superficial and deferential jurisprudence on the meaning of non-discrimination. Until the recent evolution is solidified and enhanced by, for example, incorporation of an analytically rigorous proportionality test,[273] refugees and other non-citizens are still not positioned dependably to benefit from most of the rights guaranteed to citizens.

2.5.6 International aliens law

As the preceding discussion makes clear, the inadequacy of international human rights law as a response to the vulnerabilities of refugees is in part a function of its inattention to the concerns of aliens generally. Inapplicable assumptions and outright exclusions reflect the orientation of international human rights law to meeting the needs of most of the world's population, who are citizens of their state of residence. At least until a more inclusive understanding of non-discrimination law evolves on the international plane, refugees, like other non-citizens, cannot depend on the general system of human rights protection adequately to address those of their concerns that are specifically a function of non-citizenship.

The early response of the United Nations to this dilemma was essentially to deny it. The Special Rapporteur of the International Law Commission, F. V. Garcia-Amador, confidently proclaimed that there was no need for a special legal regime to benefit aliens. His draft codification of the rights of aliens provides that "aliens enjoy the same rights and the same legal guarantees as nationals," these being "the 'universal respect for, and observance of, human rights and fundamental freedoms' referred to in the Charter of the United Nations and in other general, regional and bilateral instruments."[274] As

were able to obtain refuge": ibid. at para. 5.8. This is consistent with Art. 6 of the Refugee Convention, which requires that refugees be exempted from requirements "which by virtue of their nature a refugee is incapable of fulfilling": Refugee Convention, at Art. 6. See generally chapter 3.2.3 below.

[273] As the International Court of Justice has recently observed, the Human Rights Committee has appropriately insisted in other contexts of consideration on the proportionality of restrictions of rights before finding them to be lawful. "The Court would observe that the restrictions provided for under Article 12, paragraph 3, of the International Covenant on Civil and Political Rights [dealing with freedom of movement] are, by the very terms of that provision, exceptions to the right of freedom of movement contained in paragraph 1. In addition, it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends. As the Human Rights Committee put it, they 'must conform to the principle of proportionality' and 'must be the least intrusive instrument amongst those which might achieve the desired result' (CCPR/C/21/Rev.1/Add.9, General Comment No. 27, para. 14)": *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, decided July 9, 2004, at para. 136.

[274] F. V. Garcia Amador et al., *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974), at 5, 129.

previously shown, however, the Charter establishes only a limited duty of non-discrimination,[275] and the two Human Rights Covenants are not sufficiently attentive to the concerns and disabilities of aliens.[276] Because bilateral treaties do not enable aliens themselves to take action, but rather create rights between governments, they provide no effective recourse for refugees.[277] The upshot of Garcia-Amador's proposal, therefore, would have been to leave refugees with a fragmentary combination of rights derived from some treaties and general principles of law.[278]

A more forthright assessment of the problem was offered by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Baroness Diana Elles. She argued that the Universal Declaration of Human Rights was not a binding instrument, and could not therefore confer legal rights on aliens; that the Covenants on Human Rights offered at best patchwork protection to non-citizens; and that the many exclusions and permissible limitations in international instruments provided a substantively inadequate response to the vulnerabilities of persons outside their own country.[279] Although the Special Rapporteur's efforts were therefore clearly premised on the need to establish legally enforceable rights for aliens,[280] it is ironic that the product of her efforts within the Sub-Commission was itself completely unenforceable. The General Assembly adopted the Declaration on the Human Rights of Individuals Who are not

[275] See chapter 1.2.3 above, at p. 44. [276] See chapter 2.5.4 above, at pp. 121–123.

[277] See chapter 2.1 above, at pp. 78–79.

[278] "Admittedly, there is a body of opinion that may regard [codification of aliens' rights] as surplusage. Although the law governing the Responsibility of States for Injuries to Aliens was one of international law's first attempts to protect human rights, according to some authorities it has been preempted, in whole or in part, by the generation by the United Nations of new international human rights norms applicable to nationals and aliens alike. The fact that not all states subscribe to such norms and that, in any event, the machinery to implement them generally is non-existent or inadequate, is overlooked or ignored in such quarters. Thus, if one accepts the preemption argument, aliens actually may have less protection now than in years past": R. Lillich, "Editorial Comment: The Problem of the Applicability of Existing International Provisions for the Protection of Human Rights to Individuals Who are not Citizens of the Country in Which They Live," (1976) 70(3) *American Journal of International Law* 507, at 509.

[279] D. Elles, "Aliens and Activities of the United Nations in the Field of Human Rights," (1974) 7 *Human Rights Journal* 291, at 314–315.

[280] "What the Charter does not say is that there should be no distinction between alien and nationals ... [T]he alien, although his human rights and fundamental freedoms must be respected, may not necessarily expect equal treatment with nationals ... Continued violations of the rights of aliens in many parts of the world give grounds for doubting whether there are sufficient sanctions available against a host state without some judicial body of the highest quality and esteem, with the power to enforce judgements": "International Provisions Protecting the Human Rights of Non-Citizens," UN Doc. E/CN.4/Sub.2/393/Rev.1 (1979), at 5–7.

Nationals of the Country in which They Live,[281] but has yet to consider the codification of a binding catalog of rights for non-citizens.

Most recently, in August 2000 the Sub-Commission appointed Prof. David Weissbrodt as Special Rapporteur on the Rights of Non-Citizens, and charged him to prepare "a comprehensive study of the rights of non-citizens," which would "take into account the different categories of citizens regarding different categories of rights in countries of different levels of development with different rationales to be offered for such distinctions."[282] Weissbrodt's final report, delivered in May 2003,[283] takes a position between those of his two predecessors. Like Baroness Elles, he forthrightly catalogs the numerous ways in which non-citizens are explicitly excluded from many core treaty-based guarantees of human rights. His report acknowledges that political rights and freedom of internal movement are not clearly extended to non-citizens under the Civil and Political Covenant; that Art. 2(3) of the Economic Covenant allows poorer states to withhold economic rights from non-citizens; and that the International Convention on the Elimination of All Forms of Racial Discrimination does not preclude distinctions, exclusions, restrictions, or preferences between citizens and non-citizens.[284] He even alludes to possible reasons to question the value of non-discrimination law.[285]

Despite his recognition of the limitations of international human rights law, the thrust of Prof. Weissbrodt's report – like that of Garcia-Amador – is nonetheless that the human rights of non-citizens can be satisfactorily regulated under existing norms of international law.[286] This is, of course, a much more credible position today than it was when taken by Garcia-Amador in 1974.[287] To back up his position, the Special Rapporteur includes a summary

[281] UNGA Res. 40/144, adopted Dec. 13, 1985.

[282] "The rights of non-citizens: Preliminary report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2001.20, June 6, 2001, at paras. 4–5.

[283] "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23, May 26, 2003.

[284] Ibid. at paras. 18–22. Importantly, "[t]he Committee [on the Elimination of Racial Discrimination] ... affirms that article 1, paragraph 2, must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights": UN Committee on the Elimination of Racial Discrimination, "General Recommendation XI: Non-citizens" (1993), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 205, para. 3.

[285] "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23, May 26, 2003, at para. 23.

[286] "In general, international human rights law requires the equal treatment of citizens and non-citizens": ibid. at para. 1.

[287] See text above, at pp. 147–148.

of state practice in a number of countries,[288] and draws together the jurisprudence and concluding observations of the UN and regional human rights treaty bodies.[289] To the extent that work remains to be done – Weissbrodt pointed in a draft of his report, in particular, to the increasing number of distinctions among non-citizens *inter se*,[290] as well as barriers on access to citizenship,[291] and also provided a more broad-ranging (if somewhat eclectic) addendum of state practice which fails to respect the human rights of non-citizens[292] – the approach recommended is greater clarity and coordination among the standards applied by the existing human rights supervisory bodies,[293] not the establishment of new norms. For example, he suggests that there may indeed be particular value in vindicating the rights of non-citizens via scrutiny under the widely ratified Racial Discrimination Convention,[294] since most non-citizens are, in fact, racial minorities (remembering that "race" is defined therein to include *inter alia* national or ethnic origin[295]).

In essence, Weissbrodt provides a road map of how the existing legal norms of human rights law can more effectively be brought to bear on many of the problems faced by non-citizens around the world. Despite the obvious value to advocates and decision-makers of a report oriented in this way, the weakness of this approach is that it is prone to downplay the gaps in international human rights law. In particular, the report fails to grapple with the limited value of non-discrimination law as presently interpreted, including the problems for non-citizens that arise from the Human Rights Committee's often categorical approach to the definition of a "reasonable"

[288] In a very interesting self-reporting exercise, twenty-two governments submitted responses to a questionnaire prepared by the Special Rapporteur regarding their own standards and practice in relation to the rights of non-citizens: "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23/Add.4, May 26, 2003.

[289] See "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23/Add.1. While not directly relevant to the international standard of non-citizens' rights, Weissbrodt also cataloged relevant regional standards and jurisprudence: see "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23/Add.2, May 26, 2003.

[290] "The rights of non-citizens: Progress report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2002/25, June 5, 2002, at paras. 25–42.

[291] Ibid. at paras. 43–49.

[292] "The rights of non-citizens: Progress report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2002/25/Add.3, June 5, 2002. Weissbrodt's final report contains a more methodically organized (if still highly selective) indication of officially validated concerns: "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23/Add.3, Add.4, May 26, 2003.

[293] "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23, May 26, 2003, at paras. 31–33, 39–40.

[294] Ibid. at para. 34. [295] Racial Discrimination Convention, at Art. 1(1).

justification for differentiation; the breadth of the margin of appreciation it extends to governments; and its traditional disinclination to implement in practice its commitment in principle to an effects-based approach to the analysis of discrimination.[296] Indeed, the final report (optimistically) misstates the actual status of the Human Rights Committee's jurisprudence on non-discrimination, suggesting that justifications will be found to be reasonable only if "they serve a legitimate State objective *and are proportional to the achievement of that objective* [emphasis added]."[297]

More generally, the report simply does not aspire to provide solid answers to the underlying challenge of the exclusion of non-citizens from key parts of human rights law, including by the legal prerogative of less developed states to deny economic rights to non-citizens,[298] and by the general inability of non-citizens to claim some civil and political rights,[299] most especially when an emergency is proclaimed.[300] While the decision to defer consideration of these issues may derive from a politically realistic calculus, it remains that the Sub-Commission's most recent effort does not move us concretely towards a

[296] See chapter 2.5.5 above, at pp. 129–147.

[297] "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23, May 26, 2003, at paras. 1, 6, and 17. But see chapter 2.5.5 above, at pp. 139–145. Only one academic and one regional (not UN) decision are offered as support for this proposition: ibid. at n. 13. It is noteworthy that the (unwarranted) reference to "proportionality" did not feature in earlier drafts of the report, e.g. "The rights of non-citizens: Progress report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2002/25, June 5, 2002, at para. 28: "The Human Rights Committee has similarly observed in General Comment 18 that differences in treatment may be permissible under the Covenant 'if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant' (para. 13)."

[298] The report observes only that "[a]s an exception to the general rule of equality, it should be noted that article 2(3) must be narrowly construed, may be relied upon only by developing countries, and only with respect to economic rights": "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23, May 26, 2003, at para. 19.

[299] The report simply acknowledges that non-citizens do not enjoy full rights under Arts. 25 (political rights), 12(1) (internal freedom of movement), and 12(4) (freedom from deprivation of the right to enter one's own country), and notes the constraints on these limits set by the Human Rights Committee: ibid. at para. 18.

[300] This concern was given substantial attention in a draft version of Weissbrodt's report: see "The rights of non-citizens: Progress report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2002/25, June 5, 2002, at paras. 13, 19–20. Specifically, it was observed that "[u]nlike the general anti-discrimination clause found in article 2(1), the derogation clause does not include 'national origin' among the impermissible grounds for discrimination. This omission, according to the *travaux préparatoires*, reflects the drafters' recognition that States often find it necessary to discriminate against non-citizens in time of national emergency": ibid. at para. 20. Interestingly, no comparable acknowledgment of this restriction is included in the final report of the Special Rapporteur.

strategy for engaging – even incrementally – with these foundational concerns.

Despite the absence of broadly based progress, some concrete normative progress has been achieved in the establishment of binding rights for at least a subset of non-citizens. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families entered into force on July 1, 2003, though only a small minority of states has thus far ratified it.[301] To the extent that refugees may avail themselves of this treaty's provisions, it helpfully imposes obligations to provide, for example, emergency healthcare, children's education, fair conditions and employment, and the right to be protected against abuse and attacks. More generally, non-citizens may invoke rights under the various conventions established by the International Labor Organization to regulate migration for employment purposes.[302] Governed by an amalgam of state, employer, and worker representatives, the ILO has produced several treaties on international labor standards which, when ratified by states, are legally binding. Additional guidance is often provided by more detailed recommendations, which do not have the force of law.[303] The ILO's progressive codification of migrant worker rights is an important source of enforceable socioeconomic rights for

[301] UNGA Res. 45/158, adopted Dec. 18, 1990, entered into force July 1, 2003. Only twenty-five states have both signed and ratified the treaty: www.unhchr.ch (accessed Nov. 19, 2004).

[302] In 1939, the ILO adopted Convention No. 66, the Convention concerning the Recruitment, Placing and Conditions of Labor of Migrants for Employment, together with the accompanying Recommendation No. 61, Recommendation concerning the Recruitment, Placing and Conditions of Labor of Migrants for Employment. Convention No. 66 never secured sufficient ratifications to enter into force. It was updated in 1949 by Convention No. 97, the Convention concerning Migration for Employment (Revised) and its Recommendation No. 86, Recommendation concerning Migration for Employment (Revised). Convention No. 97 came into force shortly after the adoption of the Refugee Convention, and is a parallel source of rights for refugees lawfully admitted to residence in a state party. The ILO has since produced Convention No. 143, the Migrant Workers (Supplementary Provisions) Convention, 1975 and the companion Recommendation No. 151, Migrant Workers Recommendation, 1975. The 1975 accord deals with migration in abusive conditions and provides for equality of opportunity and treatment of migrant workers. See generally International Labor Conference et al., *Conventions and Recommendations Adopted by the International Labor Conference, 1919–1966* (1966) (International Labor Conference et al., *Conventions and Recommendations*) and Lillich, *Rights of Aliens*, at 73–74.

[303] Of particular note is Recommendation No. 86 (1949) which proposes a model agreement for the regulation of labor migration. Several of these non-binding standards speak explicitly to the needs of refugees, regarded as a subset of persons who seek employment outside their own country. First, some additional rights are added to the binding list of matters to be guaranteed on terms of equality with nationals. These include rights to recognition of travel documents, adaptation assistance, naturalization, participation in collective labor agreements, private property, and of access to food and suitable housing.

resident aliens, including those refugees who are lawfully admitted as immigrants to an asylum state. This is particularly so because ILO procedures allow enforcement action to be initiated not just by states, but equally by worker and employer organizations.[304] The critical limitation of the ILO standards is, however, that they apply only in states that voluntarily adhere to them, and generally regulate the treatment only of refugees lawfully admitted as immigrants to the state in question.

Overall, there is little doubt that non-citizens have benefited in important ways from the post-Convention evolution of international human rights law, particularly as regards their entitlement to claim most civil and political rights. On the other hand, a conservative approach has generally been taken to interpretation of broadly applicable guarantees of non-discrimination; emergency derogation can erode practical access to many civil and political rights; and poorer states remain legally entitled to exclude non-citizens from the enjoyment of most generally applicable economic rights. In these circumstances, the Refugee Convention remains a critical source of protection. In particular, it sets economic rights which must be honored in all countries; it insulates many key civil and political rights from derogation; and more generally, the Refugee Convention entrenches a broad range of entitlements which are fundamental to avoiding the specific predicaments of involuntary alienage. As such, refugee law must be understood still to be the cornerstone of the refugee rights regime, even as it has been buttressed in important ways by more general norms of human rights law.

Second, equal access to trades and occupations is established, but only "to the extent permitted under national laws and regulations." Third, migrant workers who are "lawfully within" the territory are entitled to equality of treatment with respect to hygiene, safety, and medical assistance; and, as far as the state regulates such matters, to weekly rest days, admission to educational institutions, recreation, and welfare. Fourth, the model agreement extends most of these equality rights to refugees' family members, an entitlement not proposed for the families of other alien workers. See International Labor Conference et al., *Conventions and Recommendations*.

[304] See generally F. Wolf, "Human Rights and the International Labour Organization," in Meron, *Human Rights in International Law*, at 273.

3

The structure of entitlement under the Refugee Convention

The universal rights of refugees are today derived from two primary sources – general standards of international human rights law, and the Refugee Convention itself. As the analysis in chapter 2 makes clear, the obligations derived from the Refugee Convention remain highly relevant, despite the development since 1951 of a broad-ranging system of international human rights law. In particular, general human rights norms do not address many refugee-specific concerns; general economic rights are defined as duties of progressive implementation and may legitimately be denied to non-citizens by less developed countries; not all civil rights are guaranteed to non-citizens, and most of those which do apply to them can be withheld on grounds of their lack of nationality during national emergencies; and the duty of non-discrimination under international law has not always been interpreted in a way that guarantees refugees the substantive benefit of relevant protections.

On the other hand, general human rights law adds a significant number of rights to the list codified in the Refugee Convention, and is regularly interpreted and applied by supervisory bodies able to refine the application of standards to respond to contemporary realities. Because both refugee law and general human rights law are therefore of real value, the analysis in chapters 4–7 synthesizes these sources of law to define a unified standard of treatment owed to refugees.

This chapter examines the fairly intricate way in which rights are attributed and defined under the Refugee Convention. Most fundamentally, the refugee rights regime is not simply a list of duties owed by state parties equally to all refugees. An attempt is instead made to grant enhanced rights as the bond strengthens between a particular refugee and the state party in which he or she is present. While all refugees benefit from a number of core rights, additional entitlements accrue as a function of the nature and duration of the attachment to the asylum state. The most basic set of rights inheres as soon as a refugee comes under a state's de jure or de facto jurisdiction; a second set applies when he or she enters a state party's territory; other rights inhere only when the refugee is lawfully within the state's territory; some when the refugee is lawfully staying there; and a few rights accrue only upon

satisfaction of a durable residency requirement.[1] Before any given right can be claimed by a particular refugee, the nature of his or her attachment to the host state must therefore be defined. The structure of the attachment system is incremental: because the levels build on one another (a refugee in a state's territory is also under its jurisdiction; a refugee lawfully present is also present; a refugee lawfully residing is also lawfully present; and a refugee durably residing is also lawfully residing), rights once acquired are retained for the duration of refugee status.[2]

Second, as under the 1933 Convention and the predecessor regime of aliens law, the standard of treatment owed to refugees is defined through a combination of absolute and contingent criteria. A few rights are guaranteed absolutely to refugees, and must be respected even if the host government does not extend these rights to anyone else, including its own citizens.[3] More commonly, the standard for compliance varies as a function of the relevant treatment afforded another group under the laws and practices of the receiving country. Under these contingent rights standards, refugees are entitled to be assimilated either to nationals of a most-favored state, or to citizens of the asylum state itself.[4] If no absolute or contingent standard is specified for a given right, refugees benefit from the usual standard of treatment applied to non-citizens present in the asylum state.[5] In applying this general residual standard, however, refugees must be exempted from any criteria which a refugee is inherently unable to fulfill,[6] and may not be subjected to any exceptional measures applied against the citizens of their state of origin.[7]

Third, an asylum state may not grant preferred treatment to any subset of the refugee population. The interaction of the Refugee Convention's endogenous rule of non-discrimination and the general duty of non-discrimination requires that all refugees benefit from equal access to rights in the host country.

Fourth and finally, states enjoy a limited discretion to withhold some rights from particular refugees on the grounds of national security.[8] In contrast to treaties such as the Civil and Political Covenant,[9] however, the

[1] See chapter 3.1 below.

[2] "The structure of the 1951 Convention reflects [a] 'layering' of rights": "Letter from R. Andrew Painter, UNHCR Senior Protection Officer, to Robert Pauw," (2003) 80 *Interpreter Releases* 423, at 427.

[3] See chapter 3.3.3 below.

[4] See chapters 3.3.1 and 3.3.2 below. It will be recalled that this approach establishes a built-in equalization and adjustment mechanism, since contingent rights vary as a function of the relevant treatment afforded another group under the laws and practice of the state party. See chapter 2.1 above, at pp. 77–78.

[5] See chapter 3.2 below. [6] See chapter 3.2.3 below.

[7] See chapter 3.5.2 below. [8] See chapter 3.5.1 below.

[9] "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures

Refugee Convention does not allow states to derogate from their obligations on a generalized basis, even in time of war or other serious national emergency.

The enforcement of these rights is to be accomplished by the attribution to UNHCR of a surrogate protector role comparable to that played by the various High Commissioners during the League of Nations era,[10] supplemented by the non-derogable agreement of state parties to submit any dispute regarding interpretation or application of the Refugee Convention to the International Court of Justice.[11] There is moreover potential for the national courts and tribunals of many state parties to enforce refugee rights directly, and for United Nations and other human rights bodies to take account of refugee-specific obligations in the interpretation of generally applicable human rights obligations.

3.1 Attachment to the asylum state

Refugees are entitled to an expanding array of rights as their relationship with the asylum state deepens. At the lowest level of attachment, some refugees are simply subject to a state's *jurisdiction*, in the sense of being under its control or authority. A greater attachment is manifest when the refugee is physically present *within a state's territory*. A still more significant attachment is inherent when the refugee is deemed to be *lawfully present* within the state. The attachment is greater still when the refugee is *lawfully staying* in the country. Finally, a small number of rights are reserved for refugees who can demonstrate *durable residence* in the asylum state. As the refugee's relationship to the asylum state is solidified over the course of this five-part assimilative path, the Convention requires that a more inclusive range of needs and aspirations be met.

derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, *provided that such measures are not inconsistent with their other obligations under international law* and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision [emphasis added]": International Covenant on Civil and Political Rights, UNGA Res. 2200A(XXI), adopted Dec. 16, 1966, entered into force Mar. 23, 1976 (Civil and Political Covenant), at Art. 4(1)–(2). The provision requiring continuing respect for "other obligations under international law" clearly imports the duty of state parties to the Refugee Convention to implement their duties under that treaty even when derogation from Covenant rights is allowed. With regard to the right of derogation under the Civil and Political Covenant, see UN Human Rights Committee, "General Comment No. 29: Derogations during a state of emergency" (2001), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 184.

[10] See chapter 2.3 above, at p. 85.

[11] Convention relating to the Status of Refugees, 189 UNTS 2545, done July 28, 1951, entered into force Apr. 22, 1954 (Refugee Convention), at Art. 38.

The drafters' decision to grant refugee rights on an incremental basis reflected the experience of states confronted with the unplanned arrival of refugees at their frontiers. While overseas asylum states continued mainly to receive refugees preselected for resettlement,[12] several European countries were already faced with what has today become the dominant pattern of refugee flows, namely the unplanned and unauthorized arrival of refugees at a state's borders. The drafters of the Convention explicitly considered how best to align the refugee rights regime with this transition from an essentially managed system of refugee migration, to a mixed system in which at least some refugees would move independently:

> [T]he initial reception countries were obliged to give shelter to refugees who had not, in fact, been properly admitted but who had, so to speak, imposed themselves upon the hospitality of those countries. As the definition of refugee made no distinction between those who had been properly admitted and the others, however, the question arose whether the initial reception countries would be required under the convention to grant the same protection to refugees who had entered the country legally and those who had done so without prior authorization.[13]

The compromise reached was that any unauthorized refugee, whether already inside or seeking entry into a state party's territory, would benefit from the protections of the Refugee Convention.[14] Such refugees would not, however, immediately acquire all the rights of "regularly admitted" refugees, that is, those pre-authorized to enter and to reside in an asylum state. Instead, as under then-prevailing French law, basic rights would be granted to all refugees, with additional rights following as the legal status of the refugee was consolidated.[15] The Refugee Convention implements this commitment by defining a continuum of legal attachment to the asylum state.

[12] "The Chairman, speaking as the representative of Canada, observed that the question raised by the initial reception countries did not apply to his country, which was separated by an ocean from the refugee zones. Thanks to that situation, all refugees immigrating to Canada were *ipso facto* legally admitted and enjoyed the recognized rights granted to foreigners admitted for residence": Statement of Mr. Chance of Canada, UN Doc. E/AC/32/SR.7, Jan. 23, 1950, at 12.

[13] Statement of Mr. Cuvelier of Belgium, ibid.

[14] "It did not, however, follow that the convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties . . . [W]hether or not the refugee was in a *regular position*, he must not be turned back to a country where his life or freedom could be threatened [emphasis added]": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 11–12.

[15] "[T]he problem would be seen more clearly if it were divided into three different aspects: the first concerned the treatment of refugees before they had reached an understanding with the authorities of the recipient countries; the second referred to their right to have their situation regularized and the conditions in which that was to be done; the third dealt with their rights after they had been lawfully authorized to reside in the country, which meant, in the case of France, after they were in possession of a residence card and a work card": Statement of Mr. Rain of France, UN Doc. E/AC/32/SR.15, Jan. 27, 1950, at 15.

In practice, however, some or all refugee rights are at times withheld by states pending the affirmative validation of entitlement to Convention refugee status.[16] It is, of course, true that the rights set by the Refugee Convention are those only of genuine Convention refugees, not of every person who seeks recognition of refugee status. But because it is one's de facto circumstances, not the official validation of those circumstances, that gives rise to Convention refugee status,[17] genuine refugees may be fundamentally disadvantaged by the withholding of rights pending status assessment.[18] They are rights holders under international law, but are precluded from exercising

[16] See e.g. *Krishnapillai v. Minister of Citizenship and Immigration*, [2002] 3(1) FC 74 (Can. FCA, Dec. 6, 2001), in which the court expressed the view that "in a case involving a Convention refugee claimant and not, as in this case, a Convention refugee ... [t]he Convention ... did not apply": ibid. at para. 25. Thus, for example, the court was of the view that Art. 16's guarantee of access to the courts – which actually inheres in all persons who are in fact refugees as soon as they come under a state's jurisdiction – could be claimed only "once their refugee status had been determined": ibid. at para. 27.

[17] "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee": UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, reedited 1992) (UNHCR, *Handbook*), at para. 28. This reasoning was approved in *R (Hoxha) v. Secretary of State for the Home Department*, [2002] EWCA Civ 1403 (Eng. CA, Oct. 14, 2002). But see the earlier decision of the same court in *R v. Secretary of State for the Home Department, ex parte Jammeh*, [1998] INLR 701 (Eng. CA, July 30, 1998), at 710–711, which suggested that "[i]t is ... a reasonable policy in accordance with the Convention not to confer upon would-be immigrants refugee status and rights that go with that until the entitlement to that status has been established." But this approach does not accord with the text of the Refugee Convention. "Article 1(A)(2) of the 1951 Convention does not define a 'refugee' as being a person who has been *formally recognized* as having a well-founded fear of persecution, etc. ... [A] person who satisfies the conditions of Article 1(A)(2) is a refugee regardless of whether he or she has been formally recognized as such pursuant to a municipal law process": E. Lauterpacht and D. Bethlehem, "The Scope and Content of the Principle of *Non-Refoulement*," in E. Feller et al. eds., *Refugee Protection in International Law* 87 (Lauterpacht and Bethlehem, "*Non-Refoulement*"), at para. 90.

[18] This point was recognized by the English Court of Appeal in *Khaboka v. Secretary of State for the Home Department*, [1993] Imm AR 484 (Eng. CA, Mar. 25, 1993), holding "that a refugee is a refugee both before and after his claim for asylum as such may have been considered and accepted ... It is common sense and a natural reading of article 31(1). The term 'refugee' means what it says. It will include someone who is subsequently established as being a refugee": ibid. at 489. In a subsequent decision of the Queen's Bench Division, this point was affirmed, though with the appropriate qualification that whether a refugee is entitled to particular rights is a function of the level of attachment which governs access to that right. The court was clearly anxious that an interpretation that withheld refugee rights until after status recognition could work a serious injustice, particularly as regards the right in Art. 16(1) of the Refugee Convention to access the courts. "[T]he use of the word 'refugee' [in Art. 16(1)] is apt to include the aspirant, for

their legal rights during the often protracted domestic processes by which their entitlement to protection is verified by officials. Unless status assessment is virtually immediate, the adjudicating state may therefore be unable to meet its duty to implement the Refugee Convention in good faith.[19]

This dilemma can only be resolved by granting any person who claims to be a Convention refugee the provisional benefit of those rights which are not predicated on regularization of status, in line with the Convention's own attachment requirements.[20] As UNHCR has observed,

> Every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of *non-refoulement* would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established.[21]

Governments that wish to be relieved of the presumptive (if minimalist) responsibility towards asylum-seekers have the legal authority to take steps to expedite formal determination of refugee status, including by resort to a

were that not so, if in fact it had to be established that he did fall within the definition of 'refugee' in article 1, he might find that he could have no right of audience before the court because the means of establishing his status would not be available to him so that he could not have access to the courts of this country on judicial review": *R v. Secretary of State for the Home Department, ex parte Jahangeer*, [1993] Imm. AR 564 (Eng. QBD, June 11, 1993), at 566.

[19] "The principle of good faith underlies the most fundamental of all norms of treaty law – namely, the rule *pacta sunt servanda* . . . Where a third party is called upon to interpret the treaty, his obligation is to draw inspiration from the good faith that should animate the parties if they were themselves called upon to seek the meaning of the text which they have drawn up": I. Sinclair, *The Vienna Convention and the Law of Treaties* (1984), at 119–120. An example of the clear risk of failure to adopt this approach is provided by the decision of the government of Venezuela to adopt a policy of "excluded tolerance" of Colombian asylum-seekers on their territory. While there is little doubt that many Colombians in flight from the conflict in their state are Convention refugees, the Venezuelan decision not to consider the merits of their claims has, in practice, denied them access to services and assistance to which they are, in fact, legally entitled: (2003) 128 *JRS Dispatches* (Mar. 17, 2003).

[20] These include rights which are subject to no level of attachment, rights which inhere in refugees simply physically present, and – once the requirements for status verification have been met – rights which are afforded to refugees who are lawfully present: see chapters 3.1.1, 3.1.2, and 3.1.3 below. More sophisticated rights (those that require lawful stay, or durable residence: see chapters 3.1.4 and 3.1.5 below) need be granted only after affirmative verification of refugee status. Importantly, all rights provisionally respected can be immediately withdrawn in the event an applicant is found not to be a Convention refugee.

[21] UNHCR, "Note on International Protection," UN Doc. A/AC.96/815 (1993), at para. 11.

fairly constructed procedure for "manifestly unfounded claims" if necessary.[22] Convention rights may be summarily withdrawn from persons found through a fair inquiry not to be Convention refugees. Such an approach enables a state to meet its obligations towards genuine refugees who seek its protection, consistent with the duty to ensure that at least certain basic rights accrue even before regularization of status.[23]

3.1.1 *Subject to a state's jurisdiction*

While most rights in the Refugee Convention inhere only once a refugee is either in, lawfully in, lawfully staying in, or durably residing in an asylum country, a small number of core rights are defined to apply with no qualification based upon level of attachment.[24] While as a practical matter these rights will in most cases accrue to a refugee simultaneously with those that apply once the refugee arrives at a state party's territory, there are some circumstances in which a refugee will be under the control and authority of a state party even though he or she is not physically present in, or at the border of, its territory.

For example, what of a situation in which a state exercises de facto control in territory over which it has no valid claim to lawful jurisdiction? A state

[22] Manifestly unfounded claims are "those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum": UNHCR Executive Committee Conclusion No. 30, "The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum" (1983), at para. (d), available at www.unhcr.ch (accessed Nov. 20, 2004).

[23] In a decision addressing exclusion from refugee status under Art. 1(F)(b), the High Court of Australia impliedly endorsed the view that refugee status is to be provisionally presumed pending the outcome of a status inquiry. Chief Justice Gleeson in a majority judgment observed that "[w]hatever the operation of the expression 'admission ... as a refugee' in other systems of municipal law, in Australia there would be nothing to which the language could apply. It would be necessary to read the words 'prior to his admission to that country as a refugee' as meaning no more than 'prior to his entry into that country.' The preferable solution is to read the reference to 'admission ... as a refugee' as a reference to putative admission as a refugee": *Minister for Immigration and Multicultural Affairs v. Singh*, (2002) 186 ALR 393 (Aus. HC, Mar. 7, 2002). Justice Callinan, in dissent, similarly observed that "[c]ontrary to a submission made in this court ... I am of the opinion that the words 'prior to his admission to that country as a refugee' should be understood to mean 'prior to his entry into the country in which he seeks or claims the status of a refugee.' Otherwise the purpose of the Convention would be subverted in that the nature of the applicant's prior criminal conduct could only be explored after he had been accorded refugee status": ibid.

[24] See Refugee Convention, at Arts. 3 ("non-discrimination"), 13 ("movable and immovable property"), 16(1) ("access to courts"), 20 ("rationing"), 22 ("education"), 29 ("fiscal charges"), 33 ("prohibition of expulsion or return – 'refoulement'"), and 34 ("naturalization").

might invade and take authority over the territory of another country; or it might appropriate authority over part of the *res communis*, such as the high seas. While it is not possible in such circumstances to argue that the state must respect refugee rights in such a place as the natural corollary of the state's de jure jurisdiction (because there is no right to control the territory), there is no denying that the state is exercising de facto jurisdiction over the territory in question. From the perspective of the refugee, moreover, the state's control and authority over him or her – whether legally justified or not – is just as capable of either inflicting harm or providing assistance as would be the case if the state's formal jurisdiction were fully established there.

As a general matter, of course, states do not assume international legal duties in the world at large, but only as constraints on the exercise of their sovereign authority – thus, normally applicable within the territory over which they are entitled to exercise jurisdiction. As the European Court of Human Rights has recently affirmed, "the jurisdictional competence of a State is primarily territorial."[25] In the particular context of refugee law, moreover, governments were emphatic in their rejection of a duty to reach out to refugees located beyond their borders, accepting only the more constrained obligation not to force refugees back to countries in which they might be persecuted.[26] The small set of core refugee rights subject to no attachment requirement nonetheless applies to state parties which exercise de facto jurisdiction over refugees not physically present in their territory. This is not only a natural conclusion from the way in which the text of the Refugee Convention is framed, but is an understanding that is consistent with basic principles of public international law.

The starting point for analysis is the plain language of the Refugee Convention, in which all but a very small number of core refugee rights *are* reserved for those who reach a state's territory, or who meet the requirements of a higher level of attachment. The decision generally to constrain the application of rights on a territorial or other basis creates a presumption that no such limitation was intended to govern the applicability of the rights not subject to such textual limitations. To assert that the few rights which are explicitly subject to no level of territorial attachment should nonetheless be treated as though they were so constrained would run afoul of the basic principle of interpretation that a good faith effort should be made to construe the text of a treaty in the light of its context – which clearly includes the balance of the provisions of the treaty itself.[27]

This textual reading is in several cases directly confirmed by the drafting history of the Convention. As regards property rights,[28] for example, the

[25] *Bankovic et al. v. Belgium et al.*, 11 BHRC 435 (ECHR, Dec. 12, 2001), at para. 59.
[26] See chapter 4.1 below, at pp. 300–301. [27] See chapter 1.3.2 above.
[28] Refugee Convention, at Art. 13.

drafters debated, but ultimately rejected, higher levels of attachment because they wished to ensure that refugees could claim property rights even in a state party where they were not physically present (on the same basis as other non-resident aliens).[29] Similarly, the absence of a level of attachment for purposes of the right to tax equity[30] was driven by the goal of ensuring that state parties would limit any effort to tax refugees not present on their territory by reference to the rules applied to non-resident citizens.[31] The right of access to the courts[32] was also broadly framed specifically to ensure that refugees had access to the courts of all state parties, not just those of a country where they might be physically present.[33] In each of these cases, the failure to stipulate a level of attachment was intentional, designed to grant refugees rights in places where they might never be physically present.[34]

The same explanation does not apply, however, to the decision not to stipulate any level of attachment for purposes of access to elementary education.[35] The generality of the way in which this obligation was framed followed from the drafters' determination to honor the "urgent need" for, and compulsory nature of, access by all to the most basic forms of education in line with the formula of the Universal Declaration of Human Rights – and specifically to ensure that even non-resident refugee children had access to schooling.[36] Because this particular goal might have been achieved by adoption of the next-lowest level of attachment (physical presence in the asylum state), it is arguable that the absence of any attachment requirement for this right is more the product of modest over-exuberance than of clear design. Yet there seems little doubt that had the drafters been aware that states might (as is increasingly the case) detain refugees extraterritorially, the fervor of their convictions about the fundamental importance of access to basic education would almost certainly have led them to opt for the present unqualified formulation.[37]

[29] See chapter 4.5.1 below, at pp. 526–527. [30] Refugee Convention, at Art. 29.

[31] See chapter 4.5.2 below, at p. 532. [32] Refugee Convention, at Art. 16(1).

[33] See chapter 4.10 below, at p. 645. Taking account of interaction with relevant provisions of the Civil and Political Covenant, Art. 16(1) may in some circumstances have relevance also to enabling refugees to access courts to enforce refugee rights violated extraterritorially: see chapter 4.10 below, at p. 650.

[34] "[S]everal provisions of the 1951 Convention enable a refugee residing in one Contracting State to exercise certain rights – as a refugee – in another Contracting State ... [T]he exercise of such rights is not subject to a new determination of his refugee status": UNHCR Executive Committee Conclusion No. 12, "Extraterritorial Effect of the Determination of Refugee Status" (1978), at para. (c), available at www.unhcr.ch (accessed Nov. 20, 2004).

[35] Refugee Convention, at Art. 22. [36] See chapter 4.8 below, at p. 597.

[37] This approach is not rendered unworkable by virtue of practical concerns, for example the viability of delivering elementary education immediately, or while onboard a ship. Even those rights which inhere immediately clearly do so only on their own terms. As regards

The right of access to systems which ration consumer goods[38] could also technically apply extraterritorially in line with its textual formulation, but only if the state in question operates a general rationing system in the place where it purports to exercise control over the refugee.[39] Since this duty pertains only to systems which distribute essential goods (e.g. foodstuffs), there is a clear logic to the requirement that in such circumstances refugees under a state's extraterritorial control should have access to rationed goods. No real significance should be given to the fact that the Convention's provision on naturalization[40] is not constrained by a level of attachment since, as elaborated below, this provision really is not the basis for any rights at all, but is more in the nature of non-binding advice to states.[41]

This then leaves us with only two core refugee rights that would, under the understanding of the plain meaning of the text advanced here, be of general practical relevance to state parties which choose to exercise extraterritorial jurisdiction over refugees: a duty of non-discrimination (between and among refugees);[42] and the obligation not to return them, directly or indirectly, to a place where they risk being persecuted for a Convention reason (*non-refoulement*).[43] Beyond these duties, the state party would be obligated only to act in accordance with the general standard of treatment[44] – that is, treating the refugees under its authority at least as well as it treats aliens generally,[45] exempting them from reciprocity or insurmountable requirements,[46] respecting their personal status (e.g. family and matrimonial rights),[47] and honoring rights acquired apart from the Refugee Convention itself.[48] This is certainly a modest set of expectations, and not one which could credibly be argued to render the plain meaning of the Convention's text in any sense unworkable. Much less is it an approach at odds with the treaty's object and purpose. To the contrary, if states were able with impunity to reach out beyond their borders to force refugees back to the risk of being persecuted, whether as a general matter or in relation to only particular groups of refugees, the entire Refugee Convention – which is predicated on the ability

public education, for example, refugees need only receive "the same treatment as is accorded to nationals." Thus, there is no breach of refugee law if refugees are subject only to the same delays or constraints in establishing educational facilities that might apply, for example, to citizens living in a comparably remote area. But such considerations must be addressed with the same promptness and effectiveness that would apply in the case of citizens of the state party.

[38] Refugee Convention, at Art. 20. [39] See chapter 4.4.1 below, at p. 467, n. 861.
[40] Refugee Convention, at Art. 34. [41] See chapter 7.4 below, at pp. 982–983.
[42] Refugee Convention, at Art. 3. See chapter 3.4 below.
[43] Refugee Convention, at Art. 33. See chapter 4.1 below. [44] See chapter 3.2 below.
[45] See chapter 3.2.1 below. [46] See chapters 3.2.2 and 3.2.3 below.
[47] See chapter 3.2.4 below. [48] See chapter 2.4.5 above.

of refugees to invoke rights of protection in state parties – could, as a practical matter, be rendered nugatory.

Assuming, then, that the plain meaning of the Convention's textual framing of a small number of core rights does not – in contrast to the treaty's general approach – stipulate a territorial or other required level of attachment, does it follow that these rights bind state parties wherever they act?

This is an increasingly debated question in international human rights law generally. The present range of approaches among courts and treaty supervisory bodies is, to some extent, attributable to the fact that the scope of duties under various relevant treaties is differently conceived. As the International Court of Justice has recently observed, the starting point for analysis of the scope of a treaty's obligations is clearly the language of the relevant treaty, interpreted in a manner that advances its object and purpose.[49] Thus, the four Geneva Conventions, dealing with the protection of the victims of war, are exceptional in obligating state parties "to respect and to ensure respect for the present Convention *in all circumstances* [emphasis added]."[50] Other treaties are more constrained, usually imposing obligations on state parties only where they exercise jurisdiction, which is presumptively the case in their own territory.[51] For example, the Convention against Torture imposes a duty to protect persons "in any territory under its jurisdiction,"[52] while the Civil and Political Covenant applies to persons "within [a state party's] territory and subject to its jurisdiction."[53] In most cases, human rights treaties tend either to be silent on the question,[54] or to bind states to

[49] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, decided July 9, 2004, at paras. 108–109. The Court gave particular attention to relevant jurisprudence under the Civil and Political Covenant, as well as to its *travaux préparatoires* in identifying the object and purpose. This is very much in line with the interactive approach to treaty interpretation advocated here: see chapter 1.3.3 above.

[50] Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, done Aug. 12, 1949, entered into force Oct. 21, 1950, at Art. 1.

[51] "The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions": *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, decided July 9, 2004, at para. 109.

[52] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/46, adopted Dec. 10, 1984, entered into force June 26, 1987, at Art. 2(1).

[53] Civil and Political Covenant, at Art. 2(1).

[54] For example, 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); International Convention on the Elimination of All Forms of

protect the rights of persons either "subject to"[55] or "within"[56] their jurisdiction.

Yet there is in fact a surprising commonality of approach in the interpretation of most treaties. For example, the Interamerican Commission on Human Rights, deriving its authority from the American Declaration on the Rights and Duties of Man (which is silent on the question of the ambit of obligations) has determined that "no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights."[57] To similar effect, the UN Human Rights Committee has read Art. 2(1) of the Civil and Political Covenant disjunctively, thus finding that the obligation to respect rights "within [a state's] territory and subject to its jurisdiction" means that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[58]

In a recent case, however, the European Court of Human Rights was called upon to consider the more vexing question of whether a state may also be

Racial Discrimination, UNGA Res. 2106A(XX), done Dec. 21, 1965, entered into force Jan. 4, 1969; Convention on the Elimination of All Forms of Discrimination Against Women, UNGA Res. 34/180, adopted Dec. 18, 1979, entered into force Sept. 3, 1981; and the American Declaration of the Rights and Duties of Man, OAS Res. XXX (1948).

[55] Optional Protocol No. 1 to the Civil and Political Covenant, 999 UNTS 172, adopted Dec. 16, 1966, entered into force Mar. 23, 1976, at Art. 1; American Convention on Human Rights, 1144 UNTS 123, adopted Nov. 22, 1969, entered into force July 18, 1978, at Art. 1.

[56] Optional Protocol No. 2 to the Civil and Political Covenant, 1648 UNTS 414, adopted Dec. 15, 1989, entered into force July 11, 1991, at Art. 1; European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, done Nov. 4, 1950, entered into force Sept. 3, 1953, at Art. 1.

[57] Interamerican Commission on Human Rights, "Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba," Mar. 12, 2002; "Request for Precautionary Measures Concerning Detainees Ordered Deported or Granted Voluntary Departure," Sept. 26, 2002.

[58] UN Committee on Human Rights, "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, at 192, para. 10. This reading was affirmed as accurate by 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, at para. 109: "The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, Official Records of the General Assembly, Tenth Session, Annexes, A/2929, Part II, Chap. V, para. 4 (1955))."

held to account for breach of its obligations when its actions *impact* on the exercise of human rights abroad, even if it does not exercise *jurisdiction* there.[59] In a thorough and wide-ranging discussion, the Court determined in *Bankovic* that NATO state parties to the European Convention did not violate that treaty when they authorized the bombing of Yugoslavia, resulting in civilian deaths in that country.[60] It reached this conclusion on the grounds that the victims of the attacks were not under the jurisdiction of the NATO countries:

> Article 1 of the Convention must be considered to reflect [the] ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.[61]

The Court helpfully spelled out the circumstances in which public international law recognizes a state's extraterritorial jurisdiction. First,

> recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.[62]

And second, in line with the Court's own holdings in *Loizidou v. Turkey*[63] and *Cyprus v. Turkey*,[64] jurisdiction is also established where a state exercises "effective control of an area outside its national territory":[65]

> [R]ecognition of extra-territorial jurisdiction by a Contracting State is exceptional: it [is appropriate] when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or

[59] This question should be distinguished from more general issues of state responsibility, which focus on secondary rules (what follows from breach of an international legal obligation), not on primary rules (when has an international legal obligation been breached). That is, there must first be a determination of fault under a primary rule (the question being addressed here); only then does the question of the nature of state responsibility arise: see generally J. Crawford, "The ILC's State Responsibility Articles," (2002) 96(4) *American Journal of International Law* 773, at 874.

[60] *Bankovic et al. v. Belgium et al.*, 11 BHRC 435 (ECHR, Dec. 12, 2001).

[61] Ibid. at para. 61. [62] Ibid. at para. 73.

[63] *Loizidou v. Turkey*, 23 EHRR 513 (ECHR, Dec. 18, 1996).

[64] "Having effective overall control over Northern Cyprus, [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in Northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support": *Cyprus v. Turkey*, 35 EHRR 30 (ECHR, May 10, 2001), at para. 77.

[65] *Bankovic et al. v. Belgium et al.*, 11 BHRC 435 (ECHR, Dec. 12, 2001), at para. 70.

> acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.[66]

The Court expressly rejected that "cause-and-effect notion of jurisdiction" contended for by the applicants,[67] limiting this second exceptional basis for a finding of jurisdiction to circumstances where there is evidence of "control [by a state party], whether it [is] exercised directly, through the ... armed forces, or through a subordinate local administration."[68]

In considering the relevance of this decision to refugee law, it must certainly be acknowledged that the silence of the Refugee Convention on the general ambit of the obligations it imposes – and most certainly on the ambit of the small group of rights subject to no level of attachment – is less constraining than the "within [a state party's] jurisdiction" clause in the European Convention.[69] It is also true that the *Bankovic* decision has been criticized for having failed to recognize the logic of an understanding of jurisdiction for purposes of human rights law that is more broadly construed than that under public international law generally.[70] Yet the International

[66] Ibid. at para. 71. Similarly, the US Supreme Court recently noted that under the agreement between the United States and Cuba, the Guantanamo Base is – while under Cuban sovereignty – nonetheless under the "complete jurisdiction" of the United States for the duration of its lease with Cuba. On this basis, Justice Kennedy sensibly concluded that Guantanamo Bay "is in every practical respect a United States territory": *Rasul v. Bush*, Dec. No. 03–334, June 28, 2004.

[67] *Bankovic et al. v. Belgium et al.*, 11 BHRC 435 (ECHR, Dec. 12, 2001), at para. 75. "[T]he applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State": ibid.

[68] Ibid. at para. 70. See also *Military and Paramilitary Activities in and Against Nicaragua*, [1986] ICJ Rep 14, at para. 115, in which the International Court of Justice determined that the relevant issue to establish responsibility is the "level of control exercised by the state to whom the acts might be attributed."

[69] The authors of a recent opinion commissioned by UNHCR on the scope of the Refugee Convention's duty of *non-refoulement* assert what amounts to an effects-based jurisdiction: "[P]ersons will come within the jurisdiction of a State in circumstances in which they can be said to be under the effective control of that State or are affected by those acting on behalf of the State more generally, wherever this occurs": Lauterpacht and Bethlehem, "*Non-Refoulement*," at para. 67.

[70] See e.g. A. Trilsch, "*Bankovic v. Belgium*," (2003) 97(1) *American Journal of International Law* 168: "[A]s the Court itself pointed out in *Loizidou* and *Cyprus v. Turkey*, and confirmed in the present decision, the applicability of the Convention does not depend on whether the extraterritorial act in question was lawful or unlawful – a distinction that is, in contrast, decisive in determining a state's jurisdiction under public international law. Having regard to the object and purpose of the Convention, these conceptual differences invite us to consider whether, instead of having the recognition of jurisdiction ... depend on the exercise of effective (territorial) control, the point of reference should lie in the exercise of state authority as such."

Court of Justice has recently taken much the same tack as did the European Court of Human Rights.

In its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[71] the Court was required to determine the reach of Israel's obligations under international law. It determined that while the primary point of reference is the specific provisions of a given treaty interpreted in light of the accord's object and purpose, obligations must normally be held to apply in any territory over which a state party exercises "effective jurisdiction."[72] Indeed, even when a treaty's terms might incline towards a more purely territorial sense of obligation, "it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction."[73] Strikingly, however, despite the breadth of the Court's analysis of the scope of application of both human rights and humanitarian law obligations, it did not take the view that liability might ever follow on the basis simply that a state party's actions had an impact over persons in a foreign country – suggesting that it might well be inclined to take a position on the notion of "cause-and-effect jurisdiction" akin to that embraced in *Bankovic*.

The reasoning of the International Court of Justice may, however, helpfully illustrate the application of the second basis for extraterritorial jurisdiction identified by the European Court of Human Rights, that being where a state through effective control "exercises all or some of the public powers normally to be exercised by that Government." In finding that Israel exercises jurisdiction in the Occupied Palestinian Territory, the ICJ noted with approval the practice of the Human Rights Committee to deem de facto jurisdiction to be established when the official agents of a state act in the territory of another country.[74] Applying this approach, the Court recognized "the exercise of effective jurisdiction by Israeli security forces [in the

[71] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, decided July 9, 2004.

[72] Ibid. at paras. 109–110. [73] Ibid. at para. 112.

[74] "The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions. The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos v. Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego v. Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero v. Uruguay*)": *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, decided July 9, 2004, at para. 109.

Occupied Territory]."[75] In other words, the Court understands effective jurisdiction to be established abroad where a state's agents exercise an important aspect of public power (in this case, police powers); having established that exercise of public power, the Court did not feel the need to inquire further into whether Israel also exercises a broader array of public powers in the Occupied Territory. While falling short of a pure effects-based approach to jurisdiction, the Court's holding makes clear that effective jurisdiction – and hence liability for breach of human rights – can be established even where the territorial government (here, the Palestinian Authority) continues to exercise many or even most of the public powers usually associated with governance.

For present purposes, the real importance of these decisions is that they make clear that it is not permissible to limit the underlying jurisdictional basis for state accountability on a narrowly territorial basis. To the contrary, the recognized circumstances in which jurisdiction extends beyond territory are sufficient to define a "legal space (*espace juridique*)"[76] within which those Refugee Convention rights not subject to a territorial or other level of attachment are, at a minimum, applicable.[77]

Assuming, then, that rights under the Refugee Convention not subject to an express level of attachment apply on the basis of the default position regarding jurisdiction in public international law, it may be concluded that the governments of state parties are bound to honor these rights not only in territory over which they have formal, de jure jurisdiction, but equally in places where they exercise effective or de facto jurisdiction outside their own territory.[78] At a minimum, this includes both situations

[75] Ibid. at para. 110.

[76] Ibid. at para. 80. Indeed, the Court's determination was largely in line with the perspective advanced by the defendant states (Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom) that "[t]he exercise of 'jurisdiction' ... involves the assertion or exercise of legal authority, actual or purported, over persons owing some form of allegiance to that State or who have been brought within that State's control ... [It] generally entails some form of structured relationship normally existing over a period of time": ibid. at para. 36.

[77] In the context of refugee law, the English Court of Appeal has affirmed the link between control and jurisdiction. "There was no doubt that Mr. D was within the 'jurisdiction' of the United Kingdom, however that expression might be interpreted, because the United Kingdom was asserting rights over him, in particular the right to expel him to the country from whence he had come": *Kaya v. Haringey London Borough Council*, [2001] EWCA Civ 677 (Eng. CA, May 1, 2001).

[78] "In view of the purposes and objects of human rights treaties, there is no a priori reason to limit a state's obligation to respect human rights to its national territory. Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside national territory, the presumption should be that

in which a state's consular or other agents take control of persons abroad,[79] and where the state exercises some significant public power in territory which it has occupied, or in which it is present by consent, invitation, or acquiescence.

A helpful example of the latter circumstance derives from the right of states to extend their jurisdiction into what would otherwise be the *res communis* of the high seas by claiming a contiguous zone extending up to twelve miles beyond the external perimeter of their territorial sea. A contiguous zone, unlike the territorial sea or another part of a state's territory, is not an area of sovereign authority. It is, however, a zone in which specialized jurisdiction may be exercised including, for example, enforcement of the state's customs or immigration laws.[80] To the extent that a state party opts to establish a contiguous zone – and most obviously where the claim to extended jurisdiction includes the right to regulate the movement of persons within the zone – refugees present within the area of expanded territorial jurisdiction are thus

the state's obligation to respect the pertinent human rights continues. That presumption could be rebutted only when the nature and content of a particular right or treaty language suggest otherwise": T. Meron, "Extraterritoriality of Human Rights Treaties," (1995) 89(1) *American Journal of International Law* 78, at 80–81.

[79] This view was adopted not only by the International Court of Justice, but also by the European Court of Human Rights, which noted that the respondent governments accepted the view set out in its earlier decision of *Öcalan v. Turkey*, Dec. No. 46221/99 (unreported) (ECHR, Dec. 14, 2000) that jurisdiction was established by an official act of arrest and detention outside a state's territory, said by the respondent states to be "a classic exercise of such legal authority or jurisdiction over those persons by military forces on foreign soil": *Bankovic et al. v. Belgium et al.*, 11 BHRC 435 (ECHR, Dec. 12, 2001), at para. 37. The House of Lords recently affirmed the logic of this basic principle, finding that "a member state could, through the actions of its agents outside its territory, assume jurisdiction over others in a way that could engage the operation of the [European Convention on Human Rights]": *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. 21. Inexplicably, the decision nonetheless concluded that the actions of British immigration officers stationed at Prague Airport did not meet the relevant standard. Lord Bingham observed simply that he had "the greatest doubt whether the functions performed by the immigration officers at Prague, even if they were formally treated as consular officials, could possibly be said to be an exercise of jurisdiction in any relevant sense over non-UK nationals": ibid. This conclusion does not seem to accord with the broad approach adopted by both the European Court of Human Rights and, in particular, the International Court of Justice.

[80] Convention on the Territorial Sea and Contiguous Zone, 516 UNTS 205, done Apr. 29, 1958, entered into force Sept. 10, 1964, at Art. 24; and United Nations Convention on the Law of the Sea, UN Doc. A/CONF.62/122, done Dec. 10, 1982, entered into force Nov. 16, 1994, at Art. 33. Similarly, a state may claim an exclusive economic zone of up to 200 miles from the baseline of the territorial sea in which it may, *inter alia*, construct artificial islands and regulate immigration to and from any such artificial islands: ibid. at Arts. 55–75, in particular Art. 60(2).

entitled to claim the benefit of those rights which apply without qualifications based upon level of attachment.[81]

3.1.2 Physical presence

Several additional rights – to freedom of religion, to receive identity papers, to freedom from penalization for illegal entry, and to be subject to only necessary and justifiable constraints on freedom of movement – accrue to all refugees who are simply "in" or "within" a contracting state's territory.[82] Any refugee physically present, lawfully or unlawfully, in territory under a state's jurisdiction may invoke these rights.[83] This conclusion follows not only from the plain meaning of the language of "in" or "within,"[84] but also from the express intention of the drafters,[85] who insisted that these rights must be granted even to "refugees who had not yet been regularly admitted into a country."[86] This position is also consistent with the context of the

[81] But see *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) in which the majority of the United States Supreme Court determined that Art. 33 of the Refugee Convention was not intended to apply extraterritorially, in particular on the high seas. A contrary position is elaborated in chapter 4.1.3 below, at pp. 336–339.

[82] See Refugee Convention, at Arts. 4 ("religion"), 27 ("identity papers"), 31(1) ("non-penalization for illegal entry or presence") and 31(2) ("movements of refugees unlawfully in the country of refuge").

[83] But see *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14 (Aus. HC, Apr. 11, 2002), per Justices McHugh and Gummow: "Nor does the Convention specify what constitutes entry into the territory of a contracting state so as then to be in a position to have the benefits conferred by the Convention. Rather, the protection obligations imposed by the Convention upon contracting states concern the status and civil rights to be afforded refugees who are within the contracting states." While somewhat unclear, the passage might be read to suggest that rights which inhere upon mere presence in a state may be withheld on the basis that, as a matter of law, the state has determined the person not to have formally entered its territory. Such an approach would confuse mere physical presence with lawful presence (see chapter 3.1.3 below). The fact that the drafters did not elaborate the meaning of "in" or "within" a state's territory simply confirms the self-evident plain meaning of those terms, i.e. physical presence in the territory of the state in question.

[84] See G. Stenberg, *Non-Expulsion and Non-Refoulement* (1989) (Stenberg, *Non-Expulsion*), at 87: "The statement that a person is present in the territory of a State indicates that he is physically within its borders."

[85] Mr. Larsen of Denmark persuaded the Ad Hoc Committee to draw up "a number of fairly simple rules for the treatment of refugees not yet authorized to reside in a country": Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 22. To similar effect, the representative of the International Refugee Organization stressed the importance of including in the Convention "provisions concerning refugees who had not yet been regularly admitted": ibid. at 18.

[86] Statement of Mr. Henkin of the United States, ibid. at 18. The Danish representative similarly distinguished between "refugees regularly resident" and "those ... who had just

Convention as a whole, most notably with the approach taken to the provisional suspension of rights in the context of a national emergency.[87]

Under general principles of territorial jurisdiction, this level of attachment enfranchises, for example, not only refugees within a state's land territory, but also those on its inland waterways or territorial sea,[88] including on islands, islets, rocks, and reefs; it includes also those in the airspace above each of these.[89] The Australian Senate was therefore acting very much in line with international law when it rejected a government proposal to "excise" some 3,500 islands from the portion of the national territory in which refugee protection obligations would have been deemed applicable.[90] A state's territory moreover includes both its ports of entry,[91] and so-called "international zones" within a state's territory.[92] To the extent that a state acquires additional territory by accretion, cession, conquest, occupation, or prescription,[93] it is bound to honor rights that apply at this second level of attachment in such territory.

arrived in the initial reception country": Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 11.

87 The interpretation of the Refugee Convention as granting rights even prior to formal verification of status is buttressed by the specific incorporation of Art. 9 in the Refugee Convention, which allows governments provisionally to suspend the rights of persons not yet confirmed to be refugees *if* the asylum state is faced with war or other exceptional circumstances. It follows from the inclusion of this provision in the Convention that, absent such extreme circumstances, states cannot suspend rights pending verification of status. See generally chapter 3.5.1 below.

88 See e.g. UNHCR Executive Committee Conclusion No. 97, "Conclusion on Protection Safeguards in Interception Measures" (2003), available at www.unhcr.ch (accessed Nov. 20, 2004), at para. (a)(i): "The State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons."

89 I. Brownlie, *Principles of Public International Law* (2003) (Brownlie, *Public International Law*), at 105.

90 "Island excision thrown out: hunt for new plan," *Sydney Morning Herald*, Nov. 25, 2003, available at www.smh.com.au (accessed Nov. 25, 2003). In defending the excision, the Defence Minister said that the government had excised Christmas Island "because that was seen as an easy route to get the protections under Australian law": "Plan to excise islands doomed: Hill," *Canberra Times*, June 17, 2002, at A-10. Indeed, the Immigration Minister was reported to have said that "he could not rule out placing Tasmania outside Australia's immigration borders": "Refugee boats will 'aim for mainland,'" *Canberra Times*, June 11, 2002, at A-1. Such notions led one commentator to observe, in line with rules of international law, that "if the whole of Australia were excised from the migration zone, maybe it could be excised from all the rest of the law that gives people rights to access the courts ... The islands today; the rest of Australia tomorrow. There is no difference": C. Hull, "Excising islands: where will it all end?," *Canberra Times*, June 21, 2002, at A-13.

91 G. Goodwin-Gill, *The Refugee in International Law* (1996) (Goodwin-Gill, *Refugee in International Law*), at 123.

92 *Amuur v. France*, [1996] ECHR 25 (ECHR, June 25, 1996).

93 See generally M. Shaw, *International Law* (2003), at 417–441.

A state is not, however, required to grant rights defined by this level of attachment to refugees with which it may come into contact in territory under the full sovereign authority of another state, including in particular refugees who arrive at a state's embassy or other diplomatic post abroad. While such premises are immune from intrusion,[94] they are neither assimilated to the territory of the state that established the diplomatic mission, nor otherwise free from the legal control of the territorial state.[95] Because a diplomatic post is not a part of the territory of the state whose interests it represents, the primary responsibility to honor the rights of any refugees physically present there falls to the country in which the post is located.[96]

3.1.3 Lawful presence

Refugees who are not simply physically present, but who are also *lawfully in* the territory of a state party, are further entitled to claim the rights that apply at the third level of attachment. Lawful presence entitles refugees to be protected against expulsion, enjoy a more generous guarantee of internal freedom of movement, and engage in self-employment.[97] Lawful

[94] Vienna Convention on Diplomatic Relations, 500 UNTS 95, done Apr. 18, 1961, entered into force Apr. 24, 1964, at Art. 22.

[95] *Asylum Case (Colombia v. Peru)*, [1950] ICJ Rep 266. Brownlie, however, suggests that the reference to "special arrangements" in the Vienna Convention on Diplomatic Relations, at Art. 41, "makes room for bilateral recognition of the right to give asylum to political refugees within the mission": Brownlie, *Public International Law*, at 348. The traditional practice of Latin American states to honor a grant of diplomatic asylum is codified in the Caracas Convention on Diplomatic Asylum, OAS Doc. OEA/Ser.X/1, entered into force Dec. 29, 1954.

[96] If the "refugees" in question are nationals of the territorial state, they have no entitlement to refugee rights as they will not have satisfied the alienage requirement of the Convention refugee definition. See generally A. Grahl-Madsen, *The Status of Refugees in International Law* (vol. I, 1966) (Grahl-Madsen, *Status of Refugees I*), at 150–154; J. Hathaway, *The Law of Refugee Status* (1991) (Hathaway, *Refugee Status*), at 29–33; and Goodwin-Gill, *Refugee in International Law*, at 40. A more interesting question arises with regard to third-country nationals who arrive at a consulate or embassy, however. To the extent that consular or embassy officials have jurisdiction over such persons in line with norms of customary international law (see chapter 3.1.1 above, at pp. 169–170), the state in whose consulate or embassy the refugee is located is logically bound to respect those rights not subject to territorial or a higher level of attachment (including, for example, the duty of *non-refoulement*). It would, in this sense, exercise jurisdiction concurrently with the territorial state. Yet only the territorial state would be bound to honor those rights which require physical presence in a state's territory, or a higher level of attachment.

[97] See Refugee Convention, at Arts. 18 ("self-employment"), 26 ("freedom of movement"), and 32 ("expulsion"). Goodwin-Gill, however, asserts that Art. 32 rights need be granted only to refugees who are "in the State on a more or less indefinite basis": Goodwin-Gill, *Refugee in International Law*, at 308. He offers no legal argument to justify this clear deviation from the express provisions of the Convention, relying instead on a bald appeal

presence was broadly conceived,[98] including refugees in any of three situations.

First, a refugee is lawfully present if admitted to a state party's territory for a fixed period of time, even if only for a few hours. Whether the refugee resides elsewhere and is merely transiting through the second state[99] or is sojourning there for a limited time,[100] his or her presence is lawful so long as it is officially sanctioned.[101] This clarification was particularly important to representatives concerned to grant a limited range of supplementary rights to refugees living near a frontier, who might wish to pursue commercial interests in a neighboring state.[102] As the French delegate remarked, "it could not be argued that where there was no residence, the situation was irregular."[103]

to the importance of achieving consistency with relevant state practice. State practice may, of course, assist in establishing the *interpretation* of a treaty provision: Vienna Convention on the Law of Treaties, 1155 UNTS 331, done May 23, 1969, entered into force Jan. 27, 1980 (Vienna Convention), at Art. 31(3)(b). However, state practice standing alone cannot give rise to a legal norm which may be relied upon to challenge the applicability of a conflicting treaty stipulation: see generally chapters 1.1.1 and 1.3.4 above.

98 The French representative described this level of attachment as "a very wide term applicable to any refugee, whatever his origin or situation. It was therefore a term having a very broad meaning": Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 12.

99 "Mr. Guerreiro (Brazil) asked whether the phrase 'refugees lawfully in their territory' was intended to cover refugees in transit through a territory ... Mr. Henkin (United States of America) explained that the provisions ... were really intended to apply to all refugees lawfully in the country, even those who were not permanent residents. There was no harm in the provision even if it theoretically applied to refugees who were in a country for a brief sojourn, since the individuals would hardly seek the benefit of the rights contemplated": Statements of Mr. Guerreiro of Brazil and Mr. Henkin of the United States, UN Doc. E/AC.32/SR.25, Feb. 10, 1950, at 5. See also Statement of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 17, that rights allocated at this second level of attachment would accrue to refugees "merely passing through a territory."

100 "The expression 'lawfully in their territory' included persons entering a territory even for a few hours, provided that they had been duly authorized to enter": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 14; see also Statements of Mr. Henkin of the United States at UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 20 and 32.

101 "[T]he mere fact of lawfully being in the territory, even without any intention of permanence, must suffice": N. Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation* (1953) (Robinson, *History*), at 117.

102 "The difficulties raised were ... not academic, at least in the case of refugees living near a frontier": Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 18. For example, it was suggested that the rights granted to refugees lawfully present in a state would accrue even to "a [refugee] musician [who] was staying for one or two nights in a country": Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 16–17.

103 Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 20. "For example, there were aliens lawfully in France without being resident. As evidence of that

Second and of greater contemporary importance, the stage between "irregular" presence and the recognition or denial of refugee status, including the time required for exhaustion of any appeals or reviews, is also a form of "lawful presence."[104] Presence is lawful in the case of "a person ... not yet in possession of a residence permit but who had applied for it and had the receipt for that application. *Only those persons who had not applied, or whose applications had been refused, were in an irregular position* [emphasis added]."[105] The drafters recognized that refugees who travel without pre-authorization to a state party, but who are admitted to a process intended to assess their suitability for admission to that or another state, should "be considered, for purposes of the future convention, to have been regularly admitted."[106] Thus, for example, the Full Federal Court of Australia determined in *Rajendran* that a Sri Lankan applicant whose refugee case had yet to be determined was nonetheless "lawfully in" Australia by virtue of his provisional admission under domestic regulations for purposes of pursuing his claim.[107]

Yet because the full contours of "lawful presence" are not settled, there is a body of British jurisprudence which suggests that where a state party's domestic laws – in contrast to those considered by the Australian court – do not authorize presence for purposes of pursuing a claim to refugee status, asylum-seekers are not lawfully present, and hence cannot claim rights defined by the third level of attachment.[108] This approach is said to be based on the decision of the House of Lords in 1987 in *Bugdaycay*,[109] which

he mentioned the case of Belgian nationals, who needed only an identity card to spend a few hours in France. They would be in France lawfully, even though not resident": ibid.

[104] The French description of the three phases through which a refugee passes distinguished the second step of "regularization" of status from the third and final stage at which "they had been lawfully authorized to reside in the country": Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 15.

[105] Ibid. at 20.

[106] Statement of Mr. Henkin of the United States, ibid. at 20.

[107] "In the present case, Mr. Rajendran entered the country on a visitor's visa. He now holds a bridging visa. If his application for a [refugee status-based] protection visa is ultimately unsuccessful ... that visa will cease to have effect at the time stipulated in the relevant Migration Regulations ... whereupon he will cease both to be lawfully in Australia and to be able to invoke Article 32": *Rajendran v. Minister for Immigration and Multicultural Affairs*, (1998) 166 ALR 619 (Aus. FFC, Sept. 4, 1998). The same reasoning was impliedly adopted by the South African Supreme Court of Appeal, which determined that the child of a person seeking recognition of refugee status is "a child who is lawfully in this country": *Minister of Home Affairs v. Watchenuka*, (2004) 1 All SA 21 (SA SCA, Nov. 28, 2003), at para. 36, per Nugent JA.

[108] A comparable position was taken in the United States prior to the establishment of a domestic procedure for the determination of refugee status, enacted by the Refugee Act 1980: see *Chim Ming v. Marks*, (1974) 505 F 2d 1170, at 1172 (US CA2, Nov. 8, 1974).

[109] *R v. Secretary of State for the Home Department, ex parte Bugdaycay*, [1987] AC 514 (UK HL, Feb. 19, 1987).

determined that not even temporary admission to the UK gave rise to lawful presence under British law.[110] Insisting that it could not revisit the issue determined in *Bugdaycay*, the English Court of Appeal upheld the denial of public housing to a Kurdish husband and wife on the grounds that they were not lawfully present in the United Kingdom while they awaited a decision on their refugee claims:

> There is no settled international meaning of the term "lawfully," not merely in international but national law. The word is a notoriously slippery expression, that can mean a wide range of things in different contexts. One has to ask oneself why that expression is used in the [Refugee Convention] at all. By far the most obvious explanation [for the choice of this phrase] ... is that the contracting parties to the Convention wished to reserve to themselves the right to determine conditions of entry, at least in cases not covered by the Refugee Convention.[111]

The Court therefore found that the immigration regulation which denied the lawful presence of a person temporarily admitted "does go to the lawfulness of the person's presence and is directly relevant to the question of whether,

[110] Ibid. at 526. There is no indication that relevant portions of the Convention's drafting history – e.g. those speaking to both temporary admission, and to presence before status was regularized as examples of lawful presence (see text above, at pp. 174–175) – were drawn to the attention of the House of Lords. With the benefit of these insights, at least a core international understanding of "lawful presence" for refugee law purposes might well have been identified. In any event, Lord Bridge was clearly led to conclude against finding temporarily present persons to be "lawfully in" the country because of a mistaken belief that "if [this] argument is right, it must apply equally to any person arriving in this country ... whether he is detained or temporarily admitted pending a decision on his application for leave to enter. It follows that the effect of the submission, if it is well-founded, is to confer on any person who can establish that he has the status of a refugee ... but who arrives in the United Kingdom from a third country, an indefeasible right to remain here, since to refuse him leave to enter and direct his return to the third country will involve the United Kingdom in the expulsion of a 'refugee lawfully in their territory' contrary to article 32(1)": ibid. at 526. But states may lawfully (and often do) interpose an eligibility determination procedure to determine whether some other state may be said to have primary responsibility to determine the claim to refugee status. If it is determined that the initial responsibility lies with another country and instructions for removal to that country are issued, the initial lawful presence of the refugee comes to an end, and Art. 32 no longer governs his or her removal (though Art. 33 remains applicable). See chapter 5.1 below, at pp. 663–664.

[111] *Kaya v. Haringey London Borough Council*, [2001] EWCA Civ 677 (Eng. CA, May 1, 2001), at para. 31. The constraint perceived to flow from the decision of the House of Lords in *Bugdaycay* is clear. "An international treaty has only one meaning. That is the teaching of the House of Lords in *Adan* ... It was not open to [counsel for the applicant] to argue in this Court, as he at one time sought to do, that Lord Bridge had taken an approach incorrect in international law as to the construction of the Refugee Convention. In my judgment, Lord Bridge's exposition is a binding exposition of the meaning and implications of virtually the same phrase with which we are concerned": ibid.

under national rules, the seeker for asylum is 'unlawfully present' in this country."[112]

As a starting point, the logic of deference to national legal understandings of lawful presence is clearly sensible. Not only is it correct that there is no uniform and comprehensive international standard by reference to which lawful presence can be determined but, as the debates cited above regarding temporary admission confirm,[113] the drafters did generally intend for the third level of attachment to be determined by reference to national standards. Yet there is no indication that this deference was intended to be absolute, a proposition which – if carried to its logical conclusion – could result in refugees never being in a position to secure more than rights defined by the first two of the five levels of attachment agreed to by state parties.[114] Indeed, as much was recognized by the English Court of Appeal when it determined that "the contracting parties to the Convention wished to reserve to themselves the right to determine conditions of entry, *at least in cases not covered by the Refugee Convention* [emphasis added]."[115] That is, a state's general right to define lawful presence is constrained by the impermissibility of deeming presence to be unlawful in circumstances when the Refugee Convention – and by logical extension, other binding norms of international law – deem presence to be lawful.[116] While this is in most cases a minimalist constraint on the scope of domestic discretion, it is nonetheless one that is important to ensuring the workability of a treaty intended to set a common international standard.[117]

Interpretation of the notion of "lawful presence" should therefore look primarily to domestic legal requirements, interpreted in the light of the small number of international legal understandings on point, in particular those

[112] Ibid. at para. 33. The provision in question was s. 11 of the Immigration Act 1971, which provided that "[a] person arriving in the United Kingdom by ship or aircraft shall for the purposes of this Act be deemed not to enter the United Kingdom unless he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer ... and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention."

[113] See text above, at p. 174.

[114] This result would only be precluded by the ability to establish lawful stay on the basis of de facto toleration of ongoing presence. See chapter 3.1.4 below, at pp. 186–187.

[115] *Kaya v. Haringey London Borough Council*, [2001] EWCA Civ 677 (Eng. CA, May 1, 2001), at para. 31.

[116] "The question whether an alien is 'lawfully' within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, *provided they are in compliance with the State's international obligations* [emphasis added]": UN Human Rights Committee, "General Comment No. 27: Freedom of movement" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 173, para. 4.

[117] See Introduction above, at p. 2.

reached by the drafters of the Refugee Convention.[118] Deference to domestic law cannot therefore be absolute. At a minimum, the domestic meaning of lawful presence should not be adopted for refugee law purposes where to do so would be at odds with the normative requirements of the Refugee Convention. For example, current British law purports to treat only persons who seek refugee status at a port or airport as lawfully present.[119] Yet as a matter of international law, all persons who seek recognition of refugee status within a reasonable period of time after their arrival in a state are entitled to the same rights as those who seek protection immediately upon arrival.[120] Because "lawful presence" is being construed not in the abstract, but as an integral part of the Refugee Convention, it would be contrary to the duty to interpret a treaty's terms in their context to defer to a domestic understanding of lawful presence which conflicts with the requirements of the Refugee Convention itself. In the result, where persons seeking recognition of refugee status meet the requirements of Art. 31 – that is, they "present themselves without delay to the authorities and show good cause for their illegal entry or presence"[121] – their presence must be deemed lawful, even if they fail to claim refugee status immediately, or to meet some other domestic requirement at odds with Art. 31.

An even more worrisome position is that a refugee is not lawfully present until permanent residence is granted,[122] or at least until refugee status has

[118] See text above, at pp. 174–175; and below, at pp. 183–185.

[119] In *O v. London Borough of Wandsworth*, [2000] EWCA Civ 201 (Eng. CA, June 22, 2000), the Court of Appeal observed that its "first difficulty is understanding [the argument that] all asylum-seekers are said to be here lawfully. As [counsel] acknowledged, only those who claim asylum at the port of entry and are granted temporary admission, or who claim asylum during an extant leave, are here lawfully; the rest are here unlawfully albeit, of course, they are irremovable until their claims have been determined (or they can be returned to a safe third country)." See also *R (Saadi) v. Secretary of State for the Home Department*, [2002] UKHL 41 (UK HL, Oct. 31, 2002), in which the House of Lords held that even a person who "complied with reporting conditions" immediately upon entry into the United Kingdom was still not lawfully present. As the judgment observed, "until the state has 'authorized' entry, the entry is unauthorized." Regrettably, the latter case appears to have been argued on the grounds of the importance of recognizing a "restriction on liberty" in such circumstances, rather than on the basis of the need not to contravene Art. 31 or other provisions of the Refugee Convention.

[120] The Convention provides that states "shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened ... enter *or are present* in their territory without authorization, *provided they present themselves without delay* to the authorities and show good cause for their illegal entry or presence [emphasis added]": Refugee Convention, at Art. 31(1). See chapter 4.2 below.

[121] Refugee Convention, at Art. 31(1). This provision does not require immediate presentation of a claim upon arrival in a state party: see chapter 4.2.1 below, at pp. 391–392.

[122] There is rather dated German authority for the view that Art. 32 rights, which require lawful presence, accrue only once a refugee who has entered the state unlawfully secures lawful residence in the state party: *Yugoslav Refugee (Germany) Case*, 26 ILR 496 (Ger.

been formally verified.[123] This position contradicts the plain meaning of "lawful presence." In line with the approach taken in *Rajendran*,[124] it cannot sensibly be argued that persons who avail themselves of domestic laws which authorize entry into a refugee status determination or comparable procedure are not lawfully present.[125] So long as a refugee has provided authorities with the information that will enable them to consider his or her entitlement to refugee status – in particular, details of personal and national

FASC, Nov. 25, 1958), at 498 (reporting German Federal Administrative Supreme Court Dec. BverGE 7 (1959), at 333). A comparable, though somewhat less demanding, standard has been suggested by the New Zealand Court of Appeal, which determined that a person positively determined to be a Convention refugee was not lawfully present because he had "not been granted a permit to enter New Zealand": *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at paras. 32–33.

[123] Grahl-Madsen, for example, equivocates in his analysis of the status of refugees awaiting verification of their claims by authorities. He suggests that "a refugee may be 'lawfully' in a country for some purposes while 'unlawfully' there for other purposes . . . Furthermore, a refugee's presence may, on the face of it, be 'illegal' according to some set of rules (e.g. aliens legislation), yet 'legal' within a wider frame of reference (e.g. international refugee law)": A. Grahl-Madsen, *The Status of Refugees in International Law* (vol. II, 1972) (Grahl-Madsen, *Status of Refugees II*), at 363. He ultimately adopts the definition of "regularization" stated by the British delegate to the Conference of Plenipotentiaries, namely "the acceptance by a country of a refugee for permanent settlement, not the mere issue of documents prior to the duration of his stay": Statement of Mr. Hoare of the United Kingdom, UN Doc. E/CONF.2/SR.14, July 10, 1951, at 16. While this approach was endorsed by the representatives of some states not then experiencing the direct arrival of refugees, it was rejected as insufficiently attentive to the situation of those countries, such as France, that were obliged to process refugees arriving directly through a process of regularization involving successive stages (see the description of the French system provided by the Belgian delegate to the Ad Hoc Committee at UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 22). The equation of lawful presence with formal recognition of refugee status is nonetheless still advocated by some: see e.g. M. Pellonpää, *Expulsion in International Law: A Study in International Aliens Law and Human Rights with Special Reference to Finland* (1984), at 292.

[124] See text above, at p. 175.

[125] The inappropriateness of the equation of a "lawful presence" with admission to permanent residence was explicitly brought to the attention of the Conference of Plenipotentiaries by its President, who expressed the view that "such a suggestion would probably cover the situation in the United States of America, where there were [only] two categories of entrants, those legally admitted and those who had entered clandestinely. But it might not cover the situation in other countries where there were a number of intermediate stages; for example, certain countries allowed refugees to remain in their territory for a limited time": Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 17. The only response to this clarification was an assertion by the representative of the United States that his country's system was not quite as simple as the President had implied. No delegate, however, challenged the accuracy of the President's understanding of "lawful presence" as including refugees subject to the various "intermediate stages" which a country might establish for refugees coming directly to its territory.

identity, and the facts relied upon in support of the claim for admission – there is clearly a legal basis for the refugee's presence.[126] The once irregularly present refugee is now lawfully present,[127] as he or she has satisfied the administrative requirements established by the state to consider which persons who arrive without authorization should nonetheless be allowed to remain there.[128]

This understanding of "lawful presence" is moreover consistent with the general approach of the Refugee Convention in at least two ways. First, an interpretation of "lawful presence" predicated on official recognition erroneously presupposes that states are necessarily under an obligation formally to verify refugee status. While there clearly is an implied duty to proceed to the assessment of refugee status if a state party elects to condition access to refugee rights on the results of such verification,[129] governments are otherwise free to dispense with a formal procedure of any kind: they must simply

[126] Consistent with the duty of states to implement their international legal obligations in good faith (see chapter 1.3.3 above, at p. 62), it must be possible for all Convention refugees to fulfill any such requirements. Excluded, therefore, are any requirements that are directed to matters unrelated to refugee status, including suitability for immigration on economic, cultural, personal, or other grounds. Account must also be taken of any genuine disabilities faced by particular refugees, for example by reason of language, education, mistrust, or the residual effects of stress or trauma, which may make it difficult for them to provide authorities with the information required to verify their refugee status. Because refugee status assessment involves a *shared* responsibility between the refugee and national authorities (see UNHCR, *Handbook*, at para. 196), it is the responsibility of the receiving state to take all reasonable steps to assist refugees to state their claims to protection with clarity. See generally W. Kälin, "Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing," (1986) 20 *International Migration Review* 230; J. Hathaway, *Rebuilding Trust* (1993); A. Leiss and R. Boesjes, *Female Asylum Seekers* (1994); UNHCR, "Refugee Children: Guidelines on Protection and Care" (1994); R. Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (1994); UNHCR, "Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum" (1997).

[127] Grahl-Madsen suggests one potentially important exception to this general principle. He argues that a refugee who is detained pending verification of his claim to Convention refugee status (presumably on grounds that meet the justification test of Art. 31(2) of the Convention) can no longer be considered to be "lawfully" present: Grahl-Madsen, *Status of Refugees II*, at 361–362. This conclusion is clearly tenable, though not based on decisions reached during the drafting process. A detained refugee claimant would still be entitled to those rights which are not restricted to refugees whose presence is lawful, i.e. the rights defined by the first level of attachment.

[128] UNHCR has similarly opined that "[a]t a minimum, the 1951 Convention provisions that are not linked to lawful stay or residence would apply to asylum-seekers in so far as they relate to humane treatment and respect for basic rights": UNHCR, "Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems," UN Doc. EC/GC/01/17, Sept. 4, 2001, at para. 3.

[129] In considering a comparable issue – whether it was lawful to deny an appeal of a refusal of refugee status to a person granted the alternative status of "exceptional leave to

respect the rights of persons who are, in fact, refugees.[130] Indeed, most less developed states – which host the majority of the world's refugees – do not operate formal refugee status assessment procedures. In these circumstances, the conditioning of "lawful presence" on formal verification of refugee status would allow a genuine refugee to be held hostage to a decision never to undertake the processing of his or her claim to Convention refugee status. He or she would be effectively barred from access to rights defined by the third level of attachment – a proposition which is difficult to reconcile to the duty to implement treaty obligations in good faith.[131]

Second, the understanding of lawful presence as conditioned on formal acceptance as a refugee conflates the categories of "lawful presence" and "lawful stay."[132] Even as the drafters varied the level of attachment applicable

remain" – the Master of the Rolls, Lord Phillips, eloquently captured the nature of this dilemma. "Refugees who arrive in this country are anxious to have their status as refugees established. This is not merely because recognition of their refugee status will carry with it the entitlement to remain here, but because it will ensure that they are accorded Convention rights while they are here ... There is no doubt that this country is under an obligation under international law to enable those who are in truth refugees to exercise their Convention rights ... Although Convention rights accrue to a refugee by virtue of his being a refugee, unless a refugee claimant can have access to a decision-maker who can determine whether or not he is a refugee, his access to Convention rights is impeded": *Saad v. Secretary of State for the Home Department*, [2001] EWCA Civ 2008 (Eng. CA, Dec. 19, 2001). In a much earlier decision, the German Federal Administrative Supreme Court observed that "the Federal Republic, when ratifying the Convention, assumed an obligation to grant to a foreign refugee requesting the same the requisite recognition of his status. This is not expressly provided for in the Convention, but it follows from the legal duty to carry out the terms of the Convention in the municipal sphere": *Yugoslav Refugee (Germany) Case*, 26 ILR 496 (Ger. FASC, Nov. 25, 1958), at 497 (reporting German Administrative Supreme Court Dec. BverGE 7 (1959), at 333).

130 Thus, for example, the Australian Full Federal Court has determined that the "obligations imposed by Article 33 fall short of creating a right in a refugee to seek asylum, or a duty on [the] part of the Contracting State to whom a request for asylum is made, to grant it, even if the refugee's status as such has not been recognized in any other country": *Rajendran v. Minister for Immigration and Multicultural Affairs*, (1998) 166 ALR 619 (Aus. FFC, Sept. 4, 1998). But see W. Kälin, "Towards a Concept of Temporary Protection: A Study Commissioned by the UNHCR Department of International Protection" (1996), at 32: "Although the 1951 Convention does not contain any provisions relating to national status determination procedures, the principle of good faith in fulfilling treaty obligations requires, as has been recently stressed by the German Constitutional Court, that states parties to the Convention institute a procedure which allows for determination of who is entitled to the guarantees of the 1951 Convention." Yet since many less developed countries do not in fact have any such procedure, this assertion begs the question whether all such governments are thereby in breach of the (implied) duty to institute such a procedure. More generally, on what basis could it be argued that a state which in fact grants all Convention rights to persons who claim refugee status is somehow in breach of its treaty obligations?

131 Vienna Convention, at Art. 31(1). See chapter 1.3.3 above, at p. 62.

132 See chapter 3.1.4 below.

to specific rights, they expressly opted to grant some rights at an intermediate point between "physical presence" and "lawful stay" – namely, "lawful presence."[133] Yet under the alternative interpretation, there is no such intermediate point. Refugees would move directly from being merely physically (but "irregularly") present, to securing simultaneously all the rights associated with both "lawful presence" and "lawful stay" when and if permission to remain is granted.[134] Such an approach clearly does not comport with the explicit structure of the Convention.

The view that persons present with a form of authorization that falls significantly short of ongoing permission to remain are nonetheless to be deemed lawfully present follows also from relevant determinations of the United Nations Human Rights Committee, interpreting the right to freedom of internal movement under the Civil and Political Covenant (which inheres in all persons "lawfully within the territory of a State").[135] In *Celepli v. Sweden*,[136] the Committee considered the case of a rejected refugee claimant formally ordered to be expelled to Turkey, but not in fact removed on humanitarian grounds. Despite the issuance of the expulsion order, the Committee determined the applicant to be "lawfully present" in Sweden:

[133] A detailed analysis of the notion of "lawful presence" is provided in Stenberg, *Non-Expulsion*, at 87–130. Stenberg ultimately concludes that "[t]here is ... a lack of *opinio juris* on the part of States to include refugees whose status has not been recognized [within] the scope of [lawful presence for purposes of] Article 32": ibid. at 130. This conclusion seems to be based upon an overly deferential understanding of the role of state practice in the interpretation of treaties, as contrasted with its role in the formation of customary law: see chapter 1.3.4 above. On the other hand, Stenberg's examination of both the internal structure of the Convention and its drafting history leads her to essentially the same conclusion as reached here regarding the meaning of "lawful presence." As a general matter, she observes that "the drafters of the 1951 Convention intended the term 'lawfully' in Article 32(1) to signify lawful presence in the territory of a contracting State in the sense that the term has in general national immigration law ... [T]aking into account the declaratory character of the determination of the alien's refugee status, it also seems clear that Article 32 was intended to protect not only those whose refugee status already had been recognized by the expelling State but also those whose status had not yet been recognized when the expulsion measures were initiated": ibid. at 121. Stenberg's analysis is that "for the purposes of national immigration law, an alien is 'lawfully' in the territory of the State in question if he has entered the territory in accordance with the conditions laid down in national immigration law, or his sojourn has afterwards been regularized. If, however, his entry and stay were subject to certain conditions – which for instance is the case when he has been admitted for a fixed period of time – and he no longer complies with these conditions, he cannot be considered to be lawfully in the territory": ibid. at 88.

[134] See Robinson, *History*, at 117. [135] Civil and Political Covenant, at Art. 12(1).

[136] *Celepli v. Sweden*, UNHRC Comm. No. 456/1991, UN Doc. CCPR/C/51/D/456/1991, decided Mar. 19, 1993.

> The Committee notes that the author's expulsion was ordered on 10 December 1984, but that this order was not enforced and that the author was allowed to stay in Sweden, subject to restrictions on his freedom of movement. The Committee is of the view that, following the expulsion order, the author was lawfully in the territory of Sweden, for purposes of article 12, paragraph 1, of the Covenant, only under the restrictions placed upon him by the State party.[137]

Clearly, if a *rejected* refugee claimant not removed on humanitarian grounds is "lawfully present" by virtue of the host government's decision not to enforce the removal order, there can be little doubt that a refugee claimant admitted to a status determination procedure and authorized to remain pending assessment of his or her case is similarly lawfully present. Indeed, the Human Rights Committee recently affirmed its position on the meaning of "lawful presence," expressly citing its findings in *Celepli* as authority for the proposition that:

> [t]he question whether an alien is "lawfully" within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations. In that connection, the Committee has held that an alien who entered the State illegally, but whose status *has been regularized*, must be considered to be lawfully within the territory [emphasis added].[138]

This analysis blends neatly with the understanding of the Refugee Convention advanced above. A rejected refugee claimant ordered expelled but whom the state has determined not to remove on humanitarian grounds is, in the view of the Human Rights Committee, a person whose status has "been regularized" and hence one who must be considered to be – at least for the duration of that permission to remain – "lawfully present." This conclusion makes sense because such a person – like a person seeking recognition of his or her refugee status – has satisfied the administrative requirements established by the state to determine which non-citizens should be allowed to remain, at least provisionally, in its territory. It makes clear that lawful presence is an intermediate category which occupies the ground between illegal presence on the one hand, and a right to stay on the other.

In addition to authorized short-term presence and presence while undergoing refugee status verification, the Refugee Convention foresees a third form of lawful presence. In many asylum countries, particularly in the less developed world, there is no mechanism in place to assess the refugee status

[137] Ibid. at para. 9.2.

[138] UN Human Rights Committee, "General Comment No. 27: Freedom of movement" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 173, para. 4.

of persons who arrive to seek protection.[139] Other states may on occasion opt to suspend formal status determination procedures for some or all asylum-seekers, who are thereupon assigned to an alternative (formal or informal) protection regime.[140] In either of these situations – including where governments divert refugees into so-called "temporary protection" regimes[141] – a refugee's presence should be deemed lawful.[142] This is because the decision not to authenticate refugee status, whether generally or as an exceptional measure, must be considered in the context of the government's legal duty to grant Convention rights to all persons in its territory who are *in fact* refugees, whether or not their status has been assessed.[143]

This understanding of "lawful presence" draws upon the *prima facie* legal right of individuals seeking protection to present themselves in the territory of a state which has chosen to adhere to the Refugee Convention. By choosing to become a party to the Convention, a state party signals its preparedness to grant rights to refugees who reach its jurisdiction. A state that wishes to protect itself against the possibility of receiving non-genuine claims is free to establish a procedure to verify the refugee status of those who seek its protection. But if a state opts not to adjudicate the status of persons who claim to be Convention refugees, it must be taken to have acquiesced in the asylum-seekers' assertion of entitlement to refugee rights, and must immediately

[139] See e.g. Lawyers' Committee for Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention* (1995), at 29–30.

[140] For example, the temporary protection policies adopted by some European states in response to the arrival of refugees from Bosnia-Herzegovina actually diverted asylum-seekers away from formal processes to adjudicate refugee status, or at least suspended assessment of status for a substantial period of time: Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, *Report on Temporary Protection in States in Europe, North America and Australia* (1995) (IGC, *Temporary Protection*), at 79, 118.

[141] Kälin writes that "lawful presence" "refers to presence authorized by law which ... may be of a temporary nature. Thus, these provisions may be invoked by those among the temporarily protected who are Convention refugees": W. Kälin, "Temporary Protection in the EC: Refugee Law, Human Rights, and the Temptations of Pragmatism," (2001) 44 *German Yearbook of International Law* 221 (Kälin, "Temporary Protection"), at 221.

[142] "Generally, an alien is considered to be 'lawfully' in a territory if he possesses proper documentation ... has observed the frontier control formalities, and has not overstayed the period for which he has been allowed to stay by operation of law or by virtue of 'landing conditions.' He may also be 'lawfully' in the territory even if he does not fulfil all the said requirements, *provided that the territorial authorities have dispensed with any or all of them* and allowed him to stay in the territory anyway [emphasis added]": Grahl-Madsen, *Status of Refugees II*, at 357.

[143] The critical point is that refugee status determination is merely a declaratory, not a constitutive, process. Convention rights inhere in a person who is in fact a Convention refugee, whether or not any government has recognized that status: UNHCR, *Handbook*, at para. 28.

grant them those Convention rights defined by the first three levels of attachment. This is because while the Convention does not require states formally to determine refugee status,[144] neither does it authorize governments to withhold rights from persons who are in fact refugees because status assessment has not taken place. A general or situation-specific decision by a state party not to verify refugee status therefore amounts to an implied authorization for Convention refugees to seek protection without the necessity of undergoing a formal examination of their claims. In such circumstances, lawful presence is presumptively coextensive with physical presence.

Lawful presence can come to an end in a number of ways. For refugees resident in another state who were authorized to enter on a strictly temporary basis, lawful presence normally concludes with the refugee's departure from the territory. The lawful presence of a sojourning refugee may also be terminated by the issuance of a deportation or other removal order[145] issued under a procedure that meets the requirements of the Refugee Convention, in particular Art. 33. The same is true of a refugee admitted upon arrival into a procedure designed to identify the country which is to examine his or her claim under the terms of a responsibility-sharing agreement: his or her lawful presence in the state conducting the inquiry comes to an end when and if an order is made for removal to a partner state.[146]

In the case of refugees whose presence has been regularized by admission to a refugee status verification procedure, or who have sought protection in the territory of a state that has established no such mechanism, lawful presence terminates only if and when a final determination is made either not to recognize, or to revoke, protection in a particular case. A final decision that an individual does not qualify for refugee status, including a determination made under a fairly administered process to identify manifestly unfounded claims to refugee status,[147] renders an unauthorized entrant's continued presence unlawful, and results in the forfeiture of all Convention rights provisionally guaranteed during the status assessment process.[148] Similarly, a determination that an individual has ceased to be a refugee on the grounds

[144] The decision on whether or not to establish such a system is within the discretion of each state party: ibid., at para. 189.

[145] "The expression 'lawfully within their territory' throughout this draft convention would exclude a refugee who, while lawfully admitted, has over-stayed the period for which he was admitted or was authorized to stay or who has violated any other condition attached to his admission or stay": "Report of the Ad Hoc Committee on Statelessness and Related Problems," UN Doc. E/1618, Feb. 17, 1950, at Annex II (Art. 10).

[146] Critically, however, so long as the refugee remains in the territory or otherwise under the jurisdiction of the removing country, the duty of *non-refoulement* (Art. 33) continues to apply.

[147] See text above, at p. 175. [148] Ibid.

set out in Article 1(C) of the Convention eliminates the legal basis for the former refugee's presence in the state.[149]

3.1.4 Lawful stay

Those refugees who are not simply lawfully in a country's territory, but who are lawfully staying there, benefit from additional rights: freedom of association, the right to engage in wage-earning employment and to practice a profession, access to public housing and welfare, protection of labor and social security legislation, intellectual property rights, and entitlement to travel documentation.[150] There was extraordinary linguistic confusion in deciding how best to label this third level of attachment.[151] The term "lawfully staying" was ultimately incorporated in the Convention as the most accurate rendering of the French language concept of "résidant régulièrement," the meaning of which was agreed to be controlling.[152]

Most fundamentally, "résidance régulière" is not synonymous with such legal notions as domicile or permanent resident status.[153] Instead, the

[149] See generally Grahl-Madsen, *Status of Refugees I*, at 367–412; Hathaway, *Refugee Status*, at 189–205; and Goodwin-Gill, *Refugee in International Law*, at 80–87.

[150] Refugee Convention, at Arts. 14 ("artistic and industrial property"), 15 ("right of association"), 17 ("wage-earning employment"), 19 ("liberal professions"), 21 ("housing"), 23 ("public relief"), 24 ("labour legislation and social security"), and 28 ("travel documents"). In specific circumstances, the benefit of Arts. 7(2) ("exemption from reciprocity") and 17(2) (exemption from restrictive measures imposed on aliens in the context of "wage-earning employment") may also be claimed: see chapters 3.2.2 and 6.1.1 below.

[151] "The Chairman emphasized that the Committee was not writing Anglo-American law or French law, but international law in two languages. The trouble was that both the English-speaking and the French-speaking groups were trying to produce drafts which would automatically accord with their respective legal systems and accepted legal terminology": Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 25.

[152] "The Committee experienced some difficulty with the phrases 'lawfully in the territory' in English and 'résidant régulièrement' in French. It decided however that the latter phrase in French should be rendered in English by 'lawfully staying in the territory'": "Report of the Style Committee," UN Doc. A/CONF.2/102, July 24, 1951.

[153] "He could not accept 'résidant régulièrement' if it was to be translated by 'lawfully resident,' which would not cover persons who were not legally resident in the English sense. It would not, for example, cover persons staying in the United States on a visitor's visa, and perhaps it might not even cover persons who had worked for the United Nations for five years in Geneva. The word 'residence' in English, though not exactly equivalent to 'domicile,' since it was possible to have more than one residence, had much of the same flavour": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 24. But see the contrary interpretation of the Canadian government implicit in its reservation to the Refugee Convention, available at www.unhcr.ch (accessed Nov. 19, 2004): "Canada interprets the phrase 'lawfully staying' as referring only to refugees admitted for permanent residence; refugees admitted for temporary residence will be

drafters emphasized that it was the refugee's de facto circumstances which determine whether or not the fourth level of attachment is satisfied.[154] The notion of "résidance régulière" is "very wide in meaning ... [and] implie[s] a settling down and, consequently, a certain length of residence."[155] While neither a prolonged stay[156] nor the establishment of habitual residence[157] is required, the refugee's presence in the state party must be ongoing in practical terms.[158] Grahl-Madsen, for example, argues that lawful stay may be implied from an officially tolerated stay beyond the last date that an individual is allowed to remain in a country without securing a residence permit (usually three to six months).[159]

accorded the same treatment with respect to the matters dealt with in Articles 23 and 24 as is accorded visitors generally."

154 "[T]here were two alternatives: either to say 'résidant régulièrement' and 'lawfully resident,' or to say 'lawfully' in which case 'résidant' must be omitted, otherwise, there would be too many complications in the translation of the various articles ... [I]t would be better to say 'régulièrement,' since 'légalement' seemed too decidedly legal": Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 33–34. In the context of a judgment interpreting the distinct, but related, notion of "habitual residence," the House of Lords insisted upon comparable flexibility and sensitivity to specific facts. "It is a question of fact ... Bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, 'durable ties' with the country of residence or intended residence, and many other facts have to be taken into account. The requisite period is not a fixed period. It may be longer where there are doubts. It may be short": *Nessa v. Chief Adjudication Officer*, Times Law Rep, Oct. 27, 1999 (UK HL, Oct. 21, 1999).

155 Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 12.

156 "[T]he expression 'résidant régulièrement' did not imply a lengthy stay, otherwise the expression 'résidence continue' ... would have been employed": Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 17.

157 "In the articles in question, the term used in the French text had been 'résidence habituelle' which implied some considerable length of residence. As a concession, the French delegation had agreed to substitute the words 'résidance régulière' which were far less restrictive in meaning": Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 12.

158 The French representative suggested that the refugee's presence would have to be "more or less permanent" to satisfy the third level of attachment: Statement of Mr. Juvigny of France, ibid.

159 "Considering that three months seems to be almost universally accepted as the period for which an alien may remain in a country without needing a residence permit ... it would seem that once a refugee, having filed the requisite application, has remained for more than three months, he should be considered 'lawfully staying,' even though the authority for his continued sojourn merely is a 'provisional receipt' or its equivalent ... This leads us to the more general observation, that a refugee is 'résidant régulièrement' ('lawfully staying') ... if he is in possession of a residence permit (or its equivalent) entitling him to remain there for more than three months, or if he actually is lawfully present in a territory beyond a period of three months after his entry (or after his reporting himself to the authorities, as the case may be)": Grahl-Madsen, *Status of Refugees II*, at 353–354.

Perhaps of greatest contemporary importance, it is clear that refugees in receipt of "temporary protection" who have become de facto settled in the host state[160] are to be considered to be "résidant régulièrement":

> [I]n all those articles the only concrete cases that could arise were cases implying some degree of residence, if only temporary residence; and temporary residence would be covered by the present wording, at least as far as France was concerned ... That was why he also considered, for reasons of principle, that having abandoned the idea of "*résidance habituelle*" and accepted the concept of "*résidance régulière*," the French delegation had conceded as much as it could.[161]

Indeed, the British representative, in attempting to translate the French concept to English, proposed the phrase "lawfully resident (temporarily or otherwise)."[162] The American representative, however, argued that *any* English language formulation that included the word "resident" would fail accurately to capture the broad meaning conveyed by the French understanding of "résidant." In English, he suggested, the word "resident" would not encompass a temporary stay.[163] It was therefore important to draft an English language text that would not be open to misinterpretation, for example, by denying rights to refugees staying "for a number of months."[164] The result of the Ad Hoc Committee's deliberations was therefore a decision to translate "résidant régulièrement" into English as "lawfully living in their territory."[165]

[160] "[T]hese guarantees [can] be invoked by the Convention refugees who are among the temporarily protected persons only after a certain period when it becomes clear that return is not imminent and that the country of refuge has become 'home' for the persons concerned, at least for the time being": Kälin, "Temporary Protection," at 222.

[161] Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 15.

[162] Statement of Sir Leslie Brass of the United Kingdom, ibid. at 29.

[163] "[I]n the light of the exposition given by the representative of France there might prove to be a distinction of substance between the English and French texts ... It appeared that 'résidant régulièrement' covered persons temporarily resident, except for a very short period, whereas according to English law he understood the word 'resident' could not apply to a temporary stay": Statement of Mr. Henkin of the United States, ibid. at 14. It was for this reason that the American representative objected to the British proposal, ibid. at 29, which he referred to as "a contradiction in terms": Statement of Mr. Henkin of the United States, ibid. at 29.

[164] "[H]e did not understand the exact connotation of the French word 'résidant,' but apparently it could be applied to persons who did not make their home in a certain place but stayed there for a number of months. Such persons would apparently be 'résidant régulièrement' but they would not, in the United States of America at least, be lawfully resident. To be lawfully resident in a place, a man must make his home there; it need not be his only home but it must be a substantial home": Statement of Mr. Henkin of the United States, ibid. at 26.

[165] "The English text referred to refugees 'lawfully in the territory' while the French referred to a refugee 'régulièrement résidant,' the literal English equivalent of the latter phrase

The Conference of Plenipotentiaries maintained the French language formulation of the fourth level of attachment as "résidant régulièrement," but reframed it in English as "lawfully staying in their territory."[166] This minor terminological shift brought the English language phrasing even more closely into line with the broadly inclusive meaning of "résidant régulièrement." In any event, the Conference resolved any linguistic ambiguity once and for all by explicitly agreeing that the French concept of "résidant régulièrement" is to be regarded as the authoritative definition of the fourth level of attachment.[167]

The fourth level of attachment set by the Refugee Convention is therefore characterized by officially sanctioned, ongoing presence in a state party, whether or not there has been a formal declaration of refugee status, grant of the right of permanent residence, or establishment of domicile there.[168] This understanding is consistent with the basic structure of the Refugee Convention, which does not require states formally to adjudicate status or assign any particular immigration status to refugees,[169] and which is content

having a more restrictive application. Re-examining the individual articles, it was decided in most instances that the provision in question should apply to all refugees whose presence in the territory was lawful . . . In one case [the right to engage in wage-earning employment] the Committee agreed that the provision should apply only to a refugee 'régulièrement résidant' on the territory of a Contracting State. The English text adopted is intended to approximate as closely as possible the scope of the French term": "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 12.

166 At the Conference of Plenipotentiaries, the decision was reached to reserve a number of rights allocated by the Ad Hoc Committee to refugees who were simply lawfully present (public assistance, social security, housing, freedom of association, and access to liberal professions) for refugees who were lawfully staying in the state party. This agreement to transfer these rights to persons able to satisfy the higher level of attachment seems to have been facilitated by the agreement to adopt a generous understanding of "résidant régulièrement" not tied to formal legal categories. The final attribution of rights between the second and third levels of attachment was apparently agreed to in the Style Committee of the Conference of Plenipotentiaries: "Report of the Style Committee," UN Doc. A/CONF.2/102, July 24, 1951.

167 Ibid. at para. 5. See also Grahl-Madsen, *Status of Refugees II*, at 351–352: "Against this background it seems justified to give precedence to the French term and not to ponder too much over the difference between the expressions 'lawfully staying' and 'lawfully resident' . . . Both expressions apparently mean the same thing."

168 As a practical matter, "evidence of permanent, indefinite, unrestricted or other residence status, recognition as a refugee, issue of a travel document, [or] grant of a re-entry visa will raise a strong presumption that the refugee should be considered as lawfully staying in the territory of a Contracting State. It would then fall to that State to rebut the presumption by showing, for example, that the refugee was admitted for a limited time and purpose, or that he or she is in fact the responsibility of another State": Goodwin-Gill, *Refugee in International Law*, at 309.

169 See chapter 3.1.3 above, at pp. 180–181.

to encourage, rather than to require, access to naturalization or other forms of permanent status.[170]

3.1.5 *Durable residence*

Only a few rights are reserved for refugees who are habitually resident in an asylum state: in addition to rights defined by the first four levels of attachment, such refugees are entitled to benefit from legal aid systems, and to receive national treatment in regard to the posting of security for costs in a court proceeding.[171] After a period of three years' residence, refugees are also to be exempted from both requirements of legislative reciprocity,[172] and any restrictive measures imposed on the employment of aliens.[173] As can be seen from the short list of rights subject to the fifth level of attachment, there was little enthusiasm among the drafters for the conditioning of access to refugee rights on the satisfaction of a durable residence requirement.

> **Refugee Convention, Art. 10 Continuity of residence**
>
> **1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.**
>
> **2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.**

In deciding whether or not a refugee meets a particular residence requirement, "[t]he point at issue [is] ... continuous residence, not legal residence."[174] Thus, the drafters made specific provision to accommodate the predicament of persons forcibly deported during the Second World War. Those refugees who elected to remain in the territory of the state to which they had been deported would be considered to have been resident in that country during the period of enforced presence.[175] Even though the state to

[170] Refugee Convention, at Art. 34. [171] Ibid. at Art. 16(2). [172] Ibid. at Art. 7(2).

[173] An earlier exemption from alien employment restrictions is required in the case of a refugee who was already exempt from such requirements at the time the Convention entered into force for the state party; or where the refugee is married to, or the parent of, a national of the state party: ibid. at Art. 17(2).

[174] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 5. See also Statement of Mr. Weis of the IRO, ibid.

[175] Refugee Convention, at Art. 10(1).

which deportation had been effected may not have legally consented to their entry, the focus on de facto residence led to an agreement that "the country to which a person had been deported would accept the period spent there as a period of regular residence."[176]

Recognizing that other refugees would prefer to have the time spent in enforced sojourn abroad credited toward the calculation of their period of residence in the state from which they had been removed, the drafters agreed that a victim of deportation[177] could elect to be treated as continually resident in the country from which the deportation was effected.[178] Even though such a refugee had not actually been resident in the contracting state during the time he or she was subject to deportation, "[t]he authors of the Convention sought to mitigate the results of interruption of residence not due to the free will of the refugee, and to provide a remedy for a stay without *animus* and without permission, which are usually required to transform one's 'being' in a certain place into 'residence.'"[179]

The resultant Art. 10 of the Convention is today only of hortatory value,[180] as it governs the treatment only of Second World War deportees.[181] Nonetheless, the debates on Art. 10 make two points of continuing relevance. First, the calculation of a period of residence is not a matter simply of ascertaining how long a refugee has resided outside his or her own country, but rather how much time the refugee has spent in the particular state party in which fourth level of attachment rights are to be invoked. Periods of residence in an intermediate country are not to be credited to the satisfaction of a

[176] Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 7.

[177] "It presumably was not intended to refer to persons displaced by the Government of the country on account of their suspicious or criminal activities, but only to persons forcibly displaced by enemy or occupying authorities": Statement of Mr. Perez Perozo of Venezuela, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 12.

[178] Refugee Convention, at Art. 10(2). [179] Robinson, *History*, at 96.

[180] The restrictive language was adopted notwithstanding a plea to extend the benefit of Art. 10 to all refugees. "[I]t was an important matter . . . to be credited, as constituting residence, with the time spent . . . in enforced displacement, or with the period before or after such displacement, in cases where the refugee had returned to his receiving country to re-establish his residence there. The latter provision was all the more useful in view of the fact that, under certain national legislation, the period of residence normally had to be extended if residence was interrupted. Nevertheless, the provisions of article [10(2)] merely remedied an occasional situation caused by the second world war, without providing any [general] solution": Statement of Mr. Rollin of the Inter-Parliamentary Union, UN Doc. A/CONF.2/SR.10, July 6, 1951, at 7.

[181] The article was arguably obsolete even at the time the Refugee Convention came into force, as nearly a decade had elapsed since the end of the Second World War and few, if any, rights were conditioned on continuous residence of more than five years.

durable residence requirement.[182] The calculation of a period of residence should, however, be carried out with due regard to the particular disabilities faced by refugees.[183] In keeping with the spirit of Art. 10 of the Convention, this may include either a period of enforced presence in the state party, or the time during which continuous residence was interrupted by forces beyond the refugee's control.

In sum, the general language of the five levels of attachment facilitates application of the Refugee Convention across the full range of states, despite their often widely divergent approaches to the legal reception of refugees. It moreover allows governments a reasonable measure of flexibility in deciding for themselves how best to operationalize refugee law within their jurisdictions.

Yet because access to rights is defined by practical circumstances rather than by any official decision or status, the Refugee Convention prevents states from invoking their own legalistic categories as the grounds for withholding rights from refugees. Some rights apply simply once a state has jurisdiction over a refugee; others by virtue of physical presence in a state's territory, even if illegal; a third set when that presence is either officially sanctioned or tolerated; further rights accrue once the refugee has established more than a transient or interim presence in the asylum state; and even the most demanding level of attachment requires only a period of de facto continuous and legally sanctioned residence. In no case may refugee rights be legally denied or withheld simply because of the delay or failure of a state party to process a claim, assign a status, or issue a confirmation of entitlement.

3.2 The general standard of treatment

Once the rights to which a particular refugee are entitled have been identified on the basis of the level of attachment test outlined above, the next step is to define the required standard of compliance. Many rights in the Convention are expressly defined to require implementation on the basis of either a contingent or an absolute standard of achievement. These are referred to here as "exceptional standards of treatment," the interpretation of which is addressed below.[184] Absent express provision of this kind, however, refugees are to be treated at least as well as "aliens generally."

[182] It was agreed that the time spent in the state of deportation could not be credited toward the satisfaction of a durable residence requirement in a third state, since the deportation had not resulted in any kind of attachment to the third state. "[T]he principle of the transfer from one State to another of acquired rights with respect to residence should be rejected": Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 8.

[183] See chapter 3.2.3 below, at p. 208. [184] See chapter 3.3 below.

Under traditional norms of international aliens law, the assimilation of refugees to "aliens generally" would provide little assurance of meaningful protection.[185] This is because the primary responsibility to protect the interests of aliens lies with their state of nationality, which is expected to engage in diplomatic intervention to secure respect for the human rights of its citizens abroad. Because refugees are by definition persons whose country of nationality either cannot or will not protect them, traditional aliens law could be expected to provide them with few benefits.[186] For this reason, an essential aspect of international refugee protection has always been to provide surrogate international protection under the auspices of an international agency – presently UNHCR – which is to undertake the equivalent of diplomatic intervention on behalf of refugees.[187]

More fundamentally, the very existence of relevant rights for aliens can also depend on the efforts of the refugee's state of nationality.[188] Absent consideration of the Refugee Convention and other treaties, each state determines for itself whether any rights will be granted to non-citizens beyond the limited range of rights guaranteed to all aliens under general principles of law.[189] Some countries have routinely granted aliens most of the rights extended to their own citizens.[190] A second group of states applies a

[185] See chapter 2.1 above, at pp. 78–79. [186] See generally chapters 2.1 and 2.5.6 above.
[187] See chapter 2.3 above, at p. 85; and Epilogue below, at pp. 992–993.
[188] "At the root of the idea of the juridical status of foreigners is the idea of reciprocity. The law considers a foreigner as a being in normal circumstances, that is to say, a foreigner in possession of a nationality. The requirement of reciprocity of treatment places the national of a foreign country in the same position as that in which his own country places foreigners": 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 (Secretary-General, "Memorandum"), at 28. "Reciprocity refers to the interdependence of obligations assumed by participants within the legal schemes created by human rights law ... In other words, obligations are reciprocal if their creation, execution and termination depend on the imposition of connected obligations on others. International law, being a system based on the formal equality and sovereignty of States, has arisen largely out of the exchange of reciprocal rights and duties between States": R. Provost, "Reciprocity in Human Rights and Humanitarian Law," (1994) 65 *British Yearbook of International Law* 383 (Provost, "Reciprocity"), at 383.
[189] See chapter 2.1 above, at pp. 76–77.
[190] The definition of recognized approaches to reciprocity is not without confusion. Borchard, for example, identifies only two systems, namely diplomatic and legislative reciprocity: E. Borchard, *The Diplomatic Protection of Citizens Abroad* (1915) (Borchard, *Diplomatic Protection*), at 71–72. In contrast, the document prepared by the United Nations Department of Social Affairs, "A Study of Statelessness," UN Doc. E/1112, Feb. 1, 1949 (United Nations, "Statelessness"), at 17–18, which served as the basis for drafting of the Refugee Convention, argues that there are two approaches to reciprocity, namely diplomatic and de facto. While de facto reciprocity as defined by the UN Study and legislative reciprocity as defined by Borchard are comparable in that the referent for duties owed to aliens is a domestic, rather than an international standard, it is clear that a

presumption in favor of the equivalent treatment of aliens and nationals, but reserves the right to withdraw particular rights from those refugees and other aliens whose national state fails to extend comparable protections to foreign citizens, whether by its domestic laws (legislative reciprocity) or practices (de facto reciprocity). A third approach denies the logic of routine assimilation of aliens to nationals for the purpose of rights allocation. In states that rely on the theory of diplomatic reciprocity, a fundamental distinction is made between privileged aliens, who are automatically treated largely on par with nationals, and other aliens. Foreigners within the residual category receive rights beyond those required by the general principles of law only if their state of citizenship agrees by treaty to guarantee analogous rights to foreigners under its jurisdiction.[191]

There is, of course, no reason to expect the states from which refugees flee to agree to reciprocity as a means of assisting their citizens who seek refuge abroad. Before the advent of refugee law, the severing of the bond between refugees and their state of citizenship often left refugees with no more than bare minimum rights in those states that grounded their treatment of foreigners in the existence of reciprocity. This dilemma led the League of Nations to stress the humanitarian tragedy that would ensue if refugees were subjected to the usual rules. The League also urged that there was no practical purpose served by the application of rules of reciprocity to refugees:

> [R]efusal to accord national treatment to foreigners in the absence of reciprocity is merely an act of mild retaliation. The object [of reciprocity] is to reach, through the person of the nationals concerned, those countries which decline to adopt an equally liberal regime . . . But what country or which Government can be reached through the person of a refugee? Can the refugee be held responsible for the legislation of his country of origin? Clearly, the rule of reciprocity, if applied to refugees, is pointless and therefore unjust. The injury caused to refugees by the application of this rule is substantial since the rule constantly recurs in texts governing the status of foreigners. Since the condition of reciprocity cannot be satisfied, refugees are denied the enjoyment of a whole series of rights which are accorded in principle to all foreigners.[192]

number of the Refugee Convention's drafters insisted upon the relevance of the dichotomy between reciprocity systems based on domestic legislation, as contrasted with those based on domestic practice, in the partner state. See in particular comments of Mr. Perez Perozo of Venezuela, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 3; and the exchange between the representatives of the Netherlands and Belgium at the Conference of Plenipotentiaries, UN Doc. A/CONF.2/SR.24, July 17, 1951, at 22.

[191] See generally Borchard, *Diplomatic Protection*, at 71–73.

[192] Secretary-General, "Memorandum," at 29, citing statement of the French government when submitting the 1933 Refugee Convention for legislative approval.

The predecessor 1933 Refugee Convention therefore exempted refugees from all requirements of reciprocity,[193] meaning that the baseline standard of treatment for refugees included all rights that might ordinarily have been secured by interstate negotiation. This clause had no impact on the first category of states which did not condition the treatment of refugees on reciprocity in any event. Importantly, its implications for states of the third category (those which relied on diplomatic reciprocity) were also relatively modest. Because diplomatic reciprocity does not work from an underlying presumption that aliens should receive full rights, exemption from reciprocity in diplomatic reciprocity states brought refugees only within the ranks of the residual category of foreigners. In diplomatic reciprocity states, many critical rights were simply not "on offer" to other than partner countries. Exemption from reciprocity therefore merely required diplomatic reciprocity states to assimilate refugees to second-tier resident aliens, not to enfranchise them within the ranks of preferred aliens.

The ramifications of exemption from reciprocity had, however, been significant for countries of the second category, which conditioned alien rights on legislative or de facto reciprocity. In these states, exemption from reciprocity revived the presumption that aliens should be assimilated to nationals, thereby effectively guaranteeing national treatment for refugees. In contrast to states that relied on diplomatic reciprocity, countries that embraced legislative or de facto reciprocity "usually grant[ed] foreigners the same rights as their subjects, reserving however the power to apply retorsion to the nationals of countries where aliens generally or their subjects alone [were] handicapped by the particular disability in question."[194]

This historical background is important for understanding the approach taken in the current Refugee Convention. It was initially proposed that, as under the 1933 Convention, refugees protected by the 1951 Convention should simply be assimilated to the citizens of states with which the asylum country had reciprocity arrangements.[195] While some states supported this position, including Denmark[196] and the United

[193] "The enjoyment of certain rights and the benefit of certain favours accorded to foreigners subject to reciprocity shall not be refused to refugees in the absence of reciprocity": Convention relating to the International Status of Refugees, 159 LNTS 3663, done Oct. 28, 1933, entered into force June 13, 1935 (1933 Refugee Convention), at Art. 14.

[194] Borchard, *Diplomatic Protection*, at 72.

[195] "The enjoyment of the rights and favours accorded to foreigners subject to reciprocity shall not be refused to refugees (and stateless persons) in the absence of reciprocity": Secretary-General, "Memorandum," at 28.

[196] "Denmark used reciprocity simply as a means to ensure that Danes in foreign countries received the privileges that were granted to nationals of those countries in Denmark. In such cases he felt that refugees should be granted the same privileges although there could

States,[197] France pointed to the fact that only three of the eight state parties to the 1933 Convention had actually accepted the duty to exempt refugees from reciprocity.[198] Arguing the importance of pragmatism, it tabled an alternative formulation premised on the denial to refugees of all rights conditioned on diplomatic reciprocity, and stipulating that rights conditioned on legislative or de facto reciprocity would accrue to refugees only after the passage of a number of years in the asylum country.[199] States that relied on legislative or de facto reciprocity would thereby find themselves on a similar footing with countries that embraced diplomatic reciprocity.[200]

3.2.1 Assimilation to aliens

Refugee Convention, Art. 7(1)
Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

The drafters conceived the general standard of treatment in Art. 7(1) in fairly broad terms. While it is clearly less comprehensive than the complete exemption from reciprocity endorsed in the 1933 Refugee Convention, the purpose

be no question of reciprocity": Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 18–19.

197 "[I]n the United States of America as in the United Kingdom, problems of reciprocity did not arise but ... he, too, had no objection to the inclusion of the article for the sake of countries differently situated ... The main object was to ensure that aliens should not be penalised because they had no nationality and that where privileges were generally enjoyed by aliens, through treaties or in any other way, refugees should have the same privileges": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 15–16.

198 Only Bulgaria, France, and Italy did not enter a reservation or qualification to Art. 14 of the 1933 Convention: United Nations, "Statelessness," at 93–97. It is noteworthy that Bulgaria and Italy routinely assimilated aliens to foreigners in any event, and France relied on diplomatic reciprocity (thereby allowing it to reserve a category of privileged aliens, exemption from reciprocity notwithstanding). The article was not in force for any legislative or de facto reciprocity state where it would clearly have had the greatest impact.

199 "The enjoyment of certain rights and the benefit of certain privileges accorded to aliens subject to reciprocity shall not be refused to refugees in the absence of reciprocity in the case of those enjoying them at the date of signature of the present Convention. As regards other refugees, the High Contracting Parties undertake to give them the benefit of these provisions upon completion of [a certain period of] residence": France, "Proposal for a Draft Convention," UN Doc. E/AC.32/L.3, Jan. 17, 1950 (France, "Draft Convention"), at 4.

200 Only refugees who enjoyed exemption from reciprocity under the 1933 Convention or another pre-1951 instrument are entitled immediately to be assimilated to the ranks of privileged foreigners: Refugee Convention, at Art. 7(3). See chapter 3.2.2 below, at p. 203.

of Art. 7(1) is to ensure that refugees receive the benefit of all laws and policies which normally apply to aliens.

The primary value of Art. 7(1) is to incorporate by reference all general sources of rights for non-citizens. Urged by the American delegate to ensure that the general standard "should cover all rights to be granted to refugees and not only those which were actually specified in the draft convention,"[201] the report of the First Session of the Ad Hoc Committee succinctly notes that "[t]he exemption from reciprocity relates not only to rights and benefits specifically covered by the draft convention, but also to such rights and benefits not explicitly mentioned in the draft Convention."[202] Even as the attitude of states towards the timing and scope of exemption from reciprocity hardened over the course of the drafting process, there was no weakening of this basic commitment to comprehensive application of the general standard of treatment.[203] Simply put, refugees cannot be excluded from any rights which the asylum state ordinarily grants to other foreigners. Thus, the general standard of Art. 7(1) ensures that refugees may claim the narrow range of rights set by international aliens law,[204] as well as the benefit of any international legal obligations (for example, those set by the Human Rights Covenants[205]) which govern the treatment of aliens in general.

The "aliens generally" standard was also a useful means by which to meet the concerns of diplomatic reciprocity states. France and Belgium were particularly adamant that the Refugee Convention should not compel them to treat refugees on par with the citizens of special partner states.[206] The adoption of the "aliens generally" baseline standard was intended to avoid any assertion that the general duty includes the obligation to grant refugees special rights reserved for preferred aliens, for example the citizens of countries affiliated in an economic or political union.[207] Because exceptional

[201] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 4.

[202] "Report of the Ad Hoc Committee on Statelessness and Related Problems," UN Doc. E/1618, Feb. 17, 1950 (Ad Hoc Committee, "First Session Report"), at Annex II.

[203] See Refugee Convention, at Art. 7(5): "The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21, and 22 of this Convention *and to rights and benefits for which this Convention does not provide* [emphasis added]."

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

[205] See chapter 2.5.4 above.

[206] "[C]ountries such as Belgium, which were linked to certain other countries by special economic and customs agreements, did not accord the same treatment to all foreigners. Belgium, for example, placed nationals of the Benelux countries for certain periods on a quasi-equal footing with Belgian citizens": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 5. See chapter 3.2 above, at p. 195.

[207] Mr. Cuvelier subsequently repeated "that refugees could not benefit from reciprocal treatment in cases where the right or privilege in question was granted solely as a result of an international agreement between two countries": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 4. The Israeli delegate thereupon

rights of this kind do not ordinarily inhere in "aliens generally,"[208] the new general standard allows them to be withheld from refugees.[209]

Yet even as the drafters recognized the importance of enabling states to maintain special relationships by means of diplomatic reciprocity, there was a determination to limit the exclusion of refugees to situations in which the attribution of particular rights to non-citizens was truly part of a special regime. Thus, all but one of the substantive Convention rights that require implementation only at the baseline "aliens generally" standard[210] – rights to property, self-employment, professional practice, housing, and secondary

suggested, and the Committee agreed, that "that interpretation should be placed on the record": Statement of Mr. Robinson of Israel, ibid. As helpfully clarified by the British delegate, refugees cannot automatically claim the benefit of "a special treaty between two countries": Statement of Sir Leslie Brass of the United Kingdom, ibid.

[208] See e.g. Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 5; Statement of Mr. Larsen of Denmark, ibid.; and Statement of the International Refugee Organization, in United Nations, "Compilation of the Comments of Governments and Specialized Agencies on the Report of the Ad Hoc Committee on Statelessness and Related Problems," UN Doc. E/AC.32/L.40, Aug. 10, 1950 (United Nations, "Compilation of Comments"), at 34–35: "The main reason why the Ad Hoc Committee decided to change the wording of the Articles relating to reciprocity ... was that it did not wish the Article to relate to treaty provisions conferring preferential treatment on aliens of a particular nationality. It is certain that since 1933 there has been a general development in the granting of preferential treatment to aliens of a particular nationality on the basis of customs, political and economic associations founded on geographical or historical connections. It may be held that some qualification should be made to the original formula concerning reciprocity, as included in the Conventions of 1933 and 1938, in order to overcome any misinterpretation which may lead to the belief that an article concerning the exemption from reciprocity might have as a consequence the legal entitlement for refugees to the benefits of preferential treatment."

[209] Special guarantees of reciprocal treatment, such as those negotiated by partner states in an economic or customs union, do not automatically accrue to refugees. The benefits of such forms of diplomatic reciprocity are normally extended to refugees only where the Refugee Convention stipulates that refugees are to be treated either as "most-favored foreigners," or on par with the nationals of the asylum state. "[A] distinction should be drawn between the clause relating to exemption from reciprocity and the provisions of some articles which specified whether refugees should be accorded the most favorable treatment or be subject to the ordinary law. Where such provisions were set forth in an article there was no need to invoke the clause on exemption from reciprocity. It was obvious, in fact, that where refugees were accorded the most favorable treatment there would be no point in invoking the clause respecting exemption from reciprocity ... The paragraph on exemption from reciprocity would apply only where articles failed to define the treatment accorded to refugees": Statement of Mr. Giraud of the Secretariat, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 6. See generally chapter 3.3.1 below.

[210] The exception is the right to freedom of movement set by Art. 26, which requires only that refugees be allowed to "choose their place of residence and to move freely within [the state party's] territory, subject to any regulations applicable to aliens generally in the same circumstances": Refugee Convention, at Art. 26. While there is no textual requirement to grant refugees internal mobility rights on terms "as favorable as possible," whatever

and higher education – are actually phrased to require "treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally."[211] As the Belgian delegate insisted, this form of words requires more than simply adherence to the principle of non-discrimination.[212]

First and most specifically, the phrase was agreed to circumscribe the ability of governments to refuse refugees the benefits of rights only formally subject to diplomatic reciprocity. The Report of the First Session of the Ad Hoc Committee explains this precise choice of language:

> The formula used in [Art. 13, on movable and immovable property] and in several others – i.e., "treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances" – is intended to assure that refugees will, *regardless of reciprocity*, be treated at least as well as other aliens and to encourage countries to give them better treatment where this is possible [emphasis added].[213]

As such, while it was understood that refugees would not benefit from special rights genuinely associated with unique bilateral or similar arrangements,[214] it was agreed that there is no good reason to deny refugees rights that are in fact available to most non-citizens. This was in keeping with the reason given by governments for refusal immediately to exempt refugees from all reciprocity requirements. Their concern was the importance of not undermining their special political and economic relationships; there is no such risk once the rights in question are no longer reserved for only the citizens of select partner states, but are in fact extended to the nationals of most foreign

constraints are to be imposed on freedom of movement must derive from "regulations," not simply from the exercise of bureaucratic or other discretion or directive.

211 Refugee Convention, at Arts. 13, 18, 19, 21, and 22.

212 The matter arose in the context of a French criticism that an American proposal to grant refugees "the most favorable treatment possible and, in any event, not less favorable than that given to foreigners generally as regards housing accommodations" was unnecessary in view of the duty of non-discrimination. In response, the Belgian delegate "pointed out that the United States text was not redundant, inasmuch as it required the High Contracting Parties not merely not to discriminate against refugees, but to ensure them 'the most favorable treatment possible'": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 13.

213 Ad Hoc Committee, "First Session Report," at Annex II.

214 "This article [on exemption from reciprocity] is intended to meet the situation in various countries where certain rights are accorded to aliens subject to reciprocity. In such cases there is no objection on the part of the State to aliens enjoying these rights, and the purpose of conferring them subject to reciprocity is merely to obtain similar rights for its nationals in foreign countries. The Article will confer these rights on refugees; they would otherwise be prevented from having them in view of their lack of nationality. The Article is not intended to relate to rights specifically conferred by bilateral treaty and which are not intended to be enjoyed by aliens generally": "Comments of the Committee on the Draft Convention," UN Doc. E/AC.32/L.32/Add.1, Feb. 10, 1950, at 2–3.

states.[215] Thus, where there is truly generality of access to a given set of rights – as evinced by, for example, relevant domestic laws or practices, a pervasive pattern of bilateral or multilateral agreements, or de facto enjoyment of the right by most aliens – the right in question automatically accrues to refugees as well.

Second and more generally, the duty to grant refugees "treatment as favorable as possible" requires a state party to give consideration in good faith to the non-application to refugees of limits generally applied to aliens. It was proposed in order to ensure that "refugees would be granted not the most favorable treatment, but a treatment more favorable than that given to foreigners generally."[216] The spirit of this responsibility is nicely captured by the comments of the British government that it would be prepared to "consider sympathetically the possibility of relaxing the conditions upon which refugees have been admitted."[217]

3.2.2 Exemption from reciprocity

Refugee Convention, Art. 7 Exemption from reciprocity

. . .

2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.

[215] "If the French Government and a small State concluded a treaty providing for certain rights to be granted to Frenchmen, and the same rights to be granted to nationals of that State in France, was the advantage granted to the citizens of a single country to be accorded by France to all refugees? As he interpreted it, article [7] did not mean that it was necessary to accord that treatment to all refugees. He had observed from the summary records of the Committee that the United Kingdom representative had accepted that article because it contained the word 'generally.' But where did the general treatment of aliens begin? Was it when there was reciprocal treatment with one or two other States or when there was such treatment with a very large number of other States? . . . France was prepared to give refugees the treatment given to aliens generally, but did not intend to give better treatment to refugees than that given to the majority of aliens": Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 11–12. See also Statement of Mr. Henkin of the United States, ibid. at 16: "It was also necessary to cover cases where reciprocity treaties existed with many countries and were hence equivalent to legislative reciprocity. The representative of France had raised the question of how many such treaties must exist, whether 5 or 50. He could not himself suggest a draft but the Drafting Committee would have to, so long as it was clear what was desired." Notwithstanding this assurance, the quantitative issue was resolved neither by the Drafting Committee, nor by any subsequent body that participated in the preparation of the Refugee Convention.

[216] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 14. Under this intermediate standard, a government should at least consider providing preferential treatment for refugees. See also Statement of Mr. Kural of Turkey, ibid. at 15.

[217] United Nations, "Compilation of Comments," at 40.

3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.

5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

The general standard of treatment under the Refugee Convention is, for reasons described above, premised on the continued existence of preferred aliens regimes in states that rely on diplomatic reciprocity. In such states, refugees may not insist that they be afforded rights reserved by treaty for the citizens of countries with which the asylum state has a special relationship.[218] In an effort to avoid the imposition of radically different obligations on state parties that embrace distinct understandings of reciprocity, a decision was taken to delay the assimilation of refugees to citizens in states that rely on either of the two remaining forms of reciprocity, legislative and de facto reciprocity.[219]

The need for a special approach to legislative and de facto reciprocity states arises from the quite different impact of a "general standards" baseline duty of protection in such countries. Because states that rely on legislative and de facto reciprocity acknowledge an underlying *presumption* in favor of the assimilation of aliens to citizens,[220] implementation of the "general standards" requirement would effectively have required the immediate assimilation of all refugees to citizens. Because Art. 7(1) requires that refugees receive the benefit of rights routinely granted to non-preferred foreigners on the basis of reciprocity,[221] all rights "on offer" under a legislative or de facto reciprocity system would presumptively accrue to them. Application of this

[218] See chapter 3.2.1 above, at pp. 197–198.

[219] While the text of the articles speaks only to "legislative reciprocity," it is clear from the drafting history that this term was used in contradistinction to "diplomatic reciprocity." As observed by its Belgian co-sponsor, the term "legislative reciprocity" "was emphatically not designed to exclude *de facto* reciprocity": Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.24, July 17, 1951, at 22. There is a logical basis for this assertion, grounded in differing ways of categorizing approaches to reciprocity. See chapter 3.2 above, at pp. 193–194, n. 190.

[220] See chapter 3.2 above, at pp. 193–194. [221] Ibid.

general standard of treatment would therefore have imposed a significantly more onerous obligation on states that rely on legislative or de facto reciprocity.

This result was attenuated by delaying the time at which refugees are granted the benefit of rights ordinarily subject to legislative or de facto reciprocity.[222] The Ad Hoc Committee's recommendation that "a legal obligation in this sense would be acceptable only in regard to refugees who had resided in the country for a given period"[223] led to the decision to defer exemption from legislative reciprocity until a refugee has resided in an asylum state for three years.[224]

The net result is that the general standard of treatment under the modern Refugee Convention endorses a significant, though not complete, retrenchment from the requirement of the 1933 Refugee Convention that refugees should be exempted from all reciprocity requirements. By virtue of Art. 7(1)'s limited duty to accord to refugees all rights that inhere in "aliens generally," refugees may legitimately be refused any diplomatic reciprocity rights which accrue only to preferred nationals, such as those of partner states in an economic or political union. In reliance on Art. 7(2), states may also withhold for up to three years any rights that are reserved for the nationals of states which have met the requirements of legislative or de facto reciprocity. It is only when Convention rights formally subject to reciprocity are in fact generally enjoyed by aliens that refugees too may claim these rights by virtue of the phrasing of the specific articles of the Convention which require implementation only at the baseline level.[225] Because refugees are never to be treated less well than the average foreigner, the prerogative of asylum states

[222] Austria was one of the few states present that relied primarily on legislative reciprocity. Because it was a country of first asylum for large numbers of refugees who would ultimately be granted resettlement elsewhere, the three-year delay in according exemption from reciprocity effectively met its most pressing concerns. See Comments of the Government of Austria, in United Nations, "Compilation of Comments," at 5, 32: "Considering the great number of refugees, however, who are in the country and are still coming, Austria cannot be expected to grant a permanent refuge to all who are now on Austrian territory. The Federal Government of Austria rather expects States which are much larger and economically much stronger to adopt the same generous attitude towards immigration and naturalization of refugees as that shown by Austria ... Rights which can be granted generally to a small number of aliens on the basis of reciprocity could not be extended, especially in matters of welfare and labor, to the several hundreds of thousands of refugees in Austria."

[223] Ad Hoc Committee, "Second Session Report," at 12.

[224] The determination of when the requirement of "three years' residence" has been satisfied should be made in accordance with the spirit of Art. 10 ("continuity of residence"). See chapter 3.1.5 above, at pp. 191–192.

[225] See chapter 3.2.1 above, at pp. 199–200.

to withhold rights on the basis of any form of reciprocity comes to an end once the rights in question are enjoyed by most aliens.[226]

Some drafters clearly recognized the inappropriateness of subjecting refugees to the harshness of reciprocity.[227] While unable to overcome the protectionist views of the majority of states, they nonetheless secured an amendment that shields many pre-1951 refugees from any attempt to reduce rights based on reciprocity principles.[228] Of greater contemporary relevance, Art. 7 was also amended to oblige states to give consideration to the waiver of legislative and de facto reciprocity requirements before the elapse of the three-year residency requirement.[229] As Robinson[230] and Weis[231] affirm, Art. 7(4) is not merely hortatory, but requires governments to give real

[226] See Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 7: "[P]aragraph 2 of article [7] must be interpreted in the light of paragraph 1."

[227] "According to [the draft of Art. 7(3)] ... certain refugees would continue to enjoy the reciprocity which they had previously enjoyed; that included the legislative reciprocity mentioned in the second paragraph, as well as diplomatic and *de facto* reciprocity. On the other hand, new refugees would ... enjoy exemption from reciprocity only after a period of three years' residence in the receiving country. He appreciated the reasons for which certain States felt obliged to limit the rights of new refugees in that way, but pointed out that there were other States which visualized the possibility of extending the idea of reciprocity even to non-statutory refugees": Statement of Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.24, July 17, 1951, at 21–22.

[228] "Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State": Refugee Convention, at Art. 7(3).

[229] "The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3": Refugee Convention, at Art. 7(4). The Ad Hoc Committee had "expressed the hope that States would give sympathetic consideration to extending rights, as far as possible, to all refugees without regard to reciprocity, particularly where the rights have no relation to the requirements of residence, as for example, compensation for war damages and persecution": Ad Hoc Committee, "Second Session Report," at 11–12.

[230] "[T]he [Ad Hoc] Committee expressed the hope that states would give sympathetic consideration to extending rights, as far as possible, to all refugees without regard to reciprocity, particularly where the rights have no relation to the requirements of residence. This 'hope' was transformed by the Conference [of Plenipotentiaries] into a special clause which must have more meaning than 'hope.' It is a recommendation to the Contracting States ... In other words, a state cannot be forced to accord these rights, but there must be a well-founded reason for refusing their accordance": Robinson, *History*, at 88–89.

[231] "It is only a recommendation, but imposes nevertheless a mandatory obligation to consider favourably the granting of wider rights and benefits": P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (posthumously pub'd., 1995) (Weis, *Travaux*), at 57.

attention to the logic of continued application of reciprocity requirements to refugees. While not formally obliged to grant rights subject to legislative or de facto reciprocity during the first three years a refugee resides in its territory, Art. 7(4) "uses the word 'shall' to indicate that it *requires* the states to consider favorably the possibility of according such rights."[232]

In any event, it is today legally dubious that states also bound by the International Covenant on Civil and Political Rights may validly withhold refugee rights on the grounds of an absence of reciprocity.[233] The Covenant's general guarantee of non-discrimination requires that rights allocated by a state to any group presumptively be extended to all persons under its jurisdiction.[234] Legislative and de facto reciprocity are particularly vulnerable, as the decision to deny rights to only those aliens whose national states have not agreed to reciprocal treatment is explicitly a means of pressuring other *states* to grant protection to foreign citizens.[235] As observed by the American representative to the Ad Hoc Committee, "[t]he purpose of making ... rights subject to reciprocity was to encourage other countries to adopt an equally liberal regime towards foreigners in their territory. Naturally there was nothing to be gained by making the rights subject to reciprocity where a refugee was concerned."[236] In view of the impossibility of advancing the explicitly instrumentalist goals of most reciprocity regimes through the

[232] Robinson, *History*, at 89.

[233] This is certainly the case where the rights in question are themselves guaranteed by international law. For example, the UN Human Rights Committee has expressed the view that "the provisions in [Azerbaijan's] legislation providing for the principle of reciprocity in guaranteeing Covenant rights to aliens are contrary to articles 2 and 26 of the Covenant": "Concluding Observations of the Human Rights Committee: Azerbaijan," UN Doc. CCPR/CO/73/AZE, Nov. 12, 2001, at para. 20. A recent analysis of the role of reciprocity in international human rights law asserts the potential value of reciprocity in the context of a system which still lacks a centralized enforcement mechanism. It nonetheless insists that countermeasures must be carefully targeted, lest the goals of human rights law be undermined. "At a general level, the notion of enforcing human rights law through disregard for its norms seems incompatible with this rationale, indeed, the *raison d'être*, of that body of law ... [A] mechanism that would permit infringements of human rights to be echoed by further infringements of human rights would undoubtedly undermine the structure of human rights as a body of compulsory norms limiting the actions of the State": Provost, "Reciprocity", at 444–445.

[234] See chapter 2.5.5 above, at pp. 126–128.

[235] Whether preferred rights secured by special forms of diplomatic reciprocity are equally vulnerable to attack on the basis of the duty of non-discrimination is less clear. Where enhanced rights are granted only to citizens of those states with which the asylum country is linked in a form of political or economic union, for example, this may be said to reflect an effective assimilation of those aliens to the political or economic community of the partner state. The non-discrimination analysis ought therefore to focus on whether the rights in question can be said to reflect the unique abilities and potentialities of members of a shared political and economic community. See chapter 2.5.5 above, at p. 128 ff.

[236] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 2.

person of refugees,[237] an attempt to rely on the restrictive portions of Art. 7 is unlikely to meet modern understandings of the duty of non-discrimination, the broad margin of appreciation afforded state parties notwithstanding.[238]

3.2.3 Exemption from insurmountable requirements

> **Refugee Convention, Art. 6 The term "in the same circumstances"**
> **For the purpose of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.**

As previously noted, most Convention rights that require implementation only at the baseline standard – rights to property, self-employment, professional practice, housing, and post-primary education[239] – are textually framed to require "treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances." Governments are also allowed to restrict the internal mobility of refugees lawfully present in their territory "subject to any regulations applicable to aliens generally in the same circumstances."[240] The same phrase is used to modify the duty to assimilate refugees to the nationals of most-favored states in relation to the rights to association and to wage-earning employment: "the most favourable treatment accorded to nationals of a foreign country, in the same circumstances."[241]

This language reflects the view of the drafters that where refugee rights are defined to require only the baseline standard of treatment – that is, assimilation to aliens generally – refugees should have to qualify in essentially the same way as other aliens. The initial approach of the Ad Hoc Committee was quite strict, suggesting that refugees should have to meet "the same requirements, including the same length and conditions of sojourn or residence, which are prescribed for the national of a foreign state for the enjoyment of the right in question."[242] The Committee rejected proposals that would have

[237] See chapter 3.2 above, at p. 194. [238] See chapter 2.5.5 above, at pp. 129–145.
[239] Refugee Convention, at Arts. 13, 18, 19, 21, and 22. [240] Ibid. at Art. 26.
[241] Ibid. at Arts. 15, 17. Comparable phrasing is employed to define the duty of tax equity in Art. 29 ("[no] taxes ... other or higher than those which are ... levied on their nationals in similar situations").
[242] Ad Hoc Committee, "Second Session Report," at 15.

required states to judge comparability solely on the basis of terms and conditions of stay in the asylum state.[243] The Belgian and American representatives argued that such an approach was too restrictive, but were able to persuade the Committee only that governments should be entitled to consider a wide variety of criteria in determining whether a refugee is truly similarly situated to other aliens granted particular rights.[244]

At the Conference of Plenipotentiaries, the Australian delegate lobbied unsuccessfully to grant states even more discretion to withhold rights from refugees. Mr. Shaw proposed "[t]hat nothing in this Convention shall be deemed to confer upon a refugee any right greater than those enjoyed by other aliens."[245] This position was soundly denounced, and ultimately withdrawn.[246] As the Austrian representative observed, "[i]f it were to be posited that refugees should not have rights greater than those enjoyed by other aliens, the Convention seemed pointless, since its object was precisely to provide for specially favourable treatment to be accorded to refugees."[247] The Conference nonetheless agreed that where rights are defined at the baseline "aliens generally" standard, governments could legitimately deny access to particular rights on the grounds that a given refugee is not truly "in the same circumstances" as other aliens enjoying the right in question.

In line with the thinking of the Ad Hoc Committee, representatives to the Conference were not persuaded that states should have to judge the comparability of a refugee's situation on the basis solely of the conditions of his or her sojourn or residence.[248] As Grahl-Madsen has observed, "[i]n most countries certain rights are only granted to persons satisfying certain criteria, for example with regard to age, sex, health, nationality, education, training, experience, personal integrity, financial solvency, marital status, membership of a professional association or trade union, or residence, even length of residence within the country or in a particular place. There may also be strict

[243] Proposal of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 9; and Proposal of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 23.

[244] Statements of Mr. Herment of Belgium and Mr. Henkin of the United States, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 24.

[245] Proposal of Australia, UN Doc. A/CONF.2/19, July 3, 1951.

[246] See e.g. criticisms voiced by Mr. Herment of Belgium and Mr. von Trutzschler of the Federal Republic of Germany, UN Doc. A/CONF.2/SR.6, July 4, 1951, at 5–6.

[247] Statement of Mr. Fritzler of Austria, ibid. at 6.

[248] The United Kingdom representative sought to restrict the comparison to only "requirements as to length and conditions of sojourn or residence," but withdrew his proposal in the face of substantial disagreement. See Statements of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.34, July 25, 1951, at 16; and UN Doc. A/CONF.2/SR.35, July 25, 1951, at 36.

rules for proving that one possesses the required qualifications, e.g. by way of specified diplomas or certificates."[249]

Broader concerns of this kind were likely of importance to the drafters. The Belgian delegate, for example, expressly suggested that evidence of occupational or professional qualification might be a legitimate ground upon which to condition access to certain rights.[250] The British representative insisted that the notion of "in the same circumstances" was "defined in its implications, not in its meaning."[251] While conditions of residence or sojourn were obviously the primary concerns,[252] it would be undesirable to particularize all possible grounds for defining similarity of circumstances "since that might result in the vigorous application of all possible requirements applicable to foreigners in the country of asylum."[253] Thus, Art. 6 is framed in open-ended language,[254] allowing governments "some latitude ... to decide within the general conception that refugees were not to have more privileged treatment than aliens generally as to the conditions which must be fulfilled."[255]

This discretion is not, however, absolute. Apart from the requirements now imposed by general principles of non-discrimination law,[256] the major caveat to the prerogative granted states to define the basis upon which the comparability of a refugee's situation is to be assessed is the duty to exempt refugees from insurmountable requirements. Even as governments insisted on the authority to require refugees to qualify for rights and benefits on the same terms as other aliens, they recognized that the very nature of refugeehood – for example, the urgency of flight, the severing of ties with the home state, and the inability to plan for relocation – may sometimes make compliance with the usual criteria a near-impossibility:

[249] A. Grahl-Madsen, *Commentary on the Refugee Convention 1951* (1963, pub'd. 1997) (Grahl-Madsen, *Commentary*), at 23.

[250] "To give an example, it might be that a refugee would wish to procure a document allowing him to exercise a profession or ply a trade. The element of sojourn or residence would count, of course, but other considerations might also come into play, such as the kind of trade or profession the refugee wished to engage in": Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.34, July 25, 1951, at 17.

[251] Statement of Mr. Hoare of the United Kingdom, ibid. at 17.

[252] Ibid. at 16.

[253] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 35.

[254] "[T]he treatment of foreigners was not necessarily uniform, but would depend in many instances upon the individual's circumstances and claims to consideration": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.3, July 3, 1951, at 22.

[255] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 35.

[256] See chapter 2.5.5 above.

> For example, in some eastern European countries a person had to fulfil certain qualifications relating to residence in order to be eligible for social security. The definition ... was too rigid, and would weaken the Convention ... The special circumstances of refugees must be recognized.[257]

The validity of this concern was endorsed without opposition, leading the Conference of Plenipotentiaries to adopt a joint British–Israeli amendment to require governments to exempt refugees from requirements "which by their nature a refugee is incapable of fulfilling."[258]

As suggested by the concerns of the Israeli representative that led to the redrafting of Art. 6,[259] general criteria based on length of sojourn or residence may be relied on to assess the entitlement of refugees, but may not be mechanistically applied. Some flexibility to take account of difficulties faced by refugees in meeting the usual standard is clearly called for. For example, Grahl-Madsen suggests that requirements to produce certificates of nationality, or documentation of educational or professional qualification or experience acquired in the refugee's country of origin may sometimes fall within the insurmountable requirements exception.[260] This does not mean that refugees should be admitted to jobs for which they are truly unqualified, but simply that if "the refugee is unable to produce a certificate from the university in the country of origin where he graduated, he must be allowed to prove his possession of the required academic degree by other means than the normally required diploma."[261] This is because the very nature of the refugee experience may have denied the individual the time to amass or to carry all relevant documentation when leaving his or her country, and there may be no present means to compel authorities there to issue the requisite certification from abroad.[262]

The net result is a fair balance between a general principle of assimilating refugees to other aliens – both in the positive sense of granting them access to particular benefits, and in the negative sense of requiring compliance with the usual rules for entitlement to those benefits – and the equally obvious need to render substantive justice to refugees in the application of those principles. Even when rights require implementation only to the same extent granted aliens generally, whatever impediments an individual refugee faces by virtue of the uprooting and dislocation associated with refugeehood should not be relied upon to deny access to rights.

[257] Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.5, July 4, 1951, at 19.
[258] The proposal was adopted on a 22–0 (2 abstentions) vote: UN Doc. A/CONF.2/SR.26, July 18, 1951, at 10.
[259] See text above, at note 257. [260] Grahl-Madsen, *Commentary*, at 23.
[261] Ibid. at 23. [262] See Weis, *Travaux*, at 46–47.

3.2.4 *Rights governed by personal status*

Refugee Convention, Art. 12 Personal status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

Under the dominant civil law understanding, the personal status of a non-citizen – including, for example, his or her legal capacity, family and matrimonial rights, and entitlement to benefit under rules of succession and inheritance – is ordinarily to be determined by the law of the country of which the individual is a national.[263] Thus, to determine whether a non-citizen child has been validly adopted, whether an alien is entitled to an interest in his or her spouse's property by virtue of marriage, or whether a will made by a non-citizen abroad is legally valid, reference should be made to the legal standards prevailing in the alien's country of citizenship.

There are some good reasons for this legal point of departure. For example, if the validity of a marriage were to be determined by reference to the age of consent wherever a couple happened to reside or even to visit, it is clear that international travel could pose a major risk to the stability of some fundamental personal relationships. In order to avoid such disruptions without

[263] The traditional civil law approach is to look to the law of nationality to determine an alien's personal status, a heritage of late nineteenth- and early twentieth-century nationalism. This approach was codified in the Hague Conventions on Private International Law of 1902, and is still the rule in most civilian systems. Yet there are important exceptions (such as Switzerland). The basic common law rule (prevailing in the UK, the US, etc.) has always been to look to the law of domicile. On the whole, reference to domicile or habitual residence seems to be the path of the future: see E. Scoles et al., *Conflict of Laws* (2000) (Scoles et al., *Conflict*), at 242–245. This is especially so as the result of invocation of the non-discrimination principles in EU law, leading to a focus on domicile or, more precisely, "habitual residence." "The European Court of Justice appears to be inclined to establish a 'Community concept' of residence for benefit purposes which is based on the facts of a person's living arrangements rather than the legal rules prevailing in each member state": D. Mabbett and H. Bolderson, "Non-Discrimination, Free Movement, and Social Citizenship in Europe: Contrasting Positions for EU Nationals and Asylum-Seekers," paper presented at the ISSA Research Conference on Social Security, Helsinki, Sept. 25–27, 2000, at 2, available at www.issa.int/pdf/helsinki2000/topic1/2mabbett.pdf (accessed Apr. 30, 2005).

denying courts in a country of residence or transit the ability to determine with certainty the personal status of a non-citizen within their territory, most civil law states have traditionally chosen to anchor analysis in the rules governing personal status in the non-citizen's own country. Adoption of this approach is a pragmatic means by which to enable persons to move between countries without thereby jeopardizing basic entitlements. It is also arguably a principled standard, since the rules which determine an individual's fundamental personal status are those which govern in the country to which that person owes his or her primary political allegiance.

Yet in the case of a refugee, by definition a person who no longer enjoys the assumed bond between citizen and state, the drafters of the Refugee Convention were of the view that there is no principled basis for application of the usual civil law approach to the determination of personal status. To the contrary, some representatives felt that it was ethically wrong to hold refugees hostage to personal status rules which prevailed in the countries which they had fled. The Danish representative advanced the argument that "[r]efugees should not be treated by the host country in accordance with the very laws – such as the Nürnberg Laws – that might have caused them to become refugees."[264] As summarized by Mr. Giraud of the Committee Secretariat,

> A refugee was characteristically a person who had broken with his home country and who no longer liked its laws. That fact constituted a strong reason for not applying to him the laws of his home country. Furthermore, it would make for more harmonious relations if the laws of the country in which the refugee had established domicile or residence were applied to him.[265]

The logic of not binding refugees to personal status rules in force in their country of origin thus has much in common with the basic premise of the duty to exempt refugees from exceptional measures. As discussed below, it would make little sense to stigmatize a refugee as an enemy alien on the basis of his or her formal possession of the nationality of a state the protection of which the refugee does not enjoy.[266] Similarly, it is difficult to understand why rights should be withheld from a refugee by the application of principles governing his or her personal status in the country of origin, but which are

[264] Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 2. See also Statement of Mr. Robinson of Israel, ibid.: "It would hardly be fair to say that a man who had fled from his country with the intention of never going back retained his nationality ... [N]o refugee should be forced to accept the laws of the country of which he was a national." Mr. Cha of China insisted that "refugees should be treated in accordance with the laws of the country which had given them asylum," invoking his country's aversion to the extraterritorial application of national laws: ibid.

[265] Statement of Mr. Giraud of the Secretariat, ibid. at 4.

[266] See chapter 3.5.2 below, at p. 272.

inconsistent with the rules which determine personal status in the asylum state. Yet this would have been precisely the result – at least in most civil law states – of a strict application of the general rule under Art. 7(1) that refugees should, without a provision to the contrary, receive "the same treatment as is accorded to aliens generally."

Principled concerns were not, however, solely responsible for the decision to reverse the precedent of most earlier refugee treaties, under which the rules of the refugee's country of citizenship generally determined his or her personal status.[267] To the contrary, the driving force for reform appears to have been the practical experience of the International Refugee Organization, which was concerned that the traditional nationality rule had caused real problems for refugees in the field of family rights, particularly in regard to the capacity to enter into marriage, and the ability to dissolve a marriage.[268] Reliance on the status rules of the refugee's country of citizenship was moreover said to be fraught with administrative difficulty.[269] An example offered by the Israeli delegate to the Conference of Plenipotentiaries gives some sense of this concern:

[267] The primary exception related to refugees who had no citizenship; the personal status of such refugees was determined by reference to their country of domicile or habitual residence. On the other hand, the 1933 Refugee Convention determined personal status by reference to domicile or residence for all refugees. While most refugees covered by this treaty were stateless, some were not. See Weis, *Travaux*, at 106. The reformist character of Art. 12 was new to the drafters. "[P]aragraph 1 introduces an innovation. It makes no distinction between refugees who are stateless *de jure* and those who are stateless only *de facto*. In point of fact persons in either category no longer enjoy the protection of their countries of origin": Secretary-General, "Memorandum," at 25.

[268] "The IRO had experienced great difficulties in cases where the principle of domicile and residence had not been applied": Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 5. More specifically, "the question of the right to contract marriage raised difficulties: countries which had so far applied the national law did so only in so far as it did not conflict with their public policy. It might therefore happen that the same consideration of domestic public policy might be raised in deciding the capacity of the refugee to contract marriage under the law of his country of domicile or residence. Moreover, the dissolution of marriages raised a question of competence: the courts of many countries refused to decree a dissolution of marriage if the national law of the person concerned was not obliged to recognize the validity of their ruling": Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 3–4.

[269] "In practice, the application of their own national law to refugees would involve great difficulties. Even if they had kept their own nationality, the authorities of their country of origin were unfavourably disposed towards them, and if a court of a reception country were to apply to those authorities for information needed to establish their personal status, it would presumably have difficulty obtaining such data": Statement of Mr. Kural of Turkey, UN Doc. E/AC.32/SR.7, Jan. 23, 1950, at 13. See also Statement of Mr. von Trutzschler of the Federal Republic of Germany, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 11: "There were grave technical objections to applying the law of the country of origin."

> Taking, by way of example, the case of a person whose place of origin was Vilna, and who had sought asylum in a country where in matters of international private law the courts applied the law of the country of origin, the courts would have to establish whether they should apply the Polish Civil Code, that of Lithuania before its annexation by the Soviet Union, or the Soviet Civil Code for the constituent republics of the Union. Such a decision would involve political considerations, and courts in some countries might be unwilling to go into such matters.[270]

The alternative recommended by the Secretariat was to allow refugees to benefit from the traditional common law position, under which a non-citizen's personal status is determined by the rules which prevail in his or her country of domicile. Because a refugee's state of domicile is ordinarily the country of asylum,[271] this approach was thought to facilitate the work of domestic courts involved in the adjudication of refugee rights:[272]

> Such a solution would be to the advantage of the refugees, and would be welcomed also by other inhabitants of the country who may have legal proceedings with refugees, and by the courts of the country. Courts will be freed from the very difficult task of deciding which law is applicable and of discovering what are the provisions of foreign laws in a particular regard. Moreover, in some countries, courts may exercise jurisdiction with regard to aliens only if their decisions are recognized by the courts of the country of nationality of the alien. The present provisions would, by applying the law of domicile or of residence, eliminate this limitation with regard to refugees.[273]

In the end, even the French representative – who had tabled an opposing draft, under which personal status would have continued to be decided by reference to the rules of the refugee's country of nationality[274] – was persuaded that a refugee's personal status should instead be governed by the standards applicable in his or her country of domicile.[275] As summarized by the Danish representative,

[270] Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 11–12.

[271] "[T]he principle applied in this article is the most simple because in the majority of cases a refugee adopts the country of asylum as his domicile and thus the personal status will easily be established and reference to foreign law will be avoided": Robinson, *History*, at 102.

[272] "Whereas during normal times, when there were few foreigners in a country, the application of the national law would not cause insurmountable difficulties, the courts would be inundated with work if, at a time when the number of refugees amounted to hundreds of thousands, they had to refer in each case to a national law with which they were unfamiliar": Statement of Mr. Kural of Turkey, UN Doc. E/AC.32/SR.7, Jan. 23, 1950, at 14.

[273] Ad Hoc Committee, "First Session Report," at Annex II.

[274] France, "Draft Convention," at 3–4.

[275] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 5. "The Committee was, in fact, trying to bring about the application of a new rule in countries

> With regard to refugees, the Committee had decided that their personal status would be governed by the law of their country of domicile ... That being the case, all other criteria had been abandoned. Consequently, in those states where the law of the country of domicile ... was applied, refugees would receive the same treatment as other aliens; in other countries, they would be granted a special status.[276]

In truth, however, it is not entirely clear that the approach adopted in Art. 12 of the Refugee Convention answers either the ethical or practical concerns which arise in determining a refugee's personal status. As a matter of principle, there is some force to the original assertion of the French representative that reliance on the rules of a refugee's country of nationality was often more consistent with "the national traditions of the refugees" themselves.[277] Indeed, the only non-governmental intervention on this issue opposed the shift to the determination of personal status based on the rules of domicile on the grounds that it failed to recognize the desire of many refugees ultimately to return to their country of origin:

> That a political refugee who had a horror of his country of origin, and had no intention whatsoever of returning to it, should find himself given the personal status provided by the legislation of the host government seemed reasonable. But would it be reasonable, it might still be asked, to impose on refugees who were still attached to their country of origin and lived only in the hope of returning to it (as formerly the German anti-fascists had done and as the Spanish Republicans were doing at present), a personal status which might vary considerably according to their country of residence, and to adopt that measure, according to changes in circumstances in the country of domicile, without the person affected having an opportunity of expressing his own desires on the matter?[278]

More generally, the Egyptian representative to the Conference of Plenipotentiaries provided an example which shows clearly the potential ethical difficulty of assigning personal status on the basis of the rules applying in the country of domicile:

> The majority of the Egyptian population was Mohammedan, its personal status being governed by Koranic law, whereas the personal status of other sections of the population was governed by the law of their respective religions or faiths ... [E]ach of these legal systems conceived of the

having a French legal tradition. The French idea had not met with a favorable reception so far, either on questions of principle or on those of application; in every case, it had had to yield to other ideas": Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 12.

[276] Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 11.

[277] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 3.

[278] Statement of Mr. Rollin of the Inter-Parliamentary Union, UN Doc. A/CONF.2/SR.10, July 6, 1951, at 8.

> principle of personal status in a different way ... [T]he status of aliens (other than Mohammedan aliens) in Egypt was governed by their personal status under the law of their own country, reference to that law being made by Egyptian law. If the personal status of a refugee was governed by the law of his country of domicile, or, if he had no domicile, by the law of his country of residence, and if that refugee was established in Egypt, there would be difficulty deciding which among the various types of personal status of domicile or residence should be granted to him.[279]

The result of Art. 12's deference to the rules of the domicile state in the case posited by the Egyptian representative would be that the refugee's personal status would be determined on the basis of the rules advocated by his or her religion, even if the refugee's personal preference (and prior experience in the country of origin) were to have his or her personal status determined on a secular basis.

At the level of practicality, objection may also be taken to the shift to a primary reliance on the rules of the country of "domicile" on the grounds of the inherent ambiguity of that notion. Scoles et al., for example, cite Justice Holmes' famous quotation in *Bergner and Engel Brewing Co. v. Dreyfus*[280] that

> what the law means by domicile is the one technically pre-eminent headquarters, which as a result either of fact or fiction every person is compelled to have in order that by aid of it, certain rights and duties which have attached to it by law may be determined.[281]

Because the notion of domicile places a premium on the place which an individual considers to be "home," it clearly presents a particular difficulty for refugees:

> If a political refugee intends to return to the country from which he fled as soon as the political situation changes, he retains his domicile there unless the desired political change is so improbable that his intention is discounted as merely an exile's longing for his native land; but if his intention is not to return to that country even when the political situation has changed, he can acquire a domicile of choice in the country to which he has fled.[282]

This confusion was evident in the comments of even the experts from the common law countries which had traditionally relied on domicile to determine the personal status of non-citizens. Sir Leslie Brass, for example, asserted that an individual's domicile in English law was "the country in which the refugee had established his permanent residence."[283] But as the

[279] Statement of Mr. Mostafa of Egypt, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 10.
[280] 172 Mass 154, at 157; 51 NE 531, at 532 (US SJC Mass, Oct. 29, 1898).
[281] Scoles et al., *Conflict*, at 245.
[282] L. Collins, *Dicey and Morris on the Conflict of Laws* (2000) (Collins, *Dicey*), at 129.
[283] Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 2.

American representative later noted, "a refugee might in some instances have his domicile in another country to the one in which he was living."[284] The representative of the IRO thought that a refugee's country of domicile was his or her "centre of existence."[285] The most helpful explanation, offered at the Conference of Plenipotentiaries by the British representative, was that

> [i]n Anglo-Saxon law there were two concepts: the domicile of origin, and the domicile of choice. The former might or might not be the place of birth; the latter was acquired by the personal choice of the person concerned ... It would be very exceptional if a refugee, fleeing from his country of origin, did not adopt the country of asylum as his domicile of choice.[286]

In view of the fungibility of the concept of "domicile" even in the common law states accustomed to its use, it is little wonder that so many representatives of civil law countries expressed confusion about how to apply it in practice. France observed that "it seemed ... that the word 'domicile' bore a different meaning in English from that generally accepted by those taking part in the present Conference."[287] Israel "drew attention to the ambiguity of the term 'domicile,' which was interpreted differently by different legal systems. In any case, it was quite possible for a person to have his residence in one country and his domicile in another."[288] The Chinese representative offered a practical example to illustrate his discomfort with the vagueness of the notion of domicile:

> [I]t should be specified how long a refugee was required to reside in a country in order to be considered as domiciled there. Otherwise it would be difficult to know whether he was really domiciled in a reception country, as had been the case with certain Jews who had taken refuge in Shanghai before the war and had been considered at the time to be domiciled there but who had lost that right later under the Japanese occupation and had finally been repatriated to Poland or directed to Israel. The application of the law of domicile seemed therefore to raise serious difficulties.[289]

This led the Chinese representative to conclude that "the term 'domicile' ... mean[s] the place where a person desired to live and carry out his business,"[290] a view not corrected by any other delegate.

[284] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 6.
[285] Statement of Mr. Weis of the International Refugee Organization, ibid. at 7.
[286] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 9.
[287] Statement of Mr. Rochefort of France, ibid. at 14.
[288] Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 4.
[289] Statement of Mr. Cha of China, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 2.
[290] Statement of Mr. Cha of China, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 5.

In the end, no clear definition of domicile was ever agreed to.[291] It was pragmatically, if perhaps unhelpfully, decided that "the courts of the reception country would determine the domicile ... of [refugees]."[292] While the unwillingness of the majority to accede to strong pleas in favor of reference instead to the rules on personal status prevailing in the refugee's country of "residence" or "habitual residence"[293] must surely be taken as evidence that domicile – at least as understood in the mid-twentieth century – was not simply synonymous with those notions, this dichotomy is, in practice, increasingly anachronistic. Because the present trend is for common law states to reform their law of "domicile" to bring it into line with the civil law concept of "habitual residence,"[294] the distinction between these notions may not long survive.

[291] As Robinson observes, "[t]he difference between the various concepts of domicile may provoke certain conflicts, especially when a refugee moves from the area of one concept to that of another or when the personal status of a refugee residing in one area is to be established in another. In doubtful cases, the law of the country of habitual residence of the refugee must be decisive": Robinson, *History*, at 102.

[292] Statement of Mr. Guerreiro of Brazil, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 6. See also Statement of Sir Leslie Brass of the United Kingdom, ibid.

[293] In the Ad Hoc Committee, the French representative expressed his preference for reliance on the rules prevailing in a refugee's country of residence. He "considered it advisable, in view of the complicated procedure which might be required to establish the distinction between domicile and residence, and in the interests of the refugees, to retain only the reference to the law of the country of residence in paragraph 1": Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 7. This view was voiced as well at the Conference of Plenipotentiaries. The representative of the Netherlands argued that "it would be better to replace the word ['domicile'] by the expression 'habitual residence,' which left no room for misinterpretation": Statement of Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 5. See also Statement of Mr. Fritzer of Austria, ibid. at 6. On the other hand, the Colombian representative preferred the notion of domicile because it "implied a legal relation between a person and his domicile, whereas that of residence implied simply a stay in a place, without any legal relation between the person and the place in question": Statement of Mr. Giraldo-Jaramillo of Colombia, ibid. at 8. And, seemingly oblivious to the views and concerns of most civil law delegates, the British representative asserted simply that "if the concept of 'habitual residence' was introduced, certain countries might find themselves in difficulties, because the concept had not formally existed in their legal system and would require interpretation by the courts. The concept of domicile, on the other hand, was well-known": Statement of Mr. Hoare of the United Kingdom, ibid. at 9. It is noteworthy, however, that even the idea of "residence" may also be prone to imprecision. For example, the Belgian representative expressed his concern about how to deal with the case of "a refugee domiciled in China, where he had his family and his business, [but] who might visit Belgium on a business trip. If he should happen to die in Belgium, it would be ludicrous to determine his status on the basis of the law of the *country of residence*. He would normally be subject to the law of China, his country of domicile [emphasis added]": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 7.

[294] "The notion of habitual residence appears to be emerging as a concept acceptable to lawyers from both common law and civil law traditions, as representing a compromise between domicile and nationality, or at least as a more acceptable connecting factor than

If a refugee does not have a country of domicile,[295] Art. 12 as adopted does allow for reference to the rules on personal status of the refugee's country of "residence."[296] Yet even with this back-up rule,[297] it may sometimes be difficult to know precisely how to define a refugee's personal status. As candidly observed by the American representative, "[t]he article ... raise[d] certain issues because a refugee might be in a transit camp with neither domicile nor residence."[298] Indeed, a refugee who seeks recognition of his or her status, but who has not yet been admitted to a status determination procedure, may also be a person with neither a domicile nor a residence. In keeping with the underlying spirit of Art. 12, however, it would be best to refrain from defining personal status on the basis of the rules existing in the individual's state of origin.[299] Unless the refugee applicant has a stronger attachment to some other state, the logical default position would be to refer to the usual rules which define personal status in the transit or asylum country confronted with the need to determine the individual's personal status.

Which forms of personal status, then, are to be determined by reference to the rules of the refugee's domicile state? While the Chairman of the Ad Hoc Committee was insistent that the Convention provide a clear definition of

domicile to be used as an alternative to nationality. The reform of the law of domicile in England is taking the concept closer to that of habitual residence, which is also not far removed from the understanding of domicile prevalent in United States jurisdictions": Collins, *Dicey*, at 154.

295 The British representative to the Ad Hoc Committee suggested that everyone should be understood to have a country of domicile. "If it meant, in the case of his own country, that the personal status of refugees would be determined in accordance with the law of domicile, he could accept the paragraph, since everyone had a domicile under English law": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 6.

296 "[T]he two criteria – domicile and residence – were not simply juxtaposed in the paragraph under consideration: it was to be noted that the law of the country of domicile was to be applied in the first instance, the law of the country of residence to be applied only if the country of the refugee's domicile was unknown or in doubt. While preference was thus given to the criterion of domicile, the notion of residence had been introduced because it was often easier to establish residence than domicile": Statement of Mr. Giraud of the Secretariat, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 4–5.

297 "Decisions should ... be based wherever possible on 'domicile,' and only exceptionally on 'residence'": Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 6.

298 Statement of Mr. Henkin of the United States, ibid. at 7.

299 See text above, at p. 210. "[T]he types of personal status obtaining in some countries might be incompatible with human dignity, and it could be argued that they were one of the reasons which had led to a person's fleeing his country. It would not be just for Contracting States to apply them": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 9.

relevant forms of personal status,[300] the majority of Committee members successfully resisted his plea.[301] The French and British delegates argued that it was unlikely that any agreement was possible on this subject, given its extraordinary legal complexity.[302] As in the case of the definition of "domicile," it was therefore decided that "it would be for each State which signed the convention to interpret the expressions within it within the framework of its own legislation and in the light of the concepts that were most akin to its own juridical system."[303] But this domestic discretion should be informed by "the Secretariat study . . . [which] was an adequate exposé of the concept of personal status. It was for the contracting states to decide finally upon the elements of that status, in the light of the interpretation given by the Secretariat and of the records of the Committee meetings, without, however, being bound by those texts."[304]

The Secretariat's Study refers to three types of personal status governed by Art. 12.[305] The first, "[a] person's capacity (age of attaining majority, capacity of the married woman, etc.)"[306] elicited no debate during the drafting of the Convention. While the primary concern of the Study involved the preservation of the property rights of married women (discussed below[307]), comparable dilemmas might arise for a woman coming from a state in which women were not allowed to have independent legal or economic status. Such a

[300] Statements of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 3, 11. The same concern was expressed by the Egyptian representative to the Conference of Plenipotentiaries, Mr. Mostafa, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 10: "It would . . . be desirable for the Convention to define what was meant by personal status. The question was undoubtedly a very complex one, and might involve lengthy discussion."

[301] The Israeli delegate argued that the Committee "would have to choose between an ideal convention, which would obtain only a few signatures, and a less satisfactory document which would be ratified by a greater number of States. If the Committee did not want the convention to become a dead letter, it must place a limit upon its ambitions": Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 6.

[302] "[I]t would be dangerous for the Ad Hoc Committee to follow the course advocated by the Chairman . . . Indeed, it was unlikely that such a definition would be in harmony with the various legislations of the States signatories . . . Such a notion should not . . . be defined in a convention dealing solely with refugees, but rather in an instrument dealing with private international law in general": Statement of Mr. Rain of France, ibid. at 4. See also Statement of Sir Leslie Brass of the United Kingdom, ibid. at 5: "He did not consider that the members of the Committee were competent to work out definitions of that kind."

[303] Statement of Mr. Larsen of Denmark, ibid. at 4.

[304] Statement of Mr. Robinson of Israel, ibid. at 8. See also Statements of Sir Leslie Brass of the United Kingdom, ibid.; Mr. Kural of Turkey, ibid.; and Mr. Rain of France, ibid. at 9.

[305] United Nations, "Statelessness," at 24.

[306] Ibid.

[307] See text below, at pp. 221–222.

woman might find – if reference were made by the reception state to the rules on status in the country of origin – that "[s]he [could] neither sign a lease, acquire property nor open a bank account. Her economic activity [would be] hampered and her chances of settling down and becoming assimilated [would be] jeopardized."[308] By virtue of Art. 12, however, the refugee woman is entitled to have her personal status assessed by reference to the norms prevailing in her new country of domicile (or residence, if domicile had yet to be acquired). Similarly, a refugee coming from a country in which the age of majority is, for example, twenty-one years old to an asylum state in which an individual is deemed an adult at eighteen years old, is entitled to the benefit of that lower age of majority.

The second head of personal status identified in the Study is status relevant to "family rights (marriage, divorce, recognition and adoption of children, etc.) ... [and] [t]he matrimonial regime in so far as this is not considered a part of the law of contracts."[309] It seems clear that these forms of status were uppermost in the minds of the drafters,[310] in particular because some states had taken the view that the non-citizen status of refugees meant that authorities in the asylum country could not apply their own rules to decide on eligibility for entry into or dissolution of a marriage.[311] But by virtue of Art. 12's stipulation that the personal status of refugees is to be governed by the rules of the domicile state, "[t]he authorities of the country of [domicile] will therefore be competent to celebrate marriages in accordance with the rules regarding form and substance of the place where the marriage is celebrated. Similarly courts will be competent to decree divorces in accordance with the *lex fori* establishing the conditions for divorce."[312] The breadth of relevant forms of status is clear from the explanatory notes to the paragraph of the draft article originally specifically devoted to family law matters, which observed "that personal status includes family law (that is to say filiation, adoption, legitimation, parental authority, guardianship and curatorship, marriage and divorce) and the law concerning successions."[313] While this paragraph was later deleted as a superfluous elaboration of the basic rule set out in paragraph 1, it is clear that there was agreement that a broad-ranging set of refugee family law status concerns is to be governed

[308] United Nations, "Statelessness," at 25. [309] Ibid. at 24.
[310] See text above, at pp. 211–212.
[311] Among the specific concerns identified in the Study were requirements to produce identity or other documents available only from the authorities of the country of origin, the production of civil registration documents, and possession of particular kinds of residence permits: United Nations, "Statelessness," at 25–26.
[312] Ibid. at 25. [313] Secretary-General, "Memorandum," at 25.

by the law of the domicile state,[314] whatever the rules generally applicable to other non-citizens.[315]

Third and finally, the Study suggests that Art. 12 governs personal status relevant to issues of "[s]uccession and inheritance in regard to movable and in some cases to immovable property."[316] Specific reference was required because of the ambiguity about whether such concerns were squarely matters of family law status.[317] The ambivalent phrasing ("and in some cases to immovable property") follows from the fact that inheritance of real property is not in all jurisdictions a matter regulated by personal status.[318] Clearly, the duty to assess a refugee's personal status by reference to the rules of the domicile state gives the refugee no practical advantage where personal status is not relevant (for citizens or others) to particular forms of succession or inheritance.

[314] Some substantive concerns were raised in relation to the details of the proposed Art. 12(2) (see e.g. the comments of Mr. Guerreiro of Brazil, UN Doc. E/AC/32/SR.9, Jan. 24, 1950, at 5). But in the end, no objection was taken to the request of the representative of the International Refugee Organization "to include in the Committee's report a paragraph explaining that paragraph 2 had been deleted because, in the opinion of the Committee, paragraph 1 fully covered the points raised in paragraph 2 and also because the law differed considerably in various States, particularly with regard to the questions referred to in paragraph 2. The report might then state that the Committee had unanimously agreed that the questions dealt with in paragraph 2 ought not to be governed by the rules concerning the substance, form and competence of the national law, even in the countries in which such questions were usually governed by that law": Statement of Mr. Weis of the IRO, ibid. at 13–14. The actual text of the relevant passage in the Committee's report is significantly more succinct. It notes simply that "[t]he Committee decided that it was not necessary to include a specific reference to family law, as this was covered by paragraph 1": Ad Hoc Committee, "First Session Report," at Annex II.

[315] "[T]he main purpose was to regulate the position of those countries where aliens were subject to their own national law": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 9. This was unequivocally accepted by, for example, the French delegate, who agreed that "there could be no further question of applying national law to the personal status of refugees and there was no distinction to be made between the various countries": Statement of Mr. Rain of France, ibid.

[316] United Nations, "Statelessness," at 24.

[317] The French delegate posed a question (which was never answered on the record) to the Secretariat, namely "whether it considered that the law of succession was part of family law and whether it should therefore be understood that the rules of substance of the country of domicile ... applied both to family law, particularly to the celebration and dissolution of marriage, and to the law of succession": Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 6.

[318] "In matters of succession ... the transfer of real estate [in Brazil] was carried out in accordance with the legislation of the country where the real estate was, and not in accordance with that of the refugee's country of domicile": Statement of Mr. Guerreiro of Brazil, ibid. at 5.

It should be emphasized that these three forms of personal status – namely, status relevant to personal capacity, family rights and the matrimonial regime, and succession and inheritance – were agreed to simply as general points of reference.[319] They neither bind states as a matter of formal law, nor restrict the forms of personal status potentially governed by Art. 12.[320]

The final concern of Art. 12, addressed by para. 2, is to avoid situations in which the determination of a refugee's personal status by reference to the rules of the domicile country would result in the impairment of rights acquired by the refugee in his or her country of origin.[321] Under this provision, "[r]ights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State." Two matters were of particular concern.

First, it was felt "undesirable to modify without reason the capacity of married women or the matrimonial regime."[322] To the extent that the position of women in the country of origin was superior to that which prevailed in the asylum state, application of the general rule of Art. 12 (that is, determination of personal status on the basis of the rules of the country of domicile) might result in a deprivation of acquired rights:

> At the time of their marriage these women may have been residing in their country of origin and have possessed the nationality of that country. In many cases, under their national law, marriage did not diminish their capacity but required the complete separation of the property of each spouse. Having become [a refugee] and being resident in a reception country the law of which restricts the capacity of married women and, where there is no marriage contract, requires the married couple to observe a matrimonial regime differing from that of separate estate, a woman in this position often finds her rights actually disputed.[323]

[319] See text above, at p. 218.

[320] Indeed, the British representative observed "that the definition given in the Secretariat study gave only a very vague idea of the concept of personal status": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 8. The Turkish delegate concurred, noting that "[i]n point of fact, the concept of personal status would be determined by the laws and customs of each country, with due regard to the preparatory work of the convention": Statement of Mr. Kural of Turkey, ibid.

[321] "Paragraph 2 is the result of the generally accepted validity of 'acquired (or vested) rights' which ought not be disturbed": Robinson, *History*, at 103.

[322] Secretary-General, "Memorandum," at 26. See also Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 8: "[P]aragraph 2 provided for exceptional treatment for refugees in a very narrow field ... The paragraph as a whole mainly concerned property rights connected with marriage, in respect of which it would be difficult for refugees to comply with the law of their country of domicile."

[323] United Nations, "Statelessness," at 25.

Second, the French representative voiced his desire to ensure respect for spousal rights resulting from "the acts of religious authorities to whom refugees were amenable, if performed in countries admitting the competence of such authorities."[324] If only secular marriage were authorized in the asylum state, a refugee couple might find that its union was not recognized there.

In each case, there was agreement that it would be inappropriate to allow the operation of the general rule in Art. 12 to deprive the refugee of his or her status-based acquired rights.[325] In a fundamental sense, then, Art. 12(2) goes a substantial distance towards meeting the non-governmental concern expressed at the Conference of Plenipotentiaries that greater deference should be paid to the preferences of the refugees themselves about how their personal status should be determined.[326] While not allowing refugees to elect the basis upon which their personal status is decided, Art. 12 read as a whole will often give refugees the best of both worlds. For example, a woman who comes from a country where the separate legal identity of women is not recognized is entitled under Art. 12(1) to claim the benefit of a more progressive status regime in her new country of domicile. But if the status of women is inferior in the domicile state to that which prevailed in her state of origin, she may nonetheless invoke Art. 12(2) to insist on respect for rights previously acquired under the more favorable regime.

In its original form, Art. 12(2) would have safeguarded "[r]ights acquired under a law other than the law of the country of domicile."[327] On the suggestion

[324] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.9, Jan. 23, 1950, at 14.

[325] Paragraph 2 of Art. 12 expressly exempts "[r]ights previously acquired by a refugee and dependent on personal status, *more particularly rights attaching to marriage* [emphasis added]." While less explicit than the Secretary-General's original draft (which set out that "rights attaching to marriage" included "matrimonial system, legal capacity of married women, etc."): Secretary-General, "Memorandum," at 24), the deletion of the explanatory language was without any evident substantive effect: Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 15. Moreover, when the American representative suggested the deletion of the explicit reference to marital rights altogether, the Chairman successfully argued "that those rights were indeed of particular importance and that special reference should be made to them": Statement of the Chairman, Mr. Chance of Canada, ibid. On the question of marital rights acquired by virtue of a religious ceremony, the drafting history records that "[t]he Chairman explained, after consultation with the representative of the Assistant Secretary-General, that the Secretariat had considered that the provisions of [paragraph 2] covered all acquired rights including those resulting from the acts of religious authorities to whom the refugees were amenable, if performed in countries admitting the competence of such authorities": Statement of the Chairman, Mr. Chance of Canada, ibid. at 14. The French representative thereupon withdrew his amendment that would have explicitly made this point, "not because there was any intention to rescind those provisions but because they were covered by the general terms of . . . the Secretariat draft": Statement of Mr. Rain of France, ibid. at 15.

[326] See text above, p. 213.

[327] Secretary-General, "Memorandum," at 24.

of the Belgian representative,[328] and taking account of the British delegate's insistence that the goal of Art. 12(2) was to ensure that "an individual's personal status and acquired rights before he became a refugee should be respected,"[329] the Second Session of the Ad Hoc Committee amended the text to refer to rights "previously acquired."[330] The essential concern was that while refugees should not forfeit status-based rights acquired prior to their admission to their new state of domicile, asylum states should not be obligated to respect any rights acquired by a refugee who might choose to leave his or her new domicile state temporarily in order to acquire rights not available in that country.

This point was expressly canvassed during debate on a (subsequently deleted) paragraph which stipulated that "[w]ills made by refugees ... in countries other than the reception country, in accordance with the laws of such countries, shall be recognized as valid."[331] While the explanatory comment on the paragraph made clear that its purpose was to preserve the legal force of wills made by the refugee pre-departure, but which had not been amended to conform to the specific requirements of the state of reception,[332] the Belgian delegate observed that there might well be a conflict between the text itself and its principled objective:

> Thus in the case of a Polish refugee who had spent some time in Germany and had then taken up permanent residence in Belgium, a will made in Poland would, according to the comment, be valid in Belgium, whereas according to [the text] it would be valid if it had been made either in Poland or in Germany.[333]

In the discussion that followed, the essence of the Belgian delegate's concern was recognized. But it was made clear that the key question was temporal, not jurisdictional. Mr. Larsen of Denmark, for example,

> considered that it was reasonable to include in the article relating to the personal status of refugees a provision guaranteeing the validity of wills made by them *before their arrival in the countries which became their country of domicile or residence*. On the other hand, he did not see why that provision should be drafted so as to grant the refugees, after their arrival

[328] Statement of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 4.
[329] Statement of Sir Leslie Brass of the United Kingdom, ibid. at 8.
[330] Ad Hoc Committee, "Second Session Report," at 17.
[331] Secretary-General, "Memorandum," at 24.
[332] "It frequently happens that refugees have made a will in their country of origin in accordance with the provisions of the law of that country and are convinced that the will they brought away with them remains valid. The will may not however conform to the rules as regards form and substance of the country of residence. As a result, persons who believe they have taken the necessary steps to protect the interests of their next of kin die intestate": ibid. at 26.
[333] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 17.

> in the country of domicile or of residence, the privilege of making wills in other countries in accordance with the laws of those countries and of having those wills recognized as valid in the reception countries; privileges of that nature were never granted to aliens and there was consequently no reason why they should be given to refugees [emphasis added].[334]

Similarly, the Chairman and the French representative affirmed that the focus should be on whether the will had been drawn up prior to arrival in the asylum country, whether in the state of origin or elsewhere.[335] A purposive interpretation of Art. 12(2) would thus safeguard status-based rights acquired prior to arrival in the asylum country, whether in the refugee's state of origin or in any intermediate country.

The decision to delete a specific textual reference to the continuing validity of wills made by refugees before arrival in the asylum state was reached for two reasons.[336] On the one hand, it was felt that there was no need to affirm the legality of wills simply because the formalities of their execution abroad did not correspond with those of the domicile state.[337] As the Belgian representative observed, "if the only purpose of [the provision] was to recall the principle *locus regit actum*, the paragraph was wholly unnecessary, inasmuch as the principle was generally recognized and respected."[338] Conversely, there was no agreement to honor refugee wills executed prior

[334] Statement of Mr. Larsen of Denmark, ibid. at 17. See also Statement of Mr. Rain of France, ibid. at 19: "A refugee who had made a will in his country of origin *or in transit* thought that his will was valid ... That was what the text said; that was, in fact, what should be said. The only amendment necessary was to make it clear that the provision applied to wills made before arrival in the country of reception [emphasis added]."

[335] "[I]f the provision were made only for wills drawn up in the country of origin, [the paragraph] would be of academic interest only; there was every reason to believe that the country of origin would not be prepared to allow the heirs to take possession of the property left to them, even if it was still in existence": Statement of the Chairman, Mr. Chance of Canada, ibid. at 19.

[336] It is important to note, however, that "the vote in favour of the deletion of the reference to wills should not be interpreted as weakening in any way the force of the paragraph ... dealing with acquired rights": Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 4. In response, "[t]he Chairman confirmed Mr. Rain's interpretation of the vote. The reference to wills had been deleted because it would entail conflict with domestic law. The courts of reception countries could be relied upon to deal fairly with refugees in the matter": Statement of the Chairman, Mr. Chance of Canada, ibid.

[337] "[T]here seemed to be general agreement regarding the validity of wills made by refugees in their country of origin in so far as the form was concerned": Statement of Mr. Cuvelier of Belgium, ibid. at 3.

[338] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 18. The Secretariat had, in fact, suggested that this was the sole purpose of the paragraph. "[T]he Secretariat had intended to refer to the form of a will rather than to its provisions. For example, the will of a Russian refugee in France would be recognized as valid with respect to form; the validity of its provisions, however, would have to be determined according to local law or, in the case of landed property, according to the law of the country in which the property was situated": Statement of Mr. Giraud of the Secretariat, ibid. In fact, however, the explanatory notes to the draft under consideration make clear that the

to arrival to the extent that they contained substantive provisions contrary to the laws of the asylum state.[339] The British representative

> feared that the proposal would actually permit the refugee, by his will, to alter the law of the reception country. For example ... a refugee residing in England could, by means of a will made in his country of origin, tie up property in England in perpetuity.[340]

The example provided by the Danish delegate was perhaps more poignant:

> Some countries, such as Denmark, did not allow the testator to disinherit his children; the children must be assured of their rightful share, and the testator could dispose freely of the remaining portion only. Other countries, such as the United Kingdom, allowed the testator to dispose of the whole of his estate as he pleased.[341]

In the end, the drafters acknowledged only a commitment in principle to encourage courts in asylum countries "wherever possible, [to] give effect to the wishes of the [refugee] testator."[342] On matters of substance, however, most states felt that the substantive validity of refugee wills should be subject to the usual legal and public policy concerns pertaining in the asylum country.[343]

Indeed, the drafters agreed to a public policy limitation on the duty to honor the previously acquired status-based rights of refugees. Following from the debate about refugee wills, it was agreed by the Ad Hoc Committee "that the article did not require rights previously acquired by a refugee to be recognized by a country if its law did not recognize them on grounds of public policy or otherwise. It had been decided that the provisions of the article were in any case subject to that general reservation, which was implied and need not therefore be written into it."[344] The Conference of Plenipotentiaries, however, decided to make the public policy limitation

paragraph was intended to safeguard refugee wills "as regards form and substance": Secretary-General, "Memorandum," at 26.

339 "A will drawn up in the country of origin might contain clauses which were not in conformity with the laws of the country of residence, particularly those dealing with public order": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 2.

340 Statement of Sir Leslie Brass of the United Kingdom, ibid. at 3.

341 Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 17.

342 Ad Hoc Committee, "First Session Report," at Annex II.

343 "The Chairman, speaking as the representative of Canada, acknowledged that the Government of the reception country would have to make some derogation to domestic law, thus placing the refugee in a favoured position. It might therefore be wiser to delete [the specific reference to refugee wills]": Statement of Mr. Chance of Canada, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 3. The provision was thereupon deleted by a vote of 7–2 (2 abstentions): ibid.

344 Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 8. See also Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 9: "He wondered whether ... rights [should be

explicit. Mr. Hoare of the United Kingdom proposed that the phrase, "provided the right is one which would have been recognized by the law of that State had he not become a refugee,"[345] be added to Art. 12(2). This amendment would meet his concern

> that States should not be required to respect rights previously acquired by a refugee when they were contrary to their own legislation. A State could not protect a right which was contrary to its own public policy.[346]

The specific example considered by the Conference was "the position of a divorced refugee who had obtained his divorce in a country the national legislation of which recognized divorce, but [who] was resident in a country, like Italy, where divorce was not recognized."[347] It was agreed that the asylum country could not reasonably be asked to issue documentation certifying the divorce, since "if a particular country did not recognize divorce, it could not possibly issue a certificate authenticating such a status ... [T]he right [must be] one which would have been recognized by the law of the particular State had the person in question [not] become a refugee."[348] This may be technically right, since Art. 12(2) requires only respect for previously acquired, status-based rights, not an affirmative duty to certify such entitlements.

Of more concern, however, the Belgian and French representatives opined that "[t]he purpose of the United Kingdom amendment was to place refugees on the same footing as aliens in respect of rights dependent on personal status ... [I]n the case cited by the French representative the courts of the receiving country would have to decide whether they would have recognized a divorce granted in the same circumstances to two aliens who were not refugees."[349] While the context of the remark suggests a more limited purport,[350] the comment as stated cannot be reconciled to the text of Art. 12, read as a whole.

made] dependent not only on compliance with the formalities prescribed by the law of the country of domicile but also on the [exigencies] of public order."

345 Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.25, July 17, 1951, at 4.

346 Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 13. See also Statements of Mr. Schurch of Switzerland, ibid. at 12: "Swiss law recognized acquired rights, but only subject to provisions concerning public order"; and the President, Mr. Larsen of Denmark, ibid. at 15: "It was essential to make some provision ensuring that such rights did not conflict with the legislation of the country in which the refugee became domiciled."

347 Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.25, July 17, 1951, at 4–5.

348 Statement of Mr. Hoare of the United Kingdom, ibid. at 5.

349 Statement of Mr. Herment of Belgium, ibid. at 5–6. See also Statement of Mr. Rochefort of France, ibid. at 6.

350 "[I]n principle States which forbad divorce did so only to their own nationals. It was solely for reasons of public order that a State might decide not to recognize divorces

The essential reason for Art. 12 is precisely to exempt refugees from the rules ordinarily applying to (non-refugee) aliens,[351] not to assimilate them to aliens. And while the British amendment – which was unfortunately not discussed further before being approved by the Conference[352] – was clearly intended to authorize state parties to refrain from the recognition of forms of previously acquired status which "was contrary to its own public policy,"[353] there is absolutely no basis to assert that its goal was to undermine the already agreed, essential goals of Art. 12. Thus, a reception state which does not recognize divorce as a matter of public law or policy cannot be compelled by virtue of Art. 12(2) to recognize a refugee's rights flowing from divorce.[354] If, on the other hand, the reception state has no domestic impediment to divorce, but refrains for policy reasons from recognizing the rights following from the divorce abroad of non-citizens, it would nonetheless be required by Art. 12(2) to recognize the rights of refugees accruing from divorce. In essence, the only legal or public policy concerns which are relevant to Art. 12(2) are those which apply generally in the reception state, not those which apply to non-citizens or a subset thereof. Robinson, for example, suggests that "rights resulting from polygamy in a country where it is prohibited"[355] could legitimately be resisted under the public policy exception to Art. 12(2).

The final requirement for availment by a refugee of Art. 12(2) is that he or she comply, "if this be necessary, with the formalities required by the law of [the contracting] State." This requirement was in the original draft of the Convention, and mirrors the precedents of the 1933 and 1938 Refugee Conventions.[356] The essential purpose of this requirement is "to protect the interests of third parties."[357]

between foreigners or not to authorize them to divorce in its territory": Statement of Mr. Herment of Belgium, ibid. at 5.

[351] See text above, at pp. 210–211. See also Weis, *Travaux*, at 107: "The main intent of the provision is, indeed, to subtract the refugee from the application of the law of the country of his nationality, considering that they have left that country and that that law may have undergone changes with which the refugees do not agree."

[352] See UN Doc. A/CONF.2/SR.25, July 17, 1951, at 9.

[353] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 13.

[354] It may be, however, that a general prohibition of divorce is no longer permitted under international law. "A special problem ... results from the question of the permissibility of prohibitions of divorce, as continue to exist in some States influenced by Canon law ... The systematic analysis of Art. 23 [of the Civil and Political Covenant] in light of its wording as compared with similar provisions under international law and its historical background ... leads to the result that an *absolute divorce prohibition* in conjunction with the precept of monogamy – i.e., when persons who are in agreement that their marriage is ruined are compelled by the State to lead a new family life without the statutory protection of a 'legal family' – not only constitutes interference with private and family life pursuant to Art. 17, but also *violates their right to marry* pursuant to Art. 23(2) [emphasis in original]": M. Nowak, *UN Covenant on Civil and Political Rights* (1993) (Nowak, *ICCPR Commentary*), at 412.

[355] Robinson, *History*, at 103. [356] Secretary-General, "Memorandum," at 26. [357] Ibid.

Robinson suggests, for example, that "the law of the country in which recognition is sought may prescribe that foreign adoptions have to be confirmed by [a] local court or that the special matrimonial regime (separation of property or the right of the husband to administer the property of his wife) be registered in certain records."[358] This requirement is thus not a substantive limitation on the scope of Art. 12(2) rights, but merely an acknowledgment that a refugee's previously acquired rights are not immune from the asylum state's usual requirements to register or otherwise give general notice of the existence of rights as a condition precedent to their invocation.

3.3 Exceptional standards of treatment

Where refugee rights are guaranteed in the Convention only at the baseline level of assimilation to aliens generally – rights to internal freedom of movement, property, self-employment, professional practice, housing, and post-primary education[359] – the net value of the Refugee Convention may indeed be minimal. For the most part, states are required to grant these rights to refugees only to the extent they have freely chosen to extend comparable entitlements to other admitted aliens. Conversely, if only citizens or most-favored foreigners (or no non-citizens at all) are entitled to these rights, they may legitimately be denied to refugees. As the American representative to the Ad Hoc Committee succinctly observed, "when the Convention gave refugees the same privileges as aliens in general, it was not giving them very much."[360]

The major caveat to this conclusion follows from the fact that the general standard of treatment under Art. 7(1) incorporates by reference all general norms of international law. As noted above, this means that general principles both of international aliens law and of international human rights law accrue automatically to the benefit of refugees.[361] International aliens law adds to the baseline standard of treatment at least in a negative sense: while refugees need not be granted the right to acquire private property, their legitimately acquired property may not be taken from them without adequate compensation.[362] As there is still no agreement on the codification of an affirmative right to own private property as a matter of international human rights law, even this modest protection is of some value.[363]

In most cases, general norms of international human rights law are of the greatest value in supplementing the content of refugee rights defined at the

[358] Robinson, *History*, at 104. [359] See chapter 3.2.1 above, at pp. 198–199.
[360] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 7.
[361] See chapter 3.2.1 above, at p. 197. [362] See chapter 2.1 above, at p. 77.
[363] The right of refugees to protection of property is discussed below, at chapter 4.5.1.

"aliens generally" standard of treatment.[364] For example, the Civil and Political Covenant guarantees freedom of internal movement to "everyone" lawfully within a state's territory, subject only to specific types of limits applied on a non-discriminatory basis.[365] By virtue of Art. 7(1) of the Refugee Convention, once refugees are lawfully present – that is, once they have been admitted to a status verification procedure, temporary protection regime, or authorized de facto to remain without investigation of their need for protection[366] – any continuing constraints on internal freedom of movement must thereafter be justified by reference to the standards of the Civil and Political Covenant.[367]

Similarly, the other four refugee rights defined at the "aliens generally" baseline standard of treatment – rights to self-employment, professional practice, housing, and secondary and higher education – are the subject of cognate rights in the Economic, Social and Cultural Covenant.[368] At least in developed states, the incorporation by reference of these norms under Art. 7(1) of the Refugee Convention means that the rights must be guaranteed on the terms set by the Covenant to refugees without discrimination.[369] But as previously noted, because the Economic, Social and Cultural Covenant authorizes less developed states to withhold economic rights from non-citizens,[370] the dilemma for the majority of refugees who are protected in such states may be acute.

Happily, most rights in the 1951 Convention are to be extended to refugees not at the baseline standard, but at a higher standard: on par with the rights extended to most-favored foreigners, to the same extent granted citizens of the asylum state, or simply in absolute terms. Where a right is defined to require treatment at any of these higher levels, protections beyond the general standard accrue to refugees.[371] By explicitly requiring states to meet an

[364] See chapters 1.2 and 2.5.4 above.

[365] Civil and Political Covenant, at Arts. 12 and 2(1). As previously noted, aliens have been held by the Human Rights Committee to benefit from protection against discrimination on the grounds of "other status": see chapter 2.5.5 above, at p. 127.

[366] See chapter 3.1.3 above.

[367] The right of refugees to enjoy internal freedom of movement is discussed below, at chapters 4.2.4 and 5.2.

[368] Economic, Social and Cultural Covenant, at Arts. 6(1), 11(1), and 13(2)(b).

[369] The broad margin of appreciation afforded states under prevailing notions of non-discrimination law remains problematic, however. See chapter 2.5.5 above, at pp. 129–145.

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

[371] "[A] distinction should be made between the clause relating to exemption from reciprocity and the provisions of some articles which specified whether refugees should be accorded the most favorable treatment or be subject to the ordinary law. Where such provisions were set forth in an article there was no need to invoke the clause on exemption from reciprocity. It was obvious, in fact, that where refugees were accorded the most favorable treatment there would be no point in invoking the clause respecting exemption from reciprocity": Statement of Mr. Giraud of the Secretariat,

exceptional standard of treatment, the Convention requires that refugees benefit from treatment superior to that enjoyed by aliens generally.[372] Indeed, the pervasive incorporation of these exceptional standards of treatment means that the Refugee Convention is in many ways at least as generous – and in some cases, more generous – than earlier refugee conventions which relied simply on a waiver of requirements of reciprocity for refugees.

3.3.1 Most-favored-national treatment

Two rights in the Refugee Convention – the rights to freedom of non-political association[373] and to engage in wage-earning employment[374] – are guaranteed to refugees to the same extent enjoyed by most-favored foreigners.[375] This means that refugees may automatically claim the benefit of all guarantees of associative freedom and to engage in employment extended to the nationals of any foreign state. Refugees may nonetheless still be granted less favorable treatment in relation to these rights than that enjoyed by citizens of the host country, subject to the requirements of general non-discrimination law.[376]

As earlier observed, governments were not prepared routinely to assimilate refugees to the citizens of states with which they had special economic or political relationships.[377] There was a general belief, however, that the right to work (and the related right to freedom of association, particularly to join trade unions) warranted treatment at this standard. In proposing that

UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 5–6. The representative of the United Kingdom took the lead on this issue, noting that he "did not see how there could be any question of a reciprocity provision applying except in cases where the treatment of the refugee was to be the same as that accorded to foreigners generally": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 4–5. This led the Chairman to observe that "the draft proposed by the United Kingdom representative accurately stated what was in the minds of the Committee members and he would therefore invite them to accept it": Statement of the Chairman, Mr. Chance of Canada, ibid. at 6.

[372] See e.g. Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 11: "His delegation believed that refugees should be treated better than other aliens in some respects, and that the provisions in the draft Convention which accorded better treatment to refugees than to aliens were not of such major importance as to create grave problems for many countries. Therefore, if it could be agreed that in general a minimum treatment should be accorded to refugees and that that treatment should be no worse that that given to aliens in general, and that in some respects the refugees should even have certain advantages, the articles could safely be left to the Drafting Committee."

[373] The rights of refugees to freedom of expression and association are discussed below, at chapter 6.7.

[374] The right of refugees to engage in wage-earning employment is discussed below, at chapter 6.1.

[375] Refugee Convention, at Arts. 15, 17(1).

[376] See chapter 2.5.5 above.

[377] See chapter 3.2.1 above, at pp. 197–199.

refugees enjoy preferred access to the right to work, the French representative observed that

> it was legitimate and desirable to accord the most favourable treatment to refugees to engage in wage-earning employment, and not only the treatment accorded to foreigners generally, because refugees by their very nature were denied the support of their Governments and could not hope for governmental intervention in their favour in obtaining exceptions to the general rule by means of conventions. France was thus merely being faithful to the spirit which had heretofore guided United Nations action in favour of refugees: the purpose of that action was to obtain for refugees the advantages which Governments sought to have granted to their own subjects.[378]

As the American representative to the Ad Hoc Committee put it, "without the right to work, all other rights were meaningless."[379]

The Committee therefore agreed to break with precedent,[380] and based the Convention's right to work on a French proposal that refugees be granted "the most favourable treatment given to nationals of a foreign country."[381] Governments accepted this exceptional standard of treatment with clear awareness of the impact of their decision. In its comments on the Ad Hoc Committee's draft, for example, Austria recognized that the standard amounted to a "most favoured nation clause" that would require that "hundreds of thousands of refugees" be assimilated to the "relatively small" number of foreigners traditionally granted most-favored-national access to employment.[382] The United Kingdom commented that this standard would mean that refugees would be allowed to work as steamship pilots, a job traditionally reserved for British and French citizens.[383] Belgium insisted that it would be forced to enter a reservation to the article "in view of the economic and customs agreements existing between Belgium and certain neighbouring countries."[384] Norway indicated that it, too, would have to

[378] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 2.

[379] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 12.

[380] "[T]he text proposed by the French delegation represented an advance upon the provisions of previous conventions ... While it was understandable that some delegations should hesitate to accept the innovation ... it would be surprising if the Committee should wish to retreat from the results obtained by the previous Conventions, and to end with a text which would contribute nothing towards the improvement of the conditions of the refugee": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 8–9.

[381] France, "Draft Convention," at 6.

[382] United Nations, "Compilation of Comments," at 43.

[383] Ibid. at 44; Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 14.

[384] Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 8.

reserve on the exceptional standard of treatment because of "the regional policy of the Scandinavian countries in respect of the labor market."[385]

The inevitability of reservations notwithstanding,[386] the President of the Conference of Plenipotentiaries appealed to states to "seek the golden mean, and, if possible, by precept and example, to encourage others to withdraw their reservations at a later stage. If the Conference worked along those lines he believed it might be possible to arrive at a just and effective instrument."[387] In the end, the Conference rejected the two extremes – assimilation of refugees to nationals,[388] and treatment at the residual standard of the rights of aliens generally[389] – and agreed that refugees would be entitled to engage in

[385] Statement of Mr. Anker of Norway, ibid. at 14.

[386] As observed by the Chairman of the Ad Hoc Committee, "[i]t had, of course, been realised that the inclusion of provisions which, without representing ideals to strive for, were too generous for some Governments to accept, would lead to their making reservations, but it had been thought that such a course might in the long run have a good effect even on Governments which felt themselves unable to accord the treatment prescribed in the Convention immediately upon signing it. Other such cases had arisen in the past where refugees and those who had the interests of refugees at heart had addressed appeals to Governments applying low standards, pointing to the higher standards applied by other Governments, and so had gradually produced an improvement in their policies": Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 11–12. In fact, a large number of states have entered either sweeping reservations or other major qualifications to the duty to treat refugees as most-favored nationals for purposes of either or both of Arts. 15 and 17. These include Austria, Bahamas, Belgium, Botswana, Ethiopia, Iran, Ireland, Latvia, Liechtenstein, Malawi, Mexico, Monaco, Papua New Guinea, Sierra Leone, Uganda, Zambia, and Zimbabwe. More modest qualifications have been entered by Angola, Chile, Denmark, Ecuador, Finland, France, Honduras, Jamaica, Madagascar, Mozambique, Norway, Sweden, and the United Kingdom. Yet Mr. Larsen's optimism has been partly borne out. The reservations to Art. 17 entered by Brazil, Greece, Italy, and Switzerland have been revoked: UNHCR, Declarations and Reservations to the 1951 Convention relating to the Status of Refugees, www.unhcr.ch (accessed July 15, 2003).

[387] Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF/2/SR.9, July 6, 1951, at 14. As the American representative stated, it was best to "incorporate in the convention a clause providing for a real improvement in the refugees' [right to work], even if that clause were to result in reservations which, it might be hoped, would not be very numerous or extensive": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 8.

[388] This approach was strongly promoted by Yugoslavia, with the support of Germany. See UN Doc. A/CONF/2/SR.9, July 6, 1951, at 4–5.

[389] "A country such as Italy . . . could definitely not consider assuring commitments regarding the employment or naturalization of foreign refugees, which could only add to the difficulties already confronting the Italian economy . . . [T]he Italian Government could do no more than allow refugees to benefit by the laws and regulations concerning work, employment, salaried professions, insurance and so on, which at the moment applied to all aliens resident in Italy": Statement of Mr. Del Drago of Italy, ibid. at 9.

employment on the basis of "the most favourable treatment accorded to nationals of a foreign country in the same circumstances."[390]

In addition to the relevant references made by the drafters of the Convention,[391] a helpful sense of the breadth of this exceptional standard of treatment can be distilled from the text of the reservations and declarations entered by state parties which have not agreed to grant most-favored-national treatment to refugees. Most obviously, most-favored-national treatment includes the benefits of bilateral and multilateral arrangements with special partner states. The "preferential treatment" which the nationals of Brazil and Portugal enjoy in each other's territory;[392] the "privileges" of Danish, Finnish, Icelandic, Norwegian, and Swedish citizens in each of those countries;[393] and the "rights which, by law or by treaty" are granted by Spain to the nationals of Andorra, the Philippines, Portugal, and Latin America are examples.[394] The benefits of special regional and sub-regional arrangements are included[395] – for example, the privileges enjoyed by Central Americans in states of that area,[396] and nationals of states belonging to the East African Community and the African Union.[397] More generally, most-favored-national treatment includes any privileges accorded to foreign citizens under "special co-operation agreements,"[398] "commonwealth-type" arrangements,[399] "agreements . . . for the purpose of establishing special conditions for the transfer of labor,"[400] "establishment" treaties,[401] and by virtue of any "customs, economic or political agreements."[402] Perhaps most important, the very nature of the most-favored-national standard means that it is inherently subject to evolution. As observed by Robinson,

> the "most favorable treatment accorded to nationals of a foreign country" is a dynamic concept: it varies from country to country, and from time to time. Every new agreement with a foreign country may create a new basis

[390] Refugee Convention, at Art. 17(1). The language in Art. 15 (right of association) is the same.
[391] See text above, at pp. 231–232.
[392] See reservations of Brazil and Portugal: UNHCR, Declarations and Reservations to the 1951 Convention relating to the Status of Refugees, www.unhcr.ch (accessed July 15, 2003).
[393] See reservations of Denmark, Finland, Norway, and Sweden: ibid.
[394] See reservation of Spain: ibid.
[395] See reservations of Belgium, Guatemala, Iran, Luxembourg, Netherlands, Spain, and Uganda: ibid.
[396] See reservation of Guatemala: ibid. [397] See reservation of Uganda: ibid.
[398] See reservation of Angola: ibid.
[399] See reservation of Portugal upon acceding to the Protocol: ibid. See also reservation of Spain, safeguarding special rights with the nationals of "the Latin American countries": ibid.
[400] See reservation of Norway: ibid. [401] See reservation of Iran: ibid.
[402] See reservations of Belgium, Iran, Luxembourg, Netherlands: ibid.

for the treatment, and the expiration of existing conventions may reduce the scope of the treatment.[403]

3.3.2 National treatment

Refugees are to be assimilated to citizens of the asylum state for purposes of religious freedom,[404] the protection of artistic and industrial property rights,[405] entitlement to assistance to access the courts (including legal aid),[406] participation in rationing schemes,[407] enrolment in primary education,[408] inclusion in public welfare systems,[409] entitlement to the benefits of labor legislation and social security,[410] and for purposes of tax liability.[411] This exceptional standard of treatment explicitly proscribes any attempt to justify distinctions between the treatment of refugees and citizens, as these articles usually require that the rights afforded refugees be "the same" as those enjoyed by nationals.[412] Taxes imposed on refugees may not be "other or higher than those which are or may be levied on [the host state's] nationals in similar situations."[413] And perhaps most interesting, refugees enjoy "treatment at least as favorable as that accorded to ... nationals"[414] to practice their religion and to ensure the religious education of their children. As elaborated below, this is the only provision in the Convention premised on an explicit commitment to substantive equality between refugees and citizens.[415]

With the exception of the right to religious freedom, each of these rights was defined to require assimilation to citizens in the first draft of the treaty proposed by the Secretary-General in January 1950.[416] The explanations provided there for requiring national treatment are instructive. In some

[403] Robinson, *History*, at 110.
[404] The right of refugees to freedom of religion is discussed below, at chapter 4.7.
[405] The right of refugees to the protection of intellectual property rights is discussed below, at chapter 6.5.
[406] The right of refugees to assistance to access the courts is discussed below, at chapter 6.8.
[407] The right of refugees to benefit from rationing systems is discussed below, at chapter 4.4.
[408] The right of refugees to education is discussed below, at chapter 4.8.
[409] The right of refugees to benefit from public welfare systems is discussed below, at chapter 6.3.
[410] The right of refugees to fair working conditions is discussed below, at chapter 6.1.2; the right to social security is discussed below, at chapter 6.1.3.
[411] The right of refugees to equity in taxation is discussed below, at chapter 4.5.2.
[412] Refugee Convention, at Arts. 14, 16(2), 20, 22(1), 23, and 24(1).
[413] Ibid. at Art. 29. [414] Ibid. at Art. 4.
[415] Substantive equality may, however, be more generally required by virtue of the interaction of the Refugee Convention with Art. 26 of the Civil and Political Covenant. See chapter 2.5.5 above, at pp. 127–128.
[416] Secretary-General, "Memorandum."

cases, the goal was consistency with prior or cognate international law. Equality in regard to taxation had already been required by the 1933 Refugee Convention,[417] and there was a pattern of bilateral and multilateral treaties, including those negotiated under the auspices of the ILO, that assimilated aliens to nationals for purposes of social security.[418] There were practical reasons to grant refugees national treatment under labor legislation, namely that "it was in the interests of national wage-earners who might have been afraid [that] foreign labor, being cheaper than their own, would have been preferred."[419] Similarly, while the right of refugees to sue and be sued "in principle ... is not challenged, in practice there are insurmountable difficulties to the exercise of this right by needy refugees: the obligation to furnish *cautio judicatum solvi* and the refusal to grant refugees the benefit of legal assistance make this right illusory."[420]

In two cases, the importance of assimilation was cited to justify national treatment. Primary education should be available on terms of equality with nationals "because schools are the most rapid and most effective instrument of assimilation."[421] An appeal to principle was relied on to justify national treatment with regard to artistic and industrial property rights, "since intellectual and industrial property is the creation of the human mind and recognition is not a favour."[422] And finally, simple fairness was said to require the equal treatment of refugees and nationals with regard to both access to rationing and systems for public relief. Rationing regulated the distribution of items "of prime necessity,"[423] and "[p]ublic relief can hardly be refused to refugees who are destitute because of infirmity, illness or age."[424]

The one national treatment right added to the Secretary-General's list is the right to religious freedom. A non-governmental representative to the Conference of Plenipotentiaries noted that "the negative principle of non-discrimination as expressed in article 3" did not "ensure the development of the refugee's personality."[425] It was important, he suggested, that the Convention contain a "positive definition of the spiritual and religious freedom of the refugee."[426] The delegates to the Conference agreed, noting that religious freedom conceived in affirmative terms is an "inalienable"[427] right.

[417] Ibid. at 31. [418] Ibid. at 38. [419] Ibid. at 37. [420] Ibid. at 30.

[421] Ibid. at 38. It was also noted that primary education "satisfies an urgent need," in consequence of which it was already compulsory in most states: ibid.

[422] Ibid. at 27. [423] Ibid. at 38. [424] Ibid. at 39.

[425] Statement of Mr. Buensod of Pax Romana, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 9–10.

[426] Ibid. at 10.

[427] Statements of Msgr. Comte of the Holy See and Mr. Montoya of Venezuela, UN Doc. A/CONF.2/SR.30, July 20, 1951, at 11–12.

There were nonetheless concerns that the first working draft, in which what became Art. 4 was framed as an absolute right,[428] imposed too stringent an obligation on states.[429] Yet it was recognized that the alternative of authorizing states to invoke regulatory or public order limits on religious freedom had, in practice, resulted in hardship for refugees. As the Canadian representative commented, "[i]t was well known that certain sects often committed in the name of their religion acts contrary to *l'ordre public et les bonnes moeurs*."[430] The compromise position suggested by the President of the Conference was that refugees should benefit from "the same treatment in respect of religion and religious education . . . as . . . nationals."[431]

This approach was, however, rejected by the Conference. The Holy See argued that assimilation to nationals was insufficient because "in countries where religious liberty was circumscribed, refugees would suffer."[432] It was important, he said, "to guarantee refugees a minimum of religious liberty in such countries."[433] His point was not that refugees benefit from "preferential treatment" vis-à-vis citizens.[434] Nonetheless, purely formal parity with nationals was not sufficient:

> His sole concern was that [refugees] should be given equal treatment with nationals. It was known that, precisely on account of their position as refugees, they are frequently handicapped in the practice of their religion. It was with that consideration in mind that he had put forward his amendment.[435]

This argument for substantive equality led the representative of the Holy See to propose a unique standard of treatment, namely that refugees should enjoy

[428] "The Contracting States shall grant refugees within their territories complete freedom to practice their religion both in public and in private and to ensure that their children are taught the religion they profess": UN Doc. A/CONF.2/94.

[429] Egypt, Luxembourg, and the Netherlands all felt that an affirmative right to religious freedom should be subject to the requirements of "national law": Statements of Mr. Sturm of Luxembourg, Mr. Mostafa of Egypt, and Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.30, July 20, 1951, at 11–14. Belgium and even the Holy See felt a "public order" limitation would be acceptable: Statements of Mr. Herment of Belgium and Msgr. Comte of the Holy See, ibid. at 14.

[430] Statement of Mr. Chance of Canada, ibid. at 17.

[431] Statement of the President, Mr. Larsen of Denmark, ibid. at 17.

[432] Statement of Msgr. Comte of the Holy See, UN Doc. A/CONF.2/SR.33, July 24, 1951, at 7.

[433] Ibid. The French representative agreed, but noted that such a position "had been rejected [in the Style Committee] on the grounds that Contracting States could not undertake to accord to refugees treatment more favorable than that they accorded to their own nationals": Statement of Mr. Rochefort of France, ibid. at 7–8. The British representative bluntly observed that the Holy See's approach might "be open to interpretation as an innuendo to the effect that the treatment of nationals in respect of religious freedom was not as liberal as it might be": Statement of Mr. Hoare of the United Kingdom, ibid. at 8.

[434] Statement of Msgr. Comte of the Holy See, ibid. at 8.

[435] Ibid.

"treatment at least as favorable as that accorded . . . nationals."[436] Governments are thus obliged not to deny refugees any religious freedom enjoyed by citizens, and moreover commit themselves in principle to take measures going beyond strict formal equality in order to recognize "that religious freedom as an abstract principle might be of little value if divorced from the practical means of ensuring it."[437]

3.3.3 Absolute rights

The balance of the Refugee Convention's substantive rights[438] – that is, those defined to require treatment neither at the "aliens generally" baseline standard, nor at one of the two exceptional standards (assimilation to most-favored foreigners, or to the citizens of the asylum country) – are absolute obligations. For the most part, the decision not to set a contingent standard of treatment follows logically from the fact that there is no logical comparator group for these rights.[439] Refugees are, for example, entitled to turn to the host country for administrative assistance, identity papers, and travel documents (because, unlike both citizens and most aliens, refugees have no national state willing to provide them with such facilities).[440] Other rights follow from the unique nature of refugeehood: the right to avoid penalties for unauthorized entry, to avoid expulsion or *refoulement*, to the recognition of preexisting rights based on personal status, and to take assets abroad in the event of resettlement.[441]

The absolute nature of the right of refugees to access the courts of state parties[442] (though entitlement to legal aid and to waiver of technical requirements for access inheres in refugees only to the extent granted to citizens of the refugee's place of residence[443]) follows the precedents of international aliens law[444] and the 1933 Convention, and elicited no debate.[445] While Art. 34's provisions on the assimilation and naturalization of refugees are likewise subject to no contingency, there is really no substantive right contained in

[436] The Conference approved this revised language 20–0(1 abstention): ibid. at 9.

[437] Statement of Mr. Petren of Sweden, ibid. at 9. It is clear, however, that Art. 4 does not oblige governments to take specific affirmative measures to advance the religious freedom of refugees. See chapter 4.7 below, at pp. 582–583.

[438] A number of the Convention's articles do not establish free-standing rights, but define the context within which enumerated rights must be implemented. See Refugee Convention, at Arts. 2, 3, 5–12(1), and 35–46.

[439] See generally the discussion of absolute and contingent rights developed under international aliens law in chapter 2.1 above, at pp. 77–78.

[440] Refugee Convention, at Arts. 25, 27, and 28.

[441] Ibid. at Arts. 12(2), 30–33.

[442] Ibid. at Art. 16(1).

[443] Ibid. at Art. 16(2). See chapter 6.8 below.

[444] See chapter 2.1 above, at p. 77.

[445] "[I]n principle the right of a refugee to sue and be sued is not challenged": Secretary-General, "Memorandum" at 30.

this provision. State parties are encouraged to facilitate the integration of refugees, but are under no binding duty to do so.

3.4 Prohibition of discrimination between and among refugees

As previously described, the general purpose of the legal duty of non-discrimination is defined by Fredman as being to ensure "that individuals should be judged according to their personal qualities."[446] Consideration has already been given to such key questions as the differences between formal equality ("equality before the law") and substantive equality ("equal protection of the law"); the relative importance of intention and effects in assessing whether discrimination of either kind is demonstrated; and the extent to which international law requires positive efforts to remedy unjustifiable distinctions, rather than just a duty to desist from discriminatory conduct.[447] The earlier focus was on whether the broad duty of non-discrimination – in particular, that set by Art. 26 of the Civil and Political Covenant – might actually be sufficient in and of itself to require the equal protection of refugees and other non-citizens, in which case specific norms of aliens and refugee law might be rendered essentially superfluous. Based on a close examination of the jurisprudence of the Human Rights Committee, however, the conclusion was reached that despite its textual breadth, Art. 26 could not yet be relied upon dependably to enfranchise non-citizens. In particular, account was taken of the Committee's tendency simply to accept some categorical distinctions (often including non-citizenship) as an inherently reasonable basis upon which to treat people differently; a pattern of unjustifiably broad deference to national perceptions of reasonable justification; and, in particular, only a nascent preparedness to take seriously the discriminatory effects of facially neutral laws. The conclusion was therefore reached that despite its value to counter some types of differential treatment, non-discrimination law has not yet evolved to the point that refugees and other non-citizens can safely assume that it will provide a sufficient answer to the failure to grant them rights on par with citizens.

The analysis here draws on some of these same principles, but to investigate a different question. Even if many distinctions in the ways that non-citizens, including refugees, are treated relative to citizens are deemed reasonable, does the legal duty of non-discrimination nonetheless provide a meaningful response to more specific types of disfranchisement which may be experienced by subsets of the refugee population?

To a real extent, the inappropriateness of differential allocations of refugee rights is clear from the fact that the language of the Refugee Convention

[446] S. Fredman, *Discrimination Law* (2001) (Fredman, *Discrimination*), at 66.
[447] See chapter 2.5.5 above.

presupposes that whatever entitlements are held by virtue of refugee status should inhere in *all* refugees. In setting the refugee definition, the drafters of the Convention were at pains carefully to limit the beneficiary class. They excluded, for example, persons who have yet to leave their own country, who cannot link their predicament to civil or political status, who already benefit from surrogate national or international protection, or who are found not to deserve protection.[448] Beyond these explicit strictures, however, refugees are conceived as a generic class, all members of which are equally worthy of protection.

Yet there are in fact often significant differences in the way that particular subsets of Convention refugees are treated by states. Perhaps most commonly, differentiation is based upon nationality. Saudi Arabia recognized Iraqis displaced as a result of the Gulf War as refugees even as it left thousands of refugees from other countries within its borders without status, and summarily deported at-risk Somalis.[449] India has allowed Tibetan refugees full access to employment, but limited – in some cases severely – the opportunities to earn a livelihood for refugees from Sri Lanka and, in particular, those from Bangladesh.[450] The United States has a long-standing practice of dealing much more harshly with refugees arriving from Haiti than with those who come from Cuba. Most fundamentally, it pursues a formal policy of interdiction and routine detention of Haitian refugees at Guantanamo Bay, while simultaneously allowing Cuban refugees free access to its territory.[451]

[448] See generally Grahl-Madsen, *Status of Refugees I*; and Hathaway, *Refugee Status*.

[449] "The Saudi Arabian government contends that 'Islamic principles rather than international law' are the basis for its extension of haven to Iraqi refugees. The government has failed to sign the international treaties and instruments that protect refugees from forced repatriation. It has not articulated an official policy regarding refugees or asylum": Lawyers' Committee for Human Rights, *Asylum Under Attack: A Report on the Protection of Iraqi Refugees and Displaced Persons One Year After the Humanitarian Emergency in Iraq* (1992), at 64. More generally, a Canadian government report observed that "Saudi Arabia is ... known for its policies of discrimination against refugees in general, regardless of whether or not they are Muslims ... In March 1991, for example, shortly after the downfall of Mohamed Siad Barre and when fighting was fierce in both northern and southern Somalia, Saudi Arabia deported some 950 immigrant workers to Somalia": Immigration and Refugee Board Documentation, Information, and Research Branch, "Kenya, Djibouti, Yemen and Saudi Arabia: The Situation of Somali Refugees" (1992), at 5.

[450] Tibetan refugees have been issued certificates of identity which enable them to undertake gainful employment, and even to travel abroad and return to India. Sri Lankan refugees, in contrast, have been allowed to engage only in self-employment, while Bangladeshi refugees have not been allowed to undertake employment of any kind: B. Chimni, "The Legal Condition of Refugees in India," (1994) 7(4) *Journal of Refugee Studies* 378, at 393–394.

[451] As Naomi and Norman Zucker conclude, "the United States has singled out Cubans and Haitians for diametrically opposite treatment. Cubans who quit their island are assisted

Even when Haitian refugees manage to reach US territory, they are ineligible to seek release on bond and must have their claims assessed under the abbreviated "expedited removal" procedure, rather than under the usual refugee status assessment rules.[452] In another example of differential treatment based on nationality, the British government announced in 2002 that the citizens of three countries – Liberia, Libya, and Somalia – would no longer benefit from its usual practice of granting a right of permanent residence to recognized refugees.[453] The United Kingdom also ended in-country appeal rights for persons seeking refugee status from a list

in coming to the US, are called political refugees, and are given asylum, while Haitians who leave their island are labeled economic migrants, interdicted at sea, and returned to Haiti": N. and N. Zucker, "United States Admission Policies Toward Cuban and Haitian Migrants," paper presented at the Fourth International Research and Advisory Panel Conference, Oxford, Jan. 5–9, 1994, at 1. "After it was accused of discrimination, the Carter administration granted Haitians the status of 'entrants,' on par with Cubans; however, in mid-1981 the Reagan administration reinstated differential treatment and began incarcerating apprehended Haitians . . . [President Clinton] pledged to change the policy . . . [but he] reversed himself immediately after taking office to prevent a flood of refugees that would weaken his political base in Florida": A. Zolberg, "From Invitation to Interdiction: US Foreign Policy and Immigration since 1945," in M. Teitelbaum and M. Weiner eds., *Threatened Peoples, Threatened Borders: World Migration and US Policy* 144 (1995), at 145–146. The failure of the American judiciary to end the double standard is described in T. James, "A Human Tragedy: The Cuban and Haitian Refugee Crises Revisited," (1995) 9(3) *Georgetown Immigration Law Journal* 479. "If an interdicted Haitian does manage to communicate a fear of return, the Coast Guard notifies the INS, which transports an asylum officer to the ship in order to conduct a preliminary credible fear interview. If the asylum officer determines that the individual does have a credible fear of return, then the person is transferred to Guantanamo Bay, Cuba . . . The treatment afforded interdicted Haitians starkly contrasts with the enhanced procedures applied to interdicted Cubans and Chinese, both nationalities that have strong political allies in Washington, D. C.": Women's Commission for Refugee Women and Children, "Refugee Policy Adrift: The United States and Dominican Republic Deny Haitians Protection" (2003), at 18.

[452] Lawyers' Committee for Human Rights, *Imbalance of Powers: How Changes to US Law and Policies Since 9/11 Erode Human Rights and Civil Liberties* (2003), at 30. While the routine denial of access to full asylum procedures in theory applies to all refugees who arrive by sea, Cubans are expressly exempted from its provisions: US Department of Justice, "Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Naturalization Act," Order No. 2243–0, Nov. 13, 2002. Because boat arrivals in the United States are mainly either Haitian or Cuban, the policy is effectively aimed at Haitian refugees. Amnesty International reported that the US government overtly defended this policy on the grounds that "it is longstanding US policy to treat Cubans differently from other aliens": Letter from Bill Frelick, Director, Refugee Program, Amnesty International USA, to Director, Regulations and Forms Services Division, Immigration and Naturalization Service, Dec. 13, 2002, at 2.

[453] A. Travis, "Blunkett plans to end asylum-seekers' automatic right to claim benefits," *Guardian*, Oct. 8, 2002, at 9.

of ten countries (those subsequently admitted to the European Union in 2004).[454]

Nationality-based exclusion may even be directed at all refugees coming from an entire region. For example, Uganda has granted protection to refugees coming from Ethiopia, Iraq, Sri Lanka, and Eritrea, but has shown indifference to the needs of refugees arriving from countries with which it shares a land border.[455] Sudan has recognized the refugee status of persons arriving from neighboring countries (except Chad), but has expected refugees from Arab states "to stay on an informal and unofficial basis."[456] The European Union has gone farther still, agreeing by treaty that member states may ordinarily declare any refugee claim from a citizen of an EU country to be inadmissible.[457] Conversely, Southern African states have often refused to grant protection to refugees from outside that region, earning them a public rebuke from UNHCR.[458]

[454] United Kingdom, "Certification Under Sections 94 and 115 of the Nationality and Immigration Act 2002: List of Safe Countries," Nov. 15, 2002. Claims by nationals of listed states are to be presumed to be "clearly unfounded," with the result that appeals must ordinarily be pursued after removal back to the country of origin.

[455] D. Kaiza, "Uganda: Kampala Refugee Policy is 'Bad,'" available at www.unhcr.ch (accessed July 12, 2003). Ugandan refugee policy seems to be largely ad hoc, with some ethnic groups – for example, ethnic Banyarwandans from neighboring Rwanda – suffering disproportionately: J. Kabrera, "Potential for Naturalization of Refugees in Africa: The Case of Uganda," paper presented at the Silver Jubilee Conference of the African Studies Association of the United Kingdom, Cambridge, Sept. 14–16, 1988, at 9.

[456] UN Committee on the Elimination of Racial Discrimination, "Concluding Observations of the Committee on the Elimination of Racial Discrimination: Sudan," UN Doc. CERD/C/304/Add.116, Apr. 27, 2001, at para. 15.

[457] "Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in [exceptional] cases": Protocol on Asylum for Nationals of Member States of the European Union, annexed to the Treaty establishing the European Community, OJ 97/340/01, at 103 (Nov. 10, 1997). By virtue of this provision, "the right of EU citizens to claim asylum in a neighbouring EU State has been effectively removed, unless a Member State chooses to reinstate such a right ... One striking anomaly of this situation is that third country nationals resident in a Member State may still apply for asylum within the Union: the only way in which they have more rights than nationals. But of course the main threat of the Protocol is one of principle, as it sets a very bad precedent for other regions of the world, linking the legal right of asylum to the political and economic alliance of neighbouring countries": European Council on Refugees and Exiles, "Analysis of the Treaty of Amsterdam in so far as it relates to asylum policy" (Nov. 10, 1997), at 8–9.

[458] "The United Nations refugee agency ... lambasted the 14 members of the Southern African Development Community (SADC) for rejecting refugees from outside the region. 'There is a tendency within SADC of not accepting refugees from outside the region. This is unacceptable,' UNHCR Southern Africa Director Nicolas Bwakira told a

Protection may also be skewed for purely political reasons: for example, long-standing political ties with North Korea have led China to refuse recognition to any refugee arriving from that country.[459] Sex can play an important role in limiting access to refugee rights, as was the case for women refugees from Somalia who were denied access to adequate health facilities, food, or educational opportunities while in receipt of asylum in Ethiopia.[460] The same sort of disfranchisement occurred when Nepal distributed critical supplies to Bhutanese refugees, including even food and shelter, only to male heads of household. This practice made it nearly impossible for female refugees estranged from their husbands to survive.[461]

Nor is the pattern of differentiation among refugees limited to actions grounded in nationality, politics, or sex. Since the arrival of the "boat people," Australia has routinely detained refugees who present themselves without a valid entry visa, even as it has in most cases allowed refugees arriving on a tourist or student visa to remain at liberty while their claims

news conference ... Most SADC countries [except Zambia] bar refugees from West Africa and the Horn of Africa": *Reuters*, Jan. 27, 2000.

459 "China, North Korea's principal ally, claims it is bound by its treaty obligations to Pyongyang": "Inside the Gulag," *Guardian*, July 19, 2002, at 23. "[T]he underlying reason Beijing does not welcome them, Chinese analysts say, is that it believes the fall of Communism in Eastern Europe was precipitated when Hungary allowed tens of thousands of East German refugees to pass through on their way to the West in 1989. 'If we gave them refugee status, millions would pour over our doorstep,' said a Chinese scholar who advises the North Korean and Chinese governments. 'That would cause a humanitarian crisis here and a collapse of the North. We can't afford either'": J. Pomfret, "China cracks down on North Korean refugees," *Washington Post*, Jan. 22, 2003, at A-01. The UN High Commissioner for Refugees announced that "[i]n China, the plight of North Koreans who leave their country illegally remains a serious concern. For a number of years UNHCR has been making efforts to obtain access to them, but this has consistently been denied. An analysis of currently available information recently carried out by our Department of International Protection concludes that many North Koreans may well be considered refugees. In view of their protection needs, the group is of concern to UNHCR ... [T]he principle of *non-refoulement* must be respected": "UNHCR Designates North Korean Refugees as a Group of Concern," Opening Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at the Fifty-fourth Session of the Executive Committee of the High Commissioner's Program, Geneva, Sept. 29, 2003.

460 In response, UNHCR announced that in the context of its assistance programs in Ethiopia, "[r]efugee women will be encouraged to take the lead role in the supervision of food": UNHCR, "Global Appeal 2002: Ethiopia" (2002), at 79. See also US Committee for Refugees, *World Refugee Survey 2002* (2002), at 74.

461 "This policy ... imposes particular hardship on women trying to escape abusive marriages. Either these women must stay in violent relationships, leave their relationships (and thus relinquish their full share of aid packages), or marry another man, in which cases they lose legal custody of their children": Human Rights Watch, "Nepal/Bhutan: Refugee Women Face Abuses," Sept. 24, 2003. See generally Human Rights Watch, "Trapped by Inequality: Bhutanese Refugee Women in Nepal" (2003).

to refugee status are assessed.[462] Even once recognized as refugees, those who initially arrive without authorization are granted only a renewable, three-year temporary protection visa (as contrasted with the permanent status granted those who arrive with a visa), and are moreover not entitled to reunification with their family members.[463] Pakistan provided inferior material assistance to the less educated, rural Afghan refugees in Baluchistan than to their urban co-nationals in the North West Frontier Province.[464] Some countries, at one point including the United States,[465] have refused to admit refugees who are HIV-positive.[466] In sum, refugees are frequently subjected to differences in treatment based on factors extraneous to their need for protection. The net result is a critical challenge to the notion that a universal common denominator of rights can be said to follow from refugee status.

[462] P. Mares, *Borderline: Australia's Treatment of Refugees and Asylum Seekers* (2002), at 6. See also C. Steven, "Asylum-Seeking in Australia," (2002) 36(3) *International Migration Review* 864, at 889: "Less favorable treatment has been given to unauthorized arrivals claiming asylum than those who arrive legally. Mandatory detention in prison-like conditions has been introduced to ensure that asylum-seekers are not permitted to enter nor disappear into the community before their cases have been determined, and to ensure that rejected asylum-seekers can be removed from Australia without difficulty."

[463] P. Mathew, "Australian Refugee Protection in the Wake of the *Tampa*," (2002) 96(3) *American Journal of International Law* 661, at 673.

[464] K. Connor, "Geographical Bias in Refugee Treatment Within Host Countries," paper prepared for the RSP/QEH Refugee Participation Network, 1988, at 1–5. See also S. Khattak, "Refugee Policy Politics: Afghans in Pakistan," paper presented at the Conference of Scholars and Other Professionals Working on Refugees and Displaced Persons in South Asia, Dhaka, Bangladesh, Feb. 9–11, 1998, at 6–7.

[465] In *Haitian Centers Council Inc. v. Sale*, (1993) 823 F Supp 1028 (US DCEDNY, June 8, 1993) it was determined that the indefinite detention in Guantanamo by the United States of HIV-positive Haitian refugees was not lawful. "The Clinton Administration, through the Department of Justice, did not appeal the order and admitted the infected Haitians": L. Macko, "Acquiring a Better Global Vision: An Argument Against the United States' Current Exclusion of HIV-Infected Immigrants," (1995) 9(3) *Georgetown Immigration Law Journal* 545, at 546, n. 14. At present, an HIV test is required of all persons seeking permanent residence in the United States, excepting only those who apply through cancellation of removal. Refugees who apply through the legalization program may secure a waiver of ineligibility based on HIV status where concerns of family unity, humanitarianism, or public interest are demonstrated: San Francisco AIDS Foundation, "Gaining Legal Immigrant Status," available at www.sfaf.org (accessed Dec. 16, 2003).

[466] "UNHCR and IOM have issued a joint policy which opposes the use of mandatory HIV screening and restrictions based on a refugee's HIV status. Nevertheless, some States have adopted mandatory HIV testing for refugees, and exclude those who test positive": UNHCR, "Refugee Resettlement: An International Handbook to Guide Reception and Integration" (2002), at 155.

Refugee Convention, Art. 3 Non-discrimination
The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Economic, Social and Cultural Covenant, Art. 2

. . .

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Civil and Political Covenant, Art. 2(1)
Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Civil and Political Covenant, Art. 26
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.

The drafting history of the Refugee Convention provides little guidance on the substantive reach of Art. 3's duty of non-discrimination. The Swiss delegate, for example, acknowledged only "measures of a humiliating character" to be discriminatory.[467] Egypt tried unsuccessfully to exclude action necessary for the maintenance of public order from the scope of discrimination.[468] No interest was shown in a Greek effort to ensure that

[467] Statement of Mr. Schurch of Switzerland, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 15.
[468] Statement of Mr. Mostafa of Egypt, UN Doc. A/CONF.2/SR.5, July 4, 1951, at 12. The British delegate thought that "the acknowledged right of any State to safeguard the requirements of public order and morality was extraneous to the subject-matter of

actions necessary for "public safety" were immune from scrutiny under Art. 3.[469] The most precise comment on the meaning of non-discrimination was offered by the American representative, who thought that discrimination meant "denying to one category of persons certain rights and privileges enjoyed by others in identical circumstances."[470] In line with principles of treaty interpretation earlier described,[471] this conceptual uncertainty should be remedied by taking account of the parameters of the duty of non-discrimination elaborated under the terms of cognate treaties – including, for example, under the Human Rights Covenants, described above.[472] Most fundamentally, this means that even a differential allocation of rights on the basis of a prohibited ground will not amount to discrimination if demonstrated to meet international standards of "reasonableness."[473]

In drafting Art. 3, consensus was reached on the critical point that the duty of non-discrimination is not restricted to actions taken within a state's territory, but governs as well a state's actions towards persons seeking to enter its territory. While the English language draft of Art. 3 produced by the Second Session of the Ad Hoc Committee appeared to prohibit only discrimination by a state "against a refugee within its territory,"[474] the French language formulation was not predicated on successful entry into a state's territory.[475] At the Conference of Plenipotentiaries, the French delegate successfully argued against the narrowness of the duty proposed in the English text:

> [T]he statement that the State should not discriminate against a refugee within its territory on account of his race, religion or country of origin seemed to suggest that the State was perfectly entitled to discriminate against persons *wishing* to enter its territory, that was to say, against persons not yet resident in its territory. He therefore proposed that the words "within its territory" be deleted.[476]

Article 3", while the Dutch representative argued that "[i]t would be dangerous to add a provision to Article 3 which would to some extent emasculate it": Statements of Mr. Hoare of the United Kingdom and Baron van Boetzelaer of the Netherlands, ibid. at 14.

469 Statement of Mr. Philon of Greece, ibid. at 12–13.

470 Statement of Mr. Warren of the United States of America, ibid. at 4.

471 See chapter 1.3.3 above, at pp. 64–68.

472 The practice of the Human Rights Committee in interpreting the duty of non-discrimination is described in chapter 2.5.5 above.

473 See chapter 2.5.5 above, at pp. 129–145.

474 UN Doc. E/1850, Aug. 25, 1950, at 15.

475 "Aucun Etat contractant ne prendra de mesures discriminatoires sur son territoire, contre un réfugié en raison de sa race, de sa religion ou de son pays d'origine": UN Doc. A/CONF.2/72, July 11, 1951, at 1. See also Statement of the President, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 19.

476 Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 18–19.

The rationale for the territorial limitation captured in the draft English language text had, in fact, been simply to ensure that states were left complete freedom to administer their own systems of immigration law.[477] Once it was recognized that the admission of refugees to durable asylum or permanent residency is not in any event governed by the Refugee Convention,[478] it proved possible to secure the consent of states to a duty of non-discrimination with extraterritorial application.[479] In line with the fact that Art. 3 governs all rights in the Refugee Convention, including Art. 33's duty of *non-refoulement*, the American interdiction and detention of black Haitian asylum-seekers on the high seas, while simultaneously allowing predominantly white Cuban asylum-seekers to proceed to Florida, is (unless determined to be reasonable by reference to international standards) in breach of Art. 3's duty of non-discrimination.

In contrast to the agreement on this point, there was real debate about the substantive breadth of Art. 3. As initially conceived, the provision was intended to prohibit discrimination not only against particular subsets of the refugee population, but against refugees in general. The Belgian draft of Art. 3 submitted to the Ad Hoc Committee provided that:

> The High Contracting Parties shall not discriminate against refugees on account of race, religion or country of origin, *nor because they are refugees* [emphasis added].[480]

The latter part of the duty – imposing a duty not to discriminate on the basis of refugee status itself – did not survive the Conference of Plenipotentiaries.

[477] "The history of the drafting of Article 3 showed that if the words 'within its territory' were deleted, the Convention would affect the whole field of immigration policy ... There was no subject on which Governments were more sensitive or jealous regarding their freedom of action than on the determination of immigration policies ... If the proposed deletion were made, certain Governments might feel that their policy of selection was affected by the Convention, and they might accordingly be hesitant about acceding to it": Statement of Mr. Warren of the United States of America, UN Doc. A/CONF.2/SR.5, July 4, 1951, at 5.

[478] "It was noted during the discussion that ... the Convention does not deal either with the admission of refugees (in countries of first or second asylum) or with their resettlement (in countries of immigration)": "Report of the Committee Appointed to Study Article 3," UN Doc. A/CONF.2/72, July 11, 1951, at 3.

[479] "It was thought that the words 'within its territory' in the place where they occurred in the English text could be interpreted *a contrario* as permitting such discrimination outside the territory of the Contracting State. *A document drawn up under the auspices of the United Nations ought not to be susceptible to such an interpretation* [emphasis added]": ibid. at 2. The consensus definition of this Committee – which deleted the limitation "within its territory" – was the basis for the version of Art. 3 finally adopted: UN Doc. A/CONF.2/SR.18, July 12, 1951, at 18, and UN Doc. A/CONF.2/SR.24, July 17, 1951, at 19–21.

[480] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 11.