al-Maadi and Bassatin police stations in inhumane and crowded conditions, and refused to accept food for the prisoners.[775]

Even where authorities are not directly responsible for the violence faced by refugees, they frequently create the conditions which make refugees vulnerable to attack. For example, Pakistani authorities cut off food and shelter to force Afghan refugees to move to camps near the Afghan border, even though it was well known that pro-Taliban, pro-Pushtan, and anti-foreigner sentiment in the area was high, raising serious concerns in particular for ethnic minority refugees including the Hazaras, Uzbeks, and Tajiks.[776] Because of the Kenyan and Ugandan policy of requiring refugees to live in camps, those who manage to escape to urban areas are left with few options but to sleep on the streets or in unsafe shelters where they are vulnerable to violence.[777] In September 2000, Guinean President Lansana Conte made a speech blaming refugees for border instability – leading police, soldiers, and civilian militias to launch attacks on refugee camps and against refugees in the capital city.[778]

Increasingly, anti-refugee vigilantes in asylum countries have engaged in attacks on refugees. Gangs of neo-Nazis "hunted" foreigners in the German town of Magdeburg in 1994, stabbing asylum-seekers from Africa, and beating them with iron bars. Police failed to intervene until the attacks had taken place, and then proceeded to arrest the victims.[779] The British government's policy of dispersing refugee claimants across the country also gave rise to vigilante violence, especially in areas not accustomed to the presence of racial and other minorities. Refugees in Liverpool had stones and bricks thrown through their windows;[780] Kurdish refugee claimants in Glasgow were stabbed to death.[781]

Finally, physical abuse is at times employed as part of a strategy to force refugees "voluntarily" to repatriate. Rohingya refugees were coerced to return to Burma by physical and sexual abuse at the hands of the Bangladeshi military and paramilitary forces in charge of reception camps.[782] And in

[775] Human Rights Watch, "Egypt: Mass Arrest of Foreigners," Feb. 10, 2003.
[776] Human Rights Watch, "Pakistan: Refugees Not Moving Voluntarily," Dec. 5, 2001.
[777] Human Rights Watch, *Hidden in Plain View* (2002).
[778] Human Rights Watch, "Guinea: Refugees Still at Risk," July 5, 2001.
[779] Human Rights Watch, "Germany for Germans: Xenophobia and Racist Violence in Germany" (1995), at 32–37; see also Amnesty International, "A Summary of Concerns in the Period May–October 1994," Doc. EUR/23/08/94 (Nov. 1, 1994).
[780] M. O'Kane, "Christmas charity appeal: Vulnerable given a cold welcome to Britain," *Guardian*, Dec. 3, 2001, at 12.
[781] V. Dodd and K. Scott, "UN body blames press for hatred of refugees," *Guardian*, Aug. 11, 2001, at 10.
[782] Human Rights Watch, *Human Rights Watch Global Report on Women's Human Rights* (1995), at 115–118. "[O]n July 20 [1997], the Bangladeshi security forces forcibly returned 187 refugees from Nayapara camp across the Naaf River to Myanmar. Apparently no one volunteered for repatriation, so the authorities picked mostly

late 1996, after most Rwandese refugees had repatriated, troops of the Democratic Republic of Congo under the command of Laurent Kabila massacred thousands of refugees who were reluctant to go back.[783]

> **Civil and Political Covenant, Art. 6(1)**
> **Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.**
>
> **Civil and Political Covenant, Art. 7**
> **No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment ...**
>
> **Civil and Political Covenant, Art. 9(1)**
> **Everyone has the right to liberty and security of person ...**

Even though physical security is clearly fundamental to any notion of refugee protection, the Refugee Convention is silent on this issue. At one point, Belgium and the United States tabled a proposal that would have required states to grant refugees arriving without pre-authorization "treatment compatible, from both the moral and material view, with human dignity."[784] The Belgian co-sponsor explained that this clause would "grant the refugee the means of livelihood and ... prevent his ill-treatment."[785] This language was not approved on the grounds that it was "too ambitious,"[786] the drafters opting instead to define with greater precision precisely which rights refugees would receive. No right to physical security was proposed or adopted.

Mtango suggests that this omission may follow from the primary concern of the drafters to ensure the economic and social well-being of refugees, the assumption being that physical safety would follow from the enforcement of norms derived from the international law of armed conflict and national asylum laws.[787] An alternative explanation is that refugee law, like the

women and children to be sent back": Amnesty International, "Rohingyas: The Search for Safety," Doc. ASA/13/07/97 (Sept. 1, 1997).

783 "Killings of refugees which began in October 1996 in the camps along the DRC [Democratic Republic of Congo] border with Rwanda and Burundi continued as the AFDL [Alliance des forces démocratiques pour la libération du Congo] and its allies captured more territory, through to the DRC's western border with the Republic of Congo. The refugees who had managed to escape westwards from the camps walked hundreds of kilometres and frequently set up make-shift camps ... Settlement in camps subsequently enabled the AFDL and its allies to locate the refugees and on occasions kill hundreds of them at a time": Amnesty International, "Deadly Alliances in Congolese Forests" (1997), at 6.

784 UN Doc. E/AC.32/L.25, Feb. 2, 1950, at Art. 3(1).

785 Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 24.

786 Statement of the Chairman, Mr. Chance of Canada, ibid. at 25.

787 Mtango, "Armed Attacks," at 97.

international human rights standards being contemporaneously developed, reflects a masculinist assumption that protection from physical attack need not be codified as a human right. Because the standards of both refugee law and international human rights law were nearly exclusively drafted by men, and because men presumed themselves to be independently able to ensure their own physical security (except, for example, during a war or while incarcerated), there was no need to draft a general right to physical security.[788]

Whatever the historical reason, we are today required to ground a right to physical security for refugees not in the Refugee Convention itself, but instead in what has been described as "a criss-cross of rules which have some bearing on the subject."[789] For example, child refugees may rely on Arts. 19, 20, 22, 34, 35, 36, and 37 of the Convention on the Rights of the Child.[790] Refugees who are threatened by armed conflict may invoke the protections of the Geneva Conventions on the Law of Armed Conflict and their Protocols, in particular Common Article 3, which prohibits acts of violence directed against persons not taking active part in hostilities.[791] But unless a refugee is able to invoke a specialized obligation of this kind, he or she must rely on the guarantee set by Art. 7(1) of the Refugee Convention, which confirms that refugees are to enjoy at least the same treatment as is afforded aliens in general.

[788] See generally H. Charlesworth and C. Chinkin, *Boundaries of International Law: A Feminist Analysis* (2000), at 280–287; V. Peterson, "Security and Sovereign States: What is at Stake in Taking Feminism Seriously?," in V. Peterson ed., *Gendered States: Feminist (Re)visions of International Relations Theory* (1992), at 31. Belated recognition of the importance of the right to physical security, including in a gender-specific context, has been forthcoming. At the fifty-seventh session of the Commission on Human Rights, for example, a Canadian resolution condemning violence against women as a "violation of the rights and fundamental freedoms of women" was adopted by consensus, with seventy-five co-sponsors: M. Dennis, "The Fifty-Seventh Session of the UN Commission on Human Rights," (2002) 96(1) *American Journal of International Law* 181.

[789] M. Othman-Chande, "International Law and Armed Attacks in Refugee Camps," [1990] *Nordic Journal of International Law* 153, at 153.

[790] These provisions address protection from physical or mental violence (Art. 19); special protection for children deprived of their family (Art. 20); special protection for children seeking refugee status (Art. 22); protection from sexual exploitation (Art. 34); protection from abduction or trafficking (Art. 35); protection against any form of exploitation (Art. 36); and protection against cruel, inhuman, or degrading treatment (Art. 37): Rights of the Child Convention.

[791] "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, at a minimum, the following provisions: (1) Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction, founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria": 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. 3. See Mtango, "Armed Attacks," at 103–106.

Thus, all refugees are entitled to the benefit of the narrow range of rights set by international aliens law, including the duty of every state to respect the life and physical integrity of all aliens in their territory, including refugees.[792] Yet because international aliens law unfortunately grants no directly enforceable rights to aliens themselves, this obligation will in most cases provide no practical value to refugees.[793] Of greater real importance, the ability of refugees to claim the benefit of any international legal obligations which inhere in all persons under the jurisdiction of a state party means that they are able to claim the guarantees of physical security set by the Human Rights Covenants.[794] The Human Rights Committee has made clear that the benefit of Arts. 6, 7, and 9 of the Civil and Political Covenant may be directly invoked by non-citizens under the effective jurisdiction of a state party.[795]

4.3.1 Right to life

The right to life is defined by Art. 6 of the Civil and Political Covenant to be an "inherent right," meaning that "one's right to life cannot be taken away by the state or waived, surrendered or renounced by [the individual concerned], since a human being cannot be divested, nor can he divest himself, of his humanity."[796] The right to life has been said by the International Court of Justice to be part of "the irreducible core of human rights."[797] The Human

[792] See chapter 2.1 above, at p. 76.

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

[794] "In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens": UN Human Rights Committee, "General Comment No. 15: The position of aliens under the Covenant" (1986), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 140, paras. 1–2. More specifically, state parties are required to ensure that the protection of the Covenant is "available to all individuals, regardless of nationality or statelessness, such as asylum-seekers [and] refugees": UN Human Rights Committee, "General Comment No. 31: The nature of the general legal obligation imposed on states parties to the Covenant" (2004), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 192, para. 10. See chapter 2.5.4 above, at pp. 120–121.

[795] "Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment ... Aliens have the full right to liberty and security of the person": UN Human Rights Committee, "General Comment No. 15: The position of aliens under the Covenant" (1986), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 140, para. 7.

[796] N. Jayawickrama, *The Judicial Application of Human Rights Law* (2002) (Jayawickrama, *Judicial Application*), at 256.

[797] *Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep 226, at 506, per Judge Weeramantry.

Rights Committee refers to it as "the supreme right," and insists that it "is basic to all human rights"[798] and "should not be interpreted narrowly."[799]

Most obviously, the right to life prohibits acts of intentional killing by state authorities other than under the strictest controls, and in carefully limited circumstances required by law. As the Human Rights Committee has affirmed,

> States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.[800]

The bombing of refugees in flight from Sudan, the execution of Iraqi refugees by Saudi camp officials, the murder of Rwandese refugees by troops of the Democratic Republic of Congo, and the enforced disappearance of Somali refugees by Kenyan security guards were all clearly violations of this most fundamental of all human rights.[801] Liability also inheres where a government puts unofficial agents in a position of control over refugees, and then turns a blind eye to murders committed by those to whom it has entrusted authority. Because a government may not do indirectly what Art. 6 prohibits it from doing directly, the killing of Cambodian refugees by Khmer Rouge officials who operated camps inside Thailand was an arbitrary deprivation of life by Thailand. And as the General Comment of the Human Rights Committee makes clear, an intention to kill is not requisite to finding a breach of the right to life. Thus, for example, the disregard for the life of refugees evident in the methods of deportation employed by Malawi and Austria amounts to an infringement of the duty of affirmative protection required by Art. 6.

More generally, the right to life "is not to be understood as a negative right directed solely at the State, but rather [as a right] that calls for positive measures to ensure it."[802] Where killings are not the result of direct or indirect official acts, they nonetheless infringe Art. 6 if the state fails to take

[798] UN Human Rights Committee, "General Comment No. 14: Right to life" (1984), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 139, para. 1.

[799] UN Human Rights Committee, "General Comment No. 6: Right to life" (1982), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 128, para. 1.

[800] Ibid. at 128, para. 3.

[801] "The Human Rights Committee has required states to take specific and effective measures to prevent the disappearance of individuals. They should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life": Jayawickrama, *Judicial Application*, at 280.

[802] Nowak, *ICCPR Commentary*, at 105.

appropriate, positive steps to protect persons whose lives are known to be at risk from non-state actors.[803] When Uganda left Sudanese refugees exposed to killings by Lord's Resistance Army rebels whose objectives were clear, and when no serious effort was made by Zaïre or the UN to ensure that violent *genocidaires* and weapons were kept out of the Rwandan refugee camps, the resultant slaughter inside the camps was in breach of the right to life.

Perhaps most serious of all, decisions to force refugees to remain in areas adjacent to the frontier with their country of origin frequently expose them to cross-border raids and killings by their enemies. Especially in view of the high duty of care owed to persons detained by the state,[804] Mexico's initial insistence that Guatemalan refugees remain in camps near the border with Guatemala, and Côte d'Ivoire's comparable refusal to relocate Liberian refugees away from the Liberian frontier, were both contrary to the duty to protect life under Art. 6. UNHCR's Executive Committee has affirmed the duty of governments to mitigate the possibility of non-combatant refugees becoming the objects of armed attack.[805] Protection of physical security normally entails ensuring that refugees not be required to remain in an area which may be affected by the conflict they have fled, or by any other conflict in the country of asylum.

The state of refuge is also liable under Art. 6 where its fails to establish "effective facilities and procedures to investigate thoroughly"[806] either unofficial killings or disappearances in territory under its jurisdiction. When Hong Kong officials took no credible action to apprehend those responsible for pervasive gang killings in the refugee camps, for example, there was clearly a failure to comply with the right to life. As Nowak observes, the Human Rights Committee has generally found violations of Art. 6 on the basis of "well-documented accusations of the authors and the lack of willingness on the part of the governments to assist in resolving these deaths."[807]

[803] "It is the duty of the state to protect human life against unwarranted actions by public authorities as well as by private persons. This is usually done by enacting appropriate laws to criminalize the intentional taking of life and by ensuring that such laws are enforced. But the obligation to protect the right to life also implies other positive preventive measures appropriate to the general situation": Jayawickrama, *Judicial Application*, at 260.

[804] Civil and Political Covenant, at Art. 10(1).

[805] UNHCR Executive Committee Conclusion No. 48, "Military or Armed Attacks on Refugee Camps and Settlements" (1987), available at www.unhcr.ch (accessed Nov. 20, 2004). See also UNHCR Executive Committee Conclusions Nos. 27, "Military Attacks on Refugee Camps and Settlements in Southern Africa and Elsewhere" (1982), 32, "Military Attacks on Refugee Camps and Settlements in Southern Africa and Elsewhere" (1983), and 45, "Military and Armed Attacks on Refugee Camps and Settlements" (1986), all available at www.unhcr.ch (accessed Nov. 20, 2004).

[806] UN Human Rights Committee, "General Comment No. 6: Right to life" (1982), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 128, para. 4.

[807] Nowak, *ICCPR Commentary*, at 112.

The right to life is not, however, infringed simply because refugees die. Most Southern African states, for example, allowed refugees from the South African *apartheid* regime to move away from border areas, and took serious efforts to protect them from killings at the hands of extremely sophisticated covert incursions by the military and other agents of South Africa. Nor can Uganda be held responsible for the bombing of refugee camps in its territory by Sudan. Where loss of life results neither from intention nor a failure seriously to combat risks to life, there is no breach by the host country of Art. 6. The relevant inquiry is instead whether the authorities of the asylum state intend to kill the refugee – either directly, or indirectly, as by starvation, or exposure to illness or violence – or whether they show a lack of determination effectively to respond to known risks to life, or to pursue and prosecute those responsible for risk to, or loss of, life. Because the right to life can be infringed by either act or omission, and because it focuses broadly on whether death results from a situation characterized by "elements of unlawfulness and injustice, as well as those of capriciousness and unreasonableness,"[808] it is an important means of holding governments accountable for intentional or foreseeable threats to the lives of refugees.

4.3.2 Freedom from torture, cruel, inhuman, or degrading treatment

Many of the risks to the physical security of refugees, of course, fall short of a risk to life. Art. 7 of the Civil and Political Covenant, however, also prohibits actions which amount to torture, or to cruel, inhuman, or degrading treatment. Like the guarantee of the right to life, Art. 7 not only prohibits negative state conduct, but requires governments to take affirmative steps to protect everyone under their authority from relevant risks.[809] Equally important, a state may never justify its failure to protect all persons from torture, cruel, inhuman, or degrading treatment on the grounds of an exceptional or emergency situation:

> The text of article 7 allows of no limitation ... [E]ven in situations of public emergency ... no derogation from the provisions of article 7 is allowed and its provisions must remain in force ... [N]o justification or extenuating circumstances may be invoked to excuse a violation of article 7

[808] Ibid. at 111, citing comments of the Chilean representative to the Commission on Human Rights during the drafting of the Civil and Political Covenant.

[809] "It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity": UN Human Rights Committee, "General Comment No. 20: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment" (1992), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 150, para. 2.

> for any reasons, including those based on an order from a superior officer or public authority.[810]

The definition of "torture" is relatively demanding.[811] An act may be described as torture only if four criteria are satisfied. First, the act in question must result in severe physical or mental pain or suffering. Second, the act which causes the pain or suffering must be intentional. Third, there must be a specific motivation for the intentional infliction of harm, such as the extraction of a confession, intimidation, punishment, or discrimination (but not including lawful punishment). Fourth, the act must be committed by or under the authority of a public official. By way of example, all of these criteria were met when Bangladeshi camp officials raped Rohingya refugee women with a view to terrorizing them to such a point that they would feel compelled to go back to Burma. The suffering was severe, the act of rape was intentionally inflicted by public officials, and its goal was to punish and intimidate refugees who refused to return to the risk of persecution in their own country.

While refugees are sometimes the victims of torture, they more commonly face the risk of either inhuman or cruel treatment. The prohibition of "inhuman or cruel treatment or punishment" is treated as a unified concept. That is, a clear distinction is not generally drawn between actions which are cruel, and those which are inhuman. In general, actions are "inhuman or cruel" if they meet most, but not all, of the criteria for torture.[812] Thus, acts of rape committed by state officials even if not accompanied by the specific intent required to establish torture – for example, those committed by Burmese, Kenyan, and Nepali officials – are appropriately deemed to be forms of cruel and inhuman treatment. Similarly, the intentional act of a public official intended to punish a refugee may not be "torture" if the consequent harm does not rise to the level of "severe" pain or suffering. Lesser pain or suffering, in the context of such an intentional, official, and punitive action would still

[810] Ibid. at 150, para. 3.

[811] While not defined in the Civil and Political Covenant, a helpful definition of "torture" may be derived from the subsequently enacted 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 (Torture Convention), at Art. 1(1): "For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[812] Nowak, *ICCPR Commentary*, at 131.

amount to inhuman or cruel punishment.[813] Thus, for example, the prohibition of cruel and inhuman treatment was breached when Russian police beat non-Slavic refugees; when South African officials whipped refugees waiting to register in South Africa; when Kosovar refugees were beaten by police in Sarajevo; and when Egyptian police hunted down black refugees in order to detain them in crowded and inhumane conditions, and without access to food. And because an action is no less official when implemented by private parties encouraged by the state, the unleashing of violent attacks by Guinean citizens against refugees consequent to a speech by that country's president also amounted to a form of cruel and inhuman treatment or punishment.

A state may moreover be found to have engaged in cruel or inhuman treatment where it fails to respond appropriately to known risks of a grave quality. For example, the Human Rights Committee found a breach of Art. 7 of the Covenant where Australia continued to detain an Iranian refugee claimant even after it was clear that the prolonged detention would result in irreversible psychiatric illness:

> As to the author's allegations that his first period of detention amounted to a breach of article 7, the Committee notes that the psychiatric evidence emerging from examinations of the author over an extended period, which was accepted by the State party's courts and tribunals, was essentially unanimous that the author's psychiatric illness developed as a result of the protracted period of immigration detention. The Committee notes that the State party was aware, at least from August 1992 when he was prescribed tranquillizers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity.
>
> Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author's illness had reached such a level of severity that irreversible consequences were to follow. In the Committee's view, the continued detention of the author when the State party was aware of the author's mental condition and failed to take the steps necessary to ameliorate the author's mental deterioration constituted a violation of his rights under article 7 of the Covenant.[814]

In line with this focus on failure to take the steps necessary to respond to clear risks, it follows that India and Kenya were responsible for the cruel and inhuman treatment of refugee women when their camp officials refused to

[813] Jayawickrama, *Judicial Application*, at 308–311.

[814] *C v. Australia*, UNHRC Comm. No. 900/1999, UN Doc. CCPR/C/76/D/900/1999, decided Oct. 28, 2002, at para. 8.4.

provide materials for cooking fires even after learning of the rapes of women in the adjacent forests where they were compelled to forage for wood. While there may have been no specific, invidious motivation behind these governments' actions, the failure to make alternative arrangements for the provision of fuel exhibited a willful disregard for what authorities knew was the exposure of refugee women to the severe pain and suffering of rape. Similarly, China may be held liable for cruel and inhuman treatment in view of its awareness that refusal to protect North Korean refugees left them no option but to seek informal "protection" purchased by submission to sexual or other exploitation.

The known risk of serious harm at the heart of the notion of cruel and inhuman treatment need not emanate from state officials themselves, so long as the official actions contribute in a material way to the exposure to harm. Thus, Mozambique's refusal to take measures to protect minority Burundian refugees against the known risk of race-based violence at the hands of other refugees housed in the same camp; the decisions of Kenya and Guinea to force refugees from Somalia and Sierra Leone respectively to live in border camps where it was clear they would be subject to cross-border violence committed by armies from their country of origin; Pakistan's forced relocation of even minority Afghan refugees to border regions where it was clear they would be at risk of assault; as well as Tanzania's decision to require refugees to live in the remote Mtabila camp where they could not be meaningfully protected against banditry and other attacks are all examples of cruel and inhuman treatment.

Beyond acts which are torture or cruel and inhuman, Art. 7 also prohibits treatment or punishment which is "degrading." Viewed as "the weakest level of a violation of Article 7,"[815] an act is considered degrading when it is intended to humiliate the victim, or when it shows an egregious disregard for his or her humanity. As the European Court of Human Rights opined, "degrading" treatment

> humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.[816]

Australia's resort to tear gas, room-trashings, and the punitive solitary confinement of children under the guise of "management practices" shows the requisite disregard for the humanity of the refugees against whom they were directed. So too does the robbing of desperate and defenseless Rwandan refugees arriving in Zaïre by members of that country's army. Jayawickrama

[815] Nowak, *ICCPR Commentary*, at 133.
[816] *Pretty v. United Kingdom*, (2002) 35 EHRR 1 (ECHR, Apr. 29, 2002), at para. 52.

suggests as well that an act is also to be considered degrading where it "drives [an individual] to act against his will or conscience."[817] As such, the sexual exploitation of refugees by Zimbabwean camp workers, by Namibian teachers, and by relief workers throughout much of Western Africa – effectively forcing individuals to submit to sex as a condition of access to basic necessities or other rights – are appropriately understood to be forms of degrading treatment.

4.3.3 Security of person

The third article of the Civil and Political Covenant with a bearing on the physical security of refugees is Art. 9(1). It provides that "[e]veryone has the right to liberty and security of person." While subsequent paragraphs of Art. 9 define the ways in which the right to "liberty" informs the treatment of detained persons, Sieghart sensibly argues that independent meaning should be given to the guarantee of "security of person,"[818] even though its content is not textually elaborated. This approach conforms to the principle of treaty interpretation requiring a good faith effort to give meaning to all parts of a treaty as codified.[819]

The drafting history confirms that these words are not mere surplusage. Reference to "security of person" was added to the text of Art. 9(1) on the basis of a British proposal to the eighth session of the Commission on Human Rights,[820] apparently motivated by a desire to conform to the formulation of the predecessor Art. 3 of the Universal Declaration of Human Rights.[821] During the drafting of Art. 3 of the Universal Declaration, a Cuban proposal expressly to add a guarantee of physical integrity was turned down after discussion suggesting that the right to "security of person" already encompassed this concern.[822] Specifically, Chairperson Eleanor Roosevelt concluded that "the words 'security of person' had been chosen after lengthy discussion because they were more comprehensive than any other expression. The French representative had especially noted that they included the idea of

[817] Jayawickrama, *Judicial Application*, at 311.
[818] P. Sieghart, *The International Law of Human Rights* (1983), at 139.
[819] Vienna Convention, at Art. 31(1). See chapter 1.3.3 above, at p. 62.
[820] UN Doc. E/CN.4/L.137 (1952). A Polish proposal to reframe this guarantee (UN Doc. E/CN.4/L.183) was adopted by a vote of 7–5 (5 abstentions): UN Doc. E/CN.4/SR.314, at 10. See M. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987), at 196–197.
[821] Nowak, *ICCPR Commentary*, at 162. Art. 3 of the Universal Declaration of Human Rights provides that: "[e]veryone has the right to life, liberty and security of person."
[822] L. Rehof, "Article 3," in A. Eide et al. eds., *The Universal Declaration of Human Rights: A Commentary* 73 (1992) (Rehof, "Article 3"), at 77.

physical integrity."[823] As Nowak affirms, "[i]n the French Revolution, the civic right of security was accorded high priority: it granted the citizen State protection against impairment of his personal rights and his property through interference at the horizontal level."[824]

There is therefore a textual and historical basis to argue that state parties have an independent duty under Art. 9(1) of the Civil and Political Covenant to take affirmative measures to protect all persons under their authority from attacks against their personal integrity, and perhaps also their property:

> The "right to security" ... is the right to protection of the law in the exercise of the right to liberty. "Liberty and security are the two sides of the same coin." The right to security may, therefore, be applicable to situations other than the formal deprivation of liberty. For instance, a state may not ignore a known threat to the life of a person under their jurisdiction simply because he or she is not arrested or otherwise detained. There is an obligation to take reasonable and appropriate measures to protect such a person.[825]

This view has been adopted by the Human Rights Committee, which held that Art. 9(1) was infringed when the Colombian government failed to respond in a meaningful way to death threats made against a teacher who was ultimately forced to flee the country:

> Although in the Covenant the only reference to the right to security of person is to be found in article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty ... States are under an obligation to take reasonable and appropriate measures to protect [persons under their jurisdiction]. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.[826]

Under this interpretation, Germany infringed Art. 9(1) when it responded to neo-Nazi attacks on asylum-seekers in the town of Magdeburg with no more than "incredibly sloppy" police work that led to the arrest of numerous victims, but not of the German citizens who initiated the attacks.[827] And because the duty under Art. 9(1) is owed to all persons under a state's

[823] UNGAOR (1948), Part I (Third Committee), at 189–190, cited in Rehof, "Article 3," at 77.

[824] Nowak, *ICCPR Commentary*, at 162.

[825] Jayawickrama, *Judicial Application*, at 375–376, quoting from J. Fawcett, *The Application of the European Convention on Human Rights* (1987), at 70.

[826] *Delgado Paéz v. Colombia*, UNHRC Comm. No. 195/1985, decided July 12, 1990, at paras. 5.5–5.6.

[827] See UNHCR Executive Committee Conclusion No. 72, "Personal Security of Refugees" (1993), available at www.unhcr.ch (accessed Nov. 20, 2004), at para. (c): "The Executive

jurisdiction, the governments of Honduras and Mexico were required to take reasonable measures to protect Central American refugees traveling to North America through their territory from the known risk of abuse and extortion at the hands of smugglers.

More generally, the duty to take "reasonable and appropriate measures" to guard against risks to the physical security of refugees calls into question the general policy of closed refugee camps, clearly proven to be breeding grounds for violence, in particular against refugee women and children. It most certainly requires attention to such concerns as the location of communal latrines far from refugee living quarters and inadequate lighting and patrols, all of which give rise to known risks of rape and other forms of serious harm. The duty to avoid known risks to physical security is also grounds for contesting the legality of the British dispersal policy, under which refugees were required to live in areas where the risk of private violence was clear; as well as the refusal of Kenya and Uganda to authorize refugees to live outside of camps, thereby exposing refugees living in urban areas to vigilante and other attacks known not to elicit any protective response from the government.

Art. 9(1) would not, however, be a sufficient source of protection for the Vietnamese asylum-seekers attacked by Thai pirates. While Art. 9(1) would require Thailand to protect refugees passing through its territorial waters, and arguably through any contiguous zone declared by it,[828] human rights law does not impose an obligation to reach out to refugees attacked in adjacent portions of the high seas. Because no state is bound to afford protection of human rights in parts of the *res communis* unless it has appropriated jurisdiction over that international territory, even the broad-ranging protection of Art. 9(1) cannot establish state responsibility for all threats to the physical security of refugees in search of asylum.[829]

Committee ... [c]alls upon States vigorously to investigate violations of the personal security of refugees and asylum-seekers, and where possible to institute criminal prosecution, and where applicable strict disciplinary measures, against all perpetrators of such violations." There may indeed be evidence that the problem was not simply the unwillingness of German authorities meaningfully to intervene against private violence. The UN Committee on the Elimination of Racial Discrimination reported its concern regarding "repeated reports of racist incidents in police stations, as well as ill-treatment inflicted by law enforcement officials on foreigners, including asylum-seekers": "Concluding Observations of the Committee on the Elimination of Racial Discrimination: Germany," UN Doc. CERD/C/304/Add.115, Apr. 27, 2001, at para. 19.

[828] See generally discussion of jurisdiction over adjacent seas in chapter 3.1.1 above, at pp. 160–161.

[829] Thus, for example, UNHCR's response to the attacks on Vietnamese refugees was to address "an urgent call to all interested Governments to take appropriate action to prevent such criminal attacks whether occurring on the high seas or in their territorial waters" by, for example, undertaking increased sea and air patrols, identifying and

With the exception of this critical territorial gap, Arts. 6, 7, and 9 of the Civil and Political Covenant taken together provide a relatively sound foundation for protection of the physical security of refugees. While these duties do not, of course, insulate refugees from risks to their physical security, they can be invoked by refugees to require governments of transit and asylum countries both to avoid negative acts, and to take affirmative steps to counter unofficial risks to their well-being.

4.4 Necessities of life

Most refugees are not able immediately to meet their own needs for food, water, shelter, and healthcare. Because the flight to safety cannot always be planned, and because the logistics of travel often make it impossible for refugees to bring significant resources or provisions with them, even refugees who were self-sufficient in their homeland typically depend for survival on the generosity of the asylum country.

Frequently, the basic needs of refugees are met by the local people they first encounter in the state of reception. For instance, when refugees fleeing state-sponsored terror in Guatemala arrived in Mexico's southern states in 1981, "[t]he host population received them well, provided them with food, exchanged food for work, and bought whatever the refugees had to sell (albeit at very low prices)."[830] Similarly, when more than 50,000 Mauritanian refugees fled across the river into Senegal in 1989, they were received by the local population with offers of food and shelter before international aid agencies had time to react.[831] And when Kosovar Albanian refugees arrived in Europe during the spring of 1999, "it was as if [the] river of hostility [towards the reception of refugees in Europe] began to flow backwards ... A substantial number of people offered to take Kosovans into their own homes."[832]

Circumstances permitting, refugees may achieve a measure of self-sufficiency fairly quickly through farming, small-scale business, or wage-labor. The case of Mozambican refugees who went to Swaziland shows the ability of refugees to

prosecuting those responsible, and implementing fully the rules of general international law relating to the suppression of piracy: UNHCR Executive Committee Conclusion No. 20, "Protection of Asylum-Seekers at Sea" (1980), at paras. (c)–(e), available at www.unhcr.ch (accessed Nov. 20, 2004).

[830] F. Stepputat, *Self-Sufficiency and Exile in Mexico* (1989), at 10.

[831] "As is so often the case with boundaries drawn up by colonial powers, this one divided the peoples of the river region, so that officially they are citizens of two separate states ... These traditional links between the two peoples ensured a warm welcome for the refugees who came across from Mauritania": T. Williams, "Getting on with the Business of Living," (1991) 82 *Refugees* 7, at 8.

[832] M. Gibney, "Kosovo and Beyond: Popular and Unpopular Refugees," (1999) 5 *Forced Migration Review* 28, at 28.

meet their own basic needs when provided with opportunities for self-sufficiency by the host community:

> These refugees began to arrive in Swaziland in late 1984. The majority did not receive any international aid, relying instead on their own economic activities and on assistance from local villagers ... While the refugees did not own land, some received the use of small plots from Swazi farmers who played host to them. In order to meet all their needs, refugees undertook a variety of work. They worked for small farmers, or on large commercial farms, or set themselves up as artisans or traders.[833]

Particularly where start-up assistance is made available, initiatives of this kind can generate an extraordinarily vibrant economy. For example, the international humanitarian agency AfriCare responded to a breakdown in international aid by assisting refugees from Angola and the Democratic Republic of Congo to run their own successful enterprises in a Namibian refugee camp:

> The refugees, mostly women, work as volunteers in an agro-forestry project in the camp, planting trees and growing vegetables ... [T]he project was developed to educate refugees and also to help them grow their own food to supplement their diet. The refugees have planted fruit trees, mostly papayas ... Although it is a refugee camp for more than 20,000 refugees ... there is an open market ... Items sold at the market are fish, baked cakes, cooking oil, vegetables and various other consumables. Besides the open market, the camp features a "guesthouse" and a number of restaurants and shops owned and run by the refugees themselves.[834]

4.4.1 Freedom from deprivation

Economic, legal, and other constraints may, however, impede refugees from meeting their own needs in the short term. Where this is the case, refugees are in an extremely vulnerable position. In one of the worst examples, in November 2000 the Pakistani government decided that it would refuse international aid for its massive Afghan refugee population as part of its strategy to drive the refugees back home. It even denied the UN Secretary-General access to one of the main refugee camps, where conditions had become predictably horrific:

> Tens of thousands have been camped in the open since January [2001] and the government has refused to let the UN High Commissioner for Refugees provide basic amenities for the new arrivals. The UNHCR said that more than 80,000 were squatting in squalid conditions on a strip of land in

[833] D. Keen, *Refugees: Rationing the Right to Life* (1992) (Keen, *Right to Life*), at 60–61.
[834] "Self-help initiative at Osire Refugee Camp," *Namibian Economist*, June 7, 2002.

> Jalozai, and more were arriving each day. The camp is known to aid workers as "Plastic City," because of the cheap plastic bags being used as tents. Faced with overflowing latrines and limited drinking water, the refugees, particularly the children, are dying almost daily.[835]

Sadly, the actions of the Pakistani government are not unique. Other governments have also denied refugees the necessities of life in order to force them home or to deter other refugees from arriving. For example, the UN Committee on Economic, Social and Cultural Rights inquired into allegations that Hong Kong had denied medical and dental treatment to asylum-seekers from Vietnam in order to force them to leave.[836] In an effort to make life unbearable for them, Vietnamese refugees in Malaysia were confined to longhouses in which refugees had only two square meters of living space per person. Of the sixty-one longhouses used to shelter refugees, ten were moreover declared structurally unsound by the Malaysian Red Crescent Society.[837] When refugees from the Democratic Republic of Congo, Rwanda, and Somalia protested the decision of Swaziland to stop paying them support allowances – their only means of supporting themselves – the government responded by arresting them and ordering their expulsion from the country.[838]

Essentials may also be withheld from refugees out of ethnic, religious, or other antagonism. For example, Iraqi Kurds in Turkey were forced to live in camps which had open privies infested by swarms of flies and insects.[839] Antipathy towards Somali refugees initially led the government of Kenya to refuse to register them as refugees, which prevented the Somalis from

[835] E. MacAskill, "Pakistan keeps Annan from 'world's worst' camp," *Guardian*, Mar. 13, 2001, at 14. "Although refugees continued to slip in, at year's end the border remained officially closed to them. The Pakistan government was labeling all new arrivals 'illegal immigrants.' It continued to refuse UNHCR permission to create new camps to accommodate arriving refugees, and insisted that Afghanistan is now peaceful and that Afghan refugees must return home": US Committee for Refugees, *World Refugee Survey 2001* (2001), at 163.

[836] Committee on Economic, Social and Cultural Rights, "Concluding Observations on Report of the United Kingdom," UN Doc. E/C.12/Add.10 (1996).

[837] US Government Accounting Office, "Refugees: Living Conditions are Marginal," Doc. No. UNGAO/NSIA-91-258 (1991) (US, "Living Conditions"), at 42–43.

[838] "Swaziland deports 65 refugees," *Mail & Guardian*, Sept. 4, 2002.

[839] "Privies are situated in full sunlight, without any possibility of flushing them with water . . . In the privies, faeces and other filth are piled up in the open air, covered with countless flies and other insects . . . The drainage of the camp runs off in small ditches that have been dug provisionally between the tents and along the paths. The stench is ferocious, and here too there are countless swarms of flies": German *Bundestag* Member Angelika Beer, June 12, 1989, cited in Initiative for Human Rights in Kurdistan, "Silence is Killing Them: A Report on the Situation of the Kurdish Refugees in Turkey" (1990) (IHRK, "Kurdish Refugees"), at 15.

receiving food and other general rations.[840] The necessities of life may also be denied to refugees as part of a strategy to punish them for actual or perceived misdeeds. Refugees from Sudan and Somalia, living in Kakuma camp in Kenya, were denied food for several weeks in both 1994 and 1996 as part of a strategy of collective punishment.[841] Similarly, following a dispute with Burmese refugees over the death of the driver of a logging truck, the Thai government cut all food deliveries to more than 10,000 Mon refugees.[842]

Even where there are few if any surplus resources available to meet the needs of refugees, many host countries have struggled to treat refugees fairly. In 1984, for example, acute food shortages forced Nicaragua to introduce a national rationing system for its own citizens. Each household was allowed to buy only a fixed quantity of sugar, cooking oil, rice, laundry soap, beans, and salt, at prices fixed by the government.[843] When 20,000 largely destitute Salvadoran refugees arrived to seek protection in Nicaragua, they were assimilated to nationals for purposes of participation in the rationing scheme.

On the other hand, some governments, also facing desperate circumstances, have reacted less generously. During the late 1980s, extreme drought and widespread fighting between government forces and Tigrayan and Eritrean insurgents meant that Ethiopia was unable to feed its own population. Yet it was home to some 200,000 mostly Somali and Sudanese refugees in 1987, with the refugee population rising to 740,000 by 1989. There was a critical shortfall in donor aid, with the result that the refugees' cereal rations had to be reduced from 500 grams to 375 grams per day.[844] But the situation was made much worse when international agencies, attempting to feed both

[840] African Rights, *The Nightmare Continues: Abuses Against Somali Refugees in Kenya* (1993) (African Rights, *Nightmare*), at 6. Human Rights Watch noted that in May 2003, "police conducted raids against 'foreigners,' arresting approximately 800 individuals who were held for several days in dismal conditions in an outdoor pen next to the Kasarani police station. At least 145 of the detainees were documented refugees who were charged with failing to register with the government – a statutory provision that was enforced for the first time, and with which no refugee could comply since government registration stopped in 1991": Human Rights Watch, *World Report 2003* (2003), at 43.

[841] Verdirame, "Kenya," at 64–66. Earlier reports suggest that because of antipathy towards ethnic Somalis, the Kenyan government initially would not allow Somali refugees to receive a general ration: African Rights, *Nightmare* at 6.

[842] Asia Watch, "Abuses Against Burmese Refugees in Thailand" (1992), at 3–4.

[843] J. Collins et al., *Nicaragua: What Difference Could a Revolution Make?* (1985) (Collins et al., *Nicaragua*), at 228–229.

[844] "Feeding the Hungry," (1996) 105 *Refugees* 16. International relief programs have generally been plagued by budget reductions since the early 1980s, even as the size of the world refugee population was increasing. "A smaller pie divided into an ever larger number of pieces has meant that, on average, each refugee receives fewer resources": Keen, *Right to Life*, at 36–37.

the domestic and refugee populations, were prohibited by the Ethiopian government from delivering food aid to areas under rebel control.[845]

> **Refugee Convention, Art. 20 Rationing**
> **Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.**
>
> **Civil and Political Covenant, Art. 6(1)**
> **Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.**
>
> **Civil and Political Covenant, Art. 7**
> **No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment ...**
>
> **Civil and Political Covenant, Art. 9(1)**
> **Everyone has the right to liberty and security of person ...**
>
> **Civil and Political Covenant, Art. 10(1)**
> **All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.**

In some cases, depriving refugees of the necessities of life may give rise to a breach of the duty of *non-refoulement*. Repatriation under coercion, including situations in which refugees are left with no real option but to leave, is in breach of Art. 33 of the Refugee Convention.[846] As such, Swaziland's decision to deny refugees any means of support, then to arrest and remove them when they protested their situation, was in substance an act of *refoulement*. Even when repatriation does not in fact result, core norms of the Civil and Political Covenant already examined may be contravened by such deprivations.[847] Because the right to life set by Art. 6(1) of the Civil and Political Covenant "is the supreme right ... [and] should not be interpreted narrowly,"[848] it

[845] US Committee for Refugees, *World Refugee Survey 1991* (1991), at 41. Some food aid nonetheless managed to reach rebel-held areas when donor governments re-routed their assistance to NGOs, which organized a cross-border operation to reach starving persons in Eritrea and Tigray, coordinated by Norwegian Church Aid and the Relief Society of Tigray: D. Turton, personal communication to the author, Aug. 25, 1999.

[846] See chapter 4.1.2 above, at pp. 318–319.

[847] The implications of Arts. 6 (life), 7 (torture, cruel, inhuman, degrading treatment or punishment), 9 (physical security), and 10 (rights of detainees) of the Civil and Political Covenant are discussed in detail in chapter 4.3 above, at p. 450 ff.

[848] UN Human Rights Committee, "General Comment No. 6: Right to life" (1982), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 128, para. 1.

prohibits threats to human life brought about not just by intentional killing, but also by planned or foreseeable malnutrition and life-threatening illness.[849] Thus, when the Thai and Kenyan governments expressly cut off all food deliveries to refugees held in their camps as a form of punishment, they contravened the duty in Art. 6(1) to protect the right to life, as well as Art. 10(1)'s duty to treat all detained persons with humanity and respect.[850] As previously described, Art. 6(1) is not simply a prohibition of negative conduct, but requires states to ensure a minimal standard of positive action to protect the right to life.[851] While governments enjoy broad discretion to decide how to implement Art. 6(1), they fail to meet their obligation if whatever measures taken are manifestly insufficient relative to known risks to life.[852]

Where the known risk is less clearly linked to immediate survival, actions to deprive refugees of the necessities of life may still violate the duty to respect physical security under Art. 9 of the Civil and Political Covenant.[853] For example, the determined effort of Pakistan to create near-complete misery in Afghan refugee camps by refusing foreign aid, as well as Hong Kong's denial of even basic medical care to asylum-seekers, should be seen as breaches of Art. 9. More generally, Art. 9's guarantee of security of person requires governments to take reasonable and appropriate measures to respond to known threats to basic personal well-being. A situation in which food rations provided to refugees are known to be so qualitatively deficient in terms of providing essential vitamins and nutrients that life-threatening illness is the predictable result would therefore also logically run afoul of the duty to ensure the physical security of refugees.

Denial to refugees of the necessities of life may moreover contravene Art. 7's prohibition of cruel, inhuman, or degrading treatment or punishment.[854] For example, the Human Rights Committee determined that imprisonment in a tiny space of virtually the exact size allocated to each Vietnamese refugee in Malaysian longhouses was a form of inhuman treatment.[855]Even less egregious denials of adequate accommodation may violate the Civil and Political Covenant. Because of the special duty of care owed to detainees under Art. 10(1), the extraordinarily unhygienic conditions to which Iraqi Kurds were subjected in Turkish camps would likely be seen as a form of

[849] Nowak, *ICCPR Commentary*, at 107.
[850] See discussion of Art. 10(1) in chapter 4.2.4 above, at pp. 435–439.
[851] See chapter 4.3.1 above, at pp. 451–452. [852] Nowak, *ICCPR Commentary*, at 106.
[853] See chapter 4.3.3 above, at p. 458.
[854] See generally chapter 4.3.2 above, at pp. 454–457.
[855] Exacerbating factors in the cases considered by the Human Rights Committee included the absence of light and *incommunicado* detention: *Marais v. Madagascar*, UNHRC Comm. No. 49/1979, decided Mar. 24, 1983; *Wight v. Madagascar*, UNHRC Comm. No. 115/1982, decided Apr. 1, 1985.

inhuman treatment.[856] And because Art. 7 also prohibits degrading treatment, it is contravened by conduct outside the context of enforced detention which shows a fundamental disregard for the refugee as a person.[857] For example, where food is withheld from refugees in order to extort sexual favors, officials demonstrate the willingness to demean and objectify their victim that is the essence of degrading treatment. As Eide has observed,

> The essential point is that everyone should be able, without shame and without unreasonable obstacles, to be a full participant in ordinary, everyday interaction with other people. This means, *inter alia*, that they should be able to enjoy their basic needs under conditions of dignity. No one shall have to live under conditions whereby the only way to satisfy their needs is by degrading or depriving themselves of their basic freedoms, such as through begging, prostitution or bonded labour.[858]

The drafters of the Refugee Convention, however, paid surprisingly little attention to the importance of meeting the basic needs of refugees who arrive to seek protection. While they gave detailed attention to a variety of relatively sophisticated socioeconomic rights (for example, access to social security, fair treatment under tax laws, and even the protection of refugees' intellectual property), the Convention does not address rights to food, water, or healthcare, and only regulates access to public housing for refugees once they are lawfully staying in a given country.

A variety of explanations may be offered. Most of the European states that drafted the Convention were accustomed to receiving refugees under orderly entry arrangements. Such refugees, who were immediately authorized to enter either permanently or for an extended stay, would automatically enjoy the right to engage in wage-earning or professional work. As refugees were almost always fellow Europeans, they normally possessed compatible skills, and could therefore be expected to meet basic needs from their own income. Even when refugees arrived without pre-authorization, governments in the 1940s and 1950s were still able to process these irregular entrants fairly quickly. The refugees' own assets could therefore usually see them through until their claims were recognized and work authorization granted.

More generally, the Refugee Convention predates the advent of the Western social welfare state. So long as refugees could earn their own living

[856] For example, in *Párkányi v. Hungary*, UNHRC Comm. No. 410/1990, UN Doc. CCPR/C/41/D/410/1990, decided Mar. 22, 1991, the allocation of only five minutes' time each day to meet personal hygiene needs (and an equally short time for outdoor exercise) was ruled a violation of Art. 10.

[857] See chapter 4.3.2 above, at pp. 456–457.

[858] A. Eide, "The Right to an Adequate Standard of Living, Including the Right to Food," in A. Eide et al. eds., *Economic, Social and Cultural Rights: A Textbook* 89 (1995) (Eide, "Standard of Living"), at 89–90.

and benefit from basic property rights, they enjoyed essentially as much protection as did most nationals. And in any event, it was assumed that UNHCR would take the lead on such issues given its institutional responsibility to administer public and private funds for material assistance to refugees.[859]

The one relevant concern addressed, however, was access by refugees to essential goods not distributed on the open market.[860] Because so many key goods had been rationed during the just-concluded Second World War, the drafters were concerned to ensure that all refugees, whether arriving with or without authorization,[861] and whether present only temporarily or indefinitely,[862] be included in any state-managed distribution systems that might be set up by asylum countries. While far from a guarantee that even basic necessities will in fact be provided to refugees, Art. 20 of the Convention ensures that refugees are assimilated to citizens for purposes of receiving allocations under rationing systems. If the rationing system provides that citizens receive vital goods free of charge, then so too must similarly situated refugees. But if the rationing system merely allocates quantities of goods that may be purchased, then the only right of refugees is to purchase goods through that allocation scheme.

There was discussion in the Ad Hoc Committee regarding the type of rationing systems in which refugees should have a right to participate. The Secretary-General's draft spoke only of systems to distribute items "of prime necessity."[863] There was agreement among the drafters that any system for the rationing of accommodation would be exempt from Art. 20, since housing is separately addressed by Art. 21 of the Convention.[864] It was also agreed

[859] Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res. 428(V), adopted Dec. 14, 1950, at para. 10. The United Nations had agreed to establish UNHCR in December 1949: UNGA Res. 319(IV).

[860] Robinson suggests that the value of Art. 20 is really quite modest. "It is rather unusual to treat aliens in the matter of rationing differently than nationals. Thus, the Convention only sanctions the general usage but, at the same time, strives to prevent a less favorable trend in any Contracting State": Robinson, *History*, at 119.

[861] In a critical exchange, the American representative observed "that some of the articles did not specifically indicate to which refugees they applied. He presumed that the mention of 'refugees' without any qualifying phrase was intended to include all refugees, whether lawfully or unlawfully in a territory": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 18. The immediate and unchallenged response of the Chairman was "that the United States representative's presumption was correct": Statement of the Chairman, Mr. Larsen of Denmark, ibid.

[862] "If a national were passing through a town for a day and received a day's rations, so would a refugee": Statement of Sir Leslie Brass of the United Kingdom, ibid. at 19.

[863] Secretary-General, "Memorandum," at 38 (draft Art. 18).

[864] While the American representative voiced concern that the housing needs of refugees be addressed (Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 4), the notion that housing allocation schemes should be deemed "rationing

that refugees were only to have equal access to systems for the rationing of consumer goods, not products of all kinds. An American proposal that Art. 20 should apply to all "commodities in short supply"[865] was criticized by the French representative as "too far-reaching. Governments might be encouraged to ration commodities in short supply, such as common or precious metals, because they were of particular use to the country. The text of the article should make it clear that it concerned essential goods for individual use."[866] The Ad Hoc Committee's recommendation therefore referred to the rationing of "products" (rather than commodities).[867]

Suggestions were made to circumscribe the scope of Art. 20 further by limiting its scope to rationing systems for "foodstuffs" and related items,[868] or to exclude gasoline rationing systems.[869] But the comments forwarded to the Conference of Plenipotentiaries endorsed neither of these proposed limitations.[870] In order to bring the text of Art. 20 into alignment with the explanatory comments,[871] the Conference determined that refugees would be entitled to benefit as equals from rationing systems established for all "products in short supply."[872] The absence of any qualification suggests that refugees are entitled fully to participate in any system for the rationing of any consumer good.[873]

Nicaragua's decision fully to enfranchise refugees for purposes of access to its national rationing program is therefore a stellar example of compliance with Art. 20. Even though Nicaragua experienced extraordinary difficulty in

systems" was successfully opposed by the French representative (Statement of Mr. Rain of France, ibid. at 3). The Chairman concluded from the debate "that provisions regarding housing should not be included in the article on rationing; it would be better to state these in a separate article": Statement of the Chairman, Mr. Chance of Canada, ibid. at 4.

865 Statement of Mr. Henkin of the United States, ibid. at 5.

866 Statement of Mr. Rain of France, ibid. at 5.

867 "This article applies to the generally recognized systems of rationing, which apply to the population at large and regulate the general distribution of products in short supply": "Comments of the Committee on the Draft Convention relating to the Status of Refugees," Annex II to Ad Hoc Committee, "First Session Report," at 4.

868 Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 5.

869 Statement of Sir Leslie Brass of the United Kingdom, ibid.

870 But see Weis, *Travaux*, at 160: "It follows from the debate that it refers to consumer goods in short supply, not to commodities for commercial or industrial use. Petrol was also mentioned as not being included."

871 Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 21.

872 This language was drafted by the Style Committee (UN Doc. A/CONF.2/102, July 24, 1951, at 11), and adopted by the Conference without discussion: UN Doc. A/CONF.2/SR.35, July 25, 1951, at 5.

873 The French representative observed that "[I]n practice, rationing did apply principally to foodstuffs; that, however, was a question of usage which could not affect the etymological meaning of the word 'rationing.' He pointed out that, during the Second World War, products other than foodstuffs – textiles, soap, petrol and so forth – had been rationed in France": Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 3.

meeting the basic needs of its own population (due to a combination of absolute shortages, production and transportation difficulties, and the American government's policy of economic destabilization),[874] refugee households were given access to its rationing system on terms of equality with nationals. On the other hand, Kenya's racially motivated unwillingness to register Somali refugees, thereby denying them access to food rations, was clearly in breach of Art. 20's duty to equal access to rationing systems.[875]

One concern expressed was that Art. 20 might inadvertently require the abolition of preferential rationing systems for refugees. As the Chinese representative explained, his government had treated refugees and Chinese citizens differently under rationing systems in force during the Second World War. China had provided the Jewish and other European refugees with food rations more appropriate to their own dietary requirements and preferences. These refugees received more flour and sugar than did Chinese citizens, while the Chinese received more rice than the refugees.[876] The Chairman replied that the original language of Art. 20, requiring that refugees be dealt with under rationing systems "on the same footing as nationals,"[877] meant only that refugees "would not be treated less favorably than nationals."[878] Without any discussion, however, the Conference of Plenipotentiaries opted to delete the reference to treatment "on the same footing" as nationals in favor of a recommendation from its Style Committee that refugees receive "the same treatment" as nationals under rationing systems.[879]

It is possible that the drafters intended to insist on formal equality of rations between refugees and nationals to avert the possibility of abuse under the guise of recognition of cultural or other differences. The more likely scenario, however, is that the phrase "on the same footing as nationals" was simply viewed as out of keeping with the ways in which standards of treatment are defined elsewhere in the Convention.[880] In view of the general international legal preference to define equality as meaning substantive

[874] Collins et al., *Nicaragua*, at 218–219.

[875] The discriminatory refusal of Kenyan authorities to register desperate Somali refugees, knowing that they would in the result be denied access to food and other essentials, was also likely in breach of the right to life: see text above, at pp. 464–465.

[876] Statement of Mr. Cha of China, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 3. See also Statement of Mr. Cha of China, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 19: "He hoped that the use of the words adopted would not mean that Governments would not give rations to refugees in accordance with their needs, even if such rations were larger than those given to nationals."

[877] Secretary-General, "Memorandum," at 38.

[878] Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 3.

[879] UN Doc. A/CONF.2/SR.35, July 25, 1951, at 5.

[880] Even the American representative to the Ad Hoc Committee, who had championed the logic of the phrase "on the same footing as nationals," conceded that "[h]e had no

equality,[881] Art. 20 should therefore be understood to authorize some measure of operational flexibility to ensure that refugees are in fact dealt with no less favorably than nationals.

While Art. 20 governs access only to a rationing system "which applies to the population at large," this does not exclude comparably situated refugees from accessing domestic rationing systems set up for particular sub-populations. The intention of the drafters was that refugee status (or non-citizenship) not be a basis for withholding rations from refugees. Thus, the American representative noted that Art. 20 applies to systems under which "different rations [are established] for different categories of people, for example, for children."[882] A rationing system that provides goods only for children is a system which applies to a designated part of "the population at large," in consequence of which refugee children should receive the same rations as citizen children. But if the rationing program is designed only to benefit children, adult refugees have no claim to entitlement under it.[883]

Art. 20 of the Refugee Convention governs only access to rationing systems, that is, schemes established to distribute goods *because* those goods are in short supply. It is therefore not a basis for refugees to assert a right of access to public welfare or comparable systems which allocate basic necessities (or the funds to acquire them) on the basis of economic need, rather than because of the scarcity of the products themselves.[884] Most fundamentally, Art. 20 does not require the establishment of any kind of rationing system for refugees, no matter how extreme their needs. The only obligation is to ensure that refugees benefit on terms of equality with nationals under any rationing system that is established. If neither refugees nor citizens are provided with access to a rationing system – as was the case for those in rebel-held areas of Ethiopia, to which the government denied aid agencies access – then Art. 20 of the Refugee Convention is not breached.[885] The more broadly applicable duty to provide refugees with the basic necessities of life must therefore be

particular brief for the use of such a wording": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 19. See generally chapter 3.3.2 above.

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

[882] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 19.

[883] Robinson reaches the same result, but on the basis of a different analysis. He suggests that "Art. 20 is not applicable to allocation of certain items in favor of restricted groups or to products which are generally available in sufficient quantities but are allocated to certain groups, for instance, indigent persons, large families, at or on more favorable prices or conditions. In such circumstances, Art. 7(1) would apply": Robinson, *History*, at 119–120. This result is, in any event, compelled by the duty of non-discrimination under Art. 26 of the Civil and Political Covenant: see chapter 2.5.5 above, at pp. 126–128.

[884] The right of refugees to access public welfare systems is discussed at chapter 6.3 below.

[885] The denial of aid to these areas likely violated Art. 11 of the Economic Covenant, however. See chapter 4.4.2 below, at pp. 489–490.

established under general norms of international human rights law, rather than by reliance on any specific requirement of the Refugee Convention itself.[886]

4.4.2 Access to food and shelter

Even where there is a willingness to help refugees meet their most basic needs, it is often impossible for local economies already faced with shortages of land and jobs simply to absorb all refugees who arrive. The problem is most critical in poorer countries of the South, where there tend to be larger refugee movements and fewer indigenous resources to provide for refugees.[887] India is one of the few less developed countries that has traditionally been unwilling to accept external support for its refugee relief operations.[888] In most poorer countries, the survival of refugees has depended on international agencies providing a substantial supplement to local efforts.[889] In one particularly extreme case, the Ethiopian government was critically dependent on international aid to provide for nearly all the needs of both its large refugee population and its own nationals, during the famine of the late 1980s and early 1990s.[890] Similarly, the general impact of the drought in Zambia during 2002 meant that both refugees and their hosts were at risk of starvation.[891] As UNHCR has acknowledged,

[886] See chapters 4.4.2 and 4.4.3 below.

[887] As Castles has observed, in order to assess "the weight of the 'refugee burden,' [it is most] instructive ... to relate refugee populations to the wealth of the receiving country ... Refugees are overwhelmingly concentrated in the poorest countries. This puts the frequent Northern claims of being unfairly burdened by refugees in perspective": S. Castles, "The International Politics of Forced Migration," in L. Panitch and C. Leys eds., *Fighting Identities: Race, Religion, and Ethno-Nationalism* 172 (2002), at 174.

[888] B. S. Chimni, *International Academy of Comparative Law National Report for India* (1994), at 37–39.

[889] "Almost half of the world's refugees are totally dependent on international assistance for the basic needs of food, shelter, water, and health care": Forbes Martin, *Refugee Women*, at 33.

[890] Ethiopia hosted more than 700,000 refugees in the late 1980s, even as the drought created critical shortages for millions of its own nationals in northern regions: US Committee for Refugees, *World Refugee Survey 1989* (1989), at 37–38.

[891] "Food insecurity in the region will have a tremendous effect on refugee supplies, UNHCR representative Ahmed Gubartalla has said ... Gubartalla said the drought situation in the region will not spare the refugees ... 'Since October last year we have been giving half rations to the refugees and with the food situation in Zambia, rations in our camps will be complicated ... If nationals are suffering due to the drought, by extension the refugees are affected too'": "Food insecurity will affect refugee supplies, says UNHCR," *Zamnet*, June 14, 2002. In this case, Denmark responded by funding an innovative program under which critical support was provided to both refugees and the communities that received

> The heavy price that major refugee hosting countries, which are among the least developed, have to pay in granting asylum is now widely recognized. Yet, the rhetoric on international solidarity and burden-sharing rarely translates into tangible support to refugee-affected areas. The international response has been uneven and often driven by political and economic considerations on the part of many donors.[892]

Because international refugee relief efforts are funded by voluntary state contributions, there is no guarantee that aid will be adequate to meet needs. For example, the funding shortfall for the 20,000 Angolan refugees in the Osire refugee camp in Namibia during 2001 resulted in severe food reductions:

> The funds available are only enough to buy 30% of the food needed ... Food rations have already been reduced to 80% of the recommended basic monthly diet of 2,100 (17 kg) kilocalories. Due to the cut in rations, refugees now get only 8–10 kg of maize, their staple food.[893]

Beyond inadequate food, the camp was home to more than ten times the number of refugees for which it had been constructed, resulting in shortages of all kinds:

> [T]he refugee camp ... urgently needs at least 500 more family pit latrines because existing facilities have clogged up. And although ... there are adequate water points at present ... the rate at which refugees are arriving in the country makes it impossible to guarantee a steady supply [of water] ... Apart from the scarcity of tents and kerosene for cooking food, the clinic at Osire has been strenuously overstretched and more medical equipment and drugs are needed to combat possible disease outbreaks.[894]

True disaster was thankfully averted at Osire because of a last-minute response from the Swedish and American governments.[895] But similarly perilous conditions remain common. For example, UNHCR was forced to

them. "The Danish government has given UNHCR $2.6 million for refugees and their host communities in Zambia's Western Province ... The projects formed part of the Zambia Initiative, which aims to uplift communities hosting refugees from neighboring countries living in Zambia, after it was found that many of the host communities themselves were extremely poor and battling to cope with the increased demands. Zambia is home to more than 270,000 refugees, some 225,000 of which are Angolans": "Danish government aids refugee communities," *UN Integrated Regional Information Networks*, Nov. 1, 2002.

892 UNHCR Executive Committee, "Social and Economic Impact of Massive Refugee Populations on Host Developing Countries, as well as Other Countries: Addressing the Gaps," UN Doc. EC/49/SC/CRP.24, Sept. 3, 1999, at para. 2.

893 *Namibian*, May 2, 2001. 894 Ibid., Dec. 1, 2000.

895 Ibid., May 17, 2001; US Committee for Refugees, *World Refugee Survey 2002* (2002), at 87.

put refugees in Zambia on half-rations in 2002 because of an insufficiency of aid donations.[896] In the same year, UNHCR cited financial constraints as the reason for discontinuing food and related assistance to refugees from Haiti in the Dominican Republic.[897] Funding shortfalls resulted in refugees in Kenyan camps receiving less than the World Health Organization's minimum caloric intake during most of 2002 and 2003.[898] The World Food Program was forced in 2003 to reduce food rations to refugees in Tanzania by 50 percent on top of an earlier reduction of 28 percent, leading the host government to threaten the repatriation of all refugees living in the country if the international community failed to take immediate action to stave off a violent reaction by the refugees.[899]

Shortfalls in relief funding may be the result of the political or other priorities of donor countries. For example, once a peace process was underway in Burundi, UNHCR's budget to operate refugee camps for Burundians in Tanzania was cut by 55 percent.[900] UNHCR was unable to persuade donors to make funds available to meet even basic needs in the camps of Tanzania's Kibondo district, which continued to receive more than 100 Burundian refugees each day.[901] As the local UNICEF chief observed, "[w]hen things fizzle out in terms of CNN coverage, the funding starts to disappear."[902] Indeed, even as a massive refugee effort was underway to assist refugees in flight from Kosovo, UNHCR reported that donations to existing operations

[896] "Refugees on half-ration as food stocks drop," *UN Integrated Regional Information Networks*, Jan. 18, 2002.

[897] (2003) 125 *JRS Dispatches* (Jan. 27, 2003).

[898] P. Browne, "Where refugee camps are becoming a way of life," *Guardian*, June 12, 2003, at 25.

[899] "Lack of funding to feed the 500,000 refugees in Tanzania's refugee camps is leading to a 'dire' situation ... [UNHCR and WFP] have described the situation as the 'worst ever,' and said it had led to repeated calls for donor action. Furthermore, the Tanzanian authorities have reacted by warning that they might expel the refugees if the situation were to get out of hand ... 'We have said that we would not be prepared to be put into such a situation, and the alarm has been sounded. Should things deteriorate to this extent, we may have to consider the possibility of repatriating the refugees forcefully,' [the Minister of Home Affairs, Omar Ramadhani Mapuri] said": "Food situation in refugee camp 'dire,'" *UN Integrated Regional Information Networks*, Feb. 19, 2003.

[900] "The Burundi peace talks in Tanzania last year, brokered by Nelson Mandela and visited by Bill Clinton, have done the refugees more harm than good. Most of the Hutu rebel groups were excluded and the initiative has come to nothing. But it was enough to send many donors elsewhere": J. Astill, "UN refugee work in crisis as world ignores Burundi," *Guardian*, Feb. 14, 2001, at 18.

[901] "Several operations in the refugee camps ... have been severely curtailed or suspended altogether as a result of UNHCR's funding problems ... Fuel has been cut by 50%, soap distribution to refugees has been suspended, and all construction and training programs have been cancelled": (2001) 85 *JRS Dispatches* (Jan. 17, 2001).

[902] Ibid., quoting Mr. Bjorn Lungqvist of UNICEF.

had "stagnated," meaning, for example, that funds were not available even to provide Somali refugees in Kenya with firewood for cooking.[903] A reporter wrote,

> Far from safe havens, the camps [in Kenya] are so dangerous that aid workers venture into them only with armed escorts. And if the plight of ethnic Albanians has reintroduced the word "refugee" to discourse around the world, no overflow of compassion has reached the dusty Somali settlements here.[904]

The impact of such donor selectivity often falls squarely on impoverished host communities. For example, when inadequate funding led to a cut of food rations to refugees in the Kala camp of northern Zambia, riots broke out, and refugees invaded nearby villages to steal crops belonging to the local community.[905]

Even when adequate resources are in principle provided to meet refugee needs, refugees may nonetheless face food and other shortages because agencies encounter logistical barriers to the delivery of aid, for example when refugee camps are situated in remote regions. Half of the 900 km road to refugee camps in Guinea was unpaved, making it "impassable at times in the rainy season."[906] Food deliveries to the indigenous Nicaraguan refugees living in Honduras had to be suspended during the rainy season, as their settlements could only be reached by canoe.[907] It may also be impossible to reach refugees located in areas surrounded by hostile forces. For example, rebel Mozambican forces blocked the main transportation corridor used to reach refugees in Malawi in 1990.[908]

Occasionally, malnutrition stems from the rigid application by host states of general rules. While shortfalls in international assistance accounted for

[903] "'I cannot tell you for a fact that the contributions to Kosovo have affected the contributions to the rest,' said Michel Gabaudon, chief fund-raiser for the UN High Commissioner for Refugees . . . But donations to existing operations have 'stagnated' since the outpouring for the Balkans, Gabaudon reported, and 'I have had donors say, "Where can you make cuts?"' 'If funds are cut,' he added, 'your bottom line is water and food'": K. Vick, "For Somali refugees, no safe haven," *Washington Post*, June 3, 1999, at A19.

[904] Ibid. The cuts were particularly tragic because the firewood program had obviated the need for women to scavenge for firewood in the bush, where they had been subjected to rape at a rate seventy-five times higher than would be expected in a community of that size: ibid.

[905] *SAPA-AFP*, April 15, 2001. The regional director for UNHCR characterized the situation in Zambia as a "time bomb": ibid.

[906] US, "Living Conditions," at 28.

[907] US Government Accounting Office, "Central America: Conditions of Refugees and Displaced Persons," Doc. No. UNGAO/NSIAD-89-54 (1989) (US, "Central America"), at 22.

[908] US, "Living Conditions," at 35.

much suffering at the Osire refugee camp in Namibia, the problems there were compounded by the host state's initial refusal to waive its long-standing ban on importing the refugees' staple food, maize meal.[909] Similarly, and despite the critical need for food supplies in 2002, the Zambian government initially refused to allow the World Food Program to feed more than 130,000 refugees in that country with genetically modified food provided by donors.[910] In other circumstances, food shortages result from the failure of camp or other administrators to make provision for foreseeable needs.[911] In particular, even when food reaches refugees, malnutrition may result from inadequate distribution systems. In Ethiopia, for example, the diversion of food to both Sudanese and Somali rebel movements was considered widespread.[912] Budget cuts had reduced the number of UNHCR staff assigned to monitor food distribution, in consequence of which "there was no assurance that needy refugees actually received their food allotments."[913]

In some camps where food supplies are limited, women and children are inadequately fed because cultural norms dictate that they should not eat until men have had all they wish to eat.[914] Even more egregiously, some Bhutanese

[909] *Namibian*, May 2, 2001. Because local maize prices were nearly double those of maize on the international market, the WFP objected to the requirement. Yet again in 2003, "[a] request to the Namibian Agronomic Board to be excused from the import restrictions has been refused. The WFP has now requested the intervention of the Home Affairs Ministry to plead for this decision to be reconsidered": "Food shortage looms for Osire refugees," *Namibian*, July 18, 2003. "The government imposed the ban to encourage the buying of maize from local farmers during the harvest period": *Namibian Economist*, Aug. 1, 2003.

[910] "Scramble for non-genetically modified food for refugees," *UN Integrated Regional Information Networks*, Jan. 12, 2002. A change of policy resulted in the food supplies being admitted later in the year: *Post* (Lusaka), Sept. 9, 2002.

[911] "Pressing food shortages are looming at Kakuma camp in Northern Kenya ... The medical coordinator claims that many children will die if food is not rushed to the camp. It seems that the authorities have known about the looming shortage for a long time but they took no measures to prevent it": (2000) 76 *JRS Dispatches* (Aug. 31, 2000).

[912] "Looting and diversion of food continued to be a problem in several SPLA zones. Action Against Hunger, a French non-governmental agency, claimed that it was expelled by the SPLA because it was about to investigate why a high rate of malnutrition existed in Labone despite adequate supplies of relief food for the civilian population. It was suspected that the SPLA deliberately kept some children in a thin and sickly state to justify continued high levels of relief food the SPLA could divert": Human Rights Watch, *World Report 1998* (1998), at 76.

[913] US, "Living Conditions," at 11.

[914] Forbes Martin, *Refugee Women*, at 35. See also G. Camus-Jacques, "Refugee Women: The Forgotten Majority," in G. Loescher and L. Monahan eds., *Refugees and International Relations* (1990) (Camus-Jacques, "Forgotten Majority"), at 148: "This [type of discriminatory practice] vividly demonstrates how refugee policies for the administration of material assistance are insufficient when such biased practices against women are allowed to develop and persist." See also UNHCR, "Note on Refugee Women and International Protection," UN Doc. EC/SCP/59, Aug. 28, 1990, at para. 30.

refugee women in Nepal have been unable to secure access to food and other aid because Nepal's system of registration required all rations to be distributed through male heads of household. In the result, women in abusive relationships "must stay in violent relationships, leave their relationships (and thus relinquish their full share of aid packages), or marry another man, in which case they lose legal custody of their children."[915]

For all these reasons, inadequate access to food is the leading cause of death among refugees.[916] As UNHCR has observed,

> Malnutrition is both a primary and secondary cause of death. There is a direct causal relationship between malnutrition and mortality in refugee sites, and this is most pronounced among children under five years of age.[917]

Sadly, the death rate for Somalis fleeing civil war actually peaked a year after reaching the "safety" of the Hartisheik camp in Ethiopia. Because of inadequate food, 46 of every 1,000 adults died, with the death rate for children reaching a staggering 150 per 1,000.[918] Refugees from the Democratic Republic of Congo arriving in Zimbabwe during the latter months of 2000 were so desperate to eat that they were selling their blankets to buy food.[919] In some circumstances, refugees will be forced to steal in order to meet their needs.[920] Afghan refugees in Pakistan were "faced with a no-win situation ... They can either move to the camps nearer the border with Afghanistan, where their security cannot be guaranteed, or they can stay in Peshawar, where their food supply and winter shelter cannot be guaranteed."[921] Conditions may even be so bad that refugees return home to face the risk of being persecuted, rather than starving in an asylum country. Starvation-induced repatriation was documented, for example, in the cases of Sudanese refugees struggling to survive in the Adjumani district of Uganda,[922] and Burundian refugees confronted with the misery of life in the Tanzanian Karago camp.[923]

Even where inadequate food rations do not lead directly to death or forced return, they may cause serious illness. Rations for some Iraqi Kurds in Turkey

[915] Human Rights Watch, "Nepal/Bhutan: Refugee Women Face Abuses," Sept. 24, 2003.
[916] Forbes Martin, *Refugee Women*, at 33.
[917] UNHCR Executive Committee, "Refugee Health," UN Doc. EC/1995/SC.2/CRP.29, Sept. 11, 1995.
[918] Keen, *Right to Life*, at 7–8. [919] (2000) 80 *JRS Dispatches* (Oct. 16, 2000).
[920] "Commercial farmers involved in game and livestock farming close to the Osire Refugee Camp have accused the refugees of poaching and stock theft. Tension between the farmers and the refugees, numbering over 20,000, has occasionally resulted in some refugees being shot for trespassing": "Tension escalates near Osire Refugee Camp," *Namibian*, Jan. 30, 2002.
[921] Human Rights Watch, "Pakistan: Refugees Not Moving Voluntarily," Dec. 5, 2001.
[922] (2000) 75 *JRS Dispatches* (July 20, 2000).
[923] (2000) 76 *JRS Dispatches* (Aug. 31, 2000); (2000) 84 *JRS Dispatches* (Dec. 18, 2000).

included no milk or milk products, fruit, or vegetables,[924] and refugees from the Democratic Republic of Congo were refused any fish or meat at the Dukwe refugee camp in Botswana.[925] Potentially fatal diseases long eradicated in the North, such as scurvy, xerophthalmia, anemia, and beriberi, have made comebacks in the refugee camps of the South because of acute vitamin deficiencies.[926] For example, a shortage of niacin in food baskets led to an outbreak of pellagra among Mozambican refugees in Malawi.[927] In other situations, the only food provided may be culturally foreign or simply bad. After major food cuts to refugees in the Kigoma and Kagera regions of Tanzania in 2000, it was reported that refugees received little more than "beans which were so hard that no amount of boiling will make [them] ... palatable."[928] One refugee mother of four children told an NGO worker that her family "eat[s] the same food day after day. It is different to the food we used to eat in Burundi, and it is not enough. But we cannot grow food so we cannot supplement our rations."[929]

Access to clean drinking water is also a frequent concern for refugees.[930] Even though UNHCR guidelines recommend 15–20 liters of water per day for each person, refugees in one camp in western Ethiopia were reported to receive less than 1 liter of water.[931] At the Maheba camp in Zambia, the death rate among Angolan refugees tripled in less than three months because

[924] IHRK, "Kurdish Refugees," at 11.

[925] It is reported that the UNHCR regional representative viewed the refugees' request as "unreasonable ... If we are looking at the kilo-calories content of the food, it is in accordance with international standards": *Namibian*, Feb. 7, 2001, quoting Mangesha Kebede of the UNHCR's Regional Office in Pretoria.

[926] Keen, *Right to Life*, at 17–19; United States, "Outbreak of Beriberi Among Illegal Mainland Chinese Immigrants at a Detention Center in Taiwan," (2003) 118 *Public Health Reports* 59.

[927] US, "Living Conditions," at 41–42. See also Center for Disease Control, "International Notes: Outbreak of Pellagra Among Mozambican Refugees – Malawi, 1990," (1991) 40(13) *Morbidity and Mortality Weekly Report* 209.

[928] (2000) 75 *JRS Dispatches* (July 20, 2000).

[929] Ibid.

[930] Access to clean water may indeed be the single most important means of saving refugee lives: Keen, *Right to Life*, at 21. Keen reports that when clean water was provided to refugees in eastern Sudan, "there was a 1% death rate among those who contracted cholera in refugee camps, whereas in nearby Sudanese villages the proportion reached 20%. Non-governmental organizations realized what was happening and began to give assistance to Sudanese health centres, though this effort was impeded by lack of resources": ibid.

[931] US, "Living Conditions," at 12. The same problem occurred, though to a less drastic extent, at the Lugufu camp in Tanzania, where a water supply designed for a maximum of 40,000 persons was in fact used by more than 55,000 refugees, resulting in access to no more than 13.5 liters of water per day per person: L. Talley et al., "An Investigation of Increasing Mortality Among Congolese Refugees in Lugufu Camp, Tanzania, May–June 1999," (2001) 14(4) *Journal of Refugee Studies* 412, at 423–424.

the camp had only one functioning water borehole, rather than the twenty required for its population.[932] When refugees are not given access to safe water, they may turn in desperation to contaminated sources, a major cause of disease. For example, Iraqi refugees in Iran who were forced to use a polluted stream for drinking, washing, and bathing experienced outbreaks of cholera and typhoid.[933] Milk powder from international donors has had to be mixed with unclean water, causing severe diarrhea and even death among infants and young children.[934] And refugees given responsibility to collect water (typically women) are vulnerable to sleeping sickness, malaria, yellow fever, and river blindness.[935]

Beyond food and water, refugee survival may also depend on access to adequate shelter. Even though shelter is a crucial determinant of refugee health,[936] particularly in extreme climatic conditions, it is frequently treated as the "poor cousin" to other necessities of life. For example, more than 60,000 Kosovar refugees arriving in northern Albania were forced to sleep outside in what UNHCR described as "unsanitary, open-air ... massive sick bays."[937] Citing concerns of "perceived permanency" and cost, governments sometimes insist on the right to negotiate with international agencies about whether or not refugees should be given access to housing.[938] Thus, Iraqi Kurds arriving in Turkey were initially forced to remain in open-air camps, with no shelter of any kind.[939] Some of these refugees were eventually moved into concrete flats, while 16,000 others had to endure two years of harsh

[932] (2000) 82 *JRS Dispatches* (Nov. 10, 2000).

[933] M. Elkoury, "Islamic Republic of Iran: A Million Lives in the Balance," (1991) 86 *Refugees* 30, at 30.

[934] Forbes Martin, *Refugee Women*, at 37–38. "The distribution of milk powder in refugee camps constitutes an additional problem in so far as milk powder is not an acceptable substitute for breast-feeding ... When mixed with non-sterile water, milk powder can lead to severe diarrhoea with fatal results": UNHCR, "Note on Refugee Women and International Protection," UN Doc. EC/SCP/59, Aug. 28, 1990, at para. 32.

[935] Forbes Martin, *Refugee Women*, at 38.

[936] J. Rivers and G. Brown, "Physiological Aspects of Shelter Deprivation," in I. Davis ed., *Disasters and the Small Dwelling* (1981).

[937] "The deep, chest-heaving cough can be heard all throughout the night ... [A]s the flow of refugees has slowed, medical personnel have turned their attention from life-threatening trauma to the respiratory and gastrointestinal ailments": UNHCR, *Refugees Daily*, May 6, 1999.

[938] P. Goovaerts, paper prepared for the First International Workshop on Improved Shelter Response and Environment for Refugees, June 1993, at 4–7. See also R. Zetter, "Shelter Provision and Settlement Policies for Refugees: A State of the Art Review," Nordiska Afrikainstitutet Studies on Emergencies and Disaster Relief Paper No. 2 (1995), at 78.

[939] "The men are trying to make small oases of shade out of the foliage and a few blankets in the burning heat, yet these shelters are no help against the ice-cold nights in the high mountains. A sudden storm on the night of August 4 surprised tens of thousands of people who were totally without protection. After this rain, many people, especially

winters and brutal summer heat in uninsulated tents, each holding up to sixteen people.[940] Ethiopian refugees arriving in the Sudan lived for more than a year under tarpaulins because promised UNHCR tents did not materialize. When the registration of incoming Ethiopian refugees was suspended for three months in 1990, not even this shelter was available. New arrivals were forced to build makeshift shelters out of blankets and mats.[941] Sahrawi refugees in Algeria received tents, but they were destroyed in severe sandstorms because they were of the wrong shape and too weakly constructed.[942]

Even when refugees receive housing, overcrowding is a frequent problem. Nicaraguan refugees in Honduran camps squeezed up to ten family members into each of their single-room shelters.[943] Refugee claimants in the Bahamas were reported to be "living in squalor as they awaited the outcome of status determination procedures ... The Carmichael Road facility is so overcrowded that some detainees must sleep on the floors of trailer-like structures."[944] Refugee housing also frequently lacks adequate sanitation. Because Sudanese refugees in Ethiopia had no access to facilities for bathing or dishwashing in camps, they used contaminated rivers and standing pools of water for this purpose.[945] Roma refugees from Kosovo were reportedly left without even access to basic sanitary facilities at the UNHCR-run Skopje Suto Orizare camp in Macedonia.[946] The overcrowding and lack of sanitation at Spanish detention facilities in the Canary Islands were so bad that the volunteer doctors working there suspended their service in protest over the conditions.[947]

In general, the minority of refugees who seek protection in the developed world are much less likely to be denied access to the basic necessities of life. Some countries, including Canada and Norway, have opted to allow refugees

children, came down with fever": *Frankfurter Rundschau*, Sept. 12, 1988, cited in IHRK, "Kurdish Refugees," at 5.

940 "The people are totally exposed to extreme climatic conditions in their tents without any protection: to severe frost in the winter and burning heat in the summer. Moreover, there are neither trees nor bushes in the camp, there is neither shade nor protection from the wind": German *Bundestag* Member Angelika Beer, June 12, 1989, cited in IHRK, "Kurdish Refugees," at 13.

941 US, "Living Conditions," at 22–24.

942 T. Corsellis, "The Sahrawi Refugee Camps of Western Algeria," paper presented at the Seminar on Civil Strife and Relief within the Context of the Continuum from Relief to Development, The Hague, July 1994, at 2.

943 US, "Central America," at 17.

944 "The Bahamas Struggle to Fulfill Refugee Obligations," (1998) 24 *Forced Migration Monitor* 8, reporting on the results of an Open Society Institute mission to the Bahamas.

945 US, "Living Conditions," at 14.

946 (2003) 133 *JRS Dispatches* (May 30, 2003).

947 Human Rights Watch, "Spain: Migrants' Rights Violated on Canary Islands," Feb. 21, 2002.

subject to status verification to engage in wage-earning employment.[948] In contrast, most European countries either deny asylum-seekers the right to seek employment altogether or do so for a period of time. For example, refugees undergoing status verification may not work at all in Denmark, France, Germany, or Italy.[949] In contrast, Finland allows refugees to work after a three-month waiting period; in Sweden, the waiting period is four months.[950] Since 1998, the Netherlands has allowed a more general right of refugee claimants to work, though the duration of the work permit is a maximum of twelve weeks per annum.[951]

In most cases, refugees allowed to work in industrialized countries can meet basic needs from their own income. This is less likely to be the case, however, in states which impose real bureaucratic obstacles to receipt of a work permit, or where the nature of the authorization issued arouses the suspicion of potential employers. In Argentina, for example, refugee claimants are issued only a "certificate of precarious stay" which is not readily accepted by most businesses.[952] In addition, many refugees face language difficulties, educational differences, certification requirements, cultural barriers, and xenophobic or racist barriers to work.[953] Thus, even in asylum countries that allow refugees to work, refugees may be either channeled into low-paying, insecure jobs, or simply unable to find work at all.

Refugees in the developed world who are either prevented from working or who cannot find work must therefore turn to public or private assistance to meet their basic needs. Many countries in Western Europe have established specialized reception centers to accommodate asylum-seekers which provide residents with not only shelter, but also food or cooking facilities, as well as on-site medical assistance. Some states, including Germany and Switzerland, have traditionally met the needs of refugees only by way of a mandatory stay in a reception center.[954] Belgium has more recently adopted this policy, announcing in October 2000 that it would end the provision of financial assistance to asylum-seekers upon arrival. Food and other assistance would

[948] F. Crépeau and M. Barutciski, "The Legal Condition of Refugees in Canada," (1994) 7(2/3) *Journal of Refugee Studies* 239 (Crépeau and Barutciski, "Canada"), at 239–243; Liebaut, *Conditions 2000*, at 233.

[949] Liebaut, *Conditions 2000*, at 55, 96, 116–117, and 172.

[950] Ibid. at 75, 282. [951] Ibid. at 215.

[952] S. Fraidenraij, *International Academy of Comparative Law National Report for Argentina* (1994), at 9. See generally D. Joly, *Refugees: Asylum in Europe?* (1992) (Joly, *Asylum*), at 59, who argues that uncertainty of status acts as a disincentive to offer employment to refugees.

[953] See e.g. M. Addo, *International Academy of Comparative Law National Report for the United Kingdom* (1994), at 11; J. Vedsted-Hansen, *International Academy of Comparative Law National Report for Denmark* (1994), at 2; Forbes Martin, *Refugee Women*, at 78–88.

[954] Liebaut, *Conditions 2000*, at 115, 297.

be provided only in privately run reception centers pending a decision on admissibility of the claim to refugee status.[955] In other countries, access to reception centers is voluntary, and may even be restricted. Because demand outstrips reception center capacity in France, for example, priority in admission is given to women and families.[956]

Alternatively, refugees awaiting status verification may be granted access to social assistance schemes that provide them with the funds needed to meet their own basic needs. In Canada, persons seeking recognition of their refugee status are assimilated to nationals for the purpose of access to most benefit programs.[957] Refugee claimants in Finland may also access social welfare, but have the usual social benefit amount reduced by 20 percent to account for the value of accommodation provided in reception centers – a reduction which is imposed even on refugees who live outside the centers.[958] The United Kingdom provides asylum applicants with only 70 percent of the income support paid to citizens,[959] and since 2003 has sought to bar refugees from receiving public assistance unless they make their claim to be a refugee forthwith upon arrival in the United Kingdom.[960] This provision has operated to deprive many refugee claimants of income supplements, housing benefits, and disability allowances.[961] Combined with Britain's ban on the employment of persons seeking recognition of refugee status, claimants

[955] (2000) 81 *JRS Dispatches* (Oct. 31, 2000).

[956] Personal communication with Antoine Decourcelle of CIMADE, Dec. 4, 2003.

[957] Crépeau and Barutciski, "Canada," at 243.

[958] Personal communication with Reetta Helander, Information Officer, Refugee Advice Center, Helsinki, Sept. 25, 2003.

[959] Refugee claimants receive a number of other in-kind benefits, which one commentator estimates bring their overall welfare benefit to about 80 percent of that provided to citizens: J. Hardy, "Tough on toys, tough on the causes of toys: How we ensure that asylum-seekers stick to life's bare essentials," *Guardian*, Dec. 20, 2000, at 18.

[960] These changes were brought in by the Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996 (Feb. 5, 1996), and were incorporated in the Asylum and Immigration Act on July 24, 1996. They are, in essence, a penalty on account of illegal entry or presence: see chapter 4.2.2 above. This approach appears to have been the model for the European Union's Council Directive laying down minimum standards for the reception of asylum-seekers, Doc. 2003/9/EC (Jan. 27, 2003) (EU Reception Directive), at Art. 16(2), which authorizes states to "refuse reception conditions" where a claim is not made as soon as reasonably practicable after arrival: Immigration Law Practitioners' Association, [June 2004] *European Update* 10.

[961] It was estimated that about 65 percent of refugees do not apply for recognition of refugee status to an immigration officer immediately upon arrival: A. Travis, "Thousands of asylum-seekers face 'destitution,'" *Guardian*, Dec. 27, 2002, at 1. In October 1996, however, the High Court held in *R v. London Borough of Hammersmith*, [1996] EWHC Admin 90 (Eng. HC, Oct. 8, 1996) that local authorities have a duty under the 1948 National Assistance Act to provide basic services to asylum-seekers with no other means of support. The Court found it "impossible to believe that Parliament intended that an asylum-seeker, who was lawfully here and could not lawfully be removed from the

without private means can find themselves in an extraordinarily difficult position,[962] as recent evidence before the English Court of Appeal makes clear:

> Many [asylum-seekers] sleep outside [the Refugee Council] offices, in doorways, in the gardens of a local church and sometimes in telephone boxes (the only place where they are able to keep dry). They do not have enough blankets and clothing to keep them warm. They are often lonely, frightened and feel humiliated and distressed ... Staff have seen the condition of asylum-seekers visibly deteriorating after periods of rough sleeping ... On one occasion I had to tell a group of three homeless asylum-seekers to leave the building on a Friday evening during a torrential downpour with nothing more than a blanket each, a food parcel ... and a list of day centres. When I saw them the following Monday their condition had deteriorated considerably, their clothes were filthy, they had started to smell, and they had been unable to find any of the centres listed. Other clients have become depressed and have threatened suicide; one was sectioned after she was found lying across a railway track. Their story is not exceptional – we see people in this situation on a daily basis.[963]

country, should be left destitute, starving and at risk of grave illness and even death because he could find no one to provide him with the bare necessities of life": ibid. If this was the government's intention, said the Court, "it would almost certainly put itself in breach of the European Convention on Human Rights and of the Geneva Convention": ibid. More recently, the English Court of Appeal has insisted that the application of this policy must not infringe the prohibition of cruel or inhuman treatment under Art. 3 of the European Convention on Human Rights: *R (Q) v. Secretary of State for the Home Department*, [2003] EWCA Civ 364 (Eng. CA, Mar. 18, 2003); *R (S) v. Secretary of State for the Home Department*, [2003] EWCA Civ 1285 (Eng. CA, Sept. 24, 2003); *R (Limbuela) v. Secretary of State for the Home Department*, [2004] EWCA Civ 540 (Eng. CA, May 21, 2004). Shortly after issuance of the latter judgment, the government indicated that it would desist from a rigid application of s. 55 *of the Nationality, Immigration and Asylum Act 2002*, and specifically that it would no longer be applied against persons who apply for refugee status within a few days of arrival in the United Kingdom: www.refugeecouncil.org.uk (accessed June 4, 2004).

962 Amnesty International United Kingdom, "Slamming the Door: The Demolition of the Right to Asylum in the UK" (1996), at 15; Refugee Council, "Welcome to the UK: The Impact of the Removal of Benefits from Asylum Seekers" (1996); M. Carter, Commission for Racial Equality, and the Refugee Council, "Poverty and Prejudice: A Preliminary Report on the Withdrawal of Benefit Entitlement and Impact of the Asylum and Immigration Bill" (1996). The United Kingdom previously allowed refugees who had not received an adjudication of their claim within six months to secure work authorization at that time; that policy was rescinded in July 2002. At present, permission to work is granted only if and when a positive decision on refugee status is made: British Refugee Council, "Training, Education and Employment," available at www.refugeecouncil.org.uk (accessed Dec. 13, 2003).

963 *R (Limbuela) v. Secretary of State for the Home Department*, [2004] EWCA Civ 540 (Eng. CA, May 21, 2004), at para. 92, quoting from the evidence of Hugh Tristram of the Refugee Council.

The situation in some other countries is comparably problematic. In Italy, for example, social benefit payments to asylum-seekers end forty-five days after arrival.[964]

Generalized shortages of affordable housing in Western Europe have led to congestion in refugee reception centers.[965] Thus, the Committee on Economic, Social and Cultural Rights had noted its "concern [regarding] the living conditions of asylum-seekers in some reception centres" in the Netherlands.[966] Those refugees not admitted to centers often end up in boarding houses, or sharing dwellings with strangers. The situation for asylum-seekers in countries which provide little or no support is characterized as desperate, with homelessness among refugees a not uncommon phenomenon.[967] In Italy, Roma refugees from the former Yugoslavia have been forced by circumstances to congregate on the outskirts of Italian cities, "where living conditions are very poor."[968] Under the British government's controversial dispersal policy, asylum-seekers have been given free access to public housing. But the assigned destinations are often arbitrarily selected, remote from critical services,[969] of a poor standard,[970] and sometimes in

[964] "In the absence of other solutions, most ex-Yugoslavs belonging to the Roma minority have spontaneously set up unofficial camps, located on the outskirts of some Italian cities, where living conditions are extremely poor": Liebaut, *Conditions 2000*, at 172.

[965] M. Brink et al., "Reception Policies for Persons in Need of Protection in Western European States" (1993), Center for Migration Research, University of Amsterdam (Brink et al., "Reception Policies"), at 51.

[966] Committee on Economic, Social and Cultural Rights, "Concluding Observations of the Committee on the Report of the Netherlands," UN Doc. E/C.12/1/Add.25 (1998), at para. 18.

[967] The UN has, for example, recommended that Belgium take steps "to fully ensure that persons belonging to ethnic minorities, refugees and asylum-seekers are fully protected from any acts or laws which in any way result in discriminatory treatment within the housing sector": Committee on Economic, Social and Cultural Rights, "Concluding Observations on the Report of Belgium," UN Doc. E/C.12/1994/7, at para. 14.

[968] Brink et al., "Reception Policies," at 135. See also Committee on the Elimination of Racial Discrimination, "Concluding Observations on the Report of Italy," UN Doc. CERD/C/54/Misc.32/Rev. 3, Mar. 18, 1999.

[969] "One year after the passing of the 1999 *Immigration and Asylum Act*, there are evident flaws in the asylum policies brought into force. A recent report by the Audit Commission ... [revealed that] inadequate support systems outside London present a real barrier to dispersal; there is no evidence of efforts to connect people from similar backgrounds together; [and that] asylum-seekers face difficulties in obtaining food vouchers and their paltry food allowance": (2000) 82 *JRS Dispatches* (Nov. 10, 2000).

[970] The government often contracted the housing of refugee claimants to private agencies. One such contractor, Landmark Liverpool, housed 600 refugees in Merseyside in "two 15-storey tower blocks ... sold to the company by Liverpool council after they were deemed unfit for its tenants." Upon disclosure of the circumstances, the immigration minister declared this to be "completely unacceptable" and discontinued dispersals to this company: R. Prasad, "Tower block turmoil," *Guardian*, Apr. 9, 2003, at 5.

neighborhoods where there was a known risk to the physical security of refugees and other foreigners.[971] The system has had a punitive dimension, since asylum-seekers have not been allowed to spend more than seven days away from their assigned accommodation without permission.[972] Indeed, the government imposed a "one strike" rule under which refugee claimants who failed to travel to their assigned residence within forty-eight hours without reasonable excuse would be evicted from their emergency accommodation, and permanently denied access to income support.[973]

> **Economic, Social and Cultural Covenant, Article 11**
>
> **1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.**
>
> **2. The States Parties to the present Covenant . . . recogniz[e] the fundamental right of everyone to be free from hunger . . .**

> **Economic, Social and Cultural Covenant, Article 2(1)**
>
> **Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means . . .**

The most broadly framed guarantee of access to the necessities of life is Art. 11 of the Economic Covenant. Art. 11 establishes what is now understood to be an immediate obligation to alleviate hunger, as well as a duty progressively

[971] For example, "Mr. Justice Moses in the High Court in London heard that the Gezer family of Turkish Kurds had been spat at, threatened with dogs, and had their home attacked by a group of men . . . Mr. Gezer, his wife and four children were sent to the Toryglen estate [in Scotland] in September 2001 . . . Their son was bullied at school. On one occasion, the husband tried to throw himself out of a window. On October 27, their home was attacked by a group of men, and their son Ibrahim was threatened with a knife. The family was offered emergency accommodation in Glasgow, but they returned to London to live with relatives a day after the attack. The Home Office, however, insisted that they return to Glasgow and reduced their state support to the most basic level when they refused to go": A. Travis, "Shame of violence to asylum family," *Guardian*, Apr. 17, 2003, at 13.

[972] A. Travis, "Rules leave asylum-seekers with no cash for claims," *Guardian*, Nov. 26, 1999, at 5.

[973] R. Prasad, "'One strike' rule: Asylum seekers face tough new code," *Guardian*, July 25, 2001, at 4.

to implement the right to an adequate standard of living. Art. 12, addressed below,[974] focuses more specifically on the intimately related right to physical and mental healthcare.

The rights in the Economic Covenant, including those established by Arts. 11 and 12, explicitly inhere in "everyone."[975] They are also to be implemented without discrimination "of any kind as to ... national or social origin ... or other status."[976] The Committee on Economic, Social and Cultural Rights has therefore "extended its scrutiny of differential treatment to grounds other than those specifically enumerated," including on grounds of being either a non-citizen or a refugee.[977] As Craven concludes,

> the clear purpose of the Covenant is to protect the fundamental rights of every person without exception. That human rights are seen to adhere to every human being by virtue of their humanity means that they are possessed by every person to an equal extent. As the Preamble stresses,

[974] See chapter 4.4.3 below.

[975] For example, the Committee on Economic, Social and Cultural Rights has made clear that "[t]he right to adequate housing applies to everyone. While the reference to 'himself and his family' reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 4: The right to adequate housing" (1991), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 19, para. 6. See also UN Committee on Economic, Social and Cultural Rights, "General Comment No. 12: The right to adequate food" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 63, para. 1: "The human right to adequate food is of crucial importance for the enjoyment of all rights. It applies to everyone; thus the reference in article 11.1 to 'himself and his family' does not imply any limitation upon the applicability of this right to individuals or to female-headed households."

[976] International Covenant on Economic, Social and Cultural Rights, UNGA Res. 2200A(XXI), adopted Dec. 16, 1966, entered into force Jan. 3, 1976 (Economic, Social and Cultural Covenant), at Art. 2(2). One commentator has argued that the enumerated grounds on which discrimination is prohibited are exhaustive: A. Bayefsky, "The Principle of Equality or Non-Discrimination in International Law," (1990) *Human Rights Law Journal* 1, at 5. The better position notes the clearly open-ended nature of the reference to "discrimination of any kind as to ... other status," and concludes that the list of prohibited grounds is illustrative: M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) (Craven, *ICESCR Commentary*), at 168. See also A. Chapman, "A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights," (1996) 18 *Human Rights Quarterly* 23, at 54–55: "It is notable that in a world which offers few protections of 'illegal immigrants,' the [Economic, Social and Cultural Rights] Committee has disagreed with the interpretation of at least one government (the government of Hong Kong) that asylum-seekers are not entitled to enjoy ... rights in view of their status as 'illegal immigrants.'"

[977] Craven, *ICESCR Commentary*, at 169–170.

> the Covenant is based upon an idea of the "equal and inalienable rights of all members of the human family."[978]

In relation to the right to food, for example, the Committee on Economic, Social and Cultural Rights has stressed that "any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, color, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant."[979] Because of their discriminatory character, Italy's arbitrary forty-five-day limit to the provision of assistance to refugees, as well as the decisions of Finland and the United Kingdom to provide refugees with less than the domestic standard of what is needed to meet basic needs, are presumptively in breach of their duties under the Economic Covenant. Bhutan's refusal to provide women refugees with food and other rations other than through a male family member is a particularly egregious breach, since it has in practice forced women to remain in abusive relationships in order to avoid starvation. In contrast, the French decision to give priority in admission to reception centers to women and families might well be reasonable (and hence non-discriminatory) in light of the evidence of their greater vulnerability to risk if denied shelter; this decision would not, however, excuse any lack of effort to meet the needs of single male refugees who are unable in practice to meet their needs by independent effort.

It remains, though, that duties under the Economic Covenant are not framed as obligations of result. State parties agree instead "to take steps,

[978] Ibid. at 153. To the extent that a host state government regulates the necessities of life, it is subject also to a more general duty of non-discrimination based on Art. 26 of the Civil and Political Covenant. See chapter 2.5.5 above, at pp. 125–127.

[979] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 12: The right to adequate food" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 63, para. 18. See also UN Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The right to the highest attainable standard of health" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 86, para. 18: "By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health." In its most recent elaboration of the scope of Art. 11, the Committee has specifically noted the duty to meet the needs of refugees on terms of equality with those of citizens: UN Committee on Economic, Social and Cultural Rights, "General Comment No. 15: The right to water" (2002), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 106, para. 16.

individually and through international assistance and co-operation ... to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant."[980] Thus, assuming the real logistical impossibility of, for example, delivering food and other essentials to refugees in remote parts of Guinea and Honduras during the rainy season, there would be no breach of any duty under the Economic Covenant. This duty of non-discriminatory, progressive implementation seeks to strike a delicate balance:

> It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[981]

There is therefore a duty to give priority to the realization of economic, social, and cultural rights,[982] and to ensure that their realization is subject to meaningful legal accountability and respectful of other requirements of human rights law:

[980] Economic, Social and Cultural Covenant, at Art. 2(1). "The term 'progressive realization' is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 3: The nature of states parties' obligations" (1990), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 15, para. 9.

[981] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 3: The nature of states parties' obligations" (1990), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 15, para. 9.

[982] See D. Trubek, "Economic, Social, and Cultural Rights in the Third World," in T. Meron ed., *Human Rights in International Law: Legal and Policy Issues* 205 (1984), at 215: "I believe the available resources language should be read as establishing a priority for social welfare. Given the purpose of the Economic Covenant, it is hard to see how the alternative reading would make any sense. It is clear that the drafters of the Economic Covenant wished to impose obligations on states. Yet if the only obligation arising from the Economic Covenant was that a state could spend what it wanted on social welfare, then this would be no obligation at all and the drafters would have failed in their goal. This reasoning from purpose is supported by the legislative history."

> [T]his flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.[983]

In line with this understanding, a state does not meet its obligations under Art. 11 when an adequate standard of living is available only to refugees who renounce other rights. The Belgian, German, and Swiss policies of agreeing to meet basic needs only in the case of refugees who submit to confinement in a reception center – despite their right to enjoy internal freedom of movement once identity is verified and a refugee claim duly lodged[984] – are examples of policies that set an unlawful barrier to realization of Art. 11 duties.

A second constraint on the value for refugees of the rights set by the Economic Covenant is Art. 2(3). This paragraph authorizes "[d]eveloping countries, with due regard to human rights and their national economy, [to] determine to what extent they [will] guarantee the economic rights recognized in the present Covenant to non-nationals." Sadly, neither the notion of a "developing country," nor that of "economic" rights – presumably as contrasted with social or cultural rights – is defined in the Covenant.[985] In the view of one commentator, economic rights should be narrowly confined to only those rights "that enable a person to earn a living or that relate to that process,"[986] a perspective that would require even less developed states to address access by refugees to the necessities of life under Arts. 11 and 12. But there is still no authoritative interpretation of the Covenant which embraces this view, leaving open the possibility that a poorer state might argue that Art. 2(3) effectively exempts it from extending most rights under the Covenant to refugees and other aliens.

The response of the Committee on Economic, Social and Cultural Rights to the dilemmas posed by the duty of progressive implementation and the

[983] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 9: The domestic application of the Covenant" (1998), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 55, para. 2.

[984] See chapter 4.2.4 above.

[985] This leads Warren McKean to conclude that the language of Art. 2(3) "is unconscionably vague. It must therefore be regarded as an unfortunate inclusion in a covenant of this nature and likely to cause invidious and unreasonable distinctions to be made against aliens on the ground of their foreign nationality": W. McKean, *Equality and Discrimination under International Law* (1983), at 201.

[986] E. Dankwa, "Working Paper on Article 2(3) of the International Covenant on Economic, Social and Cultural Rights," (1987) 9 *Human Rights Quarterly* 230, at 240.

potential reach of Art. 2(3) has been indirect. First, the Committee has adopted the construct of "core content" of particularly essential rights. This core content is effectively treated as an obligation of result. Second, it has read the duty of progressive implementation in tandem with the clear duty of non-discrimination to impose a duty to take affirmative steps to ensure at least the core content of Covenant rights to those who are most socially marginalized or most vulnerable. As elaborated below, these interpretive developments provide a solid foundation from which to argue that all states have a duty to provide refugees under their jurisdiction with the necessities of life, including at least access to basic food, water, clothing, shelter, and physical and mental healthcare.

The notion of core content of key rights was first elaborated by the Committee in 1990, as a creative application of empirical evidence to the progressive implementation standard:

> On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports, the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.[987]

In other words, it is the Committee's view that virtually no state – if it *really* did what the Covenant requires, namely give clear priority in resource allocation to the realization of economic, social, and cultural rights, and never allocate those funds on a discriminatory basis – could fail to realize at least the most basic levels of these four, most vital rights.[988] While a state can still justify its failure fully to implement Covenant rights by reference to

[987] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 3: The nature of states parties' obligations" (1990), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 15, para. 10.

[988] The Committee has reaffirmed its commitment to the notion of core rights. "Should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. This follows from article 2.1 of the Covenant, which obliges a State party to take the necessary steps to the maximum of its available resources, as previously pointed out by the Committee in its General Comment No. 3, paragraph 10": UN Committee on Economic, Social and Cultural Rights, "General

Art. 2(1)'s duty of progressive implementation, the Committee has made clear that no state is immune from the duty to respect the core content of rights.[989] Specifically, every state "must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[990] It follows, therefore, that Uganda and Tanzania may be held to account under this standard for the starvation-induced repatriation of refugees from their territory, as may countries such as Ethiopia, Iran, and Zambia where refugees were given grossly inadequate access to food or water.

Of critical importance in the refugee context, this duty will not be met unless a state claiming resource insufficiency proves that it has sought out, and been denied, international aid sufficient to meet its core obligations under the Covenant.[991] The Committee has specifically insisted on this duty in relation to the right to shelter[992] and, most emphatically, the right to food:

Comment No. 12: The right to adequate food" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 63, para. 17. See also UN Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The right to the highest attainable standard of health" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 86, para. 43: "In General Comment No. 3, the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care. Read in conjunction with more contemporary instruments, such as the Programme of Action of the International Conference on Population and Development, the Alma-Ata Declaration provides compelling guidance on the core obligations arising from article 12."

989 In relation to the right to water, for example, the Committee has determined that "[t]o demonstrate compliance with their general and specific obligations, States parties must establish that they have taken the necessary and feasible steps towards the realization of the right to water. In accordance with international law, a failure to act in good faith to take such steps amounts to a violation of the right. It should be stressed that a State party cannot justify its non-compliance with the core obligations ... which are non-derogable": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 15: The right to water" (2002), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 106, para. 40.

990 UN Committee on Economic, Social and Cultural Rights, "General Comment No. 3: The nature of states parties' obligations" (1990), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 15, para. 10.

991 "A final element of article 2(1), to which attention must be drawn, is that the undertaking given by all States parties is 'to take steps, individually and through international assistance and cooperation, especially economic and technical'": ibid. at para. 13. The Committee notes that the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a state and those available from the international community through international cooperation and assistance: ibid.

992 "As recognized in the Global Strategy for Shelter and in other international analyses, many of the measures required to promote the right to housing would only require the abstention by the Government from certain practices and a commitment to facilitating

> In determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State party to comply. Should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. This follows from article 2.1 of the Covenant, which obliges a State party to take the necessary steps to the maximum of its available resources, as previously pointed out by the Committee in its General Comment No. 3, paragraph 10. *A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food* [emphasis added].[993]

But if poorer states are required to seek out international aid in order to ensure the necessities of life to refugees and other vulnerable persons, is there a corresponding obligation on the part of wealthier countries to provide the needed resources? For example, were wealthier countries required to assist in meeting the basic needs of desperate refugees in Zambia, or to enable Namibia to provide for the Angolan refugees it hosted?

The regrettable answer, bound up with the failure of the effort to promote a binding human right to development,[994] is that there is no more than a principled obligation to assist poorer states.[995] While all parties to the Economic Covenant with adequate resources agree to provide international aid to promote the implementation of Covenant rights – and while the aid given by Sweden and the United States to provide for Angolan refugees in Namibia was a commendable example of principled implementation of the Covenant – there is no clear or enforceable legal obligation to provide

'self-help' by affected groups. To the extent that any such steps are considered to be beyond the maximum resources available to a State party, it is appropriate that a request be made as soon as possible for international cooperation in accordance with articles 11(1), 22 and 23 of the Covenant, and that the Committee be informed thereof": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 4: The right to adequate housing" (1991), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 19, para. 10.

[993] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 12: The right to adequate food" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 63, para. 17. The Commission on Human Rights voted 52–1 to endorse the understanding of the right to food set out in General Comment No. 12 as authoritative: UN Commission on Human Rights Res. 2001/25, Apr. 20, 2001.

[994] To date, only a non-binding declaration on this subject has been adopted. See "Declaration on the Right to Development," UNGA Res. 41/128 (1986).

[995] "Although there seems to be agreement that the rights in the Covenant are contingent, to a degree, on the provision of international assistance, the nature, scope, and obligatory nature of such assistance is unclear": Craven, *ICESCR Commentary*, at 145.

aid.[996] In particular, there is no consensus on which states are subject to the duty to assist set by Art. 2(1), or the sorts of action which are encompassed by the obligation to engage in "international assistance and cooperation, especially economic and technical."[997] Most important, Art. 2(1) does not define how much assistance is required to meet a state's obligation, or to whom that assistance should be directed.[998] The tentative nature of the duty is evident also from the rather soft language used in relevant general comments issued by the Committee on Economic, Social and Cultural Rights. States "should" provide aid to realize the right to food;[999] they "should" facilitate realization

[996] The Committee on Economic, Social and Cultural Rights has framed the duty in typically vague terms. "The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 3: The nature of states parties' obligations" (1990), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 15, para. 14.

[997] The most direct conclusion of the Committee is that "given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The right to the highest attainable standard of health care" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 86, para. 40. See generally Craven, *ICESCR Commentary*, at 146–147.

[998] At the 2001 session of the UN Commission on Human Rights, a Cuban proposal to establish an independent expert to monitor the fulfillment by developed countries of their political pledge to allocate 0.7 percent of their GNP to development assistance was abandoned for lack of support: M. Dennis, "The Fifty-Seventh Session of the UN Commission on Human Rights," (2002) 96(1) *American Journal of International Law* 181.

[999] "In the spirit of Article 56 of the Charter of the United Nations, the specific provisions contained in articles 11, 2.1, and 23 of the Covenant and the Rome Declaration of the World Food Summit, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end": UN Committee on

of the right to water in other countries;[1000] they "should" provide the funds to facilitate access by all to basic healthcare;[1001] and of most direct relevance to this study, they "should" provide disaster assistance and humanitarian assistance to meet the needs of refugees.[1002] In no case, however, has the Committee found that the Economic Covenant imposes precise and directly enforceable obligations to provide a given quantum or kind of assistance to states in any specified predicament.[1003] Craven helpfully summarizes the historical basis for this caution in suggesting any duty to provide development assistance:

> During the drafting of the Covenant, Chile claimed that "international assistance to under-developed countries had in a sense become mandatory as a result of commitments assumed by States in the United Nations." This was almost universally challenged by other representatives of all the groupings involved. The general consensus was that developing States were entitled to ask for assistance but not claim it as a legal right. The text of article 11 bears out this conclusion. In recognizing the role of international

Economic, Social and Cultural Rights, "General Comment No. 12: The right to adequate food" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 63, para. 36.

[1000] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 15: The right to water" (2002), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 106, para. 34.

[1001] "Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries wherever possible and provide the necessary aid when required. States parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments. In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health. Similarly, States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The right to the highest attainable standard of health" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 86, para. 39.

[1002] "States have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task in accordance with its ability": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 12: The right to adequate food" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 63, para. 38. "In disaster relief and emergency assistance, including assistance to refugees and displaced persons, priority should be given to Covenant rights, including the provision of adequate water": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 15: The right to water" (2002), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 106, para. 34.

[1003] "While there would appear to be considerable scope for strengthening States' external obligations ... it is an area in which States are unlikely, in the foreseeable future, to agree to specific demands on the amount of distribution of aid to third countries": Craven, *ICESCR Commentary*, at 150.

co-operation in the realization of rights, it stipulates that it should be based upon "free consent."[1004]

The one legal constraint which does appear to exist, however, is that whatever international aid is provided must be granted and administered on a non-discriminatory basis. In line with the substantive content traditionally understood to comprise the duty of non-discrimination,[1005] the importance of allocating aid on the basis of relative need has been affirmed.[1006] In particular, Art. 26 of the Civil and Political Covenant requires that there be no discrimination, in law or in fact, in the allocation of any public goods on the basis of, for example, race, nationality, social origin, or other status.[1007] A dynamic interpretation of this overarching duty would suggest that since international aid provided under Art. 2(1) of the Economic Covenant is expressly intended to advance Covenant rights where states are least able to ensure those rights independently, political or other distortions of aid are violations of the duty of non-discrimination.[1008] Thus, the decision of donor states to cut critical aid to refugees in Tanzania in order to redirect funds to meet the needs of less desperate refugees from Kosovo arriving in European states seems plausibly discriminatory.

Yet even this minimal constraint may be undermined by the practice of the Human Rights Committee to afford states an exceedingly broad margin of appreciation before a given resource allocation is deemed to be unreasonable and hence potentially discriminatory.[1009] It is thus unlikely that the

[1004] Ibid. at 148–149. [1005] See generally chapter 2.5.5 above.

[1006] While still employing irresolute language, the Committee has concluded that "[p]riority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The right to the highest attainable standard of health" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 86, para. 40. With respect to the aid provided by international organizations, see ibid. at para. 65.

[1007] See chapter 2.5.5 above, at pp. 125–127.

[1008] There is, of course, also the question of whether the duty of non-discrimination binds a state in its extraterritorial actions. It has been persuasively argued that there is no principled reason to release states which act extraterritorially from legal obligations that would otherwise circumscribe the scope of their authority. According to Meron, "[i]n 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 the state's obligations 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.

[1009] See chapter 2.5.5 above, at pp. 128–145.

Committee would find a state in breach because of a politically inspired decision to shift aid resources from one group of refugees to another. And even if a wealthy government were to decide simply to end aid to refugees or other impoverished persons abroad in favor of spending resources on its own (less needy) citizenry, the current jurisprudence suggests that no violation of Art. 26 would be found. This is because most distinctions between citizens and aliens have been found to be reasonable and therefore not discriminatory.[1010]

In the end, then, under present interpretations of international human rights law, the failure of a government to provide foreign aid or to allocate its foreign aid resources to meet relative needs is probably not legally actionable. On the other hand, where a state such as India refuses foreign aid which could have enabled it more fully to meet the subsistence needs of refugees, it likely violates Art. 11 of the Economic Covenant for reasons previously described.[1011] There is therefore what amounts to an asymmetrical approach to foreign aid in international law. A government must accept available aid to enable it to provide the necessities of life to persons under its jurisdiction, but states with the means to satisfy even the most basic survival interests of destitute persons abroad are under no concomitant legal duty to share their wealth.

Normally a state is considered to be in breach of its obligations under the Economic Covenant only where there is evidence that it has prevented access to a right, failed to stop private actions from denying access to a right, or neglected to facilitate efforts by individuals to secure their rights.[1012] In all of these cases, there is an underlying expectation of individual initiative which allows the state's duty to be conceived as secondary. The assumption of states

[1010] See chapter 2.5.5 above, at pp. 130–133. [1011] See text above, at pp. 490–491.

[1012] See e.g. UN Committee on Economic, Social and Cultural Rights, "General Comment No. 12: The right to adequate food" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 63, para. 15: "The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security." As Eide points out, "this is the most important aspect of the right to food and other survival rights: not the State as provider, but as protector. This is a function similar to the role of the State as protector in regard to civil and political rights: protecting the right to life, to freedom from slavery and servitude, from violence and maltreatment by third parties": A. Eide, "Article 25," in A. Eide et al. eds., *The Universal Declaration of Human Rights: A Commentary* 385 (1992) (Eide, "Article 25"), at 388.

such as Canada and Norway that asylum-seekers will ordinarily meet their own needs by earning money through engagement in employment – which the government authorizes – is therefore precisely in line with the spirit of the Economic Covenant. It follows also that Argentina would not be in violation of the Covenant by virtue of its decision to issue asylum-seekers with a provisional form of work permit viewed with some measure of suspicion by employers – unless, of course, the practical result were to bar refugees from virtually all work, making it impossible for them to meet their most basic needs.

Conversely, the Dutch system, under which asylum-seekers may work for no more than twelve weeks each year, is not oriented to meeting the needs of refugees. As such, it – like the complete prohibitions on work by refugee claimants imposed by such countries as Denmark, France, Germany, and Italy, and the delayed access to work imposed by Finland and Sweden – would give rise to a breach of Art. 11 of the Covenant if refugee claimants are not provided with alternative means of support.[1013] Indeed, the South African Supreme Court of Appeal has determined that the denial of the right to work in such circumstances may amount to degrading treatment:

> [W]here employment is the only reasonable means for the person's support other considerations arise. What is then in issue is not merely a restriction upon the person's capacity for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation. For it is not disputed that this country, unlike some other countries that receive refugees, offers no State support to applicants for asylum ...
>
> Thus a person who exercises his or her right to apply for asylum, but who is destitute, will have no alternative but to turn to crime, or to begging, or to foraging. I do not suggest that in such circumstances the State has an

[1013] This conclusion is in line with the view of the English Court of Appeal that regulations which denied some refugee claimants both access to work and to social support "necessarily contemplate for some a life so destitute that ... no civilised nation can tolerate it ... [S]ome basic provision should be made, sufficient for genuine claimants to survive and pursue their claims ... Parliament cannot have intended a significant number of genuine asylum-seekers to be impaled on the horns of so intolerable a dilemma: the need either to abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution": *R v. Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants*, [1996] 4 All ER 385 (Eng. CA, June 21, 1996), per Simon Brown LJ, at 401–402. As subsequently affirmed, "[t]he *ratio* of the *Joint Council* case was ... that asylum-seekers were being *deprived* of their right to appeal ... and to remain in the country meanwhile since the impugned regulations made those rights *nugatory*; they inevitably not merely prejudiced but on occasion *defeated* those rights, and made the exercise of those rights not merely difficult but *totally impossible* [emphasis in original]": *Secretary of State for the Home Department v. Jammeh*, [1999] Imm AR 1 (Eng. CA, July 30, 1998), per Hobhouse LJ, at 7.

> obligation to provide employment ... but only that the deprivation of the freedom to work assumes a different dimension when it threatens positively to degrade rather than merely to inhibit the realisation of the potential for self-fulfilment.[1014]

For similar reasons, the refusal of Namibia and Zambia to waive their food import restrictions in order to allow international agencies to feed desperate refugees was a violation of the core content of the right to food.

But the obligations of states go beyond simply to respect and to protect access to the necessities of life. The Committee on Economic, Social and Cultural Rights has also recognized an explicit duty on states to take steps to fulfill this right, particularly where marginalized individuals and social groups are concerned.[1015] The Committee has recognized that vulnerable individuals and groups cannot always meet their basic needs by independent action, in consequence of which state parties are under a legal duty to take affirmative steps to realize their rights:

> States parties are also obliged to fulfil (provide) a specific right contained in the Covenant when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.[1016]

In relation to the right to healthcare, for example, the Committee has noted that

[1014] *Minister of Home Affairs v. Watchenuka*, (2004) 1 All SA 21 (SA SCA, Nov. 28, 2003), at para. 32, per Nugent JA.

[1015] "The approach of the Committee towards the realization of the rights in the Covenant is marked by its insistence upon a process of equalization. As an initial step towards the realization of the rights in the Covenant, States are required to identify the disadvantaged sectors of the population. Those groups should be the focus of positive State action aimed at securing the full realization of their rights": Craven, *ICESCR Commentary*, at 159.

[1016] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The right to the highest attainable standard of health care" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 86, para. 37. See also Committee on Economic, Social and Cultural Rights, "General Comment No. 12: The right to adequate food" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 63, para. 15: "Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters"; and UN Committee on Economic, Social and Cultural Rights, "General Comment No. 15: The right to water" (2002), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 106, para. 37(b), which defines the core content of the right to water to include the obligation "[t]o ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups."

> [v]iolations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to health. Examples include ... insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalized.[1017]

Similarly, the duty to ensure access to housing requires "States parties [to] give due priority to those social groups living in unfavourable conditions by giving them particular consideration."[1018] Refugees are frequently a clear example of such a group:

> Asylum-seekers, refugees, and displaced persons do not have the same opportunity as others to achieve an adequate standard of living on the basis of their own efforts. They therefore require, to a larger extent than the ordinary public, direct provisions, until conditions are established in which they can obtain their own entitlements.[1019]

This direct obligation of states to provide the substance of basic survival rights to the most vulnerable – what Eide refers to as an obligation of "last recourse"[1020] – inheres even when a state is faced with extraordinary resource constraints.[1021] It should moreover be interpreted to apply once a state becomes aware of an imminent risk to vulnerable persons, not simply once

[1017] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The right to the highest attainable standard of health" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 86, para. 52.

[1018] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 4: The right to adequate housing" (1991), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 19, para. 11.

[1019] Eide, "Standard of Living," at 105. Thus, for example, the Committee on Economic, Social and Cultural Rights has observed that "[w]hereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including ... refugees [and] asylum-seekers": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 15: The right to water" (2002), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 106, at para. 16.

[1020] Eide, "Article 25," at 388.

[1021] "[T]he Committee underlines the fact that even in times of severe resources constraints, whether caused by a process of adjustment, of economic recession, or by other factors, the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 3: The nature of states parties' obligations" (1990), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 15, para. 12. See also UN Committee on Economic, Social and Cultural Rights, "General Comment No. 12: The right to adequate food" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 63, para. 28: "Even where a State faces severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic conditions or other factors, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals."

the necessities of life have already been denied. In interpreting a comparable affirmative duty under European human rights law in a successful challenge to the United Kingdom's policy of denying income support to persons who failed to claim refugee status immediately upon arrival, the English Court of Appeal observed that

> The obligation "to take measures" [under the European Convention on Human Rights] seems to me to imply more than simply acting as a long-stop in individual cases as they arise. That may be sufficient if the alternative system of charitable support is able to cope with the generality of cases, so that ... suffering ... is truly the exception. However, if on the available information, the scale of the problem is such that the system is unable to cope, then it is the responsibility of the State to take reasonable measures to ensure that it can cope. How that is done, for example whether by direct support or by financial assistance to charities working in the field, is a policy matter for the State.[1022]

In sum, the rights set out in the Covenant on Economic, Social and Cultural Rights – including to the necessities of life, and to physical and mental healthcare – inhere in everyone under a state's jurisdiction, including refugees. Any discrimination in the allocation of the enumerated rights is automatically a violation of the Covenant. The essential duty of states is to implement the rights in the Covenant progressively and as matters of priority, though it is understood that genuine resource constraints may preclude full realization of all rights immediately in some countries. Retrogression is, however, presumptively in breach of the Covenant, as is the failure to implement rights in accordance with human rights standards and with real accountability. Less developed countries may determine the extent to which they will extend "economic" rights to non-citizens, including refugees. But that flexibility does not apply to the core content of the most basic rights set by the Covenant.[1023] Non-fulfillment of the core content of these rights on

[1022] *R (Limbuela) v. Secretary of State for the Home Department*, [2004] EWCA Civ 540 (Eng. CA, May 21, 2004), per Carnwath LJ, at para. 121. See also Jacob LJ, ibid. at para. 149: "It follows that although one may not be able to say of any particular individual that there is more than a very real risk that denial of food and shelter will take that individual across the threshold, one can say that collectively the current policy of the Secretary of State will have that effect in the case of a substantial number of people. It seems to me that it must follow that the current policy (which includes having no policy save in the case of heavily pregnant women) is unlawful as violating Art. 3. And it follows that the treatment of the particular individuals the subject of these appeals in pursuit of that policy is also unlawful."

[1023] Thus, "in so far as the Covenant establishes the rights of 'everyone,' non-nationals would have a right to the enjoyment of the minimum core content of those rights ... [I]n practice, the Committee will censure situations where aliens enjoy few rights and are the objects of exploitation": Craven, *ICESCR Commentary*, at 174.

economic grounds by even the poorest states is in breach of the Covenant unless the government is able to demonstrate that it has unsuccessfully made best efforts to secure international aid to implement these rights, and has distributed whatever resources are available without discrimination. This obligation to respect the core content of basic rights in virtually all circumstances includes a duty of affirmative implementation, at least where it is foreseeable that individuals and groups are unlikely to be able to secure their rights by autonomous effort.

Turning first to the specific content of the right to food, paragraph 2 of Art. 11 establishes the right of everyone to be free from hunger as a "fundamental right," the only right so defined in either Covenant.[1024] The most basic goal of ensuring "that individuals have a right not to die from hunger and not to suffer (either physically or mentally) from malnutrition ... "[1025] is undisputed,[1026] as is clear from the view of the Committee on Economic, Social and Cultural Rights that "a State party in which any significant number of individuals is deprived of essential foodstuffs ... is, *prima facie*, failing to discharge its obligations under the Covenant."[1027] In accordance with the general approach to economic and social rights set out above, the core right to food may be breached "through the direct action of States or other entities insufficiently regulated by States," including by "the prevention of access to humanitarian food aid in internal conflicts or other emergency situations."[1028] There is therefore little doubt that Ethiopian diversion of refugee

[1024] P. Alston, "International Law and the Human Right to Food," in P. Alston and K. Tomasevski eds., *International Law and the Human Right to Food* 10 (1984) (Alston, "Right to Food"), at 32.

[1025] Ibid. at 13–14.

[1026] "[A]ny proposed limitations on the right to food which could result in death by starvation are clearly unacceptable. Apart from violating the right to food provisions, such limitations would also violate the right to life which, according to the Human Rights Committee, is 'the supreme right from which no derogation is permitted even in times of public emergency which threatens the life of the nation'": ibid. at 21.

[1027] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 3: The nature of states parties' obligations" (1990), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 15, para. 10. See also UN Committee on Economic, Social and Cultural Rights, "General Comment No. 12: The right to adequate food" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 63, para. 17: "Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger."

[1028] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 12: The right to adequate food" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 63, para. 19. The African Commission on Human and Peoples' Rights observed that the core content of the right to food could be violated by, for example, government actions which destroy or contaminate food sources (or which allow private parties to do so), as well as by the promotion of terror which poses a significant obstacle to the efforts of individuals to feed themselves: *Social and Economic Rights Action Center and Center for*

food aid to rebel soldiers was in breach of the core right to food. On the other hand, Malawi was not in violation of the Covenant when food deliveries to refugees were halted by rebel Mozambican forces operating in its territory, since these armies could not be subdued by the government. Moreover, "whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters."[1029]

The Committee has defined the core content of the right to food to include "[t]he availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture [as well as] [t]he accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights."[1030] The accessibility branch of this core duty means that failure to supervise food distribution adequately in camps where cultural norms dictate that men should eat their fill before women and children are fed is in breach of the Covenant. Equally clearly, the requirement of dietary sufficiency suggests a failure to meet Covenant requirements when refugees are provided with no milk, fruit, or vegetables, or when niacin shortages in food cause refugees to develop pellagra. And because cultural acceptability is also an aspect of the core duty, Botswana's refusal to provide refugees from the Democratic Republic of Congo with either fish or meat, and the insistence that Burundian refugees in Tanzania survive by consuming culturally unpalatable food, are also of doubtful legality.

Second and more generally, states are under a duty to promote a more complete right to "adequate food" under Art. 11(1). This branch of the right to food goes beyond concerns of immediate access to quantities of food required for survival,[1031] focusing instead on the sufficiency of diet over time to maintain health and to enable individuals to lead a normal, active life,[1032] including the establishment of food security for the medium to long

Economic and Social Rights v. Nigeria, Case ACPHR/COMM/A044/1 (May 27, 2002), at para. 65, reported at (2002) 96(4) *American Journal of International Law* 937.

[1029] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 12: The right to adequate food" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 63, para. 15. In addition, however, all states "have a joint and individual responsibility ... to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons": ibid. at para. 38.

[1030] Ibid. at para. 8.

[1031] "The right to adequate food ... shall ... not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients": ibid at para. 6.

[1032] Alston, "Right to Food," at 22–23.

term.[1033] This broader right to adequate food is not, however, part of the core content of the right to food. A state therefore breaches its obligations under Art. 11(1) only when it fails to give priority in the allocation of available resources to the progressive and non-discriminatory realization of the right.[1034]

The Committee on Economic, Social and Cultural Rights has more recently set out detailed standards relating specifically to the right to water,[1035] determined to be a component of the duties set by both Arts. 11 and 12 of the Covenant.[1036] In line with its approach to the right to food, the right to water is defined as the entitlement of "everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses."[1037] More specifically, it has been determined that "[r]efugees and asylum-seekers should be granted the right to water on the same conditions as granted to nationals."[1038]

The core content of the right to water, specifically said to be opposable even in relation to the poorest states,[1039] includes a number of components of frequent relevance to refugees. Most basically, it includes the duty "[t]o ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease [and] [t]o ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups."[1040] The provision to refugees in western Ethiopia of less than

[1033] "The notion of sustainability is intrinsically linked to the notion of adequate food or food security, implying food being accessible for both present and future generations. The precise meaning of 'adequacy' is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, while 'sustainability' incorporates the notion of long-term availability and accessibility": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 12: The right to adequate food" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 63, para. 7.

[1034] In practice, however, the Committee is reported not to have directed much of its attention to non-core concerns. "That Committee members have only rarely requested information about the nutritional status of the population, or about food quality and safety, may be criticized as being unduly cautious. However, the Committee does face considerable problems in assessing the level of enjoyment of the right to food even in so far as it relates even to malnutrition": Craven, *ICESCR Commentary*, at 309.

[1035] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 15: The right to water" (2002), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 106.

[1036] Ibid. at para. 3. [1037] Ibid. at para. 2. [1038] Ibid. at para. 16(f).

[1039] "A State which is unwilling to use the maximum of its available resources for the realization of the right to water is in violation of its obligations under the Covenant. If resource constraints render it impossible for a State party to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above": ibid. at para. 41.

[1040] Ibid. at para. 37(a), (b).

1 liter of water per day therefore amounted to a presumptive breach of the Covenant. More explicitly, at least in the case of vulnerable populations, states are required to ensure that there are "a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household"[1041] – a standard not met when there was only one borehole for all the Angolan refugees at the Maheba camp in Zambia. The core content of the right to water comprises as well the obligation "[t]o ensure [that] personal security is not threatened when having to physically access water."[1042] This standard is clearly not met when state parties require refugee women to collect water in circumstances that risk both their physical security and their health by exposure to such diseases as malaria or yellow fever.

The right to adequate clothing has not been authoritatively elaborated. In drafting the predecessor Universal Declaration of Human Rights,[1043] the specific reference to adequate food and clothing was the result of a well-received amendment by China to give substance to the notion of an "adequate standard of living."[1044] The language appears simply to have been carried forward into the Economic Covenant.[1045] The right to adequate clothing was, however, briefly considered by the Committee on Economic, Social and Cultural Rights in preparing its general comment on the rights of persons with disabilities. The Committee interpreted Art. 11 to require access to clothing that allows disabled persons "to function fully and effectively in society,"[1046] suggesting a purposive and contextualized understanding of adequacy.[1047] In line with this approach, Art. 11 should be understood to require that refugees have access to clothing which is, for example, suited to the climate and to the work and other roles which they undertake in the host country. They should also not be compelled to wear clothing which stigmatizes them as foreign to the host society, since this may amount to an

[1041] Ibid. at para. 37(c). [1042] Ibid. at para. 37(d).

[1043] "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services": Universal Declaration, at Art. 25(1).

[1044] Eide, "Article 25," at 394. [1045] Eide, "Standard of Living," at 89.

[1046] "The right to adequate clothing also assumes a special significance in the context of persons with disabilities who have particular clothing needs, so as to enable them to function fully and effectively in society. Wherever possible, appropriate personal assistance should also be provided in this connection. Such assistance should be undertaken in a manner and spirit which fully respect the human rights of the person(s) concerned": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 5: Persons with disabilities" (1994), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 25, para. 33.

[1047] The Committee has thus far declined to issue a general definition of "adequacy," preferring to provide context-specific interpretive guidance (but the right to adequate clothing has not yet been the subject of a general comment).

invitation to discrimination[1048] or, at the very least, impede their ability to function in the asylum state. On the other hand, the right of refugees to choose to wear the clothing of their society or country of origin is logically protected by the right to cultural expression under Art. 27 of the Civil and Political Covenant,[1049] unless there are reasonable countervailing concerns, such as for the safety and well-being of the refugee.[1050]

Like the right to food, the Committee has identified the duty to provide "basic shelter and housing" as a core obligation of all state parties, whatever their circumstances.[1051] It has not, however, gone on specifically to elaborate the substance of that minimum obligation, except in a negative sense. The Committee determined in 1990 "that instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the

[1048] In another context, the Committee has seen a commitment to non-discrimination as relevant to the notion of "adequacy." In considering the right to education under Art. 13, the Committee held that "[t]he requirement that 'an adequate fellowship system shall be established' should be read with the Covenant's non-discrimination and equality provisions; the fellowship system should enhance equality of educational access for individuals from disadvantaged groups": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 13: The right to education" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 71, para. 26.

[1049] "In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant": UN Human Rights Committee, "General Comment No. 15: The position of aliens under the Covenant" (1986), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 140, para. 7.

[1050] In its decision in *Bhinder v. Canada*, UNHRC Comm. No. 208/1986, UN Doc. CCPR/C/37/D/208/1986, decided Nov. 9, 1989, the Human Rights Committee considered the case of a Sikh who, by reason of his religion, refused to wear safety headgear at work. Arguing that any safety risk was confined to himself, the Sikh claimed his freedom of religion was violated. The government countered that it was obliged by Art. 7(b) of the Economic Covenant to ensure a safe working environment for all. In dismissing the claim as inadmissible, the Human Rights Committee held that "[i]f the requirement that a hard hat be worn is seen as a discrimination de facto against persons of the Sikh religion ... then, applying criteria now well established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant": ibid. at para. 62.

[1051] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 3: The nature of states parties' obligations" (1990), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 15, para. 10. See generally text above, at pp. 488–490.

relevant principles of international law."[1052] It has since developed this position in a free-standing general comment.[1053] Perhaps most obviously, "[f]orced eviction and house demolition as a punitive measure are ... inconsistent with the norms of the Covenant."[1054] More generally, forced eviction is to be an option of last resort,[1055] carefully regulated by law,[1056] and "should not result in individuals being rendered homeless or vulnerable to the violation of other human rights."[1057] The right to be protected against forced eviction is specifically said to inhere in refugees and other involuntary migrants:

> [T]he practice of forced evictions ... also takes place in connection with forced population transfers, internal displacement, forced relocations in the context of armed conflict, mass exoduses and refugee movements. In all of these contexts, the right to adequate housing and not to be subjected to forced eviction may be violated through a wide range of acts or omissions attributable to States parties. Even in situations where it may be necessary to impose limitations on such a right, full compliance with article 4 of the

[1052] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 3: The nature of states parties' obligations" (1990), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 15, para. 18.

[1053] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 7: The right to adequate housing (forced evictions)" (1997), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 46. Interestingly, the African Commission on Human and Peoples' Rights relied on General Comment No. 7 in a complaint brought on behalf of the people of Ogoniland against Nigeria: *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, Case ACPHR/COMM/A044/1 (May 27, 2002), at para. 63, reported at (2002) 96(4) *American Journal of International Law* 937.

[1054] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 7: The right to adequate housing (forced evictions)" (1997), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 46, para. 12. The Committee observes that this right is grounded not only in Art. 11 of the Economic Covenant, but also in "the Geneva Conventions of 1949 and Protocols thereto of 1977 concerning prohibitions on the displacement of the civilian population and the destruction of private property": ibid.

[1055] "States parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force": ibid. at para. 13.

[1056] "Although the Committee has indicated in its General Comment No. 3 (1990) that such measures may not be indispensable in relation to all rights, it is clear that legislation against forced evictions is an essential basis upon which to build a system of effective protection ... The legislation must also apply to all agents acting under the authority of the State or who are accountable to it. Moreover, in view of the increasing trend in some States towards the Government greatly reducing its responsibilities in the housing sector, States parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies": ibid. at para. 9.

[1057] Ibid. at para. 16.

> Covenant is required so that any limitations imposed must be "determined by law" only insofar as this may be compatible with the nature of these [i.e. economic, social, and cultural] rights and solely for the purpose of promoting the general welfare in a democratic society.[1058]

Beyond the duty stringently to curb resort to forced eviction, the affirmative content of the right to adequate housing "should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity."[1059] This fundamental standard was clearly not met when Turkey forced Iraqi Kurds to live in open-air camps or uninsulated tents for prolonged periods, when Ethiopian refugees in Sudan failed to receive promised tents from UNHCR, or when Kosovar refugees were left without shelter in Albania. But the "security, peace and dignity" dimension of the right means that the right to housing was also infringed when Pakistan effectively forced Afghan refugees to choose between living in a place where their right to physical security could be respected (but where they would be given no rations) or moving to a place where they were at risk (but would be given food and other key supplies).

The "adequacy" of housing is moreover determined not only "by social, economic, cultural, climatic, ecological and other factors,"[1060] but also by reference to legal security of tenure, the availability of facilities and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy.[1061] This standard was not met when Sahrawi refugees in Algeria received tents which could not withstand climatic conditions, in the case of refugees forced by the Bahamas to live in squalor in congested trailers, when Sudanese refugees in Ethiopia were granted no access to facilities for bathing or dishwashing, or when Roma refugees from Kosovo were provided with no sanitary facilities in Macedonia. The de facto relegation of Roma refugees to the periphery of Italian towns also raises concerns about access to basic services, as does the arbitrary assignment of refugee claimants in the United Kingdom to public housing in areas far from counseling and legal services critical to them.

[1058] Ibid. at para. 5.

[1059] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 4: The right to adequate housing" (1991), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 19, para. 7.

[1060] Ibid. at para. 8.

[1061] Ibid. at para. 8(a)–(g). The Committee's general comment specifically endorses the conclusion of the Commission on Human Settlements and the Global Strategy for Shelter that "[a]dequate shelter means . . . adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost": ibid. at para. 7.

In line with the general understanding of economic, social, and cultural rights set out above,[1062] the obligation of states to take affirmative action to ensure access to adequate housing applies with particular stringency in relation to marginalized or disadvantaged individuals and groups.[1063] Among the matters most vital to refugees, adequate shelter

> must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.[1064]

It must also be habitable, in the sense that it provides the inhabitants "with adequate space and protect[s] them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well."[1065] It is doubtful that this duty was met when refugee claimants in the United Kingdom were forced to live in areas where there were known risks of violent physical assaults. Nor was the habitability standard met when Honduras forced ten Nicaraguan refugees to share a single room, or when Spain and the Netherlands required refugees to live in grossly overcrowded refugee reception centers.

4.4.3 Access to healthcare

It is not surprising that inadequacies of food, water, and shelter take a major toll on refugee health.[1066] As previously described, the death rate among Angolan refugees in Zambia tripled when they lost access to clean water, while Iraqi refugees in Turkey forced to draw water from a polluted stream developed cholera and typhoid. In one particularly tragic example, the leading cause of death among children under the age of five in Tanzania's Lukole refugee camp was found to be acute respiratory tract infection. UNHCR's medical coordinator determined that the children's respiratory infections were the result of exposure to the cold, which usually took place

[1062] See text above, at pp. 497–499.

[1063] "States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 4: The right to adequate housing" (1991), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 19, para. 11.

[1064] Ibid. at para. 8(b).

[1065] Ibid. at para. 8(d).

[1066] N. Van Hear and B. Harrell-Bond, "Refugees and Displaced People: Health Issues," in UN Institute for Training and Research ed., *The Challenge of African Disasters* (1991) (Van Hear and Harrell-Bond, "Health Issues"), at 61.

because mothers needed to go farming early in the morning, taking their children with them because no alternative care was available.[1067] In thinking about how best to secure the necessities of life for refugees, it is therefore critical to focus on the interrelationship between food, shelter, and health. As David Keen cogently observed,

> Filling the refugees' bowls may not keep them alive. Typically, it is not simply hunger that kills refugees, but a complicated interaction between hunger and disease. Disease prevention and treatment has a critical role to play. This need not cost the earth. In fact, simple health initiatives can save more lives than high-tech medical treatments – in part because they focus on prevention and in part because they can reach much larger numbers.[1068]

Particularly successful refugee primary healthcare initiatives, such as that undertaken in Somalia during the late 1980s, therefore focus on providing food, water, and shelter, as well as on immunizing refugees against common diseases, and treating at least the most prevalent post-flight health concerns.[1069] More generally, some asylum countries have been quick to respond to the need of refugees for access to medical care. Malawi, for example, integrated refugee healthcare with the national health service, ensuring equal access to refugees in camps and those who had moved into the population at large.[1070] And when confronted with millions of Afghan refugees, Iranian authorities wisely minimized the risk of epidemic by mobilizing doctors and medicine to treat the refugees for malaria, tuberculosis, and other diseases upon arrival, and by granting them completely free access to their own hospitals.[1071]

In stark contrast, virtually no healthcare was provided to Chakma refugees in India.[1072] The 1,200 Liberian refugees in a Nigerian camp had access to a doctor only one day per week, with no emergency access to hospitals.[1073] Thai authorities provided no medical care to even severely ill patients in Khmer Rouge refugee camps.[1074] Shortages of drugs and other medical supplies were

[1067] (2001) 86 *JRS Dispatches* (Feb. 3, 2001). [1068] Keen, *Right to Life*, at 20.

[1069] Van Hear and Harrell-Bond, "Health Issues," at 69. See also World Health Organization and UNICEF, *Primary Health Care* (1978) and UNHCR, *Handbook for Emergencies* (1982).

[1070] D. Kuntz and Refugee Policy Group, "Serving the Health Needs of Refugees in Malawi: An Integrated Approach" (1990).

[1071] A. Billard, "Afghan Refugees: Health the Number One Concern," (1986) 26 *Refugees* 12.

[1072] B. S. Chimni, *International Academy of Comparative Law National Report for India* (1994), at 27.

[1073] A nursing superintendent and assistant were available at the camp five days per week, during working hours: P. Tiao and Nigerian Civil Liberties Organization, "The Status of Refugee Rights in Nigeria" (1992) (Tiao, "Refugee Rights in Nigeria"), at 10.

[1074] Banbury, "Kampuchean Displaced Persons in Thailand," at 27.

also pervasive in refugee camps inside Ethiopia and the Sudan.[1075] In particular, the failure to immunize refugees in Sudan in 1985 resulted in "a major epidemic, with the death rate from measles in one camp as high as one in every three cases diagnosed."[1076] In South Africa, refugees in principle enjoy the right to access healthcare, but "many refugees are finding a vast chasm between theory and practice, with medical personnel at many facilities acting as self-appointed 'gatekeepers' who restrict and even deny their access to health care."[1077] One South African nurse reportedly chased an Angolan refugee seeking immunization of her child away from a Mpumalanga clinic, shouting that "she, a foreigner, was eating South African medicines."[1078]

Even when healthcare is provided, it may fail to take account of linguistic, cultural, and social barriers. For example, none of the four doctors assigned to the Kiziltepe camps for Iraqi Kurds in Turkey spoke Kurdish.[1079] The health needs of women refugees are perhaps most frequently neglected. In order to secure permission to leave camps in Zambia, many refugee women have agreed to marriages of convenience to Zambian men. Yet until UNHCR organized funding for an education initiative in 2001, these women received none of the HIV/AIDS education provided by Zambia to its own citizens, roughly 20 percent of whom are HIV-positive.[1080] Female Afghan refugees in Pakistan felt unable personally to visit doctors in public health units because of the need to respect *purdah* rules (requiring the seclusion of females). Instead, a male relative was sent to explain the female's ailment to a doctor.[1081] A camp for Liberian refugees in Nigeria was reported to lack "virtually

[1075] US, "Living Conditions," at 14, 22. In the case of Sudan, problems attributable to resource insufficiency were exacerbated by logistical barriers imposed by the government. "[T]he denial of flight clearance to the area resulted in a shortage of medicine for the treatment of ongoing epidemic diseases and immunization programmes for children": UN Operation Lifeline Sudan, "Sudan Monthly Information Report," Apr. 1, 1997.

[1076] Keen, *Right to Life*, at 20.

[1077] *Mail & Guardian*, Sept. 25, 2000. "Even though refugees are entitled to the same constitutional rights as South Africans, they often end up competing with locals for access to essential social services provided by the government, and losing. 'Often they run into anti-foreign sentiments at clinics or other places where they should receive services. Also, they often do not have the papers they need to access services to which they are entitled,' explained Vincent Williams of the Southern African Migration Project": "Xenophobia, red tape hurts refugees," *IOL* (*Independent Online*), June 20, 2003.

[1078] *Mail & Guardian*, Sept. 25, 2000. The same report notes that "[i]n some hospitals, particularly those not in the urban centers of the country, refugees are treated as so-called private patients and forced to pay exorbitant fees for medical treatment": ibid.

[1079] IHRK, "Kurdish Refugees," at 15.

[1080] *UN Integrated Regional Information Networks*, Sept. 6, 2001.

[1081] US, "Living Conditions," at 51. In response to this problem, a system of home visits by "lady health visitors" was successfully established: D. Wulf, *Refugee Women and Reproductive Health Care: Reassessing Priorities* (1994) (Wulf, *Refugee Women*), at 41.

all child-birth equipment and facilities, and [was] also deficient in important pre-natal and post-natal drugs and supplements."[1082] Even seemingly gender-neutral issues such as poor sanitation in overcrowded refugee camps affect women the most "because it is they who have to cope with frequent pregnancies and with children's illnesses."[1083] In the end, "[t]he issue of women's health care is of particular importance because, when a woman becomes ill or incapacitated, or dies, the whole family structure is likely to collapse."[1084]

Access to healthcare also varies considerably for refugee claimants across developed states. Some countries, including France, the Netherlands, and Norway provide refugees full access to their national healthcare systems.[1085] Yet even in such countries, refugee health needs may not really be met. In Britain, the mandatory dispersal policies mean that some asylum-seekers are required to live in parts of the country where, for example, there are no facilities for the treatment of victims of torture.[1086] There have also been reports that refugee claimants have been refused psychological treatment by National Health Service doctors "on the grounds that they are too traumatised, too time consuming and have little grasp of the English language."[1087]

In Germany and Sweden, access to public health services is granted only for emergencies.[1088] In the United States, where there is no national healthcare system even for citizens, refugees must usually turn to whatever emergency healthcare facilities have been established by particular municipalities or organizations to assist the domestic poor. Nor are refugees in the United States exempted from the effect of the 1996 welfare law reform, under which lawful immigrants have only limited access to health, nutrition, and other public benefits.[1089]

[1082] Tiao, "Refugee Rights in Nigeria," at 13. See generally Wulf, *Refugee Women*.
[1083] Camus-Jacques, "Forgotten Majority," at 148. [1084] Ibid.
[1085] Liebaut, *Conditions 2000*, at 97, 216, and 234.
[1086] A. Travis, "'Patchy' refugee checks a health risk, warns BMA," *Guardian*, April 24, 2001, at 9; H. Carter, "Christmas charity appeal: Hard life in exile for women's rights pioneers," *Guardian*, Dec. 8, 2001, at 15. A 2001 study of service provision to refugee claimants housed in West Yorkshire found that "[m]ental health needs are often unmet": R. Wilson, "Dispersed: A Study of Services for Asylum Seekers in West Yorkshire" (2001), at 2–3.
[1087] J. Carvel, "Mental health care denied to refugees," *Guardian*, June 4, 2002, at 6. The same report noted that doctors "working with refugees in north London were shocked by a confidential letter from Barnet, Enfield and Haringey mental health NHS trust saying it would accept no more refugees for psychological therapy": ibid.
[1088] Liebaut, *Conditions 2000*, at 117, 282.
[1089] William Branigin, "'Chilling effects' seen from welfare reform: Caseload drops sharper among immigrants," *Washington Post*, Mar. 9, 1999, at A-06. See J. Frederiksson, "Bridging the Gap Between Rights and Responsibilities: Policy Changes Affecting Refugees and Immigrants in the United States Since 1996," (2000) 14(3) *Georgetown Journal of Immigration Law* 757, at 760–761.

Economic, Social and Cultural Covenant, Art. 12(1)
The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Art. 12 of the Economic Covenant is not, of course, a right to "be healthy," in the sense of imposing a duty to eradicate all disease or infirmity.[1090] Art. 12 defines a more limited right, consisting of certain immediately applicable freedoms from interference – for example, to non-interference with sexual and reproductive choices, as well as not to be subjected to medical experimentation[1091] – and an affirmative entitlement to access on a timely basis to a system of health protection which is both of good quality and respectful of cultural and individual concerns.[1092] Art. 12(2) sets out a non-exhaustive list of steps to be taken by states in implementing the right to health, including the improvement of infant and child healthcare, environmental and industrial hygiene, prevention and control of epidemics and disease, and medical service in the event of sickness.[1093]

The affirmative element of the right to health is by and large subject to the usual duty of progressive implementation. The supervisory committee has accordingly held that "[t]he notion of 'the highest attainable standard of health' in article 12.1 takes into account both the individual's biological and

[1090] A broader understanding of "health" is endorsed by the World Health Organization: see K. Tomasevski, "Health Rights," in A. Eide et al. eds., *Economic, Social and Cultural Rights: A Textbook* 125 (1995), at 128. But as the Committee on Economic, Social and Cultural Rights has confirmed, "[i]n drafting article 12 of the Covenant, the Third Committee of the United Nations General Assembly did not adopt the definition of health contained in the preamble to the Constitution of WHO, which conceptualizes health as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The right to the highest attainable standard of health" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 86, para. 4.

[1091] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The right to the highest attainable standard of health" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 86, para. 8. At its 2001 session, the UN Commission on Human Rights "note[d] with interest" General Comment No. 14 of the Committee on Economic, Social and Cultural Rights: UNCHR Res. 2001/30, UN Doc. E/CN.4/RES/2001/30, Apr. 20, 2001, at para. 2(b).

[1092] The elements of availability, accessibility, acceptability, and quality are defined in some detail in UN Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The right to the highest attainable standard of health" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 86, paras. 12(a)–(d).

[1093] "The non-exhaustive catalogue of examples in article 12.2 provides guidance in defining the action to be taken by States. It gives specific generic examples of measures arising from the broad definition of the right to health contained in article 12.1, thereby illustrating the content of that right": ibid. at para. 13.

socio-economic preconditions and a State's available resources."[1094] As such, state parties with the resources to implement the right to health may not lawfully decide to refrain from taking the necessary steps fully to implement Art. 12. Because of its comparative wealth, Nigeria would therefore have a difficult time justifying its failure to provide emergency medical facilities or reasonable access to doctors to Liberian refugees.[1095] It would similarly not be open to countries such as Germany or Sweden to deny refugees access to other than purely emergency healthcare, nor to the United States to avoid its responsibility to treat healthcare for refugees and others as an essential public service.

Even states with insufficient resources must nonetheless give priority to the realization of the right to health without discrimination of any kind.[1096] Indeed, the Committee has expressly held that governments are under an "obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access [to healthcare] for all persons, including ... asylum-seekers and illegal immigrants."[1097] This critical duty of

[1094] Ibid. at para. 9. This flexibility has led two commentators to the perhaps overstated conclusion that "the amount a nation can afford to spend on the pursuit of health is what it chooses to spend": P. Townsend and N. Davidson, "The Black Report: Inequalities in Health" (1982), at 27. In fact, the Committee on Economic, Social and Cultural Rights has made clear that "[t]he central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein. By requiring Governments to do so 'by all appropriate means,' the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account ... But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 9: The domestic application of the Covenant" (1998), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 55, paras. 1–2.

[1095] "A State which is unwilling to use the maximum of its available resources for the realization of the right to health is in violation of its obligations under article 12": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The right to the highest attainable standard of health" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 86, para. 47.

[1096] "While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2) and the obligation to take steps (art. 2.1) towards the full realization of article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health": ibid. at para. 30. See chapter 4.4.2 above, at pp. 485–486.

[1097] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The right to the highest attainable standard of health" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 86, para. 34.

non-discrimination means that India's decision to deny healthcare to Chakma refugees and Thailand's refusal to allow Khmer refugees to receive medical treatment were not lawful.

Of particular importance to refugees in the less developed world, the right to "essential primary health care" is one of the four core entitlements of all persons, whatever the circumstances of the host state.[1098] Indeed, the Committee on Economic, Social and Cultural Rights has taken the unprecedented step of declaring that "a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations [to provide healthcare], which are non-derogable."[1099] The substance of this non-derogable responsibility to provide essential primary healthcare comprises the duty of non-discrimination in access to healthcare, as well as freedom from hunger and access to basic shelter, sanitation, and water.[1100] South Africa was therefore under a duty to ensure that healthcare professionals ceased acting as vigilante gatekeepers seeking to limit scarce medical resources for citizens only. More specifically, the right to essential primary healthcare binds all state parties to "provide essential drugs, as from time to time defined under the WHO Action Program on Essential Drugs."[1101]

To ensure accountability for its duty to implement the right to health, no government may be excused from enacting and implementing a transparent and socially inclusive public health strategy, which must give priority to the needs of vulnerable or marginalized groups.[1102] It is highly doubtful that Turkey's unwillingness to provide Iraqi Kurds with access to doctors able to speak their language would meet this standard. Nor would the British decision to implement a dispersal policy which effectively prevented refugees

[1098] See chapter 4.4.2 above, at pp. 489–490.

[1099] UN Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The right to the highest attainable standard of health" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 86, para. 47.

[1100] "[T]hese core obligations include at least the following obligations: (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups; (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone; (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; ... (e) To ensure equitable distribution of all health facilities, goods and services": ibid. at para. 43.

[1101] Ibid. at para. 43(d).

[1102] "[T]hese core obligations include at least the following obligations ... (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups": ibid. at para. 43(f).

from accessing torture victim and other specialized health treatment facilities be in line with Art. 12. And perhaps most important, this requirement leaves no room to argue that the right to healthcare is respected when little or no attention is given to the specific reproductive and other health needs of women. For example, there was a clear duty on Pakistan to make female doctors available to female Afghan refugees who otherwise were culturally barred from any direct access to healthcare.

Finally, the Committee has established what amounts to a policy of strict scrutiny of another set of steps, defined as being of "comparable priority" to the non-derogable duties within the core of the duty to provide all with essential primary healthcare. These presumptive duties of immediate implementation include the provision of reproductive, pre-natal, and maternal healthcare; immunization against prevalent diseases; the control of epidemic and endemic diseases; and education and training on the prevention and control of disease and on health and human rights more generally.[1103] While a state is not held to an absolute standard of achievement in relation to these rights, non-implementation can be justified only on the basis of a true resource insufficiency.[1104] Thus, Sudan's failure to immunize refugees against a major measles outbreak was presumptively in breach of the Economic Covenant. Nigeria would be hard pressed to explain its failure to provide even basic maternal and post-natal care facilities to Liberian refugees. And Zambia, fully aware of the vital health risks for refugee women posed by widespread HIV infection in that country, would be held to a very high standard to justify its refusal to extend its general program of HIV education for women to refugee women as well.

4.5 Property rights

On occasion, refugees may be the victims of confiscation of their property. For example, refugee-specific legislation in both Uganda and Kenya provides for the confinement and slaughter of any animal brought into the country by

[1103] "The Committee also confirms that the following are obligations of comparable priority: (a) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care; (b) To provide immunization against the major infectious diseases occurring in the community; (c) To take measures to prevent, treat and control epidemic and endemic diseases; (d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them; (e) To provide appropriate training for health personnel, including education on health and human rights": ibid. at para. 44.

[1104] "If resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above": ibid. at para. 47.

a refugee.[1105] The net proceeds, if any, from the sale of the slaughtered animal are to be paid to the refugee if possible, and otherwise used for the support of refugees in general.[1106] This procedure is distinct from the right of authorities to slaughter diseased animals, in which case no compensation is payable to the refugee.[1107] The laws of these same countries also provide that any vehicle in which a refugee arrives may be commandeered by authorities to move refugees or stores or equipment for their use. No compensation is payable either for use of the vehicle, or for any consequential damage to it.[1108]

While confiscations of this kind are comparatively rare, refugees more frequently face restrictions on their ability to acquire and deal with personal property in asylum states. Restrictions may be refugee-specific, as in the case of the refusal by Botswana to allow refugees to own cattle.[1109] Refugees in Malawi enjoyed only restricted access to "natural resources – trees, land, natural building materials and wild woods ... [E]ven some types of wild edible insects and rodents were 'owned' by local landowners."[1110] More commonly, however, refugees are subject to general limitations on the acquisition of personal property applied to all foreigners. In the United States, for example, non-citizens may not own commercial radio stations[1111] or atomic energy facilities,[1112] and may not acquire federal mineral rights.[1113]

[1105] E. Khiddu-Makubuya, *International Academy of Comparative Law National Report for Uganda* (1994), at 7–8.

[1106] C. Maina Peter, "Rights and Duties of Refugees under Domestic Law: The Case of Tanzania," (1995) (Maina Peter, "Tanzania"), at 7–8; A. Kiapi, "The Legal Status of Refugees in Uganda: A Critical Study of Legislative Instruments" (1993) (Kiapi, "Uganda"), at 14.

[1107] Kiapi, "Uganda," at 14. [1108] Maina Peter, "Tanzania," at 8; Kiapi, "Uganda," at 14.

[1109] J. Zetterqvist, *Refugees in Botswana in the Light of International Law* (1990), at 40.

[1110] Keen, *Right to Life*, at 56. In 2001, Malawi proposed a policy under which only citizens would be allowed to own freehold land, with non-citizens expected to become citizens in order to retain long-term title to their land: "Proposals to prohibit foreign land ownership," *UN Integrated Regional Information Networks*, Dec. 5, 2001.

[1111] "No broadcast ... radio station license shall be granted to or held by ... any alien or the representative of any alien": 47 USC §310(b)(1). In *Campos v. Federal Communications Commission*, (1981) 650 F 2d 890 (US CA7, June 3, 1981), it was determined that the section prohibiting the granting of radio operator licenses to non-citizens did not violate due process guarantees.

[1112] "No license may be issued to an alien or any corporation or other entity if the [Atomic Energy] Commission knows or has reason to believe it is owned, controlled, or dominated by an alien": 42 USC §2133(d). This prohibition applies even in the case of non-citizens seeking an atomic energy license for medical therapy purposes: 42 USC §2134(d).

[1113] "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States ... shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such": 30 USC §22.

Land ownership and tenure is undoubtedly the most sensitive area of all. In some countries, including Kenya,[1114] Sudan,[1115] Bulgaria,[1116] and Hungary,[1117] non-citizens are simply prohibited from owning land. Luxembourg and Venezuela limit the right of property ownership to citizens and persons authorized to reside in the state.[1118] Mexico[1119] and San Marino[1120] are among the nations which insist on the right to impose restrictions on the scope of the right of non-nationals to own land. In Namibia, it is a crime to sell agricultural land to a non-Namibian without

[1114] In Kenya, "land is not granted to foreigners irrespective of status because of the sensitivity of the land issue": "Implementation of the OAU/UN Conventions and Domestic Legislation Concerning the Rights and Obligations of Refugees in Africa," Final Report of a Conference sponsored by the Refugee Studies Programme, Oxford University, Sept. 14–28, 1986, at 33. "[T]he Kenya Government has in the past opposed any attempts to allow refugees access to land on the pretext that it is a very scarce and sensitive commodity. The new regime has, however, made a statement of intent to give land for resettling refugees so as to make them a little more self-reliant. Nothing has yet taken shape": J. Okamu (Center for Refugee Studies, Moi University), personal communication, Oct. 2, 2003.

[1115] G. Kibreab, *Refugees and Development in Africa: The Case of Eritrea* (1987) (Kibreab, *Development*), at 73.

[1116] "No foreign physical person or foreign legal entity shall acquire ownership over land, except through legal inheritance. Ownership thus acquired shall be duly transferred": Constitution of the Republic of Bulgaria, Art. 22, cited in Reservation of Bulgaria to the First Protocol to the European Convention on Human Rights and Fundamental Freedoms, Sept. 7, 1992, available at www.coe.fr (accessed Nov. 19, 2004).

[1117] D. Weissbrodt, "Final report of the Special Rapporteur on the rights of non-citizens," UN Doc. E/CN.4/Sub.2/2003/23/Add.3, May 26, 2003, at para. 20.

[1118] "The right of everyone to own property alone as well as in association with others, completed final report submitted by Mr. Luis Valencia Rodríquez, Independent Expert, to the United Nations Commission on Human Rights," UN Doc. E/CN.4/1994/19, Nov. 25, 1993, at paras. 86 and 103.

[1119] "The Mexican constitution regulates the ownership of its territory and establishes that '. . . in a zone of 100 km along the border or 50 km along the coast, a foreigner cannot acquire direct domain of the land and waters'": B. Walsten and D. Christi, "Foreigners Can Own Property in Mexico," available at www.flash.net/~mexis (accessed Nov. 18, 1997). See also I. Head, *International Law, National Tribunals, and the Rights of Aliens* (1971), at 237, citing Honduras and Peru as insisting upon restrictions comparable to those imposed by Mexico.

[1120] "The Government of the Republic of San Marino declares that having regard to the provisions of law in force which govern the use of goods in conformity with the general interest, the principle set forth in Article 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature, in Paris, on 20 March 1952, has no bearing on the regulations in force concerning the real estate of foreign citizens": Reservation of San Marino to the First Protocol to the European Convention on Human Rights and Fundamental Freedoms, Mar. 22, 1989, available at www.coe.fr (accessed Nov. 19, 2004).

the permission of the Minister of Lands.[1121] Similarly, New Zealand law allows foreign investment in farmland only if it can be proved to result in "substantial and identifiable benefits" to New Zealand.[1122]

In other countries, refugees face difficulties in even leasing land. Officials in both Honduras and Mexico, for example, often prevented refugees from renting land during the late 1980s.[1123] Refugees in much of Africa have been granted the use of land, but subject to limited rights of occupancy determined by customary law. In Sudan, for example, the security of land tenure for refugees is limited to between twelve and twenty-five years,[1124] and arbitrary eviction by fellow refugees has not been effectively constrained.[1125] Elsewhere in Africa the maximum plot size allocated to refugees has often been insufficient to be economically viable,[1126] or has been conditional on the growing of compulsory types of crops.[1127]

4.5.1 Movable and immovable property rights

Refugee Convention, Art. 13 Movable and immovable property

The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

[1121] "The person who sold or otherwise disposed of that agricultural land to the foreign national or nominee owner shall ... be guilty of an offence and be liable on conviction to a fine not exceeding N$100,000 or to imprisonment for a term not exceeding five years or to both": "Foreigners face farmland squeeze," *Namibian*, Sept. 18, 2002.

[1122] D. Weissbrodt, "Final report of the Special Rapporteur on the rights of non-citizens," UN Doc. E/CN.4/Sub.2/2003/23/Add.3, May 26, 2003, at para. 21.

[1123] Keen, *Right to Life*, at 56.

[1124] "Implementation of the OAU/UN Conventions and Domestic Legislation Concerning the Rights and Obligations of Refugees in Africa," Final Report of a Conference sponsored by the Refugee Studies Programme, Oxford University, Sept. 14–28, 1986, at 33.

[1125] G. Kibreab, "Rural Refugee Land Settlements in Eastern Sudan: On the Road to Self-Sufficiency?," in P. Nobel ed., *Refugees and Development in Africa* 63 (1987), at 65.

[1126] Keen, *Right to Life*, at 56.

[1127] "[I]n the Sudan's New Halfa scheme ... tenancies were distributed to the newcomers to grow compulsory crops of cotton, wheat and ground-nuts. Lack of control over their allocated farms discourages settlers from fully committing themselves to agricultural production": V. Lassailly-Jacob, "Government-Sponsored Agricultural Schemes for Involuntary Migrants in Africa: Some Key Obstacles to Their Economic Viability," in H. Adelman and J. Sorenson eds., *African Refugees: Development Aid and Repatriation* 209 (1994), at 217.

The human right to own and to possess property enjoys a tenuous place in international law. It is usually said that controversy about the status of the right to property derives from a capitalist–socialist philosophical divide,[1128] with the right to property championed predominantly by Western countries.[1129] And it is certainly true that the status of property rights is more highly contested in the less developed world. As Gudmundur Alfredsson has observed,

> Property rights have been criticized as standing in the way of progress: from the owning of slaves to the exploitation of others through *apartheid* and transnational corporations. The importance of property rights is often deemed to pale against the background of other problems, such as hunger, poverty and misery ... The overall concentration of most of the world's property in the hands of a comparative few, especially in times of population growth and scarcity of resources, makes property rights seem more part of the problem than an interest entitled to protection.[1130]

Indeed, when the assets of the three richest individuals in the world exceed the combined GNP of all the least developed countries and their 600 million inhabitants,[1131] it is difficult to question this deep-seated skepticism about the value of private property rights.

Even in avowedly market-oriented countries, however, the content and legal standing of the right to own private property is significantly less robust than, for example, Locke's classic notion that the advancement of property rights is at the core of a state's responsibility.[1132] It is particularly noteworthy

[1128] See e.g. C. Krause, "The Right to Property," in A. Eide et al. eds., *Economic, Social and Cultural Rights: A Textbook* 143 (1995) (Krause, "Property"), at 144–145: "Western countries, with the United States in the forefront, have tended to proclaim a strong protection of the right to property, whereas the socialist countries and the Third World have emphasized the social function of property, allowing for interference with property rights in the name of public interest ... In spite of decreasing ideological and political tensions concerning property rights, the protection of property rights will remain a matter of controversy ... Property rights are closely connected with the social and economic policies of States and thus there will always be a certain amount of reluctance towards international supervision of these rights."

[1129] See A. Rosas, "Property Rights," in A. Rosas and J. Helgesen, *The Strength of Diversity: Human Rights and Pluralist Democracy* 133 (1992), at 146. "The Constitution and basic laws of most if not all Western countries have long guaranteed the right to property. This right is part and parcel of their very form of government": G. Alfredsson, "Article 17," in A. Eide et al. eds., *The Universal Declaration of Human Rights: A Commentary* 255 (1992) (Alfredsson, "Article 17"), at 255.

[1130] Alfredsson, "Article 17," at 260.

[1131] United Nations Development Program, *Human Development Report 1999* (1999), at 3.

[1132] "The great and chief end ... of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the state of nature there are many things wanting ... The reason why men enter into

that property rights were not originally included even in the European Convention on Human Rights and Fundamental Freedoms.[1133] When ultimately enacted in Europe as part of Protocol No. 1 to the Convention, the right to property was meekly framed as a right of "[e]very natural or legal person ... to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions of international law."[1134] Not only is the right to acquire property not explicitly enacted, but the right of peaceful enjoyment can be trumped by "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest."[1135]

The only general and universal formulation of the right to property is found in Art. 17 of the non-binding Universal Declaration of Human Rights, which proclaims a right both to own property individually and collectively, and to be protected against the arbitrary deprivation of property.[1136] This is clearly a fairly rudimentary version of a right to private property. In particular, unlike even the European norm, it does not specifically require undisturbed enjoyment of property. Nor does it take a position on the historically contentious issue of the standard of compensation that must be paid in the event of confiscation.[1137] And it certainly does not posit the right of every

society, is the preservation of their property; and the end why they choose and authorize a legislative, is, that there may be laws made, and rules set, as guards and fences to the properties of all the members of the society, to limit the power, and to moderate the dominion, of every part and member of the society: for since it can never be supposed to be the will of the society, that the legislative should have the power to destroy that which every one desires to secure, by entering into society, and for which the people submitted themselves to the legislators of their own making": J. Locke, *The Second Treatise on Civil Government and a Letter Concerning Toleration* (1690), at ss. 124, 222.

1133 Krause notes that "[t]he right to property was included in the draft text passed by the Consultative Assembly. However, the Committee of Ministers felt ... that inclusion of the right to property would delay the entering into force of the Convention": Krause, "Property," at 146, n. 13.

1134 Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, done Mar. 20, 1952, at Art. 1, incorporated in the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, done Nov. 4, 1950, entered into force Sept. 3, 1953 (ECHR Protocol No. 1). As elaborated in the caselaw of the European Court of Human Rights, however, the notion of "possessions" includes the full range of property interests, and the right of peaceful enjoyment has been held to constrain even de facto expropriation: Krause, "Property," at 150–151.

1135 ECHR Protocol No. 1.

1136 "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property": Universal Declaration, at Art. 17.

1137 The essential difference of view has been between those (mostly capitalist) states which assert the right to "prompt, adequate and effective compensation," contrasted with the preference of other (mostly developing) countries for a less rigorous standard of compensation. See generally R. Higgins, "The Taking of Property by the State," (1982) *Recueil des Cours* 259.

person actually to own property.[1138] In part because agreement could not be reached on these more specific concerns that would have to be addressed before the right to property could be made legally enforceable, the right to property was one of only two standards[1139] in the Universal Declaration which failed to attract support for codification as a binding legal standard in either of the two Covenants on Human Rights.[1140]

Nor has the end of the Cold War resolved these tensions. The centrality of property to each state's understanding of its basic political and social values[1141] continues to make it exceedingly difficult to arrive at a universally binding standard acceptable to all. Property rights can be understood as a classic civil right mandating no more than non-interference – freedom from deprivation, or at least from arbitrary or inadequately compensated confiscation. But they can also be understood as affirmative socioeconomic rights – access to the means by which human needs are satisfied. While virtually every state is to some extent committed to the property rights project, many states are not yet prepared to bind themselves to respect both the negative and positive meanings of a right to property.[1142] Thus, the jurisprudence of the Human Rights Committee has confirmed that property rights are not a specifically protected interest under the Civil and Political Covenant,[1143] and a more recent initiative in the Commission on Human Rights to promote

[1138] Interestingly, however, the French language text suggests a stronger basis for an affirmative right to property ("droit à la propriété," rather than "right to own property").

[1139] The other right that was not made binding is the right to be protected against unemployment, found in Art. 23 of the Universal Declaration of Human Rights.

[1140] "Notwithstanding several proposals, no such article was adopted. In lengthy debates there was disagreement on practically every aspect of the topic ... including such issues as the scope of property, conformity with State laws, expropriation and other allowable limitations, due process of law, compensation and indeed the very inclusion of the right": Alfredsson, "Article 17," at 259.

[1141] "The importance of the concept of property goes far beyond the legal sphere, as it constitutes the basic factor in the prevailing economic system within a specific society and the most fundamental variable of its social order. Its links with the political programme accepted within that society are therefore manifest. Furthermore, its philosophical and ethical implications are obvious": "The right of everyone to own property alone as well as in association with others, completed final report submitted by Mr. Luis Valencia Rodríquez, Independent Expert, to the United Nations Commission on Human Rights," UN Doc. E/CN.4/1994/19, Nov. 25, 1993, at para. 63.

[1142] "The varying opinions on and approaches to the right to property stand as textbook examples of the different cultures and economic systems of our modern world. Rich and poor, free marketeers and socialists, all see it with their own eyes. Needless to say, the conflict remains unresolved": Alfredsson, "Article 17," at 261.

[1143] "The right to property ... is not protected by the International Covenant on Civil and Political Rights": *OJ v. Finland*, UNHRC Comm. No. 419/1990, UN Doc. CCPR/C/40/D/419/1990, decided Nov. 6, 1990, at para. 3.2. Property rights may, however, be indirectly protected by virtue of the duty of non-discrimination: see chapter 2.5.5 above, at pp. 126–128.

property rights within a socioeconomic context[1144] did not result in any new normative consensus.[1145] We are therefore left with little more than a patchwork of regional guarantees of property rights.[1146]

While universal treaties do not set a right to property as such, they do require respect for the principle of non-discrimination in relation to whatever property rights may be enacted in a given state.[1147] The guarantee of non-discrimination can, in practice, be an important means to contest the legal validity of restrictions on property rights imposed on aliens generally, or

[1144] The Universal Declaration, the International Convention on the Elimination of All Forms of Racial Discrimination, UNGA Res. 2106A(XX), adopted Dec. 21, 1965, entered into force Jan. 4, 1969 (Racial Discrimination Convention), and the regional instruments attribute this right to civil and political rights. However, the Commission on Human Rights has treated property rights as an issue of the realization in all countries of economic, social, and cultural rights, in line with General Assembly resolution 45/98 of December 1991. "The right of everyone to own property alone as well as in association with others, completed final report submitted by Mr. Luis Valencia Rodríguez, Independent Expert, to the United Nations Commission on Human Rights," UN Doc. E/CN.4/1994/19, Nov. 25, 1993, at para. 98.

[1145] In response to the final report submitted by the independent expert (see note 1142 above), the Commission on Human Rights "[r]ecommend[ed] that all relevant United Nations bodies take into consideration the recommendations of the independent expert ... and [c]onclude[d] its consideration of this matter": UN Doc. E/CN.4/1994/19, Nov. 25, 1993, at paras. 4–5.

[1146] In addition to ECHR Protocol No. 1 (discussed above, at pp. 518–519), see also African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force Oct. 21, 1986 (African Charter), at Art. 14; and the American Convention on Human Rights, 1144 UNTS 123, entered into force July 18, 1978 (American Convention), at Art. 21.

[1147] See 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 (Discrimination Against Women Convention), at Art. 16; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, UNGA Res. 45/158, UN Doc. A/45/49 (1990), adopted Dec. 18, 1990, entered into force July 1, 2003, at Art. 15. Of the several non-discrimination standards, the guarantee in the Racial Discrimination Convention, in which "the right to own property alone as well in association with others" and "the right to inherit" are both subject to a guarantee of non-discrimination on the basis of "national or ethnic origin," is potentially of greatest relevance to the whole refugee class, so long as the state of asylum is a party to that agreement: Racial Discrimination Convention, at Arts. 1(1) and 5(d)(v). In the context of refugee repatriation, the Committee on the Elimination of Racial Discrimination has relied on Art. 5 in order to reach the conclusion that "refugees ... have, after their return to their homes of origin, the right to be restored to them property of which they were deprived in the course of the conflict and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void": UN Committee on the Elimination of Racial Discrimination, "General Recommendation No. XXII: Refugees and displaced persons" (1996), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 214, para. 2(c).

on refugees specifically. As analyzed above,[1148] Art. 26 of the Civil and Political Covenant governs the allocation of all rights, and prohibits discrimination on the basis of both "national origin" and "other status." Legal distinctions between citizens and non-citizens must be justifiable on the basis of real differences of capability or potentiality to pass muster under the Covenant's guarantee of equal protection of the law. As interpreted by the Human Rights Committee, Art. 26 presumes the illegitimacy of any rights allocation made on the basis of any form of status, specifically understood to include alien status.[1149]

Thus, while some exclusions on property ownership by aliens may be deemed "reasonable" under international law,[1150] others may not. For example, while a case might be made that Mexican restrictions on alien property ownership along its borders are reasonable security measures,[1151] and perhaps even that the efforts of Namibia and New Zealand to ensure continued domestic control over agricultural land, and of the United States to limit access to atomic energy, are reasonable limitations to ensure important domestic security concerns, it is difficult to imagine how the absolute denial of non-citizen property ownership in Bulgaria, Hungary, Kenya, or Sudan would be similarly justified. Even less far-reaching prohibitions, such as the American denial of radio licenses and federal mineral rights to non-citizens, and the decisions of Luxembourg and Venezuela to limit land ownership to resident non-citizens, would also have to pass the test of a reasonable limitation on grounds of "other status." The denial of some key property rights to refugees may therefore be most effectively challenged on the grounds of unreasonable differentiation against the generic class of non-citizens.

Because of the absence of a clear right to private property in human rights law, however, the property rights specifically guaranteed in the Refugee Convention are of continuing importance. First, a right to protection against confiscation of property without compensation can be derived from Art. 7(1) of the Convention. Because the overarching duty to accord refugees "the same treatment as is accorded to aliens generally" is not limited to the rights specifically set out in the Refugee Convention,[1152] Art. 7(1) incorporates by reference the duty to adhere to customary norms of international aliens law.[1153] In essence, Art. 7(1) ensures that refugees are not denied the benefit of these

[1148] See chapter 2.5.5 above, at pp. 125–128. [1149] See chapter 2.5.5 above, at p. 127.
[1150] See chapter 2.5.5 above, at pp. 128–145.
[1151] The IRO was prepared to recognize that "special regulations excluding aliens, based on security considerations, e.g. [from] property in frontier or strategic areas" were reasonable: Comments of the International Refugee Organization, UN Doc. E/AC.32/L.40, Aug. 10, 1940, at 40. The drafters did not, however, choose to restrict the scope of property rights on the basis of such considerations, opting instead to guarantee refugees whatever property rights are granted to "aliens generally in the same circumstances."
[1152] See chapter 3.2.1 above, at p. 197. [1153] Ibid.

foundational rights simply because their own state of nationality cannot be counted on to exercise its notional responsibility to undertake enforcement action.[1154] In the case of property rights, Art. 7(1)'s indirect incorporation of the duty to comply with international aliens law helpfully clarifies the rights of refugees. This is because it is well established that even though there is no duty under general principles of aliens law to allow refugees or other non-citizens to acquire property, there is a clear obligation to provide adequate compensation for any denial of property rights.[1155] As this duty falls upon state parties by virtue of Art. 7(1), alien-specific confiscatory regimes, including those applied simply against refugees, are violations of the Refugee Convention.

But because international aliens law does not establish a right to be free from property deprivation as such (but only to be fairly compensated for any such loss), it does not prohibit even a refugee-specific rule such as that requiring the slaughter of all animals brought into Kenya and Uganda by refugees, so long as adequate compensation is paid to the refugees.[1156] On the other hand, Kenya and Uganda presumptively breach international law by authorizing officials to commandeer refugee vehicles without compensation. While there is an argument that general principles of law now authorize the subordination of property rights to important social or public needs,[1157] confiscation imposed only on refugees is discriminatory, thus vitiating any such justification.

Complementing Art. 7's incorporation of a prohibition of property confiscation, Art. 13 of the Refugee Convention requires non-discrimination in relation to an inclusive notion of the right to acquire and deal with property.[1158] The article explicitly protects the right to acquire both movable

[1154] See chapter 2.1 above, at p. 79. [1155] See chapter 2.1 above, at p. 77.

[1156] Even the strongest advocates of the protection of refugee property rights conceded the logic of exceptions "based on security considerations": Comments of the International Refugee Organization, UN Doc. E/AC.32/L.40, Aug. 10, 1940, at 40.

[1157] An exception to the duty to respect private property rights in such circumstances is included in each of the three regional human rights treaties. ECHR Protocol No. 1 provides that "[t]he preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest": ibid. at Art. 1. The African Charter stipulates that "[i]t may only be encroached in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws": ibid. at Art. 14. Under the American Convention, "[t]he law may subordinate such use and enjoyment to the interest of society": ibid. at Art. 21. See Krause, "Property," at 153: "All three Conventions require that the interference must be taken in the public interest and it must be provided for by law. The formulations vary slightly, but in terms of substance there appear to be no major differences. The question of public interest is indeed a question where the State is given a wide margin of appreciation."

[1158] A broad reading of the scope of "property" is consistent with the general approach in international human rights law. "The absence of a definition of the concept of property in international conventions is not surprising. None of the Conventions limit the

(personal) and immovable (real) property, including acquisition by lease.[1159] Specific reference was made during the drafting debates to the importance of enabling refugees to purchase securities (stocks)[1160] and land,[1161] to acquire a home,[1162] and to lease premises for accommodation or in which to carry on a business.[1163] Robinson and Weis logically add that Art. 13 encompasses the right to hold money, and to establish bank accounts.[1164] Under this broad-ranging construction, both Botswana's prohibition of cattle ownership by refugees and the refusal of Honduran and Mexican officials to allow refugees to rent land were presumptively in violation of Art. 13. Similarly, the type of refugee-specific prohibition on the leasing of plots of an economically viable size found in various parts of Africa is also contrary to the Refugee Convention.

Art. 13 not only protects the right to acquire all forms of property, but also guarantees non-discrimination in regard to "other rights pertaining thereto," specifically including related contractual interests. Robinson elaborates this

protection of property to any particular kind of property. In practice, the Strasbourg organs have given 'possessions' under Protocol No. 1 to the [European Convention on Human Rights and Fundamental Freedoms] a wide interpretation and held that it covers both immovable and movable property, including immaterial rights, such as contractual rights with economic value, various economic interests, and goodwill": Krause, "Property," at 150.

[1159] In view of the fact that Art. 17 of the Universal Declaration of Human Rights had been approved by the General Assembly just over one year before the preparation of the Secretary-General's draft of the Refugee Convention, it is surprising that no express reference is made in the Refugee Convention to the right of property "ownership." While the focus on the right to "acquire" property in the Refugee Convention might be argued to exclude protection of rights of ownership in property brought into the asylum country, the express language of Art. 30 (which permits refugees to transfer "assets which they have brought into [the asylum country's] territory") must negate that interpretation. In the result, the right to acquire property "and other rights pertaining thereto" should be understood in context to include protection of the rights of ownership in all property brought into, and acquired within, the asylum state.

[1160] Secretary-General, "Memorandum," at 26.

[1161] Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 13.

[1162] In response to an American proposal to insert a new right of refugees to "housing accommodation," the Chairman of the Ad Hoc Committee advised that in the view of the Secretariat "the provisionally adopted article [13] might be considered to cover the question in a certain sense": Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 11. The representative of the United States "replied that article [13] dealt with the rights of refugees regarding immovable property and leases," leading him to constrain the scope of what became Art. 21 to "social welfare matters taken by States with a view to providing housing accommodation for certain categories of persons": Statement of Mr. Henkin of the United States, ibid. See generally chapter 6.4 below with respect to the latter issue.

[1163] Secretary-General, "Memorandum," at 26.

[1164] Robinson, *History*, at 106; Weis, *Travaux*, at 116.

notion by suggesting that such related activities as "sale, exchange, mortgaging, pawning, administration, [and] income"[1165] are protected interests. Another example of "rights pertaining" to property mentioned during the drafting debates is the ability of refugees to benefit from rent controls.[1166] Logically, then, the practice of some host states of imposing a refugee-specific requirement that only certain crops may be grown on rented land is in breach of Art. 13.

Critically, however, not even Art. 13 establishes an absolute guarantee of property rights for refugees. The original drafts suggested that property rights might be guaranteed either at the level of "the most favorable treatments accorded under treaty to foreigners"[1167] or even to require "treatment similar to that accorded to their nationals."[1168] But the drafters rejected pleas fully to enfranchise refugees in order to promote their speedy assimilation.[1169] Some states took the view that there was no good reason to privilege refugees relative to other non-citizens.[1170] Others simply wanted to be able to reserve some property rights for either their own citizens,[1171] or for the

[1165] Robinson, *History*, at 105–106.

[1166] "It may be noted that in certain countries foreigners are not covered by rent laws for the protection of tenants, save by virtue of treaties. If, therefore, refugees, who are usually destitute, are not to enjoy the treatment accorded under treaty to foreigners, they will be debarred from the benefits of such laws, which will spell disaster for them": Secretary-General, "Memorandum," at 27. The representative of the IRO suggested that rent controls might be a form of property to be excluded from the protection of Art. 13, a view expressed in the hope of persuading delegates to adopt a national treatment standard for property rights: Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 11. States opted instead for a broad definition of relevant property interests (presumably rejecting the IRO's bid to exclude some interests), but the standard of treatment was set as "aliens generally in the same circumstances."

[1167] Secretary-General, "Memorandum," at 26. A bracketed alternative form of words would allow states to commit themselves only to "the treatment accorded to foreigners generally": ibid.

[1168] France, "Draft Convention," at 4.

[1169] "In view of the desirability that refugees should be assimilated as quickly as possible into the economic life of their country of residence, refugees should be granted the same property rights as nationals subject to any special regulations excluding aliens, e.g. property in frontier or strategic areas, government or central bank bonds, shares of shipping companies, mines, etc.": Comments of the International Refugee Organization, UN Doc. E/AC.32/L.40, Aug. 10, 1950, at 40. See also Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 10.

[1170] Statement of Mr. Kural of Turkey, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 4. See also Statement of Sir Leslie Brass of the United Kingdom, ibid. at 7: "[W]hile the Committee was trying as it should to protect refugees against discrimination, it should not go to the other extreme of establishing discrimination in favour of refugees. He shared the uneasiness of other members regarding the most-favoured-nation clause."

[1171] Statement of Mr. Rain of France, ibid. at 6–7.

citizens of states with which they were allied in an economic or political association.[1172] In keeping with the traditional deference afforded states to define their own notions of property, Art. 13 requires only that refugees enjoy protected interests at a low contingent standard of treatment,[1173] namely treatment "as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances."[1174] There is therefore clearly no basis to contest restrictions on property ownership which apply generally, such as Sudan's insistence that refugees are bound by customary limitations on land tenure, or Malawi's refusal to allow refugees to gather wild rodents and insects, said to be owned by the landowners on whose property they are found. Assuming these definitions of the nature of property ownership to be of general application (or at least applied to all other non-citizens), they may in most cases govern the rights of refugees as well.

In two ways, however, the Refugee Convention does allow refugees to contest such generally applicable restrictions. First, the actual duty under Art. 13 is to accord to a refugee "treatment as favourable as possible," though in no case less favorable than that afforded aliens generally. As noted above, this standard of treatment imposes a duty on states to consider in good faith the exemption of refugees from even rules applied generally to non-citizens.[1175] Second, limitations imposed on non-citizens may in any event only be validly applied to refugees who are "in the same circumstances" as other aliens. This proviso requires states to exempt refugees from requirements which may simply not be realistic in view of impediments that follow from the refugee's uprooting and dislocation.[1176]

One clear strength of Art. 13 is that it inheres immediately in all refugees. Perhaps because the primary goal of withholding certain rights for citizens and most-favored foreigners was met by the use of the low contingent standard for property rights, the initial limitations on the scope of the beneficiary class by reference to level of attachment[1177] fell by the wayside. Thus, even as it embraced the low contingent standard, the Ad Hoc Committee's Working Group recommended the extension of property rights

[1172] "Belgium ... placed nationals of the Benelux countries for certain purposes on a quasi-equal footing with Belgian citizens. It was not the intention of the article under consideration, he hoped, to ask the same treatment for refugees": Statement of Mr. Cuvelier of Belgium, ibid. at 5. See also Statement of Mr. Larsen of Denmark, ibid. at 5: "[T]he Scandinavian countries ... did accord special treatment to Scandinavian nationals which they would not be prepared to give to other foreigners, including refugees."

[1173] "Decisions of the Working Group Taken on 9 February 1950," UN Doc. E/AC.32/L.32, Feb. 9, 1950, at 5. This standard was adopted without further debate by the Ad Hoc Committee on a 5–1 (5 abstentions) vote: UN Doc. E/AC.32/SR.25, Feb. 10, 1950, at 5.

[1174] See chapter 3.2.1 above.

[1175] See chapter 3.2.1 above, at pp. 198–200.

[1176] See generally chapter 3.2.3 above.

[1177] See text above, at pp. 525–526.

to "a refugee" without qualification.[1178] In the result, the benefits of Art. 13 can now be invoked by any refugee under a state's authority, including those not yet formally recognized as refugees.[1179] Indeed, no objection was voiced to the conclusion of the Chairman of the Ad Hoc Committee that Art. 13 "make[s] no distinction between refugees in countries adhering to the Convention and refugees resident elsewhere ... [S]ome countries whose laws imposed restrictions on the property rights of aliens might feel some apprehension that article [13] would give the same rights to refugees living in other countries as to aliens living in the country where the property was."[1180] The only recorded response was the affirmation of the British representative that "[a] refugee abroad would presumably receive the same treatment as an alien abroad"[1181] by virtue of the fact that the contingent standard "not less favourable than that accorded to aliens generally in the same circumstances" allows state parties to apply to refugees whatever distinctions are ordinarily used to define the scope of non-citizen beneficiaries. Thus, non-resident refugees are entitled to the same protection of property rights as is afforded comparably situated non-resident aliens.[1182]

4.5.2 Tax equity

Countries of refuge rarely apply special rules for the taxation of refugees; when they do, the goal may actually be to assist refugees. For example, UNHCR reports that refugees are occasionally exempted from customs duties on the importation of their personal effects.[1183] Less formal

[1178] "Decisions of the Working Group Taken on 9 February 1950," UN Doc. E/AC.32/L.32, Feb. 9, 1950, at 5, adopted by the Ad Hoc Committee at UN Doc. E/AC.32/SR.25, Feb. 10, 1950, at 5.

[1179] See chapter 3.1.1 above, at pp. 169–170.

[1180] Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 19–20.

[1181] Statement of Sir Leslie Brass of the United Kingdom, ibid. at 20.

[1182] See Robinson, *History*, at 105: "Article 13 does not contain a requirement of domicile or residence for the enjoyment of the rights conferred by it on refugees. In other words, it applies to refugees regardless of whether they have their domicile or residence in the country in which they wish to acquire property or elsewhere"; and Weis, *Travaux*, at 116: "The provision applies to all refugees, whether resident in the territory of the Contracting State or not." The notion of "'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": Refugee Convention, at Art. 6. See generally chapter 3.2.3 above.

[1183] UNHCR, "Information Note on Implementation of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees," prepared for the Sub-Committee of the Whole on International Protection, Forty-second Session, July 22, 1991, at para. 94.

dispensation from taxation may also occur. For example, refugees arriving in the Qala en Nahal settlement in Sudan "were exempted from all taxes, and tractor service charges were also waived."[1184] Similarly, Somali and Sudanese refugees living in Kukuma camp in Kenya were allowed to conduct business free of taxation until the local business community put pressure on the government to end what was perceived as an unfair advantage.[1185] More commonly, however, refugees are simply taxed in the same way as nationals. As Brian Arnold observes, "[t]ax is rarely levied on the basis of nationality, and tax discrimination between citizens and aliens is rare."[1186]

Differences based on residence, rather than citizenship, are more common, though even this practice has been attenuated by the pervasive influence of Art. 24 of the OECD model tax treaty. This clause, which served as the model for the 1980 UN model tax treaty,[1187] requires the equal treatment of resident aliens with resident citizens, and of non-resident aliens with non-resident citizens.[1188] But not all interstate tax treaties incorporate this principle. For example, Australia has refused to include an article prohibiting non-discrimination on the basis of residence in most of its tax treaties.[1189]

In practice, however, refugees are frequently situated differently from citizens in ways that may expose them to increased tax liability on the basis of facially non-discriminatory tax laws. For example, most treaties modeled on the OECD draft do not provide any protection against tax discrimination on the basis of the geographical location of property, expenditures, or activities.[1190] A refugee who has spent most of his or her life in a state other than the asylum country will often have their primary asset base abroad. To the extent that refugees are more likely than citizens to derive a substantial share of their income from overseas property, they will be more adversely impacted than citizens by the failure of most tax treaties to proscribe discrimination on the basis of the geographical source of income.

[1184] Kibreab, *Development*, at 83. [1185] Verdirame, "Kenya," at 68–69.

[1186] B. Arnold, *Tax Discrimination Against Aliens, Non-Residents, and Foreign Activities: Canada, Australia, New Zealand, the United Kingdom, and the United States* (1991) (Arnold, *Tax Discrimination*), at 27.

[1187] United Nations, *United Nations Model Double Taxation Convention Between Developed and Developing Countries* (1980) (UN Tax Treaty).

[1188] "The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances may be subjected": Organization for Economic Cooperation and Development, *Draft Double Taxation Convention on Income and Capital: Report of the OECD Fiscal Committee* (1963) (OECD Tax Treaty), at Art. 24(1).

[1189] Arnold, *Tax Discrimination*, at 258. [1190] Ibid. at 46.

Refugee Convention, Art 29 Fiscal charges

1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

Art. 29 continues the pattern set by earlier treaties[1191] of protecting refugees against the possibility of "special taxes, duties and charges."[1192] Most non-citizens avoid the prospect of differential tax[1193] by reliance on the near-universal provision in bilateral tax treaties assimilating citizens and non-citizens for purposes of fiscal liability.[1194] In the case of refugees, a protection void might arise from either of two circumstances. First, there might simply be no tax treaty with the refugee's country of citizenship, or that treaty might not include the usual guarantee of non-discrimination based on citizenship.[1195] Second, as tax treaties are typically enforced on the basis of reciprocity, refugees might be denied tax equality because of the actions of the very government from which they had fled.[1196] The goal of the Refugee Convention is to put refugees in the same position as the nationals of a

[1191] Arrangement concerning the Extension to Other Categories of Refugees of Certain Measures taken in favour of Russian and Armenian Refugees, 2006 LNTS 65, done June 30, 1928, at Art. 8; Convention relating to the International Status of Refugees, 159 LNTS 3663, done Oct. 28, 1933, at Art. 13; Convention concerning the Status of Refugees Coming from Germany, 4461 LNTS 61, done Feb. 10, 1938, at Art. 16.

[1192] "In principle foreigners residing in a country are subject to the duties, taxes and charges to which nationals are liable. They may also be subject to special taxes, duties and charges. A large number of bilateral treaties concluded on the basis of reciprocity stipulate that nationals of the co-contracting country shall enjoy the same treatment in fiscal matters as nationals. Stateless persons cannot invoke these treaties": United Nations, "Statelessness," at 31.

[1193] Brian Arnold, for example, argues that "domestic and customary international law do not constrain a country's power to discriminate for tax purposes. In this respect, aliens ... are fair game for a legislature with protectionist tendencies": Arnold, *Tax Discrimination*, at 23.

[1194] This rule is contained in the two most influential model tax treaties: OECD Tax Treaty, at Art. 24; and UN Tax Treaty, at Art. 24. The text of the two rules is identical: see text above, at p. 528, n. 1188.

[1195] It is noteworthy that Australia, Canada, and New Zealand entered a reservation to the non-discrimination clause of the OECD Model Convention: OECD Tax Treaty.

[1196] This risk is, however, attenuated by Art. 7(2) of the Refugee Convention, which exempts refugees who have lived in an asylum country for three years from requirements of legislative reciprocity. See generally chapter 3.2.2 above.

contracting state which is in compliance with its duties under a tax treaty prohibiting discrimination based on nationality.[1197]

Art. 29 is very broadly framed. Refugees must receive national treatment with respect to "duties, charges or taxes, of any description whatsoever." The more cautiously framed duty under model tax treaties, which only applies to "any taxation or any requirement connected therewith," is authoritatively defined to require equality in regard to "taxes on income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation."[1198] The more expansive language of Art. 29 of the Refugee Convention logically includes at least all of these forms of tax.[1199]

Robinson argues that the duty under Art. 29 extends also to "every kind of public assessment, be it of a general nature (taxes and duties) or for specific services rendered by the authorities to a given person (charges)."[1200] There is support for this broad reading not only in the unusually sweeping language of the article itself, but also in the rejection by the Conference of Plenipotentiaries of a proposed exception which would have allowed governments to continue to impose a refugee-specific stamp duty to issue identity cards, residence permits, and travel documents. Even though such levies were to be "wholly applied for the relief of refugees,"[1201] the drafters viewed them as an unacceptable infringement of the duty to tax refugees and nationals on the same basis.[1202] The duty to assimilate refugees to nationals does not, of

[1197] Refugees are therefore "not obliged to pay taxes or other charges levied on aliens only": Weis, *Travaux*, at 272.

[1198] OECD Tax Treaty, at Art. 2; UN Tax Treaty, at Art. 2.

[1199] The one area in which there is a sound argument not to incorporate general understanding of non-discrimination based on citizenship into the duty under Art. 29 of the Refugee Convention is with regard to taxes assessed by political sub-units of an asylum state. The general rule is that the duty to tax citizens and non-citizens equally applies not only to relevant charges made by the national government, but also to "taxes imposed by their political subdivisions or local authorities": UN Tax Treaty, at 47. On the other hand, Art. 41 of the Refugee Convention expressly provides that "[i]n the case of a Federal or non-unitary State ... [w]ith respect to those articles of this Convention that come within the legislative jurisdiction of [sub-units] ... the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment": Refugee Convention, at Art. 41(b).

[1200] Robinson, *History*, at 148.

[1201] Secretary-General, "Memorandum," at 31.

[1202] "[R]efugees had already been assimilated to nationals in respect of public assistance and labour legislation and social security. Was it therefore absolutely necessary also to contemplate imposing *a tax* to provide relief for refugees? He thought not [emphasis added]": Statement of Mr. Miras of Turkey, UN Doc. A/CONF.2/SR.12, July 9, 1951, at 14. In earlier discussion in the Ad Hoc Committee, the Chinese representative had observed that "[r]efugees are not especially wealthy persons, and if the only

course, prevent governments from assessing fees for services not required by nationals. Specifically, para. 2 of Art. 29 confirms that refugees may be required to pay a modest amount to cover the actual costs of delivering documentation required by non-citizens, such as identity papers.[1203]

Not only may refugees not be subjected to different assessments than nationals, but they must not be treated less well than nationals in relation to any given charge. This is clear from the textual prohibition of both "other *or higher*" charges or taxes. The parallel phrase in model tax treaties, which prohibits "other or more burdensome" taxation, requires "that when a tax is imposed on nationals and foreigners in the same circumstances, it must be in the same form as regards both the basis of charge and the method of assessment, its rate must be the same and, finally, the formalities connected with the taxation (returns, payment, prescribed times, etc.) must not be more onerous for foreigners than for nationals."[1204]

The duty to treat refugees on terms of equality with nationals applies, however, only to the extent that refugees and nationals can be said to be "in similar situations." In Robinson's view, differences in tax liability between citizens and refugees that are attributable to "deriving a certain amount of income, having income abroad, [or] having special income sources . . . "[1205] therefore do not infringe Art. 29. The equality guaranteed by this article of the Refugee Convention is, in other words, formal equality. There is no violation of Art. 29 if refugees in practice pay more tax than citizens not because they are refugees or non-citizens, but instead because their primary source of income is universally taxed in the asylum country at a higher rate than other sources of income. Thus, even though refugees are more likely than others to derive income from overseas property, Art. 29 would not prohibit a

intention . . . was to help them, it would be better to approach the rich": Statement of Mr. Cha of China, UN Doc. E/AC.32/SR.39, Aug. 21, 1950, at 23.

[1203] "[P]aragraph 2 . . . state[d] expressly that identity papers were included. He would therefore interpret it as applying to all the documents, including identity papers, referred to in the draft Convention. There might be other articles necessitating the issue of other administrative documents, and Contracting States should reserve the right to charge *a small fee for delivering them* [emphasis added]": Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.12, July 9, 1951, at 15. As Weis observes, "[p]aragraph 2 must be read in conjunction with Article 25, paragraph 4 and paragraphs 3 and 10 of the Schedule. The documents referred to are those mentioned in Articles 25 and 27, but also other documents required under the Convention": Weis, *Travaux*, at 272. Specifically, para. 3 of the Schedule requires that "[t]he fees charged for issue of the [travel] document shall not exceed the lowest scale of charges for national passports"; and para. 10 stipulates that "[t]he fees for the issue of exit, entry or transit visas shall not exceed the lowest scale of charges for visas on foreign passports": Refugee Convention, at Schedule.

[1204] OECD Tax Treaty, at Art. 24(1) commentary; UN Tax Treaty, at Art. 24(1) commentary.

[1205] Robinson, *History*, at 148.

regime that taxes income from overseas property (for all) more severely than it does income from domestic property.

Similarly, if nationals who are not residents are taxed differently from nationals who are residents, there can be no complaint if non-resident refugees are taxed differently from resident refugees.[1206] But any attempt to treat non-resident citizens and non-resident aliens differently for income tax purposes would run afoul of the Refugee Convention. The 1951 Refugee Convention, unlike its predecessors, does not limit the duty of tax equality only to resident refugees.[1207] Every person who is in fact a refugee, even if his or her presence in a state party is only transient, must be equated to citizens for purposes of the imposition of taxes and related charges. While most forms of tax do not apply to non-residents, duties on imports or exports are examples of charges which are assessed against non-residents, in relation to which non-resident refugees must be treated on terms of equality with non-resident citizens.[1208]

[1206] This is clear from an exchange at the Conference of Plenipotentiaries. In response to the Swedish representative's comment that his country taxed non-citizen commercial travelers and performing artists differently from nationals, the President of the Conference affirmed that only differences grounded in substance, not in nationality, would be allowed under Art. 29. "[T]he problem referred to by the Swedish representative, which was a question of domicile or habitual residence rather than nationality, could be solved within the framework of paragraph 1. For example, if a Swedish artiste resident in Denmark went back to Sweden to perform for a short period, he would be subject to the same taxes as, for instance, a Danish artiste in the same position": Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.12, July 9, 1951, at 16. The principle is also endorsed in the Commentary to the UN model tax treaty. "Consequently if a Contracting State, in giving relief from taxation on account of family responsibilities, distinguishes between its own nationals according to whether they reside in its territory or not, that State cannot be obliged to give nationals of the other State who do not reside in its territory the same treatment as it gives its resident nationals [so long as it] undertakes to extend to them the same treatment as is available to its non-resident nationals": UN Tax Treaty, at 208.

[1207] As initially proposed, the Convention continued the traditional practice of reserving the benefit of the tax equality rule for resident refugees. "The High Contracting Parties undertake not to impose upon refugees (or stateless persons) residing in their territory duties, charges or taxes, under any denomination whatsoever, other or higher than those which are or may be levied on their nationals in similar situations": Secretary-General, "Memorandum," at 31. As reframed by the Ad Hoc Committee, however, the residency requirement was deleted. "The Contracting States shall not impose upon refugees in their territory duties, charges or taxes": Ad Hoc Committee, "First Session Report," at 7. With no explicit discussion of the matter, the Conference of Plenipotentiaries deleted the reference to "refugees in their territory" in favor of "refugees." Theoretically, then, even refugees not in a state party's territory, but who are nonetheless under its authority for tax purposes, must be granted the benefit of Art. 29. See generally chapter 3.1.1 above.

[1208] "Art. 29 deals with refugees in general; in other words, to enjoy equal status with nationals 'in similar circumstances' of the country where the fiscal charges are payable,

4.6 Family unity

A critical imperative for most refugees is to avoid separation from their families. As UNHCR has observed, "family members together have more strength to face adversity than those apart."[1209] While family relations are important means of satisfying physical and psychological needs during normal times, these attachments take on even greater significance when involuntary migration deprives refugees of their traditional range of support networks.[1210] The more threatening the environment, the more family members will look to each other for intimacy and security.[1211]

Yet the very crises that force refugees to flee often shatter the unity of their families. Family members may not be able to leave together,[1212] or may be separated in the chaos of flight.[1213] Refugees separated from their families are not only less equipped to cope with life in an asylum state, but are often prone to loneliness, despair, and anxiety over the fate of their loved ones left behind in dangerous situations.[1214] As Dixon-Fyle has observed, "[t]heir relief at having reached safety may be so overshadowed by distress, guilt and worry about those who remain behind that the chances of their settling down and becoming fully integrated in their host country may be seriously reduced."[1215]

There are few legal impediments to family reunification in most less developed asylum states. Because these countries normally rely on group status determination of refugees, the acceptance of members of refugee families able to reach their territory tends to occur as a matter of course, with no differentiation made between the arrival of some family members as part of an initial influx and the subsequent arrival of others.[1216] In the South, the more serious obstacle to refugee family unity results from practical

the refugees need not reside in either the state concerned or in another Contracting State": Robinson, *History*, at 148.

[1209] UNHCR, "Families in Exile: Reflections from the Experience of UNHCR" (1995) (UNHCR, "Families"), at 3.

[1210] H. Williams, "Families in Refugee Camps," [Summer 1990] *Human Organization* 103.

[1211] J. Barudy, "The Therapeutic Value of Solidarity and Hope," in D. Miserz ed., *Refugees – The Trauma of Exile* 142 (1988). In particular, children have an increased need for physical contact with their parents, and often fear separation from their family above all else: E. Ressler et al., *Unaccompanied Children: Care and Protection in Wars, Natural Disasters and Refugee Movements* (1988) (Ressler et al., *Unaccompanied Children*), at 133, 147, and 150.

[1212] "Facing persecution and often death, refugee families are frequently forced to separate while fleeing amid mass destruction, spraying bullets, bombs, and guerilla warfare": UNHCR, "Families," at 1.

[1213] "Refugees often flee under chaotic, violent and traumatic circumstances, leaving all or part of their families behind": K. Dixon-Fyle, "Reunification: Putting the Family First," (1994) 95 *Refugees* 6 (Dixon-Fyle, "Reunification"), at 10.

[1214] "Year of the Family," (1994) 95 *Refugees* 3, at 5.

[1215] Dixon-Fyle, "Reunification," at 9.

[1216] Ibid. at 7.

difficulties in tracing family members who may be in another camp, or even in another country.

Most critically, there are often large numbers of unaccompanied children in massive refugee flows.[1217] Part or all of a child's family may be killed or accidentally separated from the child. Children may be sent out of the country, sometimes with siblings and sometimes alone, while the parents remain. Alternatively, children may remain behind temporarily while part of the family leaves to get established in a new land, or they may have been abducted into the army.[1218] In some truly extreme situations, parents are compelled voluntarily to become separated from their children as part of a survival strategy,[1219] or to enable their children to take advantage of superior opportunities often available to unaccompanied minors.[1220] In addition to such emergency-related circumstances, refugee families may become separated because of the same sorts of social, psychological, and cultural problems that arise generally in families. In other situations, "the separations are the unplanned result of the way relief assistance is provided. For example, relief workers have sometimes removed children from a dangerous area or to a medical facility without notifying the family or others in the vicinity."[1221] When resource constraints or logistical concerns conspire to keep family members apart – and particularly when children are missing – there is always a fear that "[s]ome family members [will] spontaneously repatriate to their homeland in precarious political circumstances to find their loved ones – and never return."[1222]

In the developed world, as in the South, family unity concerns more commonly arise in relation to reunification efforts, rather than as refusals of entry at the border.[1223] In contrast to the situation in poorer states,

[1217] For example, more than 20 percent of the Burundian refugees who sought asylum in Tanzania were unaccompanied children: C. Berthiaume, "Alone in the World," (1994) 95 *Refugees* 14, at 17.

[1218] F. Ahearn and J. Athey, *Refugee Children: Theory, Research, and Services* (1991), at 11.

[1219] For example, older boys may be encouraged to fend for themselves, and older girls "to attach themselves to more prosperous and safe families as helpers": L. Bonnerjea, "Disasters, Family Tracing and Children's Rights: Some Questions About the Best Interests of Separated Children," (1994) 18 *Disasters* 277 (Bonnerjea, "Disasters"), at 278.

[1220] Ressler et al., *Unaccompanied Children*, at 119.

[1221] Ibid. at 118–119.

[1222] UNHCR, "Families," at 3.

[1223] See also G. Fourlanos, *Sovereignty and the Ingress of Aliens* (1986) (Fourlanos, *Sovereignty*), at 111: "When it comes to immigration rights deriving from the principle of family unity, the situation is rather obscure. A specific right to enter and/or to reside is not very often mentioned in international agreements, but it seems that, in practice, States understand the individual right to family unity as including the right to enter their territory and to reside there (i.e. not to be expelled)." Hong Kong officials, however,

however, much of the difficulty faced by refugees seeking to reunite their families tends to result from the application of administrative requirements governing such issues as the point at which refugees should be allowed to sponsor the admission of their family members, which family members may be admitted, and what criteria must be met.

Virtually all Northern states decline family reunification to refugees awaiting the results of status determination.[1224] On the other hand, once formally recognized as a Convention refugee, most developed countries grant refugees a formal legal right to be reunited with family members.[1225] There is more ambiguity where a refugee is granted some alternative status, rather than full Convention refugee status. In Australia, for example, refugees who arrive in that country unlawfully, or who are intercepted offshore or in part of the territory deemed "excised" by Australia, are granted only temporary protected status which does not entitle them to be reunited with family members.[1226] Similar practices were once common in relation to persons granted alternative forms of protected status in much of Europe. In Germany, for example, those recognized as de facto refugees (*Duldung* status) were allowed to sponsor the admission of family members only on a discretionary basis.[1227] Refugees admitted under so-called "temporary protection" schemes were traditionally allowed access to family reunification in Italy, Norway, and

forcibly deported a pregnant asylum-seeker who was born in Vietnam, but who was considered Chinese by virtue of her resettlement in that country, even as they admitted her Vietnamese husband to a detention facility to await the outcome of his application to be recognized as a refugee: M. Eager, "Expectant mother split from spouse," *South China Morning Post*, Aug. 27, 1992. In contrast, a British High Court judge compelled the Home Office not to enforce a crime-based deportation order against the ex-spouse of an asylum applicant on the grounds that to do so would create the risk of violating the ex-spouse's right to respect for family life (as he would be separated from his children, who were in the custody of the asylum applicant, his ex-wife): C. Dyer, "HIV father wins human rights asylum case," *Guardian*, Oct. 25, 2000, at 12.

[1224] See generally Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, *Report on Family Reunification: Overview of Policies and Practices in Participating States* (1997) (IGC, *Family Reunification*). The new European Union standards on family reunification are explicitly stated not to apply to "a third-country national applying for recognition of refugee status whose application has not yet given rise to a final decision": Council Directive on the Right to Family Reunification, Doc. 6912/03 (Feb. 28, 2003) (EU Family Reunification Directive), at Art. 3(2)(a).

[1225] For example, the Swiss *Asylum Act* authorizes a grant of asylum to the spouse and children of recognized refugees, even if these persons do not themselves have a well-founded fear of being persecuted: W. Kälin, *International Academy of Comparative Law National Report for Switzerland* (1994), at 7.

[1226] Mathew, "*Tampa*," at 673.

[1227] F. Liebaut and J. Hughes, *Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries* (1997), at 101.

Sweden,[1228] but not in Finland, the Netherlands, or Spain.[1229] Under the European Union's 2001 Directive on Temporary Protection, however, a clear right to family reunification is now established for the beneficiaries of temporary protection in member states.[1230]

Even if entitled to sponsor the entry of family members, a second question is the definition of the specific relationships which qualify as family members for purposes of reunification. Some states resist any understanding of "family" that goes beyond an opposite-sex spouse and minor, dependent children.[1231] For example, under the new European Union standards, a refugee's right to family reunification extends only to his or her "spouse" and minor, unmarried children.[1232] If the refugee is not formally married to his or her spouse, it is up to each state to decide for itself whether or not to permit reunification.[1233] A second or subsequent spouse in a polygamous marriage cannot be sponsored at all.[1234] Beyond this narrow category of family members, even the discretionary authority of European Union states is now limited. They may only elect to admit other first-degree relatives who are dependent on the refugee, and adult unmarried children who are incapacitated.[1235] Such a narrow construct may bear little resemblance to the de facto familial structures of emotional and economic interdependence of the refugees themselves.[1236] It is ironically also a less generous standard than that which governs reunification within the European Union for persons granted

[1228] IGC, *Family Reunification*, at 170, 207, 244. [1229] Ibid. at 122, 186, 233, 326.

[1230] EU Temporary Protection Directive, at Art. 15.

[1231] For example, in the context of resettlement under the Comprehensive Plan of Action for Indochinese Refugees, reception states took different views on the validity of in-camp marriages and common law relationships: S. Bari, "Refugee Status Determination Under the Comprehensive Plan of Action: A Personal Assessment," (1992) 4(4) *International Journal of Refugee Law* 487, at 503–504.

[1232] EU Family Reunification Directive, at Art. 4(1). [1233] Ibid. at Art. 4(3).

[1234] Ibid. at Art. 4(4).

[1235] Ibid. at Art. 4(2). This policy will result in a diminution of refugee rights in, for example, Greece, where refugees were entitled to sponsor their parents (provided they lived with the refugee in the country of origin): A. Skordas, "The New Refugee Legislation in Greece," (1999) 11(4) *International Journal of Refugee Law* 678, at 693.

[1236] Indeed, the strict definition of a "nuclear family" is not consistent with the historical understanding of "family" even in the developed countries which now embrace it. As Bonnie Fox has observed, "[b]efore the eighteenth century in Europe, there was no term of reference for persons related by blood, marriage, or common residence: the term 'family' was not used ... Even in cultures and historical times when the nuclear unit was present, it was not necessarily distinguished from the larger groupings of which it was a part. Yet, through history, children have been raised and adults' need for food, shelter, and basic care have been met – although the way these were defined has varied tremendously": B. Fox, *Family Patterns, Gender Relations* (1993), at 23. See generally J. Hathaway, *Toward a Contextualized System of Family Class Immigration: A Study for the Government of Canada* (1994).

temporary protection in the event of a mass influx (including refugees). Such persons have the additional right to sponsor the admission of an unmarried partner, and may apply to be reunited with any other close relatives who were part of the family unit and dependent upon the refugee in the country of origin.[1237]

Even where a refugee is in principle entitled to reunification with particular family members, there may be additional criteria to be met. Australia and Canada, for example, require the refugee to prove his or her financial ability and willingness to meet the needs of some or all categories of sponsored family members.[1238] The European Union, in contrast, does not condition family reunification on such considerations so long as the application is filed within three months of the formal recognition of refugee status. After that time, however, family reunification may be subject to investigation of the sponsoring refugee's ability to provide his or her family with accommodation and health insurance, and to meet their other financial needs.[1239] More generally, the European Union authorizes the rejection of any application for family reunification on the sweeping basis of "public policy, public security or public health."[1240]

Finally, there are often prolonged delays in authorizing family reunification in developed states. Complex procedures absorb tremendous amounts of time and energy, and "keep refugees' minds riveted to the past and to trauma, instead of allowing them and their families to start thinking of the future and rebuilding their lives."[1241] In Australia, a Pakistani man recognized as a refugee in 1996 had still not received permission as of 2001 to be reunited with his wife and three daughters, one of whom suffered from cerebral palsy. His level of desperation was such that he set himself alight outside Parliament to protest the government's delays.[1242] Many Guatemalan and Salvadoran refugees in the United States were kept waiting for as many as twenty years after their arrival before being granted the formal status that entitled them to

[1237] EU Temporary Protection Directive, at Art. 15.

[1238] Under Australian law, refugees must agree to meet the needs of sponsored family members for two years, and provide a bond of A$3,500 for the principal applicant and A$1,500 for each other member of the family unit. In Canada, the sponsor of extended family members must undertake "to provide housing, care and maintenance and normal settlement needs of the applicant and accompanying dependants for up to ten years": IGC, *Family Reunification*, at 37, 91.

[1239] EU Family Reunification Directive, at Arts. 7(1), 12(1).

[1240] Ibid. at Art. 6(1). Somewhat ominously, a footnote to this provision makes clear that "[t]he notion of public policy and public security covers also cases in which a third-country national belongs to an association which supports international terrorism, supports such an association or has [extremist] aspirations": ibid.

[1241] Dixon-Fyle, "Reunification," at 9.

[1242] E. MacDonald, "Daughter to reunite with father 'to give him strength,'" *Canberra Times*, Apr. 11, 2001, at A-3.

sponsor the arrival of close family members.[1243] In some cases, delays may defeat the very possibility or logic of reunification as children reach the age of majority and are no longer eligible for admission, parents die, or marital relationships break down under the strain of separation.[1244]

Even once admitted to a state of refuge, family unity may on occasion be forcibly disrupted by the application of formal state policy. For example, hundreds of male refugees from Bosnia and Croatia were taken from their families in informal conscription "raids" conducted by the Serbian government during the mid-1990s.[1245] Another extreme example was the *en masse* detention and expulsion of Chadian refugees accused by Nigerian authorities of engaging in subversive activities against the Chadian regime. Male refugees in Maiduguri, the majority of whom were the primary breadwinners for their families, were arrested, tried, and expelled without being afforded any opportunity to defend themselves.[1246] In the United States, refugee husbands and wives have traditionally been sent to separate detention facilities while their claims are being assessed, with their children often sent to juvenile jails.[1247]

[1243] "Until recently, [Immigration and Naturalization Service] officials were estimating that it could take as many as 20 more years to process thousands of Salvadorans and Guatemalans ... who fled their homelands in the 1980s and have lived for years in legal limbo ... The hardest moment [for Salvadoran refugee Juana Fuentes] occurred in 1996, when her daughter, who lived with her grandmother, needed a stomach operation. Intensely worried, Fuentes considered going back to El Salvador. 'I could go to the operation,' Fuentes said. 'But then I couldn't come back ...' ... The daughter tried to obtain a visa to visit her in Washington but was turned down": M. Sheridan, "For many seeking asylum, a long wait; Immigration and Naturalization Service pledges faster processing of cases," *Washington Post*, Jan. 17, 2002, at T-09.

[1244] Dixon-Fyle, "Reunification," at 10.

[1245] "The Serbian Ministry of the Interior ran the conscription-by-force operation, with assistance from the Yugoslav army and ... [sometimes] with that of the military police from Krajina. Serb refugees from Bosnia and Croatia have been the main targets of the mass conscription ... Men have been taken off the streets, from farmers' markets, restaurants and university dormitories; they have been taken off buses, from work, even from high school proms": Humanitarian Law Center, "Spotlight Report No. 18: The Conscription of Refugees in Serbia" (1995), at 1. Forcible conscription has also been a risk for Liberian refugees in Guinea: Médecins sans frontières USA, "A voice from the field: Liberian refugees pay a high price for crossing into Guinea" (Dec. 2002); and for refugees in Pakistan living near the border with Afghanistan: Human Rights Watch, "Letter to General Pervez Musharraf," Oct. 26, 2001.

[1246] Nigerian Civil Liberties Organization, *The Status of Refugee Rights in Nigeria* (1992), at 30. "Most of those arrested are adult males who are now separated from the rest of their families who remain in Nigeria. The Nigerian police and army are believed to be responsible for the arrests, and they have reportedly extracted bribes from relatives for unfulfilled promises of the release of the detainees": (1992) 4(5) *News from Africa Watch* 11.

[1247] "Every year, hundreds of families arrive in the United States seeking asylum or refuge from persecution back home. Since immigration laws were made stricter in 1996, many

Less egregiously, family unity may also be adversely affected by host country policies which are simply not carefully designed or administered. For example, children and parents may become permanently separated by well-meaning but inadequately conceived efforts to "assist" children quickly to become reestablished,[1248] including putting unaccompanied child refugees up for adoption before adequate efforts to locate family members can be pursued.[1249] Even adoption systems in principle predicated on tracing and ensuring the consent of the birth family may be open to fraud or manipulation, particularly in times of crisis.[1250] Bureaucratic interference with family unity may also follow from the mechanistic administration of superficially reasonable policies. At the Ukwimi refugee settlement in Zambia, even close family members were prevented from living nearby one another by the rigid application of a policy that land parcels should be allocated strictly according to time of arrival.[1251] Similarly, only the immediate family members of

of them wind up in Immigration and Naturalization Service custody instead of out on bail while their cases are being considered. For the past five years, their arrival has meant domestic heartbreak. Husbands and wives are split up into separate detention facilities. Children are shipped to juvenile jails. In the best case scenario, a whole family would be escorted into a motel room by a round-the-clock guard, unable to use the phone or even walk down the hallway": H. Rossin, "Asylum seekers decry detention by Immigration and Naturalization Service; Agency's model shelter opened to meet family needs, but grievances remain," *Washington Post*, June 17, 2001, at A-06.

[1248] "[I]t has been quite common ... for programmes to separate children from their families as a way of 'targeting' them for help. However well meaning this is, it ignores the large body of evidence which shows that in most cases children are best off in their own families, that the needs of children through infancy and childhood are best met through constancy, continuity and stability of family membership": Bonnerjea, "Disasters," at 279.

[1249] "Adoption laws of the country of refuge may technically apply to them, but that country may not take the same interest in adoptions of refugee children as it does in adoptions of children of its nationality. In addition, in the turmoil that pervades many refugee situations, it may be difficult or impossible to get definitive proof that a child's parents are dead or have irrevocably relinquished him/her for adoption. Nonetheless, at least theoretically, some countries permit adoptions to occur without evidence of parental consent on the grounds that parents cannot be found and are not capable of giving their consent": M. McLeod, "Legal Protection of Refugee Children Separated From Their Parents: Selected Issues," (1989) 28(2) *Quarterly Review of the Intergovernmental Committee for Migration* 295, at 300.

[1250] "Unfortunately in the case of El Salvador, very little information was available and sometimes the information given to the adoptive family was false ... When informal adoptions took place, a war was going on ... However, such informal adoptions could also take place today, without raising many questions. The Salvadoran civil registration system is by no means fraud-proof. People often consider registering a child with a false identity as a more viable arrangement than trying to make an adoption or care arrangement through legal means": R. Sprenkels, *Lives Apart: Family Separation and Alternative Care Arrangements During El Salvador's Civil War* (2002), at 102–103.

[1251] "[O]ne refugee woman commented that when she came to Ukwimi, the lorry was full, so that her mother, father, four uncles and two brothers ended up in different villages":

Bosnian refugees admitted to Germany were exempted from the policy of distributing refugees throughout the country, creating real difficulties for newly arrived adult children and older relatives who, having been separated from their families for often extended periods, were prevented from reuniting even once safe from the risk of persecution.[1252] And because these refugees enjoyed no freedom of internal movement, they could not even travel within Germany to visit their relatives.[1253]

> **Recommendation "B", Final Act of the Conference of Plenipotentiaries**
> **The Conference, [c]onsidering that the unity of the family, the natural and fundamental group of society, is an essential right of the refugee, and that such unity is constantly threatened, and [n]oting with satisfaction that, according to the official commentary of the *Ad Hoc* Committee on Statelessness and Related Problems the rights granted to a refugee are extended to members of his family, [r]ecommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to: (1) [e]nsuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country, [and] (2) [t]he protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.**

> **Civil and Political Covenant, Art. 17**
> **No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.**

> **Civil and Political Covenant, Art. 23(1)–(2)**
> **The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The right of men**

R. Black and T. Mabwe, "Planning for Refugees in Zambia: The Settlement Approach to Food Self-Sufficiency," (1992) 14(1) *Third World Planning Review* 14.

[1252] A. Büllesbach, "War and Civil War Refugees in Germany: The Example of Refugees from Bosnia-Hercegovina" (1995), at 22. "It may be extremely difficult for family members who have come to Germany at different times to be reunited in the same district, if one part of the family has already been distributed to a local asylum center. In general there is also no consideration given in allocation of accommodation to where any asylum-seeker may have a family connection, although the possibility exists in exceptional cases": ECRE, "Limits," at 14.

[1253] ECRE, "Limits," at 18.

and women of marriageable age to marry and to found a family shall be recognized.

Civil and Political Covenant, Art. 24(1)
Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

Economic, Social and Cultural Covenant Art. 10(1)
The States Parties to the present Covenant recognize that ... [t]**he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children** ...

The drafters of the Refugee Convention assumed that the family members of a refugee would benefit from the protection of the Refugee Convention, even if not able themselves to show a "well-founded fear of being persecuted." Under earlier refugee accords, there had been a consistent pattern of assimilating family members to the "head of the family" for purposes of defining entitlement to the benefits of refugee status.[1254] That practice was affirmed and broadened by the Conference of Plenipotentiaries, but only as a commitment in principle, not as a matter of clearly binding law.

Specifically, the Report of the Ad Hoc Committee observed that "[m]embers of the immediate family of a refugee should, in general, be considered as refugees if the head of the family is a refugee as here defined. Also, such members are to be regarded as refugees if the conditions set forth ... apply to them, even if the head of the family is not a refugee."[1255] This view not only affirmed traditional practice, but moreover eliminated the possibility of applying the notion of "family unity with a vengeance." That is, the novation of the Ad Hoc Committee's formulation was the ability of a dependent family member to claim refugee status in his or her own right,

[1254] Even as the approach of refugee law became more individualized with the advent of the IRO Constitution, respect for family unity continued. "[F]or reasons of equity as well as administrative convenience, families – not individuals – were considered the basic units with respect to determining who [was] within the Organization's mandate. Thus, if the head of a family was found to be within (or without) the mandate, the members of his family were also so considered, unless they fell under some constitutional provisions not applicable to the head of the family": Grahl-Madsen, *Status of Refugees I*, at 413.

[1255] "Comments of the Committee on the Draft Convention relating to the Status of Refugees," Annex II to Ad Hoc Committee, "First Session Report," at 2.

whether or not the "head of the family" was entitled to refugee status. Yet it was subject to no formal debate or discussion in the Ad Hoc Committee, with the result that no relevant article was proposed for the Convention itself.

At the Conference of Plenipotentiaries, however, a declaration was inserted into the Final Act of the Conference. On the initiative of the Holy See, the Conference agreed without dissent to recommend that governments take "the necessary measures for the protection of the refugee's family especially with a view to ... [e]nsuring that the unity of the refugee's family is maintained."[1256] They expressly affirmed the "essential right of the refugee" to family unity, and endorsed the understanding of that principle stated by the Ad Hoc Committee.[1257]

This declaration is in some ways a powerful, if non-binding, affirmation of the responsibility of states to avoid actions which might disturb the unity of a refugee's family. The language originally proposed[1258] was twice strengthened in order to avoid any impression of diluting the "categorical view of the Ad Hoc Committee that governments were under an obligation to take such action in respect of the refugee's family ... [I]t would be regrettable if governments were to take the action therein proposed only when they considered that circumstances enabled them to do so."[1259] Indeed, at least the German representative was of the view that the responsibility of states was not simply to avoid disrupting family unity, but also to facilitate the reunion of divided families.[1260] Yet it is also undeniable that – for reasons not explained by the drafters – they viewed the issue of the responsibility to respect family unity as "naturally not of a contractual nature."[1261] The High Court of Australia has thus determined that a domestic system which considers, but does not guarantee, the admission of a refugee's spouse and children amounts to "implementation in Australian law of Recommendation B ... [that goes] beyond observance of the international obligations imposed by the Refugees Convention."[1262]

[1256] Ibid. [1257] See text of Recommendation "B", above at p. 540.

[1258] UN Doc. A/CONF.2/103.

[1259] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.34, July 25, 1951, at 7. The language had earlier been strengthened at the suggestion of Mr. Robinson of Israel, ibid. at 6.

[1260] "He felt it was appropriate that the Conference should emphasize the principle of the unity of the refugee's family, a principle of particular importance in a country like Germany where, by force of political circumstance, many German families had been split asunder. The German Government was making every effort to facilitate the reunion of such families": Statement of Mr. von Trutzschler of the Federal Republic of Germany, ibid. at 5–6.

[1261] Statement of Msgr. Comte of the Holy See, ibid. at 4.

[1262] *Re Minister for Immigration and Multicultural and Indigenous Affairs, ex parte Applicant S134/2002*, (2003) 195 ALR 1 (Aus. HC, Feb. 4, 2003). When this case was reviewed by

While it is possible to dismiss the Conference's recommendation as essentially hortatory,[1263] a plausible case can be made that at least the core elements of Recommendation B of the Final Act have ripened into customary international law. The Recommendation, reproduced and elaborated in the UNHCR *Handbook*,[1264] has inspired many resolutions of the UNHCR's Executive Committee. States have regularly affirmed the view that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the state,"[1265] as well as the specific importance of the family "as the fundamental group of society concerned with the protection and well-being of children and adolescents."[1266] This centrality of the family requires that "family unity should be respected,"[1267] "maintained,"[1268] and "protected."[1269] There should be a "prioritization of family unity issues at an early stage in all refugee operations,"[1270] and "all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity."[1271] And of most direct relevance to the question of the admission of family members, the Executive Committee has

> [u]nderline[d] the need for the unity of the refugee's family to be protected, *inter alia* by ... provisions and/or practice allowing that when the principal applicant is recognized as a refugee, other members of the family unit should normally also be recognized as refugees, and by providing each

the United Nations Human Rights Committee, however, it was determined that "to separate a spouse and children arriving in a State from a spouse validly resident in a State may give rise to issues under articles 17 and 23 of the Covenant": *Bakhtiyari v. Australia*, UNHRC Comm. No. 1069/2002, UN Doc. CCPR/C/79/D/1069/2002, decided Oct. 29, 2003, at para. 9.6. See discussion of relevant Covenant obligations below, at pp. 547–560.

1263 "The 1951 Convention does little more than recommend measures to ensure family unity and protection": Goodwin-Gill, *Refugee in International Law*, at 257.

1264 UNHCR, *Handbook*, at Annex I and paras. 181–188.

1265 UNHCR Executive Committee Conclusions No. 85, "Conclusion on International Protection" (1998), at para. (u), and 88, "Protection of the Refugee's Family" (1999), at para. (b), both available at www.unhcr.ch (accessed Nov. 20, 2004).

1266 UNHCR Executive Committee Conclusion No. 84, "Refugee Children and Adolescents" (1997), at para. (a)(i), available at www.unhcr.ch (accessed Nov. 20, 2004).

1267 UNHCR Executive Committee Conclusion No. 22, "Protection of Asylum-Seekers in Situations of Large-Scale Influx" (1981), at para. (II)(B)(2)(h), available at www.unhcr.ch (accessed Nov. 20, 2004).

1268 UNHCR Executive Committee Conclusion No. 85, "Conclusion on International Protection" (1998), at para. (v), available at www.unhcr.ch (accessed Nov. 20, 2004).

1269 UNHCR Executive Committee Conclusion No. 88, "Protection of the Refugee's Family" (1999), at para. (b), available at www.unhcr.ch (accessed Nov. 20, 2004).

1270 Ibid. at para. (b)(iv).

1271 UNHCR Executive Committee Conclusion No. 47, "Refugee Children" (1987), at para. (d), available at www.unhcr.ch (accessed Nov. 20, 2004).

> family member with the possibility of separately submitting any refugee claims that he or she may have.[1272]

Beyond the expectation that family members will be assimilated to the refugee for purposes of protection, "every effort should be made to ensure the reunification of separated refugee families."[1273] More recently, states have been "exhort[ed]" to pursue family reunification "in a positive and humanitarian spirit, and without delay,"[1274] and even to "consider[ ] . . . liberal criteria in identifying those family members who can be admitted, with a view to promoting a comprehensive reunification of the family."[1275] Most generally, the Executive Committee has called upon states to consolidate their procedures for family unity and reunification in a "legal framework to give effect at the national level to a right to family unity for all refugees, taking into account the human rights of the refugees and their families."[1276] Indeed, in most state parties there is a long-standing jurisprudence affirming the principle of family unity,[1277] sometimes buttressed by policies that are explicitly based upon Recommendation B.[1278]

[1272] UNHCR Executive Committee Conclusion No. 88, "Protection of the Refugee's Family" (1999), at para. (b)(iii), available at www.unhcr.ch (accessed Nov. 20, 2004). To similar effect, see UNHCR Executive Committee Conclusion No. 85, "Conclusion on International Protection" (1998), at para. (v), available at www.unhcr.ch (accessed Nov. 20, 2004).

[1273] UNHCR Executive Committee Conclusion No. 24, "Family Reunification" (1981), at para. 1, available at www.unhcr.ch (accessed Nov. 20, 2004).

[1274] UNHCR Executive Committee Conclusion No. 85, "Conclusion on International Protection" (1998), at para. (w), available at www.unhcr.ch (accessed Nov. 20, 2004).

[1275] UNHCR Executive Committee Conclusion No. 88, "Protection of the Refugee's Family" (1999), at para. (b)(ii), available at www.unhcr.ch (accessed Nov. 20, 2004).

[1276] UNHCR Executive Committee Conclusion No. 85, "Conclusion on International Protection" (1998), at para. (x), available at www.unhcr.ch (accessed Nov. 20, 2004).

[1277] See generally Grahl-Madsen, *Status of Refugees I*, at 414–417. For example, the Belgian Conseil d'Etat refused to expel the spouse of a Zaïrian asylum-seeker on grounds of family unity: *Tshisuaka and Tshilele v. Belgium*, 3rd Chamber, Ref. No. 39227 (Apr. 2, 1992), reported at (1992) 68 *Revue du droit des étrangers* 66.

[1278] In the United Kingdom, for example, the position on family reunion "is entirely different where an asylum-seeker has been recognised as a refugee. The principle of family unity for refugees is contained in the Final Act of the instrument that established the 1951 Convention. Although family reunion does not form part of the Convention itself, the United Kingdom will normally permit the reunion of the immediate family, as a concession outside the immigration rules. Under that policy, people recognised as refugees immediately become eligible to be joined by their spouse and minor children, provided that they lived together as a family before the sponsor travelled to seek asylum. Families of refugees are not required to satisfy the maintenance and accommodation requirements that normally apply when families seek admission to join a sponsor here. Other dependent relatives may be admitted if there are compelling compassionate circumstances": *Munim v. Secretary of State for the Home Department*, Lexis Unreported Decisions (Eng. CA, May 3, 2000), quoting from the statement of Mr. Nicholas Baker MP to the House of Commons, Mar. 17, 1995.

There is therefore little doubt that there is ample raw material from which to derive the necessary *opinio juris* for recognition of a customary legal norm to protect the family unity of refugees. But on close examination, it is clear that while there is a continuing insistence that the family members of a primary applicant refugee should be admitted to protection,[1279] most refugee-specific formulations fail to define with any precision the content of an affirmative dimension of the principle of family unity. Standards in general human rights law similarly tend to limit the ambit of the principle to the avoidance of "arbitrary interference,"[1280] "arbitrary or unlawful interference,"[1281] or to the separation of children from their parents "except when competent authorities subject to judicial review determine, in accordance with the applicable law and procedures, that such separation is necessary for the best interests of the child."[1282] In other words, the *opinio juris* which achieves the specificity and precision needed to generate binding legal duties does not include norms mandating affirmative reunification,[1283] or even prohibiting all forms of interference with family unity. The sense of clear legal obligation instead extends only to a duty not to engage in *unlawful or arbitrary* interference with family unity.

Interestingly, this understanding of the scope of relevant *opinio juris* coincides with the core of state practice – this being, of course, the second critical element for establishment of a customary international legal

[1279] See Recommendation B of the Final Act of the Conference of Plenipotentiaries, above at p. 540; as well as Executive Committee Conclusions Nos. 85, "Conclusion on International Protection" (1998), at para. (v), and 88, "Protection of the Refugee's Family" (1999), at para. (b)(iii), both available at www.unhcr.ch (accessed Nov. 20, 2004).

[1280] Universal Declaration, at Art. 12.

[1281] Civil and Political Covenant, at Art. 17(1). "The term 'unlawful' means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant ... The expression 'arbitrary interference' is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression 'arbitrary interference' can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances": UN Human Rights Committee, "General Comment No. 16: Right to privacy" (1988), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 142, paras. 3–4.

[1282] Rights of the Child Convention, at Art. 9(1).

[1283] For example, UNGA Res. 51/89 (1996), which "reaffirms ... the vital importance of family reunification," was adopted on a vote of 89–4 (76 abstentions). The massive number of abstentions is cause for some caution on the question of consistent *opinio juris* favoring an affirmative duty to reunify families. For a discussion of the standards applicable to recognition of a norm of customary international law, see generally chapter 1.1.1 above.

obligation. While state practice nearly universally affirms the duty of states to act lawfully, and not to take steps which arbitrarily interfere with a refugee's family unity, the duty to take affirmative steps to facilitate family reunification is more controversial.[1284] At least in historical perspective, Goodwin-Gill is right to point to "[r]estrictions on family reunion ... [which] result from the conditions attached to certain types of status, such as temporary protection which, although they facilitate the grant of refuge, may be so circumscribed as to frustrate fundamental rights relating to the family."[1285]

The need to locate a core of relatively consistent state practice in support of the putative customary norm also results in a limitation on the scope of the beneficiary class of the duty to avoid unlawful or arbitrary interference with family unity. Practice suggests that the scope of "family" members who may

[1284] "The right of [family] unity is often distinguished from the right to reunification, which extends protection more specifically to families which have been separated and wish to reunite. Few international human rights instruments specifically designate a right of family reunification or otherwise elaborate on how the right to be treated as a unit should be implemented in cases of separated families": C. Anderfuhren-Wayne, "Family Unity in Immigration and Refugee Matters: United States and European Approaches," (1996) 8(3) *International Journal of Refugee Law* 347 (Anderfuhren-Wayne, "Family Unity"), at 349. In Canadian practice, for example, "[f]amilies are separated by reunion procedures which are protracted and unpredictable. Almost no refugee claimant or asylum-seeker has found any simple effective court remedy against these procedures": Inter-Church Committee for Refugees, "Rights to Protection of the Family and Refugees in Canada," May 1993, at 2.

[1285] Goodwin-Gill, *Refugee in International Law*, at 260. Under modern understandings of temporary protection within the European Union, however, the breadth of reunification rights may actually exceed that for Convention refugees: EU Temporary Protection Directive, at Art. 15. Goodwin-Gill also asserts the relevance of the fact that "[s]everal States have made reservations to the [Convention on the Rights of the Child] provisions on family reunion, despite the importance otherwise given to the family as the basic unit of society": ibid. at 259–260. In actuality, the relevant reservations to Arts. 10 and 22 are few, and are certainly insufficient to suggest a concern by governments to protect state practice significantly out of line with the duty of family reunification posited in the treaty. The only strong exception is Japan, which does not accept a duty to admit the families of refugees. Germany makes clear that the provisions do not authorize unlawful entry or stay (which they do not in any event); the Netherlands insists on the right to make admission subject to "certain conditions." Four countries – Indonesia, Liechtenstein, Switzerland, and Thailand – make the treaty-specific duty subject to their national laws. But more than 180 state parties have accepted the family reunification provisions of the Convention on the Rights of the Child without any qualification. See Anderfuhren-Wayne, "Family Unity," at 354: "[U]nder both US and European laws the right to family unity is a limited one. It is not only the doctrines of plenary power and State sovereignty which, in effect, circumscribe the right, but also the contradictions underlying these notions: That is, on the one hand, there is an emphasis placed upon the value and importance of families and family rights, including the right of reunification; on the other hand, there is a practice of limiting these rights in an effort to preserve State autonomy."