governs when refugees seek to litigate their Convention or any other rights before domestic courts.

The challenge, however, is that Art. 16(1) is only a guarantee that refugees may access whatever judicial remedies exist in the state party. The Refugee Convention does not stipulate the subject-matter jurisdiction of a state's courts, but requires simply that whenever the courts have competence over a given matter, refugees must have unimpeded access to the courts to enforce relevant claims. As such, where the courts lack subject-matter jurisdiction to entertain claims of the kind being advanced by refugees, Art. 16(1) does not afford refugees a remedy.[1739] The dilemma of the Ugandan courts – in theory open to all, but not legislatively empowered to adjudicate refugee rights – is thus quite real. Similarly, the failure of United States law to authorize the judicial review of an administrative decision to detain a refugee claimant deprives refugees of the ability to invoke Art. 16 in aid of any effort to contest their indefinite detention before that country's courts.

A domestic jurisdictional stalemate of this kind may, however, be at odds with the requirements of the Civil and Political Covenant. Art. 14(1) of the Covenant, which expressly inheres in "[a]ll persons," affords a sound basis for arguing the entitlement of refugees to a formal legal determination of their rights, at least by way of review or appeal if these are denied by more informal decision-making structures. Specifically, the Covenant requires *inter alia* that "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." The understanding of a "suit at

"the mere reading of this text is sufficient to indicate that it refers solely to civil courts . . . [T]he Geneva Convention merely intended that the refugee should have the opportunity of bringing or defending civil proceedings": *Drago*, Decision of the Cour d'appel de Paris, 1ère Chambre d'accusation, Nov. 29, 1961, reported at (1963) 90(1) *Journal du Droit International* 719. Not only is this finding expressly based on a "mere reading" of Art. 16(2), rather than taking account of its context, object, and purpose, but the case could readily have been determined on the basis that Art. 16(2) relates to the right to bring or to defend proceedings, not to immunity from prosecution.

1739 UNHCR nonetheless significantly overstates the challenge posed by the need to establish subject-matter jurisdiction when it opines that the "[p]rovisions [of the Convention] that define the legal status of refugees and their rights . . . have *no influence* on the process of determination of refugee status [emphasis added]": UNHCR, *Handbook*, at para. 12(ii). UNHCR provides no argument in support of this overly broad position which is, for reasons set out here, at odds with the general ambit of Art. 16(1) of the Convention. At least one court, however, has taken note of UNHCR's views on this subject: *Krishnapillai v. Minister of Citizenship and Immigration*, [2002] 3(1) FC 74 (Can. FCA, Dec. 6, 2001), at para. 26 – though it nonetheless proceeded to analyze whether Canadian refugee procedures met the Art. 16(1) standard: ibid. at paras. 30–32. See also *R v. Secretary of State for the Home Department, ex parte Jahangeer et al.*, [1993] Imm AR 564 (Eng. QBD, June 11, 1993).

law" adopted by the Human Rights Committee is quite broad,[1740] including matters such as a claim for a disability pension,[1741] an application to dissolve a labor contract,[1742] and professional conduct regulation.[1743] In line with this inclusive approach, an expert study approved by the Commission on Human Rights observed that

> Immigration hearings and deportation proceedings may be suits at law. The [UN Human Rights] Committee considered a Salvadoran's claim that Canada violated his right to a fair hearing in deportation proceedings. Canada argued that deportation proceedings were not suits at law and thus not subject to Article 14(1). The Committee did not accept Canada's argument and stated explicitly that such proceedings were suits at law.[1744]

[1740] "The *travaux préparatoires* do not resolve the apparent discrepancy in the various [official] language texts [of Art. 14(1)]. In the view of the Committee, the concept of a 'suit at law' ... is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon": *YL v. Canada*, UNHRC Comm. No. 112/1981, decided Apr. 8, 1986, at para. 9.2; *Deisl v. Austria*, UNHRC Comm. No. 1060/2002, UN Doc. CCPR/C/81/D/1060/2002, decided Aug. 23, 2004, at para. 11.1. See also UN Human Rights Committee, "General Comment No. 13: Administration of justice" (1984), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 135, paras. 2, 4: "In general, the reports of States parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law ... The provisions of article 14 apply to all courts and tribunals within the scope of that article, whether ordinary or specialized."

[1741] *YL v. Canada*, UNHRC Comm. No. 112/1981, decided Apr. 8, 1986.

[1742] *Van Meurs v. Netherlands*, UNHRC Comm. No. 215/1986, decided July 13, 1990.

[1743] *JL v. Australia*, UNHRC Comm. No. 491/1992, UN Doc. CCPR/C/45/D/491/1992, decided July 29, 1992. "[W]henever ... a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee": *Perterer v. Austria*, UNHRC Comm. No. 1015/2001, UN Doc. CCPR/C/81/D/1015/2001, decided July 20, 2004, at para. 9.2.

[1744] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, "The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening," UN Doc. E/CN.4/Sub.2/1991/29, July 5, 1991, at para. 80, citing the decision of the Committee on Human Rights in *VMRB v. Canada*, decided July 18, 1988, Annex VIII.F. A follow-up report containing a draft Body of Principles to promote the right to a fair trial similarly indicated that because the relevant consideration is "the character of the rights at issue," the right to a fair trial inheres not just in the context of formal judicial action, but also in "proceedings before administrative tribunals": UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1994/24, June 3, 1994, at Annex II, para. 74(b). More generally, the same follow-up report concluded that "[i]f a person's rights and obligations may be adversely affected in a suit at law or by particularized actions or inactions taken or

On the basis of this understanding, it would be difficult to conceive a reason to exclude a determination of entitlement to claim refugee rights from the ambit of Art. 14(1) scrutiny.[1745] This principled concern to ensure an effective means to vindicate Convention rights is similarly clear from an important decision of the English Court of Appeal which rejected the view that there is no duty to allow an appeal or review of the denial of refugee status simply because the person concerned would not in fact be at risk of *refoulement*:

> The Convention requires [state parties] to grant certain rights to refugees, who have fled from their home countries . . . Refugees who arrive in this country are anxious to have their status as refugees established. This is not merely because recognition of their refugee status will carry with it the entitlement to remain here, but because it will ensure they are accorded Convention rights while they are here . . . There is no doubt that this country is under an obligation under international law to enable those who are in truth refugees to exercise their Convention rights . . .
>
> An interpretation of the Rules which permitted the Secretary of State to refuse asylum to a refugee on the ground that he had been granted [permission to remain] would . . . be in conflict with the UK's obligations

proposed by a public authority, the court or the public authority shall give the person . . . a fair and public hearing by a competent, independent and impartial tribunal established by law": ibid. at Annex II, para. 4. The expert reports by Special Rapporteurs Chernichenko and Treat were endorsed by the Sub-Commission in Res. 1994/35, Aug. 26, 1994; and subsequently by the Commission on Human Rights, UN Doc. E/CN.4/1997/2, Nov. 25, 1996, at para. 5.

1745 While dismissing the claim on the merits, the Human Rights Committee's view that the Covenant requires that refugee claimants be afforded a fair hearing before an impartial tribunal is clear from its holding in *Adu v. Canada*, UNHRC Comm. No. 654/1995, UN Doc. CCPR/C/60/D/654/1995, decided July 18, 1997, at para. 6.3: "The author claims that the hearing was not fair, as one of the two Commissioners who participated was of Ghanaian origin and a member of the Ewe tribe whose hostile attitude towards Ghanaian refugees was said to be well known among members of the Ghanaian community in Montreal. However, neither the author nor his counsel raised objections to the participation of the Commissioner in the hearing until after the author's application for refugee status had been dismissed despite the fact that the grounds for bias were known to the author and/or his counsel at the beginning of the hearing. The Committee is therefore of the opinion that the author has failed to substantiate, for purposes of admissibility, his claim that his right to a fair hearing by an impartial tribunal was violated." Similarly, the Committee Against Torture determined in its review of Venezuela's compliance with that treaty that "[t]he State party should regulate procedures for dealing with and deciding on applications for asylum and refugee status which envisage the opportunity for the applicant to attend a formal hearing and to make such submissions as may be relevant to the right which he invokes, including pertinent evidence, with protection of the characteristics of due process of law": UN Committee Against Torture, "Concluding Observations on the Report of Venezuela," UN Doc. A/54/44 (1999), 16, at para. 147.

> under the Convention in relation to the treatment of refugees living within this country.[1746]

While access itself is not specifically mentioned in Art. 14(1) of the Covenant, it is generally acknowledged to be inherent in the duty to ensure equality before courts and tribunals:

> If the right extends only to the conduct of an action which has already been initiated before a court, a state can do away with its courts, or transfer their jurisdiction to other bodies which do not possess the minimum attributes of a judicial tribunal. It is inconceivable that international human rights instruments should prescribe in detail the procedural guarantees afforded to parties in a pending proceeding without guaranteeing that which alone makes it possible for them to benefit from such guarantees. The fair, public and expeditious characteristics of a judicial proceeding are of no value at all if there is no judicial proceeding. Accordingly, the right to a fair trial embodies the "right to a court"; of which the right to institute proceedings, i.e. the right of access, constitutes one aspect.[1747]

Because Art. 14(1) rights inhere in "all persons" under a state's jurisdiction, apply to suits at law broadly conceived, and must be read to require access to a tribunal, the Australian attempt to avoid due process rights by the fictitious "excision" of parts of its territory is in breach of its duties under the Covenant. This conclusion is moreover consistent with the approach of the European Court of Human Rights in *Amuur v. France*,[1748] in which the Court ruled against the validity of a French law that purported to deny refugees access to protection by domestic courts in a so-called "international zone":

> Although by the force of circumstances the decision to order holding [of refugees seeking protection] must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties.[1749]

[1746] *Saad v. Secretary of State for the Home Department*, [2001] EWCA Civ 2008 (Eng. CA, Dec. 19, 2001), per Lord Phillips MR at paras. 1, 2, 11, and 65. The approach of the European Union to this question comes close to meeting the requirements of international law. It is proposed that an appeal or review of the denial or withdrawal of refugee status need not be provided "[w]here an applicant has been granted a status, which offers the same rights and benefits under national and Community law as . . . refugee status": EU Procedures Directive, at Art. 38(5). Reliance on this provision would be lawful only if the rights and benefits "under national and Community law" are in fact no less generous than those which must be provided under the Refugee Convention.

[1747] Jayawickrama, *Judicial Application*, at 481–482.

[1748] [1996] ECHR 25 (ECHR, June 25, 1996).

[1749] *Amuur v. France*, [1996] ECHR 25 (ECHR, June 25, 1996), at para. 43. In the same case, the French Constitutional Council had opined on Feb. 25, 1992 that "the legislature must make appropriate provision for the courts to intervene, so that they may carry out

Despite the general importance of access to justice, reasonable limitations on access, particularly where these serve the broader purpose of ensuring access to courts and tribunals for all, are not inconsistent with Art. 14(1). But these limitations must not undermine the general right to have justiciable claims settled by a competent tribunal that meets the standards of Art. 14. As Jayawickrama observes,

> [w]hat counts is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. The consistency of [a] limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, *in all the circumstances characterizing the class of case in question, to a real and fair one* [emphasis added].[1750]

The flaw in the new British system of denying an appeal in the United Kingdom to refugee claimants from listed states is thus clear: the ability to appeal a negative status determination from within the very country where there is alleged to be a real risk of persecution is cold comfort to a genuine refugee, as it will expose him or her to the very threats which induced flight in the first instance.[1751] Nor can a rigid cut-off time for making an application or seeking review or appeal be reconciled to Art. 14(1). The facts in the Australian case of *Sahak* – where the failure to meet a filing deadline was the direct result of the circumstances of the applicant's detention and "was not due to any personal default"[1752] – illustrate vividly that an ironclad filing deadline is inherently incapable of taking account of the sort of individuated circumstances which must be considered in evaluating the existence of a real and fair ability to access a court or tribunal. On the other hand, there is no reason to contest the international legality of a fairly administered requirement to seek leave or permission to present one's case to a court. As the

their responsibilities and exercise the supervisory power conferred on them": ibid. at para. 21.

1750 Jayawickrama, *Judicial Application*, at 483.

1751 The UN Human Rights Committee has determined that "[t]he right to a fair trial in a suit at law, guaranteed under article 14, paragraph 1, may require that an individual be able to participate in person in court proceedings. In such circumstances the State party is under an obligation to allow that individual to be present at the hearing, even if the person is a non-resident alien": *Ben Said v. Norway*, UNHRC Comm. No. 767/1997, UN Doc. CCPR/C/68/D/767/1997, decided Mar. 20, 2000, at para. 11.3. In an earlier decision reached on admissibility grounds, however, the Committee denied that expulsion of a refugee claimant prior to the completion of an appeal procedure constituted a breach of the duty of non-discrimination under Art. 2 of the Covenant, noting simply that "it emerges from the author's own submission that he was given ample opportunity in formal proceedings, including oral hearings, to present his case for sojourn in the Netherlands": *MF v. Netherlands*, UNHRC Comm. No. 173/1984, decided Nov. 2, 1984, at para. 4.

1752 See text above, at pp. 631–632.

Canadian Federal Court of Appeal helpfully observed in an analysis of Art. 16 of the Refugee Convention,

> Article 16 does not define a special procedure nor does it provide for special procedures for refugees. Quite to the contrary: in granting refugees the right to equal treatment before the courts, it implicitly recognizes that refugees are subject to the procedures available in the country in which [they reside]. Article 16 does not impose on the state the obligation to make available to refugees because they are refugees the most favorable procedures that can be put in place.
>
> There is no doubt that the right to apply for leave is a right of access to courts. Leave requirement is a usual procedure in Canadian law and it is, in Canadian terms, an accepted form of access to the courts of the country.[1753]

As the foregoing analysis suggests, the right of all persons seeking adjudication of a suit at law to go before a court or tribunal that meets the requirements of Art. 14 may be secured by way of appeal or review.[1754] There is therefore no objection to entrusting initial oversight of refugee rights to officials or an administrative body, so long as their actions are ultimately subject to scrutiny on the merits by a tribunal that meets the standards of Art. 14(1).[1755] But unless the initial decision is taken by a body which itself meets the requirements of Art. 14(1),[1756] the review or appellate tribunal must have "full jurisdiction. This includes the power to quash in all respects, on questions of fact and law, the decision of the administrative authority."[1757] The strong position taken on this question by the High Court of Australia, while framed as a matter of domestic constitutional law, is thus equally required by international human rights law.[1758] Because of this

[1753] *Krishnapillai v. Minister of Citizenship and Immigration*, [2002] 3(1) FC 74 (Can. FCA, Dec. 6, 2001), at paras. 31–32, per Décary JA.

[1754] "A rule that requires an [individual] to apply for and obtain leave before pursuing an appeal does not infringe his right of access to a court, particularly where if leave is refused, a petition procedure allows the [individual] to approach a higher court for a reassessment of the issues": Jayawickrama, *Judicial Application*, at 483.

[1755] For example, the Human Rights Committee found that Art. 14(1) had been complied with where entitlement to a disability pension was determined by the Canadian Pension Commission – said not to be impartial (as an executive branch of government, comprised entirely of civil servants) – so long as the decision reached was subject to "judicial supervision and control" by the Federal Court of Canada: *YL v. Canada*, UNHRC Comm. No. 112/1981, decided Apr. 8, 1986.

[1756] "[A]dministrative authorities that are largely independent and free of directives may, under certain circumstances, satisfy the requirements of a tribunal pursuant to Art. 14": Nowak, *ICCPR Commentary*, at 245.

[1757] Jayawickrama, *Judicial Application*, at 490, citing to decisions of the European Court of Human Rights on the cognate provision of the European Convention on Human Rights.

[1758] Interestingly, the only member of the High Court to comment on the relevance of international law, Justice Callinan, noted simply that "[d]espite the Universal

requirement, the British proposal to avoid judicial review or appeal by mandatory removal to an extraterritorial processing site is unworkable as a matter of international law. The courts of the country ordering the removal would by virtue of Art. 14(1) be required to entertain applications for appeal or review of the administrative decision to expel them to the processing site, and the courts of any country in which processing occurs would be similarly bound with respect to reviewing a decision not to recognize refugee status.[1759]

The essential qualitative requirements of Art. 14(1) are, first, that the tribunal adjudicating entitlement to refugee rights be "established by law."[1760] The notion of "law" in this context is "to be understood in the strict sense of a general-abstract parliamentary law or an equivalent, unwritten norm of common law, which must be accessible to all persons subject to it [and which must] define the subject matter and territorial scope of [the tribunal's] jurisdiction."[1761] Second, and closely related, the tribunal must be "competent," meaning that its "jurisdiction has been previously established by law, and arbitrary action so avoided."[1762] Third, the tribunal must be independent. Particularly relevant in this regard are "the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; [as well as] the conditions governing promotion,

Declaration of Human Rights, itself still in many respects an aspirational rather than an effective and enforceable instrument, there is no unanimity throughout the world . . . as to what claims, practices, benefits and values are deserving of protection": *S157/2002 v. Commonwealth of Australia*, [2003] HCA 2 (Aus. HC, Feb. 4, 2003). While these observations with respect to the legal authority of the Universal Declaration are certainly true (see chapter 1.2.3 above, at pp. 44–46), it is to be regretted that no reference was made in this judgment to the clearly binding standard set by Art. 14(1) of the Civil and Political Covenant.

[1759] Art. 16(1) of the Refugee Convention is also relevant, since it requires access by a refugee to the courts of any state party, not simply those of a state in which the refugee is resident: see text above, at p. 645.

[1760] Nowak's analysis implies that whatever court or tribunal is ultimately entrusted with the responsibility to determine or to oversee the enforcement of refugee rights must not be established solely for the benefit of refugees (or any other protected sub-population). Specifically, "[e]stablishing separate courts for the groups of persons listed in Art. 2(1) . . . violates Art. 14": Nowak, *ICCPR Commentary*, at 239. While conceding the risk that a separate court or tribunal may be less subject to scrutiny and thus more inclined to fall below the requirements of Art. 14, it nonetheless seems to overstate the case to deem any separate tribunal to be *per se* discriminatory. There may very well be good reasons, e.g. relevant legal expertise, special access of applicants to interpreters, cross-cultural sensitivity on the part of decision-makers, etc., that argue in favor of a specialized adjudicative structure. The relevant issue should therefore not be separateness *per se*, but rather that the relevant tribunal delivers substantive equality of treatment. See generally chapter 2.5.5 above, at pp. 126–128.

[1761] Nowak, *ICCPR Commentary*, at 245.

[1762] Jayawickrama, *Judicial Application*, at 514.

transfer and cessation of [the decision-makers'] functions."[1763] Fourth, the tribunal must be impartial, meaning not only that its members are not personally prejudiced, but also that the tribunal itself is, and appears to be, disinterested in the outcome of the cases that come before it.[1764] In this regard, the Human Rights Committee has insisted on its need to be informed about "the actual independence of the judiciary from the executive branch and the legislative."[1765] As Nowak concludes, rights and obligations "are not to be heard and decided by political institutions or by administrative authorities subject to directives."[1766]

Beyond these structural qualities, the tribunal must be positioned to deliver a "fair and public hearing." First, access to a tribunal must be without undue delay.[1767] Second, there must be respect for principles of natural justice, including the rights to submit and to contest evidence, and to a hearing before the decision-maker.[1768] Third, the tribunal must ensure the principle of procedural equality between the parties, often referred to as "equality of arms."[1769] Fourth, there should be "a reasonable opportunity to present [one's] case – under conditions that do not place [the individual concerned] at a substantial disadvantage vis à vis his opponent, and to be represented by counsel for that purpose."[1770] Respect for this principle may, for example, require the provision of an interpreter.[1771] Fifth, the hearing

[1763] UN Human Rights Committee, "General Comment No. 13: Administration of justice" (1984), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 135, para. 3. The Supreme Court of Canada has defined three essential conditions for judicial independence. These are security of tenure, financial security, and institutional independence: *Valente v. R*, [1985] 2 SCR 673 (Can. SC, Dec. 19, 1985).

[1764] See by way of analogy the decision of the European Court of Human Rights in *Gregory v. United Kingdom*, (1997) 25 EHRR 577 (ECHR, Feb. 25, 1997).

[1765] UN Human Rights Committee, "General Comment No. 13: Administration of justice" (1984), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 135, para. 3.

[1766] Nowak, *ICCPR Commentary*, at 244.

[1767] *Muñoz v. Peru*, UNHRC Comm. No. 203/1986, decided Nov. 4, 1988, at para. 11.3. Jayawickrama notes that the European Court of Human Rights has held that not even "chronic overload" justifies a violation of the duty for expeditious access to a tribunal: Jayawickrama, *Judicial Application*, at 508.

[1768] See the individual opinion of members Cooray, Dimitrijevic, and Lallah in *Muñoz v. Peru*, UNHRC Comm. No. 203/1986, decided Nov. 4, 1988, at para. 3.

[1769] In *Robinson v. Jamaica*, UNHRC Comm. No. 223/1987, decided Mar. 30, 1989, a violation of Art. 14 was found when adjournments were granted to the government, but not to the accused person: ibid. at para. 104.

[1770] Jayawickrama, *Judicial Application*, at 507.

[1771] *Guesdon v. France*, UNHRC Comm. No. 219/1986, decided July 25, 1990, at para. 10.2; *Cadoret and Bihan v. France*, UNHRC Comm. Nos. 221/1987 and 323/1988, decided Apr. 11, 1991, at para. 5.6. The Canadian Federal Court of Appeal presumed that the right to an interpreter may also be grounded in Art. 16(1) of the Refugee Convention. "Items such as free assistance of an interpreter are contemplated by the use of the word

must be public "in the interest of the individual and of society at large."[1772] While some circumstances may justify all or part of a hearing not being open to the public, "even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public."[1773]

Because national security and other exceptional concerns are only listed as the basis for the exclusion of the press and the public, they cannot be invoked to justify a wholesale violation of multiple aspects of the due process rights guaranteed by Art. 14(1). The breadth of the American departures from accepted norms in refusing the asylum requests of Iraqis on the basis of completely secret evidence, described above, is thus presumptively invalid. Indeed, as the European Court of Human Rights made clear in its decision of *Chahal v. United Kingdom*, national security concerns cannot be allowed to run roughshod over the right to a fair hearing before a court:

> The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved . . . The Court attaches significance to the fact that, as the interveners pointed out . . . in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.[1774]

It remains, however, that reliance upon access to the general courts is not an entirely satisfactory means of enabling refugees to bring their internationally derived rights to bear. Most fundamentally, not all courts have subject-matter jurisdiction over international treaties: it may be the case that neither the Refugee Convention nor the Civil and Political Covenant is directly enforceable at the suit of the refugee himself or herself. Particularly in common law countries, courts may therefore be able to take account of international law only indirectly by reliance on principles of statutory

'including' in that paragraph": *Krishnapillai v. Minister of Citizenship and Immigration*, [2002] 3(1) FC 74 (Can. FCA, Dec. 6, 2001), at para. 30.

[1772] UN Human Rights Committee, "General Comment No. 13: Administration of justice" (1984), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 135, para. 6.

[1773] Ibid. at para. 6. The reasons for excluding the public from a hearing are set out in Art. 14(1) of the Civil and Political Covenant, namely "reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice": ibid.

[1774] *Chahal v. United Kingdom*, (1996) 23 EHRR 413 (ECHR, Nov. 15, 1996), at para. 131.

interpretation, unless the treaty has in some sense been domesticated by the state party.[1775] In addition, litigation is often a very expensive process. While the drafters of the Refugee Convention did ultimately agree to help refugees overcome some of the practical impediments to accessing the courts (including by assimilating them to nationals for purposes of the duty to post security for costs, and under legal aid schemes), these more sophisticated rights are reserved for refugees who have established habitual residence in a state party.[1776]

[1775] See e.g. D. Bederman, *International Law Frameworks* (2001), at 151 ff.

[1776] See chapter 6.8 below.

5

Rights of refugees lawfully present

As the degree of attachment between a refugee and a state party increases, so too do the rights which the refugee may claim. All of the rights acquired by simple physical presence – to enter and remain in the asylum state; freedom from arbitrary detention or penalization for illegal entry; protection of physical security; access to the necessities of life; protection of property; respect for family unity; free exercise of thought, conscience, and religion; access to basic education; documentation of identity and status; and to benefit from administrative assistance and access to the courts – continue for the duration of refugee status. But once a refugee is not only in fact under the jurisdiction of a state party to the Convention, but also *lawfully present* in that country, he or she acquires three additional rights.

First, a refugee who is lawfully present enjoys both substantive and procedural protections against expulsion. These guarantees govern any effort to remove the refugee to any country, and are in addition to the right not to be sent to a country in which there is a risk of being persecuted.[1]

Second, lawfully present refugees enjoy a presumptive right to freedom of internal movement. As previously observed, the Refugee Convention grants states only a limited prerogative to detain a person seeking refugee status until his or her identity is established, basic security concerns are investigated, and the asylum-seeker's cooperation is secured for purposes of conducting all necessary investigations into his or her claim to protection. Once these concerns have been addressed, the refugee's presence has been regularized in the receiving state, and refugee-specific restrictions on freedom of movement must come to an end.[2]

Third and finally, refugees who are lawfully present are explicitly entitled to engage in self-employment. While permission to engage in employment or professional practice may be withheld until the refugee is authorized to remain in the asylum state (for example, consequent to the formal recognition of refugee status), mere lawful presence entitles the refugee to engage in independent income-generating activities. This right is a pragmatic means by

[1] See chapter 4.1 above. [2] See chapter 4.2.4 above, at pp. 415–419.

which to allow refugees to fund their own necessities of life,[3] but without thereby sanctioning integration into the more organized structures of the asylum state's economic life.

As addressed earlier,[4] a refugee is lawfully present in any of three circumstances. First, a refugee is lawfully present for the duration of any period of time for which his or her admission is authorized, even if only for a few hours.[5] Second, and of greater contemporary relevance, a refugee is lawfully present while his or her claim to refugee status is being verified, including the time required for exhaustion of any appeals or reviews.[6] Third, a refugee is lawfully present if the reception state opts not to verify his or her refugee status, including when formal status determination procedures are suspended in favor of so-called temporary protection regimes.[7]

It is important briefly to repeat the logic behind this critical third point. Simply put, a government cannot avoid its duty to grant refugees the benefit of rights which accrue upon "lawful presence" by refusing to admit them to a lawful procedure to verify their claims to be refugees.[8] While a state may decide that it does not wish, either generally or as an exceptional measure, to engage in formal status assessment, that decision not to authenticate refugee status exists against the backdrop of the government's legal duty to grant Convention rights to all persons in its territory who are in fact refugees, whether or not their status has been assessed. The nature of those rights increases as the refugee's attachment to the receiving state increases over time.[9]

The fundamental expectation that a refugee will either be resettled or have his or her status somehow normalized in the receiving state is particularly clear from the text of Art. 31(2) of the Refugee Convention. This article authorizes host states to impose constraints on a refugee's freedom of movement only "until their status in the country is regularized or they obtain admission into another country."[10] But if no inquiry is ever undertaken into refugee status, a refugee will never be able to escape what are expressly stated to be purely provisional constraints.[11] As such, the state's legal obligation to implement its treaty duties in good faith can be reconciled to its decision not to assess refugee status only if the latter decision does not prejudice

[3] See chapter 4.4 above. [4] See chapter 3.1.3 above.
[5] See chapter 3.1.3 above, at p. 174. [6] See chapter 3.1.3 above, at pp. 175–183.
[7] See chapter 3.1.3 above, at pp. 183–185. [8] See chapter 3.1.3 above, at pp. 184–185.
[9] See generally chapter 3.1 above. [10] See chapter 4.2.4 above.
[11] The logic of this system led the European Court of Human Rights to hold that a person claiming to be a refugee has "the right to gain effective access to the procedure for determining refugee status": *Amuur v. France*, [1996] ECHR 25 (ECHR, June 25, 1996), at para. 43. While not precisely true, this conclusion would nonetheless be accurate in those states which condition access to refugee rights on a formal process of refugee status determination.

enjoyment by the refugee claimant, at least on a provisional basis, of those rights that require no more than lawful presence. As Grahl-Madsen has explained,

> It has never been envisaged that there should be any group of underprivileged refugees, subject to the whims of the authorities. Quite to the contrary, so many of the provisions of the Refugee Convention . . . are based on the appreciation of the very special situation of refugees . . . as aliens incapable of gaining admission to any other country than the one in which they find themselves . . . After a time, the humanitarian considerations underlying the Refugee Convention and similar instruments must be held to override other considerations of a more traditional legal nature.[12]

5.1 Protection from expulsion

During the early part of the twentieth century, refugees allowed to enter an asylum state nonetheless often found themselves vulnerable to expulsion on grounds that they had committed even minor criminal offenses, or were deemed "public charges" because they were unable to meet their own needs due to indigence or ill health. As Grahl-Madsen describes the problem,

> [I]t became the habit of certain States to expel refugees . . . and to push those so expelled across the frontier to a neighbouring country. This practice caused considerable hardship to the refugees, who were often pushed back and forth between two or more countries and punished each time for illegal entry, but it also caused considerable inconvenience for the countries into whose territory the expelled refugees were sent in the first place. It [was] therefore quite natural that expulsion of refugees became a matter of concern to the international community. The question has been dealt with in all international instruments relating to the status of refugees [since 1928].[13]

In essence, the concern is that unlike other aliens, refugees subject to expulsion generally have no safe place to go. Yet this principled concern has continued to run up against the determination of some states to rid themselves of refugees whose continued presence is adjudged incompatible with their own interests.

For example, the United Kingdom authorizes the Secretary of State for the Home Department to expel an alien whose continued presence is not conducive to the public good. In reliance on this authority, the British government attempted to expel an Indian Sikh refugee believed to have supported terrorist activities,[14] and to force a Saudi asylum-seeker whose activities

[12] A. Grahl-Madsen, *The Status of Refugees in International Law* (vol. II, 1972) (Grahl-Madsen, *Status of Refugees II*), at 442–443.

[13] A. Grahl-Madsen, *Commentary on the Refugee Convention 1951* (1963, pub'd. 1997) (Grahl-Madsen, *Commentary*), at 185–186.

[14] *Chahal v. United Kingdom*, (1996) 23 EHRR 413 (ECHR, Nov. 15, 1996).

threatened British commercial interests to accept residence on the Caribbean island of Dominica.[15] Canadian courts have sanctioned the expulsion of, for example, a Chilean refugee convicted in Canada of sexually assaulting two young teenagers.[16] On the basis of secret testimony provided to its security police, Sweden authorized the Egyptian government to send a plane to its territory to take away two Egyptian refugees believed to be involved with international terrorism. Ahmed Hussein Agaiza had been sentenced by Egypt in absentia for having taken part in an attack on the Egyptian embassy in Pakistan, while Muhammad Zari faced a long term of imprisonment in that country for membership of an Islamic terrorist group. Both men denied the charges, but were granted no hearing before removal.[17]

Among the states of the developed world, however, Australia has traditionally pursued the expulsion of refugees on the most systematic basis. The Federal Court has endorsed a general right of the government to expel asylum-seekers to any non-persecutory country willing to admit and to protect them. On the basis of domestic legislation mandating the protection not of refugees, but instead only of persons to whom Australia owes a duty of protection, it has until the recent intervention of the High Court been accepted that even claimants who clearly meet the Convention refugee definition may legitimately be removed to any state so long as there is no real chance of *refoulement* from that country back to the asylum-seeker's own state.[18]

[15] "The British government ... bowed to pressure from the Saudi regime, the United States government and British arms companies when it ordered the deportation of Saudi Arabia's most prominent dissident to a tiny Caribbean island. Mohammed al-Mas'ari, leader of the influential London-based Islamic opposition group, the Committee for the Defence of Legitimate Rights – who last year applied for political asylum in Britain – was given 10 days to appeal against his removal to Dominica ... Mr. Mas'ari's removal would be an enormous relief to the Foreign Office, which has found his presence in Britain an embarrassment in relations with Saudi Arabia, a key export market and political ally in the region": S. Milne and I. Black, "UK bows to pressure over dissident," *Guardian Weekly*, Jan. 14, 1996, at 1. But the Chief Immigration Adjudicator overturned the deportation order, citing concerns about his safety in Dominica and the inappropriateness of the government's decision to refuse to consider his refugee claim: S. Milne, "Mas'ari's victory humiliates Howard," *Guardian Weekly*, Mar. 17, 1996, at 9.

[16] *Barrera v. Canada*, (1992) 99 DLR 4th 264 (Can. FCA, Dec. 14, 1992).

[17] P. Finn, "Europe tossing terror suspects out the door," *Washington Post*, Jan. 29, 2002, at A-01.

[18] This understanding of Convention duties derives from a series of decisions applying the judgment of the Full Federal Court in *Minister for Immigration and Multicultural Affairs v. Thiyagarajah*, (1997) 80 FCR 543 (Aus. FFC, Dec. 19, 1997), now incorporated in s. 36 of the Australian Migration Act. That body of law has been summarized as being "to the effect that, where a country other than the country of the claimant for refugee status, and other than Australia, would provide for that applicant effective protection, the person is not a person to whom Australia owes protection obligations": *Al Toubi v. Minister for Immigration and Multicultural Affairs*, [2001] FCA 1381 (Aus. FFC, Sept. 28, 2001). The High Court of Australia has recently determined, however, that Australia owes

More recently, the Australian government has implemented its so-called "Pacific Solution," under which many persons wishing to seek refugee status in Australia may be expelled from its territorial waters or contiguous zone to neighboring countries which, in exchange for often substantial development assistance and other payments, agree to receive them. This program began with the expulsion of several hundred Afghan and other refugee claimants who sought to enter Australian waters aboard the *KM Palapa I* in late August 2001. Some particularly vulnerable individuals were admitted to New Zealand's refugee status determination procedure, but the majority were taken aboard an Australian naval vessel to the tiny and impoverished island nation of Nauru. That country agreed to admit them for status verification by UNHCR and eventual resettlement in exchange for a payment of A$10 million worth of fuel, A$3 million for new generators, the cancellation of A$1 million worth of hospital bills run up by Nauruans in Australia, refurbishment of the island's sports oval, and the provision of sporting and educational scholarships for Nauruans to come to Australia.[19]

The expulsion of refugees in the less developed world is regrettably both more common and even less likely to be carried out under formal legal procedures. For example, many refugees were among the thousands of Rwandans "chased" from Uganda in an outbreak of anti-Rwandan hostility in 1982–1983. Arguing that "Uganda was for Ugandans," local government officials instigated public antipathy through accusations that Rwandans had displaced locals economically, engaged in cattle thefts, participated in paramilitary groups, and supported anti-government guerrillas.[20] Relying on

"protection obligations" to any person in Australia who meets the definition of a refugee, not simply to those refugees who cannot safely be sent elsewhere: *NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2005] HCA 6 (Aus. HC, Mar. 2, 2005), at paras. 29, 33, 42, 47. The joint reasons of six members of the High Court expressly invited the Federal Court to reconsider the approach previously adopted in *Thiyagarajah*: ibid. at paras. 52–53. In his separate opinion, Justice Kirby moreover emphasized that the traditional Australian approach renders the entitlement of refugees "hostage to arrangements purportedly made affecting their nationality by countries with which they may have no real connection. It . . . shift[s] obligations clearly imposed by international law to contingencies that, in some cases, may be imponderable": ibid. at para. 93.

[19] P. Barkham, "Paradise lost awaits asylum-seekers," *The Guardian*, Sept. 11, 2001, at 3. Australia subsequently entered into negotiations with Papua New Guinea and Kiribati to receive interdicted refugees for processing: K. Lawson, "PNG next in line to process Australia-bound refugees," *Canberra Times*, Oct. 11, 2001, at A-1. See generally J. Hathaway, "Refugee Law is Not Immigration Law," (2002) *Proceedings of the Canadian Council on International Law* 134, edited version reprinted in US Committee for Refugees, *World Refugee Survey 2002* (2002), at 38; and P. Mathew, "Australian Refugee Protection in the Wake of the *Tampa*," (2002) 96(3) *American Journal of International Law* 661.

[20] E. Khiddu-Makubuya, *International Academy of Comparative Law National Report for Uganda* (1994), at 14.

security agreements signed with countries such as Tunisia and Iran, Turkey rounded up and expelled hundreds of non-European refugees, including many recognized by UNHCR and awaiting resettlement.[21] In the aftermath of the first Gulf War, Kuwait ordered the expulsion of foreigners from countries deemed sympathetic to Iraq, including Palestinian and Iraqi refugees; it was reported that "even those who were cleared of charges without trial or were acquitted by martial law courts [were] deported."[22] In 1990, Kenyan President Moi ordered Rwandan, Ugandan, and "all refugees engaged in illegal activities" to leave the country. Police and "youth wingers" swept through major towns, indiscriminately arresting refugees and confiscating their property. Without being granted access to lawyers, trainloads of refugees were shipped to the Ugandan border and handed over to that country's security officials.[23] In 1997, soldiers of the Democratic Republic of Congo summarily expelled hundreds of Rwandan and Burundian refugees who had been awaiting processing of their claims at UNHCR's Kisangani transit camp.[24] And in 2002, Kenyan authorities threatened summarily to repatriate hundreds of Ethiopian and Somali refugees rounded up in a police sweep of Nairobi.[25]

Particularly in Africa, the expulsion of refugees is often linked to fear that their presence will embroil the host state in armed conflict, or retaliatory attack. For example, the threat of military attacks from *apartheid*-era South Africa led some neighboring countries, including Botswana, Mozambique, and Swaziland, to expel South African refugees. As Mtango observed, "because of their inability to defend themselves [from armed attack by South Africa], they [were] inclined instead to return refugees to South Africa or force them to seek resettlement in other countries."[26] Beginning in 1992, Nigerian officials began arresting and expelling Chadian refugees on the grounds that they were using northeastern Nigeria as a base for launching attacks on Chad. The Nigerian government adduced no evidence of rebel

[21] "In April 1996, [Turkey and Iran] reportedly signed an agreement stipulating the reciprocal exchange of opposition activists. The information available to Amnesty International indicates that after signing of this agreement, the numbers of Iranian asylum-seekers sent back to Iran increased sharply": Amnesty International, "Turkey: *Refoulement* of Non-European Refugees: A Protection Crisis" (1997). Turkey has also relied on new readmission treaties to return persons seeking refugee status to such states as Iraq and Syria: US Committee for Refugees, *World Refugee Survey 2002* (2002), at 251.

[22] Middle East Watch, "A Victory Turned Sour: Human Rights in Kuwait Since Liberation" (1991), at 43.

[23] Africa Watch, "Kenya: Illegal Expulsion of More than 1000 Refugees," Dec. 11, 1990, at 1–5.

[24] UNHCR, "UNHCR condemns refugee expulsion from ex-Zaïre," Press Release, Sept. 4, 1997.

[25] Human Rights Watch, "Kenyan Government Sweep of Foreigners Puts Refugees at Risk," June 8, 2002.

[26] E. Mtango, "Military and Armed Attacks on Refugee Camps," in G. Loescher and L. Monahan eds., *Refugees and International Relations* 92 (1990), at 95. See also J. Molefi, "Few Safe Havens for Apartheid's Exiles," 29(1) *Africa Report* 14, at 15.

activity by the refugees, however, and denied the refugees a public trial and access to legal representation.[27] And in the early months of 2001, Zimbabwean police ordered the expulsion of some thirty Central African refugees suspected of being rebels from the Democratic Republic of Congo sent to assassinate senior Zimbabwean officials, including President Mugabe.[28]

Refugee Convention, Art. 32 Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Civil and Political Covenant, Art. 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

When a refugee first arrives in search of protection, he or she enjoys a very limited right of non-return. At this stage, the only safeguards which an unauthorized asylum-seeker may claim derive from the duty of *non-refoulement* set by Art. 33,[29] and the right to be exempted from arbitrary detention and from penalties for unlawful entry pursuant to Art. 31.[30] These duties do not necessarily preclude a state party from expelling a refugee claimant from its territory during the earliest phases of refugee reception.[31] Governments are then only barred from

[27] P. Tiao and Nigerian Civil Liberties Organization, "The Status of Refugee Rights in Nigeria" (1992) (Tiao, "Refugee Rights in Nigeria"), at 23–25.

[28] *Independent Online* (Harare), Feb. 1, 2001.

[29] See chapter 4.1 above.

[30] See chapter 4.2 above.

[31] See chapter 4.2.3 above.

effecting expulsion which is at odds with the duty of *non-refoulement*, interpreted in the light of the Convention's context, object, and purpose. As previously described, this means that there must be no real chance that the expulsion will lead, directly or indirectly, to the refugee being persecuted, or of being denied such international rights as he or she may already have acquired.[32] Where these requirements are met, a refugee whose presence is not yet lawful – for example, because he or she has yet to apply for recognition of refugee status, or to comply with the formalities necessary to that end – may be expelled to another country. It would thus be possible in principle to design a system that pursues goals akin to those of Australia's "Pacific Solution" without breaching the Refugee Convention.[33]

As this discussion makes clear, an appreciation of the continuing relevance of the duty of *non-refoulement* is essential to understanding Art. 32's constraints on the expulsion of lawfully present refugees. The duties of *non-refoulement* and non-expulsion were never conceived as mutually exclusive; indeed, they were originally proposed as two aspects of a common obligation.[34] Thus, in describing the protection that refugees lawfully present would receive by virtue of Art. 32's protection against expulsion, the American representative referred to it as a "supplement" to the duty of *non-refoulement*.[35] Israel similarly insisted that the foundation for discussion

[32] See chapter 4.1.2 above, at pp. 322–335.

[33] A more detailed discussion of the requirements for lawful implementation of such a regime is found at chapter 4.1.2 above, at pp. 327–333.

[34] See United Nations, "Memorandum by the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems," UN Doc. E/AC.32/2, Jan. 3, 1950 (Secretary-General, "Memorandum"), at 45. This approach was modeled on Art. 3 of the 1933 Convention, under which each state party agreed to protect refugees against efforts "to remove or keep [them] from its territory by application of police measures, such as expulsion or non-admittance at the frontier (*refoulement*)": Convention relating to the International Status of Refugees, 159 LNTS 3663, done Oct. 28, 1933, entered into force June 13, 1935 (1933 Refugee Convention). The decision to separate the duties of *non-refoulement* and non-expulsion into separate articles was reached by the Ad Hoc Committee without clear explanation. It may, however, have followed from the decision to broaden the class of persons entitled to protection against *refoulement* to encompass all refugees, including those not yet admitted to an asylum country (in contrast to the more limited beneficiary class for protection against expulsion): see "Report of the Ad Hoc Committee on Statelessness and Related Problems," UN Doc. E/1618, Feb. 17, 1950 (Ad Hoc Committee, "First Session Report"), at Annex II. The British representative, for example, had made clear that "the notion of *refoulement* could apply to (a) refugees seeking admission, (b) refugees illegally present in a country, and (c) refugees admitted temporarily or conditionally": Statement of Sir Leslie Brass of the United Kingdom, Doc. E/AC.32/SR.21, Feb. 2, 1950, at 5.

[35] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 12. "Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the State

of the duty of non-expulsion was that "[t]he Committee had already settled the humanitarian question of sending any refugee whatever back to a territory where his life or liberty might be in danger."[36] The official comments of states on the Ad Hoc Committee's draft are equally clear. Both the Chilean and British governments argued for a generous interpretation of the scope of permissible expulsion precisely because the duty of *non-refoulement* had already limited their removal options.[37] And perhaps most emphatically, the Canadian representative to the Conference of Plenipotentiaries (and former chairman of the Ad Hoc Committee) affirmed that "the exercise of [expulsion] powers would be tempered with compassion, and never be at variance with the spirit of the Convention or with the terms of article [33], which related to the prohibition of expulsion to territories where the life or freedom of a refugee was threatened."[38] Because the duty of *non-refoulement* is not displaced once a refugee is lawfully present in a state party, even a state which has entered a reservation to Art. 32 cannot expel a refugee without consideration of the consequences of that act. Thus, while Uganda's purported reservation of its "unfettered right to expel any refugee in [its] territory" means that it did not violate Art. 32 when it "chased" Rwandans back to their country of origin, its actions were nonetheless in breach of Art. 33.[39]

concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp": ibid.

[36] Statement of Mr. Robinson of Israel, ibid. at 13. See also Statement of Mr. Guerreiro of Brazil, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 7, who felt that amendment of Art. 32 to establish protections against expulsion to persecution was not necessary because the duty of *non-refoulement* "covered the fundamental aspect of the problem and its provisions were applicable to all refugees."

[37] "It should also be taken into consideration that Article [33] limits the countries to which the expelled person may be sent, since it provides, and rightly so, that he may not be expelled to countries where he might be persecuted for political, social, or religious reasons": United Nations, "Compilation of the Comments of Governments and Specialized Agencies on the Report of the Ad Hoc Committee on Statelessness and Related Problems," UN Doc. E/AC.32/L.40, Aug. 10, 1950 (United Nations, "Compilation of Comments"), at 55 (Chile). See also comments of the British government, which made clear that it sought greater operational flexibility in relation to expulsion only "[i]n any case where a refugee is returnable to a country where he has no reason to fear persecution": ibid. at 57.

[38] Statement of Mr. Chance of Canada, UN Doc. A/CONF.2/SR.15, July 11, 1951, at 8.

[39] This is in fact acknowledged in the text of Uganda's reservation, which provides that "[w]ithout recourse to legal process the Government of the Republic of Uganda shall, in the public interest, have the unfettered right to expel any refugee in her territory and may at any time apply such internal measures as the Government may deem necessary in the circumstances; so however that, any action taken by the Government of the Republic of Uganda in this regard shall not operate to the prejudice of the provisions of article 33 of this Convention": available at www.unhcr.ch (accessed Nov. 19, 2004). Blay and Tsamenyi argue further that summary expulsion by Uganda violates Art. 16(1) of the Convention requiring that refugees have access to the courts of law of all state parties: 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 544–545.

As originally conceived, this supplementary protection against expulsion was to be granted only to refugees who were "authorized to reside regularly in the territory" of a state party.[40] If subject to this level of attachment, protection against expulsion would inhere only in refugees who benefit from some form of officially sanctioned, ongoing presence in a state party; refugees undergoing status verification and those present only for a limited period of time would, for example, be excluded from the beneficiary class.[41] The drafters of Art. 32, however, opted to delete the requirement for refugees to be residing in a state party in order to benefit from protection against expulsion. Instead, Art. 32 rights now inhere in all refugees "lawfully in [a state party's] territory," which includes those undergoing status verification, admitted for a set period of time, or whose claim to refugee status the asylum state has opted not to assess.[42]

The change seems to have been motivated by an effort to bring Art. 32 into line with the draft version of Art. 13 of the Civil and Political Covenant, which proposed granting a less robust form of protection against expulsion to all non-citizens who are "lawfully in the territory of a State Party."[43] The Report of the Ad Hoc Committee's first session made the change to grant Art. 32 protection to refugees "lawfully in their territory,"[44] with only a footnoted explanation citing the language proposed by the Commission on Human Rights for the draft Covenant.[45] At the Conference of Plenipotentiaries, the Swedish representative made reference to the "difficulty" of extending protection against expulsion to all refugees lawfully in a state's territory:

> What criterion would in fact be applied to decide whether a refugee was indeed lawfully in a territory? Sweden distinguished between aliens to whom a right of establishment had been granted, and aliens possessing only a right of temporary residence. The question did not arise in respect of the former, but, in respect of the latter, the Swedish Government wished to be able to expel them if it so decided when the authorization granted to them expired.[46]

Yet because a temporarily admitted refugee whose authorization to remain has expired is clearly no longer lawfully present in the state party,[47] the fact that no amendment was made to Art. 32 to accommodate the Swedish concern is not necessarily probative of the scope of the beneficiary class. This intervention does make clear, however, that the drafters were on notice that the language of Art. 32 could be construed to include refugees who had not been granted permission to stay in the asylum state.

[40] Secretary-General, "Memorandum," at 45. [41] See chapter 3.1.4 above.
[42] See chapter 3.1.3 above. [43] Civil and Political Covenant, at Art. 13.
[44] Ad Hoc Committee, "First Session Report," at Annex I. [45] Ibid. at Annex II.
[46] Statement of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 21.
[47] See chapter 3.1.3 above, at pp. 185–186.

The most significant indication that Art. 32's beneficiary class should be broadly interpreted occurred on second reading of the Convention at the Conference of Plenipotentiaries. The Swedish delegate this time pointed out the inconsistency between the English language title of Art. 32 ("Expulsion of refugees lawfully admitted") and the French language equivalent, which used the phrase "résidant régulièrement au pays d'accueil." Referring to an earlier decision of the Style Committee which had defined the equivalent English and French language terms for the various levels of attachment,[48] Mr. Petren observed that the English title did not correspond to the French title (indeed, "lawfully admitted" had not been accepted by the Style Committee at all as a relevant term of art).[49] Acknowledging the discrepancy, the Conference deleted the reference to the level of attachment in Art. 32's title without making any change to the corresponding language of the text.[50] Art. 32 was therefore approved on the basis that protection against expulsion inheres in refugees "lawfully in their territory" (in French, "se trouvant régulièrement sur leur territoire"). Because this vote was taken immediately after attention had been drawn by the Swedish delegate to the fact that the personal scope of Art. 32 required clarification, with explicit reference to the fact that being "lawfully in the territory" implies a lesser attachment to the asylum state than does "lawfully staying in the territory,"[51] it is difficult to imagine that there was any doubt among the drafters about the significance of the Conference's decision.[52]

There is, moreover, a particular logic to interpreting Art. 32 so as to grant protection against expulsion to refugees who are awaiting the results of their status verification inquiry. Because such persons have by definition complied with the host state's legal requirements and have not been finally determined to fall outside the Convention refugee definition, allowing them to remain in the country pending the results of the inquiry seems very much a matter of basic fairness. This can be seen, for example, against the backdrop of the

[48] "Draft Convention relating to the Status of Refugees, Report of the Style Committee," UN Doc. A/CONF.2/102, July 24, 1951, at para. 5.

[49] Statement of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 20.

[50] The vote in favor was 21–0 (1 abstention): ibid.

[51] "Draft Convention relating to the Status of Refugees, Report of the Style Committee," UN Doc. A/CONF.2/102, July 24, 1951, at para. 5. The attention of delegates was expressly drawn to this report immediately prior to the vote on Art. 32: Statement of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 20.

[52] See G. Stenberg, *Non-Expulsion and Non-Refoulement* (1989) (Stenberg, *Non-Expulsion*), at 92: "Based on the fact that the drafters intended that a refugee should be regarded as lawfully in the territory regardless of the period of time for which his sojourn has been authorized it may nevertheless tentatively be submitted that neither did the drafters intend that protection in accordance with Article 32 should be extended only to those whose refugee status had already been recognized by the expelling State and not to those refugees whose status had not yet been recognized."

Democratic Republic of Congo's refusal to respect the duty of non-expulsion in the case of the Rwandan and Burundian refugees awaiting processing of their claims by UNHCR at the Kisangani refugee camp: it surely offended basic norms of fairness to deny interim protection against removal to these persons simply because the formalities of status verification had yet to be completed.

In insisting upon this interpretation, it is important to remember that asylum states genuinely unable to cope with refugee arrivals always retain the option under Art. 33 initially to redirect those refugees to other states where their acquired rights will be respected, and in which there is no direct or indirect risk of being persecuted. But once the refugee has been allowed to enter a refugee status determination procedure and has acquitted himself or herself of all responsibilities to contribute to the inquiry into his or her claim (thereby regularizing his or her presence, and becoming "lawfully present" in the state), it would be unnecessarily harsh to force him or her away before a final answer is given. Indeed, such an act may well run the very risk of concern to the drafters of Art. 32, namely that of the refugee being "[c]aught between two sovereign orders, one ordering him to leave the country and the other forbidding his entry into the neighbouring country, [causing him or her to] lead[ ] the life of an outlaw and . . . in the end becom[ing] a public danger."[53] This duty to desist from expulsion is, of course, purely provisional, since the refugee's "lawful presence" comes to an end if and when refugee status is denied. In the interim, the legitimate concerns of the host state are surely adequately safeguarded by the right to expel a refugee on national security or public order grounds as described above.[54]

The basic rationale for going beyond the duty of *non-refoulement* to impose limits on the right of states to expel refugees[55] to even non-persecutory countries was elegantly stated in the Secretary-General's background study for the Convention:

> There is little likelihood that a foreign country will consent to receive a refugee whose expulsion has been ordered and who is thereby stamped as undesirable. As every frontier is barred to a refugee whose expulsion has

[53] Secretary-General, "Memorandum," at 46.

[54] State practice is largely in accordance with this position: Stenberg, *Non-Expulsion*, at 119.

[55] "Expulsion means any measure which obliges the refugee to leave the territory of a Contracting State, for instance, a residence ban": P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (posthumously pub'd., 1995) (Weis, *Travaux*), at 322. This broad reading is in line with the authoritative interpretation of the cognate duty under the Civil and Political Covenant which defines expulsion to include "all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise": UN Human Rights Committee, "General Comment No. 15: The position of aliens under the Covenant" (1986), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 140, para. 9.

> been ordered, only two possibilities are open to him, either not to obey the order and go into hiding to avoid being caught or to cross a frontier illegally and clandestinely enter the territory of a neighbouring country. In that country, too, he must go into hiding to avoid being caught. In either case, after a certain time he is discovered, arrested, prosecuted, sentenced and escorted to the frontier after serving his sentence. Caught between two sovereign orders, one ordering him to leave the country and the other forbidding his entry into the neighbouring country, he leads the life of an outlaw and may in the end become a public danger. In this way measures of expulsion, . . . intended to protect law and order, achieve opposite results when an attempt is made to apply them to refugees without taking account of their particular position.[56]

In line with this profound concern about the risks of expelling a refugee,[57] the Secretary-General's draft of the combined duty of *non-refoulement* and non-expulsion disallowed either act unless "dictated by reasons of national security or public order."[58] The expulsion of refugees was further constrained at a procedural level: only "a judicial authority"[59] could expel a refugee.[60] The competing French draft for Art. 32, on the other hand, sought to give governments much more leeway to expel refugees to non-persecutory states. Under its proposal, there would be no substantive limits on the right to expel refugees (though *refoulement* would be limited to "national security" cases), and there would be no guarantee of an opportunity to appear in court. It would be enough if the refugee were allowed "to submit evidence to clear himself, and to be represented before the competent judicial or administrative authority."[61]

In the end, a third approach suggested by a non-governmental organization, the Agudas Israel World Organization, was selected as the working draft of Art. 32.[62] This draft presented states with two options: the right to expel

[56] Secretary-General, "Memorandum," at 46.

[57] As Grahl-Madsen notes, the practice of expelling refugees not only caused real hardship to refugees, "but it [also] caused . . . considerable inconvenience for the countries into whose territory the expelled refugees were sent in the first place": Grahl-Madsen, *Commentary*, at 185.

[58] Secretary-General, "Memorandum," at 45. [59] Ibid.

[60] This right to contest expulsion before a court was based on a generous interpretation of the draft of what became Art. 13 of the International Covenant on Civil and Political Rights, UNGA Res. 2200A(XXI), adopted Dec. 16, 1966, entered into force Mar. 23, 1976 (Civil and Political Covenant), then framed to require the expulsion of any alien to be ordered "according to such procedure and safeguards as are provided by law": Secretary-General, "Memorandum," at 47.

[61] France, "Proposal for a Draft Convention," UN Doc. E/AC.32/L.3, Jan. 17, 1950 (France, "Draft Convention"), at 9.

[62] The decision to work from the non-governmental draft was reached on the basis of a proposal from the British representative, who found that it "presented the question of expulsion and non-admittance in a more logical form than did the others": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 2–3.

refugees could be constrained on substantive grounds (limited to "national security") or procedurally (by requiring that any expulsion decision be reached "in pursuance of a decision of a judicial authority," presumably for a broader range of reasons).[63] The gist of the proposal was that refugees could be adequately protected in either of two ways. Their basic interests would be safeguarded so long as refugees could only be expelled for very grave ("national security") reasons; but sufficient protection would also exist if even a broad-ranging expulsion power were always subject to judicial oversight. In either event, the non-governmental draft proposed that the refugee would be entitled to the minimal due process guarantees stated in the French draft.

Over the course of the ensuing debates, it was decided to revert to a more flexible version of the approach initially proposed by the Secretary-General, that being that the expulsion of refugees would be subject to both substantive and procedural limits. But a broader range of substantive concerns would suffice – either national security or public order grounds could be invoked – and not only courts, but also administrative decision-makers, could be entrusted to afford the refugee basic due process guarantees.

The procedure by which refugees could be expelled was the first concern of the drafters. While acknowledging the general right of states to remove non-citizens from their territory,[64] safeguards were felt necessary because

> [e]xperience had shown that a large number of expulsion orders are due to false accusations and the malice of ousted competitors. Sometimes the orders are due to an error *de persona*. So long as expulsion proceedings are secret and so long as the expelled person is deprived of any means of presenting his case, mistaken decisions are inevitable.[65]

As noted above, the Secretary-General's view was that entrusting all expulsion cases to the courts would best ensure refugees due process. The American representative championed this approach; he was adamant that allowing lesser tribunals or authorities to expel a refugee "would deprive the refugee of the safeguards which every individual was entitled to expect from judicial authority. He would be left to the discretion of police measures."[66] It was soon clear, however, that most governments were unwilling to guarantee judicial oversight of refugee expulsion.[67] The American representative thus

[63] "Communication from the Agudas Israel World Organization," UN Doc. E/C.2/242, Feb. 1, 1950, at para. 2.

[64] "The sovereign right of a State to remove ... from its territory foreigners regarded as undesirable cannot be challenged": Secretary-General, "Memorandum," at 45.

[65] Ibid. at 47. See also Ad Hoc Committee, "First Session Report," at Annex II.

[66] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 6.

[67] See comments of the representatives of Canada, Turkey, France, and Belgium, ibid. at 6–7; and comments of the government of Austria in United Nations, "Compilation of Comments," at 55.

acquiesced in a Canadian compromise,[68] under which governments could leave expulsion decisions to administrative authorities but would formally commit themselves to ensure that expulsion would be ordered "only in pursuance of a decision reached by due process of law."[69]

Importantly, Art. 32 establishes a stronger guarantee of due process than does the general standard set by the Civil and Political Covenant,[70] in that it explicitly entitles refugees "to *appeal to* . . . competent authority or . . . persons specially designated by the competent authority."[71] This standard was chosen "to avoid the possibility of a [refugee] being expelled on the decision of a mere policeman, for example"[72] – precisely the approach Kenya sought to impose on Ethiopian and Somali refugees rounded up in a sweep of Nairobi. While the language was not intended to require access to a formal appellate court[73] or even directly to the

[68] "The essential thing was that it should not be possible to expel refugees other than in accordance with a regular procedure provided by the law, whether administrative or judicial": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 12.

[69] Statement of the Chairman, Mr. Chance of Canada, ibid. at 7.

[70] Under Art. 13 of the Civil and Political Covenant, in contrast, aliens enjoy only a right to have their case "reviewed by" the competent authority or its designate. Nowak, however, interprets Art. 13 of the Covenant to provide for "an express right to *an appeal* to a higher authority [emphasis added]": M. Nowak, *UN Covenant on Civil and Political Rights* (1993) (Nowak, *ICCPR Commentary*), at 229. This conclusion may be overstated. For example, in *Hammel v. Madagascar*, UNHRC Comm. No. 155/1983, decided Apr. 3, 1987, the Committee found a violation of Art. 13 because "in the circumstances of the present case, the author was not given an effective remedy to challenge his expulsion and . . . the State party has not shown that there were compelling reasons of national security to deprive him of that remedy": ibid. at para. 19.2. While a review is clearly required, no reference is made to the specific necessity of an "appeal."

[71] Despite the generality of the language used in Art. 13 of the Civil and Political Covenant, the Human Rights Committee has found that standard to be infringed when a French national was expelled by Madagascar with only two hours' notice, and with no opportunity to challenge his removal: *Hammel v. Madagascar*, UNHRC Comm. No. 155/1983, decided Apr. 3, 1987.

[72] Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 18. The Chairman had originally referred to the need for a "final decision rendered by due process of law": ibid. at 17.

[73] "The position of the United Kingdom was similar to that of Italy, since there was no specially constituted appeals tribunal. But the reference to the procedure of appeal, at least in the English version . . . was not so specific as to make the text unacceptable to the United Kingdom Government": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.15, July 11, 1951, at 13. In some circumstances, however, it was recognized that appeal to a court might be required. At the Conference of Plenipotentiaries, the Danish Chairman asked, "How, for example, would an appeal be possible if the decision had been taken by the King in Council? He assumed that the meaning of the text was that, in the event of expulsion pronounced by the highest authority, the refugee would be given the chance of having his case re-examined. In countries where such a sentence would have been passed by local authority, the appeal

ultimate decision-maker,[74] there was agreement that a refugee should be entitled to appeal his or her case to an authority of some seniority. A simple administrative review by, for example, the supervisor of a border guard will not suffice.[75] The appeal provided should instead be a more formal reevaluation of the kind implied by the notion of the right to "présenter un recours."[76] As succinctly summarized by the British representative to the Conference of Plenipotentiaries, "[w]hat mattered was that a refugee should have full opportunity of presenting his case to the proper authority."[77]

Thus, the body or person entrusted with the ultimate decision on expulsion should, at the very least, be explicitly empowered to take account of all the circumstances of the case, including the special vulnerabilities and rights of refugees. The appellate authority must, of course, have real authority over the expulsion process. This requirement is met where, as in Canada, judicial

would be addressed to a court of higher instance": Statement of the Chairman, Mr. Larsen of Denmark, ibid. at 14–15.

[74] The British delegate was insistent that there could be no question of requiring the personal involvement of the ultimate decision-maker on expulsion cases, that being the Home Secretary in the United Kingdom: Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 20. His government introduced an amendment adopted at the Conference of Plenipotentiaries, which resulted in the clarification in Art. 32(2) that the appeal could be to "competent authority or a person or persons specially designated by the competent authority": UN Doc. A/CONF.2/60.

[75] In the Ad Hoc Committee, the French representative reacted to the original wording of the Canadian amendment by observing that "he had not grasped the exact meaning of the words 'final decision.' In France an expulsion order was issued by the Prefect, and no administrative authority could usurp his right. His order was therefore final": Statement of Mr. Ordonneau of France, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 18. The Chairman responded that the amendment had, in fact, been intended to ensure that the ultimate decision could *not* be made by a police officer: Statement of the Chairman, Mr. Chance of Canada, ibid. At its second session, the Ad Hoc Committee dropped the (arguably ambiguous) reference to a "final decision" in favor of an explicit requirement to allow a refugee to "appeal," noting that "[t]he procedural safeguards accorded to refugees were clarified and are now contained wholly in paragraph 2": "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 13.

[76] The authoritative nature of the French text is clear from the remarks of the British representative, who had been the most ardent opponent of access to an appellate court in cases of expulsion. The French representative suggested that the French notion of "présenter un recours" could most readily be translated into English as "to lodge an appeal": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.15, July 11, 1951, at 14. The British representative replied that the notion of "présenter un recours" "was in fact equivalent to the English word 'appeal'": Statement of Mr. Hoare of the United Kingdom, ibid. The decision to employ the term "appeal" in Art. 32(2) should therefore be understood in context to require access to a procedure of reevaluation of the kind implied by the French concept of "présenter un recours."

[77] Statement of Mr. Hoare of the United Kingdom, ibid. at 13.

authority over expulsion is exercised on a discretionary basis.[78] But Kuwait's decision to expel refugees suspected of collaboration with Iraq even though the charges against them had either been withdrawn or dismissed makes clear that its courts did not, in fact, possess the degree of authority required by Art. 32.

The importance of granting refugees enhanced protection against erroneous or otherwise unjustified expulsion is emphasized as well by the specificity of the Refugee Convention's procedural requirements. Like all aliens, refugees are presumptively entitled to claim the benefit of the Civil and Political Covenant's right to submit reasons against their expulsion,[79] and to be represented on the review of any decision to expel them.[80] But Art. 32's more explicit language unambiguously affirms the right of refugees to "submit evidence" in support of their case, not merely to state their reasons for resisting expulsion. The breadth of relevant evidence moreover includes any evidence which may assist the refugee to "clear himself," not just evidence "against expulsion."[81] There can therefore be no question that the person or body considering a refugee's appeal against expulsion must consider evidence relevant to, for example, the soundness of a criminal conviction which underpins the expulsion order, rather than limiting itself simply to the consideration of evidence about the propriety of the expulsion order itself.

Another striking difference between the Civil and Political Covenant and the Refugee Convention is that the latter expressly requires that the decision to expel a refugee "shall be only in pursuance of a decision reached in accordance with due process of law." The more general formulation in the Civil and Political Covenant requires only that the expulsion decision be "reached in accordance with law."[82] In Nowak's view, the Civil and Political Covenant's formulation means that "such a decision must be made by a court or an administrative authority on the basis of a law affording protection against arbitrary expulsion through the establishment of corresponding procedural guarantees."[83] In contrast, the drafters of the Refugee Convention were emphatic that a stronger guarantee of safeguards was

[78] *Krishnapillai v. Minister of Citizenship and Immigration*, [2002] 3(1) FC 74 (Can. FCA, Dec. 6, 2001), at para. 33.

[79] Nowak observes that "[e]ven though the reasons against a pending expulsion should, as a rule, be asserted in an oral hearing, Art. 13 does not . . . give rise to a right to personal appearance": Nowak, *ICCPR Commentary*, at 228.

[80] "[A] person threatened with expulsion is not entitled to *legal* counsel or to the appointment of an attorney [emphasis in original]": ibid. at 231.

[81] While Nowak may be right that the more constrained language of the Civil and Political Covenant "did not change the substance of the right" as conceived in the Refugee Convention (ibid. at 228) the greater precision of Art. 32 of the Refugee Convention more readily forecloses debate on these points.

[82] Civil and Political Covenant, at Art. 13.

[83] Nowak, *ICCPR Commentary*, at 226.

required[84] in order to ensure a meaningful "legal check on the powers of the administration."[85] The Israeli delegate, in particular, insisted that the specific protection needs of refugees justified stronger protections against expulsion than afforded aliens generally:

> [T]here should be a great distinction between the treatment of aliens in general and the treatment of refugees. The stage had now been reached in social legislation when social cases could be spoken of, and the great problem was, who was responsible for the social cases represented by the refugee. In the case of aliens, the answer was their own country; in the case of refugees, the answer was no country. If refugees were not nationals in the political sense of the country where they were resident, however, they were in a moral sense. It seemed to him that countries should accept refugees as human beings, with all the infirmities and weaknesses inherent in the human condition, and treat them accordingly when they offended against national laws.[86]

To this end, the Chinese representative endorsed the Canadian proposal to require respect for due process,[87] remarking that "[t]he concept of due process, familiar to those who understood Anglo-American common law, would be easily acceptable."[88] At its most basic level, due process embraces a duty to respect a range of technical, procedural requirements associated with basic fairness. For example, the High Commissioner for Refugees noted during the Conference of Plenipotentiaries that he "assumed that it was understood that a refugee would not be expelled while his case was *sub judice*."[89] But as Weis has correctly observed, due process also has a fundamental substantive dimension which "means that the [expulsion] decision must be based on law, that it may not be unreasonable, arbitrary or capricious and must have a real and substantive relation to its object."[90]

The drafters did not simply agree that adherence to due process norms was desirable, but formally bound themselves to respect these standards. There was little support for an effort by Italy to delete the reference to respect for due process,[91] nor even for a French proposal that decisions be reached "with

[84] Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 15.
[85] Statement of Mr. Juvigny of France, ibid. at 12.
[86] Statement of Mr. Robinson of Israel, ibid. at 16.
[87] Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 7.
[88] Statement of Mr. Cha of China, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 24.
[89] Statement of Mr. van Heuven Goedhart of UNHCR, UN Doc. A/CONF.2/SR.15, July 11, 1951, at 16.
[90] Weis, *Travaux*, at 322.
[91] UN Doc. A/CONF.2/57. Italy withdrew its proposal: Statement of Mr. Theodoli of Italy, UN Doc. A/CONF.2/SR.15, July 11, 1951, at 13.

regard for" (rather than "in accordance with") due process of law.[92] Noting that he thought the Italian and French proposals "went rather further than their authors had intended,"[93] the Belgian delegate proffered an amendment that would have required respect for the three specific aspects of due process mentioned in Art. 32(2) – the right to submit evidence, to appeal, and to be represented – only "[i]nsofar as national security permits."[94] But even this approach was generally felt to be too risky for refugees. Baron van Boetzelaer of the Netherlands successfully persuaded the Conference that limitations on the three due process rights should not be possible simply because national security was involved, but rather only when "imperative" national security concerns so required.[95] The text of Art. 32 was thus amended to allow state parties exceptionally to justify limits on a refugee's right to submit evidence, to appeal, and to be represented, but only "where compelling reasons of national security [so] require."

Three key notions therefore circumscribe the possibility of procedural constraints on the applicability of Art. 32(2). First, as the drafting history makes clear, there is no general right to avoid respect for due process norms even when compelling national security concerns require derogation: only the three rights set out in the second sentence of Art. 32(2) may be constrained. Thus, for example, not even compelling national security concerns would justify the expulsion of a refugee under a procedure which is unreasonable, arbitrary, or capricious. Whatever concerns Kenya had about the "illegal activities" of Ugandan and Rwandan refugees, or which Nigeria had about the support of Chadian refugees for rebels launching attacks on their home country from its territory, could not justify elimination of the right to a hearing altogether. Similarly, Turkey's decision summarily to expel refugees under secret "security agreements" with their states of origin clearly goes significantly beyond what Art. 32(2) allows.

[92] Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 29. France had formally tabled comments to similar effect, observing that "[t]his modification would make the text more flexible and cover urgent cases which might require a simpler procedure": Comments of France in United Nations, "Compilation of Comments," at 56. It had also tabled a formal amendment to this end (see UN Doc. A/CONF.2/63), which it subsequently withdrew: Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.15, July 11, 1951, at 13.

[93] Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.15, July 11, 1951, at 12.

[94] UN Doc. A/CONF.2/68. The Belgian representative "understood the motives that had prompted the French and Italian delegations to submit their amendments . . . He wondered whether a reservation concerning national security would not meet the points that the French and Italian delegations had in mind": Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.15, July 11, 1951, at 12.

[95] Statement of Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.15, July 11, 1951, at 15.

Second, and equally fundamentally, because this is a highly constrained, necessity-based exception to a fundamental norm, the state party seeking to avail itself of the right to avoid its usual responsibilities must establish that respect for one or more of the three due process rights cannot be reconciled to "compelling reasons of national security." The corollary to this principle is that the asylum state must logically limit its restrictions on these rights to only what is objectively necessary to safeguard its compelling security interests. This understanding is consistent with the finding of the European Court of Human Rights in the case of *Chahal v. United Kingdom*, in which the Court found that limitations on due process even when considering the expulsion of an alleged terrorist asylum-seeker must be conceived in the least intrusive fashion possible.[96] There is therefore little doubt that Sweden's peremptory expulsion of refugees suspected of terrorist affiliations or acts without any hearing, and strictly on the basis of secret evidence, was unlawful.[97]

Third, the exception to Art. 32(2) is logically difficult to invoke outside the more formal judicial arena. As Grahl-Madsen has observed,

> It is difficult to see that this exception is of much relevance in a system where the power to expel lies exclusively with administrative authorities. Even if they have reached their decision on the basis of confidential material, the nature of which may not be disclosed without endangering national security, there is hardly any reason why the refugee should not be allowed to submit evidence, appeal or be represented. This will, after all, not force the authorities to disclose their sources of information.
>
> If, on the other hand, the law provides for hearings before or appeals to a judicial or semi-judicial authority, it may be necessary for the administration to plead that certain evidence, an appeal or presentations by counsel are non-receivable by the tribunal, because if the latter received such pleas,

[96] "The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved . . . The Court attaches significance to the fact that . . . in Canada a more effective form of judicial control has been developed in cases of this type. This example illustrates that there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice": *Chahal v. United Kingdom*, (1996) 23 EHRR 413 (ECHR, Nov. 15, 1996), at para. 131.

[97] More generally, the UN Human Rights Committee expressed its concern "at cases of expulsion [by Sweden] of asylum-seekers suspected of terrorism to their countries of origin. Despite guarantees that their human rights would be respected, those countries could pose risks to the personal safety and lives of the persons expelled, especially in the absence of sufficiently serious efforts to monitor the implementation of those guarantees (two visits by the embassy in three months, the first only some five weeks after the return and under the supervision of the detaining authorities)": UN Human Rights Committee, "Concluding Observations: Sweden," UN Doc. A/57/40, vol. I (2002) 57, at para. 79(12).

> the administration would be forced to counter them by submitting classified material. Being an exception, this provision is subject to restrictive interpretation.[98]

While respect for due process before deciding to expel a refugee is clearly important, the Refugee Convention does not limit itself (as does Article 13 of the Civil and Political Covenant) to purely procedural constraints on expulsion. Under some of the early proposals for Art. 32, there were either no substantive limits on the power to expel refugees,[99] or only tribunal-dependent substantive strictures.[100] But as finally adopted, the Refugee Convention establishes a presumptive immunity from expulsion of refugees lawfully in an asylum state. The expulsion of a refugee may be lawfully pursued in only two cases, namely when either "national security" or "public order" grounds justify such action. As successfully argued by the representative of the International Refugee Organization, substantive limits on refugee expulsion make ethical and practical good sense:

> Several representatives had said that there was no reason for granting special privileges to refugees [in relation to expulsion]. He submitted that there were strong grounds for doing so, above all the ground that aliens possessing an effective nationality could return to their country of nationality in case of expulsion, whereas for a refugee it was a matter of life and death, as he had no other country to go to.[101]

The drafters therefore agreed that refugees would be entitled to assert both procedural and substantive limitations on the usual right of states to expel non-citizens:

> [T]he measure of expulsion should be decreed only after regular procedure. Such a safeguard did not, however, appear to be sufficient, for a refugee could then be expelled in due and proper form for even a slight offence. States would have to undertake not to resort to the *ultima ratio* of expulsion except for very grave reasons, namely, actions endangering national security or public order. Thus the refugee would be protected both in the matter of procedure and in that of grounds, which was not the least important consideration.[102]

Because an expulsion is lawful only where based on national security or public order grounds, the British effort to expel the Saudi dissident asylum-seeker Mohammed al-Mas'ari in order to safeguard its trade links or to promote international comity was in contravention of Art. 32. Similarly, the Australian legal regime authorization of the expulsion of asylum-seekers

[98] Grahl-Madsen, *Commentary*, at 222. [99] See the French proposal above, at p. 669, n. 61.
[100] See the Agudas Israel World Organization proposal above, at pp. 669–670.
[101] Statement of Mr. Weis of the IRO, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 15.
[102] Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 10.

simply on the grounds of their admissibility to a state in which no risk of *refoulement* exists cannot be reconciled to Art. 32: because persons undergoing verification of their refugee status are lawfully in the state party, the presumption against expulsion inheres until and unless they are found not so to qualify. Only a removal affirmatively grounded in national security or public order concerns, as described below, is compatible with the requirements of the Refugee Convention.

The clearest situation in which a refugee may lawfully be expelled is when his or her presence in the asylum state poses a risk to that country's national security. Because a threat to national security is also grounds for *refoulement* under Art. 33(2),[103] a refugee expelled on national security grounds may be removed even to his or her country of origin, if no alternative destination can be identified.[104] The core meaning of "national security" has already been discussed at some length in the context of the right of asylum states to take provisional measures under Art. 9 of the Refugee Convention,[105] and noted in relation to the right of states to engage in individuated *refoulement*.[106] The cases most readily identified as justifying expulsion on grounds of national security are those involving a refugee who seeks directly to attack the political integrity of the host state. For example, in the discussions leading to the adoption of Art. 32, the Venezuelan representative was emphatic that "young countries . . . subject to internal upheavals and revolutions" would be unlikely to sign the Convention unless guaranteed the right to expel refugees who attacked their basic democratic institutions:

> Venezuela had experienced disturbances, accompanied by violence, in which refugees from various countries had taken part; the people of Venezuela had suffered a great deal during and following those upheavals and they would not accept a convention for refugees which contained any provisions that would prevent them from defending their own institutions.[107]

Thus, if Zimbabwe had followed the required procedures before expelling the Central African refugees who were intending to murder key political

[103] See chapter 4.1.4 above, at pp. 345–348.

[104] There may be, however, legal obligations beyond those set by the Refugee Convention which limit the right of a state to return an individual to the risk of persecution: see, in particular, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/46, adopted Dec. 10, 1984, entered into force June 26, 1987 (Torture Convention), at Art. 3; the Civil and Political Covenant, at Art. 7; and the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, done Nov. 4, 1950, entered into force Sept. 3, 1953, at Art. 3.

[105] See chapter 3.5.1 above, at pp. 263–267.

[106] See chapter 4.1.4 above, at pp. 345–348.

[107] Statement of Mr. Perez Perozo of Venezuela, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 8.

leaders, expulsion on national security grounds would have been reconcilable to Art. 32.

But under modern conceptions endorsed by senior courts, the threat to national security need be neither direct nor immediate. Instead, a refugee is understood to pose a risk to the host state's national security if his or her presence or actions give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions.[108] While this test clearly leaves states a substantial margin of appreciation, a threat to national security must be capable of objective justification.[109] As the Supreme Court of Canada has put it, the threat to a state's most basic interests must be "grounded on objectively reasonable suspicion."[110] There is no requirement, though, that the refugee already have been convicted or even charged with a criminal offense. Indeed, as Grahl-Madsen notes, "an alien may offend against national security even if he cannot be considered guilty of any crime."[111] Under this approach, and assuming the credibility of the *apartheid*-era South African government's threats to invade neighboring states which provided asylum to ANC and other refugees, their expulsion in line with due process guarantees would not have violated Art. 32.[112] Of greater contemporary relevance, objection could also not be taken to the expulsion of a refugee whose terrorist acts against other states indirectly pose a credible threat to the security of the host state.

While the French representative to the Ad Hoc Committee made a valiant attempt to limit refugee expulsions to cases required by national security concerns,[113] the majority of states favored the inclusion of a second, more

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

[109] The American representative to the Ad Hoc Committee was of the view, for example, that there was a difference between the simple declaration of a national emergency by a head of state and the existence of national security grounds for the expulsion of a refugee: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 14.

[110] *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002), at para. 90.

[111] Grahl-Madsen, *Commentary*, at 203.

[112] As Maluwa writes in relation to one such neighboring state, "Botswana's commitment and *bona fides* with regard to the protection of refugees from other States in the region, and in particular those from South Africa, cannot be doubted. Nor, judging from its official pronouncements, can one charge Botswana with a failure to appreciate the duties and obligations incumbent upon it under international law with regard to the granting of asylum and protection to South African and other refugees. Responsibility for the breach of international law in this regard, therefore, must be placed squarely upon South Africa alone": T. Maluwa, "The Concept of Asylum and the Protection of Refugees in Botswana: Some Legal and Political Aspects," (1990) 2(4) *International Journal of Refugee Law* 587, at 607.

[113] Statement of Mr. Ordonneau of France, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 16, 20.

fluid ground for expulsion: "public order." The essential concern of the drafters was to allow an asylum state to expel refugees who pose a fundamental risk to the safety and security of their citizens. Whereas national security primarily addresses threats emanating from outside the host state's borders, public order was understood as a general category of concerns focusing on the importance of maintaining basic internal security.[114]

Refugees who committed serious crimes,[115] or who "obstinately refused to abide by the laws,"[116] were the main objects of public order exclusion under Art. 32. Reference was made, for example, to the right of states to expel a refugee who had committed larceny[117] or trafficked in narcotics.[118] Canada's expulsion of refugees convicted of serious sexual assaults is therefore readily

[114] "[I]n [Venezuela], 'public order' was synonymous with internal order, while 'national security' implied 'international order' . . . [T]he two ideas complemented each other and were closely linked": Statement of Mr. Perez Perozo of Venezuela, ibid. at 18. This led the Israeli delegate to propose "the adoption of the words 'internal and external national security' as the words 'public order' could in fact give rise to different interpretations": Statement of Mr. Robinson of Israel, ibid. at 19. This suggestion was not taken up, however, as there was a strong preference among delegates not to abandon the traditional term of art, "public policy." Even the British representative supported retention of this civil law construct. He "objected to the introduction of new, and hitherto unknown, terms": Statement of Sir Leslie Brass of the United Kingdom, ibid.

[115] Some references to the right of states to expel refugees on public order grounds were not clearly limited to serious offenses. Belgium "pointed out that a refugee who broke the laws also undermined public order": Statement of Mr. Cuvelier of Belgium, ibid. at 16. Sir Leslie Brass advised that "[i]n the United Kingdom, deportations were ordered on grounds of national security or public order only, which included offences against the law": Statement of Sir Leslie Brass of the United Kingdom, ibid. at 17. Yet the importance of not authorizing expulsion for "even a slight offence" was insisted upon by the Israeli representative: Statement of Mr. Robinson of Israel, ibid. at 10. See also text below, at p. 681, in which concern was expressed about the potential over-breadth of substitute language that would have authorized the expulsion of refugees for "commission of illegal acts" rather than on public policy grounds.

[116] Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 14.

[117] In explaining why he preferred reference to persons who had committed criminal acts to a proposal from the Chairman to replace "public order" by "public safety" expulsion, the American representative noted that "in the United States of America, the term 'public safety' was closely related to the term 'national security,' and could therefore not be made to cover even such serious offences as larceny": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 20.

[118] Replying to a Canadian concern, the Chairman of the Ad Hoc Committee insisted that "the term 'public order' would certainly cover the deportation of aliens convicted under the [Canadian] Opium and Narcotic Drugs Act. In view of the public injury which resulted from traffic in drugs, there could be no possible objection to that interpretation": Statement of the Chairman, Mr. Larsen of Denmark, ibid. at 22. The Canadian preoccupation was repeated at the Conference of Plenipotentiaries: Statement of Mr. Chance of Canada, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 18.

justifiable under the public order exception to Art. 32. But there was resistance to inserting a reference to criminality concerns instead of to the traditional civil law notion of public order.[119] In the view of most representatives, a simple entitlement to expel refugees for the "commission of illegal acts"[120] was both too broad, and too narrow.

It was too broad in that some criminal acts really do not pose a serious risk to the peace and stability of the state:[121] the Chairman of the Ad Hoc Committee mentioned the case of a refugee convicted for "riding a bicycle on a footpath" as an example of a "smaller illegal act"[122] that could not justify expulsion on public order grounds.[123] On the other hand, states ought to be allowed to expel a refugee who had not engaged in criminal activity, but who refused to conform his or her conduct to the basic manners and customs of

[119] The British representative, for example, responded to a proposal for deletion of the reference to "public order" in favor of "internal and external national security" by stating that "neither the Chairman nor he himself could accept [that language], as they both had criminal offences in mind": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 19. The IRO's representative then "advised the Committee that if it had in mind criminal offences, it should say so clearly": Statement of Mr. Weis of the International Refugee Organization, ibid. at 19. This led various delegations, including those of Venezuela, Turkey, and Belgium, to insist that there was no need for additional clarity, as the meaning of "public order" was not in doubt: Statements of Mr. Perez Perozo of Venezuela, Mr. Kural of Turkey, and Mr. Cuvelier of Belgium: ibid.

[120] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 19. In the view of the American representative, refugees "should be expelled only on the grounds that they had committed crimes, which should be as explicitly defined as possible": Statement of Mr. Henkin of the United States, ibid. at 14.

[121] "So far as his own government was concerned, 'public order' was directly related to the maintenance of the peace and stability of the State": Statement of Mr. Perez Perozo of Venezuela, ibid. at 13. Grahl-Madsen suggests that the focus of public order exclusion on grounds of criminality should be persons who have committed crimes which "are particularly dangerous, because they demonstrate contempt for normal human and social values or at least a clear antisocial or reckless attitude on the part of its perpetrators, e.g. poisoning, arson. One may also have to draw a distinction between wilful and negligent acts": Grahl-Madsen, *Commentary*, at 214.

[122] "It would be better to change the term 'public order' to 'public safety,' which was also a vague term, and would fail to cover extreme cases on both sides, but would not, like the wording proposed by the representative of the United States of America, cover both extremes and permit the deportation of any refugee who had committed the smallest illegal act": Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 19. This suggestion was rejected by the American delegate on the grounds that some forms of criminal conduct which did not endanger public safety (e.g. larceny) should nonetheless be grounds for expulsion: Statement of Mr. Henkin of the United States, ibid. at 20.

[123] "But just as a conviction does not . . . in itself justify expulsion, a criminal conviction cannot be considered a condition *sine qua non* for expulsion": Grahl-Madsen, *Commentary*, at 217.

the host state. Mention was made, for example, of refugees who engaged in political activism against the asylum country,[124] though the American delegation thought such concerns would have to amount to a threat to national security before they justified expulsion.[125] The Chinese representative, however, offered a particularly striking example of what he viewed as a circumstance in which it would be permissible to expel a refugee on public order grounds:

> [T]he concept of public order was important to China where manners and customs differed greatly from those of other countries, and also differed from one region to another. He himself came from a mountainous area where husbands were obliged to travel great distances to work, and were able to visit their wives only once in three years. Wives generally remained extremely faithful to their absent husbands, and if any one were to receive a visit from a stranger it would cause a considerable sensation. The concept of public order was important in relation to such peculiarities of circumstance and custom.[126]

This example was apparently welcomed by the French representative, who "remarked that the observation of the representative of China showed what different interpretations might be given to the notion of public order."[127] The Chairman also stated that "there would be general agreement that, owing to differences of custom, what would be a question of public order in one country would not in another."[128] He offered the additional example of

[124] "[T]he political activity of a refugee might also be regarded as undesirable for reasons of 'public order'": Statement of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 11. More bluntly, the Venezuelan representative felt that the possibility of expulsion on public order grounds "could be considered as a warning to refugees not to indulge in political activities against the State. It was essential that the term should be retained": Statement of Mr. Perez Perozo of Venezuela, ibid. at 13.

[125] "The representative of Venezuela, who had implied that 'public order' in his country meant something related to national emergency, could feel assured that in the opinion of the United States delegation, the requirements of national emergency were taken into account in the term 'national security'": Statement of Mr. Henkin of the United States, ibid. at 18. At the Conference of Plenipotentiaries, the delegate of the Netherlands also opposed an understanding of public order expulsion based on "activities of a subversive nature": Statement of Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 23. By way of parallel, it is interesting that the New Zealand Court of Appeal recently determined that "[i]t is also important that the interpretation of the term 'danger to the security of the country' takes account of a person's right to freedom of association and expression": *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at para. 151.

[126] Statement of Mr. Cha of China, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 24.

[127] Statement of Mr. Juvigny of France, ibid.

[128] Statement of the Chairman, Mr. Larsen of Denmark, ibid.

"illegal distillation of spirits, [which] was in some countries merely a fiscal problem, but in others a problem of public order."[129]

The various efforts to justify reliance on the traditional, civil law understanding of public order expulsion met with strong opposition from the American representative. Mr. Henkin was quite distraught, observing that "[h]is main fear was that the term 'public order' might mean much more than what it appeared to mean on the surface."[130] He worried that the right to expel a refugee based on public order concerns was so vague that some states would undoubtedly abuse this authority,[131] a fear clearly held by the non-governmental community as well.[132] Henkin was blunt in asserting that the explanations provided of the content of public order expulsion in civil law states "had not dispelled his doubts, but had in fact increased them, because of the examples . . . given. It seemed that the term 'public order' could be used as a pretext for getting rid of any refugee on the ground that he was, for one reason or another, an undesirable person."[133] While representatives had asserted that there was a clear meaning attached to "public order" in the civil law world,[134] the American representative was skeptical that there really was much agreement on the substance of the concept outside a small number of European states.[135] It most certainly was a notion that had no resonance in common law states.[136]

[129] Statement of the Chairman, Mr. Larsen of Denmark, ibid.

[130] Statement of Mr. Henkin of the United States, ibid. at 14.

[131] "He was glad to hear that, vague though the concept of public order was, it was not liable to abuse, at least in France, Belgium, and Venezuela. He would make no invidious remarks about the possibility of a less liberal application of the term in other countries, but would merely point to the importance of defining legal notions exactly in a legal instrument": Statement of Mr. Henkin of the United States, ibid. at 18.

[132] "[T]he proviso contained in article [32] relating to 'national security' and especially that relating to 'public order' seemed to his organization to be far too vague, and consequently harmful to the interests of refugees . . . Moreover, the Commission on Human Rights had on several occasions noted that the term 'public order' was vague and general and – as indeed history testified – capable of serving as a justification for glaring abuse": Statement of Mr. Braun of Caritas International, UN Doc. A/CONF.2/SR.15, July 11, 1951, at 5.

[133] Statement of Mr. Henkin of the United States, ibid. at 12.

[134] Typical of the bald assurances was the statement of the representative of the Netherlands to the Conference of Plenipotentiaries, who "said that the term *ordre publique* was acceptable to the Netherlands government as its meaning was perfectly clear": Statement of Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 23.

[135] "[C]ontrary to the impression he had formed in earlier discussions in the Committee, the term 'public order,' which in British and American law was more or less equivalent to 'public policy,' was not so understood in certain other countries": Statement of Mr. Henkin of the United States, ibid. at 18.

[136] The American representative "confessed that his delegation still felt concern at the use of the term 'public order,' partly because of its ambiguity, partly because it feared that it

Interestingly, the French delegation conceded the accuracy of much of the concern about the definition of "public order." France "admitted the contention of the United States representative that the notion of public order might stir up unpleasant memories, since it was on that notion that certain totalitarian States had based their claim to absolute discretionary powers."[137] Moreover, while the civil law states of Europe could look to detailed jurisprudential understandings of the term,[138] "the expression 'public order' was not interpreted in all countries in the same way . . . Consequently the inclusion of that expression would not . . . restrict the right of expulsion to any considerable extent."[139] Yet it was generally felt that the notion of public order provided states with a necessary source of reassurance, and gave them the flexibility required to accommodate their unique social concerns, as well as to meet future contingencies.[140] And in any event, the inclusion of a power to expel on public order grounds was effectively a deal-breaker:

> [Mr. Herment of Belgium] wondered whether the discussion was not animated by a spirit of mistrust of Governments. After all, the States which would sign and ratify the Convention would undoubtedly have the intention of according reasonably favourable treatment to refugees.
>
> He would like to urge that the long accepted notion of public order should not be set aside . . . Powers of expulsion should be left to Governments, even in cases the circumstances of which could not be foreseen, since such might in fact arise. If that were not done, the article would only be accepted with a number of reservations which would deprive it of all value.[141]

embraced too much": Statement of Mr. Henkin of the United States, ibid. at 11. At the Conference of Plenipotentiaries, the Canadian delegate stated that his government "found some difficulty with regard to the expression 'public order,' which was a term which had a more precise legal connotation in continental countries than in common law countries": Statement of Mr. Chance of Canada, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 18. Even the British government, which had supported use of the 'public order' language at the Ad Hoc Committee, took the position at the Conference that "the expression 'public order' presented definite difficulties to common law countries, where it did not possess the legal connotation it bore in continental jurisprudence": Statement of Mr. Hoare of the United Kingdom, ibid. at 24.

137 Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 17.

138 "[A]n administrative and judicial case law had been developed such as enabled jurists and even public opinion to know what was meant by 'public order'": Statement of Mr. Juvigny of France, ibid. at 17–18.

139 Statement of Mr. Ordonneau of France, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 18.

140 "There might possibly – though he hoped not – be countries where it was considered to be a man's private affair if he chose to poison himself with drugs. It would be impossible therefore to define precisely questions of public order for all countries": Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 25.

141 Statement of Mr. Herment of Belgium, ibid. at 20.

The French representative was, if anything, even more candid. The civil law states with a long tradition of expelling non-citizens on public order grounds simply would not agree to be bound by a treaty that did not allow them to continue these practices:

> There were laws in existence in which threats or actions prejudicial to public order were explicitly cited as grounds for expulsion. It was naturally not the intention of the Committee that States should be required to alter their legislation on so important a subject, especially at the present time. Accordingly, whatever formula was adopted, the notion of public order would inevitably raise its head in those code law countries where it was traditionally accepted. Any other formula the Committee might endeavour to evolve would therefore run the risk of proving illusory.[142]

In the end, those who opposed the "public order" clause appear simply to have given in to the impossibility of persuading civil law states to abandon their traditional attachment to public order expulsion.[143] But in a spirit of compromise, there was general agreement that public order should be given a narrow interpretation,[144] with the *travaux préparatoires* serving as a definitive point of reference for state parties in interpreting their authority to expel refugees on public order grounds.[145] Thus, only the commission of a serious crime (not any crime) is grounds for public order expulsion,[146] and other

[142] Statement of Mr. Juvigny of France, ibid. at 21.

[143] "[S]ince it appeared that in certain countries there was a provision of law that an alien could be expelled on grounds of public order, the only solution to the present difficulties of the Committee would be to retain the present text ... and perhaps add thereto a number of specific exclusions, stating, for example, that a refugee might not be expelled on grounds of indigency or ill health": Statement of Mr. Henkin of the United States, ibid. at 21.

[144] Mr. Robinson of Israel made the point that "it had to be remembered that considerations of national security and public order were interpreted differently in different countries. In the sense of a narrow interpretation, however, there could be no argument in favour of treating refugees differently from other aliens": Statement of Mr. Robinson of Israel, ibid. at 16. His speech was hailed by the French representative as a "brilliant statement": Statement of Mr. Juvigny of France, ibid. at 17.

[145] At the first session of the Ad Hoc Committee, the Belgian representative "asked that the discussion should be recorded in the summary record of the meeting so as to make clear what the Committee understood by the concept of public order": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 19. Similarly, at the Conference of Plenipotentiaries, the British representative noted that "if any difficulty occurred as to the meaning of ['public order'], it would presumably arise in connexion with some specific case and the court concerned would have the records of the proceedings leading up to the adoption of the Convention. It would therefore be in a position to ascertain the interpretation placed on those words": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 24.

[146] Belgium, for example, insisted that only refugees "convicted of a fairly serious offence" should be subject to public order expulsion: Statement of Mr. Herment of Belgium, UN

concerns – such as basic affronts to public morality or social norms of the asylum country[147] – are to be deemed grounds for expulsion only in truly grave cases.[148] In Grahl-Madsen's words, "it was obviously the intention of the drafters that expulsion should only be resorted to where the continued presence of the refugee would to some extent upset the very equilibrium of society."[149]

The clear goal of the drafters not to authorize the expulsion of refugees for every reason potentially within traditional civil law understandings of public order is especially clear from the drafters' decision not to amend the English language version of Art. 32 to refer to "public policy," which the Secretariat made clear was the real equivalent of the broad-ranging civil law notion of "*ordre public*."[150] The English notion of "public order," while not a formal

Doc. E/AC.32/SR.40, Aug. 22, 1950, at 11. Most important, the report of the second session of the Ad Hoc Committee records the view that Art. 32 "would permit the deportation of aliens who had been convicted of certain serious crimes where in that country such crimes are considered violations of 'public order'": Ad Hoc Committee, "Second Session Report," at 13. See also details of the objections voiced to the American proposal which would have allowed for the expulsion of refugees who had committed any criminal act: text above, at pp. 681–683. Grahl-Madsen helpfully concludes that "only where normal punishment could not save the maintenance of public order or help to restore it would one resort to the measure of expulsion": Grahl-Madsen, *Commentary*, at 208.

[147] While an Egyptian draft which made specific reference to expulsion on grounds of "public morals" was not pursued (UN Doc. A/CONF.2/44), and the representative of the Netherlands voiced his concern with any refugee expulsion predicated on moral concerns (Statement of Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 23), the British representative to the Conference of Plenipotentiaries affirmed that "the United Kingdom had accepted the words 'public order' in international instruments, while making a reservation that they were deemed to include matters relating to crime and public morals. That interpretation had not so far been challenged": Statement of Mr. Hoare of the United Kingdom, ibid. at 24.

[148] "States would have to undertake not to resort to the *ultima ratio* of expulsion except for very grave reasons, namely, actions endangering national security or public order. Thus the refugee would be protected both in the matter of procedure and in that of grounds, which was not the least important consideration": Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 10.

[149] Grahl-Madsen, *Commentary*, at 209.

[150] "In civil law countries, the concept of '*l'ordre public*' is a fundamental legal notion used principally as a basis for negating or restricting private agreements, the exercise of police power, or the application of foreign law. The common law counterpart of '*l'ordre public*' is not 'public order,' but rather 'public policy.' It is this concept which is employed in common law countries to invalidate or limit private agreements of the application of law. In contrast to this concept of public policy, the English expression 'public order' is not a recognized legal concept. In its ordinary English sense, it would presumably mean merely the absence of public disorder. This notion is obviously far removed from the concept of '*l'ordre public*' or 'public policy'": UN Doc. E/L.68, tabled at the Conference of Plenipotentiaries by its Executive Secretary, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 19–20.

legal construct, authorizes expulsion only for the narrower range of concerns necessary to avoid public disorder.[151] The significance of the failure to opt for the English language equivalent of the broader civil law notion was not lost on states. Australia, for example, unsuccessfully sought to amend the English language version of Art. 32 in order to refer to the broader notion of "public policy."[152] As such, when Ireland acceded to the Convention in 1956, it quite rightly felt the need to enter a formal understanding that it "understands the words 'public order' in article 32(1) . . . to mean . . . 'public policy'"[153] in order to avoid the strictures on its expulsion authority otherwise implied by the narrower notion of "public order."

Most specifically, there is no doubt that an effort to expel a refugee on grounds of poverty or ill health – matters felt by some to fall within the traditional civil law *ordre public* expulsion authority – cannot be reconciled to the requirements of the Convention.[154] At the first session of the Ad Hoc Committee, the Danish representative insisted that it must be clear that "social considerations, such as destitution, should not come under the heading of public order."[155] Mr. Cuvelier of Belgium agreed, explaining that "it was naturally impossible to expel a refugee for economic reasons, as in the case of destitution he could not be returned to his country of origin as could an ordinary emigrant."[156] The rationale for a distinctive approach to the expulsion of refugees was eloquently explained by the Israeli representative:

> If refugees were not nationals in the political sense of the country where they were resident, however, they were in a moral sense . . . [C]ountries should accept refugees as human beings, with all the infirmities and weaknesses inherent in the human condition.[157]

All the members of the Ad Hoc Committee who spoke to the question agreed with the view that no refugee should ever be expelled "on grounds of

[151] See text above, at p. 686, n. 150.
[152] Statement of Mr. Shaw of Australia, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 22.
[153] The text of declarations and reservations of state parties is available at www.unhcr.ch (accessed Nov. 19, 2004).
[154] As Grahl-Madsen notes, "[t]he drafters . . . were on the whole keenly aware of the vagueness of the term 'public order' in general. However, they expressed clearly their desire to delimit[ ] the meaning of the term as used in Article 32. Mr. Rochefort's emphatic statement in the Conference of Plenipotentiaries, to the effect that it would not be worthwhile to take part in the work of the Conference if it were not clear that 'public order' could not justify expulsion of indigent refugees [see text below, at p. 689] is clear proof that [it was] desired to give the term a technical meaning, without regard to the interpretation given the term in the municipal law of various countries": Grahl-Madsen, *Commentary*, at 205.
[155] Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 16.
[156] Statement of Mr. Cuvelier of Belgium, ibid.
[157] Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 16.

indigency or ill health."[158] But because of concern that a formal limitation to this effect in Art. 32 could encourage states to take an aggressive attitude toward forms of public order expulsion not expressly disallowed,[159] it was decided simply to note this implied limitation in the Committee's report.[160]

The importance of protecting refugees from public order expulsion on social grounds was emphasized again at the Conference of Plenipotentiaries. Every attempt to assert the propriety of public order expulsion by reason of ill health or poverty was soundly denounced by, in particular, the French representative. An Egyptian amendment that would have authorized the expulsion of a refugee "because he is indigent and is a charge on the State"[161] led Mr. Rochefort to assert that "[p]overty was not a vice, and indigence could not be considered a crime."[162] The Egyptian proposal was swiftly withdrawn.[163] The Canadian government's rather apologetic effort to

[158] Statement of Mr. Henkin of the United States, ibid. at 21. See also Statement of Mr. Juvigny of France, ibid.; Statement of Sir Leslie Brass of the United Kingdom, ibid. at 23; and Statement of Mr. Giraud of the Secretariat, ibid. at 26.

[159] "If . . . a country really had the intention of expelling refugees because, by reason of their state of health, for instance, they were a burden on the public purse, such a country would of necessity be obliged, when ratifying the Convention, to make reservations with regard to article [32] . . . [H]e considered that however vague the notion of public order might be, it . . . offer[ed] greater safeguards for refugees than would be given by a hastily drafted formula which would not cover all possible cases and which, moreover, would lend itself to interpretation *a contrario*": Statement of Mr. Juvigny of France, ibid. at 22. See also Statement of the Chairman, Mr. Larsen of Denmark, ibid. at 26, who expressed his concern "that the Committee might be considering the inclusion in an international convention of a provision which appeared to suggest that 'social reasons' were a question of public order."

[160] "[S]ince there was obvious agreement that 'social reasons' should not be grounds [for] expulsion, the only question which remained was whether to provide specifically for such exclusion, or to let the records of the Committee indicate that interpretation of 'public order.' He felt that the Drafting Committee should take that decision": Statement of Mr. Henkin of the United States, ibid. at 26. With the proposal for an explicit reservation defeated on a 5–2 (4 abstentions) vote (ibid. at 27), the Committee's report stipulated that "[t]he phrase 'public order' would not . . . permit the deportation of aliens on 'social grounds' such as indigence or illness": Ad Hoc Committee, "Second Session Report," at 13.

[161] UN Doc. A/CONF.2/44.

[162] Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 21. See also the remarks of Baron van Boetzelaer of the Netherlands, ibid. at 23: "He hoped the Conference would not adopt the Egyptian amendment which introduced somewhat indefinite concepts . . . He feared the adoption of such an amendment would excessively restrict the freedom of refugees." (In addition to its provisions on expulsion for reasons of indigence, the Egyptian amendment would have authorized expulsion on grounds of, for example, subversion, public morality, and health.)

[163] The Egyptian representative "noted with regret that his amendment did not seem to command general support . . . He therefore withdrew it": Statement of Mr. Mostafa of Egypt, ibid. at 25.

safeguard its domestic laws authorizing the discretionary expulsion of refugees who became public charges or who were committed to psychiatric institutions[164] prompted a similarly emphatic rebuke:

> The French delegation could not admit that the indigence of a refugee could constitute one of those reasons [for expulsion], and, if the idea of indigence was to be interpreted as a factor detrimental to public order, would no longer consider it worthwhile to take part in the work of the Conference. In France, indeed, refugees and persons who were a charge on the State were frequently synonymous terms. Tens of thousands of people were in receipt of assistance of that kind ... If there was neither the desire nor the courage on the part of governments to embark upon the legislative changes required by the application of the Convention, it seemed pointless to draft it.[165]

Canada, like Egypt, readily conceded the force of the French government's argument.[166] Undeterred, the Australian delegate insisted that states should be allowed to expel refugees "for instance, when the alien became an inmate of a charitable institution or a mental asylum."[167] Once more, the French representative replied caustically that "the fact that a refugee was penniless should most certainly not constitute one of the reasons which ... would justify the expulsion of a refugee; on the contrary, the French Government felt it was a fundamental reason for showing greater leniency."[168] Australia did not press its point.

In the end, there was a general recognition that sanctioning a right to expel refugees on grounds of poverty would create a vicious circle which would deter any state party from meeting its duty to provide refugees with basic social assistance.[169] Taking account of the prevailing view that not even aliens

[164] "In all frankness, however, he must state that Canadian law – and probably the laws of other countries too – provided in ... discretionary clauses for deportation on the grounds that the person concerned had become a public charge or was an inmate of a mental asylum or a public charitable institution": Statement of Mr. Chance of Canada, UN Doc. A/CONF.2/SR.15, July 11, 1951, at 8.

[165] Statement of Mr. Rochefort of France, ibid. at 8–9.

[166] The Canadian representative "heartily endorsed the French view that expulsion on the grounds of indigency alone would be entirely out of keeping with the ideals and hopes entertained by the Conference. He had merely pointed out how difficult it would be to amend the relevant Canadian legislation, and could only repeat that he could conceive of no circumstances in which the Canadian authorities would expel a refugee on grounds of indigency alone": Statement of Mr. Chance of Canada, ibid. at 9.

[167] Statement of Mr. Shaw of Australia, ibid. at 11.

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

[169] The French representative "apologized if he had expressed himself too forcefully; but he nevertheless wished to emphasize that the French delegation had no intention of concluding a one-sided bargain which, for the French Government, would mean the assumption of multilateral obligations with respect to countries the legislation of which would not grant refugees rights equivalent to those which the French

in general should be expelled on grounds of indigence[170] and of the legal obligation to meet at least the basic needs of refugees,[171] the British representative aptly concluded that "[t]he discussion had been useful in making it clear that the words 'public order' could not be construed as including mere indigency."[172]

Just how salient must the reasons of national security or public order be in order to justify the expulsion of a refugee? The Secretary-General's draft of Art. 32 recommended the standard from the 1933 Refugee Convention, namely that expulsion be "dictated by" reasons of national security or public order.[173] The alternative formulation proposed by the Agudas Israel World Organization, which was selected as the Ad Hoc Committee's working draft,[174] used what may on first impression appear to be less demanding language: "save on" grounds of national security.[175] It is the latter formulation ("save on") that was adopted. Yet both Grahl-Madsen[176] and

Government would undertake to guarantee them upon signing the Convention. It was by no means a theoretical consideration, since France very frequently had to take in refugees who had been expelled from other countries simply because they were penniless, or possibly, stateless": Statement of Mr. Rochefort of France, ibid. at 12. This led the Canadian delegate to reply that he "regretted that he had caused so much trouble": Statement of Mr. Chance of Canada, ibid.

[170] The President referred to resolutions of the Economic and Social Council which recommended against expulsion based on indigency: Statement of the President, Mr. Larsen of Denmark, ibid. at 9–10.

[171] See chapters 4.4 above and 6.3 below.

[172] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.15, July 11, 1951, at 10. One possible exception, noted by Grahl-Madsen, is the situation where a refugee sets out explicitly to make himself or herself a public charge. "The refugee who is able to work and still continually refuses to do so with the clear intent of living off public funds may, under certain circumstances, set such a bad example that it might seem necessary to apply sanctions of some kind or another. But it goes without saying that the situation must be nothing short of extraordinary in order to justify the invoking of public order – as understood in the Refugee Convention – in such a case": Grahl-Madsen, *Commentary*, at 211.

[173] Secretary-General, "Memorandum," at 45.

[174] See text above, at pp. 669–670.

[175] As described above (see text above, at pp. 669–670), the recommendation of the Agudas Israel World Organization was that the expulsion of refugees be subject to either procedural or substantive limitations. The latter option provided that a refugee could not be expelled "save on grounds of national security": "Communication from the Agudas Israel World Organization," UN Doc. E/C.2/242, Feb. 1, 1950, at para. 2.

[176] "[T]here was hardly any intention behind the change of wording. And in view of the meaning of the terms 'national security' and 'public order,' it seems possible to submit that the change of wording has not caused any change of meaning. If the concepts of national security and public order are to be understood in the sense that they imply a public necessity to rid oneself of the objectionable person, it is clear that it does not make any difference whether one uses the words 'dictated by' or simply says 'on grounds of'": Grahl-Madsen, *Commentary*, at 199.

Stenberg[177] take the view that there is no reason to suggest that the use of this form of words was intended to deviate from the traditional understanding that the host state must show some imperative or genuine necessity for expulsion, rather than simply that there is a plausible case for removal on grounds of national security or public order. Indeed, given the history of the drafting of Art. 32, it is probable that when the Chairman of the Ad Hoc Committee recommended what became the final language of Art. 32 ("save on grounds of national security or public order")[178] he was simply following the phrasing of the Agudas draft from which the Committee had been working, and which had not been said to posit any shift from traditional evidentiary standards.

But even if significance is attributed to the decision to use the words "save on" rather than "dictated by," the former wording also implies an evidentiary imperative, albeit one that is somewhat less demanding. As Grahl-Madsen observes, under Art. 32(1) "expulsion is not justified unless it will have a salutary effect with regard to [national security or public order]. It is not something to which one [should] resort lightly, but rather . . . one must consider whether the measure will serve its end – in other words, that it is necessary."[179] This interpretation is in line with the view of UNHCR's Executive Committee that "expulsion measures against a refugee should only be taken in very exceptional circumstances and after due consideration of all the circumstances."[180]

If a determination is made that reasons of national security or public order require a refugee's expulsion, it does not follow that the host state may immediately effect the refugee's removal. First and most critically, the safeguards against *refoulement* described above continue to apply unless the more exacting standards of Art. 33(2) for removal to a country where there is a risk of being persecuted have been met.[181] While this is unlikely to pose a

177 "The words 'are dictated by' in the 1933 Convention serve, much more than the corresponding wording of Article 32(1) of the 1951 Convention, to stress the *ultima ratio* character of the exceptions. Nevertheless, it is quite clear, on the basis of the preparatory work of the 1951 Convention, that the change of wording in Article 32(1) was not intentional": Stenberg, *Non-Expulsion*, at 132.

178 Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 17.

179 Grahl-Madsen, *Commentary*, at 200.

180 UNHCR Executive Committee Conclusion No. 7, "Expulsion" (1977), at para. (c), available at www.unhcr.ch (accessed Nov. 20, 2004).

181 See text above, at pp. 663–665. Indeed, the French representative to the Ad Hoc Committee remarked that the provisions of what became Art. 32(3), allowing refugees subject to expulsion a reasonable period within which to identify a state willing to accept them, were a useful practical means of meeting the duty of *non-refoulement* in such circumstances. "It had, in fact, been agreed that a refugee could not be sent back to a country where his life would be threatened. But a refugee who had been expelled from one

difficulty in national security cases,[182] the combined effect of Arts. 33(2) and 32 is that all but the most egregious forms of public order expulsion are effectively proscribed unless removal can be effected to a non-persecutory state.[183] Because it is ordinarily only the refugee's country of origin (in which the risk of being persecuted has been established) to which return may be effected as of right, the right to expel a refugee found to pose a lesser public order risk may therefore be foreclosed as a practical matter.[184]

Second, in line with the position that the expulsion of a refugee must clearly be a matter of final recourse, Art. 32(3) expressly requires the state contemplating expulsion to grant the refugee a reprieve for purposes of organizing his or her own admission to some other (presumably safe) country. This paragraph is innovative in two ways. In contrast to earlier conventions, it imposes a duty on state parties to delay expulsion while the refugee pursues his or her own options, rather than simply acknowledging the logic of delay.[185] In addition, while the Secretary-General's draft had predicated the right to secure a delay of expulsion solely on non-receipt of the authorizations

country had little chance of being admitted elsewhere": Statement of Mr. Ordonneau of France, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 21.

[182] This is because Art. 33(2) authorizes particularized *refoulement* in the case of a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is", a test which is essentially indistinguishable from Art. 32's authorization for the expulsion of a refugee "on grounds of national security" so long as due process norms are respected (including the substantive due process norm prohibiting unreasonable or arbitrary action). See chapter 4.1.4 above, at pp. 345–348.

[183] This is because Art. 33(2), unlike Art. 32(1), does not allow particularized *refoulement* on grounds of public order *per se*. Only a subset of public order concerns – namely, those relating to a person who "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of [the host] country" – is a basis for *refoulement*. See chapter 4.1.4 above, at pp. 349–352.

[184] See Weis, *Travaux*, at 323: "No expulsion order may be carried out unless another country is willing to admit [the] refugee."

[185] The Belgian representative had observed that the wording proposed by the Secretary-General "afforded no guarantee to refugees, and left governments free to act as they pleased, in so far as the refugees were concerned": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 22. The final wording of the paragraph as ultimately adopted was proposed by the American representative to the Ad Hoc Committee who "asked whether the Committee thought it advisable to include in article [32] certain words which, without placing any obligation on the High Contracting Parties, would express the hope that any refugee . . . would have the opportunity of trying to obtain legal admission into another country before the expulsion order was put into effect": Statement of Mr. Henkin of the United States, ibid. at 23. The proposal which Mr. Henkin then drafted (UN Doc. E/AC.32/L.23) actually went farther, using the mandatory form "shall" to define the duty to allow a refugee to seek admission to another state. The approach advocated by the Secretary-General's draft had provided simply for the right of states to impose constraints on refugees allowed to remain in the country while exploring options to expulsion. See Secretary-General, "Memorandum," at 45.

or visas needed to enter another country,[186] Art. 32(3) as adopted is not narrowly constrained in this way.[187] Its broader scope is intended to recognize that even when permission to enter another state has been received, an additional delay in departure may be required to take account of compelling personal reasons, such as "a pregnant wife or a sick child."[188] Thus, even if the Swedish decision to expel the Egyptian refugees suspected of having terrorist affiliations had been both substantively justifiable and pursued in accordance with due process, the peremptory nature of their removal was in clear violation of Art. 32(3).

Art. 32(3) should, however, be interpreted in light of its primary purpose to enable refugees to pursue non-coercive departure options. Thus, the American drafter of the paragraph readily conceded the logic of the British representative's point that states were under no obligation to grant refugees a stay of expulsion if the refugee had already sought and secured valid documentation for entry into a safe country to which expulsion could be effected.[189] Nor is there a duty to grant refugees such a prolonged delay that their travel documents expire, making their expulsion a practical impossibility.[190]

During a delay in effecting expulsion, state parties may "apply . . . such internal measures as they deem necessary."[191] It is clear that such measures

[186] The relevant part of the draft defined the beneficiary class as refugees "who are unable to leave its territory because they have not received, at their request or through the intervention of Governments or through the High Commissioner for Refugees or non-governmental agencies, the necessary authorizations and visas permitting them legally to proceed to another country": Secretary-General, "Memorandum," at 45.

[187] The Danish and French representatives took the view that this limitation was superfluous: Statements of Mr. Larsen of Denmark and Mr. Ordonneau of France, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 21.

[188] Statement of Mr. Larsen of Denmark, ibid.

[189] The British representative had expressed his concern that "the wording of the proposed new paragraph was slightly too sweeping. For example, in some cases when a refugee left a country it had been agreed that he could return if he wished within a certain time limit. If the country where he went decided to expel him and had to allow a 'reasonable period' to elapse before enforcing that decision, the time limit within which he was allowed to return to the first country might have expired in the interval": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 3. The American representative replied succinctly that "when there was a country prepared to admit the refugee, it would be unnecessary to grant him a reasonable period within which to seek legal admission": Statement of Mr. Henkin of the United States, ibid.

[190] "It was obvious that if the travel document of a refugee returnable to another country had almost expired, he could not be given the same opportunity to find another country willing to receive him as a refugee whose travel document was still valid for a considerable period": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.40, Aug. 22, 1950, at 30.

[191] States are granted a substantial margin of appreciation in deciding what internal measures should be taken. "The second sentence of para. 3 is less liberal than Art. 31, para. 2,

may include detention.[192] This is contextually logical, since once a refugee has been finally determined to be amenable to expulsion, his or her presence in the host state ceases to be lawful. In consequence, the presumptive right to freedom of internal movement under Art. 26 can no longer be invoked.[193] The refugee's presence is now simply tolerated on the state's territory, meaning that constraints on freedom of movement in line with Art. 31(2) are once again permitted.[194] Art. 32(3) would, however, be contravened were the constraints to be such as to negate the refugee's ability to pursue his or her applications for onward travel as an alternative to expulsion.[195]

To summarize, Art. 32 is a supplement to the protection against *refoulement* set by Art. 33. It is intended to limit the right of states to expel refugees to even non-persecutory states on both procedural and substantive grounds. At a procedural level, the expulsion of a refugee may be ordered by an administrative agency, but the refugee must be guaranteed the right to appeal that decision to an authority of some seniority which has the power to consider all the circumstances of the case, including the refugee's special vulnerabilities and rights, and to issue an authoritative decision governing expulsion. The appeal must moreover be conducted in line with norms of due process, including both the requirements of procedural fairness and substantive protections against a result not based on law or which is not related to the true objects of Art. 32 or is otherwise unreasonable, arbitrary, or capricious. The right of the refugee to submit evidence, to appeal, or to be represented, may, however, be constrained to the extent required by compelling reasons of national security.

first sentence: the former speaks of measures as 'they *may deem* necessary' . . . while the latter mentions measures 'which *are* necessary' . . . The difference is in the subjective appraisal of the measures: in the case of Art. 31, they must appear to be necessary to an objective observer . . . [Under] Art. 32, it suffices if the competent authorities consider them to be required": N. Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation* (1953) (Robinson, *History*), at 159–160.

[192] The Chairman of the Ad Hoc Committee expressed his worry that "temporary detention might constitute a punitive measure for deported refugees who could not proceed elsewhere": Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 22. The representative of the IRO pointedly responded "that a refugee would not regard a period in prison or in an internment camp as a punitive measure, as he might otherwise run the risk of being sent back to a country where his life would be threatened": Statement of Mr. Weis of the International Refugee Organization, ibid. While Mr. Weis' assertion is not legally correct in view of the continuing force of Art. 33, his essential point – that detention while arranging a preferred departure option is likely to be seen by a refugee as preferable to expulsion – is nonetheless sound.

[193] See chapter 5.2 below. [194] See chapter 4.2.4 above. See also Robinson, *History*, at 159.

[195] Robinson notes that the restrictions "cannot be of such nature as to make it impossible for the refugee to secure admission elsewhere because the Convention considers expulsion a measure to be taken only if the refugee is unable to leave the country on his own motion": Robinson, *History*, at 160.

Substantively, the expulsion of a refugee is lawful only if shown to be based on grounds of national security or public order. Expulsion on the basis of national security requires the host state to show an objective, reasonable possibility that the refugee's actions or presence expose the host state to the risk of direct or indirect substantial harm to its most basic interests. This test would be met, for example, where there is a real risk of an armed attack on that state's territory or its citizens, or of the destruction of its essential democratic institutions. Expulsion may also be based on public order concerns – a term of art not coterminous with traditional civil law notions of *ordre public*, a notion understood to include a wide range of public policy concerns. Under the Refugee Convention, relevant public order concerns are those which bespeak a threat to the internal security of the host country. Public order concerns may be based, for example, on the fact that a refugee has committed a serious crime or is a recidivist, or that he or she has engaged in activity which amounts to a grave affront to public morality or social norms. But social concerns such as poverty or ill health are not to be invoked as public order grounds to expel a refugee.

5.2 Freedom of residence and internal movement

The range of constraints on freedom of movement to which refugees may be subjected immediately upon arrival has been addressed in chapter 4.[196] Detention is particularly common in the case of refugees who come as part of a mass influx. In addition, governments sometimes provisionally detain persons they believe may pose a risk to their own safety or security, whose identity is unclear, or who have yet to provide authorities with the basic information needed in order to begin the process of verifying their claim to refugee status.

The focus here is instead on limitations on freedom of residence and internal movement that are imposed after the initial reception stage. A refugee may be granted some form of time-limited right to stay in the host state, or be admitted to a formal procedure to verify his or her refugee status. In many less developed states which do not formally assess refugee status, persons claiming to be refugees are simply allowed to remain. Despite the explicit or tacit authorization granted to stay in the reception country in each of these circumstances, limits on the right to decide where to live or on internal travel may still be imposed. So pervasive is the belief that refugees may lawfully be confined away from local populations that outrage has at times been expressed when refugees seek even a modicum of mobility. For example, a senior Malawian official is quoted as having expressed his anger

[196] See chapter 4.2.4 above.

that "refugees were violating local regulations that they remain in holding camps and were instead 'roaming free through Malawi's city streets . . . These refugees are insulting their hosts by breaking the rules. They are not allowed to wander about freely . . . They should appreciate Malawi's hospitality and not spoil our attitude towards all refugees.'"[197]

Most seriously, some countries – including Australia and the United States – routinely continue the imprisonment of many refugees even after they have complied with all formalities required to investigate their claims to protection.[198] While prolonged detention of this kind is not common in the industrialized world, it is widespread in many less developed countries. Kenya and Uganda are among the states which generally restrict refugees to camps and criminalize any attempt to escape from them.[199] Indeed, Kenya has gone so far as to detain refugees found in urban areas on the grounds of their failure to register there, even when no registration service was in fact available.[200] It has even forcibly relocated some of the small minority of refugees granted formal permission to live in urban areas.[201] In the late 1980s, Zimbabwe designated certain areas where refugees were required to reside, then forced its growing population of Mozambican refugees to relocate to five large

[197] *African Eye News Service*, Nov. 8, 2000, quoting Deputy Commissioner for Relief and Rehabilitation Willy Gidala.

[198] The Australian and American practices are described in chapter 4.2 above, at pp. 375–377. The practice of general or mandatory detention begins upon arrival, and normally continues until and unless refugee status is formally recognized. The Australian immigration minister, Philip Ruddock, has remained unmoved by massive protests and strong international legal criticism directed against his country's regime. "'Detention policy is public policy in Australia which will not be unwound,' Mr. Ruddock said": P. Barkham, "Refugees dig their own graves in Australian detention protest," *Guardian*, Mar. 8, 2002, at 17.

[199] Refugees in these countries who violate the rules requiring them to live in camps and who move to urban areas – Nairobi and Kampala in particular – have been essentially abandoned by the host governments, and have been subjected "to beatings, sexual violence, harassment, extortion, arbitrary arrest and detention": Human Rights Watch, "Hidden in Plain View," Nov. 2002.

[200] "The 145 refugees have been charged with failing to register with the government of Kenya, a statutory violation that is being enforced for the first time. But no refugee is able to comply with the statute because there has been no governmental registration service for the refugees since 1991": Human Rights Watch, "Kenyan Government Sweep of Foreigners Puts Refugees at Risk," June 8, 2002.

[201] "In the largest group arrest on November 29 [2002] . . . 20 Kenyan police officers began house-to-house arrests in Kawangware, a so-called slum neighborhood to the southwest of Nairobi. More than 50 refugees were arrested, and some described being beaten during the arrests . . . Among those arrested were two Congolese women with UNHCR-issued documents granting them permission to remain in Nairobi for security reasons": Human Rights Watch, "Kenya: Crackdown on Nairobi's Refugees after Mombassa Attacks," Dec. 6, 2002.

camps on its eastern border.[202] It took much the same approach in response to a rise in refugee arrivals during 2002, deciding to "round up all refugees not employed or attending school and confine them to Tongogara camp in Chipinge," apparently with UNHCR's approval.[203] Similarly, during the late 1990s and early part of this century, Pakistan forcibly relocated millions of settled Afghan refugees into camps in the northwest frontier province near the border with their country of origin, notwithstanding evidence that their security was at risk there.[204]

Forcible residence in refugee camps is not always the result of direct coercion, but may sometimes be achieved indirectly. For example, Malawian officials used their control over relief supplies, especially food, as a means of inducing reluctant Mozambican refugees to "accept" relocation to camps.[205] India refused to allow separated refugee families in Tamil Nadu to live together, threatening to cut off the minimal ($3 per month) refugee subsistence allowance to anyone who moved away from his or her assigned camp.[206]

While refugees sent to so-called "open" refugee camps may still enjoy at least some measure of freedom of movement,[207] it is otherwise in "closed"

[202] Lawyers' Committee for Human Rights, *African Exodus* (1995) (LCHR, *African Exodus*), at 100–101; S. Nkiwane, *International Academy of Comparative Law National Report for Zimbabwe* (1994), at 15–20. "The justification for this policy [was] that it is easier to cater to the refugees' needs when they are grouped together. A further reason for these security measures is that the recent RENAMO incursions . . . have claimed many victims among the local population and left a trail of devastation in their wake. These attacks have terrorized the inhabitants and engendered hostility towards the Mozambican refugees, who are held responsible for them": M. El-Chichini, "Four Crowded Camps," (1988) 55 *Refugees* 38, at 38.

[203] "Government rounds up refugees," *Daily News* (Harare), May 20, 2002. "The United Nations High Commissioner for Refugees (UNHCR) in Zimbabwe is expanding Tongogara camp to accommodate the refugees . . . 'In the urban areas the cost of living is high,' [UNHCR assistant programme officer Tapiwa] Huye said. 'Some of the refugees could end up being destitute or getting involved in illegal activities and prostitution for survival. Besides, it is government policy that only those refugees who are attending school or in employment will remain in the urban centres'": ibid.

[204] Human Rights Watch, "Letter to General Pervez Musharraf," Oct. 26, 2001; and "Pakistan: Refugees Not Moving Voluntarily," Dec. 5, 2001.

[205] "Refugees in Zobwe, Thyolo, and Machinga, and on the east side of Lake Malawi were told that they must go to Lisungwe if they wanted to receive food aid": LCHR, *African Exodus*, at 102.

[206] "64 year old Rafael . . . has his daughter in another camp 100 km away . . . 'I cannot move to the other camp, the authorities ban refugee movements, and if I move I will lose my registration and won't receive any assistance from the government'": (1999) 41 *JRS Dispatches* (Jan. 15, 1999). Concerns regarding interference with family unity are addressed in detail at chapter 4.6 above.

[207] For example, Liberian refugees housed in Nigerian refugee camps enjoyed the right to leave the camps, though not to abandon them as their residence: Tiao, "Refugee Rights in

camp settings. Kurdish refugees from Iraq were confined in southeast Turkey in guarded camps, surrounded by barbed wire, with strict limitations on external movement.[208] Burundians in Tanzania were not only forced into camps, but "said their requests to leave the camp in order to locate their spouses and children or to return to their home areas to sell their possessions were repeatedly . . . denied by camp commanders."[209] Even Vietnamese refugees formally "screened in" as genuine refugees under the Comprehensive Plan of Action were not always released from mandatory confinement in Hong Kong and other processing states.[210] Cambodian and Burmese refugees in Thailand have been subjected to a similarly restrictive regime, unable to leave the military-controlled camps except to resettle in third states.[211] Indeed, in July 2003 it was announced that the UNHCR had agreed to fund

Nigeria," at 5. Mozambican refugees in Zimbabwean camps had some flexibility to leave the camps, as did Guatemalan refugees assigned to refugee settlements: K. Jacobsen, "Factors Influencing the Policy Responses of Host Governments to Mass Refugee Influxes," (1996) 30 *International Migration Review* 655 (Jacobsen, "Host Governments"), at 661; F. Stepputat, "Self-Sufficiency and Exile in Mexico: Report on a Field Study among Relocated Guatemalan Refugees in South-East Mexico, August–November 1988," UN Research Institute for Social Development Discussion Paper No. 9, Aug. 1989 (Stepputat, "Exile in Mexico"), at 13, 14, 17.

[208] US Committee for Refugees, *World Refugee Survey 1992* (1992), at 81. "In late 2002, the Turkish government feared a new influx, and established a series of camps within the 9-mile (15 km) Turkish-occupied strip in northern Iraq. When it introduced this plan in November, the Turkish government stated that its main goal would be to send foreigners in the camps either back to their region of origin or to third countries": US Committee for Refugees, *World Refugee Survey 2003* (2003), at 229.

[209] Human Rights Watch, "In the Name of Security: Forced Round-Ups of Refugees in Tanzania," July 1999, at 28.

[210] "Even for those screened in as refugees under the 1951 Convention, there was not complete recognition of the rights enumerated in that Convention. They had limited freedom of movement and selective access to employment, and there was a tendency to keep them in semi-closed camps, pending resettlement. Often they needed passes to leave the camps on a daily basis for activities outside the camps": V. Muntarbhorn, *The Status of Refugees in Asia* (1992), at 155. Hong Kong's practices were particularly harsh. "Vietnamese who succeeded in proving their status as a refugee were to be sent to closed camps": Lawyers' Committee for Human Rights, "Inhumane Detention: The Treatment of Vietnamese Boat People in Hong Kong" (1989), at 10–11. As of 1995, 1,500 persons determined to qualify for Convention refugee status remained incarcerated in Hong Kong: Lawyers' Committee for Human Rights, "Hong Kong Critique 1995" (1995).

[211] "The Thai Defense Force associated the refugees with a variety of security threats, and then sought to control strictly the refugees' movements and location. Refugees were obliged to remain in camps close to the Thai–Cambodian border; they were not permitted to work and could only leave the camps when they were to be resettled in third countries": Jacobsen, "Host Governments," at 661. "In the mid-1990s, Thailand improved its relations with Burma's government, and began restricting refugees' movements in and out of the camps in Thailand and curtailing their ability to work on nearby farms or to rent land and grow crops": US Committee for Refugees, *World Refugee Survey 2003* (2003), at 135.

the building of a camp for the mandatory detention of some 1,500 Burmese refugees in Thailand. The Thai government announced that "[i]f [the refugees] resist the relocation . . . their registration with UNHCR will be revoked and they will be prosecuted."[212]

Despite the prevalence of such policies, it is increasingly recognized that laws forcing refugees to live in camps are often difficult to enforce in practice. For example, the Zambian Deputy Minister of Home Affairs was reduced to "appeal[ing] to [escaped refugees] to return to the camp because it was an offence under the law to leave it."[213] More generally, and despite the determination of most African states to detain refugees, Sommers reports that most refugees simply become self-settled in violation of the law:

> In legal terms . . . the local government usually gives them no alternative because virtually all refugees are ordered to live in camps or settlements. Yet almost from the outset, the reality of refugee lives confounds common perceptions of them as passive, compliant victims of violence. Given a chance, refugees turn entrepreneurial, violating camp regulations along the way. They are risk-takers who prefer to conceal illegal activities rather than constrict their lives inside camp or settlement enclosures . . .
>
> Despite institutional attempts to keep refugees and host populations separate . . . most refugees in Africa are spontaneously settled . . . Local governments and UNHCR have long been aware of this . . . UNHCR, whose mandate is to protect and assist all refugees, tends to focus on camp refugees both because their funding is usually constrained and because they prefer not to challenge African government policies that commonly restrict urban residence for refugees. This presents refugees with a clear choice: choosing between the protection and provisions that settlements promise to provide and UNHCR is mandated to assure on the one hand, and accepting considerable risks for the chance to pursue a life outside the camps on the other. Many, if not most, refugees willingly accept the risk of living outside the camps.[214]

Beyond their impracticality, laws confining refugees to camps may have unintended negative consequences not only for refugees, but also for surrounding communities. In Zambia, for example, women refugees began to marry local men in order to gain automatic access to citizenship, entitling them to leave the refugee camps. This practice, in turn, "excited a backlash from concerned locals . . . Zambian women . . . lodged a formal complaint with the Ministry of Home Affairs about refugee women 'stealing' their

[212] "Thais to intern 1,500 Burmese," *International Herald Tribune*, July 3, 2003, at 1.

[213] "Ex-combatants from Angola, DRC desert refugee camp in Zambia," *SAPA-AP*, Apr. 22, 2002. "'Most of them have deserted the camp and joined the Zambian communities in villages,' [a Zambian official] said": ibid.

[214] M. Sommers, "Young, Male and Pentecostal: Urban Refugees in Dar es Salaam, Tanzania," (2001) 14(4) *Journal of Refugee Studies* 347, at 348–350.

husbands."[215] And when Tanzania commenced its policy of requiring refugees to live in camps, both the self-reliance of refugees and the economic prosperity of surrounding communities were compromised:

> During the height of the refugee presence in Ngara and Karagwe districts in 1994 and 1995, there were few restrictions on the mobility of refugees and hosts. Tanzanian- and refugee-owned businesses thrived. Refugees provided labor on Tanzanian farms throughout the area, and Tanzanians moved in and out of the camps to conduct business, socialize, and make use of camp-based resources such as water taps and hospitals . . .
>
> After 1996, however, the government controlled more carefully the movement of refugees within its borders . . . In Kibondo, Kasulu and Kigoma rural districts, where the refugee populations did not peak until later, the tighter controls on refugee–host interactions affected the extent to which hosts could benefit . . . Villagers complained that they were prevented from exchanging goods in refugees' markets and that refugees were restricted from leaving camps to work as laborers on their farms.[216]

Even if not detained in prisons or refugee camps, refugees may still be compelled to reside in a location not of their choosing. In the early 1970s, the government of Sudan worked with UNHCR to relocate Eritrean refugees from border camps to new, permanent settlements in the Qala en Nahal area. The relocation was justified as requisite to enabling the refugees to become self-sufficient by taking advantage of under-utilized agricultural land. But it was opposed by the refugees themselves as incompatible with their desire to repatriate.[217] Much the same rationale was given for Mozambique's decision to force refugees to abandon their homes near Maputo and to relocate them thousands of kilometers away in the northern provinces, where there was access to arable land for agricultural purposes.[218] In an effort to promote a regional peace plan and to avoid the risk of cross-border raids, Mexico forced

[215] "UNHCR tackles HIV/AIDS in refugee camps," *UN Integrated Regional Information Networks*, Sept. 6, 2001.

[216] B. Whitaker, "Refugees in Western Tanzania: The Distribution of Burdens and Benefits among Local Hosts," (2002) 15(4) *Journal of Refugee Studies* 339, at 351–352.

[217] G. Kibreab, *Refugees and Development in Africa: The Case of Eritrea* (1987), at 80–83. See also A. Karadawi, *Refugee Policy in Sudan, 1967–1984* (1999), at 138: "This was thought to be an appropriate political option that minimised the security risk created by the presence of the refugees inside Sudan and the political tensions between Sudan and Ethiopia." The duty of refugees to live in camps is codified in Sudanese law, with "[n]on-compliance . . . punishable with imprisonment not exceeding one year . . . Camps and settlements in the Sudan are thus established to perpetuate, rather than to bring to an end, refugee status and to block the incorporation of refugees into Sudanese society": G. Kibreab, "Resistance, Displacement, and Identity: The Case of Eritrean Refugees in Sudan," (2000) 34(2) *Canadian Journal of African Studies* 249, at 268–270.

[218] The Mozambican Foreign Minister responded to protests by indicating "that he thought some of [the refugees] had an exaggerated idea of their rights. 'There have been frequent

Guatemalan refugees away from their border camps, and towards interior locations. To ensure the success of the relocation drive, "[s]ettlements were burned, food supplies were severed, and forced evictions were carried out by the Mexican Navy."[219] Also arguing operational necessity, during the late spring of 2000 India forced some 3,000 settled Tamil refugees away from their homes and into distant areas so as to make room for expected new arrivals from Sri Lanka. The refugees were given no choice about where they were to be sent, and were moved without clear regard for their physical safety.[220]

One of the most notorious systems for restricting the residence of refugees in the developed world has been implemented by Germany. While not confining refugees to prisons or camps, Germany's 1982 Asylum Procedure Act authorizes the dispersal around the country of persons awaiting verification of their refugee status, argued to be the best means by which fairly to share the responsibility for their protection and support among the various *Länder*. The designated area of residence can be as small as 15 square kilometers, and the duration of the enforced residence as long as two to seven years. With limited exceptions, not even travel outside the assigned area is allowed without a special permit. Failure to obtain the required authorization may result in a fine of up to €2,500, with repeat offenders unable to pay the fine liable to imprisonment for up to one year.[221]

There is moreover reason to believe that other European states may soon begin to impose tough limits on freedom of residence and movement along the lines of the German system. Under the European Union's recently agreed Reception Directive, EU states enjoy the right to "decide on the residence of the applicant for asylum for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application."[222] Moreover, if a refugee abandons the assigned place of

cases of demands that go beyond the obligations that states have towards them,' he said. [Minister] Simao explained that the decision to transfer the refugees to northern provinces was taken to allow them space to carry out self-support activities": Agencia de Informaçao de Mozambique, "Mozambique committed to assisting refugees," Mar. 27, 2003.

[219] J. Simon and B. Manz, "Representation, Organization, and Human Rights Among Guatemalan Refugees in Mexico – 1980–1992," (1992) 5 *Harvard Human Rights Journal* 95, at 109–110.

[220] "On 24 May, during the transfer of some refugees to another camp, a six-month-old child suffocated to death in a scuffle in a bus. When the mother of the dead child wanted the bus to be stopped, the reply of the police escort was, 'Let us keep moving. Even if we stop the bus, the dead child will not be alive'": (2000) 73 *JRS Dispatches* (June 19, 2000).

[221] European Council on Refugees and Exiles, "Setting Limits" (2002) (ECRE, "Limits"), at 11–15. See also F. Liebaut, *Legal and Social Conditions for Asylum Seekers in Western European Countries* (2000) (Liebaut, *Conditions 2000*), at 115–116.

[222] The relevant portions of Art. 7 provide that "[a]sylum seekers may move freely within the territory of the host Member State *or within an area assigned to them by that Member State* ... Member States may decide on the residence of the asylum-seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective

residence without permission, the Directive purports to authorize the host state to "reduce or withdraw the reception conditions"[223] – a euphemism for the various rights otherwise guaranteed to persons awaiting a decision on their refugee claim,[224] including, for example, the rights to family unity, education, and healthcare.[225]

To date, however, most developed countries have imposed few formal restrictions on the residence or mobility of refugees. Belgian law assimilates refugees to non-citizens generally, all of whom may be subject to restrictions on mobility or residence on public order or national security grounds.[226] Spain and Sweden are among the countries which allow refugees to settle and travel wherever they choose, subject only to a duty to inform police of any change of residence.[227] Refugees who have complied with the requirements for verification of their status are otherwise free to choose their home and to travel inside the country as they wish.[228]

The only significant trend away from this respect for mobility rights in the developed world has been the imposition in some states of de facto constraints on the mobility of refugees by tying access to public housing or income support to residence in designated areas or facilities. In Austria, for example, refugee claimants who leave their place of accommodation for more than three days without permission lose their entitlement to federal assistance.[229] In the United Kingdom, refugees must agree to dispersal to an assigned residence if they do not have the financial resources to meet their own needs. Only one offer of accommodation is made; if not accepted by the

monitoring of his or her application . . . When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law [emphasis added]": Council Directive laying down minimum standards for the reception of asylum-seekers, Doc. 2003/9/EC (Jan. 27, 2003) (EU Reception Directive), at Art. 7.

[223] Ibid. at Art. 16(1)(a). Beyond concerns of freedom of movement and residence, the withdrawal of rights as punishment is inconsistent with decisions taken in drafting Art. 2 of the Refugee Convention. See chapter 2.4.4 above, at pp. 104–107.

[224] "'[R]eception conditions' shall mean the full set of measures that Member States grant to asylum-seekers in accordance with this Directive": EU Reception Directive, at Art. 2(i).

[225] These rights are set out in Chapter II of the Directive, "General Provisions on Reception Conditions": EU Reception Directive, at Arts. 8, 10, and 13. The right to benefit from emergency healthcare is, however, under no circumstances to be withdrawn: ibid. at Art. 16(4).

[226] "Like any other alien, a refugee may be placed under forced residence restrictions, whereby the Minister of Justice can require an individual alien who has breached public order or national security to leave a specific location, to remain away from that location, or to reside in a specified place": F. Liebaut and J. Hughes, "Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries" 39 (2000).

[227] ECRE, "Limits," at 29.

[228] France and Italy are typical in this regard: ibid. at 35, 37.

[229] European Council on Refugees and Exiles, *Legal and Social Conditions for Asylum Seekers in Western European Countries, 2003* (2003) (ECRE, *Conditions 2003*), at 23.

refugee claimant, no alternative housing is offered.[230] Changes introduced in 2001 required refugees to arrive at their designated residence within forty-eight hours, or risk being permanently barred from the public welfare system.[231] The way in which the dispersal system has been administered has moreover been criticized as grossly insensitive:

> The dispersal system itself is pure harassment. Recently, a refugee was sent from the Tees Valley to Leicester, away from his best friend and only known contact in the UK, on the pretext that there was no single male accommodation available. The same day, a man in Leicester was dispersed to the Tees Valley.[232]

A softer approach is implemented in the Netherlands. Those refugees who agree to live in a reception center, or *Asielzoekerscentrum*, receive comparatively generous income support, as well as language classes and assistance to find work outside the center. But some income support – albeit insufficient to pay a market rent – is still provided to those refugees who prefer to live on their own, or with friends or family members.[233]

Even where refugees are not subject to efforts to confine them in camps or particular regions, they may still not enjoy real freedom of movement within the whole of the territory of the host country. Refugees in the Sudan, for instance, have generally been allowed to reside in Khartoum only if they already had employment, were referred by a qualified doctor for medical reasons, secured admission to a university, or were the spouse or dependant of a lawful resident of Khartoum.[234] Zambia has traditionally taken much the same approach, allowing only students, professionals, and traders to live in urban areas. Yet not even these persons have been able readily to move internally, since the permit required to live in a city is typically granted only upon payment of an exorbitant fee.[235]

The relevance of financial concerns to freedom of movement is borne out also in the experience of some refugees in developed states. Because in France

[230] ECRE, "Limits," at 21.

[231] "Until now, those who have failed to travel – 'without good cause' – have had a second chance to move before their support was stopped . . . According to Home Office rules, the only valid reasons for failure to travel are illness or the need to maintain contact with the charity, the Medical Foundation for the Care of Victims of Torture": R. Prasad, "'One strike' rule: Asylum seekers face tough new code," *Guardian*, July 25, 2001, at 4.

[232] J. Hardy, "Tough on toys, tough on the causes of toys: How we ensure that asylum-seekers stick to life's bare essentials," *Guardian*, Dec. 20, 2000, at 18.

[233] ECRE, "Limits," at 38.

[234] G. Kibreab, "Refugees in the Sudan: Unresolved Issues," in H. Adelman and J. Sorenson eds., *African Refugees: Development Aid and Repatriation* 58 (1994).

[235] "Several refugees interviewed for this article at the Commissioner for Refugees' offices revealed that the fees for employment (K250,000) and study permits (K100,000) issued by the government cost 'too much money.' 'Imagine asking a person working as a store

no social assistance is paid to refugees until after registration with a *préfecture*, a process that may take several months, movement outside their place of arrival for virtually any reason is essentially beyond reach for most refugees.[236] In the United Kingdom, welfare payments made to refugees awaiting a decision on their claim expressly exclude any allocation for travel.[237] The protection consequences can sometimes be quite direct:

> [T]here have been problems with travel to attend immigration interviews. Asylum seekers are issued with travel vouchers to cover the cost of the train journey, but there have been problems with travel vouchers not arriving in time for the interviews. This has had a direct effect on the outcome of asylum applications since the number of refusals for "non-compliance" – i.e. not attending interviews, has risen dramatically since the dispersal system was introduced.[238]

Refugee Convention, Art. 26 Freedom of movement
Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

Civil and Political Covenant, Art. 12
1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

. . .

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

. . .

The drafters of the Refugee Convention were firmly committed to the view that once lawfully in the territory of a state party, refugees should be subject

attendant or vegetable vendor . . . to pay K250,000,' lamented a DRC refugee . . . Before 1999, refugees were allowed to reside in urban areas provided they had a valid refugee identity card, and could prove to authorities that they had means of support": *Daily Mail of Zambia*, June 16, 2000.

236 ECRE, "Limits," at 36.

237 "[W]hile travel is not prohibited, the welfare payment is set at a level that is not expected to make travel possible. In reality, asylum-seekers have experienced acute difficulties in meeting basic needs . . . and the ability to travel is one of the first casualties": ibid. at 22.

238 Ibid. at 22.

only to whatever restrictions govern the freedom of internal movement and residence of other non-citizens. The presumptive right of refugees to be assimilated to other aliens for purposes of freedom of movement can lawfully be suspended or limited in only two circumstances: during a mass influx, or while investigating the identity of and possible security threat posed by an individual seeking recognition of refugee status. The more general rule prohibits refugee-specific policies or practices which curtail the ability of refugees to choose the place where they wish to live, or to move about the territory of a state party.

This compromise position was awkwardly arrived at. Despite the precedent of the 1938 Convention, which expressly provided for the right of refugees to enjoy freedom of internal movement,[239] the working draft for the 1951 Convention did not even mention the issue. This omission was noted during discussion of the right of refugees to receive identity papers, when the Belgian and French representatives suggested that the failure to codify freedom of internal movement would amount to "a gap in the draft."[240] It emerged that the reason for the omission had been to avoid a situation in which states would not enjoy the right to impose restrictions on freedom of movement during a mass influx:

> The Secretariat had had in mind the case of the Spanish refugees who presented themselves in large numbers at the French frontier towards the end of the Spanish Civil War and for whom it had been necessary to set up reception camps to meet their immediate needs before regularizing their position and arranging for their dispersal throughout the country. The obligation to remain in these camps was clearly a considerable limitation on the right of movement . . . Such a practice might, however, prove essential in certain circumstances.[241]

Elaborating this concern later in the debate, the representative of the International Refugee Organization implored representatives who favored

[239] "Without prejudice to the power of any High Contracting State to regulate the right of sojourn and residence, a refugee shall be entitled to move about freely, to sojourn or reside in the territory the present Convention applies to, in accordance with the laws and internal regulations applying therein": Convention governing the Status of Refugees coming from Germany, 4461 LNTS 61, done Feb. 10, 1938 (1938 Refugee Convention), at Art. 2.

[240] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 12. See also Statement of Mr. Cuvelier of Belgium, ibid. at 11: "Such a provision was included in article 2 of the 1938 Convention, which gave refugees the right to move about freely, to sojourn and to reside in the territory to which they had been admitted. He would like to know why the Secretariat had omitted to include those provisions in its draft, and also whether the Committee would be prepared to have them in the Convention."

[241] Statement of Mr. Rain of France, ibid. at 14.

an article that would codify the right of refugees to enjoy freedom of movement to be realistic:

> Realities must be faced and it must be remembered that the problem which had arisen in France when vast numbers of Spanish refugees had arrived was reappearing, or was liable to reappear in other countries, such as Switzerland, Italy, and so forth.[242]

In addition to the need to be able lawfully to restrict freedom of movement while organizing the reception of a mass influx of refugees, the Danish representative to the Ad Hoc Committee argued that governments should also be entitled to detain dangerous refugees. Mr. Larsen was concerned about "the case of refugees who, having been admitted to a country, had to be expelled from it but could not leave immediately. It was clear that the two situations had certain points in common."[243] He therefore proposed an amendment that

> Internment and restricted residence may be enforced only in individual cases and for imperative reasons of national security and order. The conditions of internment and the treatment of interned refugees shall, both morally and materially, be consistent with human dignity.[244]

In the end, it was agreed that the right of states to detain refugees who pose a threat to host state security, as well as to resort to provisional detention during a mass influx, should be addressed in the context of the proposed rule governing expulsion and non-admittance.[245] The result was Art. 31(2), which grants states some flexibility to limit the freedom of movement of refugees in both situations of concern.[246] As previously described, Art. 31(2) authorizes the provisional detention of refugees arriving in the context of a mass influx for a period of days to enable the receiving state to organize the logistics of emergency reception and dispersal in a way that minimizes disruptions to

[242] Statement of Mr. Weis of the IRO, ibid. at 18.

[243] Statement of Mr. Larsen of Denmark, ibid. at 22. The original concern of the Danish representative really does not raise an issue of concern to refugee law. If it is determined that the person seeking recognition of refugee status is subject to exclusion on the grounds of, for example, having committed an extraditable crime or posing a threat to national security, he or she is not a refugee and is therefore subject to the state's general immigration detention rules. But because of the declaratory nature of refugee status, an exception to the general right to freedom of movement was required to authorize detention while the circumstances which might justify exclusion from refugee status are being investigated. This is the function of Art. 31(2). See chapter 4.2.4 above, at pp. 420–424.

[244] Statement of Mr. Larsen of Denmark, ibid. at 23.

[245] Statements of Mr. Henkin of the United States and Mr. Rain of France, ibid. at 23–24.

[246] The scope of these exceptions is addressed at chapter 4.2.4 above, at pp. 419–429.

public order.[247] More generally, it also allows host states to limit freedom of movement during the time needed to ensure that an individual seeking entry as a refugee does not pose a threat to national security, for example while investigating his or her identity and circumstances of arrival.[248]

Importantly, however, the right of a state to limit freedom of movement on either ground comes to an end when a refugee's status is "regularized." As previously analyzed, regularization is not synonymous with recognition of

[247] See chapter 4.2.4 above, at pp. 419–420. The French representative insisted that any right to detain refugees arriving in a mass influx *not* be included as a limitation on the Convention's right of freedom of movement, but instead be carefully placed within the article addressing the question of expulsion and admittance (now Art. 31). He observed that "[t]he admission that refugees could be placed in camps was only due to the fact that such measures were sometimes inevitable if the refugees were in such vast numbers that a State felt that to allow them to scatter throughout its territory might be detrimental to public order": Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 24. In introducing the right of states to restrict freedom of movement under Art. 31(2), the representative of the International Refugee Organization confirmed that it "concerned primarily the position of refugees admitted provisionally as an emergency measure. He recognized that it was sometimes impossible for Governments to allow such refugees full freedom of movement and the paragraphs proposed were intended to define the restrictions which might be necessary and to reduce them to the minimum": Statement of Mr. Weis of the IRO, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 3. Robinson observes in a footnote that "Art. 26 would also not conflict with *special situations* where refugees have to be accommodated in special camps or in special areas even if this does not apply to aliens generally [emphasis added]": Robinson, *History*, at 133, n. 207. Goodwin-Gill cites Robinson's position without analysis, noting simply that "[s]uch measures are now the usual response, *especially on the occasion of large-scale influx* [emphasis added]": G. Goodwin-Gill, "International Law and the Detention of Refugees," (1986) 20(2) *International Migration Review* 193, at 207. But in light of the drafting history and context of Arts. 31(2) and 26 described here, the exceptional right to detain should be understood to be fully codified in Art. 31(2). Otherwise refugees may be confined to camps only in accordance with rules applicable to aliens generally, and which meet the requirements of Art. 12 of the Civil and Political Covenant: see text below, at pp. 711–718.

[248] See UNHCR Executive Committee Conclusion No. 44, "Detention of Refugees and Asylum-Seekers" (1986), at para. (a), available at www.unhcr.ch (accessed Nov. 20, 2004), which "[n]oted with deep concern that large numbers of refugees and asylum-seekers in different areas of the world are currently the subject of detention or similar measures by reason of their illegal entry or presence in search of asylum, pending resolution of their situation." The Executive Committee then agreed that "detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect the national security or public order": ibid. at para. (b). While the reference to public order is not justified under Art. 31(2), the balance of this formulation is a helpful summary of the scope of permissible provisional denial of freedom of movement.

refugee status.[249] To the contrary, "[a]ny person in possession of a residence permit was in a regular position. In fact, the same was true of a person who was not yet in possession of a residence permit but who had applied for it and had the receipt for the application. *Only those persons who had not applied, or whose application had been refused, were in an irregular position* [emphasis added]."[250] Once status is regularized, including by the lodging of an application for recognition of refugee status and completion by the individual concerned of the necessary steps to enable a state to assess his or her claim,[251] all refugee-specific restrictions on the right to move freely and to choose one's residence must end in accordance with Art. 26.[252]

In the result, general policies of post-regularization refugee detention of the kind pursued by Australia and the United States, as well as the long-term confinement of refugees by such countries as Kenya, Pakistan, Uganda, and Zimbabwe, are in breach of the Refugee Convention. While significant latitude is available prior to regularization of status under the terms of Art. 31, there is no legal basis for refugee-specific detention once the individual concerned has complied with his or her obligations to provide authorities with the information needed to assess the claim to be a refugee.

This prohibition on refugee-specific constraints on choice of residence is no less offended when the approach of authorities is indirect, such as the issuance of threats by Malawi and India to deny food and subsistence allowances to coerce refugees to remain in assigned camps, or the Austrian and British rules which withdraw income support from refugees who choose to exercise internal freedom of movement.[253] Because no state may lawfully withhold the essentials of life from refugees,[254]

[249] See chapter 3.1.3, above, at pp. 178–183.

[250] This statement of the representative of France was made during the course of the discussion on the right of refugees to enjoy freedom of internal movement and choice of residence: Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 20. See generally chapter 3.1.3 in which the logical and legal reasons for endorsing this understanding are set out in detail.

[251] See chapter 3.1.3 above, at pp. 175–178.

[252] "The freedom of movement as [defined] by Article 26 is not dependent on any particular purpose. The refugee may move around for business or for pleasure": Grahl-Madsen, *Commentary*, at 111.

[253] Indeed, in the cases where the United Kingdom forced a refugee to live in a remote location but failed to provide the individual in a timely way with the funds required to travel to the refugee status interview, resulting in the dismissal of the claim to protection, there is a basis to argue that the duty of *non-refoulement* has been indirectly violated: see chapter 4.1.2 above, at pp. 319–321. More generally, however, Art. 26 is simply a prohibition of constraints as opposed to a duty to facilitate the right of a refugee to choose his or her residence, or to enjoy internal freedom of movement. Thus, to the extent that these rights are compromised in practice by the French decision to delay access to the social welfare system until registration with the local *préfecture*, Art. 26 is not violated.

[254] See chapter 4.4 above.

there is no legal difference between the use of such threats to compel a refugee to reside in a place not of his or her choosing and a direct order of confinement.[255]

In a similar vein, governments may not lawfully rely on the terms of refugee resettlement or temporary admission in order indirectly to limit the freedom of movement and choice of residence of refugees. This possibility was raised directly by the representative of Venezuela to the Ad Hoc Committee, who noted that granting refugees complete freedom to choose their residence might allow them to ignore the terms of resettlement agreements under which refugees were admitted to residence in return for agreeing to work on a particular farm for a period of years.[256] Similarly, the Danish delegate sought to safeguard systems under which refugees are required to live in a particular location while acquiring the skills that would enable them to be resettled.[257] The example given was Denmark's decision during the Nazi era to admit to its territory "certain young German Jews on the condition that after they had completed their agricultural training there, they would leave for other countries, Israel for example, in order to follow their occupation."[258] In a bid to accommodate concerns of this kind, the Chairman of the Ad Hoc Committee proposed that the right of refugees to enjoy freedom of internal movement and residence be "subject to the conditions under which they were admitted."[259]

The Chairman's proposal was, however, rejected on the grounds that it could be invoked to sanction refugee-specific constraints. Because "such an addition would provide few safeguards for refugees,"[260] the Committee voted to prohibit all refugee-specific limitations on freedom of movement or

[255] In contrast, the Dutch system – under which basic income support is provided to all refugees awaiting the results of status verification, but superior benefits are offered to those willing to live in a refugee reception center – is not legally problematic. By offering an enhanced level of support to those who agree to reside in a designated place, the Netherlands promotes the reception center option without any unlawful coercion.

[256] The Venezuelan representative "drew attention to the problem with which the authorities of a signatory State might be faced in the event of the article's adoption, if, for example, refugees admitted as agricultural workers were to leave the farms to which they had been assigned and engage in trade in the towns, refusing to return to agricultural work. Although the refugees would thereby have infringed the conditions of their admission to the territory, the reception State might find itself powerless to take any action against them by virtue of the provisions of the article which the Committee was proposing to adopt": Statement of Mr. Perez Perozo of Venezuela, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 15.

[257] Statement of Mr. Larsen of Denmark, ibid. at 16.

[258] Statement of Mr. Larsen of Denmark, ibid. at 16.

[259] Statement of the Chairman, Mr. Chance of Canada, ibid. at 21.

[260] Statement of Sir Leslie Brass of the United Kingdom, ibid. at 21.

residence, including those implemented indirectly by terms and conditions of admission,[261] unless generally applied to all non-citizens:[262]

> If new restrictions were introduced into a provision which was intended to grant refugees simple equality of treatment with aliens – an equality which, it seemed to him, should be taken for granted – it would look as though States were being invited to treat the refugees with less consideration than was accorded to aliens.[263]

[261] The use of indirect limitations was identified as problematic by the American representative early in the discussions. In response to a Belgian proposal to incorporate the rule on freedom of movement from the 1938 Convention, Mr. Henkin "pointed out that the first phrase of that article, 'Without prejudice to the power of any High Contracting Party to regulate the right of sojourn and residence' appeared to nullify in advance the rights granted to refugees in the latter part of the text": Statement of Mr. Henkin of the United States, ibid. at 13. Interestingly, even though the discussions noted above had clearly resulted in a decision that terms and conditions of admission could not be relied upon to restrict freedom of movement, the draft adopted by the First Session of the Ad Hoc Committee still contained the reference to "the conditions under which such refugees were admitted": Ad Hoc Committee, "First Session Report," at Annex I, Art. 21. Without any recorded debate, however, the report of the Second Session of the Ad Hoc Committee deleted the reference, allowing only "regulations applicable to aliens generally in the same circumstances" to delimit a refugee's freedom of movement and residence: Ad Hoc Committee, "Second Session Report," at Annex I, Art. 21. But see Weis, *Travaux*, at 210: "Article 26 . . . does not affect the conditions imposed on refugees for their admission."

[262] At the Conference of Plenipotentiaries, it was suggested by Canada and Australia that requiring refugees admitted under general immigration schemes to remain in a given job for a period of time should not be understood to violate Art. 26: Statements of Mr. Shaw of Australia and Mr. Chance of Canada, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 16. This is a plausible interpretation, since refugees resettled as immigrants would only face the same (indirect) constraints on freedom of movement as any other non-citizen admitted under the general program. As Grahl-Madsen observed, Art. 26 "does not relate to employment. The rules regulating employment are found in Articles 17 through 19 [see text below at chapters 5.3, 6.1, and 6.2]. It will be appreciated that in so far as there are restrictions on the freedom to seek whatever employment one might desire, the right to choose one's place of residence may be restricted in fact though not in law": Grahl-Madsen, *Commentary*, at 111. It would be otherwise, however, if a resettlement program were directed only to refugees, or if a variant of a general program addressed to refugees imposed more significant limitations on freedom of movement or residence than the general scheme for non-citizens wishing to immigrate. Indeed, Australia recognized as much by entering a reservation, providing that Art. 26 would not be understood to preclude "the imposition of conditions upon which a refugee may enter the Commonwealth . . . [or] the making of arrangements with a refugee under which he is required to undertake employment under the direction of the Government": 189 UNTS 200–202, since withdrawn.

[263] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 21. See also Statements of Mr. Guerreiro of Brazil and Mr. Cuvelier of Belgium, ibid. Providing an example of a limit which appears to have been found acceptable by the Committee, the Brazilian delegate pointed out that "it was true that refugees authorized to enter Brazil as farm workers were required to remain so for a certain number of years, [but] the same provisions applied equally to aliens": Statement of Mr. Guerreiro of Brazil, ibid.

In line with this firm commitment to assimilate refugees to other non-citizens,[264] not even a proposal introduced at the Conference of Plenipotentiaries to authorize refugee-specific constraints on place of residence where necessary to avoid friction between states was pursued.[265] Thus, Mexico's forcible relocation of Guatemalan refugees away from its southern border in order to promote regional peace was not justified under the Convention.[266] There is, of course, no legal impediment to the promotion of residence in areas safe from border incursion or incitement to hostility, so long as refugees are not forcibly moved or confined to their new homes. As much is clear from the softer language of Art. II(6) of the OAU Refugee Convention, which provides that "[for] reasons of security, countries of asylum shall, *as far as possible*, settle refugees at a reasonable distance from the frontier of their country of origin [emphasis added]."[267] But if mandatory constraints on freedom of residence are deemed essential, they must be directed to all non-citizens (or to all persons). Even Art. 9 of the Convention, which does allow strictly provisional and genuinely essential restrictions on freedom of movement and residence in response to "war or other grave and exceptional circumstances," does not authorize a general policy of refugee-specific constraints after the verification of refugee status.[268]

This does not mean, however, that there can be no limits on the freedom of movement of lawfully present refugees (including those awaiting a decision on their application for recognition of refugee status). To the contrary, Art. 26

[264] "Article 26 makes it clear beyond doubt that a Contracting State may not impose such restrictions applicable only to refugees": Grahl-Madsen, *Commentary*, at 110.

[265] "[T]he Yugoslav delegation had submitted an amendment ... to cover cases where the fact that refugees resided near the frontier of their country of origin might cause friction between the States. Contracting States should be empowered to prescribe zones in which residence would be forbidden to refugees": Statement of Mr. Makeido of Yugoslavia, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 16. The proposal was, however, withdrawn: ibid.

[266] The harshness with which the relocation was enforced also raises issues of the violation by Mexico of its duty to ensure the physical security of refugees: see chapter 4.3.3 above.

[267] Convention governing the Specific Aspects of Refugee Problems in Africa, UNTS 14691, done Sept. 10, 1969, entered into force June 20, 1974, at Art. II(6). The concern expressed by Blay and Tsamenyi that "[t]he Convention overlooks these issues [of the need for security-based limitations on movement], which may be very significant in the case of some States" is therefore not entirely accurate: Blay and Tsamenyi, "Reservations," at 551.

[268] More specifically, any decision to invoke Art. 9 must be predicated on a good faith assessment that restrictive measures are essential to protection of the receiving state's most vital national interests. The steps taken must be logically connected to eradication of the security concern, may not be of indefinite duration, and may be continued after an individual's refugee status is affirmatively verified only on the basis of unresolved case-specific security concerns. In order to avail itself of even this discretion, a state much proceed in good faith to investigate the security concerns and to verify refugee status. See generally chapter 3.5.1 above.

allows state parties to subject refugees to "any regulations applicable to aliens generally in the same circumstances." For example, where all non-citizens in a state for more than a brief period are required to register their place of residence – as in Spain and Sweden – there is no legal concern where refugees are required to meet the same requirement. Because the internal movement of refugees is limited only by a measure that is generally applied to other non-citizens,[269] the requirements of Art. 26 are met.[270] The same is true where restrictions on freedom of movement are less broadly conceived. Belgium, for example, complies with Art. 26 by limiting the freedom of residence and movement of refugees who present national security or public order threats only on the basis of its general laws addressed to all non-citizens.

In particular, it was noted by the drafters that refugees would be required to respect "the existence in most countries of frontier or strategic zones, access to which [is] forbidden to aliens."[271] As Grahl-Madsen suggests, refugees may also be subject to general rules which impose limits on freedom of movement "because of a natural catastrophe, or because of a rebellion, civil war or large scale police operation, that is to say areas where strangers may be in the way, or where their safety cannot be guaranteed."[272] But the constraints must not be targeted solely at refugees. Thus, the lawfulness of any effort to exclude refugees from border areas prone to armed conflict depends on the scope of the prohibition. So long as all persons, or at least all non-citizens, are excluded from that area, refugees may similarly be barred from entry. But if the prohibition is targeted solely at refugees, it is in breach of the Refugee Convention.

[269] See chapter 3.2.1 above.

[270] The Turkish representative to the Ad Hoc Committee posed a question of direct contemporary relevance to many states. He "wondered what the position would be in the case of a State which, having adopted a very liberal attitude with regard to aliens, who were subject to no restrictions of time or place, received refugees and wished in some way to restrict the conditions of residence of those refugees. Such a State might be prompted to modify its legislation concerning aliens, which would be a highly regrettable measure": Statement of Mr. Kural of Turkey, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 19. No reply was offered. While the risk posed was real at the time of the Convention's drafting, the subsequently enacted Art. 12 of the Civil and Political Covenant constrains the risk of downgrading the mobility rights of non-citizens generally in order to be able lawfully to restrict the movements of refugees: see text below, at pp. 713–718. Mr. Kural's intervention is helpful as a clear indication that it was understood by the drafters that the approach taken to Art. 26 would allow no room for refugee-specific limitations.

[271] Statement of Mr. Kural of Turkey, ibid. at 14. A limitation of this kind can also be applied to refugees, assuming that it is not itself found to infringe the general duty not to discriminate against non-citizens, including refugees: see chapter 2.5.5 above.

[272] Grahl-Madsen, *Commentary*, at 111. In such circumstances, however, any distinction in the freedom of movement enjoyed by citizens and that allowed aliens would have to be consistent with the duty of non-discrimination: see text below, at pp. 717–718.

As a matter of logic and fairness, this duty not to stigmatize refugees makes good sense. While there are often good reasons for a government to deny a right of entry into, or residence in, a given place, it is difficult to see how the fact of being a refugee – as contrasted with simply being a person, or at least a non-citizen – can be relevant to the imposition of a categorical exclusion of this very fundamental freedom.[273]

There are two exceptions to the principle that refugees may be subject to the same constraints on freedom of movement which apply to aliens generally. First, because freedom of movement and residence may be limited under Art. 26 only in accordance with "any regulations applicable to aliens generally *in the same circumstances* [emphasis added]," the Refugee Convention requires the non-mechanistic application to refugees of even limits routinely applied to other non-citizens. This form of words requires states to temper the application to refugees of generally applicable rules in order to compensate for any disadvantages faced by refugees in consequence of their refugeehood – for example, because of the urgency of flight, the severing of ties with the home state, or the inability to plan for relocation.[274] Thus, if a reception country normally limits the freedom of internal movement to aliens able to produce a satisfactory security attestation from their country of origin, or grants non-citizens the right to choose their place of residence only after a certain period of residence or sojourn in the host state, it must make some dispensation in administering those rules for refugees whose situation makes perfect compliance an untenable proposition. The Zambian rule requiring possession of a (very expensive) permit to live as a student, professional, or trader in an urban area is a clear example of a general norm which, if strictly applied, would fail to take account of the general inability of refugees (relative to other non-citizens) to plan and save funds in anticipation of their new circumstances.

Second and more generally, Art. 12 of the Civil and Political Covenant delimits the general right of states to control the freedom of internal movement and residence of non-citizens lawfully inside a state's territory.[275] Because most aliens cannot insist on a right of entry into a foreign state,[276]

[273] "Without the freedom to move and to take up residence without official permission, personal freedom would indeed be curtailed": A. Grahl-Madsen, "Article 13," in A. Eide et al. eds., *The Universal Declaration of Human Rights: A Commentary* 203 (1992), at 205. See generally the discussion of the duty not to discriminate in imposing limits on freedom of movement and residence set by Art. 12 of the Civil and Political Covenant, below, at pp. 717–718.

[274] See chapter 3.2.3 above, at pp. 207–208.

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

[276] It has recently been determined, however, that persons who "because of [their] special ties to or claims in relation to a given country cannot be considered to be a mere alien,"

it is sometimes suggested that non-citizens may "bargain away" their rights under Art. 12 by assenting to conditions of entry which deny them freedom of internal movement or residence.[277] This is a difficult position to justify in law, based as it is on the notion that individuals may somehow elect to decline rights which are explicitly defined to be inalienable.[278] But in any event, it has no application to refugees, as the drafting discussions recounted above make abundantly clear.[279] By virtue of the non-negotiability of access[280] and the presumptive lawfulness of a refugee who has met a state party's procedural requirements for verification of refugee status,[281] limits on a refugee's freedom of movement or residence derived from rules generally applicable to all aliens must meet the requirements of Art. 12 of the Civil and Political Covenant.

At first glance, the need to comply with the rules on permissible limitation set by Art. 12 of the Covenant appears not to be much of a constraint, as the

including in particular "long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence," may invoke the right to enter their "own country" under Art. 12(4) of the Civil and Political Covenant: ibid. at para. 20.

277 Nowak asserts, without any analysis, that "the lawful residency of aliens may be limited to a part of a State's territory, such that the freedom of movement and residency is locally restricted": Nowak, *ICCPR Commentary*, at 201–202. The view of the UN Human Rights Committee on this issue is awkwardly framed. "Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant": UN Human Rights Committee, "The position of aliens under the Covenant" (1986), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 140, para. 6. This formulation could be read to suggest that the non-citizen (once allowed to enter the state's territory) is able to refuse to comply with terms or conditions of admission which conflict with Art. 12.

278 "The States Parties to the present Covenant, considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal *and inalienable rights* of all members of the human family is the foundation of freedom, justice and peace in the world . . . [a]gree upon the following articles [emphasis added]": Civil and Political Covenant, at Preamble. It is difficult to imagine anyone making the argument that a non-citizen could agree to become a slave, or to be subjected to cruel or inhuman treatment, in exchange for permission to enter a foreign state's territory. Yet under the Covenant, the only legal difference between these rights and Art. 12 is that the latter is derogable during time of national emergency, not a distinction which is relevant to the question of renouncing inalienable rights.

279 See text above, at pp. 709–710. Any effort to condition access to protection on the refugee's preparedness to accept constraints on freedom of movement or residence is unlawful because refugees, unlike most non-citizens, have a legal right to claim protection in a state party under the terms of the Refugee Convention.

280 See chapter 4.1 above.

281 Refugees, including those awaiting the results of verification of their status, are by definition "lawfully in" the reception state (see chapter 3.1.3 above, at pp. 175–183).

list of approved purposes for restricting the mobility rights of non-citizens is quite broad. For example, a limitation may be imposed where necessary "to protect national security," now understood to include measures necessary to avoid an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions.[282] In addition, restrictions on freedom of movement may be imposed where necessary to protect public order (*ordre public*), a wide-ranging notion that includes the prevention of crime and the promotion of general democratic standards of conduct.[283] Germany might, for example, argue that the assignment of refugees to live in a specific region is compelled by the basic tenets of its federal system. And even if the host government's goal cannot be brought within the scope of a general public order concern, states may also limit freedom of movement where required by considerations of "public health or morals or the rights and freedoms of others." Thus, India might take the view that forcing Tamil refugees to move in order to open up reception places for new (and more vulnerable) refugees expected to arrive on its territory was also justifiable under Art. 12 of the Covenant. Indeed, even Sudan and Mozambique might suggest that the forcible relocation of refugees to areas where they could meet their own subsistence needs was dictated by the need to avoid a huge drain on their resources, thus enabling them to meet the basic needs of their own citizens.

As these examples make clear, the Civil and Political Covenant authorizes limitations on non-citizens' freedom of movement for quite a broad-ranging set of reasons. But Art. 12(3) is not without limits. For example, it is unlikely that Sudan's decision to ban most refugees from residing in Khartoum could be justified on the basis of any of the purposes authorized by the Covenant. It is moreover difficult to see how European Union restrictions on the residence and movement of refugee claimants in order simply to advance the "public interest," much less to enhance "swift processing and effective monitoring" of

[282] See chapter 3.5.1 above, at pp. 264–266. For example, the Danish delegate to the Ad Hoc Committee which drafted the Refugee Convention noted that "Denmark and Czechoslovakia, for example, would undoubtedly have hesitated to admit German refugees in 1938 if they had been obliged to allow them to settle in areas already inhabited by minorities, whose ranks would, in the first place, have been swelled by the refugees and in whose political activity against the unity of the country the refugees might subsequently have participated": Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.15, Jan, 27, 1950, at 16.

[283] But "the purpose for interference does not relate to the specific *ordre public* of the state concerned but rather to an international standard of the democratic society. For instance, the far-reaching restrictions on freedom of internal movement and residency for reasons of *apartheid* that were proposed by South Africa ... not only contravene the prohibition of discrimination under Arts. 2(1) and 26 in conjunction with Art. 12, but also the international *ordre public* under Art. 12(3)": Nowak, *ICCPR Commentary*, at 213.

refugees, can be brought within the terms of Art. 12(3). Such overly broad formulations may well infringe the duty to ensure

> that the restrictions . . . not impair the essence of the right; the relation between right and restriction, between norm and exception must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.[284]

And in any event, there is little doubt that the European Union's purported authorization to withdraw even basic human rights from refugees who disobey limits on their freedom of internal movement contravenes the obligation to ensure that any limits on freedom of movement be administered in a way that is "consistent with all other rights recognized in the Covenant."[285]

Even where the goals of a given restriction on movement or residence can be linked to one of the approved purposes defined by the Covenant, the restriction must still meet Art. 12(3)'s quite demanding legal provisos. First and most basic, a restriction is valid only if it is "provided in law." As the Human Rights Committee has held, "[t]he law itself has to establish the conditions under which the rights may be limited."[286] This is in line with Nowak's appraisal that "[m]ere administrative provisions are insufficient . . . [unless they] follow[ ] from the enforcement of a law that provides for such interference with adequate certainty."[287] The informality of the forced relocation of Eritreans by Sudan, even if otherwise lawful, would therefore not meet the standard of the Civil and Political Covenant.

Second, the legal restriction must be substantively justifiable as "necessary" to meet one of the listed goals. This language, intended by the drafters of the Covenant to be intentionally strict, requires that a restriction on freedom of movement or residence be objectively justifiable as essential to one of the approved purposes:[288]

> Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective

[284] UN Human Rights Committee, "General Comment No. 27: Freedom of movement" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 173, para. 13.

[285] Ibid. at para. 11. [286] Ibid. at para. 12.

[287] Nowak, *ICCPR Commentary*, at 209. He concludes that "[a] broad interpretation that . . . seeks to sweep so-called 'executive legislation' or administrative provisions under the term ['prescribed by law'] would . . . correspond with neither the purpose of a legal proviso nor the intentions of its drafters": ibid.

[288] "A restriction on this right is . . . consistent with the legal provision in Art. 12(3) not when the State concerned believes it serves one of the listed purposes for interference but rather when it is necessary for achieving this purpose": ibid. at 211.

> function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.
>
> The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.[289]

In light of this understanding, Germany would likely find it impossible to show that its federal system could not withstand the strain of, for example, the shift to a system of fiscal burden-sharing among the *Länder* to replace the current policy of enforced dispersal of refugees.[290] The necessity requirement makes it particularly difficult ever to establish the legality of closed refugee camps, such as those operated by Hong Kong, Thailand, and Turkey. Unless it can be shown that only the absolute denial of freedom of movement would suffice to meet an approved objective – that is, that an open camp, or a camp from which absences of even limited time and purpose were allowed, could not meet the state's legitimate goals – then the necessity requirement is not satisfied.

Third, the restriction must be one that is consistent with the general rights regime established by the Covenant ("and are consistent with the other rights recognized in the present Covenant").[291] As such, even if Tanzania's closed camp policy for Burundians were otherwise lawful, its administration of the camps in a way that contravened the duty of states to protect family unity (under Art. 23 of the Covenant[292]) would render the detention unlawful. The drafters were particularly concerned that any limitation on freedom of movement – even if legally sanctioned and objectively justifiable as necessary to meet one of the approved goals – must nonetheless not violate the duty of non-discrimination.[293] This preoccupation has recently been affirmed by the Human Rights Committee:

[289] UN Human Rights Committee, "General Comment No. 27: Freedom of movement" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 173, paras. 14–15.

[290] By way of comparison, the Human Rights Committee has "note[d] that asylum-seekers in Denmark are often restricted or discouraged from choosing a residence in specific municipalities or from moving from one municipality to another. Denmark should ensure that any such measures are applied in strict compliance with article 12 of the Covenant": UN Human Rights Committee, "Concluding Observations: Denmark," UN Doc. CCPR/C/70/DNK (2000), at para. 16.

[291] "The permissible limitations which may be imposed on the rights protected under article 12 . . . are governed . . . by the need for consistency with the other rights recognized in the Covenant . . . [T]o be permissible, restrictions must . . . be consistent with all other rights recognized in the Covenant": UN Human Rights Committee, "General Comment No. 27: Freedom of movement" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 173, paras. 2, 11.

[292] See generally chapter 4.6 above.

[293] Nowak, *ICCPR Commentary*, at 210. The meaning of the duty of non-discrimination is canvassed in depth in chapter 2.5.5 above.

> [I]t would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[294]

In the case of its decision to evict Tamil refugees in order to make room for newly arriving refugees, India would thus be required to show that the eviction of non-citizens of a single ethnic group was objectively justifiable on the basis of an assessment of their relative needs and ability to reestablish themselves elsewhere.

Despite its principled constraints, there is however no reason to believe that the scope of permissible limitations on freedom of internal movement presents a serious challenge to the ability of host countries to ensure their most basic interests. The flexibility of Art. 12 is nicely illustrated by a decision of the Human Rights Committee rendered in response to the complaint of a Tunisian refugee against France. The complainant was co-founder of the political movement Ennahdha, and fled Tunisia where he was sentenced to death by trial in absentia. After being recognized by France as a refugee, it came to light that the refugee was an active supporter of groups which engaged in violence against civilian populations. Rather than effecting his expulsion on public security grounds, the decision was made to confine him to the Digne-les-Bains region, and to require him to report daily to police there. This limitation on his internal freedom of movement was upheld by the Committee, though clearly only on the basis of a determination that it was a restriction that was not unduly broad, and which was open to careful scrutiny by national courts:

> [T]he State party produced evidence to the domestic courts that Mr. Karker was an active supporter of a movement which advocates violent action. It should also be noted that the restrictions of movement on Mr. Karker allowed him to reside in a comparatively wide area. Moreover, the restrictions on Mr. Karker's freedom of movement were examined by the domestic courts which, after reviewing all the evidence, held them to be necessary for reasons of national security.[295]

In sum, host governments enjoy reasonable latitude lawfully to limit the freedom of movement and residence of refugees arriving in their territory. Under Art. 31(2), both persons arriving as part of a mass influx and individuals seeking recognition of refugee status whose identity and circumstances

[294] UN Human Rights Committee, "General Comment No. 27: Freedom of movement" (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 173, para. 18.

[295] *Karker v. France*, UNHRC Comm. No. 833/1998, UN Doc. CCPR/C/70/D/833/1998, decided Oct. 26, 2000, at para. 9.2. See also *Celepli v. Sweden*, UNHRC Comm. No. 456/1991, UN Doc. CCPR/C/51/D/456/1991, decided Mar. 19, 1993, in which it was determined that it was reasonable to confine a non-citizen terrorist suspect to his home town of 10,000 persons, and to require him to report to the police three times weekly.

of arrival are under investigation may lawfully be detained on a strictly provisional basis. But once the refugee is lawfully present – which includes admission to a procedure for verification of refugee status, as well as so-called temporary admission – Art. 26 requires the termination of all refugee-specific limits on choice of residence and freedom of movement. From that point, only constraints applied to aliens generally may be enforced against refugees, and even then only in a way that takes account of the specificity of the refugee's predicament. Any such limits are moreover only validly enforced to the extent they are based on unambiguous legislative authority, are objectively necessary to attain one of the purposes defined by the Civil and Political Covenant, and are administered in a non-discriminatory way that is consistent with respect for civil and political rights.

5.3 Self-employment

There is little doubt that the inherent trauma of the refugee experience can be exacerbated by enforced idleness and dependence.[296] Ohaegbulom has written of the refugee's need "to become a whole person again, one who earns his own living and the respect of those around him."[297] Simply put, "[s]elf-reliance can improve the refugee's self-image and therefore his or her ability to cope with being a refugee."[298] More fundamentally, the refugee's ability to engage in productive economic activity in the asylum country may also be critical to survival. While international human rights law has evolved to recognize the duty of states affirmatively to assist all persons under their authority – including refugees – to access the necessities of life,[299] refugees too often find that in practice they must fend for themselves.

The focus of this section is the right of refugees to engage in independent economic activity. Under the Refugee Convention's structure of incremental entitlement, this right accrues at an earlier stage than the right of refugees either to be employed, or to engage in professional practice.[300] Because these

[296] Gorman makes the case against what he calls the 'Palestinization' of refugees who are forced to remain in dependent situations and are denied the opportunity to pursue self-reliance through economic activity, resulting in their alienation, resentment, and exasperation: R. Gorman ed., *Refugee Aid and Development* (1993), at 8. See also D. Miserz ed., *Refugees – The Trauma of Exile: The Humanitarian Role of the Red Cross and the Red Crescent* (1987), at 92.

[297] F. Ohaegbulom, "Human Rights and the Refugee Situation in Africa," in G. Shepherd and V. Nanda eds., *Human Rights and Third World Development* (1985), at 197.

[298] S. Forbes Martin and E. Copeland, *Making Ends Meet? Refugee Women and Income Generation* (1988), at 3.

[299] See chapter 4.4 above.

[300] Each of these rights accrues only once a refugee is "lawfully staying" in the country of reception, while the right to engage in self-employment is owed to refugees who are simply "lawfully in" a state party. See generally chapters 3.1.3 and 3.1.4 above for an

two means of earning a livelihood may lawfully be withheld from refugees for a period of time, the ability of refugees to survive through their own efforts – for example, by raising food for consumption or sale, trading, or launching their own business – takes on a particular importance for refugees awaiting a decision on refugee status recognition, or on access to some alternative mechanism of durable protection.

In the less developed world, the right to engage in agricultural activities is usually the most pressing concern. There are sometimes blunt refusals to allow refugees to farm. Pakistan, for example, not only denied Afghan refugees the right to own land or other property, but was unwilling to allocate vacant land on which they might engage in food production.[301] Exclusion from agriculture may also be the more subtle result of the refugees' assignment to an area in which there is no available land, or where cultural norms prevent them from farming. A study of Sudanese and Somali refugees living in camps in northwest Kenya observed that "there is little possibility of [the refugees] engaging in agricultural activities, and refugees cannot normally keep cattle. This would be unacceptable to the local population, given the existing fierce competition among different groups for ownership of cattle. These factors conspire to render the refugee population almost completely dependent on aid for survival."[302]

In contrast, Guinea allowed traditional land allocation systems – under which land is made available by appeal to a village "friend," with no government or other involvement – to function as Liberian refugees arrived in that country. Because it was largely in the economic interests of those controlling access to land to promote its cultivation by refugees, the net result was an increase in overall food production.[303] More affirmative efforts were undertaken by Tanzania to respond to the needs of Hutu refugees from Burundi during the 1990s. Upon arrival, refugee families were granted plots of land to clear for cultivation. Refugees began farming basic subsistence crops, later incorporating cash crops. They were also encouraged to undertake poultry farming, brick-making, and carpentry.[304] Refugees at Namibia's Osire camp

elaboration of the meaning of these terms. The substance of the rights to engage in employment and professional practice is detailed in chapters 6.1 and 6.2 below.

301 H. Christensen and W. Scott, "Survey of the Social and Economic Conditions of Afghan Refugees in Pakistan," UN Research Institute for Social Development Report No. 88.1 (1988), at 2–3.

302 G. Verdirame, "Human Rights and Refugees: The Case of Kenya," (1999) 12(1) *Journal of Refugee Studies* 54, at 62.

303 R. Black and M. Sessay, "Forced Migration, Land-Use Change and Political Economy in the Forest Region of Guinea," (1997) 96 *African Affairs* 587, at 602–604.

304 J. Sterkenburg et al., "Refugees and Rural Development: A Comparative Analysis of Project Aid in Sudan and Tanzania," in H. Adelman and J. Sorenson eds., *African Refugees: Development Aid and Repatriation* (1994), at 199–200.

were allowed to take up agricultural activities and to form small businesses to alleviate their poverty and hunger.[305] Botswana has similarly promoted efforts by refugees to engage in income-generating and agricultural activities in settlements such as that at Dukwe,[306] and allowed those refugees who wished to start their own business outside the settlement to apply for a permit (normally reserved for citizens) to do so – though a journey of some 460 km to Gabarone is required to make the necessary application.[307] Mexico is another state which has established planned agricultural settlements for refugees. Guatemalan refugees were settled in Campeche, where they were allowed to grow fruits and vegetables for their own consumption and sale. Refugees also had the opportunity to engage in small-scale projects such as handicraft production, carpentry, and tailoring.[308]

Some countries have taken a similarly open view of the right of refugees to engage in handicrafts and various forms of trading or commerce. Refugees assigned to camps in Ghana have been allowed to supplement their rations by independent commercial activity, including by operating restaurants and other independent business ventures.[309] Switzerland allows only non-citizens with durable status in that country to undertake self-employment, but nonetheless extends that right to all refugees.[310] In Belgium, both recognized refugees and those awaiting verification of their status are eligible to secure an authorization to engage in self-employment.[311] Indeed, Joly describes a range of affirmative efforts by European states to promote independent economic activity by refugees, including rural projects in France, a Spanish initiative to provide funds for refugees seeking to start businesses, and refugee craft cooperatives in the United Kingdom launched with government loans and local council grants.[312] To the extent that limitations are imposed, they tend to be fairly specific. France, for example, subjects refugees to its general rules prohibiting non-citizens from engaging in such businesses as arms

[305] "Self-help initiative at Osire refugee camp," *Namibia Economist*, June 7, 2002.

[306] "Examples of income-generating projects in the settlement are a brick-moulding unit, knitting groups, a carpentry unit, a bakery, a restaurant, an art and craft group, and several small shops throughout the settlement . . . Examples of successful agricultural activities are poultry projects with broilers and laying hens": J. Zetterqvist, *Refugees in Botswana in the Light of International Law* (1990), at 39–40.

[307] Ibid. at 63. [308] Stepputat, "Exile in Mexico," at 13–17.

[309] A. Essuman-Johnson, *International Academy of Comparative Law National Report for Ghana* (1994), at 13–14. Thus, for example, UNHCR determined that refugees in the Buduburam refugee camp were economically self-sufficient, and ended assistance to them in 2000: US Committee for Refugees, *World Refugee Survey 2003* (2003), at 72.

[310] W. Kälin, *International Academy of Comparative Law National Report for Switzerland* (1994), at 15.

[311] K. Leus and G. Vermeylen, *International Academy of Comparative Law National Report for Belgium* (1994), at 11.

[312] D. Joly, *Refugees: Asylum in Europe*? (1992), at 59.

manufacturing, mining and oil production, banking, the serving of alcohol, and truck driving.[313]

There are, however, countries that take a harder line on self-employment. In many countries, there are "very limited provisions . . . for refugee craftsmen and artisans to re-establish their trades and exploit new markets."[314] While the law authorizes the issuance of permits to refugees who wish to start their own enterprises in Greece, authorities there are reported to delay the issuance of the required permits in the hope of avoiding early integration.[315] Refugees in Botswana have complained that there are no funds available to start up independent enterprises.[316] Indeed, Botswana issued by-laws in 2002 which deny all non-citizens the right to operate hair salons and barber shops in the Central District – thereby depriving refugees and others of access to one of the few successful options for self-support.[317] Costa Rica will allow refugees to undertake self-employment, but only if the applicant has relevant prior experience and can show that Costa Rican citizens will not be displaced by the refugee's business.[318] Zambia has made it practically impossible for refugees lawfully to start a business:

> Until now, refugees had to show a viable registered business in order to get a self-employment permit. Now, new regulations for issuing or renewing a self-employment permit will require that the refugee show at least US$25,000 in assets.[319]

Even more bluntly, Denmark simply refuses to allow refugees awaiting the results of status verification to engage in any form of self-employment or commercial activity,[320] and Malawi insists that refugees have no right to

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

[314] R. Zetter, "Shelter Provision and Settlement Policies for Refugees: A State of the Art Review," Nordic Africa Institute Studies on Emergencies and Disaster Relief Working Paper No. 2 (1995), at 39.

[315] Z. Papassiopi-Passia, *International Academy of Comparative Law National Report for Greece* (1994), at 50.

[316] *Botswana Daily News*, Sept. 13, 2000.

[317] *Gazette* (Gabarone), July 3, 2002.

[318] "To assess this displacement factor, a refugee official must make a geographical reconnaissance of the *barrio* in which the refugee lives, and generally works, to see if there are Costa Ricans engaged in the same trade. Where there are Costa Rican businesses (usually small workshops attached to living quarters) of the type requested by the refugee, the government may deny the work permit. This procedure ensures that the refugee business does not compete with Costa Rican business": E. Larson, "Costa Rican Government Policy on Refugee Employment and Integration, 1980–1990," (1992) 4(3) *International Journal of Refugee Law* 326, at 338.

[319] (2001) 90 *JRS Dispatches* (Apr. 7, 2001).

[320] J. Vedsted-Hansen, *International Academy of Comparative Law National Report for Denmark* (1994), at 2.

establish or to operate businesses.[321] Under the new rules applicable throughout the European Union, states are required to allow refugees to undertake "self-employed activities subject to rules generally applicable to the profession and to the public service," but only once "refugee status has been granted."[322]

> **Refugee Convention, Art. 18 Self-employment**
> **The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.**

This rarely invoked article of the Refugee Convention is in several respects quite extraordinary. First, it is not derived from either of the usual sources, those being prior refugee conventions and the Universal Declaration of Human Rights. The 1951 Refugee Convention was the first international instrument to speak to the right of refugees to undertake independent economic activity, a notion not even alluded to in the subsequently drafted Human Rights Covenants.[323] Second, particularly in view of its legal novelty, it is astonishing that the drafters of the Refugee Convention viewed it as essentially uncontroversial, confining most of their discussions on Art. 18 to the question of the appropriate contingent standard for measuring compliance with the right. Yet as an explicit acknowledgment of the right to participate in entrepreneurial activities at the heart of the market economy, this provision is of potentially enormous importance to refugees. It is, in this

[321] Malawi's Deputy Commissioner for Relief and Rehabilitation, Willy Gidala, is reported to have stated emphatically that "refugees are insulting their hosts by breaking the rules. They are not allowed to wander about freely or engage in business": *African Eye News Service*, Nov. 8, 2000.

[322] 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. 26(1). There is no rule specifically addressed to the ability to undertake any form of independent economic activity prior to recognition of refugee status; the general principle relevant to employment is that "Member States shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not have access *to the labour market* [emphasis added]": EU Reception Directive, at Art. 11.

[323] The closest provision is Art. 6 of the Economic, Social and Cultural Covenant, which affirms "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts": International Covenant on Economic, Social and Cultural Rights, UNGA Res. 2200A(XXI), adopted Dec. 16, 1966, entered into force Jan. 3, 1976 (Economic, Social and Cultural Covenant), at Art. 6(1).

sense, a critical complement to the right of refugees to acquire, and to deal with, both movable and immovable forms of private property, and to be treated fairly under host state taxation schemes.[324]

The rationale for the novel provision was blandly said to be that "a certain number of refugees are handicraft workers with special knowledge and occupational skills, or manufacturers familiar with manufacturing processes peculiar to their country of origin."[325] The case for allowing refugees to make use of their entrepreneurial talents appears to have been considered self-evident. Nor was there any real consideration given to the substantive scope of Art. 18 – including the right of refugees to participate in "agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies." This list is precisely the same as that proposed in the Secretary-General's initial draft,[326] and was not even debated by the drafters.[327]

The textual reference to the right to establish "companies" clearly grants refugees the right to incorporate their enterprises, thereby securing the usual benefits of limited liability. We know also that the competing French version of Art. 18, which would have omitted the right of refugees to engage in agricultural self-employment,[328] was withdrawn even before debate was commenced.[329] There can therefore be no question of excluding agriculture from the range of permissible activities for refugees. But because Art. 18 does not mandate affirmative agricultural resettlement efforts of the kind laudably undertaken by such states as Tanzania, Botswana, Namibia, and Mexico, neither the failure of Pakistan to grant Afghan refugees access to vacant farmland, nor even the assignment by Kenya of Somali and Sudanese refugees to camps where agriculture was unviable and raising livestock was culturally contentious, amounts to a breach of Art. 18.[330] It is enough if the usual

[324] The rights of refugees to own property and to be dealt with equitably under taxation schemes are canvassed at chapters 4.5.1 and 4.5.2 above.

[325] Secretary-General, "Memorandum," at 35. [326] Ibid.

[327] Grahl-Madsen suggests only that "[i]t is apparent that the expression used ['self-employment'] must be given the widest possible interpretation": Grahl-Madsen, *Commentary*, at 76.

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

[329] Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 13.

[330] This does not mean, however, that such actions are insulated from legal challenge. To the contrary, to the extent that the Pakistani actions were targeted at Afghan refugees, they likely breach the duty of non-discrimination: see chapters 2.5.5 and 3.4 above. Similarly, the fact that Kenya required the refugees to live in a place where they could not pursue agricultural production is presumptively in violation of the right of refugees freely to choose their place of residence: see chapter 5.2 above. And in each case, the host government was under an affirmative obligation to provide refugees with the essentials of life, particularly in view of the clear link between official policies and the inability of the refugees to provide for their own needs: see chapter 4.4 above.

market or other rules are allowed to govern access to land, as was the case for Liberian refugees arriving in Guinea.

The drafting history of Art. 18 does assist us to understand the level of attachment at which the right to engage in self-employment inheres. The proposal was initially that only refugees "regularly resident" (*résidant régulièrement*) in a state would be entitled to undertake independent economic activity.[331] While that level of attachment, subsequently translated into English as "lawfully staying,"[332] still governs the rights to undertake employment and to engage in professional practice,[333] the text of Art. 18 was amended by the Ad Hoc Committee to grant the right to self-employment at an earlier stage, namely when a refugee is simply "lawfully in" the territory of a state party (*se trouvant régulièrement*).[334] In view of this clear, if unremarked, change, there can be little doubt that all refugees who have regularized their presence in the host state – including those whose short-term presence is authorized, who have been admitted into a process for refugee status verification, or who are present in a state party which elects not to verify status[335] – may rely on Art. 18.[336] As Robinson writes,

> The expression "lawfully in their [territory]" cannot be only verbally different from "lawfully staying in the country." It must mean in substance something else, viz. the mere fact of lawfully being in the territory, even without any intention of permanence, must suffice.[337]

This duty is clearly recognized in the Belgian policy of making self-employment permits available to persons awaiting the results of refugee status verification. Danish practice, as well as the comparable new European Union rules (in the EU Qualification Directive) – each of which purports to withhold the right to engage in independent economic activity until status has been recognized – are, in contrast, out of step with the requirements of the Convention.

[331] Secretary-General, "Memorandum," at 35.

[332] See chapter 3.1.4 above. [333] See chapters 6.1 and 6.2 below.

[334] There is no record of debate on this point, the revised text having appeared for the first time in Ad Hoc Committee, "First Session Report," at Annex I. The point was not dealt with in the subsequent session of the Ad Hoc Committee, nor at the Conference of Plenipotentiaries.

[335] See chapter 3.1.3 above.

[336] Robinson accurately observes, however, that "Art. 18 is not applicable to refugees residing outside the country where the self-employed activity is to be exercised; applicable in such cases is Art. 7(1), i.e. refugees not residing in the country in which they want to engage in self-employment or establish commercial or industrial companies will be permitted to do so only if, under the laws of the country, aliens in general, residing abroad, are authorized to do so and under the same conditions": Robinson, *History*, at 116–117.

[337] Ibid. at 117. See also Weis, *Travaux*, at 152: "[P]hysical presence, even a temporary stay or visit, [is] sufficient, in distinction to 'lawfully staying,' the terminology used in other Articles."

There is, in fact, a real logic to this decision to grant refugees early access to independent economic activity. The Refugee Convention was drafted prior to the advent of modern social welfare systems, and even before the elaboration of the Economic Covenant's duty to provide the essentials of life to all persons unable to meet their own basic needs.[338] Absent some means of enabling refugees to survive economically in the asylum state while awaiting a formal decision on refugee status or other durable protection, it is clear that extraordinary hardship would have been inflicted on the many destitute refugees. Yet the drafters were profoundly concerned not to provide for the economic needs of refugees at the expense of the citizenry of reception states. The British delegate, for example, insisted that refugee rights could not compromise the "planned economy" of his country.[339]

The drafters achieved a workable compromise of interests by authorizing governments to delay refugees' access to both employment and professional practice – areas in which the potential for conflict with the domestic labor market is probably both most acute and most visible – while at the same time agreeing to allow refugees to survive economically through their own entrepreneurship. In essence, refugees are allowed to meet their needs by the generation of new economic activity, though they may initially be barred from competing with citizens for a share of extant employment opportunities. This determination to ensure that refugees have early access only to self-generated economic activity is clear from the only amendment to Art. 18 made at the Conference of Plenipotentiaries. At the suggestion of the Dutch and British representatives, it was agreed that a refugee would have the right to engage in self-employment only "on his own account,"[340] thereby clearly distinguishing this right from a right to undertake activities approximating either employment or investment in a concern established or operated by others.

A true balance between respecting the need of refugees to survive economically and not subjecting the host community to undue competition from refugees was, however, never really established. While it was agreed that the right to engage in self-employment would inhere at an early stage, the value to refugees of the right was significantly compromised by the decision to define the standard for compliance as simply "treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances." This contingent standard builds on the residual minimum standard in Art. 7 ("the same treatment as is accorded to aliens generally").[341] It clearly disallows any restrictions on self-employment aimed

[338] See generally chapter 4.4.1 above.

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

[340] UN Doc. A/CONF.2/SR.9, July 6, 1951, at 19.

[341] See chapter 3.2.1 above.

strictly at refugees, rather than at non-citizens generally. Thus, the Costa Rican regime under which *refugees* alone were denied the right to self-employment if their activities were deemed likely to compete with indigenous enterprises was in breach of Art. 18. More generally, where there is truly generality of access by non-citizens to self-employment or other independent economic activity – as evinced by, for example, relevant domestic laws or practices, a pervasive pattern of bilateral or multilateral agreements, or de facto enjoyment of the right by most aliens – the right to engage in self-employment automatically accrues to refugees as well.[342]

On the other hand, if non-citizens are only rarely allowed to engage in self-employment, or if self-employment is strictly a special right genuinely associated with unique bilateral or similar arrangements, it is not a right that necessarily inheres in refugees. Thus, Botswana's refusal to allow any non-citizen to operate a hair salon or barber shop may not infringe Art. 18, since refugees are caught by what appears to be a rule generally applicable to all non-citizens. Under this standard, it is also clear that refugees should normally be expected to comply with routine requirements to undertake self-employment, such as the acquisition of a license, and be subject to the normal constraints on the scope of such activity.[343] As such, the French rules barring non-citizens generally from self-employment in certain sensitive fields may reasonably be applied to refugees as well (though some forms of activity on the prohibited list – such as truck driving or the serving of alcohol – would likely be difficult to sustain as reasonable constraints in keeping with the duty of non-discrimination[344]). On the other hand, Art. 18 is not respected by the practice of Greek authorities intentionally to prolong the bureaucratic process for issuing self-employment permits to refugees in the hope of slowing down their assimilation. Refugees may only be subject to the *usual* rules governing the treatment of non-citizens, applied in the *usual* way.

The exclusion of refugees from independent economic activity where it is not a right generally enjoyed by other non-citizens may not, however, be implemented in a mechanistic way. This is because the drafters of Art. 18 devised what they intended to be an intermediate contingent standard between the baseline of Art. 7 and the assimilation of refugees to either nationals or the citizens of most-favored states. Specifically, the American representative had criticized reliance simply on the residual contingent standard, noting that granting refugees the same right to engage in self-employment as foreigners generally "would confer no real benefit on refugees."[345] He therefore "wondered whether it might not be possible to find a third solution,

[342] See chapter 3.2.1 above, at pp. 199–200.
[343] See Robinson, *History*, at 117.
[344] See chapter 2.5.5 above, at pp. 129–145.
[345] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 14.

whereby refugees would be granted not the most favourable treatment, but a treatment more favourable than that given to foreigners generally."[346] This proposal met with general agreement,[347] resulting in amendment of the draft article to include the current standard of treatment.

Art. 18's duty to afford refugees "treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances" as regards self-employment thus requires a state party to give consideration in good faith to the non-application to refugees of limits generally applied to other aliens.[348] While exigent circumstances clearly suffice to withhold the right from refugees,[349] refugees should not be barred from independent economic activity on purely formalistic grounds. As such, Malawi's blanket refusal even to consider allowing refugees to undertake self-employment breaches Art. 18 because of its rigid, mechanistic nature. In contrast, Switzerland's decision not to apply its usual rules restricting self-employment by non-citizens to refugees is an example of the thoughtful and humanitarian approach intended by the drafters.

Second, as previously analyzed, the duty to grant refugees access to self-employment on terms not less favorable than those enjoyed by aliens generally "in the same circumstances" means that there is a duty to exempt refugees from general requirements which the refugee cannot meet by virtue of his or her refugeehood – for example, because of the urgency of flight, the severing of ties with the home state, or the inability to plan for relocation.[350] Ideally, states would be inspired to go beyond the strict scope of this duty and, for example, provide start-up funds and other forms of compensatory assistance to refugees wishing to establish businesses in line with the practices of such countries as France, Spain, and the United Kingdom. But because Art. 18 read in the light of Art. 6 requires only the exemption of refugees from insurmountable restrictions (rather than the provision of positive aid to launch a business), Botswana's failure to provide comparable start-up assistance is not in breach of the Convention.

[346] Ibid.

[347] Mr. Kural of Turkey "appreciated the humanitarian motives of the United States representative and felt that a formula should be found urging States to accord to refugees treatment more favourable than that given to foreigners generally": Statement of Mr. Kural of Turkey, ibid. at 15. See also Statement of Sir Leslie Brass of the United Kingdom, ibid. Indeed, the Brazilian representative would have preferred an even stronger standard: ibid.

[348] See chapter 3.2.1 above, at p. 200.

[349] During the drafting of Art. 18, the Belgian representative noted his concern regarding an overly liberal contingent standard on the grounds that his country "had an acute middle class problem": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 14.

[350] See chapter 3.2.3 above.

The legal duty to exempt refugees from insurmountable requirements does, however, provide reason to question the legality of Botswana's failure to make it possible for refugees to secure the required business permit without traveling 460 km to Gabarone. Even if this is the usual practice applied to other non-citizens, Botswana is under a legal duty to tailor generally applicable requirements which fail to take account of the hardships already endured by refugees, logically including a responsibility to minimize the usual bureaucratic hurdles to undertaking independent economic activity.

Even more serious are the distinctly punitive regulations enacted by Zambia, under which only refugees with a net worth of US$25,000 – more than sixty times the average per capita income in that country – may secure a self-employment permit. As the Jesuit Refugee Service has explained, "[t]his condition is insurmountable for most refugees, who have lost their previously accumulated capital in the process of fleeing their country."[351] As such, it would be difficult to conceive a much clearer example of a situation in which a constraint on access to self-employment – even if applied generally to non-citizens – may not lawfully be enforced against refugees. Because even general limitations on the self-employment of non-citizens may be applied only to refugees who are, in fact, "in the same circumstances" as other aliens, governments are under a legal duty to vary or eliminate constraints which fail to take real account of the disadvantages that accrue from involuntary alienage.[352]

[351] (2001) 90 *JRS Dispatches* (Apr. 7, 2001).

[352] Indeed, restrictions such as the Zambian regulations, which are aimed solely at refugees, are even more flagrant violations of the Refugee Convention. Whatever the flexibility granted states by virtue of Art. 18's comparatively low contingent standard of treatment, it simply cannot be read to authorize refugee-specific constraints of any kind: see text above, at pp. 726–727.

6

Rights of refugees lawfully staying

A significant number of important rights accrue to refugees only once they are "lawfully staying" in a state party. These include the right to engage in wage-earning employment and to practice a profession, freedom of association, access to housing and welfare, to benefit from labor and social security legislation, intellectual property rights, and the entitlement to receive travel documentation.

As previously described, a refugee is lawfully staying (*résidant régulièrement*) when his or her presence in a given state is ongoing in practical terms.[1] This may be because he or she has been granted asylum consequent to formal recognition of refugee status. But refugees admitted to a so-called "temporary protection" system or other durable protection regime are also lawfully staying. So long as the refugee enjoys officially sanctioned, ongoing presence in a state party, he or she is lawfully staying in the host country; there is no requirement of a formal declaration of refugee status, grant of the right of permanent residence, or establishment of domicile.[2] On the other hand, rights which require lawful stay do not accrue to refugees awaiting the results of a formal process of status verification, as the purely provisional nature of such persons' presence in the host state is at odds with the Convention's reservation of these more integration-oriented rights for those who are expected to remain in the state party for a significant period of time.

6.1 Right to work

In most of the less developed world, access to the national labor market is either denied altogether or extremely limited for refugees. Host states are often concerned that allowing refugees to work will drive down wages for

[1] See chapter 3.1.4 above, at pp. 186–187.

[2] This understanding is consistent with the basic structure of the Refugee Convention, which does not require states formally to adjudicate status or assign any particular immigration status to refugees, which does not establish a right to permanent "asylum," and which is content to encourage, rather than to require, access to naturalization. See Convention relating to the Status of Refugees, 189 UNTS 2545, done July 28, 1951, entered into force Apr. 22, 1954 (Refugee Convention), at Art. 34.

their own citizens, thereby creating tensions between the refugees and their hosts. As UNHCR has observed,

> The arrival of large numbers of asylum-seekers and the absorption of some or even all of them as refugees, even on a temporary basis, can create serious strains for host countries. This is particularly the case for poorer communities where the ability of the people and the inclination of the government to shoulder the resultant burden may be severely diminished by economic difficulties, high unemployment, declining living standard, and shortages in housing and land . . . Inevitably there are tensions between international obligations and national responsibilities in such circumstances, with the result, in a number of States, that priority is accorded to nationals over all aliens, including refugees, in fields such as employment.[3]

Thus, for example, refugees in Cambodia are granted no work authorizations, "reducing them to little more than illegal immigrants."[4] Tanzania, anxious to avoid the prospect of the de facto integration of Hutu refugees from Burundi, imposed an effective ban on their employment.[5] An only slightly more subtle approach was adopted by Zambia, which set an exorbitant fee for issuance of a work permit to refugees, well beyond the means of nearly all.[6] This tack was defended by immigration officials on the grounds of "the Zambian government's decision to 'push back' some refugees to control crime in towns, attributed largely to the presence of 'aliens.'"[7]

In some circumstances, however, formal bans on the employment of refugees may be of little practical significance. While Mauritania disallows work by refugees, the country's lack of administrative infrastructure means that in practice work can usually be found in informal sectors of the

[3] UNHCR, "Implementation of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees," UN Doc. EC/SCP/54, July 7, 1989, at para. 11.

[4] "Cambodia: precarious position of refugees," (2002) 114 *JRS Dispatches* (June 28, 2002).

[5] J. Astill, "UN refugee work in crisis as world ignores Burundi," *Guardian*, Feb. 14, 2001, at 18. Despite the recommendations of a study conducted in 2001 by the Centre for the Study of Forced Migration at the Faculty of Law, University of Dar es Salaam, the Tanzanian government decided not to expand the employment rights of refugees. Instead, the 2003 National Refugee Policy provided only that the government would "continue to look for solutions to its unemployment problem and this calls for all stakeholders to join hands in developing a conducive environment for more employment opportunities. As far as refugees are concerned, the government will allow small income generating activities to be undertaken within the camps": personal communication with Cheggy Mziray of the Centre for the Study of Forced Migration, Faculty of Law, University of Dar es Salaam, Dec. 3, 2003.

[6] "'Imagine asking a person working as a store attendant or vegetable vendor . . . to pay K250,000,' lamented a DRC refugee . . . The absence of permits often resulted in detention by police, a fact that worried . . . [the] regional representative for UNHCR. More than 30 refugees are presently languishing in detention centres, while two Congolese refugees died recently while in detention": *Daily Mail of Zambia*, June 16, 2000.

[7] Ibid. quoting Zambian immigration department spokesperson Danny Lungu.

economy.[8] And some poorer states do allow refugees to work, though usually under the same conditions as other non-citizens. In Zimbabwe, for example, domestic law provides that refugees "shall, in respect of wage-earning employment, be entitled to the same rights and subject to the same restrictions, if any, as are conferred or imposed generally on persons who are not citizens of Zimbabwe."[9]

There are, however, important exceptions to the exclusion of refugees from authorized employment in less developed states. In South Africa, judicial intervention has ensured that even persons awaiting refugee status verification are entitled to work.[10] In Pakistan, Afghan refugees have been allowed to work, with the result that more than 87 percent of Afghan refugee households could claim at least one income earner.[11] And in Western Africa, the governments of ECOWAS states have agreed to allow refugees from within that region to work while in receipt of protection.[12] But even here, reality does not always match commitments. In Senegal, for example, Mauritanian refugees remained unrecognized and hence forced to survive on food aid,[13] while Liberian refugees in Côte

[8] "[N]ot one refugee interviewed had been granted a work permit nor heard of any others who had obtained such a permit. Most refugees do not believe, however, that a work permit is necessary for them to carry out labor in the informal sectors of the economy where they have found work; due to weak administrative infrastructure and a lack of enforcement resources, the government has adopted a laissez-faire approach": C. Lindstrom, "Urban Refugees in Mauritania," (2003) 17 *Forced Migration Review* 46.

[9] *Zimbabwe Refugees Act* (Law No. 13, 1983), at s. 12(3), cited in Lawyers' Committee for Human Rights, *African Exodus* (1995) (LCHR, *African Exodus*), at 104.

[10] *Watchenuka Case*, Dec. No. 1486/02 (SA Cape Prov. Div., Nov. 18, 2002); affirmed in *Minister of Home Affairs v. Watchenuka*, (2004) 1 All SA 21 (SA SCA, Nov. 28, 2003).

[11] But Pakistan has deemed refugees from other countries, including Iraq, Iran, Somalia, and Bosnia, simply to be illegal immigrants, and denied them the right to work: N. Ahmad, *International Academy of Comparative Law National Report for Pakistan* (1994), at 6–7; US Committee for Refugees, *World Refugee Survey 2003* (2003), at 153.

[12] LCHR, *African Exodus*, at 108. Pursuant to the Protocol relating to Free Movement of Persons, Residence and Establishment, UNTS 32496 (1996), done at Dakar, May 29, 1979, member governments of the Economic Community of West African States agreed to ensure that by the end of a fifteen-year transitional period "Community citizens have the right to enter, reside and establish in the territory of Member States": ibid. at Art. 2(1). Pursuant to the Supplementary Protocol on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment, UNTS 32496 (1996), done at Abuja, July 1, 1986, "each of the Member States shall grant to citizens of the Community who are nationals of other Member States, the right of residence in its territory for the purpose of seeking and carrying out income earning employment": ibid. at Art. 2.

[13] LCHR, *African Exodus*, at 108. "In 2000, the Senegalese government abruptly halted efforts to register Mauritanian refugees and provide them with identity cards. The government initially cited planned changes in its refugee administrative system as the reason for the delay. The registration process remained stalled in 2002": US Committee for Refugees, *World Refugee Survey 2003* (2003), at 88.

d'Ivoire lost their right to food aid if they left their assigned place of residence in search of employment.[14]

Some countries, while insisting on stringent limitations on the right of refugees to work, have nonetheless taken affirmative steps to enable refugees to become economically productive. In Costa Rica, refugees enjoyed no right to work until 1984, at which time the rules were changed to allow refugees to work solely as wage-laborers, and under strict conditions.[15] Because of the limited nature of the right granted, refugees were able to survive only by virtue of an internationally financed effort to establish opportunities for refugee self-employment, particularly in workshops producing leather goods and clothes.[16] Elsewhere refugees have been settled in areas near to large-scale agricultural plantations so that they would be able to earn their living as wage-laborers, simultaneously providing a much-needed source of labor for local farming enterprises.[17]

But when access to work or other economic activity is conditioned on relocation to camps or planned settlements, many refugees will resist such constraints and choose instead to self-settle, typically in rural villages near the border with their country of origin.[18] Often sharing the ethnic origin of their neighbors, and settling in a geographic and economic environment similar to that which they left behind, self-settled refugees enjoy certain advantages in their efforts to integrate into the local economy.[19] Yet because they exist outside the national legal framework, generally remaining unregistered with national or international agencies for fear of discovery, they do not receive

[14] LCHR, *African Exodus*, at 108. "Refugees living outside the official refugee zone were ineligible for material assistance, UNHCR reported": US Committee for Refugees, *World Refugee Survey 1998* (1998), at 66.

[15] Specifically, 90 percent of the workers in every business were required to be Costa Rican nationals, and no Costa Rican citizen could be displaced in order to facilitate the employment of a refugee: T. Basok, *Keeping Heads Above Water: Salvadorean Refugees in Costa Rica* (1993) (Basok, *Heads Above Water*), at 35–36, 61.

[16] The widespread failure of the initiative led the government to focus on smaller urban enterprises, such as shoe-making and tailoring, but that program too suffered from a very high failure rate: Basok, *Heads Above Water*, at xvii, 66–67, 74–84. A more recent survey determined that "while legal aspects have improved – every refugee in Costa Rica is legally entitled to work with the refugee ID card – some employers are still unclear about the significance of such documentation and about refugees' right to work in general": G. Monge, "Survey indicates refugee profile, integration in Costa Rica," *UNHCR Behind the Headlines*, Oct. 31, 2002.

[17] T. Kuhlman, "Organized Versus Spontaneous Settlement of Refugees in Africa," in H. Adelman and J. Sorenson eds., *African Refugees: Development Aid and Repatriation* 117 (1994) (Kuhlman, "Organized Versus Spontaneous"), at 128–129.

[18] Ibid. at 124.

[19] E. Brooks, "The Social Consequences of the Legal Dilemma of Refugees in Zambia," paper presented to the Silver Jubilee Conference of the African Studies Association of the United Kingdom, Sept. 1988 (Brooks, "Refugees in Zambia"), at 4. See also Kuhlman, "Organized Versus Spontaneous," at 135.

food or other forms of refugee assistance.[20] In particular, the uncertainty of their legal status often inhibits their efforts to achieve self-reliance, and particularly to undertake longer-term economic planning. Angolan refugees in Zambia, for example, initially survived by a combination of selling their possessions, working as casual agricultural labor, and charity. Three years after their arrival, more than 80 percent were still dependent on others for assistance.[21] Moreover, as Brooks has observed, "[r]elations with local residents will be stressful as long as the uncertainty lasts. After all, it is pretty hard to put much effort into crop production if one is expecting to be shifted at any moment."[22]

Self-settled refugees in the South who defy restrictions on their freedom of movement in order to secure work in urban settings often find that the illegality of their presence means that they are at the mercy of their employers, and must accept much lower wages than locals receive.[23] Even when their work is legally authorized, refugees often have difficulty actually securing employment because of language barriers and cultural differences.[24] As a result, work for urban refugees is generally concentrated in the informal sector despite the often highly employable skills which refugees have to offer.[25]

Most developed states place few restrictions on the right to work of persons formally recognized as refugees. Indeed, the European Union has determined that "Member States shall authorise beneficiaries of refugee status to engage in employed . . . activities subject to rules generally applicable to the profession and to the public service, immediately after . . . refugee status has been granted."[26] Despite their generally good record on allowing recognized refugees full access to employment opportunities, many countries, including France,[27]

[20] Brooks, "Refugees in Zambia," at 2.

[21] H. Williams, "Self-Settled Refugees in North-Western Zambia: Shifting Norms of Assistance from Social Networks," in M. Hopkins and N. Donnely eds., *Selected Papers on Refugee Issues II* (1993), at 145.

[22] Brooks, "Refugees in Zambia," at 6.

[23] G. Kibreab, "Refugees in the Sudan: Unresolved Issues," in H. Adelman and J. Sorenson eds., *African Refugees: Development Aid and Repatriation* 58 (1994) (Kibreab, "Sudan"); Kuhlman, "Organized Versus Spontaneous," at 133.

[24] A. Karadawi, "The Problem of Urban Refugees in Sudan," in J. Rogge ed., *Refugees: A Third World Dilemma* 124 (1987) (Karadawi, "Urban Refugees in Sudan").

[25] J. El Bushra, "Case Studies of Educational Needs Among Refugees II: Eritrean and Ethiopian Refugees in the Sudan," unpublished manuscript, Mar. 1985 (El Bushra, "Educational Needs"), at 22. See also Karadawi, "Urban Refugees in Sudan," at 126.

[26] 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. 26(1).

[27] "Asylum seekers are not allowed to work, although significant numbers work illegally, particularly once their allowance has expired": European Council on Refugees and Exiles, "Setting Limits" (2002) (ECRE, "Limits"), at 36.

Germany,[28] Italy,[29] and the United Kingdom,[30] have nonetheless traditionally denied persons undergoing refugee status assessment the right to undertake employment. In the case of Ireland, the policy seems to have pleased virtually nobody:

> Despite pleas from business and labour leaders and the Association for the Unemployed, the [Irish] Government refuses to allow asylum-seekers to work in the booming economy. They draw the dole while waiting for a hearing, which can take more than a year, prompting accusations of sponging.[31]

Despite such concerns, the member states of the European Union have agreed that they will each set a period of time during which applicants for asylum are barred from entering the labor market.[32] Those limits will, however, normally be lifted if a decision on the refugee claim is not reached within one year. Even at that point, however, states are still allowed to grant priority in employment to EU and European Economic Area nationals, as well as to legally resident

[28] "While they await a final verdict on their application, asylum-seekers are sent to hostels or camps, often in extremely isolated locations. They are not allowed to work. They are not allowed to study. And for as long as their case takes to decide – normally several years – they are obliged to remain within the boundaries of the local police authority": J. Hooper, "Welcome to Britain: Fortress Germany," *Guardian*, May 23, 2001, at 8.

[29] "The country's clogged bureaucracy takes more than six months to provide a modest sustenance allowance and more than a year to hear asylum claims. In the meantime, refugees are barred from working officially, and their children are barred from attending public school": J. Smith, "Europe bids immigrants unwelcome," *Washington Post*, July 23, 2000, at A-01.

[30] "Home Secretary David Blunkett talked recently about broadening the work permit system to help deal with skill shortages, but there was nothing in his proposals to help asylum-seekers already in the UK. A Home Office spokesman confirmed asylum-seekers' worst fears. 'I think the answer is no – work permits would not be aimed at those already in the country'": C. Cottell, "Asylum seekers: Would you flee the land of your birth for this?," *Guardian*, Oct. 27, 2001, at 22.

[31] R. Carroll, "Dublin curbs Romanian immigration," *Guardian*, Aug. 5, 1998, at 4. Under ss. 9(4)(b) and 9(7) of the Refugee Act 1996 as amended, "[a]n applicant shall not seek or enter employment . . . during the period before the final determination of his or her application for a declaration [to be a Convention refugee] . . . A person who contravenes [this limitation] . . . shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €635 or to an imprisonment for a term not exceeding one month, or both."

[32] This approach mirrors the practice of such countries as the Netherlands, where employment is denied for the first six months, and Sweden, where there is a bar on work for the first four months after filing of the request for protection: ECRE, "Limits," at 27, 38. The United Kingdom previously allowed refugees to work if their claims remained undecided six months after submission; that policy was, however, revoked in July 2002: "UK asylum-seekers' right to work withdrawn," (2002) 117 *JRS Dispatches* (Aug. 29, 2002).

third country nationals[33] – an approach that has been followed for several years in Greece.[34]

Similarly, refugees channeled into "temporary protection" systems have not always enjoyed the right to work. While many states – including Australia, Belgium, Finland, Italy, Norway, Sweden, the United Kingdom, and the United States – have normally granted the beneficiaries of temporary protected status the right to work,[35] other developed countries have been less generous. A delay of up to six months has generally been imposed in Switzerland and the Netherlands before work is authorized;[36] and France applied a similar rule to Kosovar Albanian refugees provisionally admitted to its territory in the late 1990s.[37] Refugees diverted into temporary protection systems in states such as Denmark and Germany have faced even more severe restrictions. In Denmark, refugees granted temporary protected status have not been issued work permits, and are forbidden from accepting employment other than in a job that has been advertised through the employment office and relevant publications for three months without having been filled by a Danish resident or holder of a work permit.[38] Similarly, Bosnian refugees in receipt of temporary protection in Germany were allowed to work after a three-month waiting period, but then only if a labor market assessment confirmed that there was no "privileged employee" – that is, a German or

[33] Council Directive laying down minimum standards for the reception of asylum-seekers, Doc. 2003/9/EC (Jan. 27, 2003) (EU Reception Directive), at Art. 11.

[34] "The right to work of [persons seeking recognition of refugee status] . . . is granted under the condition that no interest has been shown in this specific occupation by a Greek citizen, a citizen of another member state of the European Union, by a recognized refugee, or by an emigrant Greek with foreign citizenship [citing to Article 4 of Presidential Decree 189/1998]": A. Skordas, "The Regularization of Illegal Immigrants in Greece," in P. deBruycker ed., *Regularization of Illegal Immigrants in the European Union* 343 (2000), at 381.

[35] Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, *Report on Temporary Protection in States in Europe, North America and Australia* (1995) (IGC, *Temporary Protection*), at 8.

[36] Ibid. at 153, 210. In Switzerland, the delay may be as little as three months: T. Armyros, "Migration und Xenephobie in der Schweiz," available at www.raben-net.ch (accessed Feb. 28, 2005). In the Netherlands, "[a]sylum seekers are allowed to work, but not during the first six months of their stay and only for periods of limited duration (like the summer season)": US Committee for Refugees, *World Refugee Survey 2003* (2003), at 210.

[37] B. Philippe, "L'embarras des authorités," *Le Monde*, Apr. 9, 1999.

[38] Prior to revisions to the Yugoslav Act in June 1994, not even these exceptional opportunities were open to persons in receipt of temporary protection. Between the time of the 1994 amendments and April 1995, only 366 refugees found employment under the new arrangements: G. Brochmann, "Bosnian Refugees in the Nordic Countries: Three Routes to Protection," paper prepared for the Norwegian Institute for Social Research, Mar. 1995, at 18–19. See also IGC, *Temporary Protection*, at 74, 82; and F. Liebaut ed., *Legal and Social Conditions for Asylum Seekers in Western European Countries* (2000) (Liebaut, *Conditions 2000*), at 63.

other EU national, or non-citizen with a permanent residence or work permit – available to fill the job.[39] Work permits were normally restricted to a specific activity at a particular company, and limited to a duration of one year before reassessment. This approach resulted in very high unemployment rates for Bosnians in Germany, as well as widespread "under-employment" in unskilled jobs not subject to the "privileged employee" priority system.[40]

In response to the real problems faced by refugees diverted into temporary protection regimes as an alternative to seeking Convention refugee status, the Parliamentary Assembly of the Council of Europe recommended that employment rights should be granted to such refugees "where . . . stay is prolonged."[41] This position has now been formally adopted in European Union law, which since 2001 has required that "persons enjoying temporary protection [shall be authorized] to engage in employed or self-employed activities."[42] Priority may, however, be given "to EU citizens and citizens of States bound by the Agreement on the European Economic Area, and also to legally resident third-country nationals who receive unemployment benefits."[43]

Even where refugees in developed countries do not face legal barriers to seeking work, they nonetheless often encounter practical barriers to securing employment. Some barriers may be specific to the situation of refugees, as a study by the Dutch Refugee Council suggests:

> An estimated 40% of [refugees are] looking for a job. By comparison, the Dutch population unemployment figure for 2000 was around 3%, and among immigrants around 12%. The level of education among refugees is virtually the same as that for Dutch people, and many refugees have had work experience in their countries of origin. Why is the unemployment rate so high?
>
> There are a few reasons for this. Refugees are relatively old when they enter the labour market, and their work experience does not match what is required on the Dutch labour market. The long asylum procedure forces asylum-seekers into long years of idleness. When they finally are allowed to work, the gap between them and the labour market is already very large. Refugees have no network of family, friends, neighbours and acquaintances

[39] IGC, *Temporary Protection*, at 116.

[40] A. Büllesbach, "War and Civil War Refugees in Germany: The Example of Refugees from Bosnia-Hercegovina," May 1995 (Büllesbach, "Civil War Refugees"), at 54–60.

[41] Parliamentary Assembly of the Council of Europe, "Temporary Protection of Persons Forced to Flee Their Country," Rec. 1348 (1997), at para. 9.

[42] Council Directive on minimum standards for giving protection in the event of a mass influx of displaced persons and on the measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Doc. 2001/55/EC (July 20, 2001) (EU Temporary Protection Directive), at Art. 12.

[43] Ibid. Equally important, persons who prefer to be assessed for formal Convention refugee status may no longer be forced by a state to accept temporary protected status instead: ibid. at Art. 17(1).

> who can help them to find a job informally. Employers are not familiar with refugees and have difficulties acknowledging their qualities.[44]

More generally, differences of culture and language, local unemployment, and discrimination may all work against a refugee's success in the job market.[45] In Spain, it has been suggested that "as in other Western societies, situations and circumstances of racial discrimination against immigrants occur at each and every step of their efforts to enter the labour market."[46] Labor market statistics from Sweden, showing higher unemployment among Iranian, Iraqi, and African refugees than for refugees from Eastern Europe and Latin America, have similarly been interpreted as revealing "concealed discrimination." While measures were introduced in Sweden to combat discrimination in the workforce, concerns have been raised that "currently legal rules in Sweden do not provide job applicants and employees with adequate protection against ethnic discrimination, and there is a risk that discrimination will increase in the future."[47]

In response, many developed host states have established programs designed to assist refugees to adapt to local labor markets. Employment schemes involving local employers have been established in the Netherlands and the United Kingdom, self-employment projects are available to refugees in France and Spain, and training programs are commonly available in many other countries.[48] The United States places tremendous emphasis on early employment for refugees; indeed, some arrangements between government and voluntary agency partners require refugees to accept any reasonable job offer to remain eligible for assistance.[49]

[44] Dutch Refugee Council, "Living in Freedom: Work," available at www.vluchtelingenwerk.nl (accessed Feb. 28, 2005).

[45] Joly decries "the discrimination experienced by refugees, especially if they come from the third world. They frequently have to accept the most menial and worst paid jobs": D. Joly, *Refugees: Asylum in Europe?* (1992) (Joly, *Asylum*), at 58. See generally H. Lambert, *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (1995) (Lambert, *Seeking Asylum*), at 171.

[46] C. Solé and S. Parella, "The Labour Market and Racial Discrimination in Spain," (2003) 29(1) *Journal of Ethnic and Migration Studies* 121, at 122.

[47] M. Eriksson, *International Academy of Comparative Law National Report for Sweden* (1994), at 39.

[48] Joly, *Asylum*, at 58–59. Issues of access to vocational training are discussed in more detail in chapter 4.8 above, at pp. 607–613.

[49] Tang Thanh Trai Le, *International Academy of Comparative Law National Report for the United States* (1994), at 33 and Annex, at 2–3. "[A]ll refugees are eligible for [Temporary Assistance for Needy Families] assistance for their first five years in the country . . . States must ensure that recipients are involved in some form of work-related activity. However, the work requirement might not take effect immediately, and some recipients may be exempted from the work requirement": Institute for Social and Economic Development, Refugee Welfare and Immigration Reform Project, "Fact Sheet: Refugees and Temporary Assistance for Needy Families (TANF)," Sept. 1, 1999, at 2–3.

6.1.1 Wage-earning employment

Refugee Convention, Art. 17 Wage-earning employment

1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of the Convention for the Contracting State concerned, or who fulfils one of the following conditions:

(a) He has completed three years' residence in the country;
(b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefit of this provision if he has abandoned his spouse;
(c) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Economic, Social and Cultural Covenant, Art. 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Under even contemporary general standards of international human rights law, non-citizens cannot be said to enjoy any meaningful right to engage in wage-earning employment.[50] It is true that Art. 6 of the Economic Covenant

[50] There is no international guarantee of a right actually to secure work, only freely to seek work: M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) (Craven, *ICESCR Commentary*), at 203.

speaks in general terms, and that it expressly confirms that the specific right not to be forced to undertake particular work against one's will inheres in "everyone." But except in fairly extreme cases bordering on exploitation, treaty supervisory bodies, including the Committee on Economic, Social and Cultural Rights, have generally been slow to critique exclusions from employment based on citizenship.[51] Craven attributes this reluctance to the overwhelming weight of state practice, noting that "it is somewhat unlikely that States would consider themselves bound by a provision forcing them to eliminate any restrictions on the employment of aliens."[52]

More fundamentally, apart from the core content of Art. 6[53] – normally understood to include protection against unjust denial of work, and the right not to be subjected to forced labor[54] – this provision of the Economic Covenant imposes only a duty of progressive, non-discriminatory implementation, not of immediate result.[55] More seriously still, there can be little doubt that all but the core content of the right to work is an "economic right," meaning that states of the less developed world – home to the overwhelming majority of the world's refugees – "may determine to what extent they [will] guarantee [the right to work] to non-nationals."[56] Nor is there much force to the rather creative argument that the flip-side of Art. 2(3) is logically a

[51] For example, a member of the Economic, Social and Cultural Rights Committee did pursue the issue of whether Jordanian restrictions on the employment of non-citizens were in breach of the duty of non-discrimination, particularly because there appeared to be no economic basis for the restrictions: UN Doc. E/C.12/1988/SR.4, at para. 45. But more generally, the Committee has been described as exhibiting a "[r]eluctance . . . to be unequivocal in its defence of the equal treatment of aliens": Craven, *ICESCR Commentary*, at 173. The Human Rights Committee has shown a comparable preparedness to assume the legitimacy of distinctions in the allocation of rights based on citizenship: see chapter 2.5.5 above, at pp. 131–133. More generally, "job requirements may not in themselves be deemed to be discrimination . . . [I]t is not an easy task to establish a clear line making it legitimate to resort to 'inherent requirements' or 'security of the State'": K. Drzewicki, "The Right to Work and Rights in Work," in A. Eide et al. eds., *Economic, Social and Cultural Rights: A Textbook* 169 (1995), at 178.

[52] Craven, *ICESCR Commentary*, at 174. It is possible, however, that the argument against discrimination would be better received if predicated on the overarching obligation set by Art. 26 of the Civil and Political Covenant: see generally chapter 2.5.5 above, particularly at pp. 125–128.

[53] "[E]ven if non-nationals are not entitled to equal treatment in all respects, it is important to stress that this does not deprive them of all rights under the Covenant. Certainly, in so far as the Covenant establishes the rights of 'everyone,' non-nationals would have a right to the enjoyment of the minimum core content of those rights": Craven, *ICESCR Commentary*, at 174. The notion of "core content" of economic rights is discussed in detail at chapter 4.4.2 above, at pp. 488–490.

[54] Craven, *ICESCR Commentary*, at 205.

[55] See generally chapter 2.5.4 above, at p. 123 and, in particular, chapter 4.4.2 above, at pp. 486–488.

[56] See chapter 2.5.4 above, at p. 122 and chapter 4.4.2 above, at p. 488.

presumption that states of the developed world *do* have a duty to allow non-citizens to work: even though some countries have entered reservations to guard against such an interpretation, neither state practice nor the pattern of inquiry before supervisory bodies is in line with such a construction.[57]

In practical terms, then, refugees might look to the Economic Covenant as a source of protection against arbitrary dismissal (though recognizing that preferring unemployed citizens to aliens is unlikely to be deemed arbitrary), and in particular against forced labor (which may include situations of perceived serious exploitation).[58] Tanzanian employment restrictions, apparently aimed in practice only at Hutu non-citizens, might well breach the UN Charter's prohibition of discrimination on grounds of race,[59] thereby qualifying them as being in breach of the "unjust denial of work" component of the non-derogable core of Art. 6. It might also be determined that the US policy of requiring a refugee to accept "any available job" in order to remain eligible for assistance payments amounts to unlawful forced labor, assuming the assistance scheme is critical to enabling the refugee to secure access to the necessities of life.[60] Because in such a case the refugee would effectively face a Hobson's choice – either take the available job at the pay offered, or forfeit the necessities of life – he or she would not be able in any meaningful sense "freely [to] choose[ ]or accept[ ]" the job offered. But apart from such extreme situations, the provisions of the Economic Covenant are unlikely to be of great value to refugees.

In light of the minimalist import of the Economic Covenant, the scope of the right to work guaranteed by the Refugee Convention is truly impressive. Of particular note, Art. 17 of the Refugee Convention is *not* conceived as a duty of progressive implementation: once its requirements are met, the obligation to allow refugees to work accrues immediately. More important still, Art. 17 binds all states, whatever their level of economic development. Thus, even assuming that less developed countries may rely on Art. 2(3) of the Economic Covenant to insulate themselves from breach of that treaty where

[57] "The effects of the UK and French reservations, which may be said to be tacitly approved, are to modify the obligations of those States under the Covenant in relation to other States parties. They do not imply, however, that the provisions of the Covenant in general allow for such an interpretation": Craven, *ICESCR Commentary*, at 213–214.

[58] There is agreed to be a special obligation to facilitate access to the core content of rights by the members of vulnerable groups, which may include refugees: see chapter 4.4.2 above, at pp. 497–499. Craven also suggests that reliance might be placed upon Art. 4 of the Economic Covenant, which requires that any restriction on rights be "solely for the purpose of promoting the general welfare in a democratic society": Craven, *ICESCR Commentary*, at 213–214.

[59] See chapter 1.2.3 above, at p. 44.

[60] This is because there is a binding duty under international law to provide particularly vulnerable populations with at least the most basic necessities of life: see chapter 4.4.1 above, at pp. 497–499.

non-citizens are not allowed to work,[61] the application of such policies to refugees will likely be in breach of the Refugee Convention. Only six countries of the less developed world – Botswana, Burundi, Ethiopia, Iran, Papua New Guinea, and Sierra Leone – maintain reservations to Art. 17 of the Refugee Convention which are broad enough to allow them to enforce a general policy of excluding refugees from wage-earning employment altogether.[62] For the overwhelming majority of less developed state parties, including several known to exclude refugees from the legal right to work – for example, Cambodia, Côte d'Ivoire, Mauritania, and Senegal – the possible right to exclude refugees from work under Art. 2(3) of the Economic Covenant is effectively trumped by Art. 17 of the Refugee Convention.

This result is in keeping with the intentions of the drafters of the Refugee Convention, who were determined to provide refugees with better than the lowest common denominator of state practice, under which non-citizens are often excluded from the labor market.[63] The drafters clearly recognized, and intended, that Art. 17 would require states to grant refugees preferential access to work opportunities, even though this had not been the case under earlier refugee treaties. As the American delegate observed, "the mere fact that the provisions of a convention required a change in the existing laws of any country was not a valid argument against them. If all national laws were to remain unchanged, why should there be a convention?"[64]

This is not to say that Art. 17 was conceived in naïveté. Then as now, governments were keenly aware of the domestic political and other risks of allowing refugees to compete with their own citizens for employment opportunities. The Austrian representative, for example, insisted that "[e]very state had the duty of giving its own nationals priority consideration."[65] While it

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

[62] See reservations and declarations of state parties, available at www.unhcr.ch (accessed Nov. 20, 2004). Three other less developed countries – Malawi, Zambia, and Zimbabwe – have entered reservations requiring only treatment at the same level as is afforded aliens generally which, in the light of Art. 2(3) of the Economic Covenant, may be no access to work at all. In each of these countries, however, the more specific duties under Art. 17(2) still apply, subject to the reservation to that paragraph entered by all three countries requiring that refugees entitled to the benefit of Art. 17(2) secure a work permit. Austria and Latvia maintain a blanket reservation to Art. 17 of the Refugee Convention, but as developed countries are bound by the duty progressively to implement the right to work under Art. 6 of the Economic Covenant. The nature of that duty is described at chapter 2.5.4 above, at p. 123 and, in particular, chapter 4.4.2 above, at pp. 486–488.

[63] "[I]f the Committee merely granted to refugees the treatment granted to foreigners generally, it would actually bring about no improvement in their lot": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 3.

[64] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 15. See also Statement of Mr. Weis of the IRO, ibid. at 16.

[65] Statement of Mr. Fritzer of Austria, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 8.

might be reasonable to enfranchise refugees in the domestic labor market during times of economic expansion,[66] the same was not true when host countries were confronted with high domestic unemployment.[67] As the Italian government explained,

> A country such as Italy, which was over-populated and therefore had a great deal of unemployment, and whose frontiers and Adriatic coast lay adjacent to areas which formed an inexhaustible source of refugees, could definitely not consider assuming commitments regarding the employment . . . of foreign refugees, which could only add to the difficulties already confronting the Italian economy.[68]

The French and Belgian representatives worried that a generous approach to the right of refugees to work "would be unfavourably received by the trade unions concerned in the country of reception and that, in fact, might work against the refugees."[69] Indeed, the observer from the American Federation of Labor explicitly invoked the importance for workers of a "defence of their rights against foreign competition."[70] His organization therefore pressed for language that made refugee rights subject to "the laws and regulations for the protection of the national labour market."[71]

More generally, governments just recovering from the Second World War were anxious not to jeopardize their plans for economic recovery by allowing the free entry of refugees into the workforce. The situation of the United Kingdom was typical of that faced by many European countries. While

[66] "Refugees must be guaranteed normal living conditions, which implied freedom to engage in work. The existing state of the labour market allowed the country to observe that principle. Nevertheless his country could not undertake to apply the provisions [of Art. 17(2)] for an indefinite period": Statement of Mr. Schurch of Switzerland, ibid. at 6.

[67] "It should not be forgotten that a large number of Swiss nationals were obliged to leave their own country to find work": Statement of Mr. Schurch of Switzerland, ibid. at 6. See also Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.37, Aug, 16, 1950, at 14: "France . . . desired to be able to control the movement of labour, and the refusal to permit a refugee to take employment in an overcrowded branch of activity in which there were already thousands of French subjects unemployed did not amount to a denial of the right to work."

[68] Statement of Mr. Del Drago of Italy, UN Doc. A/CONF.2/SR.9, July 6, 1961, at 9. Earlier in the drafting process, Italy had expressed its willingness to allow refugees to work "as soon as unemployment has fallen back to the average figure recorded for a certain number of pre-war years to be determined": United Nations, "Compilation of the Comments of Governments and Specialized Agencies on the Report of the Ad Hoc Committee on Statelessness and Related Problems," UN Doc. E/AC.32/L.40, Aug. 10, 1950 (United Nations, "Compilation of Comments"), at 14.

[69] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 4. Mr. Cuvelier of Belgium "shared the view of the representative of France": ibid.

[70] Statement of Mr. Stolz of the American Federation of Labor, ibid. at 12.

[71] Ibid.

emphasizing that Britain had previously authorized refugees to work and "that the favourable treatment provided for them had caused no serious hardship for British workers,"[72] Sir Leslie Brass nonetheless explained the salience of changed circumstances:

> [T]he war had altered the economic situation of the United Kingdom which was currently facing serious difficulties resulting both from the material damages it had sustained and from the fact that its economy had been geared to war production over a period of several years. To remedy the situation, the United Kingdom, in agreement with the employers and trade union representatives concerned, and for the common good of the people, had had to adopt a system of planned economy. The United Kingdom had had, for example, to subject wage-earners who were its own nationals to certain restrictions.[73]

In other countries, recovery efforts had been pursued by strategies more directly targeted at the regulation of non-citizen labor. French law, for example, "authorized the fixing of a maximum percentage of aliens employable in each branch of activity,"[74] while Sweden "had been obliged for domestic reasons to introduce a system of labour permits for all aliens which, at the present juncture, it was unable to abandon."[75]

Concerns such as these could very easily have resulted in either the failure to guarantee refugees the right to work, or no more than a minimalist commitment at the lowest common denominator. But the opposite occurred. To begin, the drafters decided not to work from the draft article proposed by the Secretary-General, under which a full right to work would ordinarily be denied during the refugee's first three years in the host state, and even then would be only a right to claim exemption from the full "severity" of general limits on the employment of non-citizens.[76] Instead, they selected as their model the competing French proposal,[77] which began with a much stronger, affirmative statement of entitlement. Once a refugee was "regularly resident" in a state party, he or she would be entitled to benefit from "the most favourable treatment given in the country in question to nationals of a foreign country as regards the right to engage in wage-earning

[72] Statement of Sir Leslie Brass of the United Kingdom, ibid. at 5.

[73] Ibid. See also Statement of Mr. Larsen of Denmark, ibid. at 6–7.

[74] Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 13.

[75] Statement of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 6.

[76] United Nations, "Memorandum by the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems," UN Doc. E/AC.32/2, Jan. 3, 1950 (Secretary-General, "Memorandum"), at 34. This approach was based on that previously adopted in earlier refugee conventions.

[77] Reliance on the French draft was proposed by the Chairman of the Ad Hoc Committee, Mr. Chance of Canada, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 2.

employment."[78] The difference of approach is key: not only did the French model provide that the right to work would accrue on the basis of a more flexible (and usually earlier attained) level of attachment,[79] but the right was conceived as having affirmative content at a fairly high contingent level, namely the same right to work as enjoyed by "most-favored foreigners."[80] Despite all of their concerns about domestic unemployment and the requirements of their planned economies, the drafters did not depart from these two baseline principles in fleshing out the content of Art. 17.

What accounts for this apparently courageous stand? Fundamentally, there seems to have been a clear awareness among the drafters that there are few rights more central to refugee self-sufficiency than the right to work.[81] As the American representative observed, "without the right to work all other rights were meaningless. Without that right no refugee could ever become assimilated in his country of residence."[82] It was therefore decided that it made more sense to set the right to work at a meaningfully high level, recognizing that states not yet in a position to enfranchise refugees within their domestic labor market would feel compelled to enter a reservation to the treaty.[83] As the Chairman of the Ad Hoc Committee explained,

[78] France, "Proposal for a Draft Convention," UN Doc. E/AC.32/L.3, Jan. 17, 1950 (France, "Draft Convention"), at 6.

[79] Under neither proposal, however, was there a suggestion that most refugees should be allowed to work from the beginning of their time in a host country.

[80] Under the Secretary-General's standard, in contrast, refugees would only have been entitled to relief from restrictions on the employment of non-citizens. This would not have entitled them to the special privileges often enjoyed by the citizens of most-favored countries. The general meaning of this contingent standard is set out in detail at chapter 3.3.1 above, and analyzed in relation to the right to work below, at pp. 749–752.

[81] The South African Supreme Court of Appeal has recently determined that, as a matter of domestic constitutional law, even persons seeking recognition of refugee status may in some circumstances be entitled to undertake employment. In reaching this conclusion, the Court observed that "[t]he freedom to engage in productive work – even where that is not required in order to survive – is indeed an important part of human dignity . . . for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful": *Minister of Home Affairs v. Watchenuka*, (2004) 1 All SA 21 (SA SCA, Nov. 28, 2003), per Nugent JA at para. 27.

[82] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 12. This thinking is shared by Craven, who writes that "[n]ot only is [work] crucial to the enjoyment of 'survival rights' such as food, clothing, or housing, [but] it affects the level of satisfaction of many other human rights such as the rights to education, culture, and health . . . [W]ork is an element integral to the maintenance of the dignity and self-respect of the individual": Craven, *ICESCR Commentary*, at 194.

[83] In response to a suggestion by the Chairman of the Ad Hoc Committee that "the question was whether article [17] should remain unchanged, thereby risking numerous reservations, or, with a view to obviating reservations, . . . an attempt should be made to restrict

> It had, of course, been realised that the inclusion of provisions which, without representing ideals to strive for, were too generous for some Governments to accept, would lead to their making reservations, but it had been thought that such a course might in the long run have a good effect even on Governments which felt themselves unable to accord the treatment prescribed in the Convention upon signing it. Other such cases had arisen in the past where refugees and those who had the interests of refugees at heart had addressed appeals to Governments applying low standards, pointing to the higher standards applied by other Governments, and so had gradually produced an improvement in their policies.[84]

This strategy of setting a relatively high standard with awareness that some reservations would initially be likely, was affirmed by the President of the Conference of Plenipotentiaries:

> [T]he Conference ... could aim either at perfection or at reaching the lowest common denominator of agreement. If the latter course were adopted, the government which insisted on the most restrictive conditions would be in a position to dictate the final form that the provisions of the draft Convention should take. If, on the other hand, the former course was followed, many governments would probably be obliged to enter reservations ... Neither of these solutions seemed very desirable, and he therefore appealed to representatives to seek the golden mean, and, if possible, by precept and example, to encourage others to withdraw their reservations at a later stage. If the Conference worked along those lines, he believed it might be possible to arrive at a just and effective instrument.[85]

With the benefit of hindsight, this strategy was extraordinarily insightful.[86] While there is no doubt that Art. 17 has attracted many reservations, more

the provisions concerning wage-earning employment to a minimum," the Belgian representative answered that he "was in favour of the first alternative": Statements of the Chairman, Mr. Larsen of Denmark, and of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 17. See also Statement of Mr. Robinson of Israel, ibid. at 18.

[84] Statement of the Chairman, Mr. Larsen of Denmark, ibid. at 11–12.

[85] Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 14. In response, the British representative to the Conference of Plenipotentiaries withdrew an amendment that would have constrained the scope of Art. 17, noting that "the aim of the Conference should be to frame as liberal a text as could be achieved in the light of practical possibilities": Statement of Mr. Hoare of the United Kingdom, ibid. at 14–15.

[86] "[I]t would be better to incorporate in the convention a clause providing for a real improvement in refugees' situation ... even if that clause were to result in reservations, which, it might be hoped, would be neither very numerous or extensive": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 8. Weis has noted that "[a] number of States made reservations to Article 17. They either withdrew them later, however, or put its provisions into force in spite of the reservation. Thus, the provisions of Article 17 can today be regarded as the general standard as regards the