claim a right to be protected against even arbitrary or unlawful interference with family unity is limited to the refugee's opposite-sex spouse and any minor, dependent children.[1286] There is simply too much variation in state practice regarding members of the more extended family – including even parents, grandparents, and adult children – for a clear rule of customary international law to have emerged requiring respect for the unity of the broader family class.[1287] Yet even with all of these limitations, the ability of refugees to invoke a customary international legal duty prohibiting states from acting unlawfully or arbitrarily to disrupt the unity of at least their nuclear family is no small victory.

In state parties to the Human Rights Covenants, it makes more sense to rely upon those treaties to assert comparable entitlements. Both Covenants affirm the central place of the family in international law,[1288] and require

[1286] See Grahl-Madsen, *Status of Refugees I*, at 416, 418. This was also the understanding embraced by the drafters of the unsuccessful Convention on Territorial Asylum, which would have guaranteed reunification only for "the spouse and the minor or dependent children of any person to whom [the state] has granted the benefits of the Convention": UN Doc. A/CONF.78/DC.4, Jan. 31, 1977. Most recently, UNHCR observed that "[t]here is virtually universal consensus in the international community concerning the need to reunite members of [the] family nucleus": UNHCR, *Resettlement Handbook* (1996), at IV(12).

[1287] "The difficulty lies in the fact that a universally accepted concept of family can hardly be said to exist. The differences existing between the various regional-cultural family notions can be very large; sometimes the family is regarded as an institution, sometimes as a creation of contractual will, or it may be a part of religious life": Fourlanos, *Sovereignty*, at 88. For example, Swiss practice grants asylum-seekers no access to family reunification, and grants recognized refugees the right to be reunited only with a spouse and dependent children. More distant family members will be allowed to join the refugee only in exceptional cases, e.g. if they are disabled or otherwise dependent upon the support of the recognized refugee: W. Kälin, *International Academy of Comparative Law National Report for Switzerland* (1994), at 17. The UNHCR Executive Committee has, however, called on states to consider "liberal criteria in identifying those family members who can be admitted, with a view to promoting a comprehensive reunification of the family": 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). See also UNHCR, "Summary Conclusions on Family Unity," Global Consultations Expert Roundtable, Nov. 8–9, 2001, at para. 8: "International human rights law has not explicitly defined 'family' although there is an emerging body of international jurisprudence on this issue which serves as a useful guide to interpretation. The question of the existence or non-existence of family is essentially a question of fact, which must be determined on a case-by-case basis, requiring a flexible approach which takes account of cultural variations, and economic and emotional dependency factors. For the purposes of family reunification, 'family' includes, at the very minimum, members of the nuclear family (spouses and minor children)."

[1288] Civil and Political Covenant, Art. 23(1); Economic, Social and Cultural Covenant, Art. 10(1).

governments to take affirmative legislative steps to "protect" the family.[1289] It is also clear that refugees may not be denied protection of their familial rights on grounds of their status as non-citizens:

> The Covenant [on Civil and Political Rights] does not recognize the right of aliens to enter or reside in the territory of a State party. However, in certain circumstances an alien may enjoy the protection of the Covenant *in relation to entry or residence*, for example, when considerations of non-discrimination, prohibition of inhuman treatment and *respect for family life* arise ... [Non-citizens] may not be subjected to arbitrary or unlawful interference with their privacy, *family*, home, or correspondence [emphasis added].[1290]

The central concern, however, is just what type of concrete action by states is required in order to discharge this treaty-based duty of protection.

The most unambiguously framed protection is Art. 17 of the Civil and Political Covenant, the core of which mirrors the customary legal norm just described. It proscribes "arbitrary or unlawful interference with ... family" and grants "[e]veryone ... the right to the protection of the law against such interference or attacks." Thus, any interference with an individual's family unity not carried out on the basis of legal authority is a violation of the Covenant. As the Human Rights Committee has explained, "[i]nterference by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant."[1291] Because interference with the family unity is only "lawful" if conducted in a manner that respects "the provisions ... of the Covenant," both the Serbian break-up of refugee families from Bosnia and Croatia by informal conscription "raids," in which male family members were dragged away without any semblance of due process, and Nigeria's separation of Chadian refugee families by the *en masse* detention of male refugees without implementation of any process to

[1289] Civil and Political Covenant, Arts. 17(2), 23(1), 23(4), and 24(1); Economic, Social and Cultural Covenant, Art. 10(1).

[1290] 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. 5 and 7. See also UN Human Rights Committee, "General Comment No. 17: Rights of the child" (1989), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 144, para. 5: "The Covenant requires that children should be protected against discrimination on any grounds ... Reports by States parties should indicate how legislation and practice ensure that measures of protection are aimed at removing all discrimination in every field ... particularly as between children who are nationals and children who are aliens."

[1291] "The term 'unlawful' means that no interference can take place except in cases envisaged by the law": UN Human Rights Committee, "General Comment No. 16: Right to privacy" (1988), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 142, para. 3.

assess the legitimacy of subversion charges against them,[1292] amounted to indirect violations of this aspect of the duty under Art. 17.

But even if authorized by law, actions which interfere with family unity are still prohibited if they are "arbitrary." The drafting history of the predecessor provision in the Universal Declaration of Human Rights suggests that an interference is arbitrary if it is "not in accordance with well-established legal principles,"[1293] or if action is "taken at the will and pleasure of some person who could not be called upon to show just cause for it."[1294] In the context of the drafting of the Civil and Political Covenant, "it was stressed above all that 'arbitrary' clearly went beyond 'unlawful' and contained an element of 'capriciousness.'"[1295] Nowak elaborates:

> [R]egardless of its lawfulness, arbitrary interference contains elements of injustice, unpredictability, and unreasonableness. Moreover, the expression "arbitrary" suggests a violation by State organs. In evaluating whether interference ... by a State enforcement organ represents a violation of Art. 17, it must especially be reviewed whether, in addition to conformity with national law, the specific act of enforcement had a purpose that seems legitimate on the basis of the Covenant in its entirety, whether it was predictable in the sense of the rule of law and, in particular, whether it was reasonable (proportional) in relation to the purpose to be achieved.[1296]

This approach to Art. 17 is embraced by the Human Rights Committee, which insists that lawful interference is only non-arbitrary if it is "in accordance with the provisions, aims and objectives of the Covenant and ... in any event, reasonable in the particular circumstances."[1297]

The reference by the Human Rights Committee to "reasonableness" follows logically from the need for non-arbitrary acts to be consistent with other provisions of the Covenant, including the duty of equality before the law and equal protection of the law under Art. 26. While the Committee has generally afforded states a broad margin of appreciation in its assessment of reasonableness, particularly where non-citizens are concerned,[1298] it has nonetheless relied on Art. 17 to prevent the deportation of the family members of a

[1292] "No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law": Civil and Political Covenant, at Art. 9(1).

[1293] L. Rehof, "Article 12," in A. Eide et al. eds., *The Universal Declaration of Human Rights: A Commentary* 187 (1992) (Rehof, "Article 12"), at 189–190, quoting from the New Zealand representative, Mrs. Newlands.

[1294] Ibid. at 190, quoting from the British representative, Mrs. Corbet.

[1295] Nowak, *ICCPR Commentary*, at 291.

[1296] Ibid. at 292–293.

[1297] UN Human Rights Committee, "General Comment No. 16: Right to privacy" (1988), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 142, para. 4.

[1298] See chapter 2.5.5 above, at pp. 130–132.

refugee whose claim had not yet been finally determined.[1299] The Committee recently considered a case in which a refugee's wife and children had arrived separately from him, and had been detained for nearly three years. The husband had initially been recognized as a Convention refugee, though the basis for that decision was under review. The Human Rights Committee determined that removal of the wife and children would amount to an arbitrary interference with family:

> Taking into account the specific circumstances of the case, namely the number and age of the children, including a newborn, the traumatic experiences Mrs. Bakhtiyari and her children would face if returned to Pakistan and the absence of arguments by the State party to justify removal in these circumstances, the Committee takes the view that removing Mrs. Bakhtiyari and her children without awaiting the final determination of Mr. Bakhtiyari's proceedings would constitute arbitrary interference in the family of the authors, in violation of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.[1300]

The fact-specific nature of the inquiry into arbitrariness suggests that Art. 17 will be most readily breached when there is capricious or unpredictable interference with family unity. For example, the refusal of Zambian authorities to take any account of family relationships in the assignment of refugees at Ukwimi to particular land parcels – insisting instead on an uncompromising application of a system of allocating plots based on the date of arrival – can readily be seen as an action in violation of Art. 17.[1301] The rigidity of the Zambian approach is demonstrative of the sort of capriciousness or unreasonableness that taints even a system authorized by law as "arbitrary," and therefore inconsistent with the protective responsibilities of Art. 17. A similar rigidity, and hence unreasonableness, also characterizes the traditional American approach of segregating the members of refugee families for indefinite detention while awaiting verification of their status. Art. 17 is also breached where a state engages in or promotes the adoption of

[1299] More generally, the Committee has been willing in the context of immigration-based removals to insist that a resultant interference with family life be not only lawful, but also not arbitrary. In considering a challenge to the deportation of a stateless married couple from Indonesia and their thirteen-year-old son who was a citizen of Australia, the Committee observed that "[i]t is certainly unobjectionable under the Covenant that a State party may require, under its laws, the departure of persons who remain in its territory beyond limited duration periods": *Winata v. Australia*, UNHRC Comm. No. 930/2000, UN Doc. CCPR/C/72/D/930/2000, decided July 26, 2001, at para. 7.3.

[1300] *Bakhtiyari v. Australia*, UNHRC Comm. No. 1069/2002, UN Doc. CCPR/C/79/D/1069/2002, decided Oct. 29, 2003, at para. 9.6.

[1301] It is noteworthy that "Art. 17 does not contain a legal proviso allowing for restrictions in the interest of public order or similar purposes": Nowak, *ICCPR Commentary*, at 290–291.

unaccompanied child refugees on the basis of inadequate efforts to trace the child's parents, or where – as in the case of El Salvador – it fails to take reasonable safeguards to avoid fraud and manipulation of the adoption process.[1302] Indeed, Germany's decision to exempt from its general aliens dispersal policy only "immediate" family members of Bosnian refugees likely also failed to comply with Art. 17 in view of the evolving domestic consensus against such a narrow construction of the "family."[1303]

As important as Art. 17 is as a means of contesting actions which disrupt family unity, the superficially less robust protection of Art. 23 of the Civil and Political Covenant may actually be of greater value to refugees seeking to compel states to take *affirmative* steps to unify their families.[1304] The key clause requires states to recognize "[t]he right of men and women of marriageable age to marry and *to found a family* [emphasis added]." In its General Comment on Art. 23, the Human Rights Committee determined that

> [t]he right to found a family implies, in principle, the possibility to procreate and live together ... [T]he possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to *ensure the unity or reunification of families*, particularly when their members are separated for *political, economic or similar reasons* [emphasis added]."[1305]

[1302] See also UNHCR Executive Committee Conclusion No. 85, "Conclusion on International Protection" (1999), available at www.unhcr.ch (accessed Nov. 20, 2004), at para. (c): "The Executive Committee ... [c]alls upon States, UNHCR and other relevant actors to give particular attention to the needs of unaccompanied refugee children pending their reunification with their families; and affirms, in this regard, that adoption of refugee children should only be considered when all feasible steps for family tracing have been exhausted, and then only in the best interests of the child and in conformity with international standards."

[1303] See e.g. *Kroon v. Netherlands*, (1994) 19 EHRR 263 (ECHR, Oct. 27, 1994), affirming the importance of biological and social realities in the definition of family relationships. More generally, see discussion of the duty under the Civil and Political Covenant universally to apply a state's own definition of family to all, below, at pp. 553–557. Moreover, Germany's refusal to allow refugee families the freedom to travel within Germany was likely in breach of the Convention: see chapter 4.2.4 above.

[1304] See Nowak, *ICCPR Commentary*, at 402, 406: "As an institutional guarantee, Art. 23 differs from negative protection against interference with private and family life guaranteed by Art. 17. The claim possessed by the institution 'family' under Art. 23 to protection by society and the State is stronger than that in Art. 12 of the [European Convention on Human Rights], which merely sets forth the right to marry and found a family ... [I]nstitutional guarantees always imply certain *privileges* on the part of the individuals affected by them. Since life together is an essential criterion for the existence of a family, members of a family are entitled to a stronger right to live together than other persons [emphasis in original]."

[1305] UN Human Rights Committee, "General Comment No. 19: The family" (1990), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 149, para. 5.

Clearly, the sorts of forces which cause refugee families to become separated are paradigmatic examples of "political . . . or similar reasons." Because refugee status manifestly precludes the family exercising its right to live together in the country of origin,[1306] the Human Rights Committee's conclusions should be read to compel measures to ensure the unity or reunification of refugee families in the state of asylum.

In practical terms, the most significant difficulty of relying on this official interpretation of Art. 23 to require states affirmatively to promote family unity parallels one of the constraints discussed above regarding the scope of a possible customary legal duty: some forms of "family" may be thought to be excluded from Art. 23's protection. One argument of this kind may, however, be dismissed. It is sometimes suggested that when Art. 23(2) is read as a whole – "[t]he right of men and women of marriageable age to marry and to found a family" – it follows that only persons who benefit from the first part of the right ("to marry") may claim the benefit of the second part of the right ("to found a family"). Thus, only persons who are "married" may assert the right to "found a family," entailing the right to "live together." This argument is, however, fallacious. As the drafting history of the clause makes clear, actual marriage is not required to invoke the right to found a family.[1307] The Human Rights Committee has recently made precisely this point in the context of its rejection of an argument by France that a refugee from Cameroon forfeited the right to be reunited with his wife by virtue of the absence of evidence of conjugal relations with her, and proof of his sexual infidelity with another woman:

> Article 23 of the Covenant guarantees the protection of family life including the interest in family reunification. The Committee recalls that the term "family," for purposes of the Covenant, must be understood broadly [so] as to include all those comprising a family in the society concerned. The protection of such family is not necessarily obviated, in any particular case, by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations.[1308]

[1306] This understanding parallels what has come to be known as the "elsewhere approach" under the jurisprudence interpreting the European Convention on Human Rights. While the legal duty is simply to allow families to live together, this may require the admission of family members where there is no possibility of safe reunification abroad. See generally H. Storey, "The Right to Family Life and Immigration Case Law at Strasbourg," (1990) 39 *International and Comparative Law Quarterly* 328.

[1307] Nowak makes reference to the failed motion submitted by the French government, which would have restricted the definition of the relevant family to a marital family: Nowak, *ICCPR Commentary*, at 413, n. 70.

[1308] *Ngambi and Nébol v. France*, UNHRC Comm. No. 1179/2003, UN Doc. CCPR/C/81/D/1179/2003, decided July 16, 2004, at para. 6.4. On the facts of the case, however, it was

While the Committee's reference to the duty to reunite families as understood in "the society concerned" is somewhat ambiguous,[1309] it is most likely that the duty is simply to facilitate the reunification of families as conceived in the country in which the refugee is now present. As Nowak frames the duty, "the protection of this provision covers cohabitation with or without children, the founding of a *polygamous marriage* with or without children in States that recognize polygamy, as well as the founding of all other familial forms consistent with the legal and cultural peculiarities of the respective State."[1310] Yet as this formulation suggests, the problem for refugees may well be that "the legal and cultural peculiarities" of the asylum country do not recognize *their* families – for example, the family of a refugee in a polygamous marriage or same-sex union, or an extended refugee family seeking protection from a society in which the nuclear family is the norm.[1311]

International law constrains the scope of a state's right to define family for itself in only a minimalist way. Most fundamentally, there is a presumptive duty of states arising from Art. 24 of the Covenant,[1312] significantly amplified

determined that the author of the communication had not effectively refuted evidence that the documents presented to substantiate the marriage were false: ibid.

[1309] That is, it is not textually clear whether the reference is to social constructions in the refugee's country of origin, or those which prevail in the state in which a duty of family reunification is being asserted. Nor does the subsequent reference to "local practice" clarify this issue.

[1310] Nowak, *ICCPR Commentary*, at 413. Since Nowak's analysis was prepared, however, it has been determined by the Human Rights Committee that "equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist": UN Human Rights Committee, "General Comment No. 28: The equality of rights between men and women" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 178, para. 24. It might therefore logically be determined that Art. 23 of the Civil and Political Covenant compels reception states *not* to facilitate the reunification of families organized on the basis of unlawful discrimination.

[1311] "A *stricto senso* universality in international law hardly exists. There is always room for variations, and this is even more the case when it comes to culturally conditioned institutions, such as family. The differences from one region to another can be so big that what is normal and, thus, allowed in one society (e.g. a polygamous marriage), may be strongly disapproved of and legally forbidden somewhere else": Fourlanos, *Sovereignty*, at 92.

[1312] "Article 24 ... entails the adoption of special measures to protect children ... The Covenant requires that children should be protected against discrimination on any grounds such as ... national or social origin, property or birth ... Reports by States parties should indicate how legislation and practice ensure that measures of protection are aimed at removing all discrimination in every field ... particularly as between children who are nationals and children who are aliens": UN Human Rights Committee, "General Comment No. 17: Rights of the child" (1989), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 144, paras. 1, 5. Of particular importance, Nowak asserts that "Art. 24(3) ... grants at least a *subsidiary jus soli* for all children born or found on

by the Convention on the Rights of the Child,[1313] to recognize children under the age of eighteen as part of the parental family unit.[1314] Second, it may also be argued that the agreement in principle of state parties to the International Covenant on Economic, Social and Cultural Rights that there is a special responsibility to meet the needs of aged family members[1315] should be read to compel the inclusion of such persons in the definition of the family unit. Third, the Human Rights Committee has suggested that the notion of "family" should be interpreted not in the abstract, but on the basis of social norms in the society concerned.[1316] But beyond these parameters, the asylum

the territory of a State Party and who would be stateless without recognition of this right": Nowak, *ICCPR Commentary*, at 434. A judge of the High Court of Australia arrived at a similar result on the basis of common law reasoning. In considering the deportation of the parent of an Australian-born child, Justice Gaudron commented that "it is arguable that citizenship carries with it a common law right on the part of children and their parents to have a child's best interest taken into account, at least as a primary consideration, in all discretionary decisions by governments, and government agencies which directly affect that child's individual welfare, particularly decisions which affect children as dramatically and as fundamentally as those involved in this case": *Minister for Immigration and Ethnic Affairs v. Teoh*, (1995) 183 CLR 273 (Aus. HC, Apr. 7, 1995), per Gaudron J. at 304.

[1313] "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests ... [A]pplications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family": Rights of the Child Convention, at Arts. 9(3) and 10(1).

[1314] "[T]he Covenant does not indicate the age at which [a child] attains his majority. This is to be determined by each State party in the light of the relevant social and cultural conditions. In this respect, States should indicate in their reports the age at which the child attains his majority in civil matters and assumes criminal responsibility. States should also indicate the age at which a child is legally entitled to work and the age at which he is treated as an adult under labour law ... However, the Committee notes that the age for the above purposes should not be set unreasonably low and that in any case a State party cannot absolve itself from its obligations under the Covenant regarding persons under the age of 18, notwithstanding that they have reached the age of majority under domestic law": UN Human Rights Committee, "General Comment No. 17: Rights of the child" (1989), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 144, para. 4.

[1315] "State parties should make all the necessary efforts to support, protect and strengthen the family and help it, in accordance with each society's system of cultural values, to respond to the needs of its dependent ageing members": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 6: The economic, social and cultural rights of older persons" (1995), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 35, para. 31.

[1316] "Regarding the term 'family,' the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned": UN Human Rights

state has broad autonomy to interpret who qualifies as "family," and hence is entitled to "live together." The duty under international human rights law is simply to apply that definition to all, including when making decisions regarding the reunification of refugee families.[1317] It follows, therefore, that this provision cannot be relied upon, for example, to compel states to reverse their stand against reunification of multiple spouses in a polygamous marriage where such marriages are not recognized domestically.

Despite recognizing that family membership for reunification purposes should ordinarily be defined in line with the host state's own norms, Nowak nonetheless suggests that families organized around a same-sex union may face an additional hurdle. He argues that same-sex relationships do not qualify to benefit from the right to "found a family" (including the right to unity and to reunification of family), even in asylum states which authorize same-sex marriages:

> Given that the right to marry and *found* a family is, in contrast to all other rights of the Covenant, expressly provided to "men and women," the protection afforded the founding of a family presupposes at least that two persons of different sex and of marriageable age are living together. Persons of the same gender who live together with or without children, are, therefore, not protected by the right to found a family.[1318]

This seems an unduly restrictive interpretation. While there may be no practical choice but to defer to particular states' understandings of "family," there is no good reason to deny protection of the right to found a family to persons in a same-sex relationship in a state where such unions are lawful. Art. 23(2) extends its benefits to "men and women" – not to "a man and a woman" – and can therefore logically be read to require gender equality rather than to exclude homosexual relationships. Such an interpretation is moreover consistent with the position of the Human Rights Committee that

Committee, "General Comment No. 16: Right to privacy" (1988), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 142, para. 5.

[1317] "[T]he concept of the family may differ in some respects from State to State, and even from region to region within a State, and it is therefore not possible to give the concept a standard definition. However ... when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection": UN Human Rights Committee, "General Comment No. 19: The family" (1990), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 149, para. 2. Comparable deference to national understandings is evident in, for example, UN Committee on the Elimination of Discrimination Against Women, "General Recommendation No. 21: Equality in marriage and family relations" (1994), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 253, para. 13: "The form and concept of the family can vary from State to State, and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, or custom within the country, the treatment of women ... must accord with the principles of equality and justice for all people."

[1318] Nowak, *ICCPR Commentary*, at 413.

discrimination based on sexual orientation is discrimination based on sex, and is therefore prohibited.[1319] As such, Art. 23(2) may be a sound basis upon which to contest the failure of European Union member states to guarantee a right of reunification to unmarried (including same-sex) partners of refugees. Precisely because of its deference to domestic legal understandings, Art. 23(2) effectively requires the right of family reunification to extend to such relationships as are legally recognized as entitled to protection in a given state party. As the UN Human Rights Committee has determined,

> [T]he concept of the family may differ in some respects from State to State, and even from region to region within a State ... [I]t is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23 [of the Civil and Political Covenant] ... In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.[1320]

With both national and regional jurisprudence in Europe that recognizes non-married partners and other beyond the nuclear definition as family members,[1321] it is difficult to understand how their exclusion from the scope of family reunification could be justified on the basis of deference to local values.[1322] Nor is it a sufficient answer that particular European Union

[1319] "The State party has sought the Committee's guidance as to whether sexual orientation may be considered an 'other status' for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view, the reference to 'sex' in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation": *Toonen v. Australia*, UNHRC Comm. No. 488/1992, UN Doc CCPR/C/50/D/488/1992, decided Mar. 31, 1994, at para. 8.7. This decision was rendered by the Human Rights Committee after the publication of Nowak's treatise, which may account for his unduly cautious approach to the recognition of same-sex families.

[1320] UN Human Rights Committee, "General Comment No. 19: The family" (1990), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 149, para. 2.

[1321] Decisions of the European Court of Human Rights cast doubt on whether a narrow "nuclear" understanding of family can be sustained even in Europe, noting in particular the recognition of relationships between grandchildren and grandparents and between non-married partners to be within the realm of protected family interests: Nowak, *ICCPR Commentary*, at 300; and Jayawickrama, *Judicial Application*, at 765–767.

[1322] As much was impliedly recognized in the European Union's own position on the family reunification of temporarily protected persons, which grants a clear right to sponsor the admission of the applicant's "unmarried partner in a stable relationship, where the legislation or practice of the State concerned treats unmarried couples in a way

states *may* choose to reunify such family members, in at least some circumstances: read in tandem with the guarantee of equal protection of the law found in Art. 26 of the Covenant,[1323] there is an obligation on state parties to define the *right* to family reunification in an even-handed way, without relegating any particular type of legally valid family relationship purely to the realm of discretion.

Drawing on the right under Art. 23(2) of families to "live together," the Human Rights Committee has determined that states are under a duty to take measures to "ensure the unity or reunification of [refugee] families."[1324] The question of when such affirmative efforts are sufficient will likely be measured in relation to the usual (and fungible) "reasonableness" standard.[1325] On this basis, it is doubtful that conditioning family reunification on the sponsor's ability to support his or her family members would be found to breach Art. 23(2), at least insofar as the requirements are fairly set in relation to a very basic cost of living, and the refugee has not been prevented from enjoying such rights as to work, to deal in property, etc.,[1326] which are key to giving him or her a fair chance of meeting that standard. Similarly, the European Union's policy of denying family reunification where public security or public health concerns are raised is likely justifiable, so long as those notions are interpreted in line with international standards.[1327] While also presumptively legitimate, greater scrutiny is nonetheless warranted of the ways in which the European Union's decision also to sanction denial of family reunification on "public policy" grounds is implemented: in practice, the breadth of this notion can raise the specter of measures that border on infringement of the prohibition of arbitrary conduct, and which therefore could not be considered reasonable limitations.[1328]

comparable to married couples under its law relating to aliens": EU Temporary Protection Directive, at Art. 15. For purposes of Art. 23 analysis, however, the relevant standard should be the treatment afforded such relationships under the state's general laws (not under its laws regarding non-citizens).

[1323] See chapter 2.5.5 above, at pp. 126–128.

[1324] UN Human Rights Committee, "General Comment No. 19: The family" (1990), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 149, para. 5.

[1325] "Problems with the positive obligation approach arise in establishing its scope. The point at which a State is obligated to act affirmatively to protect the right to family unity is unclear. Moreover, the interpretations of this notion also have a potential for ambiguity ... Such standards leave much in the hands of individual judicial opinion": Anderfuhren-Wayne, "Family Unity," at 380.

[1326] See chapters 5.3, 6.1, and 6.2 regarding the right of refugees to work; and chapters 4.5 and 6.5 regarding their property rights.

[1327] Compare Civil and Political Covenant, at Arts. 12(3), 19(3), 22(2). See chapter 6.7 below, at pp. 899, 901, for a discussion of the interpretation of these widely accepted limitations on the exercise of basic rights.

[1328] With respect to the potential breadth of the traditional notion of *ordre public*, this being the French-language equivalent of "Public Policy," see chapter 2.4.4 above, at pp. 102–103;

Most susceptible to successful challenge are limitations imposed on the right to family reunification based strictly on forms of status. In particular, many persons who are in fact Convention refugees have nonetheless been assigned "temporary protected" or other status by asylum countries, and denied full family reunification rights on the basis of that status. Despite its obvious connotation of limited duration, the "temporary protected" label has in practice not been routinely indicative of the actual duration of the refugees' stay in the asylum state. To the contrary, many "temporarily protected" refugees have in fact been compelled to remain in protection abroad for very long periods of time, even as some persons recognized as full Convention refugees have been able to repatriate in a short space of time.[1329] A particularly clear example of this concern was the American delay of more than twenty years to process the claims of many Guatemalan and Salvadoran refugees admitted under special regulatory regimes, during which time they were denied the right of family reunification. Indeed, the label "asylum-seeker" employed by some countries is similarly problematic. Because of the time which status verification may take in some systems – often stretching to several years – not even this label can be relied upon as a clearly reliable indicator of a short-term, transient position in the host state.

It follows that to the extent that a government relies strictly upon the label assigned a given individual – "asylum-seeker," "temporarily protected" person, or Convention refugee – to grant or to withhold rights to family reunification, it does not implement the right to family reunification in a reasonable way. This analysis calls into question the automatic denial of reunification rights in most developed countries to all persons awaiting the results of status verification, however long these inquiries take. It also raises doubts about the traditional practice of such countries as Finland, the Netherlands, and Spain to deny family reunification to all persons assigned to "temporary protected" status. Germany's traditional practice of allowing the holders of temporary (*Duldung*) status access to reunification on only a discretionary basis may similarly be adjudged an unacceptably formalist distinction.

A particularly egregious case is the decision of Australia to assign "temporary protected" status to all refugees arriving without pre-authorization or who are intercepted offshore or in so-called "excised" territories, and to rely on that status to prohibit such refugees from being reunited with their family members. In view of the legal right of refugees to seek protection without advance permission[1330] and the duty of states to protect all refugees under their de jure or de facto jurisdiction,[1331] it is difficult to imagine any plausible

chapter 5.1 below, at pp. 679–690; chapter 5.2 below, at p. 715; and in particular, chapter 6.7 below, at pp. 900–901.

[1329] See Hathaway, "Label." [1330] See chapter 4.2 above, at pp. 386–388.

[1331] See chapter 3.1.1 above.

basis for stigmatizing all refugees arriving in these circumstances as entitled only to limited protection rights, and particularly to be denied any right of reunion with their families. In contrast to the European temporary protection policies, moreover, the temporary status assigned these refugees does not even purport to have any relationship to the anticipated duration of the need for protection in Australia – it is rather a punitively assigned label, earned on the basis of the refugee's internationally lawful, but domestically disapproved, actions. In such circumstances, the denial of all facilities for family reunification cannot be said to be reasonable under international law, with the result that Australia should be found in breach of its duties under Art. 23(2) of the Civil and Political Covenant.

To be clear, the argument here is not that the duty to act reasonably compels an immediate right of all refugees to family reunification; rather, it is simply that any delay in allowing refugees to access family reunification facilities must be based on rational, substantive considerations rather than simply on the basis of the formal status assigned to them. For example, assuming the existence of discretion to take account of the special psychological or other circumstances of the persons concerned, the Human Rights Committee's understandings would likely sanction an incremental approach under which a refugee (whatever his or her formal status) would be entitled to be reunited with a spouse and children after one year in the asylum state, and with other dependent family members after two years there. Under such a model, states would have ample time to avoid the reunification of families where the primary claim to protection is clearly unfounded, or where the need for protection is really short-lived. Yet refugees would not be indefinitely denied their right to family unity simply on the basis of a formal label assigned to them.

In sum, Art. 23(2) of the Civil and Political Covenant – in contrast to either the customary international legal duty to avoid unlawful or arbitrary interference with a refugee's family, or even the more elaborated Art. 17 with its concomitant duty to afford protection against such interference – is a standard against which the sufficiency of an asylum state's *affirmative* efforts to preserve refugee family unity, including by way of reunification efforts, can legitimately be measured.[1332] At the very least, authoritative interpretations of Art. 23(2) make it clear that an asylum state which either refuses to admit or to facilitate the reunification of a refugee's "family" – albeit as defined by

[1332] Fourlanos reaches a comparable conclusion on the basis of Art. 10(1) of the Covenant on Economic, Social and Cultural Rights. "If a State grants many kinds of protection to a family (e.g. financial, practical, education), but fails to ensure family unity, then that State has not complied with Article 10(1) of [the ESC] Covenant. This is especially so when minor children are living with the family": Fourlanos, *Sovereignty*, at 99.

the asylum country's own understanding of relevant relationships – is in breach of its international legal obligations.[1333]

4.7 Freedom of thought, conscience, and religion

Refugees who introduce a foreign religion into an asylum state are sometimes subjected to targeted restrictions on their freedom of religion. For example, Falasha Jews from Ethiopia were the objects of proselytization by Sudanese Christian camp administrators.[1334] In Chad, Nigerian and Senegalese members of the Faydal Djaria Muslim community were arrested at the behest of the Chadian Higher Council of Islamic Affairs, which took umbrage at this community's alleged failure to conform to the principles of Islam.[1335] Refugees of a minority religion may also experience pressure from other refugees to conform to dominant beliefs. The camps in which many Afghan refugees lived in Pakistan were controlled by conservative religious groups committed to strict enforcement of Islamic codes. Some refugees compelled to live in those camps were thus required to abide by religious standards in which they did not believe, and to which they had not subscribed in their home country.[1336] Bosnian Muslim refugees in Austria were accused of religious laxity by a Saudi-run relief agency when they refused to accept scarves for the women refugees to cover their heads.[1337]

More commonly, however, the religious freedom of refugees is constrained by limits which apply, at least in principle, to all persons in the asylum country. This dilemma clearly arises for refugees arriving in a theocratic state, in which all are expected to abide by a particular set of beliefs. For example, Taliban authorities in Afghanistan required all Muslims to adhere to an interpretation of Islam under which virtually all human rights of

[1333] Ibid. at 110: "Obviously, by imposing such duties on States, the principle of family unity limits the State exclusionary power with regard to admission of aliens. A State refusing admission to a family member will probably find itself in contravention of international law, unless there is a reason to justify such a deviation."

[1334] D. Kessler and T. Parfitt, *The Falashas: The Jews of Ethiopia* (1985), at 11.

[1335] "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 130.

[1336] N. Ahmad, *International Academy of Comparative Law National Report for Pakistan* (1994), at 9, citing as an example the required use of *purdah* (veil covering a woman's face). "Daily life in the camps strongly reflects the greater Islamification of society. There is peer pressure to conform and also pressure from the Mujahadeen": K. Clark, "Islamic Fundamentalism in the Afghan Camps in Peshawar," (1992) 3(1) *Women Against Fundamentalism Journal* 15, at 15.

[1337] K. Durán and J. Devon, "Saudi relief hypocrisy: How the Kingdom uses and abuses 'charity,'" *National Review Online*, May 13, 2003, available at www.nationalreview.com (accessed June 13, 2003).

women were denied.[1338] The opposite dilemma faces the nearly 300,000 Vietnamese refugees who settled in Southern China. These refugees face the same broad-ranging denials of any free religious practice as do Chinese citizens,[1339] defended by the Chinese government on the grounds that religious adherents in that country are "duty-bound to undergo patriotic re-education ... [R]eligion must adapt to the local society and to its development and operate within the confines of the Constitution and laws."[1340]

More commonly, however, states impose restrictions which target the adherents of minority religions.[1341] There are broad-ranging limits on

[1338] "[T]he Taliban's policy of intolerance and discrimination in the name of religion ... affects Afghan society as a whole and women and Shiite Muslims in particular. Two communications reveal that the Taliban has introduced what is in point of fact a system of apartheid in respect of women, based on its interpretation of Islam: exclusion of women from society, employment and schools, obligation for women to wear the burqa in public and restrictions on travel with men other than members of the family ... The Special Rapporteur believes that the maintenance, openly and publicly, of an apartheid policy of this nature is abnormal, from the standpoint of human rights": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/1999/58, Jan. 11, 1999, at para. 26.

[1339] US Committee for Refugees, *World Refugee Survey 1996* (1996), at 81.

[1340] "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/1999/58, Jan. 11, 1999, at para. 48. "The Government continued its crackdown on unregistered churches, temples, and mosques ... Members of some unregistered religious groups, including Protestant and Catholic groups, were subjected to increased restrictions, including, in some cases, intimidations, harassment, and detention": US Department of State, *Annual Report on International Religious Freedom for 2002* (2002), at 197–198.

[1341] A helpful general overview of the religions subject to repression around the world was provided by the United Nations Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. "Religious minorities are affected primarily by the threat of their very existence as special communities, as exemplified by the deportation of Adventists and Protestants in Azerbaijan; the campaigns of repression against members of the Falun Gong, the arrest, imprisonment and expulsion of Tibetan monks and nuns from monasteries and the sentencing of Christians to death in China; the harassment of Christians in Myanmar; the sentencing to death of members of the Ismaili community in Saudi Arabia; and the arrest of Protestants and Adventists in Turkmenistan. Religious minorities are also subject to direct and indirect limitations on the manifestation of their religious identity or belief, as shown by the destruction of Tibetan Buddhist places of worship and the expulsion of nuns and monks from monasteries in China; the occupation and partial destruction of a property belonging to the Armenian Patriarchate in Israel; the closure of places of worship of religious minorities in Eritrea; threats to close Baptist places of worship in the Republic of Moldova and those of the Protestant communities in Turkey; and the prevention of non-recognition of conscientious objection, leading to the imprisonment of Jehovah's Witnesses, in the Republic of Korea": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2003/66, Jan. 15, 2003, at paras. 131 ff.

freedom of religion in Russia for persons who are not members of an officially recognized religion.[1342] Egypt[1343] and Iran[1344] are among the states which have criminalized practice of the Baha'i faith, while Pakistan has combated the appeal of Sufism by executing leaders of the faith on blasphemy

[1342] "The 1997 law on religion, which replaced a more liberal 1990 law, continues to be the focus of serious concern about the state of religious freedom in the country. One of the law's most controversial provisions is a requirement that a church must prove that it has existed for at least 15 years in the country before it is allowed to be registered as a full-fledged religious organization. (Registration as a religious organization is necessary in order for a religious community to rent or buy a facility, proselytize, publish literature, provide religious training, or conduct other activities.) In a November 1999 ruling, the Constitutional Court upheld the 15-year requirement but also permitted the registration of organizations that already were registered when the 1997 law was passed or that were willing to become a local branch of a larger registered denomination. The provision still severely restricts the activities of small, new, independent congregations": United States Department of State, *Annual Report on International Religious Freedom for 2000* (2000), at 357–358. "Despite court decisions that have liberalized its interpretation, [the 1997 law] seriously disadvantages religious groups that are new to the country by making it difficult for them to register as religious organizations. Unregistered groups lack the juridical status necessary to establish bank accounts, own property, invite foreign guests, publish literature, or conduct worship services in prisons, state-owned hospitals, and among the armed forces": US Department of State, *Annual Report on International Religious Freedom for 2002* (2002), at 449.

[1343] "According to another communication from the Special Rapporteur, the Supreme Religious Court in Cairo declared the Baha'i faith a dangerous heresy in 1925. In 1960, all Baha'i assemblies were dissolved, their property and other assets confiscated and their religious activities banned. Nevertheless, Baha'is supposedly remained free as individuals to practise their religion in accordance with the freedom of religion guaranteed to all under the Constitution. To this day, however, the Baha'i community is said to be subjected to constant close surveillance: Baha'is are not allowed to meet in groups, especially for religious observances, and their literature is destroyed. It is alleged that they cannot legally celebrate their marriages, which are deemed to constitute concubinage, while the children born of such unions are regarded as illegitimate": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 33. "Baha'is also continued to face persecution, including being denied permission to worship or to carry out other communal affairs publicly. At least four Baha'is were serving prison terms for their religious beliefs": Human Rights Watch, *World Report 2003* (2003), at 446.

[1344] "An initial urgent appeal concerned the case of three Baha'is, namely, Mr. Ata'ullah Hamid Nasirizadih, Mr. Sirus Dhabihi-Muqaddam and Mr. Hidayat-Kashifi Najafabadi, who were reportedly condemned to death in secret because of their religious beliefs and ran the risk of execution. A second urgent appeal connected with the first alleged that Mr. Sirus Dhabihi-Muqaddam and Mr. Hidayat-Kashifi Najafabadi had been informed by the Mashad prison authorities that their sentence had been upheld. In these two communications, the Special Rapporteur 'urgently appealed to the Government of the Islamic Republic of Iran to ensure that the sentences were not carried out and that all judicial remedies and guarantees required by international human rights standards be provided to the above-mentioned persons.' A third urgent

charges.[1345] Other states have employed only slightly less drastic tactics to discourage minority religions. In Turkmenistan, officials of the National Security Committee beat a Jehovah's Witness leader for failing to renounce his faith;[1346] Saudi Arabia arrested a member of the Ismaili religion on "sorcery" charges[1347] and expelled an Indian Christian for distributing a Christian videotape.[1348] Restrictions of this kind may mean that asylum is in no sense indicative of access to rights-regarding protection. For example, the Jehovah's Witness refugees who fled from Mozambique to Malawi

appeal concerned allegations of the hanging of a Baha'i, Mr. R. Rawahani, accused of converting a Muslim woman, even though the woman apparently claimed to be a Baha'i. This appeal also referred to a senior member of the Islamic Revolutionary Court, who allegedly described the report of the execution as a lie and stressed that no such sentence had been passed by the Iranian courts": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/1999/58, Jan. 11, 1999, at para. 66.

[1345] "On 5 August 2000, Mohammed Yusuf Ali, a Sufi mystic accused of blasphemy, was reportedly condemned to death in Lahore. It appears that this decision was reached despite the fact that the persons who had accused Mohammed Yusuf Ali of proclaiming himself a prophet failed to back up their allegations with any hard evidence": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 116. See generally D. Forte, "Apostasy and Blasphemy in Pakistan," (1994) 10 *Connecticut Journal of International Law* 27. "Government officials state that although religious minorities account for approximately 5 percent of the country's population, 25 percent of the cases filed under the blasphemy laws are aimed at religious minorities": US Department of State, *Annual Report on International Religious Freedom for 2002* (2002), at 639.

[1346] "On 21 June 1999, in Gyzylarbat, members of the National Security Committee are reported to have arrested Annamammedov Yazmammed, a Jehovah's Witness ... Allegedly threatened with physical violence with the intention of forcing him to renounce his faith and to reveal the names of the Jehovah's Witnesses in Gyzylarbat, he was eventually beaten because of his refusal to comply. On 22 June 1999, he was reportedly sentenced by the Gyzylarbat court to 12 days' administrative detention for insulting the members of the National Security Committee": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 132.

[1347] According to Saudi authorities, "[t]he facts were the following: information had reached the security forces about the illegal practice of sorcery on a large scale by an inhabitant of the kingdom, provoking reactions from a large number of citizens and residents ... The person who was at the origin of the incident was arrested for sorcery, which is forbidden by law in Saudi Arabia. According to Saudi Arabia, this had nothing to do with the person's affiliation with the Ismaili sect, whose members enjoy the same rights as others and are subject to the same obligations": ibid. at paras. 8–9.

[1348] "Saudi Arabia replied that George Joseph had been arrested for having engaged in activities that created a disturbance and in response to complaints from persons living in his neighbourhood. Mr. Joseph was allegedly distributing a video that was illegal, being contrary to the values and rules in force in Saudi Arabia": ibid. at paras. 10–11.

found that the Witnesses were one of five religious groups whose religious practice was banned by that country during the reign of President Hastings Banda.[1349]

The precise focus of efforts to repress religious practice varies considerably. In some states, the goal is to prohibit the actual holding of particular religious views, whether or not these views are put into practice. Nepal prohibits conversion to Seventh Day Adventism,[1350] while Laos has forced converted Christians to renounce their new faith.[1351] In one case, the Yemeni government agreed not to carry out a death sentence imposed for apostasy on a Somali refugee who had converted from Islam to Christianity; the "solution" arrived at in cooperation with UNHCR was to expel the refugee from the country to Djibouti.[1352]

[1349] Due to their precarious situation in Malawi, the Jehovah's Witnesses "have taken advantage of any chance to leave Malawi": D. Cammack, "Protection in a 'Model Program': Mozambican Refugees in Malawi" (1993), at 16–17. The one-party regime of President Hastings Banda ended in 1994, and religious freedom for minorities has now been restored, including provision for the payment of damages to persons dismissed from official employment on grounds of religion: US Department of State, *Annual Report on International Religious Freedom for 2002* (2002), at 60–61.

[1350] "The Seventh-Day Adventist church, which maintains several churches, a school and a hospital in Nepal, may conduct most religious activities with the exception of conversions, which are banned; the Church's right to own property is not officially recognized": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 105.

[1351] "In October 2000 the Government reportedly launched a campaign to eradicate Christian churches and thereby curtail their role and influence in society. This campaign, styled a 'programme', seeks to monitor Christian organizations and accuses them of representing an alien religion controlled by enemy forces. The programme has already been partially implemented with security forces apparently forcing newly converted Christians to sign declarations renouncing the Christian faith": ibid. at para. 123.

[1352] "On 16 January 2000, Mohammed Omer Hadji, a Somali refugee resident in Yemen, was reportedly arrested and held at Tawahi police station on account of his conversion to Christianity. Following his release on 13 March 2000, he was allegedly beaten by the police and told that he would be killed unless he returned to the Muslim faith. He was reportedly rearrested two months later and condemned to death by a court for apostasy, although the court stated that the death sentence would not be carried out if he reconverted to Islam ... [T]he Government replied to the UN Special Rapporteur that '... such conduct constitutes an offence under Yemeni laws and legislation.' Accordingly, the said person was arrested and referred for trial on the charge of apostasy from Islam to another religion. However, in view of his status as a refugee in Yemen, the Yemeni Government decided that it would be more appropriate to expel him from the territory of Yemen in collaboration and coordination with the UNHCR office in Sana'a. This decision was put into effect and the said person was expelled to Djibouti on Friday, 25 August, as an alternative to the continuation of the trial proceedings": ibid. at paras. 147–148.

Even in asylum countries where there are no limits on religious belief, true freedom of religion may not exist. Simple adherence to (or refusal to adopt) a religion may not be prohibited, but religious worship or communal prayer may be barred. Christian church services are prohibited in Bhutan,[1353] and sometimes disrupted in Turkey.[1354] Police have broken up Baptist church services in Georgia[1355] and Turkmenistan;[1356] in Azerbaijan, Jehovah's Witnesses have been forced to conduct prayer meetings in private homes to avoid punishment

[1353] "Christian churches are not authorized to conduct religious activities. The Seventh-Day Adventist Church has reportedly complained that the authorities have refused to allow it to build a church even though Bhutanese citizens belong to that denomination": ibid. at para. 19. "The law provides for freedom of religion; however the Government limits this right in practice": US Department of State, *Annual Report on International Religious Freedom for 2002* (2002), at 618.

[1354] "As far as non-Muslims are concerned, with the exception of the Jewish minority, whose situation is entirely satisfactory, the situation of the Christian communities – Greek Orthodox, Armenian (Orthodox, Catholic and Protestant), Assyro-Chaldean and Turkish Catholic and Protestant – raises problems with regard to the principles of tolerance and non-discrimination. These communities have to endure many hardships and violations, including the confiscation of religious property, the banning of religious seminaries, interference at various times in procedures for electing religious dignitaries, restrictions on freedom of worship in public and, at times, even a climate of insecurity that affects Christians": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 160.

[1355] "On 20 August 2000, in Tianeti, the chief of district police, assisted by three police officers, reportedly broke up a Baptist religious service. The police are reported to have destroyed objects of worship and taken Pastor Kalatozishvili to the police station in order to put pressure on him to give up his work in the Baptist Church in favour of the Orthodox Church": ibid. at para. 47. "Local police and security officials continued to harass at times non-traditional religious minority groups, especially members of the Jehovah's Witnesses. The police only sporadically intervened to protect such minorities from attacks by Orthodox extremists. In some cases, police actually participated in or facilitated the attacks": US Department of State, *Annual Report on International Religious Freedom for 2002* (2002), at 372.

[1356] "It is alleged that on 14 November 1999 the National Security Committee ordered a raid on the Baptist congregation of the Council of Evangelical Baptist Churches during the Sunday sermon. On 13 February 2000, the Committee reportedly interrupted a private religious meeting organized by the Baptist pastor Vitaly Tereshnev, on the grounds that the meeting was illegal ... On 2 February 2000, the Baptist pastor Anatoly Belyayev is said to have been arrested by members of the National Security Committee while he was peacefully performing his religious activities": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 134. "As in previous years, the Russian Orthodox Church and Sunni Islam were the only religions permitted in Turkmenistan ... From November 2001 through February 2002, police dispersed Adventist, Baptist, and Jehovah's Witness prayer gatherings ... Dozens of worshippers were interrogated and faced verbal abuse and threats by police while in custody; several were beaten": Human Rights Watch, *World Report 2003* (2003), at 373.

by authorities.[1357] To counter "extremists," Egypt now controls all mosques in that country, and decides who is allowed to deliver sermons there.[1358]

Perhaps most frequently, authorities constrain religious practice by limiting the ability of minority religious organizations to establish a physical presence. For example, Chinese officials have invoked land use laws to justify the demolition of churches built by local inhabitants.[1359] Only Moslem mosques may be built in the Maldives,[1360] while Moslem mosques were effectively prohibited in Athens until 2000.[1361] Pentecostal churches have

[1357] In its response to the Special Rapporteur, the government observed that "[d]uring the inquiry, it also appeared that the activities of the Jehovah's Witnesses in the district were not limited to the refinery. Among other things, it was established that the members of the sect met regularly in an apartment located in an apartment building in Lokbatan. Those meetings, which were also attended by minors, were organized by the occupants of the apartment, Remi and Galina Remiev": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 15. "Local law enforcement authorities regularly monitor religious services, and some observant Christians and Muslims are penalized for their religious affiliations": US Department of State, *Annual Report on International Religious Freedom for 2002* (2002), at 320.

[1358] "Management of all mosques and shrines has been centralized in the hands of the Ministry of Awqaf [Islamic endowments] ... Every person not expressly authorized to do so is prohibited from mounting a mosque pulpit and delivering a sermon, inasmuch as the law requires a statement from the Ministry of Awqaf": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 35.

[1359] In defense of its actions, the Chinese government noted that "[a] thorough investigation has revealed that in 1998 the inhabitants of Cangnan County, Wenzhou, Zhejiang Province, acting without authorization from the public authorities, built a church on a plot of land in the village of Linguan, Pingdeng commune, Cangnan County, in serious violation of the Land Use Law of the People's Republic of China. On 31 December 1999, pursuant to the relevant provisions of that Law, the Cangnan County Office of Land Use had the church destroyed. Other inhabitants of the county, acting without authorization from the competent authorities, converted a factory into a church in Yanggong village, Lingqi commune, in violation of legislation of the People's Republic of China governing urban land use. On 15 December 1999 the Cangnan county authorities had the church destroyed, pursuant to the law": ibid. at para. 25.

[1360] "The law apparently restricts non-Muslim religious ceremonies. The public celebration of non-Muslim religious rites is forbidden and must be strictly limited to the private sphere. Consequently, only mosques may be built. School curricula include mandatory teaching of Islam": ibid. at para. 99.

[1361] M. Petronoti, "Greece as a Place for Refugees: An Anthropological Approach to Constraints Pertaining to Religious Practices," paper presented to the Conference on War, Exile and Everyday Life, Institute of Ethnology and Folklore Research, Zagreb, 1995. "In 2000, the Parliament approved a bill allowing construction for the first Islamic cultural center and mosque in the Athens area ... Members of the Orthodox Church oppose the cultural center, claiming it may 'spread the ideology of Islam and the Arab world'": US Department of State, *Annual Report on International Religious Freedom for 2002* (2002), at 385.

been destroyed by the government of Myanmar.[1362] Police in Sudan ransacked a Catholic college.[1363] Other tactics are more subtle, if equally effective. Nauru refuses to recognize the Seventh Day Adventist Church, by virtue of which it may not acquire property or hold public meetings.[1364] Hungary recently withdrew tax-exempt status from all but six favored churches.[1365]

Even if worship and the presence of organized religious institutions are not constrained, practices closely connected to religious belief may be restricted or prohibited. Proselytization is proscribed or heavily regulated in Bulgaria,[1366] Georgia,[1367] and France.[1368] And Uzbekistan defended its

[1362] "On 12 June 2000, the State Peace and Development Council allegedly ordered the demolition of a Pentecostal church in Cherry Street, Haka, capital of Chin State, even though the building had been erected in 1999 with the approval of the Ministry of Religious Affairs": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 101.

[1363] "On 21 June 2000, at Khartoum, the police allegedly attacked the Comboni Catholic College and proceeded to destroy and commandeer property": ibid. at para. 125.

[1364] "It is reported that the authorities are refusing to allow the registration of the Seventh-Day Adventist Church. Owing to this lack of recognition, the said community is unable to purchase land and cannot hold public meetings or conduct baptisms, weddings or funerals. The Seventh-Day Adventist Church is therefore obliged to conduct its religious activities in private homes": ibid. at para. 104.

[1365] "In May 2000 tax and customs legislation was reportedly amended to limit the tax exemptions available to churches having contracts with the State. This modification allegedly stripped most religious communities (such as Seventh-Day Adventists, Evangelicals, Methodists and Pentecostalists) of their tax-exempt status, leaving only six churches exempt": ibid. at para. 52. "[C]riteria limit the tax benefit to only 14 of some 136 registered churches in the country. Several of the smaller churches whose members cannot participate in this tax deduction took the case to the Constitutional Court, which chose not to review it": US Department of State, *Annual Report on International Religious Freedom for 2002* (2002), at 390.

[1366] "According to a second communication, notwithstanding constitutional provisions guaranteeing freedom of religion and belief, such non-traditional minorities as the Jehovah's Witnesses and the Church of Jesus Christ of Latter-Day Saints face hurdles in conducting their activities. On 20 March 2000, two Jehovah's Witnesses in Turgovishte were reportedly arrested for disturbing the peace owing to their proselytizing in public. In April 2000, police in Plovdiv allegedly halted the distribution of religious tracts by missionaries from the Church of Jesus Christ of Latter-Day Saints, who were also charged with distributing documents without a permit": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 22.

[1367] The Georgian government has reported "that there have been a number of citizens' complaints concerning the activity of Jehovah's Witnesses aimed at attracting new members by using bribes (money, food, etc.). In this connection, we are going to make amendments to the Criminal Code of Georgia in order to forbid unlawful proselytism, as has been done in some European countries. The elaboration of these amendments is under way": ibid. at para. 45.

[1368] Legislation passed in 2001 "provides up to three years' imprisonment for acts of 'serious and repeated pressure, or the use of techniques to alter the mind of a person, leading him

refusal to allow Baptists to operate summer youth camps on the grounds that "members of the congregation were undesirables and should join the Russian Orthodox Church."[1369]

A particular concern is freedom of religious education. Norway insists on the teaching of Christianity and Christian ethics in its schools,[1370] Greece provides instruction in only the Greek Orthodox religion in its public schools,[1371] and Bhutan requires daily recitation in schools of a prayer

or her to commit a harmful act ... [or] ... to act in any way prejudicial to his interests.' Catholic, Protestant, Jewish and Muslim representatives objected that it could result in 'overzealousness and judicial excess' and might threaten established religions as well": J. Bosco, "China's French Connection," *Washington Post*, July 10, 2001, at A21. "Leaders of the four major religions, such as the president of the French Protestant Association and the president of the Conference of Bishops of France, raised concerns about the legislation. By the end of the period covered by this report, no cases had been brought under the new law": US Department of State, *Annual Report on International Religious Freedom for 2002* (2002), at 367.

[1369] "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 111.

[1370] "Pursuant to the Religious Knowledge and Education in Ethics Act of October 1995, the teaching of Christianity and Christian ethics is reported to be mandatory in primary and secondary schools. On special grounds, exemptions from specific religious activities such as prayer may be granted, but students may not forgo instruction in the subject as a whole": ibid. at para. 109. "The course [on 'Religious Knowledge and Education in Ethics'] covers world religions and philosophy and promotes tolerance and respect for all religious beliefs; however, based on the country's history and the importance of Christianity to society, the course devotes more time to Christianity. All children must attend this mandatory class, and there are no exceptions for children of other faiths ... The Norwegian Humanist Association contested the teaching of the subject in the courts, claiming that it is a breach of freedom of religion and parents' rights to provide religious instruction to their children. In August 2001, the Supreme Court unanimously rejected the claims from the Humanist Association": US Department of State, *Annual Report on International Religious Freedom for 2002* (2002), at 431.

[1371] "Primary and secondary school curricula include compulsory instruction in the Orthodox religion for pupils of that faith. This then raises the question as to whether pupils who were baptized Orthodox but are not observant or have become atheist should be exempted. Representatives of the Muslim community in Athens have reportedly complained of the absence of religious instruction in Islam in school curricula": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 49. "Non-Orthodox students are exempted from [the duty to take the course, but] ... [t]he neighborhood schools offer no alternative supervision for the children during the period of religious instruction. The [Muslim] community has complained that this forces the parents to have their children attend Orthodox religious instruction by default": US Department of State, *Annual Report on International Religious Freedom for 2002* (2002), at 386.

common to Muslims and Hindus.[1372] The United Nations Special Rapporteur on Religious Intolerance criticized the former Afghan government for denying parents the right to ensure the religious and moral education of their children,[1373] and Sudan for forcing children of all faiths to study Islam in school on pain of corporal punishment or expulsion from school.[1374] In Malaysia, restrictions on freedom of religious education apply even to some adults. All Muslim civil servants are expected to attend continuing Islamic education courses, defended by that country's government on the grounds that "[w]hile civil servants are required to be politically neutral, all Malaysians are expected to play their role in the promotion of religious and cultural harmony . . . [A]s Islam exhorts its believers to be fair and just to all regardless of religious and political belief, rather than impairing the neutrality of civil servants, these classes may in the end emphasize the principle of neutrality."[1375]

With rare exceptions, restrictions on the right to freedom of religion are not targeted at refugees as such. However, restrictions on belief or action directed at those who profess minority religions are more likely to have a disproportionate impact on refugees and other aliens, since most citizens will by definition be a part of the religious majority in their own country. Moreover, the vulnerability of refugees to loss of religious freedom may be heightened by the denial in some states of even formal guarantees of religious freedom to non-citizens. For example, A report of the United Nations Special Rapporteur on Religious Intolerance identified Bulgaria, Byelorussia, Cape Verde, Finland, Jordan, Pakistan, Rwanda, Sudan, Syria, Ukraine, and the United States as countries in which the religious freedom of non-citizens is less fully guaranteed than is that of citizens.[1376]

[1372] According to the Bhutanese government, "[s]chool curricula, with the exception of those of monastic schools, make no provision for religious instruction or practice; however, a prayer common to Buddhism and Hinduism is recited daily in all schools, and prayers are said in boarding schools at the secondary level": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/1999/58, Jan. 11, 1999, at para. 45.

[1373] E. Benito, "Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief," UN Doc. E.89.XIV.3 (1989), at 12.

[1374] A. Amor, "Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/1994/79, Jan. 20, 1994, at 110. See also Sudan Human Rights Voice, "The Right to Education: Limitations and Violations" (1995), at 3.

[1375] "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 97.

[1376] E. Benito, "Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief," UN Doc. E.89.XIV.3 (1989), at 35–46.

Refugee Convention, Art. 4 Religion
The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

Civil and Political Covenant, Art. 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Economic, Social and Cultural Covenant, Art. 13(3)
The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to ... ensure the religious and moral education of their children in conformity with their own convictions.

No predecessor refugee treaty included a specific reference to the right of refugees to enjoy religious freedom, and no such provision was contained in the working drafts of the Refugee Convention.[1377] The oversight seems to have been based on a belief in the Ad Hoc Committee that "no useful purpose"[1378] could be served by codifying a right so clearly understood to

[1377] Robinson, *History*, at 77.

[1378] Statement of Mr. Guerreiro of Brazil, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 8. See also Statement of Sir Leslie Brass of the United Kingdom, ibid.: "[A] convention relating to refugees could not include an outline of all the articles of the Universal Declaration of Human Rights ... [B]y its universal character, the Declaration applied to all human groups without exception and it was pointless to specify that its provisions applied also to refugees."

be inalienable.[1379] Not only was the right affirmed in the Universal Declaration of Human Rights, but even under traditional aliens law there was a well-established duty to respect the non-citizen's "personal and spiritual liberty within socially bearable limits."[1380]

There was nonetheless overwhelming support at the Conference of Plenipotentiaries for the contrary view that "the text should impose a contractual obligation on states"[1381] to respect the religious liberties of refugees.[1382] In part, a formal obligation of this kind was felt to be warranted as a basic matter of principle, since lack of religious freedom was frequently a cause of refugee flight.[1383] But the delegates were also persuaded that "the spiritual and religious factor was of special significance, having regard to the material and moral distress prevailing among the majority of refugees."[1384] It

[1379] "The call for freedom of religion was undoubtedly one of the most important elements that led to the overcoming of medieval views of the world and the development of modern perceptions of basic and human rights. Therefore, it is not surprising that freedom of religion was set down in early, modern-day national and international documents ... [F]reedom of thought and religion is not infrequently termed, along with freedom of opinion, the core of the Covenant ... based on the philosophical assumption that the individual as a rational being is master of his (her) own destiny": Nowak, *ICCPR Commentary*, at 309–310.

[1380] See chapter 2.1 above, at p. 76.

[1381] Statement of Msgr. Comte of the Holy See, UN Doc. A/CONF.2/SR.30, July 20, 1951, at 11. See also Grahl-Madsen, *Commentary*, at 15: "The words 'shall accord' indicate a legal obligation. The right is due to all refugees within the territory, i.e. [it] is not conditioned on the presence of the refugee being lawful."

[1382] The Ad Hoc Committee deferred consideration of the issue, and ultimately failed to recommend an article on freedom of religion: UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 9. The idea was, however, resuscitated by a non-governmental observer, Pax Romana, at the Conference of Plenipotentiaries: Statement of Mr. Buensod of Pax Romana, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 9–10.

[1383] "He believed that some of the pertinent provisions of the [Universal] Declaration had been overlooked and that it would be advisable to include ... two articles reproducing as closely as possible articles 18 and 19 ... which related to freedom of thought, conscience and religion, and freedom of opinion respectively. In his opinion, provisions relating to freedom of opinion would be most appropriate in a convention on refugees, as the latter, as a rule, had abandoned their country of origin because they no longer enjoyed that freedom there": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 8.

[1384] Statement of Mr. Buensod of Pax Romana, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 10. The representatives of Austria, Belgium, Canada, Colombia, Egypt, France, Germany, the Holy See, Luxembourg, the Netherlands, Sweden, the United Kingdom, and Venezuela spoke in favor of the adoption in principle of an article on the right of refugees to religious freedom: UN Doc. A/CONF.2/SR.11, July 20, 1951, at 10–18. The view of the Ad Hoc Committee that reference was not warranted because religious freedom was so obviously a core interest did not prevail, since there was evidence that in practice even core rights were not always respected: Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 9.

would clearly be unacceptable if refugees forced to flee religious persecution were to be required to accept as "protection" conditions of life which denied them the very freedom which forced them abroad, as was the case for the Jehovah's Witness refugees who fled to Malawi only to find their religion banned in that country. Indeed, such was the importance attached to religious freedom that the relevant article was given pride of place by locating it immediately after the duty of non-discrimination, prior to any other substantive rights.[1385]

Indeed, the right to religious freedom is the only article in the Convention which comprises a principled obligation on states to take steps for the benefit of refugees beyond even what is done for their own citizens. For reasons earlier elaborated,[1386] the standard of treatment for the right of refugees to religious freedom is defined as "treatment at least as favourable as that accorded to their nationals." Thus, while refugees may under no circumstance be afforded fewer religious rights than citizens, the drafters adopted what amounts to a principled commitment to go beyond simple formal equality in order to recognize "that, precisely on account of their position as refugees, they were frequently handicapped in the practice of their religion."[1387]

The proponent of this unique standard of treatment did not clearly define the substance of this duty of states to go beyond a "national treatment" standard. The representative of the Holy See initially argued that assimilation to the nationals of the asylum state was an inadequate standard of treatment, since "[t]here was ... a danger that in countries where religious liberty was circumscribed, refugees would suffer."[1388] Yet he later insisted that he was not "pressing for preferential treatment of refugees."[1389] All in all, there appears to have been agreement in principle that states should seek to provide what amounts to substantive equality of religious freedom for refugees. Recognizing that "religious freedom as an abstract principle might be of little value if divorced from the practical means of ensuring it,"[1390] governments accepted that they would in some circumstances need to make special efforts to enable refugees to practice their religion. As Weis observes, simple formal equality of treatment with nationals would be insufficient "particularly [in] countries in which there is a State religion to which the refugees do not belong

[1385] As initially proposed by Luxembourg, the provision on religious freedom would have been Art. 17(a): UN Doc. A/CONF.2/SR.30, July 20, 1951, at 10. The representatives of the Holy See, Venezuela, and Belgium advocated its placement at the start of the substantive rights in the Refugee Convention: ibid. at 11–12.

[1386] See chapter 3.3.2 above, at pp. 235–237.

[1387] Statement of Msgr. Comte of the Holy See, UN Doc. A/CONF.2/SR.33, July 24, 1951, at 8.

[1388] Ibid. at 7. [1389] Ibid. at 8.

[1390] Statement of Mr. Petren of Sweden, ibid. at 9.

or where the refugees' religion is not represented in the local population."[1391] Thus, even *if* it were lawful to impose restrictions on minority religions of the kind now in place in Russia, to limit land use in ways that constrain the establishment of minority religions as is done in China and Nauru, or to use tax laws to benefit only established religions as is the case in Hungary, the Refugee Convention establishes an obligation on asylum states to take account of the specificity of the religious needs of refugees in pursuing such policies, rather than simply subsuming them within the more general application of policy.

The duty to go beyond the standard of treatment afforded citizens was, however, conceived as "a moral principle ... somewhat in the nature of an abstract recommendation, but one which was nevertheless entirely consonant with the Universal Declaration of Human Rights."[1392] There was no question of requiring asylum states to dismantle state churches,[1393] amend their constitutions,[1394] or even to commit financial resources to assist refugees to practice their religion.[1395] Thus, the responsibility to make accommodation for the special disadvantages faced by refugees in practicing their religion is recognized, but not defined with a degree of precision that admits of formal legal application. As a matter of binding law, there is only the understanding that the right of refugees to religious freedom "must be in no way inferior to

[1391] Weis, *Travaux*, at 43.

[1392] Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.33, July 24, 1951, at 7–8.

[1393] In calling for modifications to the original draft of Art. 4 tabled by Luxembourg, the French representative noted that "[t]he difficulty, however, lay in the precise form to be given to such a declaration of principle ... The problem also had a bearing on the question of the national church": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.30, July 20, 1951, at 13. This matter was of particular concern to the Swedish representative, who referred "to the position in his own country, where there was an Established Church – the Lutheran Church – supported by the state ... Quite clearly, if there was a large influx of, for example, Roman Catholic refugees, Sweden could not be expected to give them the same treatment as members of the Lutheran Church. He presumed that under the provisions of article 4 such refugees would receive the same treatment as Swedish Roman Catholics": Statement of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.33, July 24, 1951, at 8.

[1394] "The text would have to be couched in such terms as would make allowance for the constitutional procedures providing for religious liberty in each country": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.30, July 20, 1951, at 15. See also concern in this regard expressed by Mr. Rochefort of France, ibid. at 13.

[1395] "Material facilities and economic assistance fell entirely outside the scope of the article": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF/2/SR.33, July 24, 1951, at 9. See also Statement of Mr. Petren of Sweden and Msgr. Comte of the Holy See, ibid. Earlier in the debate, the Canadian representative had proposed "that the provision might be drafted negatively in such terms that Contracting States would undertake not to restrict in any respect the freedom of refugees within their territories to practise their religion": Statement of Mr. Chance of Canada, UN Doc. A/CONF.2/SR.30, July 20, 1951, at 17.

that accorded to nationals."[1396] Yet even measured against this standard, the inferior protection of religious freedom for non-citizens found by the United Nations to exist in Bulgaria, Byelorussia, Cape Verde, Finland, Jordan, Pakistan, Rwanda, Sudan, Syria, Ukraine, and the United States is, to the extent it impacts refugees, an infringement of the Convention.

The content of the right of refugees "to practise their religion" is not spelled out in the Convention. The original formulation tabled by France on the initiative of the non-governmental organization Pax Romana stipulated that refugees should enjoy "full freedom to continue to practice and manifest their religion . . . individually or jointly, in public and in private, through education, instruction, religious observance, worship and the carrying out of rites."[1397] The Working Party's reformulation deleted this catalog of protected religious interests in favor of a succinct reference to "complete" freedom of religious practice,[1398] which was in turn amended by the Style Committee to refer simply to "freedom to practice their religion." Importantly, however, nothing in the Conference discussion suggests an interpretation of the scope of religious freedom less robust than the original list proposed by Pax Romana.[1399] To the contrary, the representatives confirmed their intention to secure for refugees "a substantial measure of protection and the exercise of inalienable rights,"[1400] and "full freedom in the practice of religion."[1401]

A broad reading of the scope of protected religious practice is moreover compelled by Art. 18 of the Civil and Political Covenant. This protection, like nearly all rights set by general international human rights law, accrues to the benefit of non-citizens, including refugees,[1402] and is not subject to

[1396] Grahl-Madsen, *Commentary*, at 16.

[1397] Statement of Mr. Buensod of Pax Romana, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 10. Mr. Rochefort of France agreed that this commitment should "be examined in principle": ibid. at 11, in consequence of which the proposal was referred to a working party.

[1398] UN Doc. A/CONF.2/94, introduced by the representative of Luxembourg, UN Doc. A/CONF.2/SR.30, July 20, 1951, at 10.

[1399] Grahl-Madsen suggests that the absence of a list of protected religious interests in Art. 4 "does not necessarily call for a more restrictive interpretation": Grahl-Madsen, *Commentary*, at 16.

[1400] Statement of Msgr. Comte of the Holy See, UN Doc. A/CONF.2/SR.30, July 20, 1951, at 11.

[1401] Statement of Mr. Montoya of Venezuela, ibid. at 12.

[1402] See chapter 2.5.4 above, at pp. 120–121. Even refugees subject to provisional or other detention enjoy the right to freedom of religion. "Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint": UN Human Rights Committee, "General Comment No. 22: Freedom of thought, conscience or religion" (1993), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 155, para. 8.

derogation, even in time of extreme national emergency.[1403] The Covenant textually protects "practice," which the Human Rights Committee has defined (in conjunction with the protected interests in religious "observance" and "teaching") to include

> not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, ... the use of a particular language customarily spoken by a group ... [and] acts integral to the conduct by religious groups of their basic affairs, such as, *inter alia*, the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.[1404]

Thus, the refusal of the Maldives to allow the construction of religious buildings other than mosques, the past refusal of Greece to allow the construction of mosques in Athens, as well as the destruction of Pentecostal churches in Myanmar and of Catholic schools in Sudan, are all actions in violation of the right of freedom to practice the religion of one's choice. On the other hand, Uzbekistan's refusal to allow Baptist summer camps may not involve activities sufficiently close to the core of religious observance to qualify as a violation of freedom of religion.

Religious freedom as defined under the Civil and Political Covenant moreover protects not just freedom to practice "religion," but more generally freedom of "thought, conscience and religion ... [including] freedom to have or to adopt a religion or belief of his choice."[1405] This formulation

[1403] Civil and Political Covenant, at Art. 4(2). Note, however, that the freedom to "manifest one's religion or beliefs" (as opposed to the right to have or to adopt a religion or belief) may be subject to certain limitations, pursuant to Art. 18(3). See text below, at pp. 579–581.

[1404] UN Human Rights Committee, "General Comment No. 22: Freedom of thought, conscience or religion" (1993), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 155, para. 4. In a recent decision, for example, the Human Rights Committee found a violation of Art. 18 in the case of a Muslim prisoner being held in Trinidad and Tobago on the grounds *inter alia* that "he has been forbidden from wearing a beard and from worshiping at religious services, and that his prayer books were taken from him ... [T]he Committee reaffirms that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts": *Boodoo v. Trinidad and Tobago*, UNHRC Comm. No. 721/1996, UN Doc. CCPR/C/74/D/721/1996, decided Apr. 2, 2002, at para. 6.6.

[1405] "The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief": UN Human Rights Committee, "General Comment No. 22:

makes it absolutely clear that the actual decision about whether to hold or not to hold a religion or belief is itself a protected interest:

> The right ... is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others ... Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed.[1406]

There is thus no question that the Nepalese prohibition of conversion to Seventh Day Adventism, Laotian insistence on renunciation of Christianity by converts, the criminalization of the Baha'i faith in Egypt and Iran, prosecutions for apostasy in Pakistan and for "sorcery" in Saudi Arabia, as well as the attempt to force the conversion of Jehovah's Witness members by beatings in Turkmenistan are all violations of the Civil and Political Covenant.

More generally, the nature and scope of protected interests under the Covenant is quite wide-ranging:

> Although no definition of "thought" or "conscience" is provided, taken together with "religion" they include all possible attitudes of the individual toward the world, toward society, and toward that which determines his fate and the destiny of the world, be it a divinity, some superior being or just reason and rationalism, or chance.[1407]

Thus, the nature of relevant spiritual or intellectual commitments, and hence of the actions which follow from them, is arguably broader than under the Refugee Convention. By virtue of this conceptual expansion, for example, relevant educational freedoms under the Covenant on Economic, Social and Cultural Rights are now understood to include the right of parents and guardians "to ensure the religious *and moral* education of their children in conformity with their own convictions [emphasis added]."[1408] Nor can there be any question of excluding from protection actions taken within what is

Freedom of thought, conscience or religion" (1993), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 155, para. 1.

[1406] Ibid. at 155, paras. 1–2.

[1407] K. Partsch, "Freedom of Conscience and Expression, and Political Freedoms," in L. Henkin ed., *The International Bill of Rights* 208 (1981) (Partsch, "Freedom of Conscience"), at 213.

[1408] Economic, Social and Cultural Covenant, at Art. 13(3). In its General Comment on the right to education, the Committee on Economic, Social and Cultural Rights noted that "[t]he second element of article 13(3) is the liberty of parents and guardians to choose other than public schools for their children, provided the schools conform to 'such minimum educational standards as may be laid down or approved by the State.' This has to be read with the complementary provision, article 13(4), which affirms 'the liberty of individuals and bodies to establish and direct educational institutions,' provided the institutions conform to the educational objectives set out in article 13(1) and certain

arguably a single "religious" tradition – for example, the arrest by Chad of Nigerian and Senegalese members of a minority Islamic sect on grounds of non-conformism with dominant understandings of Islam – since any variations in the scope of belief are clearly within the realm of the broadly framed freedom of thought, conscience, and religion.

Of particular relevance to refugees, the Civil and Political Covenant also makes clear that "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." There can be little question that desperate refugees confined to camps or settlements may feel compelled to repress their own religious views in the face of demands for compliance with divergent beliefs advocated by those with the power to control their access to food and other resources essential to their survival. Illicit forms of coercion include "the use of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as for example those restricting access to education, medical care, [and] employment ... are similarly inconsistent with article 18(2)."[1409] Thus, both the attempts of Sudanese officials to convert the Falasha Jewish refugees and the acquiescence of Pakistani officials in strict enforcement of Islamic precepts in Afghan refugee camps on its territory (albeit organized by refugee leaders themselves) violated the Covenant. Similarly, Bosnian refugee women who refused to wear the headscarves given to them by the Saudi Islamic organization charged with assisting them were entitled to turn to the state for relief against any recriminations grounded in that refusal.

minimum standards": 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. 29. In respect to Art. 18(4) of the Civil and Political Covenant, the Human Rights Committee has observed simply that "[t]he liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions ... is related to the guarantees of the freedom to teach a religion or belief stated in article 18(1)": UN Human Rights Committee, "General Comment No. 22: Freedom of thought, conscience or religion" (1993), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 155, para. 6. Indeed, the Convention on the Rights of the Child may actually have narrowed the scope of the parental prerogative, as the parental role is now conceived as auxiliary to the primary right of children to decide on the nature of their own religious or moral upbringing. "States Parties shall respect the right of the child to freedom of thought, conscience and religion. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child": Rights of the Child Convention, at Art. 14(1)–(2).

[1409] UN Human Rights Committee, "General Comment No. 22: Freedom of thought, conscience or religion" (1993), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 155, para. 5.

Only two limitations on the scope of religious practice protected under the Refugee Convention are clear. First, while the drafters rejected the prerogative of states to limit religious freedom in the interest of "public morality,"[1410] they affirmed, in line with Art. 2 of the Convention,[1411] that states could validly curtail activities which refugees might argue to be of a religious nature under general limitations required to ensure "public order."[1412] With the advent of the Civil and Political Covenant, however, even the right of states to limit religious freedom in the interest of promoting public order is constrained. By relying on the cognate right to religious practice in the Covenant, refugees can insist that any limitations be grounded not in the "concept of *ordre public* under French civil law, but rather only to avoid disturbances to the order in the narrow sense."[1413] Because the drafters of the Covenant chose to deviate from precedent by avoiding reference to the broader civil law construct of public order, the scope for limitation is significantly reduced, as Partsch explains:

[1410] The Colombian representative urged that the religious freedom of refugees should be subject to the requirements of "public morality": Statement of Mr. Giraldo-Jaramillo of Colombia, UN Doc. A/CONF.2/SR.30, July 20, 1951, at 15. This proposal was not pursued after the intervention of the French representative, Mr. Rochefort, ibid. at 16: "[I]t would be undesirable to introduce into the text the words ... 'and of public morality,' proposed by the Colombian representative, for clearly the practice of religion went hand in hand with morality."

[1411] See chapter 2.4.4 above.

[1412] The Egyptian delegate proposed that the religious freedom of refugees should be "limited by the requirements of national law": Statement of Mr. Mostafa of Egypt, UN Doc. A/CONF.2/SR.30, July 20, 1951, at 14. The representative of the Netherlands was initially disposed to this limitation, though he preferred the language "subject to the laws and regulations and measures adopted to maintain public order": Statement of Baron van Boetzelaer of the Netherlands, ibid. The Belgian representative was, however, worried "that the phrase suggested by the Netherlands representative might prove restrictive. Laws might be promulgated or regulations applied which would nullify the provisions of the proposed new article. He would prefer the formula 'subject to the *requirements* of public order' [emphasis added]": Statement of Mr. Herment of Belgium, ibid. With the support of the representative of the Holy See, the delegate of the Netherlands was persuaded that the Belgian formulation – predicated not just on the invocation of public order reasons, but on the necessity for their invocation – was indeed to be preferred: Statement of Baron van Boetzelaer of the Netherlands, ibid. In the end, however, not even this more cautious language was inserted into Art. 4 based on the recommendation of Msgr. Comte of the Holy See that "it was unnecessary to include the words 'subject to the requirements of public order.' Article 2 of the draft Convention already laid down that a refugee had the particular duty of conforming with measures taken for the maintenance of public order in the country of refuge; that provision was of a general nature, applicable to all the succeeding articles": ibid. at 17. Thus, only public order measures which conform to the general requirements of Art. 2 (see chapter 2.4.4 above) are lawful limitations on the religious freedoms of refugees.

[1413] Nowak, *ICCPR Commentary*, at 327.

> Article 18(3) permits limitations to protect "public safety, order, health or morals." Presumably "public" modifies "order" as well as "safety," but here it is used without the interpretative addition of the French term *ordre public*. Indeed, here even the French text does not speak of "*ordre public*" but of *la protection de l'ordre*. This clearly suggests that limitations on freedom to manifest one's religion cannot be imposed to protect *ordre public* with its general connotations of national public policy, but only where necessary to protect public order narrowly construed, i.e. to prevent public disorder. A state whose public policy is atheism, for example, cannot invoke Article 18(3) to suppress manifestations of religion or beliefs.[1414]

As such, China's invocation of "public order"[1415] to justify its efforts to minimize the influence of religion in its society is not within the realm of acceptable limitation. On the other hand, the decision by Egypt to manage and regulate the delivery of sermons in mosques in order to "prevent extremists from taking over mosques"[1416] may meet the standard for a public order limitation on religious freedom. As the UN Special Rapporteur on Religious Intolerance has impliedly recognized, so long as the risk of public violence is real and the steps taken are focused and proportional, some constraints on freedom of religious speech are permissible.[1417]

Interestingly, even as the duty simultaneously to respect obligations under the Covenant has effectively narrowed the scope for invocation of a public order limitation on religious practice under the Refugee Convention, the advent of the Covenant has sanctioned other forms of limitation – including those based on public safety, health, and respect for the fundamental rights and freedom of others.[1418] Of arguably greatest concern, the Covenant seems

[1414] Partsch, "Freedom of Conscience," at 212–213. See also Nowak, *ICCPR Commentary*, at 325: "The ground of national security is lacking altogether, [and] that of public order (*ordre public*) was substituted with the less far-reaching 'protection of order.'"

[1415] See e.g. the recent defense offered by the Chinese government to the Special Rapporteur on Religious Intolerance. "On 23 August 1999, Zhang Rongliang, Feng Jianguo, Wang Xincai and some other key members of cult organizations, flaunting the banner of 'unification of churches,' called together some people to set up a new cult organization in Tanghe county, Henan Province, and disturbed the public order there. The local public security department, acting on the local people's reports, banned their illegal activities according to law": "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 150.

[1416] Ibid. at para. 35.

[1417] "The Special Rapporteur thanks Egypt for the information concerning measures to combat the political exploitation of religion (particularly the posting of security personnel in places of worship) as part of a genuine medium- and long-term strategy for the prevention of religious extremism": ibid. at para. 36.

[1418] The Human Rights Committee has insisted however, that "[i]n interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and

also to have validated one form of limitation specifically rejected by the drafters of the Refugee Convention – namely, restrictions based on "public morals."[1419] At first glance, then, the expulsion by Saudi Arabia of the Indian who distributed a Christian videotape contrary to host country "values," and even the rigid enforcement of an extreme version of Islam by the Taliban in Afghanistan, may appear to be consistent with the understanding of religious freedom codified in the Covenant. There are, however, two answers to this dilemma.

First, the potential risk stemming from the prerogative of states to limit religious freedom on grounds of public morals under the Covenant is in fact less serious than the treaty's broad language might suggest.[1420] As the Human Rights Committee has explained, "the concept of morals derives from many social, philosophical and religious traditions: consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving from a single tradition."[1421] This criterion makes Saudi actions, grounded in the promotion of only an Islamic understanding of morals, not justified. Moreover, a limitation for reasons of morals also has to be "directly related and proportionate to the specific need on which [it is] predicated."[1422] Thus, the decision of the Taliban in Afghanistan massively to violate the human rights of women in pursuit of its vision of a morally defined society – even if had not been based in a single vision of morality – could not in any event have been justified. Second, at least to the extent that the form of religious freedom at issue is within the arguably narrower

non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted": UN Human Rights Committee, "General Comment No. 22: Freedom of thought, conscience or religion" (1993), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 155, para. 8. Moreover, "[t]he fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers": ibid. at para. 9.

[1419] Note, however, that "restrictions are not to be allowed on grounds not specified [in paragraph 3], even if they would be allowed as restrictions to other rights protected by the Covenant, such as national security": ibid. at para. 8.

[1420] "A Soviet proposal to make freedom of thought and religion subject to a mere formal legal proviso in accordance with 'the dictates of public morality' was deleted by the Human Rights Commission by a vote of 9:4, with 3 abstentions. Instead, agreement was reached on a proviso in Art. 18(3) listing all reasons for limitation, which relates only to public freedom of religion and belief and is narrower than comparable limitations clauses in the Covenant": Nowak, *ICCPR Commentary*, at 312.

[1421] UN Human Rights Committee, "General Comment No. 22: Freedom of thought, conscience or religion" (1993), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 155, para. 8.

[1422] Ibid.

ambit of Art. 4 of the Refugee Convention, a refugee can avoid the impact of public morality limitations on religious freedom by invoking the Refugee Convention's right to practice one's religion which, as explained above, does not admit of limitation for reasons of morals.[1423]

Beyond limitations grounded in securing public order, the second form of limitation on religious liberty accepted by the drafters of the Refugee Convention followed from the view of the representative of the Holy See that the right to "public worship" implied in Art. 4 need not be understood to require governments to authorize the performance by refugees of "external [religious] acts."[1424] There is no doubt that the Refugee Convention protects the rights of refugees to engage in public worship, for example in a church or mosque. As such, the Convention is violated when refugees are subject to the formal or de facto prohibition of minority worship in states such as Bhutan, Turkey, Georgia, Turkmenistan, and Azerbaijan. On the other hand, because the scope of religious freedom guaranteed under the Refugee Convention may not extend also to "external religious acts," the constraints on proselytization imposed by such countries as Bulgaria, Georgia, and France may not run afoul of Art. 4. But a refugee might choose instead to rely on the cognate right in the Civil and Political Covenant which, as noted above, has been interpreted to safeguard a variety of external practices, including the distribution of religious literature.[1425]

[1423] See text above, at p. 578. A refugee relying on the Covenant's protection of the right to manifest religion or beliefs could also face restrictions based on "public health," "public safety," or "the fundamental rights and freedoms of others." Nowak suggests that the public health limitation might include, for example, the right to require persons to be vaccinated against contagious diseases, religious convictions notwithstanding. The public safety limitation could justify a constraint on religious ceremonies which, if conducted, could engender a hostile confrontation. The exception for protection of the rights and freedoms of others would, in Nowak's view, validate the prohibition of acts such as female circumcision, even if based on a religious rite: Nowak, *ICCPR Commentary*, at 326–329. Except to the extent that comparable concerns amount to *ordre public* exceptions, however, a refugee could arguably avoid even these constraints on the right to practice religion by invoking Art. 4 of the Refugee Convention rather than Art. 18 of the Civil and Political Covenant.

[1424] "There was, in fact, a difference between external acts of worship and public worship. Public worship was not necessarily performed by external acts; while it did not exclude external acts of worship, it did not necessarily imply them, but it was possible to bring the two together": Statement of Msgr. Comte of the Holy See, UN Doc. A/CONF.2/SR.30, July 20, 1951, at 13.

[1425] See text above, at p. 575. In relying on the Covenant, however, the refugee would face the possibility of the various forms of limitation deemed permissible under Art. 18(3), even if these would not apply to constrain rights under Art. 4 of the Refugee Convention. This potential for restrictions would not, however, apply to communal religious observance in private. As Nowak has commented, "[w]hen an individual prays alone in his (her) home or performs together with those like-minded a religious observance, this

The most specific form of religious liberty protected by the Refugee Convention is the right of refugee parents "as regards the religious education of their children." This right, presented to the Conference of Plenipotentiaries as the right of refugees "to ensure that their children are taught the religion they profess,"[1426] was the subject of substantial debate. The main concern of states, in line with their view that their principled responsibility to facilitate the religious freedom of refugees should not entail a duty to fund such activities,[1427] was that the phrasing proposed "implied that the State would be committed to providing at its own expense facilities for teaching the religion of the refugee."[1428] To avoid this interpretation, it was agreed that the only obligation of states was "to grant refugees ... freedom to ensure that their children were taught in the religion they professed."[1429] The duty was "permissive on [refugee] parents and not mandatory on governments."[1430] The implications of this understanding of the right to freedom of religious education are perhaps best understood in relation to a description of the Swedish approach to education, as given by that country's representative to the Conference of Plenipotentiaries:

> Primary education was compulsory in Sweden, and parents who could not afford to send their children to a private school were obliged to send them to a State school, where religious instruction was given according to the Lutheran faith. If a refugee belonged to a church other than the Lutheran church, he had full freedom to withdraw his children from the classes in religious instruction.[1431]

undoubtedly constitutes 'practice' ... [P]rivate freedom to practice actively a religion or belief may not be subject to any restrictions pursuant to Art. 18(3). However, such practice may be termed private only so long as it does not leave that sphere of individual existence and autonomy that does not touch upon the freedom and sphere of privacy of others": Nowak, *ICCPR Commentary*, at 319.

[1426] UN Doc. A/CONF.2/94. [1427] See text above, at p. 573.

[1428] Statement of Mr. Fritzer of Austria, UN Doc. A/CONF.2/SR.30, July 20, 1951, at 14–15.

[1429] Statement of Mr. van Heuven Goedhart of UNHCR, ibid. at 15.

[1430] Statement of Mr. Rees of the Commission of the Churches on International Affairs, ibid. at 17. See also Statements of Mr. Herment of Belgium and Mr. Fritzer of Austria, ibid. at 15.

[1431] Statement of Mr. Petren of Sweden, ibid. at 12. Mr. Petren went on to say that atheist parents did not enjoy the same right to withdraw their children from mandatory Lutheran education classes, a position now clearly inconsistent with the accepted position that freedom of religion includes the right to hold *or not to hold* particular convictions. See UN Human Rights Committee, "General Comment No. 22: Freedom of thought, conscience or religion" (1993), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 155, paras. 2, 6: "Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief ... [A]rticle 18(4) permits public school instruction in subjects such as general history of religions and ethics if it is given in a neutral and objective way."

In essence, therefore, Art. 4 ensures that refugee parents are free (if they have the resources) to enrol their children in schools which provide their preferred form of religious instruction; and if they are not able to fund education of that kind, they enjoy the liberty to withdraw their children from any non-preferred form of religious instruction provided within the public school system. Thus, the Greek practice of requiring study of Greek Orthodoxy in all of its schools, Bhutanese insistence on recitation of a Muslim–Hindu prayer in its public classrooms, Sudanese infliction of corporal punishment on students who will not study Islam, and the absolute denial of freedom of religious education during the Taliban era in Afghanistan may all, albeit to varying degrees, result in violations of the Refugee Convention's right to freedom of religious education. Even the more nuanced Norwegian requirement for education in Christianity and Christian ethics, under which "exemptions from specific religious activities such as prayer may be granted, but students may not forgo instruction in the subject as a whole,"[1432] is not in compliance with the Refugee Convention because of the partial nature of the right of parents to withdraw their children from specifically Christian instruction. Much the same analysis follows from understandings of the right to religious education derived from the Civil and Political Covenant,[1433] though the Human Rights Committee has determined also that states may not discriminate in the funding of religious education.[1434]

[1432] "Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief," UN Doc. E/CN.4/2001/63, Feb. 13, 2001, at para. 109.

[1433] "[T]he parental right in the Covenant on Civil and Political Rights is of a rather modest nature ... [In particular] it may be assumed that the parental right covers private school freedom. The States Parties are, of course, not obligated to subsidize private schools": Nowak, *ICCPR Commentary*, at 331–332. Similarly, under Art. 13(3) of the Covenant on Economic, Social and Cultural Rights, "[t]he State here is obliged merely to refrain from placing obstacles in the way of parents wishing to exercise this right": Craven, *ICESCR Commentary*, at 110. As neither Art. 4 of the Refugee Convention nor cognate rights under the Covenants specifically regulate the religious education of other than "children," a refugee seeking to contest subjection to the Malaysian policy of mandatory Islamic education for civil servants who self-define as Muslim would have to justify his or her complaint on the grounds of the more general right to practice one's religion in the manner of one's choosing. See text above, at p. 575.

[1434] "[T]he Committee observes that the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under article 26 of the Covenant to equal and effective

4.8 Education

The importance with which refugees view education is usually evident during their very earliest days in an asylum country.[1435] Anxious for their children's studies to resume before knowledge is lost, or simply to restore a sense of purpose in a situation otherwise without hope, refugees frequently establish classes for their children immediately upon reaching safety, using whatever resources are available to them.[1436] As most refugees anticipate eventual repatriation, resumption of the education of their children is also critical to providing them with a sense of continuity, enabling the children to retain their cultural identity which may be challenged by life in the host country. Of particular importance is preservation by children of facility in the language of the country of origin.[1437] As the mother tongue is often the first cultural characteristic to be lost, the viability of repatriation is undermined when children are unable to use their own language in school, particularly in the early grades.[1438]

Education takes on a different role if and when the prospect of return home becomes less real. When assimilation or resettlement is envisaged, education is instrumental in equipping both refugee children and adults to survive and succeed in their new environment. Learning the local language has been identified as one of the most important skills for newcomers,[1439] one that is essential to overcoming the "de-socialization" caused by communications problems.[1440] Training in productive skills can enable refugees to be

protection against discrimination": *Waldman v. Canada*, UNHRC Comm. No. 694/1996, UN Doc. CCPR/C/67/D/694/1996, decided Nov. 3, 1999, at para. 10.6.

[1435] International Extension College and World University Service (UK), "Refugee Education: The Case for International Action" (1986) (IEC and WUS, "Refugee Education"), at 8.

[1436] "Gathering primary school age children together and organizing some kind of educational activity for them immediately improves the morale of the community. It also gives parents, often single parents, the relief and time they need to carry out their other urgent responsibilities. Such 'schools' may be in tents or under trees or in any form of shelter, at least to start with": IEC and WUS, "Refugee Education," at 13. For example, the first classes for Mozambican refugees in Malawi were "held under trees in the absence of appropriate buildings, and teachers had to make do with whatever teaching materials had been brought with the refugees": D. Tolfree, "Refugee Children in Malawi: A Study of the Implementation of the UNHCR Guidelines on Refugee Children" (1991) (Tolfree, "Refugee Children in Malawi"), at 20.

[1437] UNHCR, "Refugee Children: Guidelines on Protection and Care" (1994), at 31.

[1438] UNHCR observes that it is also the case that refugee children tend to learn most quickly in their own language: ibid. at 113.

[1439] "Language is crucial to successful settlement. For young people it is the key to access to education; for adults it opens up a wide range of possibilities, not the least of which is managing everyday life": Joly, *Asylum*, at 59.

[1440] See generally M. Domanski, "Insights from the Refugee Experience: A Background Paper on Temporary Protection," in J. Hathaway ed., *Reconceiving International Refugee Law* 22 (1997).

employable and hence self-supporting in their new societies.[1441] Particularly where the transition is to a more developed economy, it will be important to assist refugees whose post-secondary academic training has been interrupted by flight.[1442] Refugee women not involved in the external workplace have unique needs for compensatory education to avoid social isolation, and to provide them with a measure of autonomy in their new community.[1443]

While the importance of refugee education is nearly universally recognized, UNHCR has estimated that fewer than half of refugee children receive even elementary education.[1444] The situation for refugee girls is worse still, as additional barriers such as family responsibilities and traditional values may lead to lower attendance for girls, leading to lower attendance and higher drop-out rates.[1445] Despite some extraordinary successes – notably among Afghan refugees in Pakistan[1446] – girls still make up only about 39 percent of refugee children attending UNHCR-assisted primary schools, and only about 29 percent of the secondary school population.[1447]

The inability of many refugee children to access education is perhaps not surprising in a world where the vast majority of refugees are the responsibility

[1441] IEC and WUS, "Refugee Education," at 17–18. [1442] Ibid.

[1443] Forbes Martin, *Refugee Women*, at 49.

[1444] "While more refugee children are attending primary school – an estimated 44 percent in 2000, compared to 36 percent in 1993 – more can be done to increase primary education opportunities and ensure equal access for all refugee children, including adolescents": UNHCR, "Refugee Children," UN Doc. EC/GC/02/9, Apr. 25, 2002, at para. 19. "Only 50 percent of refugee children are enrolled in the four lowest grades and a mere 12 percent in the four highest grades": UNHCR, "Report of the United Nations High Commissioner for Refugees," UN Doc. E/2003/68, June 6, 2003, at para. 19.

[1445] "Refugee girls' enrolment decreases progressively; absenteeism among girls, who are obliged to assist with family chores, is higher than among boys; there is a high drop-out rate due in part to the lack of teachers properly trained and sensitive to girls' needs; families hold traditional values in which education is not seen as a goal for self-sufficiency or as being of assistance in the improvement of their daily life": Expert Group Meeting on Refugee and Displaced Women and Children, "Refugee and Displaced Women and Children," UN Doc. EGM/RDWC/1990/WP.2 (1990).

[1446] "The most dramatic success on behalf of girls' education was achieved in Pakistan, where resistance to it from Afghan men had to be overcome, but all UNHCR offices demonstrated a commitment to educating both boys and girls. Although girls still remain in school fewer years than do boys, hostility seems to be diminishing": Women's Commission for Refugee Women and Children, "UNHCR Policy on Refugee Women and Guidelines on their Protection: An Assessment of Ten Years of Implementation," May 2002, at 29. Just a decade earlier, less than 0.1 percent of school-age Afghan refugee girls in Pakistan were reported to be enrolled in school: Forbes Martin, *Refugee Women*, at 45.

[1447] UNHCR, "More refugee girls must go to school, says UNHCR on International Women's Day," Mar. 7, 2003.

of its poorest states.[1448] Unable in many cases to meet the educational needs of their own citizens, these countries simply lack the resources to provide adequate educational opportunities for refugees, whether within the national school system or through separate institutions.[1449] Cambodia, for example, has taken the view that because of its lack of resources it is entitled to prioritize the education of its own children over that of urban refugee children living in and around Phnom Penh.[1450] But financial constraints do not account for all failures to provide refugees with education. Education is sometimes denied as a means of discouraging refugee flows, or encouraging their premature repatriation. During the 1990s, for example, the Turkish government provided no educational facilities to the Iraqi Kurds in camps in southeastern Turkey, and prohibited refugee-organized educational programs for some 13,000 refugee children.[1451] Similarly, the Thai government was initially reluctant to approve any educational programs for Cambodian refugees in order "to prevent the institutionalization and perpetuation of the camps and the attendant likelihood of attracting more refugees from Cambodia."[1452] And before the South African Human Rights Commission intervened, the government of that country denied refugee children access to

[1448] "[I]n developing countries, 130 million children of school age are currently estimated to be without access to primary education, of whom about two-thirds are girls": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 11: Plans of action for primary education" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 60, para. 3.

[1449] For example, the situation in Africa has been described as "mass movements of virtually illiterate peasantry fleeing to countries where educational resources are already overburdened to meet even the basic needs of their own citizens, let alone those of outsiders": H. Pilkington, "The Higher Education of Refugees in Africa: Suggestions," [Nov. 1996] *Refugee Issues* 1 (Pilkington, "Higher Education"). See also S. Nkiwane, *International Academy of Comparative Law National Report for Zimbabwe* (1994), at 15, who writes that Zimbabwe has enough difficulty educating its own nationals, without taking on unlimited responsibilities for refugees.

[1450] "Public education is also inaccessible to refugee children. The UNHCR has been pushing for more rights for refugees though Cambodia, being a very poor country, prioritizes its own citizens' economic betterment over the enforcement of international treaty obligations relating to immigrants and asylum-seekers": "Cambodia: precarious position of refugees," (2002) 114 *JRS Dispatches* (June 28, 2002).

[1451] "The children are not receiving school instruction, nor are they being offered pedagogical supervision. The school instruction that was organized by the refugees themselves and took place in dark, stinking cellars has been prohibited. The makeshift school materials were confiscated": IHRK, "Kurdish Refugees," at 30.

[1452] P. Gyallay-Pap, "Reclaiming a Shattered Past: Education for the Displaced Khmer in Thailand," (1989) 2(2) *Journal of Refugee Studies* 257 (Gyallay-Pap, "Shattered Past"), at 265.

educational facilities until and unless their claims to refugee status (or those of their parents) were positively assessed.[1453]

When support for refugee education is provided, it often comes only after considerable delay,[1454] and is frequently inadequate.[1455] While refugee communities have proven capable of organizing their own education programs almost immediately upon reaching refuge,[1456] they often require support from national and international agencies in order to reach as many eligible children as possible, and to fund educational materials and teacher training.[1457] Continual financial shortfalls mean that, with notable exceptions,[1458] most refugee children in the less developed world who are fortunate enough to attend school still face daunting obstacles, such as overcrowded classrooms, shortages of teaching materials, and a dearth of qualified teachers.[1459] Teachers were particularly scarce among the Cambodian refugees in Thailand following the anti-intellectual massacres by the Khmer Rouge.[1460] Shortages of qualified teachers for Mozambican refugees in Malawi prevented

[1453] "Originally ... a prohibition on work and study was indicated in all asylum application papers ... The [South Africa Human Rights] Commission called this limitation into question as being unconstitutional, and the prohibition was eventually lifted in cases of children so that they would be entitled to start school immediately": L. Stone and S. Winterstein, *A Right or a Privilege? Access to Basic Education for Refugee and Asylum-Seeker Children in South Africa* (2003), at 28. The unconstitutionality of the prohibition was later confirmed in *Minister of Home Affairs v. Watchenuka*, (2004) 1 All SA 21 (SA SCA, Nov. 28, 2003), at para. 36.

[1454] It is reported that education is often a low priority among organizations assisting refugees, considered a luxury by agencies that "optimistically ignore the fact that most short-term refugee situations become long term": IEC and WUS, "Refugee Education," at 8. As a result, "[t]here are no examples where education has been provided to refugees in the early stage of their exile, along with emergency relief services, except where refugees themselves have mobilized what limited resources they have to set up schools and literacy classes": ibid. at 36.

[1455] "We are now reaching the stage where some budget restrictions may simply prove too severe to sustain ... In the educational sector, substantial cutbacks in the construction of new facilities and provision of materials will mean that many refugee children are denied access to schooling": Forbes Martin, *Refugee Women*, at 46, quoting from the UNHCR Head of Program Management Services.

[1456] Refugee-initiated schools were established, for example, in Djibouti, Thailand, Pakistan, and Sudan. "The spontaneity of such refugee self-help projects makes for speed ... They may have very few or no resources, but they are unhampered by bureaucratic delays and they thus provide the very first community development activities and the first injections of hope in the future which are so vital in the emergency stages of a refugee crisis": IEC and WUS, "Refugee Education," at 13.

[1457] Ibid. at 22.

[1458] Among the refugee education systems positively appraised by experts are those for Tibetans in India and for Palestinian refugees under the auspices of UNRWA: B. S. Chimni, *International Academy of Comparative Law National Report for India* (1994), at 28; Forbes Martin, *Refugee Women*, at 47.

[1459] Forbes Martin, *Refugee Women*, at 46. [1460] Gyallay-Pap, "Shattered Past," at 270.

teacher–student ratios from improving beyond 1:100.[1461] Liberian refugees in Nigeria, restricted to their camp's makeshift school, suffered particularly from a shortage of teaching supplies and basic equipment such as desks and chairs.[1462] Some Sahrawi refugee children had only one textbook per class, and library resources were "practically nonexistent."[1463]

The nature of refugee education provided in the South is also sometimes contentious. UNHCR advocates "education for repatriation," with the curriculum to be based on that in the refugees' country of origin.[1464] This approach was adopted, for example, for Afghan refugees in Pakistan, Mozambican refugees in Malawi and Zimbabwe, and Rwandan refugees in Tanzania, Burundi, and Zaïre.[1465] But conflict may arise between the refugee community and host government when there is a divergence of views about whether repatriation, integration, or resettlement is the most appropriate goal. For instance, the Tanzanian government of the mid-1980s believed that it made most sense to attempt to integrate Burundian refugees into the Tanzanian national culture. The priority of the refugees themselves, however, was to be prepared for repatriation to Burundi.[1466] Similarly, the Sudanese government's policy of assimilating Eritrean refugees into its own schools conflicted with the refugees' aspiration for education that was relevant to the socioeconomic reality in their homeland, and which would prepare them to serve their people and country upon return.[1467] Differences in approach to education can also arise between refugees and international agencies. The curriculum developed by UNBRO for Cambodian refugees in the Thai border camps, for example, was based on Western methodology and Western

[1461] This ratio was considered a great success, and was only achieved after the hiring of hundreds of additional teachers: Tolfree, "Refugee Children in Malawi," at 20–21.

[1462] "In spite of the resourcefulness of the refugees, the school has many deficiencies caused by lack of adequate financial support. Interviews with the teaching staff revealed that there are insufficient chairs, desks and blackboards; and the school has virtually no books. From its inception, neither the teachers nor the students in grades 7–9 have had textbooks. The students in grades 1–6 have textbooks but very little else": Tiao, "Refugee Rights in Nigeria," at 14.

[1463] A. Velloso, "Palaces for Children: Education in the Refugee Camps of the Sahrawi Arab Democratic Republic," [Apr. 1996] *Refugee Participation Network*.

[1464] A. Avery, "Education: The Least of UNHCR's Priorities? UNHCR Responds," [Apr. 1996] *Refugee Participation Network* (Avery, "UNHCR Responds").

[1465] Ibid.

[1466] A. Ayok Chol, "Reflections on the Policies and Practices of Refugee Education in Tanzania," paper presented at the University of Dar es Salaam, Tanzania, July 29, 1987.

[1467] J. El Bushra, "Case Studies of Educational Needs Among Refugees II: Eritrean and Ethiopian Refugees in the Sudan" (1985), at 24. Because of the perceived inappropriateness of the Sudanese educational system, many refugees sent their children to schools set up by liberation groups or voluntary organizations: ibid.

industrialized standards, without reference to Khmer Buddhist culture and their traditional agrarian lifestyle. As Gyallay-Pap observed,

> The question [is] ... whether an education system based largely on western industrial development norms, with its emphasis on productivity and consumption (or "raising the standard of living"), is appropriate for a people who have steadfastly remained agriculturalists attached to the land and traditional culture. The disparity between the modern Khmer school curriculum and the realities of Khmer culture and society is seen in the near absence of artistic, religious, and other traditional cultural subjects through which the Khmer have traditionally self-understood themselves.[1468]

In developed countries, in contrast, recognized refugee children are nearly universally integrated into the national school systems of the asylum state.[1469] But until refugee status is formally recognized, refugee children may face barriers to accessing education. For example, the United Nations Committee on the Rights of the Child observed that in Greece there have been "[d]ifficulties in gaining access to education for some groups of children, including asylum-seeking and refugee children."[1470] Under the British government's policy of dispersing asylum-seekers throughout the country, local school boards have sometimes refused to enroll refugee children for fear of reducing their schools' ranking based on student performance on standardized tests, or of having to fund language support for them.[1471] Even more seriously, British legislation passed in 2002 provides that the children of refugee claimants

[1468] Gyallay-Pap, "Shattered Past," at 273.

[1469] In the European Union it is now agreed that "[m]ember states shall grant full access to the education system to all minors granted refugee or subsidiary protection status, under the same conditions as nationals": Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Doc. 2004/83/EC (Apr. 29, 2004) (EU Qualification Directive), at Art. 27(1).

[1470] UN Committee on the Rights of the Child, "Concluding Observations of the Committee on the Rights of the Child: Greece," UN Doc. CRC/C/15/Add.170, Feb. 1, 2002, at para. 66(e). The Committee therefore recommended that Greece "[e]nsure that asylum-seeking, refugee and illegal immigrant children have access to education": ibid. at para. 69(f).

[1471] A. Travis, "Asylum seekers suffer as dispersal system fails," *Guardian*, June 1, 2000, at 1. It is estimated "that 2,000 children of asylum-seekers are without school places ... [F]ewer than 12% of local authorities with a social services department had a refugee strategy": ibid. Writing in 1998, the chief executive of the British Refugee Council warned that "if in the future, asylum-seekers' families are dumped in areas where there is no experience of their needs, the number of children out of school will grow. Local community relations would suffer, particularly if the advance billing casts all asylum-seekers as bogus scroungers": N. Hardwick, "Asylum: Stairway to Hell," *Guardian*, Aug. 5, 1998, at 2. Interestingly, refugee children may actually contribute to an improvement of academic quality in schools, according to the head of education at

will no longer be entitled to attend local schools, but may be limited to taking classes within refugee accommodation centers.[1472] From February 2005, however, the European Union's Reception Directive requires that the minor children of refugee applicants receive education "under similar conditions as nationals" beginning not later than three months after the filing of an application for protection by either the child or his or her parents.[1473]

Another contentious issue in developed countries is the language of instruction for refugee children. Whereas most jurisdictions in Canada[1474] and some European states, including Norway and Sweden,[1475] do provide mother tongue instruction to refugee children, other states, such as Belgium and France,[1476] offer little or no such instruction. In Ireland, for example, the decision was made that Vietnamese refugee children should be "left to either sink or swim"[1477] in English-language education.

Secondary and post-secondary education is usually less easily accessed by refugees than is elementary education. Most refugees in the South have no access whatever to advanced formal education;[1478] indeed, the Refugee

the British National Union of Teachers, who reported that "[a]ll the evidence we have is that in some of the toughest schools, it is the asylum-seekers' children who provide stability, because they are most dedicated to getting the best out of the system": L. Brooks, "Asylum: a special investigation," *Guardian*, May 1, 2003, at 2.

1472 "For the purposes of section 13 of the Education Act 1996 (c. 56) (general responsibility of local education authority) a resident of an accommodation centre shall not be treated as part of the population of a local education authority's area": Nationality, Immigration and Asylum Act 2002, c. 41, at s. 36(1). An earlier report of a government-dominated committee on human rights had opined that educating refugee children outside mainstream schools would give rise "to troubling echos of educational regimes where children were educated separately on the basis of race or colour": G. Younge, "Villagers and the damned," *Guardian*, June 24, 2002, at 17.

1473 EU Reception Directive, at Art. 10(2).

1474 Half of the provinces of Canada (Quebec, Ontario, Manitoba, Saskatchewan, and Alberta) support heritage language programs, to which refugee children have access. In Ontario, for example, a heritage language program is provided when twenty-five or more students request it: Canadian Education Association, "Heritage Language Programs in Canadian School Boards" (1991).

1475 ECRE, *Conditions 2003*. Italy also is in principle committed to providing mother-tongue instruction, but is reported not to do so in practice due to a lack of qualified teachers: ibid.

1476 Ibid.

1477 F. McGovern, "The Education of a Linguistic and Cultural Minority: Vietnamese Children in Irish Schools, 1979–1989," (1993) 12 *Irish Education Studies* 92, at 95. "No special language provision was made for the Vietnamese children of school-going age in the mainstream system ... The belief was that if children were submerged in the mainstream schooling system, they would pick up English language and somehow survive": ibid.

1478 Pilkington, "Higher Education," at 1.

Education Trust has reported that of the 1.5 million teenage refugees living in less developed countries, only 50,000 – about 3 percent – are able to attend school beyond the primary level.[1479] There are notable exceptions, such as Sudan and Swaziland, which built secondary schools specifically for refugees.[1480] But the primary means for refugees in the less developed world to access secondary and university education has been through the award of scholarships provided by UNHCR and other agencies, the number of which is extremely limited.[1481] In the Osire refugee camp in Namibia, for example, rioting broke out when only three out of fifty-six applications for study grants were accepted.[1482] Even in states where refugees in principle have access to higher education, authorities who fear that the admission of a refugee effectively deprives a citizen of access to higher education therefore sometimes take action to restrict the educational opportunities of refugees.[1483] For example, Tanzania has set a limit of 2 percent non-citizens in post-elementary educational institutions.[1484] Other difficulties include recognition of academic credentials,[1485] accessing information about educational opportunities, and satisfaction of the requirements set by scholarship-granting agencies.[1486]

Non-formal education in the less developed world has also received insufficient attention and financial support.[1487] As a result, educational programs

[1479] Refugee Education Trust, "First International Symposium on Post-Primary Education for Refugees and Internally Displaced Persons, 18–19 September 2002, Geneva" (2003).

[1480] IEC and WUS, "Refugee Education," at 16.

[1481] For example, the number of scholarships provided to Afghan refugees in Pakistan has been described as "a drop in the bucket." As one UNHCR official explained, "[w]e have got to think about providing the new generation with a future. Afghans need doctors, teachers, engineers . . . We realize that a few scholarships are not going to do the trick": E. Girardet, "Urban Refugees in Peshawar," (1986) 27 *Refugees* 15 (Girardet, "Peshawar"), at 16–17.

[1482] "There are reportedly more than 3,000 students in pre-primary and primary schools as well as in adult education at the Osire camp. The exact number of students who would like to study from grades 10 and higher could not be established. There is no secondary school at Osire, which now houses over 17,000 refugees, more than five times the figure that the camp can officially accommodate": *Namibian*, Mar. 12, 2001.

[1483] "In Sudan, we encountered young Eritreans, many of high school age, who are desperate to continue their education but cannot. For most it is a question of funds or the refusal by local authorities to take more than a handful of students": T. Skari and E. Girardet, "Urban Refugees: Out of the Public Eye," (1985) 23 *Refugees* 14, at 14.

[1484] Forbes Martin, *Refugee Women*, at 47.

[1485] IEC and WUS, "Refugee Education," at 17. See also Tiao, "Refugee Rights in Nigeria," at 15, for a description of the problems faced by Liberian refugees seeking higher education in Nigeria.

[1486] Pilkington, "Higher Education," at 2–4.

[1487] IEC and WUS, "Refugee Education," at 31.

designed to impart basic skills to adult refugees, including literacy and numeracy training, have been in short supply.[1488] Where such programs have been established, they have at times been hampered by limited access,[1489] and by the failure to encourage refugee involvement in their development.[1490] In addition, the frequent absence of special compensatory programs for women refugees has at times been glaring.[1491] In contrast, a non-formal educational program for Bhutanese refugees in Nepal encouraged women's participation through the provision of separate male and female classes, held in "semi-public" space, and timed so as not to conflict with women's responsibilities such as ration collection, childminding, and other household activities.[1492]

Vocational programs tend to be more adequately funded by international agencies than are basic educational initiatives.[1493] The most common focus is the training of health workers and teachers,[1494] but some initiatives are more ambitious. For example, the self-help projects in Kenya's coastal refugee camps assisted many women, as well as men, to learn manual and management skills through such activities as craftwork, sewing, and agriculture.[1495] The ANC work unit program at their settlement in Tanzania provided opportunities for South African refugees to be trained in construction and agriculture, and in running small industries such as clothing, leather goods, carpentry, welding, and the repair of motor vehicles and electrical appliances.[1496] However, as refugees become settled, they frequently seek more expensive, institutionalized vocational training courses. Centers such as the Vocational Training Center in Angola for Namibians, the mechanical training center for Afghans in Pakistan, and the UNRWA/UNESCO Institute of

[1488] Ibid. An innovative success story is the Education Program for Sudanese Refugees (EPSR) established by Makerere University which provided refugees with library, reading, and training facilities, all at a location easily reached by foot from the area where more than half of the refugees lived: B. Sesnan, "Push and Pull: Education for Southern Sudanese in Exile, 1986–1996," in G. Retamal and R. Aedo-Richmond eds., *Education as a Humanitarian Response* 59 (1998), at 69–70.

[1489] For example, while several programs were run for refugees in Thailand, "only a small proportion of the eligible population has the possibility of participating in these activities": R. Preston, "Is There a Refugee-Specific Education?," (1990) 23(3) *Convergences* 3 (Preston, "Refugee-Specific"), at 7.

[1490] Educational programs for Mozambican refugees in Swaziland were criticized because refugees did "not generally participate in educational decision-making and program implementation, and many of the programs [were] generated within the offices of the UNHCR and other agencies": H. Woodbridge et al., "Education for Adult Refugees in Swaziland," (1990) 23(3) *Convergences* 23, at 33.

[1491] IEC and WUS, "Refugee Education," at 31–32.

[1492] T. Rahman, "Literacy for Refugee Women: A Case Study from Nepal," [Apr. 1996] *Refugee Participation Network*.

[1493] IEC and WUS, "Refugee Education," at 32. [1494] Preston, "Refugee-Specific," at 6.

[1495] Avery, "UNHCR Responds." [1496] IEC and WUS, "Refugee Education," at 18.

Education for Palestinian refugees have provided practical on-the-job training, linked to needs in the host community.[1497] But the relatively high cost of such centers has limited their number.[1498]

In the developed world, access to secondary and post-secondary education, as well as to language courses, continuing education courses, and informal orientation courses is generally provided to recognized refugees on at least the same terms as that afforded other long-term lawful residents.[1499] The form in which these latter adult-oriented programs is delivered varies considerably, including courses designed specifically for refugees, courses offered through national adult education systems, and courses organized by NGOs. As in the South, one concern is that many refugee women have difficulty accessing educational opportunities truly suited to their needs. Due to conventional assumptions about which spouse is the "breadwinner," training courses have sometimes been unduly male-focused.[1500] For example, the British vocational education system has been found inadequate in addressing refugee women's family responsibilities,[1501] in particular the need for access to childcare facilities.[1502]

The most serious challenge for refugees seeking to avail themselves of educational opportunities in the developed world is the distinction sometimes drawn between recognized refugees and those whose asylum claims have yet to be formally determined, or who are granted an alternative form of status. The European Union treats access to vocational training for refugees awaiting status verification as a matter of pure discretion for state parties.[1503] In the result, basic orientation programs, continuing education classes, and even language programs are denied to refugee claimants in some countries. For example, in Italy and Portugal, asylum-seekers must often depend on NGOs and community organizations to provide them with language

[1497] Ibid. at 18, 33; Girardet, "Peshawar," at 17.

[1498] IEC and WUS, "Refugee Education," at 18.

[1499] In the European Union, for example, "[m]ember states shall allow adults granted refugee or subsidiary protection status access to the general education system, further training or retraining, under the same conditions as third country nationals legally resident": EU Qualification Directive, at Art. 27(2).

[1500] "Because of the traditional assumption that heads of families are men, skill-training programmes and income-generating activities have been directed at them": Camus-Jacques, "Forgotten Majority," at 149.

[1501] V. Shawcross et al., *Women in Mind: The Educational Needs of Women Refugees in the UK* (1987), at 22.

[1502] Africa Educational Trust, "Education, Training, and Employment Needs of Refugees in London," available at www.africaed.org (accessed Sept. 16, 2003). See also A. Bloch, "Refugees' Opportunities and Barriers in Employment and Training," Research Paper No. 179, UK Department for Work and Pensions (2002).

[1503] "Member States may allow asylum-seekers access to vocational training irrespective of whether they have access to the labour market": EU Reception Directive, at Art. 12.

training.[1504] In Australia, the Chief Minister of the Australian Capital Territory defied the federal government's policy of denying language training to refugees holding temporary protection visas by arranging for their instruction at a Canberra technical institute.[1505]

Much the same pattern of differentiation holds for more formal sorts of advanced education. While recognized refugees in the North are for the most part assimilated to long-term residents for purposes of eligibility for grants and bursaries to attend university,[1506] refugees whose claims have not yet been formally assessed may be denied such access.[1507] Immigration officials frequently have discretion to authorize enrollment on an individual basis, and their decisions are typically non-reviewable.[1508]

Refugee Convention, Art. 22 Public education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

[1504] In Italy, for example, "[l]anguage courses are organised on a large scale by NGOs and church organisations, including the Federation of Evangelical Churches, Caritas, the Communità di Sant' Egidio, the Salvation Army, and some reception centers": Liebaut, *Conditions 2000*, at 172. In Portugal, "[t]here are no state-funded language classes for asylum-seekers. For two years, the Portuguese Refugee Council has run a Program for asylum-seekers and refugees consisting in Portuguese language and computer classes. Due to a lack of funding, this has been stopped": ibid. at 249.

[1505] R. Macklin, "Stanhope defies Howard with English classes for asylum-seekers," *Canberra Times*, May 3, 2002, at A-5.

[1506] See, for example, EU Qualification Directive, at Art. 27(1).

[1507] F. Liebaut and J. Hughes, *Legal and Social Conditions for Asylum Seekers and Refugees in Selected European Countries* (1997). With the exception of minor children of refugees, access to advanced forms of education by persons seeking refugee status is simply not addressed by the European Union, leaving the matter to the discretion of state parties: EU Reception Directive, at Art. 10(1).

[1508] In Canada, for example, "[n]ot only has the Immigration Act failed to provide a clear way out of this ambiguity, but it has also left it to the whims and caprices of immigration officials. By what criteria are these officials supposed to grant permission when necessary? How do we ascertain whether such decisions are justifiable or not? How do we ensure that such a ruling, which has consequences for a refugee's future, will be made in the interest of a refugee?": E. Opoku-Dapaah, "Financial and Other Adjustment Assistance for Newcomers: Literature Review for the Center for Refugee Studies" (1994).

Economic, Social and Cultural Covenant, Art. 13
1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;
(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

The Refugee Convention broke with precedent by making a clear commitment to provide at least the most basic forms of education to refugees (and their children[1509]) on terms of equality with nationals. While the predecessor

[1509] As Grahl-Madsen observes, "the present paragraph will on the whole only be meaningful if it is interpreted to give children of refugees the rights for which it provides, unless they have greater rights in their own right, i.e. as nationals of the country of residence": Grahl-Madsen, *Commentary*, at 86. Grahl-Madsen refers in this regard to Recommendation B of the Final Act of the Conference of Plenipotentiaries, in which the state representatives "[n]ot[ed] 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": ibid. See also, for example, the comment of the French representative in relation to Art. 22(2) that "[t]he fundamental purpose of article [22] was to prevent the *son* of a refugee from being forbidden to enter a given faculty [emphasis added]": Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 26.

treaties of 1933 and 1938 required only that educational rights be granted to refugees to the extent enjoyed by aliens in general,[1510] the drafters of the current Refugee Convention were firmly committed to the belief that public elementary education – meaning "elementary education over which the Contracting State concerned had direct control, whether financial or other"[1511] – should be made available to all refugees without qualification, and on terms of equality with citizens of the host state.

The Convention does not offer a clear definition of "elementary" education.[1512] One analysis of the Universal Declaration's right to "elementary" education suggests that "[t]here is no fixed border between elementary and fundamental education. Elementary education includes fundamental education such as literacy, arithmetic and basic orientation into society."[1513] On the other hand, the French representative to the Ad Hoc Committee seems to have equated the term with "primary education," as distinguished from "secondary and higher" education.[1514] Under this more formal and

[1510] The relevant provision in these earlier treaties stipulated that "[r]efugees shall enjoy in the schools, courses, faculties and universities of each of the Contracting Parties, treatment as favorable as other foreigners in general. They shall benefit in particular ... by the total or partial remission of fees and charges and the award of scholarships": United Nations, "Statelessness," at 58.

[1511] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 8. Mr. Hoare's position followed from the clarification of the American representative to the Ad Hoc Committee that "the words 'public education' ... were intended to apply not only to State-owned schools but also to private schools receiving Government subsidies": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.23, Feb. 10, 1950, at 7. Indeed, while the general rule agreed to was that the headings for articles in the Convention should not have independent legal force, the President of the Conference of Plenipotentiaries noted that an exception should be made "in the case of article 22, 'Public education'": Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 37.

[1512] See S. Blay and M. Tsamenyi, "Reservations and Declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees," (1990) 2(4) *International Journal of Refugee Law* 527 (Blay and Tsamenyi, "Reservations"), at 547: "The difficulty with Article 22(1) is that the Convention does not define what is 'elementary education.' Thus in the case of States where primary education stretches from primary school through to high school and therefore covers education before tertiary studies, Article 22(1) imposes a significant burden." While this critique may overstate the consequences of the definitional ambiguity, it is unclear whether, for example, "middle school," "junior high school" and other stages providing a transition between elementary and secondary education are encompassed by Art. 22(1). Perhaps most important for many refugees, it is not clear whether elementary education includes basic (adult) education in literacy and related matters. See text below, at pp. 596–597.

[1513] P. Arajäravi, "Article 26," in A. Eide et al. eds., *The Universal Declaration of Human Rights: A Commentary* 405 (1992) (Arajäravi, "Article 26"), at 408–409.

[1514] France, "Draft Convention," at 7. The French government appears to have seen no substantive divergence between its language and that proposed by the United Nations draft, and therefore withdrew its proposal: UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 9.

conservative interpretation, it is less clear that Art. 22(1) guarantees access to fundamental or basic education in all its forms (including, for example, adult education),[1515] but may be limited instead to participation in pre-secondary, grade school education.[1516]

There is, however, no mistaking the breadth of the beneficiary class.[1517] Rights under Art. 22(1) are granted to "refugees" – not, for example, only to refugees "lawfully in" or "lawfully staying in" a state party. Robinson thus logically concludes that "[i]t must be assumed that paragraph 1 is equally applicable to both resident and non-resident refugees, in view of the generally accepted nature of public elementary education."[1518] Indeed, the representative of the United Kingdom affirmed at the Conference of Plenipotentiaries that "[p]aragraph 1 was couched in very general terms, and the only limitation upon it was the title ('Public Education')."[1519]

Thus, the Greek failure to ensure access to elementary education by the children of asylum-seekers, as well as the failure of British authorities to ensure that local schools receiving refugees under dispersal policies in fact admit the children of asylum-seekers to primary education, were violations of Art. 22(1). More generally, the decision of the European Union to condition access to education by the children of refugee applicants on the lodging of a protection application, and even then to authorize a delay of as much as three months, are policies out of line with the requirements of Art. 22(1).[1520] Indeed, the European Union's decision to guarantee access to primary

[1515] The UN Committee on Economic, Social and Cultural Rights, for example, has taken the view that "[w]hile primary education is not synonymous with basic education, there is a close correspondence between the two. In this regard, the Committee endorses the position taken by UNICEF: 'Primary education is the most important component of basic education'": 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. 9. The Committee on Economic, Social and Cultural Rights uses the terms "basic" and "fundamental" education interchangeably: ibid. at para. 22.

[1516] Grahl-Madsen suggests that "'[e]ducation other than elementary education' is normally understood as education beyond the grade school": Grahl-Madsen, *Commentary*, at 87.

[1517] This interpretation is borne out in state practice. In formulating their reservations to Art. 22(1) of the Convention, Egypt, Mozambique, Zambia, and Zimbabwe each noted their inability to assimilate refugees to their own citizens for purposes of access to public elementary education.

[1518] Robinson, *History*, at 123. See also Weis, *Travaux*, at 170: "The Article refers to 'refugees' without qualification such as 'lawfully stay[ing]'"; and Grahl-Madsen, *Commentary*, at 86: "Article 22 applies to 'refugees' – there is no condition as to residence, lawfulness of presence in territory, etc."

[1519] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 7.

[1520] Even under arguably difficult circumstances, there has been little tolerance of delay in ensuring that refugee children are granted access to education. For example, in its scrutiny of the report of Poland, the Committee on the Rights of the Child expressed

education only under "similar conditions as nationals" – rather than, as the Refugee Convention requires, to guarantee "the same treatment as is accorded to nationals" – is also of doubtful validity. For the same reason, it is unlikely that the new British policy of denying the children of asylum applicants access to local schools, where the curriculum is almost surely more diverse,[1521] will pass muster under Art. 22(1). These policies stand in marked contrast to South Africa's recent reversal of its bar on the admission of the children of asylum-seekers to public primary schools, a decision taken in the face of social and economic circumstances significantly more challenging than those faced in any developed country. As that country's Supreme Court of Appeal pointedly observed, "[t]he freedom to study is ... inherent in human dignity, for without it a person is deprived of the potential for human fulfilment."[1522]

In part, the decision of the drafters that all refugees should have immediate and unconditional access to the same forms of public elementary education as nationals was the product of an awareness that "schools are the most rapid and most effective instruments of assimilation."[1523] Equally important, however, it was recognized that access to elementary education "satisfies an urgent need (it is for this reason that most States have made it compulsory)."[1524] The Secretary-General's background study for the Convention thus explicitly referenced the conceptual breakthrough on this point that had been recently been achieved by Art. 26 of the Universal Declaration of Human Rights, which provides that "[e]veryone has the right to education.

its "concern[] that children waiting for their refugee claims to be processed do not have opportunities for education if they are housed in emergency blocks": UN Committee on the Rights of the Child, "Concluding Observations on the Report of Poland," UN Doc. CRC/C/121 (2002), 120, at para. 539.

[1521] For example, one fourteen-year-old Kurdish refugee girl in a British reception center reported, "I should be studying for my GCSEs now, but we are only taught English, history and art here for a few hours a day. We don't have the opportunity to learn every subject and if the teacher is away or on holiday we don't have any lessons. We are learning things we already know and because all ... of us learn together, the standard is set at that of a seven-year-old. My ambition is to be a lawyer, but if I don't get my GCSEs I won't be able to do that": D. Taylor, "Education: Worlds apart: Is it right for asylum-seeking children to be taken out of school and taught in detention centers?," *Guardian*, Jan. 7, 2003, at 6, quoting Beriwan Ay.

[1522] *Minister of Home Affairs v. Watchenuka*, (2004) 1 All SA 21 (SA SCA, Nov. 28, 2003), per Nugent JA at para. 36. The same court was clear that while the right to education could not be universally guaranteed by any state to all who might wish to live in it, "where, for example, the person concerned is a child who is lawfully in this country to seek asylum (there might be other circumstances as well), I can see no justification for limiting that right so as to deprive him or her of the opportunity for human fulfilment at a critical period ... A general prohibition that does not allow for study to be permitted in appropriate circumstances is in my view unlawful": ibid.

[1523] Secretary-General, "Memorandum," at 40. [1524] Ibid.

Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory."[1525] Importantly, the Universal Declaration's duty to provide elementary education to "everyone" is restricted neither to nationals, nor even to children:[1526]

> As "elementary education shall be compulsory," also adults who have not received elementary education must be educated ... The compulsion obliges society to attend to the existence of access to schools to see to it that either through the education offered by the society or otherwise the knowledge and skills provided by the elementary education are received.[1527]

It follows that under Art. 22(1), refugees and refugee children who have not completed their elementary education are entitled to receive it on terms of equality with the citizens of an asylum state, and without waiting for formal status determination procedures to be commenced or concluded.[1528] It is therefore likely that at least some of the adult asylum-seekers denied access to basic education programs pending verification of their status are not being granted their full rights under Art. 22(1). While limitations may be validly placed on access to the full range of adult education programs,[1529] any initiative which provides adult citizens with elementary school equivalency education (e.g. in basic literacy or numeracy) must be available to refugees, whether formally recognized as such or not, on terms of equality with nationals.

Importantly, the Refugee Convention's guarantee of access to elementary education is more comprehensive than the cognate right under Art. 13(2)(a) of the Covenant on Economic, Social and Cultural Rights. Under the Covenant, some flexibility in achieving free primary education for all is

[1525] Universal Declaration, at Art. 26(1).

[1526] This approach is consistent with the recent affirmation by the Committee on Economic, Social and Cultural Rights that the duty to provide education "to everyone" includes, for example, a duty towards the elderly. "Article 13, paragraph 1, of the Covenant recognizes the right of everyone to education. In the case of the elderly, this right must be approached from two different and complementary points of view: (a) the right of elderly persons to benefit from educational programmes; and (b) making the know-how and experience of elderly persons available to younger generations": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 6: The economic, social and cultural rights of older persons" (1995), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 35, para. 36.

[1527] Arajäravi, "Article 26," at 408–409.

[1528] "Paragraph 1 was inspired by Art. 26(1) of the Universal Declaration of Human Rights which proclaimed that elementary education should be compulsory and free. It is obvious that in compulsory and free education refugees cannot be treated differently from nationals": Robinson, *History*, at 122.

[1529] See text below, at pp. 607–611.

available, at least to poorer states, as rights under that treaty need only be implemented progressively,[1530] albeit without discrimination.[1531] Even though primary education has been recognized as a "core" entitlement,[1532] meaning that any generalized failure to meet the standard is *prima facie*

[1530] "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. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. 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": 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.

[1531] The flexibility to implement the right to primary education is, however, significantly constrained by Art. 14 of the Covenant. This provision requires state parties which do not offer free and compulsory primary education upon accession to the Covenant to prepare and file – within two years – a "detailed plan of action for the progressive implementation, *within a reasonable number of years, to be fixed in the plan*, of the principle of compulsory education free of charge for all [emphasis added]": Economic, Social and Cultural Covenant, at Art. 14. The supervisory committee has therefore held that "the plan must specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan. This underscores both the importance and the relative inflexibility of the obligation in question. Moreover, it needs to be stressed in this regard that the State party's other obligations, such as non-discrimination, are required to be implemented fully and immediately": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 11: Plans of action for primary education" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 60, para. 10.

[1532] "In its General Comment 3, the Committee confirmed that States parties have 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels' of each of the rights enunciated in the Covenant, including 'the most basic forms of education.' In the context of article 13, this core includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1); [and] to provide primary education for all in accordance with article 13(2)(a)": 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. 57.

evidence of a breach of the Covenant,[1533] states may nonetheless seek to justify their failure to provide universal primary education by reference to a true lack of resources.[1534] There is moreover a basis for argument that the Covenant's duty to provide primary education is an "economic right," thus allowing less developed countries legitimately to withhold it from non-citizens pursuant to Art. 2(3) of the Covenant.[1535] Even this flexibility would not, however, be a basis to justify the Thai government's reluctance to educate Khmer refugees, much less the refusal of the Turkish government

[1533] "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": 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. Thus, a recent report noted that "[w]hen discussing, for example, the report of Zaïre, the Committee made it clear that charging fees for primary education is contrary to article 13, paragraph 2(a). A State party cannot justify such a measure by referring to severe economic circumstances": "The right to education as a human right: an analysis of key aspects: Background paper submitted by Fons Coomans," UN Doc. E/C.12/1998/16, Sept. 29, 1998, at para. 5.

[1534] "In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it 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. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints": 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, paras. 10–11.

[1535] "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals": Economic, Social and Cultural Covenant, at Art. 2(3). On one reading, the right to education is *not* an "economic" right, and therefore not subject to derogation by less developed countries under Art. 2(3). "The right to education . . . is the most outstanding example of the 'cultural rights' category, although some scholars maintain that it is a social right": M. Nowak, "The Right to Education," in A. Eide et al. eds., *The Universal Declaration of Human Rights: A Commentary* 189 (1992), at 196. Yet the Committee on Economic, Social and Cultural Rights has recently muddied the waters by asserting that the right to education "has been variously classified as an economic right, a social right and a cultural right. It is all of these": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 11: Plans of action for primary education" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 60, para. 2.

to allow non-governmental organizations to provide schooling to the children of Iraqi Kurdish refugees. Because these policies were intended to discourage refugee arrivals – and perhaps even indirectly to *refouler* refugees already present to their country of origin – they fail absolutely to meet the stringent criteria for justifiable non-compliance based purely on a genuine resource insufficiency.[1536]

But even if the fungibility of relevant obligations under the Economic Covenant were to be found to justify the withholding of primary education from non-citizens, the duty to provide elementary education under Art. 22 of the Refugee Convention admits of no such discretion. The right of refugees to access elementary education is rather a simple duty of result. While refugees are entitled to no greater access to elementary education than are nationals of the host country,[1537] they may not be denied access to education on the grounds that all nationals are entitled to be admitted before any refugees are provided for. Unless an express reservation of the kind entered by eight states – Egypt, Ethiopia, Malawi, Monaco, Mozambique, Papua New Guinea, Zambia, and Zimbabwe – is in place, the duty to assimilate refugees to nationals under Art. 22(1) means that the receiving country must share out whatever facilities and resources for elementary education it has on terms of equality between refugees and citizens. Thus, Malawi's reservation saved it from being in breach of Art. 22(1) when the number of primary school teachers made available for Mozambican refugees resulted in a 1:100 teacher–student ratio. But when Nigeria provided only meager educational facilities and supplies to Liberian refugees, or when Cambodia refused to provide any education facilities to urban refugee children, these states acted

[1536] The truly exceptional nature of a legitimate failure to provide primary education can be seen in the Committee on Economic, Social and Cultural Rights' approach to Art. 14 of the Covenant, under which states which do not already have universal and free primary education are "required to adopt a plan of action within two years . . . This obligation is a continuing one and States parties to which the provision is relevant by virtue of the prevailing situation are not absolved from the obligation as a result of their past failure to act within the two-year limit. The plan must cover all of the actions which are necessary in order to secure each of the requisite component parts of the right and must be sufficiently detailed so as to ensure the comprehensive realization of the right . . . A State party cannot escape the unequivocal obligation to adopt a plan of action on the grounds that the necessary resources are not available. If the obligation could be avoided in this way, there would be no justification for the unique requirement contained in article 14 which applies, almost by definition, to situations characterized by inadequate financial resources": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 11: Plans of action for primary education" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 60, paras. 8–9.

[1537] Thus, for example, there would be no breach of Art. 22 in a state such as Mauritania, which is unable to provide even its own citizens with free elementary education. See C. Lindstrom, "Urban Refugees in Mauritania," (2003) 17 *Forced Migration Review* 46.

contrary to the Convention – even if their actions might have been saved by Art. 2(1) or 2(3) of the Economic Covenant. Under the theory of the Refugee Convention, refugee children are not to be made to pay the price for resource insufficiency in the host state. Whatever financial insufficiencies are present are instead to be addressed by burden-sharing among states.[1538]

For developed countries, the duties to provide elementary education under the Refugee Convention and the Economic Covenant are essentially indistinguishable,[1539] as wealthier states cannot easily meet the test for valid failure to satisfy such a core right.[1540] In interpreting Art. 13 of the Covenant, the Committee on Economic, Social and Cultural Rights has made clear that

[1538] See chapter 3.3.2 above. See also UNHCR Executive Committee Conclusion No. 47, "Refugee Children" (1987), at para. (o), available at www.unhcr.ch (accessed Nov. 20, 2004), in which the Executive Committee "[r]eaffirmed the fundamental right of refugee children to education and called upon all States, individually and collectively, to intensify their efforts, in cooperation with the High Commissioner, to ensure that all refugee children benefit from primary education of a satisfactory quality, that respects their cultural identity and is oriented towards an understanding of the country of asylum"; UNHCR Executive Committee Conclusion No. 59, "Refugee Children" (1989), at para. (f), available at www.unhcr.ch (accessed Nov. 20, 2004), in which the Executive Committee "encouraged UNHCR to strengthen its efforts in assisting host country governments to ensure the access of refugee children to education, *inter alia* through the involvement of new organizations and governmental and non-governmental donors, and where necessary through the incorporation of appropriate arrangements in its programmes of assistance"; and UNHCR Executive Committee Conclusion No. 74, "General Conclusion on International Protection" (1994), at para. (gg), available at www.unhcr.ch (accessed Nov. 20, 2004), in which the Executive Committee "[u]rges UNHCR, in cooperation with Governments, other United Nations and international and non-governmental organizations, especially UNICEF and ICRC, to continue its efforts to give special attention to the needs of refugee children, ensuring, in particular, that arrangements are made for their immediate and long-term care, including ... education." The problem, of course, is that developed countries have not always met this ethical responsibility in a complete or timely way. UNHCR has assembled advice on how best to meet this challenge in J. Crisp et al. eds., *Learning for a Future: Refugee Education in Developing Countries* (2001).

[1539] "[T]here are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including article ... 13(2)(a) ... which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain": 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. 5.

[1540] See text above, at pp. 599–602. As Craven has written, "[a]lthough economic considerations will always play a part in any calculation relating to the implementation of the rights, the presumption is that developed States are under an obligation to implement the provisions of the Covenant immediately, the progressive nature of the obligations applying only to those States that lack sufficient resources to do so themselves": Craven, *ICESCR Commentary*, at 132–133.

compliance requires, *inter alia*, that primary education be completely free,[1541] and that there be no discrimination in accessing primary education, specifically on grounds of sex.[1542] The impermissibility of discrimination based on refugee (or "asylum-seeker") status is clear from Concluding Observations of the Committee on Economic, Social and Cultural Rights on the report of the United Kingdom:

> The Committee is deeply concerned by the information it has received concerning the treatment of Vietnamese asylum-seekers in Hong Kong. It is particularly concerned about the situation of the children and is alarmed by the statements made by the Government that these children have no entitlement to the enjoyment of the right to education or to other rights in

[1541] "The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. Their elimination is a matter which must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 11: Plans of action for primary education" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 60, para. 7.

[1542] "The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education. Similarly, the prohibition of gender discrimination in access to education, required also by articles 2 and 3 of the Covenant, is further underlined by this requirement": ibid. at 60, para. 6. See also 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. 5: "The Committee notes that since the General Assembly adopted the Covenant in 1966, other international instruments have further elaborated the objectives to which education should be directed. Accordingly, the Committee takes the view that States parties are required to ensure that education conforms to the aims and objectives identified in article 13(1), as interpreted in the light of the World Declaration on Education for All (Jomtien, Thailand, 1990) (art. 1), the Convention on the Rights of the Child (art. 29(1)), the Vienna Declaration and Program of Action (Part I, para. 33 and Part II, para. 80), and the Plan of Action for the United Nations Decade for Human Rights Education (para. 2). While all these texts closely correspond to article 13(1) of the Covenant, they also include elements which are not expressly provided for in article 13(1), such as specific references to gender equality and respect for the environment. These new elements are implicit in, and reflect a contemporary interpretation of, article 13(1)." The UNHCR Executive Committee has similarly expressed its concern that "all refugee women and girls [should be granted] effective and equitable access to basic services, including ... education and skills training": UNHCR Executive Committee Conclusion No. 64, "Refugee Women and International Protection" (1990), at para. (a)(ix), available at www.unhcr.ch (accessed Nov. 20, 2004).

> view of their status as "illegal immigrants." The Committee considers the situation inconsistent with obligations set forth in the Covenant.[1543]
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> Finally, and perhaps most interesting, the Committee has determined that ... the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students ... [E]ducation has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.[1544]

This interpretation raises interesting questions about whether the curriculum should, as UNHCR normally advocates, be presumptively oriented to preparation for repatriation, rather than designed to immerse refugees in the culture and society of the host country. Inflexibility in the opposite direction – for example, the UN's decision to implement a Western curriculum for Cambodian refugees in Thailand in order to prepare them for resettlement – may also be legally problematic.

[1543] "Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland," UN Doc. E/C.12/1994/19, Dec. 21, 1994. This is in line with the general position of the Committee that non-citizen status is not usually to be understood as a legitimate ground for discrimination. "[T]he State party's other obligations, such as non-discrimination, are required to be implemented fully and immediately": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 11: Plans of action for primary education" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 60, para. 10. The content of this duty of non-discrimination was subsequently elaborated to include access "to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds ... The prohibition against discrimination enshrined in article 2(2) of the Covenant ... encompasses all internationally prohibited grounds of discrimination. The Committee interprets articles 2(2) and 3 in the light of the UNESCO Convention against Discrimination in Education, the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the ILO Indigenous and Tribal Peoples Convention, 1989 (Convention No. 169)": 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, paras. 6(b)(i) and 31. The Committee on Economic, Social and Cultural Rights has moreover traditionally treated nationality as a prohibited ground of discrimination. "Certainly, in so far as the Covenant establishes the rights of 'everyone,' non-nationals would have a right to the enjoyment of the minimum content of those rights. Thus, in practice, the Committee will censure situations where aliens enjoy few rights and are the object of exploitation": Craven, *ICESCR Commentary*, at 174.

[1544] 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, paras. 6(c)–(d).

Similar concerns arise where, as in the case of Burundians in Tanzania or Eritreans in Sudan, refugee parents wish education to focus on preparation for repatriation, but the host state prefers to orient teaching towards integration of the refugees. On balance, though, so long as the delivery of integration-oriented education proceeds from a genuine and reasonable belief that durable asylum is both needed and likely to be available in the host country, it is difficult to conceive of a basis upon which to criticize states such as Tanzania or Sudan for pursuing the integrative approach. If repatriation is unlikely, a focus on integration is very much adapted "to the changing societies and communities and respon[sive] to the needs of students within their diverse social and cultural settings."[1545] In line with Art. 13(3)–(4) of the Covenant,[1546] however, refugee parents should be allowed to establish alternative (repatriation-oriented) primary schools for their children if they wish, so long as minimum qualitative standards are met and the host state is not expected to fund those schools.

Much the same logic applies to the question arising in many Northern states of whether there is a duty to provide education in the native language of refugee children. While often a sensible policy, there is no consensus that governments have a duty to fund minority language education.[1547] While there would arguably be such a duty if repatriation were probable,[1548] the very nature of refugee status (in which there can be no such certainty, given the duty to protect refugees for as long as there is a real chance of persecution

[1545] Ibid. at paras. 6(c)–(d).

[1546] "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State ... No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State": Economic, Social and Cultural Covenant, at Art. 13(3)–(4).

[1547] "[A] State must respect the freedom of individuals to teach, for instance, a minority language in schools established and directed by members of that minority. This does not imply, however, that a State must allow the use of this language as the only medium of instruction; this would be dependent on the educational policy of the State. As a minimum, however, States must not frustrate the right of members of national, ethnic or linguistic minorities to be taught in their mother tongue at institutions outside the official system of public education. However, there is no State obligation to fund these institutions": "The right to education as a human right: an analysis of key aspects: Background paper submitted by Fons Coomans," UN Doc. E/C.12/1998/16, Sept. 29, 1998, at para. 15.

[1548] See text above, at p. 605, n. 1544.

in the home state) argues against this being a universal position. Thus, the failure of states such as Belgium and France to provide instruction in the refugees' mother tongue is not clearly in violation of the Covenant so long as refugee parents are not prevented, if they wish, from establishing institutions to provide education in that language.

While there was ready agreement that refugees should have unconditional access to elementary education, the drafters of the Refugee Convention debated at some length the extent to which refugees should be entitled to rights in regard to secondary and other non-elementary forms of education. The initial proposal on this issue assumed that refugees were already entitled to enter higher institutions of learning, but needed to be assimilated to the citizens of most-favored states in order to have access to scholarship and other funds to pay their tuition and fees.[1549] The drafters were made aware of "the difficulties which might arise in connection with the award of scholarships to refugees. It seemed that most scholarships were administered by a foundation and granted according to special provisions."[1550] Thus, the UN's strategy coming into the drafting process was predicated on the de jure accessibility of non-elementary education to refugees, and sought simply to overcome the practical impediments to higher education by enfranchising refugees within the ranks of privileged non-citizens.

Sadly, most governments took a distinctly less liberal view on advanced forms of education than they had on elementary education. While the German and Yugoslav delegations proposed sweeping amendments that would have granted refugees full national treatment in regard to advanced education,[1551] the majority of representatives were determined to limit the

[1549] "The [non-elementary] grades of education are generally speaking open to foreigners; refugees will therefore receive the benefit of this circumstance if they are placed on the same footing as other foreigners. [But] [s]ince refugees are in a precarious economic position and the Government of their country of origin takes no interest in them, it would be desirable to do more than merely accord them the ordinary rights enjoyed by foreigners; otherwise in practice although secondary and higher education is open to them, they will be unable, for want of money, to take advantage of it. For this reason it is proposed to grant refugees the most favourable treatment accorded to nationals of a foreign country": Secretary-General, "Memorandum," at 40.

[1550] Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 9.

[1551] Comparable proposals were tabled by Yugoslavia (UN Doc. A/CONF.2/31) and Germany (UN Doc. A/CONF.2/45). "[T]he purpose of his amendment ... was to grant refugees facilities in higher as well as in elementary education. Such generosity would not only benefit refugees, but also the countries in which they resided. Indeed, there was a kind of moral obligation on public authority to help young people who, through no fault of their own, had been placed in unfavourable conditions. Moreover, although assimilation was difficult for the elderly, everything should be done to make it

scope of entitlement. First, as in regard to elementary education, it was made clear that only *public* forms of post-elementary education are regulated by Art. 22(2).[1552] Second, while it was agreed that the Refugee Convention should specifically regulate "access to studies,"[1553] it was acknowledged that post-elementary educational institutions would retain significant autonomy to make merit-based evaluations of a refugee applicant's qualifications for admission,[1554] including the assessment of foreign credentials on the usual basis.[1555] And third, the governments were emphatic that the right of access to post-elementary education cannot be invoked as an indirect means to

possible and easy for young people to share fully in the life of the country of their adoption. They should consequently be allowed access to all educational opportunities in their new homeland": Statement of Mr. von Trutzschler of the Federal Republic of Germany, UN Doc. A/CONF.2/SR.10, July 6, 1951, at 11.

1552 "In the United Kingdom, higher education was in the hands of schools and universities, which were for the most part private institutions with their own regulations which could not be overruled by a Convention, particularly where fees were concerned. If it was understood that the provisions of paragraph 2 applied to public education only, his delegation would see no objection to accepting that text": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 9. See also the remarks of the representatives of Canada, France, Israel, and Belgium, ibid. at 9–10. The French delegate thus concluded "that there could not be any doubt concerning the interpretation of paragraph 2: it referred solely to public education and State scholarships. Private institutions could obviously not be compelled against their will to admit refugees or to grant them reduced rates": Statement of Mr. Rain of France, ibid. at 10. At the Conference of Plenipotentiaries, the British representative insisted that "[w]hat the Conference must do was to bind states to give equality of treatment to refugees in the institutions over which the State had control": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.10, July 6, 1951, at 14.

1553 The Belgian representative to the Ad Hoc Committee "suggested that the words 'access to education' be inserted ... since access to education was a matter of considerable importance": Statement of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.38, Aug. 17, 1950, at 9.

1554 This was a matter of particular concern to the Belgian representative, who was anxious to safeguard "the distinction [in Belgium] that study abroad qualified the candidate for admission to schools of a certain grade only if such study was recognized by an examining board as being equivalent to Belgian elementary or secondary education": Statement of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 25. In response, the French representative opined that "the instances cited by the Belgian representative were of minor importance and an explicit reservation could not in any way reflect badly upon the country making it": Statement of Mr. Juvigny of France, ibid. at 26. But in the end, it was agreed that so long as the assessment "was one not of nationality but rather of qualifications," it did not infringe the Convention: Statement of the Chairman, Mr. Larsen of Denmark, ibid. at 25.

1555 Statement of Mr. van Heuven Goedhart of UNHCR, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 6. The General Comment on the cognate right in the Economic, Social and Cultural Covenant allows for screening "by reference to all their relevant expertise and experience": 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. 19.

insist on admission to a trade or profession for which the education acquired is the usual prerequisite. As the French representative explained,

> [T]he two questions should not be linked together, since the practice of a profession was dealt with in other articles. A scientific standpoint had to be adopted in the present case, whereas the question of exercising a profession should be decided on a non-scientific basis. The fundamental purpose of article [22(2)] was to prevent the son of a refugee from being forbidden to enter a given faculty. For example, a student who became a refugee after completing two years of medical studies should be allowed to continue those studies.[1556]

Concluding the discussion on this point, the Chairman of the Ad Hoc Committee observed that

> it would seem to him an unhappy solution if the State of residence were to refuse a refugee the right to obtain an education only on the ground that he would be unable as an alien to practice his profession. He might wish to get an education merely for his private scientific enjoyment, or he might wish to emigrate to another country and there to practice his profession. It was also possible that a person studying some science was not eligible for citizenship at the time when he was a student, for instance because he was not able to support himself; but he might nevertheless be interested in getting an education and a degree, hoping to be naturalized afterwards, whereupon he would be able to use the degree. So, in any event, the question of education and degrees covered by article [22(2)] should not be combined with the exercise of liberal professions dealt with in article [19].[1557]

But by far the most significant decision taken was to reject the duty to assimilate refugees to most-favored foreigners, and instead to grant them post-elementary education rights only to the extent these are enjoyed by "aliens generally." Because Art. 22(2) regulates "the remission of fees and charges and the award of scholarships," governments attending the Conference of Plenipotentiaries resurrected concerns which had been overcome in the Ad Hoc Committee[1558] that the provision would require the

[1556] Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 26. Thus, Grahl-Madsen concludes that "[o]nce a child of a refugee has been given the benefit of Article 22(2), he should continue to [enjoy that right] until he has finished the school to which he has been admitted, and until his diploma etc. has been superseded by another one of higher standing": Grahl-Madsen, *Commentary*, at 86.

[1557] Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 27–28. See also Statement of Mr. Henkin of the United States, ibid. at 28: "[I]t was better to allow an opportunity for study to a refugee, even if afterwards he could not practise a liberal profession, rather than prevent him from obtaining an education at all."

[1558] In response to arguments for redrafting to accommodate states anxious to preserve the right to award special bilateral and other scholarships, the United States insisted that "he did not think that preferential treatment had been excluded from the most favourable

assimilation of refugees to students for whom special arrangements had been made under bilateral funding agreements.[1559] For example, the United Kingdom had made special provision to grant scholarships to Polish citizens,[1560] while Venezuela had particular scholarship arrangements with the "Bolivar countries, with which it was linked by ties of history and consanguinity."[1561] The general sense was that states should be free to make such special arrangements without fear that they were thereby indirectly assuming significant obligations to fund the education of refugees. On the initiative of the British government,[1562] the required standard of treatment was therefore reduced to "treatment as favorable as possible, and, in any event, not less favorable than that accorded to aliens generally in the same circumstances."[1563] Moreover, while there is nothing in the drafting history to suggest an intention by states to apply this lower standard of treatment to

treatment clause and would not like that interpretation adopted. If the Benelux countries, for example, were not prepared to accord their special treatment to refugees, he would prefer it to be stated in the form of a reservation": Statement of Mr. Henkin of the United States, ibid. at 24. See also Statement of Mr. Weis of the IRO, ibid.; and the Chairman, Mr. Larsen of Denmark, ibid. This led to the adoption of the more generous standard, under which states agreed to "accord to refugees the most favorable treatment accorded to nationals of a foreign country with respect to education other than elementary education and, in particular, as regards access to studies, the remission of fees and charges and the award of scholarships": "Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session," UN Doc. E/1850, Aug. 25, 1950 (Ad Hoc Committee, "Second Session Report"), at 21.

1559 "[I]n France there was a distinction between scholarships awarded under bilateral treaties, and those by which refugees could benefit ... [A]lthough the French Government was prepared to give refugees all possible assistance in that direction, it would not go beyond the measures already taken": Statement of Mr. Rochefort of France, UN Doc. A/CONF/2/SR.10, July 6, 1951, at 14.

1560 Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 23; repeated in the Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.10, July 6, 1951, at 14.

1561 Statement of Mr. Perez Perozo of Venezuela, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 23.

1562 "In the United Kingdom Government's view the legal effect of paragraph 2 would be to impose upon it the obligation of treating all refugees as favourably as it had done one particular group. The countries linked by the Brussels Treaty were also endeavouring to extend reciprocal arrangements between them to a large number of fields. It might be that schemes for the exchange of students and for scholarships would be developed. There again, such special arrangements would be inapplicable to refugees ... [H]e could not help but feel that it would be preferable to redraft the text so as to make it generally acceptable rather than to adopt it as it stood and oblige a number of governments to enter reservations": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.10, July 6, 1951, at 14–15.

1563 Indeed, it was only when reminded by the UNHCR of the way in which this level of attachment had ordinarily been framed elsewhere in the Convention that the reference to "treatment as favourable as possible" was included in Art. 22(2): Statement of Mr. van Heuven Goedhart of UNHCR, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 5.

the other matters regulated by Art. 22(2) – specifically, access to post-elementary education and the recognition of academic credentials[1564] – the text as adopted nonetheless makes clear that on these questions also, the duty of states is simply to treat refugees at least as well as they do aliens in general.

Under the Refugee Convention, then, there is no basis for contesting Tanzania's requirement that refugees be admitted to post-elementary education only as part of the overall 2 percent of places assigned to non-citizens; or Zambia's policy that refugees apply for the same costly student permit required of other aliens; or Canada's insistence that persons seeking recognition of refugee status seek the same exercise of particularized discretion to attend college or university that is required of all other non-citizens. On the other hand, Australia's policy of denying access to English-language education to refugees granted a "temporary protection" visa, but not to other refugees (or to resident non-citizens in general), puts it in breach of the duty to grant *all* persons who are in fact Convention refugees at least the same access to education (other than elementary education) as is enjoyed by aliens generally.

Because of the various limitations inherent in Art. 22 of the Refugee Convention,[1565] refugees seeking to benefit from other than elementary education will in many cases do well to invoke Art. 13(2) of the Economic Covenant. Under clauses (b) and (c), "secondary" and "higher" education must be made "generally available and accessible *to all* [emphasis added]." While poorer states may rely upon the Economic Covenant's general duty of progressive implementation to justify an overall insufficiency of secondary education opportunities or the failure progressively to make such education free of charge,[1566] there must be no discrimination against non-citizens in

[1564] The French representative, for example, had made clear that "[t]he reservations made by his delegation concerned the award of scholarships to aliens, and in that connection it should be noted that in France all aliens had access to all educational establishments, except for certain large schools which prepared candidates for posts from which aliens were excluded ... although they might, in certain conditions, be admitted with alien status": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.10, July 6, 1951, at 17.

[1565] The weakness of the Refugee Convention on this point is clear from the framing of UNHCR Executive Committee Conclusion No. 37, "Central American Refugees and the Cartagena Declaration" (1985), at para. (p), available at www.unhcr.ch (accessed Nov. 20, 2004), in which the Executive Committee "*[r]ecognized the need* of refugee children to pursue further levels of education and *recommended* that the High Commissioner *consider* the provision of post-primary education within the general Program of assistance [emphasis added]."

[1566] Note, however, that "[t]he realization of the right to education over time, that is 'progressively,' should not be interpreted as depriving States parties' obligations of all meaningful content. Progressive realization means that States parties have a specific and

granting access to secondary or higher forms of education.[1567] Because education at these levels, in contrast to primary education, need not be immediately free of charge,[1568] it is plausible that under the UN's "reasonableness" approach to the assessment of discrimination[1569] an equitable system of cost-recovery from non-citizens who have yet to contribute to the public funding base for advanced education might be found to be justifiable.[1570] It is, however, less clear that the European Union's decision to grant refugees post-secondary education opportunities only to the same extent provided to "third country nationals legally resident" would also be found to be reasonable, since in contrast to other non-citizens refugees cannot freely and safely avail themselves of such opportunities in their country of nationality.

The formulation of post-elementary education rights in the Economic Covenant is also valuable to refugees in several additional ways. First, it is clear that technical and vocational education is within the scope of guaranteed "secondary education."[1571] Second, whereas the Refugee Convention authorizes merit-based assessments to govern access to all post-elementary

continuing obligation 'to move as expeditiously and effectively as possible' towards the full realization of article 13": 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. 44.

1567 "[E]ducational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party": 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. 6(b). See text above, at p. 600. If, however, the interpretation of the right to education as an "economic" right is accepted, less developed countries are entitled under Art. 2(3) of the Covenant to withhold any such protection from non-citizens. See text above, at. p. 601.

1568 In regard to secondary and higher education, the relevant obligation is simply to increase accessibility "by the *progressive* introduction of free education [emphasis added]." While this duty does not allow for inaction (see text above, at pp. 600–601), neither does it set an immediate obligation of result.

1569 See chapter 2.5.5 above, at pp. 128–145.

1570 If, however, tuition or similar educational fees are deductible expenses or otherwise wholly or partially rebated to citizens of the asylum state, refugees must receive the same benefit by virtue of Art. 29 of the Refugee Convention: see chapter 4.5.2 above.

1571 "Technical and vocational education (TVE) forms part of both the right to education and the right to work (art. 6(2)). Article 13(2)(b) presents TVE as part of secondary education, reflecting the particular importance of TVE at this level of education": 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. 15. This is not to say that such education is clearly excluded from the requirements of the Refugee Convention, simply that it is not explicit there. In Grahl-Madsen's view, "[t]he phrase ["education other than elementary education" in the Refugee Convention] comprises general higher education as well as vocational training": Grahl-Madsen, *Commentary*, at 87.

education, Art. 13(2)(b) of the Covenant requires that access to secondary education – as distinguished from higher (e.g. college and university) education[1572] – be subject to no such evaluations. The Committee on Economic, Social and Cultural Rights has made clear that "[t]he phrase 'generally available' signifies ... that secondary education is not dependent on a student's apparent capacity or ability."[1573] Third, the reference in Art. 13(2)(d) of the Covenant to the importance of "[f]undamental education ... for ... persons who have not received or completed the whole period of their primary education" is, while not formally binding,[1574] a clear signal that adult education in literacy, numeracy, and social orientation education is a matter of international concern.

Finally, it is particularly interesting that Art. 13(2)(e) goes some distance to meeting the original concern of the drafters of the Refugee Convention, namely that legal access to education would be meaningless to most refugees if not provided with the financial wherewithal to pay their tuition and fees. Under this clause, governments commit themselves ("shall") to establish "an adequate fellowship system" applicable at all levels of education – primary, secondary, higher, and fundamental. Of critical importance to refugees, "[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."[1575] To the extent that refugees are forced to rely on an inferior scholarship system in order to access any level of education, they may therefore invoke Art. 13(2)(e) to contest their exclusion.[1576] At least in developed countries not entitled to withhold economic rights from aliens in reliance upon Art. 2(3) of the Covenant, any attempt to limit refugees to educational funding sources established by UNHCR or other agencies would require justification in relation to norms of non-discrimination law.

[1572] Access to higher education is governed by Art. 13(2)(c), which does allow restrictions to access "on the basis of capacity."

[1573] 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. 13.

[1574] In contrast to access to secondary and higher education – which "shall be made equally accessible to all" – fundamental education "shall be encouraged or intensified as far as possible."

[1575] 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.

[1576] Thus, for example, the Committee on Economic, Social and Cultural Rights critiqued the Canadian practice of excluding refugees not yet in receipt of permanent resident status from eligibility for post-secondary education loan programs: "Concluding Observations: Canada," UN Doc. E/C.12/1/Add.31 (1998), at paras. 37, 39, 49.

4.9 Documentation of identity and status

Whatever rights are held by refugees may be of little value if their refugee status cannot be proved. The critical importance of documentary proof of identity was described in an information note submitted to UNHCR's Executive Committee in 1984:

> For a refugee, the lack of identity documents may be far more than a source of inconvenience. In almost all countries an alien must be able to prove not only his identity, but also that his presence in the country is lawful. In some countries aliens without appropriate documentation are subject to detention and sometimes even to summary expulsion. Such measures are particularly serious for a refugee, for whom they could involve the risk of being returned to his country of origin. Even where the consequences of being without documentation are less drastic, the refugee, in order to benefit from treatment in accordance with internationally accepted standards, needs to be able to establish vis-à-vis government officials not only his identity, but also his refugee character. Due to circumstances in which they are sometimes forced to leave their home country, refugees are perhaps more likely than other aliens to find themselves without identity documents. Moreover, while other aliens can turn to the authorities of their country of origin for help in obtaining documents, refugees do not have this option.[1577]

While most refugees do have access to state-issued documentation that confirms both their personal identity and legal status,[1578] there are three major exceptions.

First, a few host states refuse to distinguish between the legal status of refugees and that of other non-citizens. Burmese refugees in Thailand, for example, have not been considered "refugees" at all, but rather "displaced persons."[1579] Because their presence is unauthorized, they have been given no

[1577] UNHCR, "Identity Documents for Refugees," UN Doc. EC/SCP/33, July 20, 1984 (UNHCR, "Identity Documents"), at paras. 2–3.

[1578] Ibid. at para. 12. Progress has moreover been achieved on this front in many states. "In Kenya, for instance, the government initiated a major exercise to issue 100,000 adult refugees with laminated photographic identity cards. In Ecuador, a shared government–UNHCR database paved the way for personal documents for all Colombian asylum-seekers and refugees. In other operations, such as those in Côte d'Ivoire, Georgia, Guinea, and Yemen, UNHCR reached agreements with the government that photographic identity cards should be issued not only to all adult men, but also to women, thereby enhancing protection of refugee women in particular ... In another positive development, UNHCR began in late 2002 issuing asylum-seekers documentation with the cooperation of Egyptian authorities, helping prevent detention for illegal stay": UNHCR, "Note on International Protection," UN Doc. A/AC.96/975, July 2, 2003, at para. 5.

[1579] Thailand "has never recognized as refugees the Burmese ethnic minority refugees living near the Burmese border": US Committee for Refugees, *World Refugee Survey 1997* (1997), at 119.

identity documentation of any kind. Only a small minority of the Burmese refugees – primarily former students active in Burma's democracy movement – were recognized as "persons of concern" by UNHCR, and issued UNHCR identity documents. The government's insistence in 1989 that UNHCR cease providing documentation of status even to this group resulted in arrests, detention, and instances of forced repatriation by Thai authorities.[1580]

A second and more general concern is the unwillingness of authorities in many states to provide identity documentation until and unless an asylum-seeker's refugee status has been formally verified. Indeed, a majority of states which responded to a UNHCR survey on implementation of the Refugee Convention indicated that the provision of documentation to refugees is dependent on a positive determination of refugee status.[1581] In Russia, for example, refugees from non-CIS states are routinely denied identity documents. The Russian government refuses to accept their applications for asylum,[1582] and local authorities deny them the residence permits needed to legalize their presence.[1583] While the UNHCR does register such asylum-seekers, Russian authorities do not always respect this form of

[1580] "With no written document, Burmese have no way of identifying themselves as 'persons of concern to UNHCR' to Thai police. 'Persons of concern' facing arrest, trial, detention and deportation often have difficulty contacting UNHCR, leaving the refugee in an even more vulnerable position vis-à-vis the police": Asia Watch, "Abuses Against Burmese Refugees in Thailand" (1992), at 6. "Thailand has allowed UNHCR to assess the refugee claims of some Burmese, but it regards UNHCR-recognized refugees as illegal immigrants": US Committee for Refugees, *World Refugee Survey 2003* (2003), at 134. In the result, "[d]ue to the absence of official government recognition of their situation, the Shan refugees in the Shan State–Thailand border continue to languish in desperate conditions ... Their protection needs are largely unmet": (2002) 122 *JRS Dispatches* (Nov. 22, 2002).

[1581] UNHCR, "Information Note on Implementation of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees," UN Doc. EC/SCP/66, July 22, 1991, at para. 38.

[1582] "Many asylum-seekers ... are left in legal limbo for years, unable to even register their asylum claim and obtain documents identifying them as asylum-seekers": Amnesty International, "Russian Federation: Failure to Protect Asylum Seekers" (1997). "By law, registration of applicants should take no more than five days. The [government], however, continued to place asylum-seekers on a pre-registration waiting list without issuing them documents confirming their applicant status. The waiting period, on average, lasted 18 months to two years, leaving asylum-seekers vulnerable to police harassment": US Committee for Refugees, *World Refugee Survey 2003* (2003), at 214.

[1583] "In some cities, official refugee status is required for a residence permit, while at the same time refugee status cannot be obtained without a resident permit": US Committee for Refugees, *World Refugee Survey 1997* (1997), at 206. Other obstacles to obtaining a residence permit include exorbitant fees, which in Moscow equate to 500 times the legal minimum wage. Residence registration systems have remained in use despite the Constitutional Court ruling of April 1996 which struck down the notorious *propiska* system: ibid.

identification.[1584] In the result, refugees are often treated as illegal immigrants, and subjected to extortion, harassment, arbitrary detention, physical abuse, and the threat of *refoulement*.[1585] They are "denied most rights, including the right to work, to receive public assistance and non-emergency health care, or even to register marriages and births. Many schools do not accept the children of far-abroad asylum-seekers because of their illegal status."[1586] South Africa, in contrast, issues a formal "asylum-seeker permit" to all refugees arriving in its territory. There have, however, been complaints that these permits are not in fact issued within the two weeks required by law, during which time refugees are "at risk of being apprehended, detained or even deported."[1587]

Even where some form of documentation is provided to asylum-seekers, it may not be generally recognized within the community at large. In Argentina, for example, the certificate of "precarious presence" issued to asylum-seekers pending assessment of the refugee claim is not considered to be valid by most employers, often resulting in exploitative employment relationships.[1588] Similarly, Canada's practice during the late 1990s of not processing Somali and Afghan refugees for permanent residency until five years after arrival in

[1584] Amnesty International quotes Lt.-Gen. Ivan Rakmanin of the border guards of Kaliningrad district as saying that "[UNHCR] identity cards given out to these people are not considered as documents by our law enforcement officials": Amnesty International, "Russian Federation: Failure to Protect Asylum Seekers" (1997). "Because most far-abroad asylum-seekers, including those registered with UNHCR, never receive refugee status, Russian authorities consider them to be illegal migrants": US Committee for Refugees, *World Refugee Survey 2003* (2003), at 216. See also R. Redmond, "Old Problem in a New World," (1993) 94 *Refugees* 28, at 30.

[1585] "[R]andom identity checks on the streets of cities in Russia are common and asylum-seekers without the proper residence registration papers often report being threatened with detention or even *refoulement* to their country of origin": Amnesty International, "Russian Federation: Failure to Protect Asylum Seekers" (1997).

[1586] US Committee for Refugees, *World Refugee Survey 2003* (2003), at 216.

[1587] *The Sowetan* (Johannesburg), May 11, 2000. This is confirmed by Jesuit Refugee Service advocacy and information officer in Johannesburg, Paulin Mbecke, who reported a "protest ... against the blatant hostility shown by Home Affairs officials towards asylum-seekers and their failure to provide documentation for new arrivals. Among their grievances, asylum-seekers underlined the arbitrary use of power by officials and the failure to treat immigrants in a humane and dignified manner. The response from the Home Affairs Braamfontein officer in charge, Mr. Nkululeko, was that due to a shortage of staff and equipment, the office is unable to be more helpful": (2000) 83 *JRS Dispatches* (Dec. 2, 2000). Importantly, however, the Durban High Court intervened to order the Minister of Immigration and his Director-General to issue identity documents to two Rwandan refugees, failing which they would be held in contempt of court: "Court gives Buthelezi ultimatum over Rwandan students' documents," *Business Day*, May 28, 2003; "Buthelezi narrowly escapes jail sentences," *The Mercury*, June 5, 2003.

[1588] S. Fraidenraij, *International Academy of Comparative Law National Report for Argentina* (1994), at 9.

Canada – in contrast to its usual practice of moving immediately to assimilate recognized refugees – meant that these refugees, who lacked the permanent resident documentation normally possessed by refugees, were less likely to receive good job offers from employers.[1589] In Egypt, not even government officials have always respected refugee identification cards. During a police campaign of mass arrests of foreigners in early 2003, "[i]ndividuals carrying blue identification cards issued by the UNHCR were arrested alongside undocumented foreigners. Refugees explained to Human Rights Watch that the police repeatedly told them the UNHCR cards were 'useless.'"[1590]

A third set of problems arises in those states which do not ordinarily engage in the formal assessment of refugee status, but which simply acquiesce in the presence of refugees on their territory. The system which prevailed in Pakistan until 1992 required Afghan refugees who wished to procure an identity document ("Shanakti pass") to provide a recommendation from one of seven registered Afghan political parties. This process resulted in the denial of documentation to many non-partisan Afghan refugees in Pakistan.[1591] The failure of authorities in Côte d'Ivoire to provide identity documents to its Liberian refugee population prevented them from traveling outside of designated reception areas, and "[e]ven within the reception area, refugees [could] face harassment or arrest by the police for not carrying

[1589] "In 1996, Immigration Minister Lucienne Robillard decreed that Somali and Afghani refugees must wait for five years after coming to Canada before they can be considered for permanent status. They need time, she said, 'to demonstrate respect for the laws of Canada and for us to detect those who may be guilty of crimes against humanity or acts of terrorism.' Most Somali refugees don't have any kind of identification or travel documents. 'Many Somalis have never had such documents,' says one man angrily. 'And there is no government in Somalia, not for years. So who would issue documents?' Without permanent status, says Abdirahman Aden Sabriye, a community development worker ... 'you can't get a decent job. No employer is willing to give you training. You are stuck. You become helpless. There is depression, stress, mental problems'": B. Taylor, "The school where pupils look forward to Mondays," *Toronto Star*, Mar. 7, 1999. The "Undocumented Convention Refugees in Canada Class," by virtue of which this practice was implemented, was abolished with the entry into force of the *Immigration and Refugee Protection Act 2002*. "UCRCC, by the Department's own figures and evaluation, has been a colossal failure, and at the practical level it created new problems. Since the introduction of the UCRCC there was a reported escalation in the rate at which Somali and Afghan documents, including passports, were being summarily rejected without proper consideration": H. Mohamed and H. Kits, "Protecting the Unprotected: Submission to the House of Commons Standing Committee on Citizenship and Immigration," Feb. 14, 2002, at 7.

[1590] Human Rights Watch, "Egypt: Mass Arrests of Foreigners, African Refugees Targeted in Cairo," Feb. 10, 2003.

[1591] Letter from Mr. Ray Fell of UNHCR Islamabad to Ms. Nausheen Ahmad of Shirkat Gah, Aug. 18, 1994, cited in N. Ahmad, *International Academy of Comparative Law National Report for Pakistan* (1994).

proper identification."[1592] Rwandan refugee leaders voiced their concern that Tanzania would not issue them with generic refugee status identification cards, fearing that the purpose of the alternative "refugee labor card" issued only to refugees employed by UNHCR and other agencies was "to identify [an] elite group in Tanzania for the Government of Kigali ... This kind of action could constitute [an indirect] way to fulfill a plan of forced repatriation of the Rwandan refugees."[1593] Nepal has failed to register a whole generation of Tibetan refugees born in Nepal (but not granted Nepali citizenship),[1594] and declined to register refugees from Bhutan for more than a decade. It agreed to issue identity certificates only when the prospect of repatriation was in sight, and when it had secured the agreement of Bhutan to assist in the verification process.[1595] And in late 2000, Zambia implemented a computerized system to issue refugee identity cards in cooperation with UNHCR, but its purpose is strictly to identify the minority of refugees authorized to reside in urban areas.[1596]

Refugee Convention, Art. 27 Identity papers
The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Under the early generations of refugee treaties, refugees were issued a single identity document – originally known as a "Nansen passport" in honor of the first High Commissioner for Refugees, later simply as a "travel

[1592] Lawyers' Committee for Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention* (1995), at 50. "[M]ost refugees in Côte d'Ivoire lacked identity documents, leaving the refugee population vulnerable to harassment and arbitrary detention by police. A joint program by the government and UNHCR to issue identity cards began in 1999, but little progress was made during 2000 and 2001 because many police regarded the document as invalid. Refugees living in the capital, Abidjan, continued to receive new identity cards, however": US Committee for Refugees, *World Refugee Survey 2002* (2002), at 68.

[1593] Letter from Faustin Nkomati and two colleagues to the UNHCR Ngara Office, Jan. 30, 1996. In a letter of Jan. 6, 1996 written to the NGO Forum in Ngara, UNHCR had defended the labor card system, noting the importance of its secondary purpose – namely, to identify persons excluded from refugee status because they were reasonably believed to have contributed to the genocide.

[1594] "In 1963, Tibetan refugees who were 18 years of age or older were registered and issued identification cards ... Since then, however, there have not been any further registrations, and a whole generation of Tibetans born in Nepal – but not Nepali citizens – remains unregistered": US Committee for Refugees, "Tibetan Refugees: Still at Risk" (1990), at 12.

[1595] (2001) 89 *JRS Dispatches* (Mar. 22, 2001).

[1596] *Pana* (Lusaka), Nov. 10, 2000. Ironically, this system which facilitates denial of the right of refugees to internal freedom of movement (see chapter 4.2.4) was celebrated by the UNHCR Representative in Lusaka, who noted that "Zambia is among the first countries in the world where the system of registering refugees will be fully operational": ibid.

document" – which served both to facilitate international travel by refugees, and also to identify its holder as a refugee authorized to reside in the asylum country.[1597] For reasons elaborated below,[1598] the drafters of the 1951 Refugee Convention elected to provide themselves with some discretion to refuse to issue refugees with international travel documents on national security or public order grounds, as well as to standardize the format of those documents. A separate draft article was therefore proposed to stipulate the duty to provide refugees with a more general form of identification, essentially for use within the asylum country.[1599]

The working drafts of what became Art. 27 assumed that the general identity document would, as under the earlier treaties, only be issued to "refugees authorized to reside" in the state party, in consequence of which the duty under Art. 27 would ordinarily be met by issuance of a residence card to the refugee.[1600] This proposal did not survive the scrutiny of the Ad Hoc Committee, however, which insisted that not all refugees would necessarily be granted a right of residence in the state party[1601] (and indeed, no binding duty to grant residence was made part of the Convention[1602]). Yet, as the French representative observed, there was nonetheless a need to document the status of persons

> whose presence was merely tolerated on a temporary basis following an illegal crossing of the frontier. The latter only enjoyed the right of asylum

[1597] UNHCR, "Identity Documents," at para. 4. [1598] See chapter 6.6 below.

[1599] "The 'identity papers' with which Art. 27 deals are for internal use, as contrasted with 'travel documents' to be used for journeys abroad. It is a paper certifying the identity of a refugee": Robinson, *History*, at 133.

[1600] "The High Contracting Parties undertake to issue identity papers (residence card, identity card, etc.) to refugees (and stateless persons) authorized to reside in their territory": Secretary-General, "Memorandum," at 41. The commentary noted that "[i]t is the practice to issue identity papers, under various designations, which serve both as identity cards and residence permits. This practice, which meets an essential requirement, should be generalized": ibid. The relevant provision in the French working draft for the Convention (draft Art. 16) was identical: France, "Draft Convention," at 7.

[1601] "Mr. Rain [of France] urged that the Committee could not decide on a text for the question of residence permits until a satisfactory formula on the right of residence had been adopted": Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 13. See also Statement of Mr. Henkin of the United States, ibid. at 14, who went so far as to propose "that in order to avoid any misinterpretation the first part of the article should be drafted to read: 'Without prejudice to the right of the High Contracting Parties to regulate the right of entry for permanent residence in the country.'" The same view prevailed at the Conference of Plenipotentiaries, where the Dutch representative insisted that the official record confirm that "[t]he High Commissioner had made it clear that the duty imposed on States by article [27] in no way impaired their right to control the admission and sojourn of refugees": Statement of Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 17.

[1602] See chapter 7.4 below.

> until such time as their position had been regularized by the issuance of a temporary and later of a permanent residence permit. While ... such permits would in practice serve them primarily as identity cards, there was a secondary aspect of the problem, since a variety of documents could serve as proof of identity. The residence permit was thus only secondarily an identity card; *it primarily constituted permission to reside in the reception country* [emphasis added].[1603]

As this makes clear, the purpose of what became Art. 27 was not to document identity in some abstract sense, but rather to document – albeit on a provisional basis – the refugee status of the person concerned.[1604] Indeed, the revised formula which emerged from a Working Group of the Committee seems explicitly to have been based on the French delegate's approach:

> The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid passport issued pursuant to Article [28, i.e. a Convention Travel Document].[1605]

This formula, which was adopted by the Ad Hoc Committee without comment,[1606] is noteworthy in two respects.

First, in contrast both to the working drafts and to all prior refugee treaties, the identity document in question is not to be withheld until a refugee is "lawfully staying" in the asylum country.[1607] The drafting history leaves no room for doubt that this formulation was intended to enfranchise asylum-seekers immediately upon their arrival.[1608] Indeed, at the Second Session of

[1603] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 13.

[1604] The Canadian representative, for example, initially expressed some discomfort at Art. 27's duty to issue a certificate "guaranteeing re-admission to its territory": Statement of Mr. Winter of Canada, UN Doc. E/AC.32/SR.38, Aug. 17, 1950, at 23. Canada agreed at the Conference of Plenipotentiaries that it would meet its Art. 27 obligations by issuance of an "immigrant's record of landing," reflecting the then-prevailing practice of assimilating refugees immediately upon arrival: Statement of Mr. Chance of Canada, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 17.

[1605] "Decisions of the Working Group Taken on 9 February 1950," UN Doc. E/AC.32/L.32, Feb. 9, 1950, at 10.

[1606] UN Doc. E/AC.32/SR.23, Feb. 10, 1950, at 8.

[1607] This view is confirmed by state practice in Malta, the only country which has entered a reservation to Art. 27. While identity cards are not issued to refugees immediately upon arrival, "[a]ll refugees and asylum-seekers who are in Malta for a period over six months have the possibility of obtaining an official Maltese I.D. card": C. Buttigieg, *International Academy of Comparative Law National Report for Malta* (1994), at 8.

[1608] See Robinson, *History*, at 134: "Contrary to other articles, Art. 27 deals with 'any refugee in their territory,' thus indicating verbally that neither residence nor even lawful presence is required. All that is necessary is that the refugee be physically in the territory of the given state"; Weis, *Travaux*, at 213: "The provision applies to all refugees physically present in the territory, whether legally or illegally there"; and Grahl-Madsen, *Commentary*, at 115: "The identity papers envisaged in Article 27 shall not only be

the Ad Hoc Committee, the Belgian representative questioned the intent behind the amendment of Art. 27 to require the issuance of an identity certificate to "any refugee in their territory." He inquired

> whether the authors of the draft Convention would have any objection to the insertion of the word "lawfully" before the words "in their territory." He failed to see how any contracting party could agree to issue identity papers to refugees who were unlawfully in its territory or who were there on an essentially temporary basis. He assumed that the text referred to refugees who had been granted permission to reside in a country.[1609]

The response was swift and unequivocal. The American representative observed that "the Committee had agreed to extend the provisions of article [27] to all refugees, so that a refugee illegally present in any country, though still subject to expulsion, would be free from the extra hardships of a person in possession of no papers at all."[1610] Mr. Weis of the IRO insisted that "the intention of the Committee had been that every refugee should be provided with some sort of document certifying his identity, without prejudice to the right of the Government of any country in which he might be illegally present to expel him."[1611] And most forcefully of all, the French representative

> thought that was undoubtedly what the members of the Committee had in mind. When an alien whose position was irregular entered a country and the authorities of that country decided not to expel him immediately, he would be given a provisional document which he could produce if, say, he were stopped in the street; such a document would be purely provisional and its owner's stated identity might even prove to be false, but he would not be entirely an outcast and he would hold a provisional document enabling him to be identified.[1612]

The Belgian delegate accepted these explanations.[1613] The scope of the beneficiary class for Art. 27 was only once more alluded to during the drafting debates, resulting in a confirmation that the duty to issue identity papers "could not be refused to anyone, whatever his status or the legality of his presence in a given territory ... [T]he identity papers ... were not a legal document, but merely a temporary certificate of identity, in no way prejudging the future position of a refugee, or even his actual status as a refugee."[1614]

available to refugees lawfully in the territory, but also to those whose entry was illegal or whose position has not been regularized, however temporary their stay."

[1609] Statement of Mr. Herment of Belgium, UN Doc. E/AC.32.SR.38, Aug. 17, 1950, at 23.

[1610] Statement of Mr. Henkin of the United States, ibid. at 24.

[1611] Statement of Mr. Weis of the IRO, ibid. at 24.

[1612] Statement of Mr. Juvigny of France, ibid. at 24.

[1613] Statement of Mr. Herment of Belgium, ibid. at 24.

[1614] Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 23.

Thus, Russia's refusal to provide documents to non-CIS asylum-seekers is clearly in breach of Art. 27. On the other hand, the South African system, which mandates the delivery of provisional documentation to asylum-seekers within two weeks of arrival, seems a reasonable accommodation of the Art. 27 duty to administrative realities. It is critical, however, that even during such a brief delay, there be a means in place to meet refugees' most basic needs, and in particular to protect them from *refoulement*.

Art. 27's goal of ensuring that all refugees arriving in a state party receive provisional proof of their refugee status is affirmed by the second important change adopted by the Ad Hoc Committee. Rather than positing a general duty to issue identity documents, the text as adopted required states to provide such papers only to refugees not in possession of a Convention Travel Document (CTD) ("to any refugee in their territory who does not possess a valid passport issued pursuant to Article [28]").[1615] A CTD, issued under Art. 28, need only be issued to refugees "lawfully staying in their territory,"[1616] meaning in most cases refugees whose status has been verified and who have been granted the right to remain in the asylum country.[1617] Once in possession of the more authoritative CTD, the need for provisional documentation of refugee status would logically disappear – the holder of the CTD could use the document for travel, but it is also more than sufficient to substantiate the individual's status as a refugee for all domestic purposes, in line with pre-Second World War practice.[1618]

At the Conference of Plenipotentiaries, however, a drafting change was made that, if construed literally, has the potential to obscure the true purpose of Art. 27. On the motion of the delegate from France, the phrase "issued pursuant to article 28" was deleted as "superfluous in view of paragraph 2 of article 28."[1619] The latter paragraph requires that travel documents issued to refugees under earlier refugee treaties "be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article."[1620] The evident concern of the French representative was to avoid the need to provide identity documents to the large number of refugees

[1615] See Art. 27 as adopted by the Ad Hoc Committee, text above, at p. 620, n. 1605.
[1616] See generally chapter 6.6 below.
[1617] See chapter 3.1.4 above, at pp. 189–190.
[1618] See text above, at pp. 618–619. There is, however, one circumstance in which this analysis may not hold. Because a state has the discretion (but not the duty) to provide even persons whose refugee status has not been formally verified with a CTD (see chapter 6.6 below, at pp. 847–851.), some persons in possession of a CTD may not, in fact, be recognized by the granting state as Convention refugees. In practical terms, however, it is unlikely that a state would both grant an individual a refugee travel document and simultaneously treat him or her as a non-refugee.
[1619] Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 9.
[1620] Refugee Convention, at Art. 28(2).

who already held a travel document certifying their refugee status, albeit not one issued under the 1951 Refugee Convention.

But the text as adopted has been considered by many commentators to have much more drastic consequences. Specifically, because Art. 27 now requires identity documents to be issued only to refugees "who do not possess a valid travel document," it is sometimes argued that the only duty is to provide documentation of *identity*, not of *identity as a refugee*.[1621] Thus, it is said that a refugee who still possesses the passport of his or her country of origin, or who holds a visa from third state, need not be provided with identity documentation under Art. 27.[1622] Yet it is manifestly clear that documents of this kind – in contrast to either the CTD or equivalent refugee travel documents issued under earlier treaties intended by the drafters to limit the Art. 27 duty – in no way serve the purpose of Art. 27, namely to establish the refugee's provisional entitlement to be treated as a refugee.

The linguistic confusion is such that it is suggested even by UNHCR that "[i]dentity papers which show only the name, the date and place of birth, and the current address of the refugee would satisfy the literal requirements of Article 27."[1623] The agency clearly understands that documents of this kind have little value as a tool of international protection,[1624] and appreciates the vital importance of the real purpose of Art. 27 – namely, documenting on an

[1621] See Grahl-Madsen, *Commentary*, at 113: "The identity papers to which Article 27 refers ... are simply papers which show the identity of the refugee[ ], without conferring on him any rights at all."

[1622] "The provision applies only if the refugee does not possess a valid travel document, whether issued by the State in which he or she finds themself or by another State; it may even be their national passport": Weis, *Travaux*, at 213. "The expression ['travel documents'] – as used in Article 27 – probably also applies to aliens' passports, if duly visaed. It is important to note that Article 27 does not require that the travel document must be issued by the State in whose territory the refugee is present, and upon whom the duty to issue an identity paper would devolve if the refugee possessed no valid travel document. In other words, the State in whose territory a refugee finds himself is not obliged to issue identity papers if the refugee possesses a valid travel document, issued by the authorities of that State or of a foreign State": Grahl-Madsen, *Commentary*, at 116.

[1623] UNHCR, "Identity Documents," at para. 9.

[1624] "For purposes of international protection, however, it is often essential that such identity papers also indicate the holder's refugee status. Proof of refugees status may be of vital importance, for example, in situations where refugees are caught up in police operations directed against aliens whose presence in the country is considered unlawful": ibid. More generally, the Executive Committee has "[a]cknowledge[d] the importance of registration as a tool of protection, including protection against *refoulement*, protection against forcible recruitment, protection of access to basic rights, family reunification of refugees and identification of those in need of special assistance, and as a means to enable the quantification and assessment of needs and to implement the appropriate durable solutions": UNHCR Executive Committee Conclusion No. 91, "Conclusion on Registration of Refugees and Asylum-Seekers" (2001), at para. (a), available at www.unhcr.ch (accessed Nov. 20, 2004).

interim basis the holder's status as an asylum-seeker.[1625] Yet because of its failure to interpret the text in its context, UNHCR feels compelled to state its case as a recommendation,[1626] rather than an assertion of legal entitlement under Art. 27. In its Conclusion No. 35, the Executive Committee

> *Recommended* that asylum applications whose applications cannot be decided without delay be provided with provisional documentation sufficient to ensure that they are protected against expulsion or *refoulement* until a decision has been taken by the competent authorities with regard to their application.[1627]

Similarly, in Conclusion No. 91, the Executive Committee merely

> *[r]equests* States, which have not yet done so, to take all necessary measures to register and document refugees and asylum-seekers on their territory as quickly as possible upon their arrival, bearing in mind the resources available, and where appropriate to seek the support and co-operation of UNHCR.[1628]

In truth, however, these statements largely reflect the essence of the legal *duty* of states pursuant to Art. 27. There was absolutely no discussion at the Conference of Plenipotentiaries to suggest any desire to depart from the purposive interpretation adopted by the Ad Hoc Committee; to the contrary, the French representative's suggestion to amend the language to its present form was explicitly predicated solely on concern to take account of "travel documents issued by countries which, though non-Contracting States,

[1625] "During the period preceding the determination of refugee status, asylum applicants clearly have the same need for appropriate identity documents as recognized refugees": UNHCR, "Identity Documents," at para. 18.

[1626] "The risk of expulsion or *refoulement* may indeed be greater for the asylum applicant – whose status has not yet been regularized and whose entitlement to refugee status has yet to be determined – than for the recognized refugee. It follows therefore that the asylum-seeker *should* be provided with documentation adequate to ensure that his provisional right to protection against *refoulement* will be respected and that he will be treated in accordance with his status as a person who may in fact be a refugee [emphasis added]": ibid.

[1627] UNHCR Executive Committee Conclusion No. 35, "Identity Documents for Refugees" (1984), at para. (d), available at www.unhcr.ch (accessed Nov. 20, 2004).

[1628] UNHCR Executive Committee Conclusion No. 91, "Conclusion on Registration of Refugees and Asylum-Seekers" (2001), at para. (g), available at www.unhcr.ch (accessed Nov. 20, 2004). See also Executive Committee of the High Commissioner's Programme, "Agenda for Protection," UN Doc. EC/52/SC/CRP.9/Rev.1 (June 26, 2002), at Part III, Goal 1, Point 11: "In keeping with the Conclusion on Registration of Refugees and Asylum-Seekers (No. 91, 2001), and bearing in mind confidentiality requirements regarding the use of data, States are to register and document female and male refugees and asylum-seekers on their territory on an individual basis as quickly as possible upon their arrival, in a manner which contributes to improving their security, their access to essential services, and their freedom of movement."

nevertheless wished to accept refugees outside the framework of the Convention."[1629] In other words, provisional refugee identification would not be required by persons in possession of a travel document issued to refugees (under the Convention or otherwise), since a person in possession of a refugee travel document already had sufficient proof of his status as a refugee. But asylum-seekers – whether present legally or illegally, whether their claims were verified or not – are entitled to certification of their provisional right to be treated as refugees. This duty is equally applicable to states which do not routinely assess refugee status, with the result that the failures of Côte d'Ivoire to document Liberian refugees and of Nepal to provide identity certificates to the Tibetans and Bhutanese are inconsistent with the requirements of Art. 27.

There is no particular form which the identity document must take.[1630] Thus, Rwanda could validly choose to issue a "refugee labor card" rather than an identity certificate as such. Whatever its title, the document must simply enable refugees to avail themselves of the rights to which they are entitled. As such, there is no reason to see the Canadian decision to delay issuance of permanent resident documentation to Somali and Afghan refugees as a violation of Art. 27 (so long as some alternative proof of their refugee status was provided), since there is no obligation under the Refugee Convention to grant permanent entry to refugees.[1631] Nor is it impermissible for Argentina to issue asylum-seekers with a "certificate of precarious presence" if the only objection taken is that employers are reluctant to accept that document for employment purposes; refugees only acquire the right to engage in employment once they are "lawfully staying" in the host country.[1632]

Zambia's system, in contrast, is not in compliance with Art. 27, since it illegitimately purports to document only a minority of refugees as entitled to internal freedom of movement contrary to Art. 26 of the Convention.[1633] Egypt's delegation of authority to UNHCR to issue refugee identification seems similarly problematic, in that not even its own police officers appear to have understood the legal authority of the documentation issued. Even more fundamentally, both the Thai refusal to recognize the Burmese as refugees, and the former Pakistani practice of allowing expatriate Afghan political parties to decide who should be granted refugee status identification,

[1629] Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 9.

[1630] "Identity cards did not necessarily mean identity cards like those issued in European countries; they might simply consist of a document showing the identity of the refugee": Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 17. The Canadian government, for example, indicated that it planned simply to use its ordinary immigrant landing documents for this purpose: Statement of Mr. Chance of Canada, ibid.

[1631] See chapter 7.4 below.

[1632] See chapter 6.1.1 below.

[1633] See chapter 5.2 below.

were in violation of the Convention. States may not avoid their obligation to document refugees by willful blindness, or by purporting to delegate that role to agencies not under the effective control of a state with accountability under international law.

In sum, any refugee in the territory of a state party and not in possession of a refugee travel document is, pursuant to Art. 27, entitled to receive a provisional refugee identity certificate to use until his or her claim to refugee status is finally refused, or until it is accepted and eligibility for a refugee travel document established. This is consistent with the basic approach of the Convention under which a state party has essentially two choices when an asylum-seeker arrives on its territory. It may exercise its right under Art. 32 to expel an asylum-seeker not yet "lawfully in" its territory,[1634] if this can be done consistent with its immediate duty to avoid the prospect of *refoulement*, direct or indirect, to the refugee's country of origin;[1635] or it may provide the asylum-seeker with provisional documentation of refugee status, which entitles that person to be treated as a refugee pending the completion of any procedures established to verify claims to refugee status. Precisely because some refugee rights inhere by virtue of either simple physical presence,[1636] or lawful presence (e.g. while undergoing status determination or in receipt of temporary protection) yet before refugee status is formally acknowledged,[1637] Art. 27 is the vital link between theory and reality. If a person legally entitled to the benefit of refugee rights could not document his or her entitlement to same, the Refugee Convention would be of little practical value. The right to receive provisional refugee identification set out in Art. 27 is therefore the essential key to enabling refugees to in fact benefit from the protections which states have determined should be their due.

4.10 Judicial and administrative assistance

As important as it is to insist that persons claiming to be refugees are both identified and provisionally treated as entitled to the protection of the Convention, the practical reality is that refugees will often be unable to enforce their rights without assistance from state or international authorities.

[1634] See chapters 3.1.3 above and 5.1 below.
[1635] See chapter 4.1 above.
[1636] These include the rights elaborated in this chapter: protection from *refoulement*; freedom from arbitrary detention or penalization for illegal entry; physical security rights; access to the necessities of life; basic property rights; the right to family unity; freedom of thought, conscience, and religion; access to basic primary education; and the right to administrative assistance from host state authorities.
[1637] These rights are elaborated in chapter 5 below, and include protection from expulsion; internal freedom of movement; and the right to engage in self-employment.

As described above,[1638] the early generations of refugee accords were predicated on a recognition that "the characteristic and essential feature of the problem was that persons classed as 'refugees' have no regular nationality and are therefore deprived of the normal protection accorded to the regular citizens of a State."[1639] Like all non-citizens, refugees were essentially at the mercy of the institutions of a foreign state. In contrast to other foreigners, however, refugees clearly could not seek the traditional remedy of diplomatic protection from their country of nationality.

The various High Commissioners appointed by the League of Nations were therefore authorized to name the equivalent of consular representatives to state parties.[1640] These representatives not only issued a variety of forms of documentation required by refugees to effectuate their rights, but also "[s]upport[ed] the various requests submitted by refugees to the authorities of their place of residence."[1641] While the formal system of internationally rendered diplomatic protection for refugees came to an end with the onset of the Second World War, "in a number of countries certain quasi-consular functions ... continued to be rendered to refugees and displaced persons, first by representatives of the PCIRO, and subsequently by the IRO. If such persons came within the mandate of IRO, the representatives of IRO, where necessary, lent them assistance in a variety of forms, ranging from material aid to intervention with the authorities of the country of residence or with the Consuls of the countries of immigration."[1642]

In contrast, the Statute of the United Nations High Commissioner for Refugees, drafted contemporaneously with the Refugee Convention,[1643] does not expressly mandate the organization to provide refugees with consular

[1638] See chapter 2.3 above.

[1639] "Report by the Secretary-General on the Future Organisation of Refugee Work," LN Doc.1930.XIII.2 (1930), at 3.

[1640] Weis writes that "the question of administrative assistance to refugees arose with the establishment of the Soviet Union. As long as the Soviet Union was not recognized, the Czarist consuls continued to render administrative assistance to Russian nationals and refugees. With the recognition of the Soviet Union, these consuls lost their official character. They continued, however, to render assistance to refugees and it was then required that the documents and certifications issued by them should be countersigned by the local representative of the League of Nations High Commissioner for Refugees. The Arrangement concerning the Legal Status of Russian and Armenian Refugees of 30 June 1928 recommended that the League of Nations High Commissioner for Refugees [should], by appointing representatives in the greatest possible number of countries, render the services enumerated in the Arrangement, in so far as such services [did] not come within the exclusive competence of the national authorities": Weis, *Travaux*, at 203–204.

[1641] United Nations, "Statelessness," at 44. [1642] Ibid. at 46.

[1643] The UNHCR Statute was adopted by the General Assembly as Res. 428(V), Dec. 14, 1950 (UNHCR Statute).

assistance of this kind. More generally, the Statute does not grant UNHCR any clear power to champion the enforcement of refugee rights. The agency is authorized to engage in the "promotion" of "the admission of refugees";[1644] it may moreover seek authority from specific states to engage in consular-type work under its mandate to "promot[e] through special agreements with Governments the execution of any measures calculated to improve the situation of refugees ... [and to] assist[ ] governmental and private efforts to promote ... assimilation within new national communities."[1645] At most, the agency may assert its general responsibility to "supervise the application" of the Refugee Convention.[1646] But unlike its institutional predecessors, UNHCR is not specifically tasked to act as agent for the enforcement of refugee rights.[1647] It was rather the expectation of the drafters of the Refugee Convention that primary responsibility to assist refugees to enforce their rights should fall to the state parties themselves:

> [E]ven if the Government of the country of asylum grants the refugee a status which ensures him treatment equivalent to or better than that enjoyed by foreigners, it does not follow that on that account alone he will be allowed to enjoy the rights granted to him. If the refugee is actually to enjoy these rights, he must obtain the assistance of an authority which will perform for him the services performed by national authorities in the case of persons with a nationality. In the absence of an international authority, the High Contracting Parties must appoint a national authority which will furnish its assistance to refugees and deliver the documents they require.[1648]

In practice, refugees have often looked to their host country's courts to secure respect for their rights. Even in states where the courts have no clear role in refugee-status determination, judges have at times intervened to ensure the protection of refugees. In one recent Japanese decision, for example, the court initially ordered the government to pay ¥9,500,000 in damages to a Burmese refugee in respect of what it determined to have been his unlawful

[1644] UNHCR Statute, at Art. 8(d). [1645] Ibid. at Art. 8(b)–(c).

[1646] Ibid. at Art. 8(a), and Refugee Convention, Art. 35. This authority was not, however, intended to displace the primary role of states in oversight of the Refugee Convention. See J. Hathaway, "Who Should Watch Over Refugee Law?," (2002) 14 *Forced Migration Review* 23, and more generally, chapter 2.5.2 above and Epilogue below, at pp. 992–998.

[1647] Thus, for example, when Swaziland threatened the (unlawful) deportation of refugees because they had exercised their international legal entitlement to internal freedom of movement, UNHCR could do little more than request "an extended grace period" within which to arrange alternative protection for the refugees: "Unhappy refugees to stay a little longer," *Times of Swaziland*, Aug. 2, 2002.

[1648] Secretary-General, "Memorandum," at 43–44.

detention subsequent to a legally erroneous rejection of his protection claim.[1649] While the decision was successfully appealed on the basis that the required standard of wrongfulness for the award of damages against the state had not been proved,[1650] the underlying finding that the detention was in breach of the refugee's rights was not disturbed. Even in India, which has not acceded to either the Refugee Convention or Protocol, judges have shown remarkable creativity in crafting remedies for refugees which effectively vindicate Convention rights.[1651]

But in other contexts, the host government may effectively deny refugees access to its legal system. Verdirame reports an extreme case, in which the Kenyan government, acting through UNHCR and its implementing partner, simply left a refugee community to administer justice for itself, effectively ignoring its responsibility to ensure that the rights of refugees on its territory were respected:

> In theory, Kenyan law applies to Kakuma Camp. In practice, this seldom happens. In Kakuma, refugees have been allowed to establish their own "court" system which is funded by [UNHCR's implementing partner], Lutheran World Federation ...
>
> Punishment meted out by these courts in camps ... includes flogging. During a visit in July 1997, the obvious human rights implications of such decisions were brought to the attention of agency staff. This concern was dismissed with the observation that "this is their culture" ...
>
> The population of Kakuma Camp, although living on the territory of Kenya, is administered by humanitarian organizations, independently of the government, outside its judicial system, with no checks on powers and, in effect, without legal remedies against abuses.[1652]

The same result can accrue by virtue of a legislative deficit. In Uganda, Art. 22 of the Constitution formally guarantees full access by all to that country's courts. But the Control of Alien Refugees Act allows authorities to order refugees to be relocated in their absolute discretion, with no provision for refugees to contest such a decision before the courts. Nor may refugees

[1649] The award included ¥8,000,000 in respect of emotional distress suffered during the period of unlawful detention, and a further ¥1,500,000 to cover his legal fees: *Z v. Japan*, 1819 HANREI JIHO 24 (Tokyo DC, Apr. 9, 2003).

[1650] Specifically, it was determined that while the detention was itself unlawful, a stricter standard of illegality is required before damages may be awarded in accordance with the terms of the State Redress Act: *Japan v. Z*, No. Heisei 16 Gho Ko 131 (Tokyo HC, Jan. 14, 2004), appeal denied No. Heisei 16 Gyo Tsu 106, Heisei 16 Gyo Hi 115 (Jap. SC, May 16, 2004).

[1651] See e.g. *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 83 AIR 1234 (India SC, Jan. 9, 1996).

[1652] Verdirame, "Kenya," at 62–64.

detained on public order grounds challenge an executive detention order before a judge.[1653]

Clearly, judicial assistance may be of greatest value to a refugee seeking recognition of his or her status as a refugee: unless refugee status is not contested by the host state, a fair assessment of refugee status is the indispensable means by which to vindicate Convention rights.[1654] Yet even on this vitally important question, refugees do not always enjoy clear access to the courts. In the United States, for example, national security concerns have been invoked to order the denial of asylum in secret hearings in which the persons seeking recognition of refugee status were not allowed to see the evidence, hear the testimony, or even know what charges were being brought against them.[1655] An administrative decision to detain a refugee claimant for the duration of the status assessment process is moreover not subject to appeal or review by American courts.[1656] Australia has gone farther still, actually "excising" some more remote parts of its territory from what it calls its "migration zone," with refugees arriving in such excised areas "treated as if they were in an overseas refugee camp – with their visas processed under (discretionary) rules, no rights to appeal to court, and no right to come to Australia if accepted as refugees."[1657]

[1653] E. Khiddu-Makubuya, *International Academy of Comparative Law National Report for Uganda* (1994), at 9–10.

[1654] See Kälin, "Temporary Protection," at 218: "Although the 1951 Convention does not contain any provisions relating to national status determination procedures, the principle of good faith in fulfilling treaty obligations requires, as has been stressed by the German Constitutional Court [citing the case of *EZAR 208*, 2 BvR 1938/93; 2 BvR 2315/93 (Ger. FCC, May 14, 1996), abstracted in (1997) 9 *International Journal of Refugee Law* 292], that States Parties to the Convention institute a procedure which allows for a determination of who is entitled to the guarantees of that treaty."

[1655] J. Risen, "Evidence to deny 6 Iraqis asylum may be weak, files show," *New York Times*, Oct. 13, 1998, at A-9.

[1656] "While the expedited removal provisions of the 1996 immigration law require the detention of asylum-seekers during the expedited removal process, they do not prohibit parole once asylum-seekers have established a credible fear of persecution and are therefore no longer subject to expedited removal proceedings. The authority to parole arriving asylum-seekers, however, is entrusted to the detaining authority, the Immigration and Naturalization Service. If the Immigration and Naturalization Service denies parole, that decision cannot be appealed to an independent judicial authority. While immigration judges can review Immigration and Naturalization Service custody decisions with respect to various other categories of non-citizens, immigration judges are precluded from reviewing issues relating to detention of 'arriving' aliens, a category which includes all arriving asylum-seekers": E. Acer, "Living up to America's Values: Reforming the US Detention System for Asylum Seekers," (2002) 20(3) *Refuge* 44, at 45–46.

[1657] K. Lawson, "Christmas Island plan to divide Labor MPs," *Canberra Times*, Dec. 3, 2002, at A-6. Extraordinarily, the United Nations High Commissioner for Refugees has endorsed a variant of this plan under which determination for some applicants would

The ability of refugees to seek an appeal or review of a negative decision on status determination is even more frequently stymied. An extraordinary British plan, which came to light in February 2003, proposed to remove asylum-seekers from the United Kingdom to so-called "regional protection zones" in places such as Iran, Iraq, and Somalia, where their claims to refugee status would be processed by UNHCR or another agency. One of the asserted strengths of this approach was said to be that "[t]here would not need to be a right to a legal challenge to the [refugee status] decision."[1658] Less ambitiously, the British government has already put in place a system under which all rejected asylum claims from listed countries are required to be certified as "clearly unfounded," meaning that no appeal can be pursued prior to deportation.[1659] As a former solicitor-general observed, "[i]t is difficult enough to appeal within the UK, where advisers can be based miles from dispersed applicants, but from overseas, appeals would be impossible. And this presumes the countries to which they are sent are safe."[1660]

The review of rejected refugee claims may also be foreclosed in practice by the setting of rigid deadlines within which an individual is required to seek judicial intervention. A clear example is provided by the Full Federal Court of Australia's decision in *Sahak*,[1661] in which the Court affirmed the application of a twenty-eight-day, non-reviewable filing deadline in the case of a rejected asylum-seeker from Afghanistan. It did so despite having found that his failure to comply "was not due to any personal default." Indeed, the applicant

occur at a common site within the European Union without any clear commitment to judicial review. "Under the 'EU Prong,' the UNHCR proposes separating out asylum-seekers from countries that produce hardly any genuine refugees. These asylum-seekers would be sent to one or more reception centers somewhere within the EU, where their claims would be *rapidly examined* by joint EU teams. Those judged not to have any sort of refugee claim *would be sent straight home* [emphasis added]": R. Lubbers, "Put an end to their wandering: Europe should do more to support refugees in their regions of origin," *Guardian*, June 20, 2003, at 22.

1658 A. Travis, "Asylum report: Shifting a problem back to its source," *Guardian*, Feb. 5, 2003, at 6, quoting from the report, "A New Vision for Refugees."

1659 "If the Secretary of State is satisfied that a person who makes ... an asylum claim is entitled to reside in a State listed in subsection (7), he shall issue a certificate under subsection (1) to the effect that that person might not bring an appeal under sections 65 or 69 of the Immigration and Asylum Act 1999 while in the United Kingdom unless satisfied that the claim is not clearly unfounded": Nationality, Immigration and Asylum Act 2002, at s. 115(6).

1660 "A new iron curtain: The Lords must reform the asylum bill," *Guardian*, Oct. 9, 2002, at 19, quoting Lord Archer. So long as the initial consideration of their claims was fair, the English Court of Appeal has nonetheless held that the procedures envisaged by s. 115 are not unfair: *R (ZL) v. Secretary of State for the Home Department*, [2003] 1 WLR 1230 (Eng. CA, Jan. 24, 2003), at paras. 38, 49.

1661 *Sahak v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 215 (Aus FFC, July 18, 2002).

was detained during the relevant time by the government in a remote location. He was not provided with the forms on which to appeal even though he had written to the Minister in his native language requesting same; he had no access to counsel to assist him in applying to the Court; he did not speak English; and when the appeal forms were finally completed due to the intervention of an interpreter, the business manager of the detention facility failed to file them until after the deadline for appeal had expired.[1662] The Court, however, found no basis for relief from the literal application of the filing deadline.[1663] There are, however, signs that at least some courts have begun decisively to challenge legislative efforts to curtail their right to review rejected asylum claims. The High Court of Australia recently considered sweeping privative legislation in relation to the review of refugee claims, and determined that "if read literally, ... [the new law] would purport to oust the jurisdiction of this court."[1664] In rejecting such an interpretation, the High Court noted that "[i]f tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end."[1665] And more generally, the European Union has codified the right of refugee claimants to "an effective remedy," including in particular the right to apply to a court or tribunal to review a refusal or withdrawal of refugee status.[1666]

[1662] Motta reports that under s. 193 of the Australian Migration Reform Act 1992, "there is no requirement for the Minister or any officer to provide a detained person with an application form for a visa; or to advise a person that they may apply for a visa; or to allow a person access to advice (whether legal or otherwise) in connection with applications for visas, unless the detainee should specifically request it. The ramifications of this 'cone of silence' built around asylum-seekers in detention was almost instantly obvious. In 1993–1994, 100% of unauthorized arrivals by boat made refugee claims. In 1994–1995 only 10.4% did. In 1996–1997, 80% of unauthorized boat entrants were removed without requesting legal assistance": Motta, "Rock," at 16.

[1663] Despite a creative effort to argue that the literal application of the rules for filing would amount to racial discrimination, the majority of the court declined to intervene, noting that "such discrimination or disadvantage as arose from the practical operation of ... the Act was not racial discrimination ... Any differential effect which the application of ... the Act produces is not based on race, color, descent or national or ethnic origin, but rather on the individual personal circumstances of each applicant": *Sahak v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 215 (Aus FFC, July 18, 2002). While a concurring member of the court did find that the differential impact of the law was clearly on grounds of national origin, he nonetheless dismissed the application on the questionable grounds that the right to judicial review could still be pursued before the High Court. While true, restriction to one opportunity for prerogative review in a country's top court still amounts to a substantial disadvantage relative to the review rights enjoyed by persons not disadvantaged on the grounds of their national origin.

[1664] *S157/2002 v. Commonwealth of Australia*, [2003] HCA 2 (Aus. HC, Feb. 4, 2003), per Gleeson CJ.

[1665] Ibid. [1666] EU Procedures Directive, at Art. 38.

Refugee Convention, Art. 16(1) Access to courts
A refugee shall have free access to the courts of law on the territory of all Contracting States.

Civil and Political Covenant, Art. 14(1)
All persons shall be equal before the courts and tribunals. In the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...

Refugee Convention, Art. 25 Administrative assistance
1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.
2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.
3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.
4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.
5. The provisions of this article shall be without prejudice to articles 27 and 28.

One possible means of assisting refugees to vindicate their rights would have been to return to the pre-Second World War precedent of empowering the international supervisory agency, presently the UNHCR, to undertake quasi-consular representation on behalf of refugees. Yet in line with the more general determination of states to decentralize authority for the implementation of refugee protection,[1667] no such proposal was tabled. Indeed, the strongest endorsement of an international mechanism for effectuating the exercise of refugee rights was contained in the French draft of Art. 25, under which UNHCR would have had automatic residual authority to provide

[1667] See J. Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law," (1990) 31(1) *Harvard International Law Journal* 129, at 166–168.

administrative assistance to refugees – but only if a state failed to devise its own system for facilitating the implementation of refugee rights.[1668]

The failure to grant UNHCR a general responsibility to assist refugees to vindicate their rights largely reflects a deference to the decision of the General Assembly not specifically to include this responsibility in the agency's mandate.[1669] There was also a clear disinclination to tie the hands of the future Office of the High Commissioner, which might not wish to undertake protection work in precisely the same way as had its predecessors.[1670] Because of these operational uncertainties, the drafters insisted that states assume the basic responsibility to facilitate the exercise of rights by refugees.

[1668] "In all cases in which the exercise of a right by the foreigner normally requires the administrative assistance of the authorities of his country or of its representatives abroad, the High Contracting Parties undertake either to appoint a national authority or, failing that, to empower the High Commissioner for Refugees to furnish assistance to refugees": France, "Draft Convention," at 8.

[1669] The relevant discussions occurred in the Ad Hoc Committee several months before UNHCR was established, and the representatives were understandably reluctant to usurp the jurisdiction of the General Assembly to define the agency's role. "The High Commissioner had not yet been appointed, the nature of his functions was not known, and it was still not clear whether he would administer them through offices in various countries or through a central agency": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.19, Feb. 1, 1950, at 2. See also Statement of Sir Leslie Brass of the United Kingdom, ibid. at 3: "[I]t was beyond the competence of this Committee to attribute functions to the High Commissioner or to imply that his office would exercise functions in various countries." At the meeting of the Conference of Plenipotentiaries – which occurred after the enactment of the UNHCR Statute – one delegate expressed resignation that nothing could be done to reverse the decision of the General Assembly not to entrust UNHCR with the duty to render administrative assistance to refugees. "The Belgian Government regretted that a task of this nature had not been entrusted exclusively to an international authority. Under his mandate, the High Commissioner could protect only groups of refugees, and that was where the tragedy lay in certain cases, where the refugee needed not only the protection which the relations established between the High Commissioner and national authorities afforded him, but individual protection as well": Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 12.

[1670] "[T]he language still appeared to retain a certain weakness inasmuch as it might be interpreted as granting a country the right, if it so desired, to designate an international authority to furnish assistance to refugees, regardless of the wishes of the international authority concerned": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.19, Feb. 1, 1950, at 6. The immediate reply of the Israeli delegate – which the drafters agreed "should be incorporated into the Committee's report in order to meet the point of the United States representative" – was that "[o]bviously [states] could not arbitrarily designate an international body as the authority in question against its wishes. The reference to international authorities could be invoked only if an appropriate international organ existed and was willing to assume the obligation envisaged in the paragraph. Where no such organization existed, the Contracting Party would have to designate an authority to furnish requisite assistance to refugees": Statement of Mr. Robinson of Israel, ibid. at 7.

While a government might validly delegate its duty to provide administrative assistance to a willing international agency, the government ultimately remains responsible to ensure that refugees actually receive the assistance they require.[1671] As framed by the American representative,

> There was a danger that some countries might seek to relieve their own agencies of administrative responsibility by referring refugees to an international authority . . . In order to eliminate the risk of leaving refugees unprotected, it seemed advisable to make it mandatory upon Governments to assume responsibility except when an international authority functioning in their territory was in a position to do so. In the latter event, States should retain the option of accepting the authority of an international organ.[1672]

In line with this perspective, the Refugee Convention requires each state party to conceive an administrative mechanism by which to facilitate the exercise of Convention rights by all refugees living in its territory. The nature of the duty of administrative "assistance" to be provided by a refugee's country of residence under Art. 25(1) is not, however, set out in the Convention. While the Committee deleted a parenthetical reference to consular assistance as an unnecessary refinement,[1673] it indicated no intention to vary the sorts of administrative assistance traditionally provided to refugees. As Grahl-Madsen suggests, the duty to provide administrative assistance to refugees under paragraph 1 of Art. 25 therefore goes beyond the responsibility to issue documents set out in paragraph 2, and logically includes "correspondence, investigations, recommendations, counseling, [and] personal

[1671] At the commencement of debate on this issue, the French delegate quickly assured his colleagues that even the French proposal "would leave each state free to decide whether administrative assistance should be furnished by its own national authorities or by an international authority, if such authority existed. It was not intended to impose duties upon the High Commissioner nor to give him exclusive competence in the matter": Statement of Mr. Ordonneau of France, ibid. at 2.

[1672] Statement of Mr. Henkin of the United States, ibid. at 2–3. Sir Leslie Brass of the United Kingdom, ibid. at 3, also emphasized that a consular role for an international agency on behalf of refugees "was not contemplated by the United Kingdom government." See also Statements of the Chairman, Mr. Chance of Canada, and Mr. Perez Perozo of Venezuela, ibid.

[1673] The original draft provided that "[i]n all cases in which the exercise of a right by a foreigner requires the assistance of the authorities of his country (in particular of the consular authorities) the High Contracting Parties shall designate an authority which shall furnish assistance to refugees": Secretary-General, "Memorandum," at 43. The reference to consular assistance was said by the Belgian representative to lack "clarity," leading the Brazilian delegate to suggest its deletion on the grounds that "the introductory clause of paragraph 1 was sufficiently clear in that respect": Statements of Mr. Cuvelier of Belgium and Mr. Guerreiro of Brazil, UN Doc. E/AC.32/SR.19, Feb. 1, 1950, at 4.

assistance"[1674] needed to enable refugees to benefit from their Convention rights.[1675] Thus, a state party may not validly limit respect for refugee rights to only such refugees as are somehow able to advance those rights independently; governments have an affirmative responsibility under Art. 25(1) to establish a mechanism by which refugees may benefit in practice from their legal entitlements.[1676]

One means of fulfilling this duty is for the host state to make arrangements with UNHCR or another international agency[1677] to act as intermediary in assisting refugees to secure their rights.[1678] A state might alternatively choose to establish or empower an independent national authority to assist refugees,[1679] or to include refugee protection within the mandate of one or

[1674] Grahl-Madsen, *Commentary*, at 103. Weis asserts at least as broad an understanding, noting that "[t]he term 'administrative assistance' is wider than the functions enumerated in the Arrangement of 1928. It may include investigations, counseling and personal assistance. It includes the functions normally exercised by consuls": Weis, *Travaux*, at 204.

[1675] The Belgian representative to the Conference of Plenipotentiaries stressed the importance of Art. 25 as mandating a mechanism to provide "individual protection" to refugees beyond the group-based protection role granted to UNHCR under its Statute: Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 12.

[1676] "[T]he language of article [25] [is] mandatory, rather than permissive. It placed upon Governments the obligation to provide administrative assistance to refugees who could not obtain it through normal consular channels since they no longer enjoyed the protection of their country of origin": Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.19, Feb. 1, 1950, at 4. At the first session of the Ad Hoc Committee, the text of Art. 25(1) was amended to make this affirmative duty clear by adding the words "shall arrange" (so that it read, "The Contracting State . . . shall arrange that such assistance be afforded"): Ad Hoc Committee, "First Session Report," at Annex I.

[1677] "Article 25 does not specify any particular international authority. A Contracting State is therefore free to choose any international authority it likes, which is able and willing to carry out the task. It is, however, clear that the drafters of the Convention had in particular the Office of the High Commissioner for Refugees in mind. It was decided, however, not to mention this Office by name, because it was felt that the Contracting States should not impose any tasks on it, this being a matter for the United Nations to decide, and because there was a possibility that the Convention would survive the Office": Grahl-Madsen, *Commentary*, at 105.

[1678] See text above, at pp. 627–628. "A Government may itself provide such assistance by creating an authority to do so or by assigning the task to an existing national authority, or a country may prefer to make arrangements for an international authority to render such assistance. If, for example, the United Nations High Commissioner for Refugees should deal with administrative assistance, a country may arrange with the High Commissioner to have such assistance rendered in its territory. In any event, however, there is an obligation on the Contracting State to see that such assistance is provided": Ad Hoc Committee, "First Session Report," at Annex I.

[1679] "In some countries, such as the United Kingdom, no special machinery had been set up. In others, however, special offices had been established for that purpose. In fact, the

more[1680] existing governmental agencies.[1681] In view of the explicit language of Art. 25(1),[1682] however, it would not be sufficient to entrust the provision of administrative assistance to a non-governmental organization unless that organization receives delegated power from the state, or from an international organization acting at the state's behest. The critical concern is to ensure that the entity charged with assisting refugees be genuinely in a position to act authoritatively.[1683]

All refugees, whether or not their status has been formally verified, are entitled to benefit from administrative assistance.[1684] Some confusion on this point could arise from the fact that this duty falls on a refugee's state of "residence," which might suggest that only refugees who meet one of the higher degrees of attachment (e.g. lawful presence, or lawful stay) may assert a right to assistance.[1685] On balance, however, this conclusion is not justified.

Not only does the text not qualify the beneficiary class by reference to a level of attachment, but the drafters at times used the phrase "residence" (as

provision was based on the practice of Belgium and France": Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.19, Feb. 1, 1950, at 4.

[1680] "[I]nasmuch as refugees might have to apply to several authorities in order to secure administrative documents, the words 'an authority' in the final clause of the paragraph should be in the plural": Statement of Mr. Cha of China, ibid. at 4. See also Statements of Mr. Kural of Turkey, ibid., and Mr. Perez Perozo of Venezuela, ibid. at 5.

[1681] "[T]he word 'designate' did not imply that an authority to furnish assistance to refugees was necessarily to be established; such authority or authorities might already exist in certain countries, in which case they need merely be designated": Statement of Mr. Cuvelier of Belgium, ibid. at 5. See also Statement of Mr. Robinson of Israel, ibid.: "[T]he reference [in the Secretary-General's draft] to the Arrangement of 30 January 1928 [under which the responsibility to provide administrative assistance was entrusted to a High Commissioner for Refugees] would in itself appear to make the creation rather than the mere designation of a special authority mandatory; as that was not the intention of the Committee, the reference to the Arrangement of 1928 should be deleted."

[1682] It is the duty of states to "arrange that such assistance be afforded ... by their own authorities or by an international authority": Refugee Convention, at Art. 25(1).

[1683] "If the refugee is actually to enjoy these rights, he must obtain the assistance of an authority which will perform for him the services performed by national authorities in the case of persons with a nationality. In the absence of an international authority, the High Contracting Parties must appoint a national authority which will furnish its assistance to refugees": Secretary-General, "Memorandum," at 43–44. See also Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 12, who "stressed the importance of article [25], which was designed to meet one of the most constant and essential needs of refugees ... In many European countries refugees ... would like to be able to get into direct touch with someone *who was responsible for protecting them* [emphasis added]."

[1684] The text of Art. 25 grants "refugees" without qualification the right to a state's administrative assistance. See generally chapter 3.1.1 above.

[1685] See generally chapter 3.1 above.

opposed to habitual residence, or domicile[1686]) in a way that implied no more than transient presence in a state party.[1687] Significantly, the original draft text imposed the duty of administrative assistance simply on "the High Contracting Parties."[1688] This was amended by the Ad Hoc Committee to assign the duty to "[t]he Contracting State in whose territory the exercise of a right by aliens would normally require the assistance of the authorities of the country of nationality."[1689] The goal of this change was to make clear that there was a duty to assist refugees not just in their asylum country, but also in any country to which the refugee might travel or have dealings.[1690] At the Conference of Plenipotentiaries, however, the Belgian representative observed that it would make more sense to assign the duty of administrative assistance to a single state.[1691] Because a refugee might need to exercise a right in a non-contracting state, "the country of residence should lend its good offices. The concept of territory should, for those

[1686] "The word 'habitual' (Arts. 14, 16(2)) is not used, indicating that a permanent residence is not required": Robinson, *History*, at 131. See also Grahl-Madsen, *Commentary*, at 104: "The State 'in whose territory he is residing,' or the country of residence, is not the same as the country where a refugee has domicile or where he is 'lawfully staying' or allowed to settle."

[1687] For example, in debate on Art. 12 of the Convention, the Belgian representative expressed his concern about how to deal with the case of "a refugee domiciled in China, where he had his family and his business, [but] who might visit Belgium on a business trip. If he should happen to die in Belgium, it would be ludicrous to determine his status on the basis of the law of the *country of residence*. He would normally be subject to the law of China, his country of domicile [emphasis added]": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 7. Significantly, it was also a representative of Belgium who introduced the notion of "residence" into Art. 25 at the Conference of Plenipotentiaries: see text below, at pp. 638–639.

[1688] Secretary-General, "Memorandum," at 43.

[1689] Ad Hoc Committee, "First Session Report," at Annex I.

[1690] "Refugees do not enjoy the protection and assistance of the authorities of their country of origin. Consequently, even if the government of the country of asylum grants the refugee a status which ensures him treatment equivalent to or better than that enjoyed by aliens, *he may not in some countries be in a position to enjoy the rights granted him*. Often he will require the assistance of an authority which will perform for him the services performed by national authorities in the case of persons with a nationality. In this article, *governments* undertake to assure that refugees obtain required assistance ... [T]here is an obligation *on the Contracting States* to see that such assistance is provided [emphasis added]": Ad Hoc Committee, "First Session Report," at Annex II.

[1691] "He did not consider that the obligation on Contracting States to afford refugees the necessary administrative assistance was brought out with sufficient clarity in that paragraph ... In the opinion of the Belgian delegation ... the responsibility should be placed squarely on the authorities of the country of residence, who were better able to come to the assistance of refugees": Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 12–13.

reasons, be omitted from the provisions governing the exercise of a right by refugees."[1692]

Thus, the amendment of the text of Art. 25 to assign responsibility for the provision of administrative assistance to a refugee's country of residence was in no sense an effort to restrict the beneficiary class of Art. 25, but was rather intended simply to make clear that the country in which the refugee is staying should assist him or her, even when necessary for the exercise of a right outside that state's jurisdiction.[1693] This interpretation most readily advances the purposes of the Refugee Convention: since there is no doubt that some rights inhere in refugees prior to their being granted a right of ongoing residence in an asylum country,[1694] it would be nonsensical to allow states effectively to avoid their reciprocal duties towards refugees by refusing refugees the assistance required to invoke their rights.

One of the most basic concerns of refugees is to acquire the sorts of official documentation often required to function in the asylum country. Art. 25(2) is expressly addressed to this matter. It requires the refugee's state of residence to provide the refugee with "such documents or certifications as would normally be delivered to aliens by or through their national authorities."[1695] The explanatory note to the Secretary-General's original proposal for Art. 25(2) provides a helpful sense of both the scope of the duty, and the rationale for such a provision:

> In order to perform the acts of civil life (marriage, divorce, adoption, settlement of succession, naturalization, acquisition of immovable property, constitution of associations, opening of bank accounts, etc.), a person must produce documents to certify his identity, position, civil status, nationality, etc., and if he is a foreigner, to testify to the provisions of his former or present national law and the conformity of instruments executed in his country of origin with the legislation of that country . . .

[1692] Statement of Mr. Herment of Belgium, ibid. at 13. Both the Colombian delegate and the High Commissioner for Refugees voiced their approval of this change (see Statements of Mr. Giraldo-Jaramillo of Colombia and of Mr. van Heuven Goedhart of UNHCR, ibid. at 14), which was adopted by the Conference without further debate: ibid. at 15.

[1693] Weis notes that "[a]dministrative assistance is not limited to the territorial authorities of the country of residence. Diplomatic or consular authorities may be designated to render this assistance to refugees while abroad or they may furnish such assistance provided it is furnished 'under the supervision' of the designated authority": Weis, *Travaux*, at 204.

[1694] See chapter 3.1 above.

[1695] "The words 'by or through' (their national authorities) . . . indicate that it is either the local authority which ordinarily renders the service or the consula[r] authorities through which the documents or certifications are procured or delivered": Robinson, *History*, at 130. See also Grahl-Madsen, *Commentary*, at 105: "Paragraph 2 allows a flexible system to be established, on the [sole] condition that there is some supervision by a competent authority."

> It is easy for a foreigner to obtain such documents. He merely has to apply to the national services which operate in his country of origin or which are accredited abroad and they will deliver the documents which he requires. A refugee whose links with his country of origin are broken cannot obtain such papers from the authorities of that country. In the absence of any international authority, a national authority designated for the purpose will be required to issue to refugees all the documents of which they stand in need.[1696]

This responsibility does not, however, include the issuance of either refugee identity or travel documents, matters regulated by Arts. 27 and 28 of the Convention respectively.[1697] Nor does it amount to a duty to issue documents which the refugee could readily acquire by independent effort,[1698]

[1696] Secretary-General, "Memorandum," at 44. Note, however, that the substance of a refugee's personal status is governed by the rules which pertain in his or her country of domicile, in accordance with Art. 12 of the Refugee Convention. See generally chapter 3.2.4 above.

[1697] These matters are expressly excluded by Art. 25(5). The duty to issue identity documents is discussed at chapter 4.9 above; the issuance of travel documents is considered in chapter 6.6 below. Art. 25(5) was added to the text to respond to concerns of some representatives that its scope might otherwise appear to be overly broad. The American delegate, for example, credited the Swiss observer "for pointing out that article [25] might appear to cover travel documents, which were properly the subject of article [29]. The Drafting Committee might wish to make some change to remove the possibility of confusion": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.38, Aug. 17, 1950, at 21. Similarly, the Chairman of the Ad Hoc Committee confirmed that "the 'certifications' referred to in article [25] were not identity papers but evidence of such matters as marital status or medical proficiency": Statement of the Chairman, Mr. Larsen of Denmark, ibid.

[1698] For example, the British delegate asked whether "if a Spanish refugee currently in England required a birth certificate, would the United Kingdom Government be obliged to attempt to procure the certificate for him, although in such a case the refugee might presumably obtain the document simply by requesting it from the Spanish Government's Registrar of Births?": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.19, Feb. 1, 1950, at 6. The response was "that the hypothesis just mentioned by the United Kingdom representative automatically fell outside the scope of paragraph 1 which would operate only in the case of a refugee unable to secure the necessary documents from the authorities of his country": Statement of Mr. Cuvelier of Belgium, ibid. As this exchange makes clear, the duty to provide refugees with documents under Art. 25(2) is appropriately considered a subset of the more general duty of administrative assistance set out in Art. 25(1). See Grahl-Madsen, *Commentary*, at 106: "Whereas Paragraph 1 deals with administrative assistance of any description, Paragraph 2 is restricted to 'documents or certifications.'" But as Grahl-Madsen insists, "[a] refugee cannot be expected to ask the authorities of his country of origin for assistance, and the authorities of the country of residence consequently cannot refuse to afford assistance on the ground that the refugee has not first tried [to see] if the former can help him. The same must apply if the refugee needs documentation relating to acts which have taken place in countries with a regime similar to that prevailing in [the refugee's] country of origin, e.g. if a refugee from Hungary

or which are not genuinely necessary to the conduct of daily life or for the vindication of a refugee's rights. For example, it was noted by the drafters that in most common law states, non-citizens were normally allowed to rely on an affidavit attesting to relevant facts, rather than securing official documentation from governmental authorities. Refugees could, of course, do the same.[1699] But where official documentation is required, a commitment from the authorities of the refugee's host state to provide the refugee with substitute documentation is often critical.[1700] As observed by the Belgian delegate to the Conference of Plenipotentiaries, "[t]he object of paragraph 2 of article [25] was to enable refugees to procure documents which they would not be able to obtain from the countries which would normally provide them . . . That was a most important provision, and it was therefore right that it should be safeguarded to the greatest possible extent."[1701] The drafters therefore agreed that states should enjoy no latitude to refrain from issuing such documents or certifications as are truly required by a

needs a certificate from Czechoslovakia or Romania. If, on the other hand, administrative assistance is required from some other country where a refugee cannot fear any persecution, e.g. a country where he formerly enjoyed asylum, the refugee must try [to] get what he needs from that country": ibid. at 103.

[1699] "No difficulties arose in countries of common law, where the affidavit system was applied": Statement of Mr. van Heuven Goedhart of UNHCR, A/CONF.2/SR.11, July 9, 1951, at 14. As confirmed by the representative of the United Kingdom, Art. 25(2) would "in point of fact have no practical effect in the United Kingdom": Statement of Mr. Hoare of the United Kingdom, ibid. at 15. He later amplified this position, noting that he "wished to make it clear that the Government of the United Kingdom, where the system envisaged in paragraph 2 of article 25 did not exist, would not interpret the paragraph as mandatory in the sense that it would require the United Kingdom Government to invent and introduce a system for supplying documents of the type which would be supplied by other countries. The United Kingdom Government would, however, render every assistance to refugees by continuing to apply its own system – which was based on the personal affidavit – and to other countries by seeing that documents of that type were duly legalized if required by refugees for transmission to other countries": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 9.

[1700] The concern is, of course, documentation related to matters which occurred outside the asylum country. "If an act has taken place in the country of residence, the refugee will be able to get a certificate from the appropriate authority just like anybody else": Grahl-Madsen, *Commentary*, at 103.

[1701] Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 13. Thus, in response to an Austrian amendment which would have made the duty to provide refugees with substitute documentation purely an optional matter, the High Commissioner for Refugees replied that he "would very much regret it if the Conference were to adopt the Austrian amendment, which would so weaken article [25] as to deprive it of all significance": Statement of Mr. van Heuven Goedhart of UNHCR, ibid. at 14. The Austrian government thereupon withdrew its proposal: ibid.

refugee.[1702] As the earlier discussion of the beneficiary class of Art. 25 makes clear, it is the responsibility of the refugee's state of residence to issue these documents, even if they are required by the refugee for purposes outside its borders.[1703]

What sorts of documentation does Art. 25(2) envisage? A decision was taken not to enumerate specific categories of documents, but rather to leave it to each state to provide refugees with whatever documents are "required in the performance of the acts of civil life."[1704] The list of documents in the Secretary-General's original draft, itself based on the sorts of documents provided to refugees by international authorities under earlier treaties,[1705] was recommended by the drafters as illustrative of the scope of the duty under Art. 25(2).[1706] It includes documents certifying "the position" of the refugees or their "family position and civil status," attestations of "the regularity" of documents issued in the refugee's home country, certifications to "the good character and conduct of the individual refugee, to his previous record, to his professional qualifications[1707] and to his university degrees or academic diplomas," and even recommendations "with a view to obtaining visas, permits to reside in the country, admission to schools, libraries, etc."[1708] The duty under Art. 25(2) extends to all documents and certifications

[1702] The Chairman of the Ad Hoc Committee, in his capacity as representative of Canada, proposed that the duty under Art. 25(2) should inhere only "as far as possible" or "when possible": Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.19, Feb. 1, 1950, at 7, 8. He subsequently withdrew his suggestions: UN Doc. E/AC.32/SR.25, Feb. 10, 1950, at 8.

[1703] "If a refugee resident in the territory of country A happened to marry, and so exercised a right in the territory of country B, the question would arise as to which authorities were responsible for giving him the administrative assistance which he required. In the opinion of the Belgian delegation, as expressed in its amendment . . . the responsibility should be placed squarely on the authorities of the country of residence": Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 13. See text above, at pp. 638–639. Robinson adds that "[a]lthough par. 3 does not say so, it must be assumed that such documents or certifications are valid in all Contracting States even if delivered by the authorities of one Contracting State (not an international authority). This conclusion is based on the equal force of documents or certifications issued by either the international authority or the local authorities": Robinson, *History*, at 132.

[1704] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.19, Feb. 1, 1950, at 8.

[1705] Statement of Mr. Weis of the International Refugee Organization, ibid. at 8.

[1706] "As an indication of the types of document which refugees may require according to the varying practices of countries, a list is given below. This list is not intended to be exhaustive, nor does it imply that these documents are necessary to refugees in all countries": Ad Hoc Committee, "First Session Report," at Annex II.

[1707] The Chairman of the Ad Hoc Committee also specifically mentioned documentation of "medical proficiency" as an example of the type of documentation within the scope of Art. 25(2): Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.38, Aug. 17, 1950, at 21.

[1708] Secretary-General, "Memorandum," at 43.

typically issued "either by the judicial or administrative authorities of [the refugee's] country of nationality or by its consular authorities,"[1709] including those "relating to material and legal rights."[1710]

Documents issued pursuant to Art. 25(2) "shall be given credence in the absence of proof to the contrary."[1711] The initial drafts of Art. 25 had been framed in more emphatic terms. Under the Secretary-General's proposal, "certificates so delivered shall take the place of the original acts and documents and shall be accorded the same validity."[1712] The French proposal went even further, proposing that Art. 25 documents "shall rank as authentic documents and shall take the place of the acts and documents issued in the refugee's country of origin."[1713] However, as a consensus emerged in the Ad Hoc Committee that even the English affidavit system would meet the requirements of Art. 25(2),[1714] the French representative expressed his unwillingness to accept at face value the authenticity of all such documents.[1715] The Committee's conclusions note as well that documents issued under Art. 25 could not really be said to have the same validity as original documents; the point was rather that they were as authentic as the secondary certifications or attestations that would ordinarily be issued to a non-citizen by his or her consular authorities.[1716] Thus, "[s]uch documents would be accepted as evidence of the facts or acts certified, in accordance with the laws of the country in which the document is presented."[1717] In positing this clarification, the report notes that "the Committee in no way intended

[1709] Ad Hoc Committee, "First Session Report," at Annex II. Robinson goes farther, arguing that under Art. 25(2) "Contracting States would be called upon to deliver also documents and certifications which are to be supplied by authorities other than those of the country of nationality of the refugee (for instance, if the refugee was born outside the country of his nationality or married there) because in such instances the documents and certifications are usually provided through the authorities of a person's home country which act[s] as intermediar[y]": Robinson, *History*, at 130.

[1710] Statement of Mr. Fritzer of Austria, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 11.

[1711] Refugee Convention, at Art. 25(3).

[1712] Secretary-General, "Memorandum," at 43.

[1713] France, "Draft Convention," at 8.

[1714] See text above, at p. 641.

[1715] "[I]n inserting the provision that the certificates delivered should rank as authentic documents, his delegation had intended to give them the highest possible value. On considering the type of certificates envisaged, however, he had come to the conclusion that they could not all rank as authentic documents in the accepted meaning of that term under French law . . . He therefore withdrew the French version of paragraph 3 in favor of the Secretariat draft": Statement of Mr. Ordonneau of France, UN Doc. E/AC.32/SR.19, Feb. 1, 1950, at 8–9.

[1716] "The purpose of this clause is to have the Contracting States give documents issued to refugees the same validity as if the documents had been issued by the competent authority of the country of nationality (within the country or by a consular agent abroad) of an alien, or as if the act had been certified by such authority": Ad Hoc Committee, "First Session Report," at Annex II.

[1717] Ibid.

to reduce the value which such documents have under existing arrangements."[1718]

This equivocation was nonetheless clearly of concern to the Belgian delegate to the Conference of Plenipotentiaries who introduced the final wording of Art. 25(3). He insisted that the Ad Hoc Committee's draft should be replaced "by some text easily capable of dispelling any doubts arising out of such documents; that was why [Belgium] had suggested that they should be regarded as authentic in the absence of proof to the contrary."[1719] His proposal was adopted without opposition,[1720] in consequence of which the onus must be understood to fall squarely on a government to whom an Art. 25 document is presented to show why it ought not to be relied upon. As Robinson concludes, "such documents or certifications possess a lesser degree of validity than ordinary documents (which is inherent in the circumstance that their delivery is often based on insufficient proofs) and may be annulled or modified by contrary evidence. However, as long as such contrary evidence is not available, the documents and certifications are to serve the same purpose as official instruments of the national authorities."[1721]

Despite the importance of each state party's commitment to provide administrative assistance to refugees, the downside of this approach, cogently observed by Mr. Herment of Belgium, is that "when the authorities of the receiving country were called upon to consider a complaint or a protest from a refugee, they would always be both judge and party to the dispute."[1722] In view of this potential conflict of interest, it was to be expected that refugees would in at least some instances turn to the courts of a state party to enforce their rights, whether based specifically on Convention entitlements or on Art. 7(1)'s attribution to refugees of the rights inhering in aliens generally.[1723] To this end, there was general agreement to adopt Art. 16(1), derived almost literally from the guarantee in both the 1933 and 1938 treaties of "free and ready access to the courts of law" in the territory of any state party.[1724]

[1718] Ibid.

[1719] Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 14.

[1720] Both the representative of Colombia and the High Commissioner for Refugees expressed their support for the Belgian amendment: Statements of Mr. Giraldo-Jaramillo of Colombia and Mr. van Heuven Goedhart of UNHCR, ibid. at 14. The Belgian amendment was adopted without dissent on a 17–0 (5 abstentions) vote: ibid. at 15.

[1721] Robinson, *History*, at 132. See also Grahl-Madsen, who notes that "[t]aking into consideration the basis on which the documents ... often shall have to be issued (corroborated or uncorroborated statements by the persons concerned) it seems that the Conference has made a sound ruling": Grahl-Madsen, *Commentary*, at 108.

[1722] Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 12.

[1723] See chapter 3.2 above.

[1724] Ad Hoc Committee, "First Session Report," at Annex I. This right is, in any event, part of customary international law on the protection of aliens: see chapter 2.1 above, at p. 77.

Importantly, Art. 16(1) is not limited to a right to access the courts of the country in which the refugee is located. In the words of the President of the Conference of Plenipotentiaries, Art. 16(1) "stipulated that a refugee should not only have free access to the courts in the country where he resided, but to the courts in the territory of all contracting States."[1725] Nor do rights inhere only in refugees once they are granted a right to enter or remain in a given state. To the contrary, the drafting history makes quite clear that Art. 16(1) rights inhere in all refugees, whether or not they have been admitted to a state.[1726] As the American representative observed, "persons who had only recently become refugees and therefore had no habitual residence were ... covered by the provisions of ... paragraph 1."[1727] Indeed, as the English High Court (Queen's Bench Division) has observed, any other interpretation might well frustrate the essential purposes of the Convention:

> The use of the word "refugee" [in Art. 16(1)] is apt to include the aspirant, for were that not so, if in fact it had to be established that he did fall within the definition of "refugee" in article 1, he might find that he could have no right of audience before the court because the means of establishing his status would not be available to him.[1728]

Thus, subject only to the issue of subject-matter jurisdiction noted below,[1729] the efforts of an increasing number of countries to deny access to their courts to refugees seeking the review or appeal of a negative assessment of refugee status are *prima facie* incompatible with Art. 16(1) of the Convention.

[1725] Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.8, July 5, 1951, at 13. The mechanics of this duty were explained in comments by the Israeli representative, Mr. Robinson, ibid. at 12: "Assuming, for instance, that the Governments of the United Kingdom and Yugoslavia were both parties to the Convention, and that a refugee resident in the United Kingdom wished to sue a debtor in Yugoslavia, the legal authorities in the latter country would ask the United Kingdom authorities whether the claimant was a refugee. If the answer was in the affirmative, the problem would be solved for the Yugoslav Court. It seemed to him that the issue was perfectly straightforward."

[1726] As framed in the Secretary General's original proposal, "[r]efugees are to have free access to justice, not only in their own country of residence, but in any other country party to the Convention": Secretary-General, "Memorandum," at 30.

[1727] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.25, Feb. 10, 1950, at 6.

[1728] *R v. Secretary of State for the Home Department, ex parte Jahangeer et al.*, [1993] Imm AR 564 (Eng. QBD, June 11, 1993), per Jowitt J at 566.

[1729] See text below, at p. 647. The subject-matter jurisdiction concern may, however, be remedied by reliance on the Civil and Political Covenant: see text below, at pp. 647–650.

Only two, fairly modest, amendments were made to the original proposal for what became Art. 16(1).[1730] First, the English language text was altered to refer only to "free access" to the courts (rather than "free and ready access") on the grounds that "in English, the words 'free' and 'ready' were synonymous in the context if used alone, but in conjunction 'free' might mean without payment of court fees."[1731] The clear intention, affirmed by the decision not to amend the French language text (which continues to refer to "libre et facile accès devant les tribunaux"),[1732] is that while refugees may be expected to pay the usual fees to access the courts,[1733] state parties must not seek in any way to impede their resort to the courts. The effective denial of any access to domestic courts by Kenya to refugees in Kakuma camp was therefore clearly an infringement of Art. 16(1).

The second amendment made by the drafters was to vary the title of Art. 16 to the more general "access to the courts," rather than the arguably more constrained "right to appear before the courts as plaintiff or defendant."[1734] While this change of title does not resolve the interpretive question (particularly since the shift does not appear to have been formally debated by the Ad Hoc Committee),[1735] the new title nonetheless neatly affirms the ordinary meaning of the language used in Art. 16(1). While clearly the provision entitles refugees to engage in private litigation as a means of enforcing their rights – specific reference was made, for example, to the right of refugees to sue for divorce[1736] or to recover a debt[1737] – the right of access to the courts is framed as a general right, in no sense limited to access for purposes of launching or defending a civil suit.[1738] In principle, Art. 16(1) therefore

[1730] France, "Draft Convention," at 4. The members of the Ad Hoc Committee preferred this draft to that presented by the Secretary-General: UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 7–8.

[1731] Statement of Sir Leslie Brass of the United Kingdom, ibid. at 7.

[1732] On the motion of the Israeli representative, the English version of Art. 16(1) was amended to meet the British delegate's concerns, though the French language text was explicitly left unamended: Statement of Mr. Robinson of Israel, ibid. at 7.

[1733] Only refugees who have established "habitual residence" in a state party may claim the right to dispensation from some of the usual financial barriers to accessing the courts, in particular the duty to post security for costs and to receive legal aid. These matters are addressed by Art. 16(2)–(3) of the Convention: see chapter 6.8 below.

[1734] France, "Draft Convention," at 4. The title proposed in the Secretary-General's draft was even more narrow ("the right to sue and be sued"): Secretary-General, "Memorandum," at 29.

[1735] The change first appears in Ad Hoc Committee, "First Session Report," at Annex I.

[1736] Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 7.

[1737] Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.8, July 5, 1951, at 12.

[1738] The First Court of Appeal of Paris rendered a judgment which appears to dispute this proposition. In sensibly rejecting the view that Art. 16(2)'s obligation to grant refugees "the same treatment as a national in matters pertaining to access to the courts" should be read to grant a refugee immunity from extradition proceedings, the Court observed that