity of laws designed to effect restitution to persons deprived of property by Communist regimes.[245] These cases did not actually involve an allegation of discriminatory impact in the application of facially neutral laws: to the contrary, the laws being contested explicitly denied compensation to persons able to meet citizenship and other criteria.[246] Yet because the governments argued that despite the language of the relevant laws there had been no intention to discriminate against non-citizens, the Committee felt compelled to take up the question of discriminatory effects. It did so most clearly in its decision of *Adam v. Czech Republic*, where it specifically determined that there is no need to find an intention to discriminate in order to establish a breach of Art. 26:

> The State party contends that there is no violation of the Covenant because the Czech and Slovak legislators had no discriminatory intent at the time of the adoption of Act 87/1991. The Committee is of the view, however, that the intent of the legislature is not dispositive in determining a breach of article 26 of the Covenant, but rather the consequences of the enacted legislation. Whatever the motivation or intent of the legislature, a law may still contravene article 26 of the Covenant if its effects are discriminatory.[247]

[244] "[T]he Act does not distinguish between New Zealand citizens and foreigners ... [A] deduction takes place in all cases where a beneficiary also receives a similar [government-administered] benefit ... from abroad": *SB v. New Zealand*, UNHRC Comm. No. 475/1991, UN Doc. CCPR/C/50/D/475/1991, decided Mar. 31, 1994, at para. 6.2.

[245] The seminal case was *Simunek et al. v. Czech Republic*, UNHRC Comm. No. 516/1992, UN Doc. CCPR/C/54/D/516/1992, decided July 19, 1995.

[246] For example, the issue in *Simunek et al. v. Czech Republic*, ibid., was whether the Czech government had discriminated by passing a law which granted restitution for property confiscated during the Communist era, but only to those who were citizens and permanent residents of the Czech Republic on September 30, 1991.

[247] *Adam v. Czech Republic*, UNHRC Comm. No. 586/1994, UN Doc. CCPR/C/57/D/586/1994, decided July 23, 1996.

This position has been affirmed in subsequent decisions dealing with laws that were similarly explicit in their denial of rights to non-citizens.[248]

The Committee's most direct affirmation that discrimination contrary to Art. 26 can be discerned on the basis of effects without proof of intent came in a decision which found a Dutch law to be discriminatory because it provided survivorship benefits for the children of unmarried parents, but only if they were born after a particular date. In that context, the Committee unambiguously affirmed that "article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons."[249] It remains to be seen whether the Committee will adopt the same approach when called upon to assess the reasonableness of rules which discriminate in fact against non-citizens despite their complete facial neutrality[250] – including, for example, rules on

[248] See e.g. *Blazek v. Czech Republic*, UNHRC Comm. No. 857/1999, UN Doc. CCPR/C/72/D/857/1999, decided July 12, 2001, at para. 5.8; and *Brok v. Czech Republic*, UNHRC Comm. No. 774/1997, UN Doc. CCPR/C/73/D/774/1997, decided Oct. 31, 2001, at para. 7.2.

[249] *Derksen v. Netherlands*, UNHRC Comm. No. 976/2001, UN Doc. CCPR/C/80/D/1976/2001, decided Apr. 1, 2004, at para. 9.3. See also *Althammer v. Austria*, UNHRC Comm. No. 998/2001, UN Doc. CCPR/C/78/D/1998/2001, decided Aug. 8, 2003, at para. 10.2, which noted that "a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionally affect persons having a particular race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds." Specifically as regards sex discrimination, the Human Rights Committee has taken the view that "[t]he State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women. States parties must provide information regarding the actual role of women in society so that the Committee may ascertain what measures, in addition to legislative provisions, have been or should be taken to give effect to these obligations, what progress has been made, what difficulties are encountered and what steps are being taken to overcome them": UN Human Rights Committee, "General Comment No. 28: The equality of rights between men and women" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 178, para. 3.

[250] There is some cause for optimism in the Committee's recently expressed view that "an indirect discrimination may result from a failure to treat different situations differently, if the negative results of such failure exclusively or [disproportionately] affect persons of a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status": *Godfried and Pohl v. Austria*, UNHRC Comm. No. 1160/2003, UN Doc. CCPR/C/81/D/1160/2003, decided July 9, 2004.

immigration, child support, and pension entitlement adjudicated in earlier cases without the benefit of an effects-based analysis.[251]

The third and most fundamental concern about the Human Rights Committee's non-discrimination analysis is its tendency to assume the reasonableness of many state-sanctioned forms of differentiation, rather than to condition a finding of reasonableness on careful analysis. There has, in particular, been a reluctance to delve into the facts of particular cases in order to ensure that the differential treatment is actually proportionate to the social good thereby being advanced.[252] For example, the case of *Debreczeny v.*

[251] The specificity of the approach in the property restitution cases is clear from the views of the Committee that it has determined only that "a requirement in the law for citizenship as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary, and, consequently, a discriminatory distinction between individuals who are equally victims of prior state confiscations, and constitutes a violation of article 26 of the Covenant": *Des Fours v. Czech Republic*, UNHRC Comm. No. 747/1997, UN Doc. CCPR/C/73/D/747/1997, decided Oct. 30, 2001, at para. 8.4. It is also important to note that in both the property restitution cases and even in the decision of *Derksen v. Netherlands*, UNHRC Comm. No. 976/2001, UN Doc. CCPR/C/80/D/1976/2001, decided Apr. 1, 2004, the impugned legislation was, in fact, explicit about the category of persons to whom benefits would be denied (non-citizens in the former cases, children born before a particular date in the latter decision). The Committee has yet to apply the indirect discrimination doctrine to a situation in which there is no such explicit limitation in the law or practice being scrutinized. Moreover, the Committee in *Derksen*, ibid., seemed at pains to make clear that the government's recent decision to extend survivorship benefits to the children of unmarried parents was critical to the finding of discrimination. "In the circumstances of the present case, the Committee observes that under the earlier [law] the children's benefits depended on the status of the parents, so that if the parents were unmarried, the children were not eligible for the benefits. However, under the new [law], benefits are being denied to children born to unmarried parents before 1 July 1996 while granted in respect of similarly situated children born after that date": ibid. at para. 9.3. Yet if the Committee is truly committed to an effects-based approach to the identification of indirect discrimination, it is unclear why a law designed along the lines of the former law – which provided benefits for the children of married parents, but not for the children of unmarried parents – would not amount to discrimination in fact against the children of unmarried parents. Indeed, the rejection in this same case of a claim by the child's mother for benefits on the grounds that she and her (now deceased) partner failed to be married and hence to establish entitlement under the survivorship regime applicable to spouses suggests the extraordinarily fragile nature of the Committee's new-found commitment to the eradication of indirect discrimination.

[252] For example, to determine whether a law that infringes a protected right may nonetheless be adjudged a "reasonable limitation" for Canadian constitutional law purposes, the Supreme Court of Canada has determined that the government's objective must be pressing and substantial, and that there is proportionality between means and end. To determine the latter question of proportionality, consideration should be given to whether the limitation on the right is carefully designed to achieve its objective; whether it constrains the right to the minimum extent truly necessary; and whether the benefit of the limitation outweighs the harm occasioned by infringement of the right: *R v. Oakes*,

Netherlands[253] involved a police officer who was excluded from membership on a municipal council by reason of a law deeming membership of the council to be incompatible with the subordinated position of a police officer to local authorities. While the Committee logically noted the "objective and reasonable" goal of avoiding conflicts of interest, it failed to explain why the *complete exclusion* of the police officer from holding local political office was a proportionate means to achieve that goal.[254]

Deference to state assertions of reasonableness is also evident in two cases against Sweden involving the denial of financial assistance for school meals and textbooks to children attending private schools. The Human Rights Committee found no reason to uphold the claims of discrimination on the grounds that the government might "reasonably and objectively" choose to treat public and private schools (not students) differently.[255] The Committee observed that students who wish to receive the benefits should exercise their option to attend a public school. Yet surely if "reasonableness" has any significance in the context of discrimination analysis, it should be to direct

[1986] 1 SCR 103 (Can. SC, Feb. 28, 1986). The importance of a law's objective cannot compensate for its patent over-breadth. As such, the Supreme Court of Canada has struck down legislation advancing critical objectives when the means adopted are not proportional to the objective, e.g. involving the protection of children from sexual offenders (*R v. Heywood*, [1994] 3 SCR 761 (Can. SC, Nov. 10, 1994)), the protection of female children from the harm caused to them by premature intercourse (*R v. Hess*, [1990] 2 SCR 906 (Can. SC, Oct. 4, 1990)) and the protection of persons from the health risks of tobacco use (*RJR-Macdonald Inc. v. Canada*, [1995] 3 SCR 199 (Can. SC, Sept. 25, 1995)).

253 UNHRC Comm. No. 500/1992, UN Doc. CCPR/C/53/D/500/1992, decided Apr. 3, 1995.

254 Similarly, the Committee upheld the reasonableness of the retroactive reclassification of a member of the Polish civic militia as a member of the prior regime's security forces, thereby making him ineligible for reappointment in the post-Communist government: *Kall v. Poland*, UNHRC Comm. No. 552/1993, UN Doc. CCPR/C/60/D/552/1993, decided July 14, 1997. In a dissenting opinion, Members Evatt and Medina Quiroga wrote that "it has to be examined whether the classification of the author's position as part of the Security Police was both a necessary and proportionate means for securing a legitimate objective, namely the re-establishment of internal law enforcement services free of the influence of the former regime, as the State party claims, or whether it was unlawful or arbitrary and or discriminatory, as the author claims": ibid.

255 In *Blom v. Sweden*, UNHRC Comm. No. 191/1985, decided Apr. 4, 1988, the Committee declared that "[i]n deciding whether or not the State party violated article 26 by refusing to grant *the author, as a pupil* of a private school, an education allowance for the school year 1981/82, whereas *pupils* of public schools were entitled to education allowances for that period, the Committee bases its findings on the following observations. The State party's educational system provides for both private and public education. The State party cannot be deemed to act in a discriminatory fashion if it does not provide the same level of subsidy *for the two types of establishment*, when the private system is not subject to State supervision [emphasis added]": ibid. at paras. 10.2–10.3. That the Committee failed to grapple with the issue of whether there was truly a difference in the needs of the two classes of student is readily apparent from its reference to the legitimacy of withholding funds from one of two kinds of *establishment*.

attention to whether or not the differential rights allocation is made on the basis of real differences of need between the persons affected – here, the students attending the private schools and those in public schools. There is, however, no evidence that the Committee even canvassed this issue, much less that it found some reason implicitly to declare that *all students* in attendance at a private school are by virtue of that status in no need of personal financial assistance. In these cases reliance on a "reasonableness" test rather than on serious analysis of the real needs and interests of the persons involved served simply to legitimate state discretion.[256]

This extraordinary deference to state perceptions of reasonableness has even led the Committee to condone clear unfairness in the purported pursuit of justice. While some form of restitution was clearly called for in the case of Uruguayan civil servants dismissed by the former military government for their political affiliations, the Human Rights Committee in *Stalla Costa v. Uruguay*[257] did not even consider whether the particular affirmative action program adopted – which effectively blocked access to civil service recruitment for a whole generation of younger Uruguayans – was unduly intrusive on the rights of the non-beneficiary class. Instead, the Committee was content to find the program to be "reasonable and objective," observing simply that "[t]aking into account the social and political situation in Uruguay during the years of military rule, in particular the dismissal of many public servants ... the Committee *understands* the enactment ... by the new democratic Government of Uruguay as a measure of redress [emphasis added]."[258]

Indeed, it is "understandable" that the new government would wish to afford redress to the improperly fired civil servants. This general legitimation is precisely the result compelled by scrutiny of a differential rights allocation in relation to no more than a "reasonableness" test. That the program is "understandable" does not, however, make it non-discriminatory. A decision on this latter issue should have led the Committee to consider, for example, whether there were other means of redress open to the Uruguayan government that would not have had such a devastating impact on persons not previously employed by the state.

There are many other examples in which state-sanctioned differentiation is simply assumed to be reasonable without meaningful analysis. The Committee has rejected claims of discrimination based on an assumption of reasonable differentiation where social welfare benefits were calculated

[256] The Swedish school benefits cases could, however, legitimately be rejected on the basis that they do not involve differentiation on the grounds of actual or imputed group identity. They may, in other words, be examples of arbitrariness in rights allocation, rather than discrimination as such. See generally text above, at p. 124.

[257] UNHRC Comm. No. 198/1985, decided July 9, 1987.

[258] *Stalla Costa v. Uruguay*, ibid. at para. 10.

based on a presumption of greater support from cohabiting family members than from non-related cohabitants;[259] where active and retired employees who were similarly situated economically were treated differently for purposes of pension calculation;[260] where compensation was paid to military personnel, but not to civilians, who were detained by enemy soldiers during wartime;[261] where a legal aid system funded counsel for the civil defendant in a criminal case at nearly three times the rate paid to counsel for the plaintiff;[262] where the government elected to bar only one of several forms of employment understood to be inconsistent with respect for human dignity, with severe economic consequences for the former employees;[263] and where a

[259] "In the light of the explanations given by the State party, the Committee finds that the different treatment of parents and children and of other relatives respectively, contained in the regulations under the Social Security Act, is not unreasonable nor arbitrary, and its application in the author's case does not amount to a violation of article 26 of the Covenant": *Neefs v. Netherlands*, UNHRC Comm. No. 425/1990, UN Doc. CCPR/C/51/D/425/1990, decided July 15, 1994, at para. 7.4.

[260] "In the instant case, the contested differentiation is based only superficially on a distinction between employees who retired before 1 January 1992 and those who retired after that date. Actually, this distinction is based on a different treatment of active and retired employees at the time. With regard to this distinction, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that the distinction was not objective or how it was arbitrary or unreasonable. Therefore, the Committee concludes that the communication is inadmissible": *Nahlik v. Austria*, UNHRC Comm. No. 608/1995, UN Doc. CCPR/C/57/D/608/1995, decided July 22, 1996, at para. 8.4.

[261] "As regards the claim that the exclusion of civilian detainees from entitlements under the War Pensions Act is discriminatory, the Committee notes from the information before it that the purpose of the Act is specifically to provide pension entitlements for disability and death of those who were in the service of New Zealand in wartime overseas, not to provide compensation for incarceration or for human rights violations. In other words if disability arises from war service it is irrelevant to the entitlement to a pension whether the person suffered imprisonment or cruel treatment by captors. Keeping in mind the Committee's prior jurisprudence according to which a distinction based on objective and reasonable criteria does not constitute discrimination within the meaning of article 26 of the Covenant, the Committee considers that the authors' claim is incompatible with the provisions of the Covenant and thus inadmissible": *Drake v. New Zealand*, UNHRC Comm. No. 601/1994, UN Doc. CCPR/C/59/D/601/1994, decided Apr. 3, 1997, at para. 8.5.

[262] "The Committee recalls that differences in treatment do not constitute discrimination, when they are based on objective and reasonable criteria. In the present case, the Committee considers that representation of a person presenting a civil claim in a criminal case cannot be equalled to representing the accused. The arguments advanced by the author and the material he provided do not substantiate, for purposes of admissibility, the author's claim that he is a victim of discrimination": *Lestourneaud v. France*, UNHRC Comm. No. 861/1999, UN Doc. CCPR/C/67/D/861/1999, decided Nov. 3, 1999, at para. 4.2.

[263] "The Committee is aware of the fact that there are other activities which are not banned but which might possibly be banned on the basis of grounds similar to those which justify the ban on dwarf tossing. However, the Committee is of the opinion that, given that the

state's law codified a presumption that military officers of a predecessor state presented a risk to national security and were therefore ineligible for citizenship.[264] In a recent and particularly clear example of the Committee's abdication of its role seriously to examine the merits of a state's assertion of the reasonableness of differentiation, a twenty-year residence requirement for purposes of voting on self-determination for New Caledonia was upheld as non-discriminatory:

> [T]he Committee considers that, in the present case, the cut-off points set for the ... referendums from 2014 onwards are not excessive inasmuch as they are in keeping with the nature and purpose of these ballots, namely a self-determination process involving the participation of persons able to prove sufficiently strong ties to the territory whose future is being decided. This being the case, these cut-off points do not appear to be disproportionate with respect to a decolonization process involving the participation of residents who, over and above their ethnic origin or political affiliation, have helped, and continue to help, build New Caledonia through their sufficiently strong ties to the territory.[265]

ban on dwarf tossing is based on objective and reasonable criteria and the author has not established that this measure was discriminatory in purpose, the mere fact that there may be other activities liable to be banned is not in itself sufficient to confer a discriminatory character on the ban on dwarf tossing. For these reasons, the Committee considers that, in ordering the above-mentioned ban, the State party has not, in the present case, violated the rights of the author as contained in article 26 of the Covenant": *Wackenheim v. France*, UNHRC Comm. No. 854/1999, UN Doc. CCPR/C/67/D/854/1999, decided July 15, 2002, at para. 7.5.

264 The law in question presumes that foreigners who have served in the armed forces of another country pose a threat to Estonian national security. In this case, "the Tallinn Administrative Court ... found that the author had not been refused citizenship because he had actually acted against the Estonian state and its security in view of his personal circumstances. Rather, for the reasons cited, the author was in a position where he could act against Estonian national security ... It observed that there was no need to make out a case of a specific individual threat posed by the author, as he had not been accused of engaging in actual activities against the Estonian state and its security": *Borzov v. Estonia*, UNHRC Comm. No. 1136/2002, UN Doc. CCPR/C/81/D/1136/2002, decided Aug. 25, 2004, at para. 2.5. The Committee nonetheless determined that "the State party concluded that a grant of citizenship to the author would raise national security issues generally on account of the duration and level of the author's military training, his rank and background in the armed forces of the then USSR ... [T]he author did enjoy a right to have the denial of his citizenship application reviewed by the courts of the State party. Noting, furthermore, that the role of the State party's courts in reviewing administrative decisions, including those decided with reference to national security, appears to entail genuine substantive review, the Committee concludes that the author has not made out his case that the decision taken by the State party with respect to the author was not based on reasonable and objective grounds": ibid. at para. 7.4.

265 *Gillot v. France*, UNHRC Comm. No. 932/2000, UN Doc.CCPR/C/75/D/932/2000, decided July 15, 2002, at para. 14.7.

The Committee did not even examine the question whether "sufficiently strong ties" might be demonstrated by a period of residence significantly less than twenty years, much less the allegation that the goal of the requirement was to disfranchise an ethnic minority of the population.[266]

The critical difference that careful analysis of the reasonableness of differentiation can make is evident from examination of a pair of cases which alleged that the automatic prolongation of alternative military service was discriminatory in relation to genuine conscientious objectors. In *Järvinen v. Finland*,[267] the Human Rights Committee considered Finland's rule requiring conscientious objectors to military service to undertake alternative service for double the period of military service. The doubling of service time for conscientious objectors was said by the state to be justified on the grounds that it was necessary in order to discourage abuse of the non-combatant option. The Committee agreed, finding that the scheme was "reasonable" based on the importance of administrative workability, and because there was no intention to discriminate. No effort was made to assess whether the risk of abuse under the new system truly required such a significant disparity between the duration of military and alternative service, much less whether it was necessary to impose the prolonged service on persons willing to submit to careful scrutiny of their reasons for refusal to engage in military service.

In contrast, the Human Rights Committee more recently arrived at the opposite conclusion when it refused simply to accept the state party's assertion of reasonableness. In a series of decisions rendered against France on facts essentially indistinguishable from those considered in *Järvinen*, the Committee rejected the reasonableness of a double-time civilian service alternative imposed in the interests of ensuring that only true conscientious objectors would avoid military service:

> Any differentiation, as the Committee has had the opportunity to state repeatedly, must . . . be based on reasonable and objective criteria. In this context, the Committee recognizes that the law and practice may establish differences between military and national alternative service and that such differences may, in a particular case, justify a longer period of service, provided that the differentiation is based on reasonable and objective criteria, *such as the nature of the specific service concerned or the need for a special training in order to accomplish that service*. In the present case,

[266] "The authors also consider the period of residence determining the right to vote in referendums from 2014 onwards, namely 20 years, to be excessive. They again assert that the French authorities are seeking to establish an electorate of Kanaks and Caldoches for whom, moreover, the right to vote is maintained even in the event of lengthy absences from New Caledonia": *Gillot v. France*, ibid. at para. 3.10.

[267] UNHRC Comm. No. 295/1988, decided July 25, 1990.

> however, the reasons forwarded by the State party do not refer to such criteria or refer to criteria in general terms without specific reference to the author's case, *and are rather based on the argument that doubling the length of service was the only way to test the sincerity of an individual's convictions*. In the Committee's view, such argument does not satisfy the requirement that the difference in treatment involved in the present case was based on reasonable and objective criteria. In the circumstances, the Committee finds that a violation of article 26 occurred, since the author was discriminated against on the basis of his conviction of conscience [emphasis added].[268]

There could surely be no more compelling example of why a real injustice can be done when the assessment of reasonableness fails to scrutinize the reasons advanced by states for practices which raise *prima facie* claims of discrimination.[269] Regrettably, only a minority of the jurisprudence under Art. 26 takes up this question,[270] and none of it has thus far engaged in more sophisticated proportionality analysis.

[268] *Foin v. France*, UNHRC Comm. No. 666/1995, UN Doc. CCPR/C/67/D/666/1995, decided Nov. 3, 1999, at para. 10.3. See also *Maille v. France*, UNHRC Comm. No. 689/1996, UN Doc. CCPR/C/69/D/689/1996, decided July 10, 2000; and *Venier and Nicolas v. France*, UNHRC Comm. Nos. 690/1996 and 691/1996, UN Docs. CCPR/C/69/D/690/1996 and CCPR/C/69/D/691/1996, decided July 10, 2000.

[269] See also *Young v. Australia*, UNHRC Comm. No. 941/2000, UN Doc. CCPR/C/78/D/941/2000, decided Aug. 6, 2003, in which the refusal of the Committee to defer to the government's assertion that it was "reasonable" to distinguish between same-sex and opposite-sex couples for purposes of entitlement to veterans' benefits led to a finding of discrimination contrary to Art. 26. In contrast to the usual pattern of deference, the Committee here noted that "[t]he State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced": ibid. at para. 10.4.

[270] A somewhat unstructured analysis underpins some of the Committee's decisions. For example, in one case the Committee explicitly articulated the view that the disfranchisement of past property owners in favor of current tenants was rendered reasonable by virtue of the existence of a system to compensate the former owners. "The State party has justified the (exclusionary) requirement that current tenants of former State-owned residential property have a 'buy first option' even vis-à-vis the former owner of the property with the argument that tenants contribute to the maintenance of the property through improvements of their own. The Committee does not consider that the fact of giving the current tenants of former State-owned property priority in the privatization sale of such property is in itself unreasonable; the interests of the 'current tenants', who may have been occupying the property for years, are deserving of protection. If the former owners are, moreover, compensated on equal and non-discriminatory terms . . . the interplay between Act XXV of 1991 and of Act LXVIII of 1993 can be deemed compatible with article 26 of the Covenant": *Somers v. Hungary*, UNHRC Comm. No. 566/1993, UN Doc. CCPR/C/53/D/566/1993, decided July 23, 1996, at para. 9.8. More recently, in *Love v. Australia*, UNHRC Comm. No. 983/2001, UN Doc.

The point is not that the Human Rights Covenants' guarantees of non-discrimination – in particular, Art. 26 of the Civil and Political Covenant – will never be of value to refugees and other non-citizens. To the contrary, non-discrimination law will be a critically important remedy for refugees if recent, positive developments continue and take hold – specifically, if there is clear rejection of the view that categorical distinctions based on citizenship are to be assumed to be reasonable; if there is a genuine preparedness to take account of the discriminatory effects of superficially neutral laws and practices; and if the nascent preparedness to begin real interrogation of state assertions of reasonableness continues. The Human Rights Committee has moreover shown an awareness that refugee rights should follow from their unique predicament as involuntary expatriates,[271] and has indicated a particular disinclination to find restrictions to be reasonable insofar as individuals are unable to comply by virtue of having been forced to seek refugee status abroad.[272] But all of these developments must be seen for what they are: modest and recent shifts away from what has traditionally been a rather

CCPR/C/77/D/983/2001, decided Mar. 25, 2003, a case involving an allegation of age discrimination in the context of a mandatory retirement requirement for commercial airline pilots, the Committee observed that "it is by no means clear that mandatory retirement age would generally constitute age discrimination. The Committee takes note of the fact that systems of mandatory retirement age may include a dimension of workers' protection by limiting the life-long working time, in particular when there are comprehensive social security schemes that secure the subsistence of persons who have reached such an age. Furthermore, reasons related to employment policy may be behind legislation or policy on mandatory retirement age ... [T]he Committee's task [is to assess] whether any particular arrangement for mandatory retirement age is discriminatory. In the present case, as the State party notes, the aim of maximising safety to passengers, crew and persons otherwise affected by flight travel was a legitimate aim under the Covenant. As to the reasonable and objective nature of the distinction made on the basis of age, the Committee takes into account the widespread national and international practice, at the time of the author's dismissals, of imposing a mandatory retirement age of 60. In order to justify the practice of dismissals maintained at the relevant time, the State party has referred to the ICAO regime which was aimed at, and understood as, maximising flight safety. In the circumstances, the Committee cannot conclude that the distinction made was not, at the time of Mr Love's dismissal, based on objective and reasonable considerations": ibid. at paras. 8.2–8.3.

[271] "These victims of political persecution sought residence and citizenship in other countries. Taking into account that the State party itself is responsible for the departure of the authors, it would be incompatible with the Covenant to require them permanently to return to the country as a prerequisite for the restitution of their property or for the payment of appropriate compensation": *Simunek et al. v. Czech Republic*, UNHRC Comm. No. 516/1992, UN Doc. CCPR/C/54/D/516/1992, decided July 19, 1995, at para. 11.6.

[272] In *Blazek v. Czech Republic*, UNHRC Comm. No. 857/1999, UN Doc. CCPR/C/72/D/857/1999, decided July 12, 2001, the Committee observed "that it cannot conceive that the distinction on grounds of citizenship can be considered reasonable in the light of the fact that the loss of Czech citizenship was a function of their presence in a State in which they