than 80 percent of state parties have accepted the provision without qualification of any kind.[87] Most reservations are moreover fairly tightly conceived:[88] only eight states (Austria, Botswana, Burundi, Ethiopia, Iran, Latvia, Papua New Guinea, and Sierra Leone) maintain what amounts to a blanket reservation denying the applicability of the article as a whole. Equally important, seven countries which originally constrained their acceptance of Art. 17 – Australia, Brazil, Denmark, Greece, Italy, Malta, and Switzerland – have either withdrawn or significantly narrowed the scope of their reservations,[89] just as the drafters hoped would occur. Because no new reservations can be made after a country has ratified the Convention,[90] the decision to adopt a realistically high standard has resulted in what amounts to the strongest guarantee at the universal level of the right of any group of non-citizens to undertake employment.

In substantive terms, the essence of the obligation to allow refugees to work, contained in the first paragraph of Art. 17, is "of a more categorical nature"[91] than that found in any of the predecessor refugee conventions. While the drafters did not elaborate the scope of "wage-earning employment," Grahl-Madsen concludes that taking account of both the plain meaning of the term and the fact that self-employment and professional practice are the only types of work addressed elsewhere in the Convention,[92]

right of refugees to engage in wage-earning employment": P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (posthumously pub'd., 1995) (Weis, *Travaux*), at 149.

87 Specifically, only 27 of the 145 state parties maintain any reservation or qualification with respect to Art. 17: see text of reservations and declarations of state parties available at www.unhcr.ch (accessed Nov. 20, 2004). This fact bears out the intuition of the drafters that a simple cost–benefit analysis would prove the value of setting a relatively high standard. As the French delegate to the Ad Hoc Committee put it, "[i]f it was thought that 'x' States would accede and that 'x-2' States would express reservations . . . it would be preferable to modify [the article]. If, on the other hand, the majority of states would accept article [17] . . . without any reservations, it would make sense to retain the article": Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 14.

88 This tendency to enter fairly specific reservations was predicted by the American representative to the Ad Hoc Committee, who observed that "an article to which all or most countries made reservations would be pointless. However, if only some countries, even four or five, made reservations, those reservations would not all be equal in their nature and scope": Statement of Mr. Henkin of the United States, ibid. at 15.

89 See reservations and declarations of state parties, available at www.unhcr.ch (accessed Nov. 20, 2004).

90 Refugee Convention, at Art. 42(1). This understanding was affirmed at the Conference of Plenipotentiaries: Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 13.

91 N. Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation* (1953) (Robinson, *History*), at 114.

92 See chapter 5.3 above regarding the right to engage in self-employment, and chapter 6.2 below regarding the right to engage in professional practice.

> there can be no doubt that [the term "wage-earning employment"] must be understood in its broadest sense, so as to include all kinds of employment which cannot properly be described as self-employment, or [professional practice] ... It ... comprises employment as factory workers, farmhands, office workers, salesmen, domestics and any other kind of work the remuneration for which is in the form of a salary as opposed to fees or profits. It seems reasonable to include waiters, salesmen and others who are remunerated to a greater or smaller extent in the form of tips, commissions or percentages; the crucial point is apparently whether they may be said to have an employer and are not free agents.[93]

In view of the breadth of this definition, the decision of some less developed countries to permit refugees to work only as wage laborers on agricultural plantations is clearly in breach of Art. 17. Nor may a country indirectly limit the right of refugees to look for work, as for example Zambia did to Angolan refugees when it set a prohibitive fee to secure the registration needed lawfully to approach employers.[94]

Refugees not only have the right to work, but also to look for and to accept any offer of "wage-earning employment" which is extended to them. This is not to say that refugees have the right to secure the form of employment which they prefer. As Craven explains in the context of Art. 6 of the Economic Covenant,

> In theory, the concept of freely chosen employment extends to ensuring the fullest opportunity for each worker to use his or her skills in a suitable job. There is a possible tension here between absolute individual choice and the limited options that might be open to him or her in the employment market. It is not realistic to suggest, for example, that the State has to create work opportunities that correspond entirely to the wishes of individuals seeking work.[95]

Thus, the mere fact that refugees face linguistic, cultural, or other barriers to effective competition in the domestic labor market does not bespeak a violation of the Refugee Convention.[96] It remains, however, that refugees may in

[93] A. Grahl-Madsen, *Commentary on the Refugee Convention 1951* (1963, pub'd. 1997) (Grahl-Madsen, *Commentary*), at 70. See also Robinson, *History*, at 114; and Weis, *Travaux*, at 147.

[94] With regard to the duty of states to provide refugees with documentation of their identity and status, see chapter 4.9 above. Nor may the failure to provide refugees with documentation be based on the refusal of refugees to comply with restrictions on internal freedom of movement, since the latter are presumptively invalid. See chapter 5.2 above.

[95] Craven, *ICESCR Commentary*, at 217–218.

[96] At best, it might be argued that developed countries have a duty under the 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(2), progressively to take affirmative steps within the bounds of their available resources to promote "full and productive employment" of all persons under their jurisdiction.

some cases be entitled to invoke the duty of non-discrimination, including in particular the responsibility of states to "guarantee to all persons equal and effective protection against discrimination on any ground," in order to contest such exclusions.[97]

The contingent standard by which enjoyment of the right to work is to be measured – namely "the most favourable treatment accorded to nationals of a foreign country in the same circumstances" – amounts to a particularly important advance over earlier treaties. To be sure, not all states felt it was appropriate to enfranchise refugees in the ranks of most-favored foreigners. Austria argued that "[t]he number of persons to whom the most favoured nation clause applies is as a rule relatively small. Since Austria has hundreds of thousands of refugees, their automatic inclusion in a most favoured nation clause ... would make it impossible for Austria to conclude such agreements in the future."[98] On the other hand, Yugoslavia would have gone much farther in the opposite direction, advocating a national treatment standard because "in most countries the number of refugees was smaller than the number of unemployed ... [U]nless the former were accorded the freedom to seek employment on equal terms with the nationals of the country concerned, they would be unable to find work."[99]

Each of these extreme positions was rejected. While France congratulated the Yugoslav delegation for its "generous display of liberalism,"[100] there was nearly universal consensus that it would be unrealistic to ask reception states to assimilate refugees to their own citizens for purposes of access to employment opportunities.[101] Canada therefore "urged the Yugoslav representative not to press his amendment; otherwise the Conference would probably find itself involved in an endless discussion."[102] Even UNHCR argued against the more generous Yugoslav approach, insisting that "certain delegations would then be obliged to enter reservations to the entire article."[103]

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

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

[99] Statement of Mr. Makiedo of Yugoslavia, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 15.

[100] Statement of Mr. Rochefort of France, ibid. at 10.

[101] For example, Norway "could not agree to put refugees on the same footing as its own nationals in respect of wage-earning employment": Statement of Mr. Anker of Norway, ibid. at 13. The French reaction was more blunt, asserting that "[t]he Yugoslav amendment jeopardized the very existence of [the right to asylum], and did not therefore reflect a very realistic attitude": Statement of Mr. Rochefort of France, ibid. at 10. Interestingly, Germany – which today maintains perhaps the least generous policy in Europe on the right of refugees to work – voiced the strongest support for the Yugoslav initiative, noting that a clause "similar in purport to the Yugoslav amendment had been incorporated in the legislation of the Federal Republic of Germany": Statement of Mr. von Trutzschler of the Federal Republic of Germany, ibid. at 4.

[102] Statement of Mr. Chance of Canada, ibid. at 8.

[103] Statement of Mr. van Heuven Goedhart of UNHCR, ibid. at 12. The Yugoslav amendment was soundly defeated on a 16–1 (4 abstentions) vote: ibid. at 16.

At the same time, however, there was surprisingly strong support for the view that unless refugees benefited from at least most-favored-national treatment, Art. 17 would be of little practical value.[104] In responding to a Belgian query whether the most-favored-national standard might not be too generous, the French representative was emphatic that no less could be granted to refugees:

> [I]t was legitimate and desirable to accord the most favourable treatment to refugees as regards the right to engage in wage-earning employment, and not only the treatment accorded to foreigners generally because refugees by their very nature were denied the support of their Governments and could not hope for governmental intervention in their favour in obtaining exceptions to the general rule by means of conventions. France was therefore merely being faithful to the spirit which had heretofore guided United Nations action in favour of refugees: the purpose of that action was to obtain for refugees the advantages which Governments sought to have granted to their own subjects.[105]

In the end, even those countries which were uncomfortable with the higher contingent standard were persuaded to accept it, and to make whatever reservation was deemed necessary to accommodate their particular national circumstances. Belgium, for example, "considered the right to work as one of the fundamental rights to be accorded to refugees and, despite the amount of unemployment in Belgium, it accepted article [17]."[106]

The drafting history therefore leaves no room for doubt that the most-favored-national standard is intended to secure for refugees the same right to seek employment as is enjoyed by the nationals of states with which the host country has a regional economic or customs union, or other special form of association. As Grahl-Madsen concluded,

> If a country concludes an international agreement, passes a law or institutes a practice, whereby nationals of a certain foreign State are entitled to an especially favourable treatment with regard to wage-earning employment, refugees shall be entitled to the same treatment. It does not matter if there

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

[105] Statement of Mr. Rain of France, ibid. at 2–3.

[106] Statement of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 16. See also Statement of Mr. Anker of Norway, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 13, in which he indicated "that Norway accepted the principle [of most-favored-national treatment] laid down in article [17] of the draft Convention. It could do so all the more readily in that its labour legislation granted refugees more favourable treatment than aliens in general."

> are special ties between the two States, as long as they both are States in the eyes of international law.[107]

Consensus on this point is particularly clear from the fact that during the drafting process, Belgium, Norway, and Sweden all expressed their intention to enter reservations to protect their special regional arrangements from the language of Art. 17.[108] And indeed, a significant number of countries have entered reservations intended to avoid the duty to grant refugees the same right to work as the citizens of partner states: in addition to the six countries which grant refugees only the same employment rights as aliens generally,[109] a further eighteen have accepted the general standard but denied refugees work benefits associated with particular customs, economic, or political unions.[110]

It follows, therefore, that the decisions of Denmark and Germany to grant work rights to Bosnian and other refugees in receipt of so-called "temporary protection" only when nationals or other EU citizens were not available to

[107] Grahl-Madsen, *Commentary*, at 70. See also Robinson, *History*, at 109–110: "Most favorable treatment includes also rights granted under bilateral or multilateral conventions whether on the basis of specific conventional provisions or on that of the 'most favored nation' clause. This was made clear by the Belgian representative, who proclaimed that his country would have to enter a reservation to [Art. 17] in view of the economic and customs agreements existing between Belgium and certain neighboring countries"; and Weis, *Travaux*, at 129–130: "Most favourable treatment means the best treatment which is accorded to nationals of another country by treaty or usage. It also includes rights granted under bilateral or multilateral treaties on the basis of special provisions or the 'most favoured nation' clause."

[108] Statements of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 16 ("[H]e would, however, like to express a reservation relating to countries members of a regional union"), and UN Doc. A/CONF.2/SR.9, July 6, 1951, at 8 ("However, the Belgian delegation would have to enter reservations in respect of paragraph 1 of that article in view of the economic and customs agreements between Belgium and certain neighbouring countries"); Statement of Mr. Petren of Sweden, ibid. at 6 (Sweden "could not undertake to extend to refugees the preferential treatment granted to nationals of other Scandinavian countries under existing special treaties"); and Statement of Mr. Anker of Norway, ibid. at 14 ("He desired to associate himself with the statements made by the Swedish and Danish representatives on the regional policy of the Scandinavian countries in respect of the labour market. Accordingly, he would be compelled to enter reservations on article [17] when the Convention was signed").

[109] The six countries are Ireland, Liechtenstein, Malawi, Mexico, Zambia, and Zimbabwe: see reservations and declarations of state parties, available at www.unhcr.ch (accessed Nov. 20, 2004). Because of this reservation, the legislation of Zimbabwe described earlier, which grants refugees only the same right to work as enjoyed by aliens generally, is not in violation of the Convention.

[110] These countries are Angola, Belgium, Brazil, Burundi, Cape Verde, Denmark, Finland, Iran, Latvia, Luxembourg, Moldova, Netherlands, Norway, Portugal, Spain, Sweden, Uganda, and Venezuela: see reservations and declarations of state parties, available at www.unhcr.ch (accessed Nov. 20, 2004).

take relevant jobs did not comply with the requirements of Art. 17(1). More generally, all state parties which are members of the European Union – excepting only Austria and Latvia (which have entered a blanket reservation to Art. 17), and Belgium, Luxembourg, and the Netherlands (which have entered a relevant reservation[111]) – must grant refugees lawfully staying in their territory the same access to employment as is provided to citizens of other European Union countries. While this requirement does not impact the position of refugees awaiting status verification (who are in most cases merely lawfully present, not yet lawfully staying), it does govern the entitlement of refugees present on an ongoing basis, including both those recognized as refugees and those admitted to a temporary protection regime. While this is the approach now taken under the European Union's Qualification Directive with respect to recognized refugees,[112] the provision allowing the right to work of refugees admitted to a temporary protection regime to be subordinated to the claims of European Union and European Economic Area citizens, as well as to those of legally resident third-country nationals, is in breach of the Refugee Convention. Once a refugee is lawfully staying, he or she must be treated on par with the citizens of most-favored states, not ranked hierarchically after them.

Importantly, though, because the contingent standard for the right to work is framed not simply as most-favored-national treatment, but rather as "the most favourable treatment accorded to nationals of a foreign country *in the same circumstances* [emphasis added]," refugees must generally qualify for the right to work in the same way as do most-favored non-citizens, unless the general requirements are effectively insurmountable for refugees because of the uniqueness of their circumstances.[113] It was logically suggested, for example, that this language means that a refugee may not legitimately refuse to comply with the terms of a resettlement program[114] under which the beneficiary (whether a refugee, or simply an immigrant) agrees to undertake particular employment for a period of years in the host country in return for preferential admission, transportation assistance, or comparable

[111] None of the reservations entered by other EU states to preserve privileges granted to citizens of special partner states (Denmark, Finland, Portugal, Spain, and Sweden) purports to deny to refugees the special privileges afforded the citizens of EU states; all are rather of a more limited character: see reservations and declarations of state parties available at www.unhcr.ch (accessed Nov. 20, 2004).

[112] EU Qualification Directive, at Art. 26(1). [113] See generally chapter 3.2.3 above.

[114] "IRO had concluded agreements with certain countries of reception providing for a mass influx of refugees into those countries under a special scheme for manpower recruitment. Those agreements stipulated that after completion of their original contracts, refugees would be entitled to the same conditions as nationals as regards the right to engage in wage-earning employment": Statement of Mr. Weis of the IRO, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 3–4.

immigration benefits.[115] (The drafters did, however, incorporate language in Art. 17(3) which affirms their hope that at least upon conclusion of the period of assigned work, refugees admitted under immigration-based schemes would be assimilated to citizens for purposes of access to the full range of employment opportunities.[116]) More generally, the "in the same circumstances" language of Art. 17(1) easily accommodates the concerns of some states that refugees should obtain work permits, or otherwise satisfy routine administrative requirements for the employment of non-citizens.[117] But it is otherwise where, as in the case of Zambia, the exorbitant fee imposed to

[115] At the Conference of Plenipotentiaries, the Australian representative expressed grave concerns regarding his country's ability to enforce the terms of labor restrictions under resettlement agreements if Art. 17 were adopted. "He also had his doubts about the words 'in the same circumstances' in the third line of paragraph 1, and in that connexion, recalled his earlier statement regarding Australia's position as a country of immigration ... Australia's aim was to assimilate the refugees within its territory, but its immigration scheme provided for labour contracts for certain types of migrants ... It had been asserted by some representatives that the Australian delegation's reservations would be covered by the words 'in the same circumstances,' those words being taken to mean that refugees should have the same treatment as other aliens in the same circumstances, in the sense that the refugees would have to satisfy the requirements prescribed for nationals of foreign States resident in Australia": Statement of Mr. Shaw of Australia, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 11. Indeed, because a refugee who is admitted under an immigration-style relocation scheme (often providing affirmative assistance to travel and becoming reestablished) is in essentially the same position as an immigrant in receipt of the same benefits, it is not unreasonable to treat the immigrant and the refugee comparably.

[116] The representative of the International Refugee Organization expressed his desire to see "a clause in the convention safeguarding [the] position in the future" of "refugees in special categories which fell within the framework of plans for the recruiting of foreign manpower and of immigration plans": Statement of Mr. Weis of the IRO, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 9–10. Specifically, he had sought to ensure that once the terms of the labor contract were completed, refugees would automatically receive the same right to compete for jobs as citizens: ibid. at 4. The French representative was among those who felt such a rigid prescription "would go beyond the intentions of his Government": Statement of Mr. Rain of France, ibid. at 4. Thus, the American delegate proposed a middle ground position under which states would agree simply to give "favourable consideration" to the assimilation of refugees who had honored the terms of their immigration contracts to nationals for purposes of work: Statement of Mr. Henkin of the United States, ibid. at 5. Paragraph 3 of Art. 17 was drafted by the US representative, and requires that "sympathetic consideration" be given to granting national treatment to refugees, "in particular ... those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes."

[117] In general international human rights law as well, "[i]t is readily accepted that foreign workers may be required to obtain special authorizations (or permits) in order to be able to work": Craven, *ICESCR Commentary*, at 213. Interestingly, several states – Malawi, Mexico, Mozambique, Sweden, Zambia, and Zimbabwe – nonetheless felt it necessary to enter a reservation to Art. 17 of the Refugee Convention to safeguard their right to require refugees to secure a work permit: see reservations and declarations of state parties, available at www.unhcr.ch (accessed Nov. 20, 2004). Because these reservations do not

secure a work permit amounts to a de facto bar on access to work by virtually all refugees. The duty under Art. 6 to exempt refugees from insurmountable requirements applies in such a case,[118] meaning that refugees must receive administrative dispensation sufficient to offset the disadvantages they face in meeting the requirement to secure a work permit.[119]

The right to be assimilated to most-favored non-citizens as regards a broad-ranging right to seek wage-earning employment is, of course, reserved for refugees who are "lawfully staying" in the host country. At one point, it had been agreed that a lower level of attachment – simply being "lawfully in" a state party – would suffice to have access to employment.[120] But in keeping with the general decision to translate rights defined in the French text to inhere in refugees "résidant régulièrement"[121] as requiring "lawful stay,"[122] the text as finally adopted requires a refugee to show de facto ongoing residence in a state (whether or not domicile or a right of permanent residence has been acquired) before claiming Art. 17(1) rights. Thus, the President of the Conference of Plenipotentiaries accurately concluded that a refugee temporarily visiting a country "should not be accorded the right to engage in wage-earning employment to any greater extent than other aliens."[123]

The more important contemporary concern addressed by this level of attachment is the perceived need to deter the filing of unfounded refugee claims in order simply to gain access, albeit only provisionally, to employment opportunities in the host country. As the English Court of Appeal has noted,

> Part of the purpose of immigration policy is to exclude economic migrants: the removal of the restriction upon the right to work merely because someone has claimed asylum would jeopardize that policy.[124]

indicate an intention to deviate from the substantive requirements of Art. 17, they should be interpreted simply to require refugees to comply with the state's administrative requirements. That is, the reservations cannot be relied upon as a means of indirectly avoiding the substantive obligations set by Art. 17, absent specific words to that effect.

[118] See generally chapter 3.2.3 above.

[119] Zambia's justification for its policy – namely, as a means of "pushing back" refugees – may also be a basis for challenging the policy as an indirect tool of *refoulement*. See chapter 4.1.2 above, at p. 318.

[120] "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 I.

[121] "[I]n the first paragraph of the French text, the expression 'refugiés résidant habituellement' should be replaced by the phrase already accepted: 'refugiés résidant régulièrement'": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 10.

[122] See chapter 3.1.4 above, at p. 189.

[123] Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 14.

[124] *Secretary of State for the Home Department v. Jammeh*, [1999] Imm AR 1 (Eng. CA, July 30, 1998). The same decision less accurately suggests the lawfulness of withholding the right to work until "status has been established." Art. 17 of the Refugee Convention requires simply that a refugee be "lawfully staying" in the state party in order to acquire

Because the right to undertake wage-earning employment does not ordinarily inhere in persons who have simply claimed refugee status, the failure by such states as France, Germany, Ireland, Italy, and the United Kingdom to authorize refugees to work while undergoing refugee status verification (assuming those procedures are not unduly prolonged[125]) is not in breach of the Convention.[126] Nor can objection be taken on the basis of Art. 17 to the traditional practice of some European countries, including France, the Netherlands, and Switzerland, of delaying the right to work of refugees in receipt of temporary protection for a period of several months (now superseded in EU states by a duty of immediate access to the labor market[127]). While persons admitted to so-called temporary protection systems are appropriately treated as "lawfully staying" in the host country,[128] it has always been understood that the notion of lawful "stay" (as opposed to mere lawful presence) can be said to begin on the last date that an individual is allowed to remain in a country without securing a residence permit (usually three to six months).[129] So long as the right to work is granted once the refugee's presence becomes ongoing in practical terms (whatever the label assigned by the host country), the requirements of Art. 17 are met.[130]

There are, however, some circumstances in which even refugees not yet lawfully staying in a state party may claim a right of exemption from a critical subset of the limits imposed by many states on the employment of noncitizens. Indeed, these specific exemptions may be of value to refugees lawfully staying in a country where even most-favored nationals face real constraints on access to wage-earning employment.[131] Under Art. 17(2),

the right to work. While a person recognized as a refugee clearly meets this standard, a refugee may also be lawfully staying in some circumstances prior to formal recognition of refugee status. See chapter 3.1.4, at pp. 186–188.

[125] But where, as is reported to be the case in Senegal, the formal status recognition procedure cannot be relied upon to function in a reasonably timely way, a state may not rely upon the absence of formal status to contradict the de facto reality of ongoing presence in the state party. See chapter 3.1.4 above, at pp. 189–190.

[126] If, however, these procedures do not result in a decision within three years, there is nonetheless a duty under Art. 17(2)(a) to provide at least exemption from labor-market-based restrictions on access to employment. See text below, at pp. 756–757.

[127] EU Temporary Protection Directive, at Art. 12. This new European Union policy complies with the Refugee Convention's duty to grant the right to work once a refugee is lawfully staying in the host country, but breaches the duty to assimilate refugees to the citizens of most-favored states (in that it grants EU and EEA citizens priority in employment over refugees).

[128] See chapter 3.1.4 above, at p. 188. [129] Ibid. at pp. 186–187. [130] Ibid. at pp. 189–190.

[131] Arts. 17(1) and 17(2) are not, in other words, alternative provisions. A refugee who is lawfully staying in a state party and therefore entitled to the benefit of Art. 17(1) may also claim rights under Art. 17(2). Conversely, a refugee who has met one of the conditions for relief from labor-market-based employment restrictions under Art. 17(2) also acquires rights under Art. 17(1) at such time as he or she is lawfully staying in the country.

refugees in any of four situations described below – whether or not they are also "lawfully staying" in the host state – must not be subjected to "restrictive measures ... for the protection of the national labour market."

In general terms, the grounds for entitlement to invoke Art. 17(2) identify "refugees who ha[ve] already established some ties with a country."[132] First and most straightforward, the opening clause of Art. 17(2) makes clear that refugees who already enjoyed exemption from labor restrictions in the host state before the Convention entered into force continued to benefit from such exemption.[133] Second and of greater contemporary relevance, any refugee who has been "resident" in a host state for three years,[134] even if it cannot yet be said that he or she is lawfully staying there, is entitled to exemption from labor-market-based restrictions. Because the term "residence" is used in the Convention to refer to de facto ongoing presence rather than to legal notions such as the establishment of domicile,[135] time spent in the reception state since the lodging of an application for refugee status verification should be understood to count toward satisfaction of the three-year threshold. So conceived, Art. 17(2) provides an important safeguard for refugees: while it may offer less protection than the most-favored-national treatment which refugees lawfully staying receive under Art. 17(1), Art. 17(2) rights at least accrue both automatically and at an earlier stage (even if provisionally),[136] thereby mitigating to some extent the hardship which can follow when status assessment procedures are prolonged. The recent European Union directive allowing persons awaiting the results of a refugee status determination

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

[133] As Robinson explains, "the purpose of this provision is to bind the Contracting States to continue applying ... favourable treatment": Robinson, *History*, at 115.

[134] As originally framed, Art. 17(2)(a) required "at least" three years' residence: France, "Draft Convention," at 6. The text was amended by France at the suggestion of the representative of the IRO, who feared that "the expression 'at least' might lead to misunderstanding. It might be understood to mean that what was involved was a period of undetermined duration that was, however, in excess of three years": Statement of Mr. Weis of the IRO, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 3. The French representative "saw no objection to the deletion of the expression 'at least,' if its retention might lead to debate": Statement of Mr. Rain of France, ibid. On the basis of this exchange, it is clear that states have no discretion to prolong the three-year delay set by Art. 17(2)(a).

[135] "It seems that the term 'residence' must be interpreted as liberally as possible, so as to include anyone who has been physically present in the country for a period of three years, irrespective of whether his presence has been lawful or not. The period of residence will not be interrupted by short periods spent in travelling or visiting other countries": Grahl-Madsen, *Commentary*, at 72. Weis takes a similarly broad approach, arguing that "[t]he term 'residence' ... is not qualified and might, therefore, include residence which may have been illegal for a certain time but which was subsequently legalized; short absences should not be taken into account": Weis, *Travaux*, at 148. See generally chapter 3.1.3 above, at pp. 182–183.

[136] See chapter 3.1 above, at pp. 158–160.

procedure the right to work after one year reflects a commitment to the purpose advanced by Art. 17(2)(a), and implements it at an earlier time than the Refugee Convention requires.[137]

Significantly greater debate was elicited in regard to paragraphs (b) and (c) of Art. 17(2). Under the first of these provisions, a refugee who is married to a citizen of the host country is immediately entitled to relief from employment restrictions based on labor market considerations. There was little support for the view that an immediate exemption should be withheld unless the refugee automatically acquires the host state's nationality by marriage.[138] To the contrary, the dominant view was that the fact of marriage was itself a sufficient pragmatic basis for exemption, since it clearly showed that the refugee had "some roots in the country, whatever might be the basis of these roots under the nationality laws of that country."[139] The only limitation, reflected in the explicit caveat to Art. 17(2)(b), is that abandonment of the citizen spouse deprives a refugee of the benefit of this provision. An effort was made to authorize the withdrawal of Art. 17(2)(b) benefits also for violation of family obligations falling short of abandonment,[140] but the complexity of defining the relevant circumstances with precision appears to have led the drafters to forsake that effort.[141] Thus, the best view is that a

[137] EU Reception Directive, at Art. 11. There are, however, two concerns with the approach adopted by the European Union. First, as described below, no provision is made for earlier access to the right to work required by paras. (b) and (c) of Art. 17(2): see text below, at pp. 757–760. Second, to the extent that a given refugee is entitled to the benefit of any part of Art. 17(2), the European Union standard unlawfully makes access by refugees subordinate to that afforded European citizens and long-term residents. The freedom from "restrictive measures imposed on aliens" set by Art. 17(2) is framed in general terms, not simply as freedom from restrictive measures imposed on "all but most favored" non-citizens. See text below, at p. 761.

[138] This concern was raised by the Chinese representative, who objected to Art. 17(2)(b) on the grounds that "China applied the *jus sanguinis* [principle] ... under which the nationality of the spouse was not changed by marriage. There was, therefore, no reason in law to favour a refugee who married a person of Chinese nationality": Statement of Mr. Cha of China, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 8.

[139] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 13.

[140] The Belgian representative to the Conference of Plenipotentiaries "said that it was known that marriages were at times contracted solely with a view to securing certain advantages. It would be paradoxical if a refugee was able to benefit from his marital status without observing his marital obligations": Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 17–18. The precise form of the Belgian amendment was rephrased by the French representative to focus on either abandonment or failure "to honour their family obligations": Statement of Mr. Rochefort of France, ibid. at 18, and adopted by the Conference on a 6–5 (9 abstentions) vote "subject to appropriate drafting changes by the Style Committee": ibid. As finally presented and adopted, however, the text of Art. 17(2)(b) refers only to abandonment.

[141] The remarks of the British representative make clear the difficulty of a complete definition of the circumstances in which Art. 17(2)(b) benefits should be withdrawn. "The French

refugee may rely on Art. 17(2)(b) even if he or she does not in fact cohabit with his or her spouse.[142] Indeed, taking account of the recognition that the clause should not be interpreted so as to deprive the citizen spouse of practical access to support payments ordered by a court upon marital breakdown,[143] it makes sense to embrace Grahl-Madsen's view that a refugee who is separated (but not yet divorced) may also rely upon Art. 17(2)(b).[144] As he suggests, a purposive understanding of the notion of abandonment should focus on "whether there is still a community of interests between [the refugee and his or her spouse] e.g. that the refugee supports the spouse."[145] If not, and only then, should Art. 17(2)(b) exemption be denied.

Finally, Art. 17(2)(c) allows the parent of a child who is a citizen of the host country also to claim exemption from labor-market-based employment restrictions. Opposition to this clause came primarily[146] from the United

representative's attempt to improve on the Belgian amendment raised difficulties of its own. For example, a refugee might not abandon his wife, but he might treat her with such cruelty that she was forced to leave him ... It would be extremely difficult to allow for all possible contingencies": Statement of Mr. Hoare of the United Kingdom, ibid. at 17.

142 Belgium took the view that "a stipulation obviously had to be made that, in order to be exempt from the application of the restrictions imposed on aliens, the refugee must reside with the spouse ... on whose account he or she enjoyed that exemption": Statement of Mr. Herment of Belgium, ibid. at 8. But he later withdrew this suggestion on the basis of the French delegate's comment that "[i]t might be physically impossible for the refugee to reside with his wife, in which case the wording of the Belgian amendment, if adopted, would be unfair to him": Statement of Mr. Rochefort of France, ibid. at 16. Most obviously, for example, the refugee might be able to secure employment only by living apart from his or her spouse for some or much of the time; it would defeat the purpose of Art. 17(2)(b) were the refugee to be prevented from supporting his or her family in such circumstances.

143 "Moreover, if the wife were able to obtain from the courts a maintenance order against her husband, it would clearly be desirable that the husband should continue to enjoy rights in relation to employment so as to be able to support her": Statement of Mr. Hoare of the United Kingdom, ibid. at 17.

144 "[A] refugee may invoke Article 17(2)(b) if he is married to a national of the country concerned, also if they live apart, and even if they are factually or legally separated; but not after a divorce, for in that case he (she) has no spouse any longer": Grahl-Madsen, *Commentary*, at 73.

145 Ibid.

146 China also opposed the clause, though probably not for sound reasons. "With regard to children, only those who were born of a Chinese mother or father became Chinese. It was therefore unlikely that sub-paragraph (c) would be applied frequently in [China] and the Chinese Government could not be expected to alter its legislation on nationality merely to improve the situation of refugees. The Chinese delegation would therefore find it hard to accept [clause (c)]": Statement of Mr. Cha of China, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 8. This intervention suggests that the Chinese representative really did not understand the purport of Art. 17(2)(c) since, if the children of a refugee did not in fact acquire Chinese citizenship under its laws, the refugee parent would receive no exemption from employment restrictions.

Kingdom, which initially opposed the rule on the grounds that it would result in "capricious discrimination"[147] in countries where nationality is acquired in accordance with the principle of *jus soli*. Because a refugee's child born on the territory of such a state would automatically be a citizen, whereas a child born to the same parents before arrival in the host state would not, clause (c) would "favour[ ] those who had children born after their arrival."[148] Yet as the delegate from the United States (also a *jus soli* state) countered, the preferred treatment was logical because the bond of citizenship gave rise to a greater attachment between at least part of the refugee family and the host country.[149] This led the British representative to adopt a somewhat different (and arguably more candid) tack. He expressed his worry that refugees might exploit Art. 17(2)(c) by timing their arrival in the United Kingdom to coincide with the birth of a child, thereby indirectly securing immediate access to the labor market.[150] The Danish chairman provocatively "wondered whether that was the fault of the draft Convention or of *jus soli*,"[151] and suggested that such concerns should logically be addressed by reservation[152] (a position ultimately accepted by the United Kingdom). But the American representative was adamant in defense of the principled logic of allowing the refugee parent of a child citizen to avoid labor market restrictions: "The capriciousness of the provision in question ... was not as real as it might appear ... [I]t was clearly in the national interest that the mother of a citizen of the country should have some means of sustenance."[153] The British effort to delete clause (c) was thereupon defeated in the Ad Hoc Committee.[154]

[147] Statement of Sir Leslie Brass of the United Kingdom, ibid. at 6. [148] Ibid.

[149] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 13.

[150] "A case which had arisen recently would answer the question of the United States representative. A woman who had come to the United Kingdom with a permit to engage in one particular sort of employment had given birth to a child two days after arrival. If the United Kingdom accepted article [17] with no reservations, such a woman would be free of all the restrictions imposed by her work permit since her child would be a citizen of the United Kingdom. That was why it was fair to say that in countries whose nationality laws were based on *jus soli* the principle in paragraph 2(c) would operate very oddly": Statement of Sir Leslie Brass of the United Kingdom, ibid. at 15. He later continued that "[i]t was hardly necessary to point out that to relieve a woman, who entered the country and later gave birth to a child, of all restrictions with regard to employment might be an inducement to such conduct": ibid. at 17. Yet as the Belgian representative immediately noted, it was doubtful that "the example quoted by the United Kingdom was well chosen. The lady in question had a labour contract and, after the birth of her child, the authorities might have insisted on the contract being respected": Statement of Mr. Herment of Belgium, ibid. at 16. This is clearly right: see text above, at pp. 752–753.

[151] Statement of the Chairman, Mr. Larsen of Denmark, ibid. at 15. [152] Ibid. at 16.

[153] Statement of Mr. Henkin of the United States, ibid. at 17. [154] Ibid. at 19.

Despite efforts by the United Kingdom again to press its concerns at the Conference of Plenipotentiaries,[155] clause (c) was maintained. The scope of the provision was moreover clarified in response to a suggestion from the President of the Conference that he assumed that Art. 17(2)(c) "covered illegitimate as well as legitimate children, in view of the provisions contained in Article 25(2) of the Universal Declaration of Human Rights."[156] While the Israeli representative believed that absent an amendment only the parents of children born in wedlock would be covered by Art. 17(2)(c),[157] the majority of representatives appear to have been persuaded by the French delegate's assurance "that the existing text of the sub-paragraph was satisfactory. It would be difficult to make it clearer."[158] This seems clearly to be correct, since the ordinary meaning of "children" is not limited to the offspring of a married couple.

Where a refugee falls into one of these categories – he or she has been present in the asylum state for at least three years, or has a spouse or children with the host state's nationality – "restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market" are prohibited, whether or not the refugee in question is also lawfully staying in the state party.[159] This duty to exempt refugees applies whether the restriction is formally directed at non-citizens themselves, or at

[155] "Although he recognized that the purpose of sub-paragraph 2(c) was to ensure that a refugee with a family, who was firmly established in his country of refuge, should be accorded his due rights, he could not accept the arbitrary conditions stipulated in that sub-paragraph": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 5. The United Kingdom has, however, entered and maintained a reservation to Art. 17(2)(c): see reservations and declarations of state parties, available at www.unhcr.ch (accessed Nov. 20, 2004).

[156] Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 15. The relevant part of the Universal Declaration provides that "[a]ll children, whether born in or out of wedlock, shall enjoy the same social protection": Universal Declaration of Human Rights, UNGA Res. 217A(III), Dec. 10, 1948 (Universal Declaration), at Art. 25(2).

[157] "[A]s sub-paragraph 2(c) opened with the word 'He' it could only apply to legitimate children. He would suggest that if the intention was that the provision should be applicable to illegitimate children as well, the words 'or she' should be inserted after the word 'He' in this particular case": Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 15. The implication seems to be that a man cannot have an "illegitimate" child. As a factual matter, this is clearly not true. If, on the other hand, this position is taken because the father of a child born out of wedlock has no parental rights, then the argument is anachronistic.

[158] Statement of Mr. Rochefort of France, ibid.

[159] Grahl-Madsen argues for an implied restriction on access to Art. 17(2)(c) exemption in the case of "a father, who has never made any attempt to support his illegitimate child, and [who may] never [have] shown any interest in it": Grahl-Madsen, *Commentary*, at 73. But Grahl-Madsen's conclusion fails to take account of the fact that para. (c), unlike para. (b), does not provide for the withdrawal of entitlement consequent to abandonment. While it would clearly be undesirable in policy terms for a father who provides no

employers.[160] By way of example, France noted that by virtue of Art. 17(2), it could not subject all refugees to its system of issuing restricted work authorizations based on labor market conditions in particular fields.[161] Perhaps most obviously, refugees entitled to the benefit of Art. 17(2) must not be subject to "provisions that aliens may only be employed if no nationals are available for the job in question."[162] The European Union's new Reception Directive, in contrast, fails both to take account of the duty to allow more immediate access to work by the spouses and parents of host country minor citizens, and specifically to ensure that such refugees are not subject to its usual policy of subordinating the right to work of refugee claimants to those of European citizens and resident third-country nationals.[163]

On the other hand, as was the case for Art. 17(1), Art. 17(2) provides no relief against the duty to respect the terms of resettlement agreements;[164] much less does it excuse refugees from compliance with restrictive measures

support to his citizen child to rely upon his status as father to secure exemption from employment restrictions, it is nonetheless difficult to find a textual basis for the approach suggested by Grahl-Madsen. Moreover, in view of the legal duty in most countries for the father of a child born out of wedlock to provide support for his child, application of Grahl-Madsen's interpretation might also defeat the ability of the child's mother to secure access to the funds she requires in order to support the child.

[160] "The first category may relate to measures taken by the authorities directly against the foreigner ... The second group apparently deals with restrictions imposed on the employer: he may be prohibited from hiring foreigners, who are generally permitted to do the work in question, unless he can prove that no national is available for the position or he may be permitted to accept only a certain number or percentage of alien employees or only such who are not engaged elsewhere. In order to cover all the possibilities, the authors of the Convention combined both cases of restrictions": Robinson, *History*, at 115.

[161] "If article [17] remained as it stood, France would be obliged to enter a reservation to ... part of paragraph 2 ... [Its domestic law], enacted in 1932 in view of the economic situation, and in 1946 in order to regulate the labour market, did not have the effect of denying refugees the right to work ... All [France] desired was to be able to control the movement of labour, and the refusal to permit a refugee to take employment in any overcrowded branch of activity in which there were already thousands of French subjects unemployed ...": Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 13–14. France did enter such a reservation, which it maintains at the time of writing: see reservations and declarations of state parties, available at www.unhcr.ch (accessed Nov. 20, 2004). Interestingly, though Venezuela suggested that it had a comparable system in place (Statement of Mr. Perez Perozo of Venezuela, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 19), it did not enter a reservation to protect its domestic regime.

[162] Weis, *Travaux*, at 148. [163] EU Reception Directive, at Art. 11.

[164] "[T]he restrictions referred to in the second paragraph were certainly not those stipulated in agreements between certain countries and IRO. They were restrictions deriving from the domestic law of various countries": Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 9. See also Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 13; Statement of Mr. Herment of Belgium, ibid. at 16; and Weis, *Travaux*, at 148: "The preoccupation of Australia about refugees

which bind even nationals of the host country.[165] More generally, there is no exemption from measures which have a purpose other than the protection of national workers.[166] As the French representative insisted, "the measures in question were the result of laws and regulations for the protection of the labour market. It was therefore only a question of restrictive measures to protect national labour against foreign competition. There could be no possible doubts on that point."[167] Grahl-Madsen concurs, observing that Art. 17(2) "only deals with measures for the protection of the national labour market. Measures which have another purpose, e.g. prohibition of employment of aliens in industries working for the national defence, based on considerations of national security, are not affected."[168]

The last paragraph of Art. 17 requires the governments of state parties to "give sympathetic consideration to assimilating the rights of *all refugees* with regard to wage-earning employment to those of *nationals* [emphasis added]." As this text makes clear, Art. 17(3) does not impose a duty of result.[169] It nonetheless mandates a process of "sympathetic consideration" which

who had been admitted with a work contract obliging them to perform specific work for two years was not well-founded."

[165] In response to concerns expressed by the United Kingdom regarding its right to apply measures imposed on its own citizens "in agreement with the employers and trade union organizations concerned ... for the common good of the people" (Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 5), the representative of the IRO was unambiguous. "[T]he French text was, in fact, identical with that of the Convention of 1933 which was designed to ensure equal treatment for refugees and nationals. At that time, no restrictive measures had been applied against refugees in the matter of employment. The situation had since changed and it was obvious that the text to be adopted should indicate that restrictive measures which were applicable in the case of nationals, applied equally to refugees": Statement of Mr. Weis of the IRO, ibid. at 11.

[166] This is not to say that restrictions on the right to work for *any* other reason are valid. The policy of Côte d'Ivoire of taking away a refugee's right to work if he or she moves without authorization is, for example, not valid because it is predicated on enforcement of an illegal constraint on internal freedom of movement: see chapter 5.2 above.

[167] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 11. See also Statements of Mr. Cuvelier of Belgium, Mr. Stolz of the American Federation of Labor, and Mr. Metall of the International Labor Organization: ibid. at 11–12. Indeed, the British representative proposed a more direct fromulation of the purpose of Art. 17(2), namely to ensure the "protection of national workers": Statement of Sir Leslie Brass of the United Kingdom, ibid. at 12.

[168] Grahl-Madsen, *Commentary*, at 71.

[169] Indeed, it was opposed by the Netherlands for precisely this reason. The Dutch representative to the Conference of Plenipotentiaries "considered that the provisions of paragraph 3 of article [17] constituted a recommendation to, rather than an obligation on, Contracting States. It was undesirable to make recommendations in a convention. It would therefore be desirable to relegate *voeux* [aspirations] and recommendations appearing in the draft Convention as it then stood to a separate draft resolution, which the Conference could adopt later when the instrument itself was signed": Statement of Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 15.

may, or may not, ultimately provide refugees with a full-fledged right to work.[170] While the primary goal of Art. 17(3) as initially conceived was to provide some relief to refugees admitted under immigration schemes or labor contracts once the terms of their initial agreements are satisfied,[171] its scope is not narrowly conceived. In light of the debates on Art. 17 taken as a whole, the third paragraph seems very much to be a principled recognition of the centrality of employment to the ability of refugees to reestablish their lives,[172] which states regrettably felt unable fully to permit in the context of their own difficult domestic circumstances. Importantly, the constrained approach taken by the drafters to definition of the right of refugees to work was never promoted on grounds of lack of need or merit, but simply on the grounds that state parties could not do better by refugees without sacrificing their own critical national interests. When and if conditions allow, Art. 17(3) signals the commitment of governments to allowing refugees both earlier and more complete access to the full range of wage-earning opportunities.[173]

6.1.2 Fair working conditions

Refugee Convention, Art. 24 Labour legislation and social security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities:

[170] Significantly, para. 3 does not take the approach initially advocated in the Secretary-General's draft, under which state parties simply "reserve[d] the right to accord the treatment given to national wage-earners to specified categories of refugees": Secretary-General, "Memorandum," at 34. Rather, as proposed by the American representative, it requires states to give favorable consideration to the assimilation of refugees to citizens for purposes of work, instead of just allowing them to do so: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 5.

[171] See text above, at pp. 752–753.

[172] See UNHCR Executive Committee Conclusion No. 50, "General Conclusion on International Protection" (1988), available at www.unhcr.ch (accessed Nov. 20, 2004), at para. (j): "[T]he enhancement of basic economic and social rights, including gainful employment, is essential to the achievement of self-sufficiency and family security for refugees and is vital to the process of re-establishing the dignity of the human person and of realizing durable solutions to refugee problems."

[173] The Executive Committee has affirmed this obligation in principle by "[e]ncourag[ing] all States hosting refugees to consider ways in which refugee employment in their countries might be facilitated and to examine their laws and practices, with a view to identifying and to removing, to the extent possible, existing obstacles to refugee employment": ibid. at para. (k).

remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining.

. . .

Economic, Social and Cultural Covenant, Art. 7
The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular:

(a) remuneration which provides all workers, as a minimum, with:
(i) fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
(ii) a decent living for themselves and their families in accordance with the provisions of the present Covenant;
(b) safe and healthy working conditions;
(c) equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
(d) rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

The right of refugees to enjoy fair working conditions is a novel feature of the 1951 Refugee Convention. It was not guaranteed in any of the predecessor refugee treaties, nor was it proposed in the French government's draft of the 1951 Convention. The decision of the Secretary-General to promote such a right was likely inspired by the contemporaneously drafted Arts. 23 and 24 of the Universal Declaration of Human Rights[174] which, in turn, were based upon the detailed work of the International Labor Organization.[175] In

[174] Art. 23 of the Universal Declaration refers *inter alia* to "just and favourable conditions of work," to "equal pay for equal work" without discrimination, to "just and favourable remuneration ensuring for [the worker] and his family an existence worthy of human dignity," and to the right "to form and to join trade unions." This is complemented by Art. 24 which posits "the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay."

[175] See generally K. Källström, "Article 23," in A. Eide et. al. eds., *The Universal Declaration of Human Rights: A Commentary* 373 (1992); and G. Melander, "Article 24," in ibid. at 379 (Melander, "Article 24"). For example, "[t]he rights mentioned in article 24 are among

presenting his proposal for what became Art. 24 of the Refugee Convention, the Secretary-General insisted that it had both a principled[176] and a pragmatic rationale:

> The placing of foreigners and national workers on the same footing not only met the demands of equity but was in the interests of national wage-earners who might have been afraid that foreign labour, being cheaper than their own, would have been preferred.[177]

In line with this thinking, it was proposed that refugees – at least once they are "lawfully staying" in the host country[178] – should be able to insist upon guarantees of fair working conditions not simply on par with those extended to aliens generally or even to most-favored foreigners, but rather at a level of equivalency with the protections enjoyed by citizens of the asylum state itself.

While the commitment to assimilating refugees to nationals was maintained, the substantive breadth of Art. 24(1)(a) as originally proposed by the Secretary-General was reduced to bring it into line with the approach taken in the Migration for Employment Convention, drafted by the International

the original concerns of the labour movement and among the early standards established by international labour law": Melander, ibid. at 379.

[176] Craven neatly captures the ethical dimension, arguing that "[i]f, on the one hand, work is seen as a necessary evil, then humanity requires that the conditions under which it is undertaken are as tolerable as possible": Craven, *ICESCR Commentary*, at 226.

[177] Secretary-General, "Memorandum," at 37. The Ad Hoc Committee specifically referenced these considerations as underpinning para. 1(a): Ad Hoc Committee, "First Session Report," at Annex II.

[178] This level of attachment was implied in the original draft prepared by the Secretary-General, which made Art. 24 "subject to the provisions of Article [17, on wage-earning employment]": Secretary-General, "Memorandum," at 37. The Ad Hoc Committee, however, proposed a more relaxed standard based on the approach of the cognate provision of the ILO's Migration for Employment Convention of 1949, which granted labor protections to migrants "lawfully within [the state party's] territory." It therefore agreed that Art. 24 rights be granted to refugees "lawfully in their territory": Ad Hoc Committee, "First Session Report," at Annex I. Without engaging in any plenary debate on the issue, the Conference of Plenipotentiaries reverted to the present, more restrictive formulation. The timing of entitlement to access wage-earning employment and to the protection and labor standards is in principle the same, namely when the refugee is lawfully staying in the state party. But it is arguable that in the event access to employment is granted at an earlier time than required by the Convention, the state party may still refuse to grant refugees the benefit of Art. 24(1)(a) until lawful stay is established. If it were to do so, it would of course create precisely the competitive advantage for refugee workers over nationals which the drafters sought to avoid. In addition, refugees working in such circumstances would still be entitled to assert the right to basic labor protections under Art. 7 of the Economic Covenant, discussed below, at pp. 770–771. An argument could also be made that the refusal to refugees authorized to work of the protection of labor laws would breach the general duty of non-discrimination set by Art. 26 of the Civil and Political Covenant, since it would be difficult to justify as a reasonable exclusion: see chapter 2.5.5 above.

Labor Organization in 1949.[179] As explained by the Belgian representative, who had also chaired the conference that produced the ILO's convention, that treaty "had been prepared by experts after long and careful study. They had been guided by a desire to apply to migrant workers or refugees the same regulations which governed nationals."[180] Because not all states that would sign the Refugee Convention were also members of the ILO, "the draft convention on refugees would lose nothing by duplicating the provisions of the ILO convention, with the drafting changes required to adapt the latter to refugees."[181]

As the Danish representative feared,[182] however, the decision to follow the ILO's approach meant that some protections proposed by the Secretary-General fell by the wayside. First, the Secretary-General had proposed that governments grant refugees the benefit of "all the labour regulations applicable to nationals,"[183] whereas Art. 24(1)(a) follows the ILO's lead of requiring respect for only a finite – if nonetheless quite extensive – list of protections.[184] Second and more specifically, two types of standard mentioned in the original draft as examples of laws from which refugees would benefit were not found in the ILO's list, and were therefore not included in the Refugee Convention.[185] These are "guarantees of employment" and standards directed to "health and safety in employment."[186] While the latter protection now accrues to refugees in many countries by virtue of the subsequently adopted Art. 7 of the Economic Covenant,[187] the loss of a specific right to be treated as a citizen in enforcing guarantees of employment may be of particular concern to refugees who are resettled under a labor migration program. This omission of an explicit reference to this right to enforce a private arrangement is, however, consistent with a third shift occasioned by the decision to follow the ILO's approach: it explicitly grants access to the listed forms of labor protection only "in so far as such matters are governed by laws or regulations

[179] Convention concerning Migration for Employment (Revised) (ILO Conv. 97), 120 UNTS 70, done July 1, 1949, entered into force Jan. 22, 1952, at Art. 6.

[180] Statement of Mr. Cuvelier of Belgium, UN Doc. A/AC.32/SR.14, Jan. 26, 1950, at 5.

[181] Statement of Mr. Metall of the International Labor Organization, ibid. at 6.

[182] "[T]he draft convention on refugees was intended to deal specifically with that particular category of persons and the special circumstances in which they found themselves. It seemed pointless to copy the provisions of a convention applicable to foreigners in general": Statement of Mr. Larsen of Denmark, ibid. at 5.

[183] Secretary-General, "Memorandum," at 37.

[184] These are described below, at pp. 768–770.

[185] One right included in the Convention, but not mentioned in the original draft by the Secretary-General, is the right to benefit from "overtime arrangements." It might, however, be argued that this entitlement is implied in the duty to grant refugees protections related to wages and working hours.

[186] Secretary-General, "Memorandum," at 37.

[187] See text below, at pp. 770–771.

or are subject to the control of administrative authorities." This clause, now included in Art. 24(1)(a), makes it clear that only public domain labor protection must be extended to refugees.[188] Where particular forms of labor protection are granted and governed solely by private agreement between employer and employee, there is no duty to provide refugees the same rights as nationals.[189]

Moreover, in "adapting" the ILO Convention to meet the particular circumstances of refugees, the drafters retreated from full incorporation of that treaty in at least two respects. First, the ILO treaty requires that migrant workers be granted national treatment with regard to worker "accommodation."[190] The Belgian representative to the Ad Hoc Committee proposed the deletion of this protection for purposes of the Refugee Convention,[191] a move supported in particular by the British representative who worried that "it would be difficult to guarantee exactly equal treatment for refugees in the matter of housing, since the housing shortage was acute and the matter had to be dealt with on the basis of need. It was also felt that a certain degree of preference as regards housing should be given to some categories of nationals, such as ex-servicemen."[192] The drafters therefore declined to grant refugee workers any special housing rights, meaning that they benefit only from the general entitlement of refugees to access housing on the same terms as aliens generally set by Arts. 13 and 21 of the Refugee Convention.[193]

The second area in which refugee entitlements are framed to require less than the ILO Convention was the commitment to migrant workers of equality with nationals as regards "membership of trade unions and enjoyment of

[188] Under parallel provisions of the Economic Covenant, "[i]n the case of those States that operated a system of collective bargaining, it would be impossible for the State to assume responsibility for matters that were negotiated by the trade unions": Craven, *ICESCR Commentary*, at 227, quoting from the statement of a British drafter of the Covenant at UN Doc. E/CN.4/SR.206 (1951), at 10.

[189] "The State could not intervene, for example, where agreements existed between employees and employers": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.14, Jan. 26, 1950, at 5.

[190] One of the concerns was whether, in fact, the ILO Convention required equal treatment only with respect to *worker* accommodation, or with regard to accommodation in general: Statements of Mr. Henkin of the United States and Mr. Rain of France, ibid. at 9.

[191] Statement of Mr. Cuvelier of Belgium, ibid. at 8.

[192] Statement of Sir Leslie Brass of the United Kingdom, ibid. at 8. See also Statement of Mr. Cha of China, ibid. at 9–10: "His own country, devastated by war and suffering from a grave shortage of housing, had taken urgent measures, following the end of the Second World War, to relieve the suffering of the refugees; those measures had often placed the refugees in a more advantageous position, from the point of view of housing, than many Chinese nationals. He felt that the matter of housing should be left to the initiative and control of the individual Governments."

[193] See chapter 4.5.1 above and chapter 6.4 below. This conflict was noted by the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.38, Aug. 17, 1950, at 9.

the benefits of collective bargaining." The focus of concern was the first part of the clause, which conflicted with the lower standard of treatment (assimilation to most-favored nationals) granted to refugees by Art. 15's guarantee of the right of association (including trade unions).[194] If the ILO's precedent of assimilating refugees to nationals were followed, France feared that refugees might be entitled to establish and run trade unions:

> [The French] Government ... would be unable to accept a provision which would make it possible for refugees to participate in the administration or management of unions comprising French nationals and aliens, or which would, by implication, make it possible to organize unions of workers or employees consisting entirely of aliens ... His Government was prepared to accord refugees most-favoured-nation treatment, but was not prepared to accord them treatment equal to that accorded to its own nationals.[195]

The ILO's observer accurately insisted, however, that his organization's treaty actually spoke only to "membership of trade unions; it was not a question of providing in the Convention for equal treatment with regard to the organization of trade unions and participation in their administration."[196] Nonetheless, some states clearly objected to even allowing refugees the same access as citizens to join trade unions. China, for instance, asserted that "because of the presence of surplus labour in [that] country, there was no question of any alien joining a trade union there."[197] It was therefore agreed that while Art. 24(1)(a) would assimilate refugees to nationals for purposes of enjoying the benefits of collective bargaining,[198] the right to join and participate in the work of trade unions would be governed by the more general rules of Art. 15.

Reliance on the ILO treaty as a precedent nonetheless had some important advantages for refugee workers, even as compared with the subsequently enacted cognate provision of the Economic Covenant. Neither the Secretary-General's original draft for the Refugee Convention nor Art. 7 of the Economic Covenant requires that refugees be assimilated to nationals for purposes of the right to benefit from overtime arrangements, restrictions on

[194] See chapter 6.7 below.

[195] Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.38, Aug. 17, 1950, at 10.

[196] Statement of Mr. Oblath of the International Labor Organization, ibid. at 11.

[197] Statement of Mr. Cha of China, ibid. at 10. China was, however, prepared to accept the most-favored-national level of attachment provided for in Art. 15's guarantee of freedom of association, presumably because it did not intend to grant the nationals of any country the right to join trade unions: ibid.

[198] The American representative had earlier proposed "that the words 'enjoyment of the benefits of collective bargaining' ... should be added at the end of sub-paragraph 1(a)(i)": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.14, Jan. 26, 1950, at 8.

home work, minimum age of employment rules, opportunities for apprenticeship and training, or rules governing the work of young persons – all matters now governed by Art. 24(1)(a).

The core protections of Art. 24(1)(a), in contrast, are today mirrored by similar duties in Art. 7 of the Covenant on Economic, Social and Cultural Rights. Where there is overlap, it is clear that a fused obligation may be advanced by refugee workers in at least the majority of developed states which have acceded to both treaties. In the less developed world, where duties under the Economic Covenant are often avoided by reliance either on the Covenant's duty of progressive implementation or on its authorization for poor states to exclude non-citizens from the scope of economic rights,[199] the obligations under Art. 24(1)(a) of the Refugee Convention – which are immediately binding, and applicable to all state parties – provide an important source of entitlement for refugees who might otherwise not have been able to insist on access to any form of labor protection.

First, Art. 24(1)(a) of the Refugee Convention requires that refugees be treated as citizens for purposes of the regulation of "remuneration, including family allowances where these form part of remuneration." The parallel right in the Economic Covenant is more explicit, requiring governments to commit themselves to a minimum qualitative standard of remuneration – sufficient to provide for a "decent living for themselves and their families," at least to the level guaranteed by Art. 11 of the Covenant;[200] and, in any event, "fair wages and equal remuneration for work of equal value *without distinction of any kind* [emphasis added]." This guarantee of *equal* pay for *equal* work logically imports a theory of comparable worth,[201] and leaves no room for the application of a margin of appreciation which might defeat the claims of refugees brought under general duties of non-discrimination.[202]

Second, the Refugee Convention requires that refugee workers be treated as nationals where there are protections addressed to "hours of work ... [and] holidays with pay." The Economic Covenant requires further that

[199] See chapter 2.5.4 above, at pp. 122–123.

[200] "The text indicates that the term 'decent living' is to be read in the light of the other provisions of the Covenant. Particular reference could be made to article 11 which refers to 'an adequate standard of living.' More specifically, however, the phrase 'a decent living' appears to refer to those rights that depend for their enjoyment upon personal income such as rights to housing, food, clothing, and perhaps health, education, and culture": Craven, *ICESCR Commentary*, at 235. The ambit of Art. 11 of the Economic Covenant is discussed in some detail in chapter 4.4.2 above.

[201] See Craven, *ICESCR Commentary*, at 237.

[202] See chapter 2.5.5 above, at pp. 139–145. "The requirement of equal remuneration in the Covenant is broader than that found in other instruments ... First, whereas the ILO Convention No. 100 and article 119 of the Treaty of Rome provide for equal pay only in relation to men and women, article 7(1) applies to 'all workers ... without distinction of any kind'": Craven, *ICESCR Commentary*, at 238.

hours of work be subject to "reasonable limitations," a standard which at least one member of the supervisory committee found would not ordinarily be met in the case of a fifty-four-hour working week.[203] The Covenant also requires that work be constrained to allow for "rest [and] leisure," said by one expert to impose a bifurcated duty:

> The word "rest" ... is intended to guarantee a real cessation of activities, giving the individual [the] possibility to regain his strength. "Leisure" on the other hand should make it possible for the individual to cultivate his mind and interests.[204]

More specifically, the Covenant stipulates also that all workers receive "periodic holidays with pay" and "remuneration for public holidays."[205]

A third area of overlap between the Refugee Convention and the Economic Covenant is the regulation of "women's work." While the drafters of the Refugee Convention likely had in mind regulations which traditionally limited the hours or conditions of work of women to enable them to meet family and other responsibilities, in contemporary context refugees must benefit from rules intended to implement the Economic Covenant's commitment to "women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work." Importantly, the supervisory committee has taken a particular interest in the plight of migrant women, insisting that they must benefit from this duty to promote sex equality in the workplace in the same way as citizens.[206]

There are also three aspects of Art. 7 of the Economic Covenant that provide protections not granted under the Refugee Convention. First, the Covenant guarantees equal opportunity "for everyone to be promoted in his employment," with no criteria other than seniority and competence deemed relevant. The Committee on Economic, Social and Cultural Rights has held that Art. 7(c) imposes a duty on state parties to establish objective norms for promotion in the public sector, as well as legislation to counter private sector discrimination in promotion.[207] By virtue of this clause, a refugee worker may not ordinarily be passed over for advancement in favor of a citizen of the host state on grounds of his refugee (or non-citizen) status.[208]

[203] See Craven, *ICESCR Commentary*, at 245, referring to the comments of expert Mratchov, UN Doc. E/C.12/1989/SR.8, at 7.

[204] Melander, "Article 24," at 380.

[205] Economic, Social and Cultural Covenant, at Art. 7(d).

[206] See Craven, *ICESCR Commentary*, at 240.

[207] Ibid. at 243–244.

[208] That is, there would be a duty to show the reasonableness of the differential treatment on objective grounds. While it might be possible to make this argument in relation to security-sensitive fields of work, it would otherwise be difficult to justify why lack of citizenship makes an otherwise employable refugee ineligible for promotion on the basis of competence and seniority. See chapter 2.5.5 above, at pp. 130–133.

A second provision of the Economic Covenant ironically requires states to grant refugees a form of protection that was deleted from the Secretary-General's draft of Art. 24 when the decision was made to work from the ILO precedent,[209] namely to benefit from "safe and healthy working conditions." The drafting history of Art. 7(b) makes clear only that there was a commitment that workers be protected from conditions "injurious to health,"[210] though the Committee on Economic, Social and Cultural Rights has in practice required states to demonstrate both non-exclusion of various categories of workers from protection and progressive achievement in advancing the standards of worker health and safety.[211]

Finally, the Economic Covenant effectively reestablishes the formula originally proposed by the Secretary-General for the Refugee Convention, namely that the listed entitlements are merely examples of what should be done to promote the more general obligation to provide workers with "just and favourable conditions of work." Because Art. 7 of the Economic Covenant applies to "everyone," state parties are duty-bound to recognize its standards for all workers under their jurisdiction, including refugees.

In sum, at least in developed countries bound by both the Refugee Convention and the Economic Covenant, the scope of the guarantee of fair working conditions may be said to derive from a fusion of norms – the best of both worlds, since each treaty provides for some rights not set by the other. Most important, the generality of the duty under the Economic Covenant implied in its recognition of the "right of everyone to the enjoyment of just and favourable conditions of work" means that refugees may claim the benefit of any public domain protection of workplace fairness, whether or not it is of a type specifically mentioned in Art. 24(1)(a) of the Refugee Convention. But while it is true that there is now significant overlap between Art. 24(1)(a) of the Refugee Convention and the subsequently enacted Art. 7 of the Economic Covenant, the Refugee Convention's guarantees remain of real importance for at least two reasons.

First, the substantive ambit of the Refugee Convention's guarantees of workplace fairness is in some ways broader than that of the Economic Covenant, explicitly including the right to benefit from rules and procedures related to overtime arrangements, restrictions on home work, minimum age of employment, apprenticeship and training, the work of young persons, and enjoyment of the benefits of collective bargaining. Thus, even in developed states, Art. 24(1)(a) is a source of entitlement beyond what is granted by general norms of international human rights law.

[209] See text above, at p. 766.
[210] Craven, *ICESCR Commentary*, at 230, citing the Statement of the Yugoslav representative, UN Doc. E/CN.4/AC.14/Add.2, at 2.
[211] Craven, *ICESCR Commentary*, at 142.

Second and most important, less developed states may normally elect not to extend an economic right set by the Covenant to non-citizens by reliance on Art. 2(3) of that treaty, but enjoy no such discretion where the same right appears in the Refugee Convention. Thus, the fact that Art. 24(1)(a) guarantees refugees the same public domain safeguards of fair treatment in the workplace as accrue to citizens of the host country – whatever that country's economic circumstances – is enormously important to the majority of the world's refugees who live outside the developed world. Indeed, because the Refugee Convention repeats three of the most critical forms of protection required by the Economic Covenant (namely those related to remuneration, hours of work and holidays, and the employment of women), the Refugee Convention effectively trumps Art. 2(3) of the Covenant to the extent of that overlap.

6.1.3 Social security

Refugee Convention, Art. 24 Labour legislation and social security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters: . . .

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations.

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to

social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

Economic, Social and Cultural Covenant, Art. 9
The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

While the structure of the Refugee Convention anticipates that refugees lawfully staying in an asylum country will support themselves by undertaking work, the drafters logically took account of the possibility that refugees, like citizens, might sometimes be prevented by circumstances beyond their control from earning their own living. Most of the states which prepared the Refugee Convention had established social security systems funded largely by contributions from workers and employers to compensate persons unable to work for more than strictly temporary reasons.[212] But refugees were not always in a position meaningfully to benefit from these social security systems. In Switzerland, for example,

> With regard to old-age and widows' and orphans' insurance, refugees were treated as favourably as aliens generally. They had to be insured if they carried on any gainful activity, but were entitled to a grant only if they had paid contributions for at least 10 years, and the grant they received was only two-thirds of that received by Swiss nationals. In addition, they were not entitled to temporary grants.[213]

In many other countries, the situation was worse still, as non-citizens frequently had no right to access social security at all unless a treaty was in place between the host state and the non-citizen's country of origin.[214] An

[212] "A distinction is often made between *social security* and *social welfare*. Through such a classification one wishes to separate between the 'earned' social security benefits of workers and their families, and any individual or group receiving need-based assistance from public funds, raised through tax revenues": M. Scheinin, "The Right to Social Security," in A. Eide et al. eds., *Economic, Social and Cultural Rights: A Textbook* 159 (1995) (Scheinin, "Social Security"), at 159. The issue of access to need-based (publicly funded) social assistance is addressed below, at chapter 6.3.

[213] Statement of Mr. Schurch of Switzerland, UN Doc. E/AC.32/SR.38, Aug. 17, 1950, at 11.

[214] "A number of bilateral treaties and certain international treaties, notably those concluded under the auspices of the International Labour Office, place foreigners who are nationals of State Parties to the Agreements on the same footing as nationals in respect of social security ... In these circumstances, the same equality should be ensured to refugees": Secretary-General, "Memorandum," at 38.

injured or incapacitated refugee worker might therefore be left with no means of support, based simply on the failure of his or her country of origin to sign an agreement with the new country of residence. In line with their general commitment to compensate refugees for the disadvantages of involuntary alienage, and their particular concern that the welfare of refugees should not be held hostage to the whims of the states they had been compelled to flee, the drafts presented by both the Secretary-General[215] and the French government[216] proposed the assimilation of refugees lawfully staying in a state party to citizens of the host country for purposes of entitlement to social security. Subject only to the understanding that the actual mechanisms by which social security benefits are delivered to refugees might be distinct,[217] this basic principle was never called into question during the drafting process.[218]

As in the case of guarantees of workplace fairness,[219] the members of the Ad Hoc Committee were persuaded to model the social security rules of the Refugee Convention on the precedent of the ILO's Migration for

[215] The Secretary-General's draft contained two separate articles. The first, Art. 16(2), provided that States would "accord to the victims of industrial accidents or their beneficiaries the same treatment that is granted to their nationals." The second and more general provision, Art. 17, required further that refugees would receive national treatment "in respect of social security ... (sickness, maternity, invalidity, old-age insurance, insurance against the death of the breadwinner, and unemployment insurance)": Secretary-General, "Memorandum," at 37–38.

[216] "While regularly resident in the territory of one of the High Contracting Parties, refugees shall receive the same treatment as nationals in respect of insurance and social security (including industrial accident compensation)": France, "Draft Convention," at 7.

[217] "[I]n Denmark an insured person only made a formal contribution to the social security scheme ... [so] that it was in reality the State that contributed to the various funds. The Danish Government was prepared to extend social security to refugees, but under the Danish system it would be necessary for the benefits to be paid to refugees on that count to come from funds other than the old age pension fund and the like": Statement of Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.10, July 6, 1951, at 19. See also Statement of Mr. Hoare of the United Kingdom, ibid.: "[A] similar situation arose in the United Kingdom. There were certain old age pensions for which foreigners were not eligible, but their grant depended on the applicants' means, and a foreigner whose means were the same would get the equivalent under the general social security legislation. He had assumed that article [24] could be interpreted broadly enough to meet the requirements of Denmark and the United Kingdom in that respect."

[218] Some countries, including Switzerland, maintained the view that certain social security payments would be made to refugees only on the same terms as granted to aliens generally: see Statement of Mr. Zutter of Switzerland, ibid. at 20. The Swiss reservation to this effect has since been withdrawn, though several other countries maintain comparable reservations: see reservations and declarations of state parties, available at www.unhcr.ch (accessed Nov. 20, 2004).

[219] See chapter 6.1.2 above.

Employment Convention.[220] The substantive reach of Art. 24(1)(b) is therefore quite broad, extending to legal schemes to provide for assistance in the event of "employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme." The notion of "social security," in other words, includes the full range of contribution-based initiatives designed to compensate workers unable to continue working. As the intervention of the International Labor Organization made clear, nothing turns on the label assigned to the program since "[p]resent-day legislation and treaties made no distinction between industrial accidents and social security and it would be difficult to discuss the two matters separately."[221] Subsequent exchanges, for example, establish that any scheme to provide compensation for employment injury – whether called "social security" or something else – is covered by the terms of Art. 24(1)(b).[222]

The only form of social security protection which elicited any significant discussion by the drafters was assistance to be paid in the event of "disability." The ILO precedent used the term "invalidity," said by that organization to mean "permanent disability, while 'disability' also covers temporary disability."[223] Despite the ILO's plea to incorporate the narrower term ("invalidity")

[220] See chapter 6.1.2 above, at pp. 765–767. Not all countries supported this approach. The British representative, for example, "did not feel satisfied that the ILO text under consideration entirely covered, or could be made to cover, the situation of refugees": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.14, Jan. 26, 1950, at 7. Even the Belgian representative who had chaired the conference that produced the ILO Convention was cautious in his endorsement of using that treaty as the model for the Refugee Convention. He "wished to make it clear that he did not advocate the adoption of article 6 of the Migration for Employment Convention as it stood; he merely felt that it would be a more useful basis for discussion than the Secretariat's text": Statement of Mr. Cuvelier of Belgium, ibid.

[221] Statement of Mr. Metall of the International Labor Organization, UN Doc. E/AC.32/SR.14, Jan. 26, 1950, at 4.

[222] The Belgian delegate insisted that the Refugee Convention should be understood to give "refugees general security against social and other risks": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 3. The American representative suggested that an amendment to clarify this point was not required "as Mr. Cuvelier's explanation would appear in the summary record": Statement of Mr. Henkin of the United States, ibid. That report notes explicitly that "[t]his article includes provision for payment in cases of employment injury even if in a particular country such payments do not constitute a part of a social security system": Ad Hoc Committee, "First Session Report," at Annex II.

[223] "Comments submitted by the Director-General of the International Labour Office on the Draft Convention relating to the Status of Refugees," UN Doc. E/AC.32/7, Aug. 15, 1950, at 3.

in the Refugee Convention, the drafters were content to allow refugees to benefit from a more comprehensive duty:

> [T]he reason for the change to the word "disability" was that "invalidity" apparently had no connection in English with the state of being an invalid. As "disability" was in any event wider in its meaning than what was meant by "invalidity," [the representative of the United States] saw no reason why the International Labour Office should object to it.[224]

It was thereupon agreed that the broader meaning of social security in the event of disability – including programs to provide compensation in the event of either permanent or temporary incapacity – should be recorded as authoritative.[225]

Not only does Art. 24(1)(b) require that refugees be assimilated to citizens for purposes of benefiting from all forms of social security protection,[226] but it also sets one duty to assist refugees in a way that may not be open to nationals. As several delegates confirmed, their general laws or regulatory practices normally prohibited the payment of a social security survivor

[224] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.38, Aug, 17, 1950, at 9. As Mr. Henkin suggested, the word "invalidity" simply does not have a relevant meaning in English. See also Statement of Sir Leslie Brass of the United Kingdom, ibid. at 16: "[T]he word 'invalidity' had no connection with health. If it was desired to indicate that the disability was permanent, then the words 'permanent disability' should be used. 'Invalidity' was obviously a mistranslation of a French term, which had crept into previous instruments." The Chairman then proposed the use of the term "permanent disability" in Art. 24(1)(b), but abandoned that notion when no support was expressed for the idea: ibid.

[225] The Canadian representative "supported the proposal previously made by the United States representative that the Committee's interpretation . . . quoted by the International Labour Office in paragraph 5 of its comments should be included in that article": Statement of Mr. Winter of Canada, ibid. at 15. This proposal was supported by the representatives of the United Kingdom, Denmark, and France: ibid.

[226] In consequence of this duty, for example, the United States is in *prima facie* breach by opting to deny social security benefits to refugees who failed to acquire US citizenship within seven years of arrival in that country: "Thousands of refugees face loss of US benefits," *Seattle Post-Intelligencer*, Nov. 12, 2003. While refugees are to be assimilated to citizens for purposes of determining their entitlement to social security, states enjoy no right to *require* refugees to become citizens in order to participate in social security schemes. In the case of the United States, however, a finding of non-compliance is probably avoided by the terms of a US reservation to Art. 24(1)(b) which provide that the obligation is accepted "except insofar as that paragraph may conflict in certain instances with any provisions of title II (old age, survivors' and disability insurance) or title XVIII (hospital and medical insurance for the aged) of the Social Security Act. As to any such provision, the United States will accord to refugees lawfully staying in its territory treatment no less favorable than is accorded aliens generally in the same circumstances": see reservations and declarations of state parties, available at www.unhcr.ch (accessed Nov. 20, 2004).

benefit to a non-resident. The President of the Conference of Plenipotentiaries, for example, noted that "Danes were not allowed to draw pensions when resident abroad, so that it would not be possible, for instance, to allow the compensation payable on the death of a refugee to be transferred to his widow resident outside the country."[227] Similar rules existed in the United Kingdom, Germany, and Norway.[228] Even though a rule of general application, the refusal to pay social security to a non-resident surviving spouse or child was said by the International Refugee Organization to have a disproportionate impact on the survivors of refugee workers:

> Difficulties had arisen in cases of fatal accidents to refugees whose beneficiaries resided abroad. Since those beneficiaries were not regular residents of the country where the accident had occurred, they had not received the benefits.[229]

As such, "[t]he dispensation of a residential qualification is of particular importance to refugees whose families are often split in their search for re-establishment in a country other than their country of origin."[230]

Art. 24(2) provides precisely that dispensation. It sets an absolute duty, whatever the host state's general rules, that compensation in the event of the death of a refugee worker occasioned by employment injury or occupational disease be made to the refugee's survivors whether they live in the host country or elsewhere.[231] Importantly, none of the governments which voiced concern about their non-conforming social security laws actually opposed this provision, agreeing instead simply to enter a reservation on point.[232] In the result,

> Paragraph 2 of Article 24 ... goes beyond national treatment. Even if the [surviving] dependants of nationals are not entitled to benefit if they stay outside the country concerned, surviving dependants of refugees shall be allowed to enjoy such benefits and have them transferred out of the country.[233]

[227] Statement of Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.10, July 6, 1951, at 21.

[228] Statements of Mr. Hoare of the United Kingdom, Mr. von Trutzschler of the Federal Republic of Germany, and Mr. Anker of Norway, ibid. at 21–22.

[229] Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.14, Jan. 26, 1950, at 6.

[230] United Nations, "Compilation of Comments," at 49.

[231] Weis notes, however, that "[a]s to the actual transfer of the compensation, currency regulations are preserved but they should, as far as possible, be interpreted in such a way as to make transfer possible": Weis, *Travaux*, at 192.

[232] Germany did not, in fact, enter a relevant reservation; Denmark and Norway initially reserved on this point, but have since withdrawn their reservations to Art. 24(2). In addition to the United Kingdom (which maintains its reservation), New Zealand and Poland have also entered a reservation specifically to Art. 24(2): see reservations and declarations of state parties, available at www.unhcr.ch (accessed Nov. 20, 2004).

[233] Grahl-Madsen, *Commentary*, at 96–97.

In at least this one way, the Convention's rules on social security clearly accommodate the specificity of the refugee predicament.

Apart from this one enhancement, the refugee is generally entitled to receive only the same access to social security as is enjoyed by citizens of the host country. And even this general principle is attenuated by the rules set out in clauses (i) and (ii) of Art. 24(1)(b), read in conjunction with Arts. 24(3) and (4). These rules are in response to the general expectation of states that where an individual has contributed to the social security system of more than one country, certain benefits (such as an old age or retirement benefit) are routinely cost-shared by the various governments in which some measure of entitlement has accrued. As the representative of the International Labor Organization explained, "agreements were often concluded in order to enable workers who moved from one country to another to accumulate the insurance benefits earned in both countries. The two countries concerned would each agree to pay their share according to the time worked in their territory."[234] This is the case for nearly all refugees, who have generally spent part of their working life in their country of origin, and the rest in one or more asylum states. But because of their status as refugees, there is the possibility that partner states will not in fact be willing to cost-share the social security to be paid by the asylum country.

Most obviously, the ruptured relationship between the refugee and his or her country of origin means that there is no guarantee that the country of origin will be willing to make its contribution to the refugee's social security benefit.[235] But it is also frequently the case that refugees work in a country of transit or first asylum which may be similarly disinclined to contribute to the social security benefit.[236] In either of these situations, and unless express provision were made in the text of Art. 24, the drafters were concerned that the asylum state might be in the unhappy position of being asked to pay a full

[234] Statement of Mr. Metall of the ILO, UN Doc. E/AC.32/SR.14, Jan. 26, 1950, at 11.

[235] "Such agreements could benefit the nationals of the countries concerned but it was difficult to see how they could benefit a refugee who had lost the protection of his Government and had cut himself off from the social security system of his country of origin": Statement of Mr. Metall of the ILO, ibid. See also Statement of Mr. Cuvelier of Belgium, ibid. at 12: "[S]uch arrangements were always the result of special arrangements ... [R]efugees could not expect to receive any insurance benefits from their countries of origin."

[236] This situation was raised by the observer from the American Federation of Labor. "[A]lthough refugees could not expect to benefit from any rights acquired in their countries of origin, some of them had acquired rights in Germany before moving to some other country for resettlement. Arrangements were being made to obtain recognition for those rights. He fully agreed with the representative of Belgium that it was essential to mention the limitation [in para. 14(1)(b)(i)] since all the arrangements were the result of special agreements": Statement of Mr. Stolz of the American Federation of Labor, ibid. at 12.

social security benefit to the refugee, but being unable to recover any contribution from the governments of other states where the refugee had accrued social security entitlements.[237] As Grahl-Madsen explains, this predicament could arise because

> [i]t follows from sub-paragraph [(1)(b)] that a refugee shall as a rule receive national treatment with regard to social security in the country where he is lawfully staying. That is to say, if nationals, by virtue of being nationals, are entitled to the full benefit of a social security scheme even if they have spent most of their life abroad and only resided in the country for a marginal period, whereas aliens must have resided in the country and contributed to the scheme for a considerable period of time in order to become eligible, refugees shall be assimilated to the former.[238]

The essential goal of clauses (i) and (ii) of Art. 24(1)(b), read together with paragraphs (3) and (4) of the same article, is therefore to delimit the general right of refugees to be treated as citizens for purposes of entitlement to social security by authorizing state parties to reduce the refugee's social security benefit to the extent of any unfunded contribution which should in principle have been made by one or more other countries in which the refugee has worked. The Belgian delegate to the Ad Hoc Committee provided a simple example of the approach ultimately adopted:

> He took as an example the case of a Polish miner in France. If the miner had worked ten years in Poland and twenty years in France, under the existing bilateral agreement Poland would pay one-third and France two-thirds of his pension. If the miner became a refugee, however, Poland could hardly be asked to pay the share which normally ought to have been paid by Poland. The miner would therefore receive in France only the two-thirds which that country had originally undertaken to pay.[239]

The text which implements this principle is somewhat awkwardly drafted, but is actually quite sensible if its various parts are viewed as a whole.

First, and in line with the Belgian representative's example just cited, it was agreed that there could be no question of denying refugees such social security benefits as are owed them under the general rules of the host state, taking into account relevant requirements based on such factors as the time spent working and/or contributions made while working in the asylum state. On the basis of a firm assurance that "even in the absence of bilateral

[237] This can be seen in the blunt response of the American representative to an amendment proposed by the American Federation of Labor: "Mr. Stolz's amendment would ensure a refugee the rights he had acquired by virtue of bilateral agreements before becoming a refugee. He did not consider it possible to adopt such a proposal."

[238] Grahl-Madsen, *Commentary*, at 94.

[239] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 4.

agreements, [a refugee's] acquired rights would be safeguarded,"[240] a non-governmental amendment to Art. 24(1)(b) designed explicitly to safeguard the portion of a social security benefit payable under the host state's own laws was withdrawn.[241]

Second, clause (i) is predicated on the understanding that refugees should in principle receive the benefit of any bilateral or other arrangements in place to preserve their "acquired rights and rights in course of acquisition."[242] As the Belgian representative explained, "A Polish miner residing in France would normally receive the insurance benefits he had accumulated in both countries, assuming there was close cooperation between the two countries in respect of insurance."[243] But the fact that clause (i) is a limitation clause makes clear that where there are no such arrangements in place, the country in which the refugee is staying cannot be expected to pay a benefit to the extent it is owed as the result of work not carried out on its territory, or for which worker or other contributions have not been made to its coffers. As Robinson writes, these rights acquired abroad "may either be disregarded or recognized in part only."[244]

It was also agreed that governments could lawfully exclude refugees from certain special arrangements funded by the state and designed to "top up" social security payments to their own citizens.[245] But the right of

[240] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.14, Jan. 26, 1950, at 12.

[241] In response to Mr. Henkin's assurance (see text above, at p. 780, n. 240), the representative of the American Federation of Labor withdrew his amendment, noting that he had proposed it "only because he had feared that becoming a refugee might deprive a person of the share to be paid by the country of reception": Statement of Mr. Stolz of the American Federation of Labor, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 4.

[242] "Maintenance of 'acquired rights' relates to rights to social security benefits acquired in one country and to be recognized, within the existing accumulation, by another country; maintenance of 'rights in [course] of acquisition' refers to a partial accumulation of rights which in itself is not sufficient to grant benefits and which represents part of the necessary amount of accumulation required for the enjoyment of benefits": Robinson, *History*, at 126.

[243] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 12.

[244] Robinson, *History*, at 126. Grahl-Madsen takes a more extreme position, arguing that a refugee who is subject to a treaty pertaining to a social security scheme is excluded from the general right to be assimilated to nationals for purposes of entitlement to social security: Grahl-Madsen, *Commentary*, at 94. There was, however, no discussion among the drafters that supports this view. Moreover, if the goal of clause (i) had been to exclude refugees covered by interstate social security treaties from the scope of the basic duty to assimilate refugees to nationals, it is surprising that it was framed merely in descriptive terms ("There may be appropriate agreements . . . ") rather than as a definitive exclusion from the basic duty set by Art. 24(1)(b).

[245] Grahl-Madsen clarifies that this clause normally refers to "allowances paid over and above the partial pension to which a person may be entitled by virtue of contributions paid, so that his total benefit shall be equal to a normal (or only slightly less than a normal) pension": Grahl-Madsen, *Commentary*, at 96.

governments to deny refugees access to such additional benefits is limited to circumstances in which the supplementary benefit is paid *entirely* from state funds, that is, from a fund not based even in part on contributions from workers or employers. This restriction is clear from the text of Art. 24(1)(b)(ii), which resulted from the defeat of an Austrian proposal that refugees not receive the benefit of special arrangements funded "wholly or partially out of public funds."[246] While sympathetic to the right of a state to provide special support to its citizens, the drafters feared that if any leeway were granted states to exclude refugees from special payments funded even in part from employer and worker contributions, "refugees would lose certain rights deriving from their contributions."[247] As the French government insisted,

> It was . . . possible that under certain social security systems the contributions paid by employers and workers were not sufficient to ensure financial stability; in such cases there was often a system of State assistance to redress the balance. If the Austrian proposal were accepted, in countries where the system was financed partly by the State but mainly by contributions from the persons insured, wage-earning refugees who paid contributions might find themselves deprived of all right to benefits, that was to say, of the counterpart of the contributions they had paid.[248]

Because it could be seen that the Austrian approach was open to an interpretation that might deprive a refugee worker "of the benefits of his own or his employer's contributions,"[249] sub-paragraph (ii) of Art. 24(1)(b) disallows any exclusion of refugees from special arrangements funded in whole or in part from such contributions.

One of the most important protections of Art. 24 is the guarantee in paragraph (3) that refugees benefit automatically from any social security arrangements made between or among state parties to the Refugee Convention. As conceived by the Ad Hoc Committee, Art. 24(3) would have gone farther still, entitling refugees to claim the benefit of any interstate agreement binding their host country, including one with a state not bound by the Refugee Convention.[250] There was, however, concern that such a

[246] United Nations, "Compilation of Comments," at 48.
[247] Statement of Mr. Oblath of the International Labor Organization, UN Doc. E/AC.32/SR.38, Aug. 17, 1950, at 17.
[248] Statement of Mr. Juvigny of France, ibid. at 17–18.
[249] Statement of Sir Leslie Brass of the United Kingdom, ibid. at 18.
[250] "The Contracting States whose nationals enjoy the benefits of agreements for the maintenance of acquired rights and rights in the process of acquisition in regard to social security, shall extend the benefits of such agreements to refugees subject only to the conditions which apply to their nationals": "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 22.

broadly framed duty could effectively compel state parties to pay out a combined social security benefit even when the partner country refused to cost-share the benefit. Governments were willing to commit themselves fully to enfranchise refugees only where there was a sufficiently solid guarantee that cost-sharing rules would apply also to benefits paid to refugees – and only state parties to the Refugee Convention would clearly be bound in this regard. As explained by the British representative to the Conference of Plenipotentiaries:

> He had no objection to the principle that those agreements [on transfer of social security rights] ... should apply equally to refugees and to nationals, but the text ... [should not] permit of the possibility that, under a bilateral agreement concluded between a State Party and a State non-Party to the Convention, the former would be required to apply to refugees from the latter the same conditions as it would apply to its own nationals. Such a unilateral obligation would be an unjustifiable burden on the State Party to the Convention, and he doubted whether it would be practicable without the co-operation of the non-Contracting State. He believed the original intention had been that where such agreements existed between Contracting States, they should automatically be applied to refugees from both countries.[251]

The text of Art. 24(3) was therefore amended to limit the legal duty of states to enfranchise refugees under interstate arrangements for the protection of social security benefits to such agreements as are made between or among state parties to the Refugee Convention.[252] This provision clearly responds to one of the two circumstances of initial concern to the drafters, namely the cases of refugees who had worked in one or more countries of asylum before ultimately settling in a different state party:[253]

[251] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.10, July 6, 1951, at 22.

[252] Grahl-Madsen takes the view that para. 3 applies also where two or more contracting states are parties to a multilateral treaty to which non-contracting states are also parties, but only as regards "rights acquired or in the process of acquisition in countries parties to the [Refugee] Convention": Grahl-Madsen, *Commentary*, at 97. This is a sensible interpretation, as the mutuality of obligation to enfranchise refugees upon which para. 3 is based would exist in such circumstances.

[253] Robinson argues that para. 3 "refers *only* to rights which a refugee accumulated in a Contracting State where he first found asylum and which he would like to make use of in another such country [emphasis added]": Robinson, *History*, at 127. While this was clearly the focus of concern to the drafters, there is no basis in the language adopted or purposes pursued to exclude a similar approach to, for example, social security entitlement acquired by a refugee in respect of work undertaken in a state party different from that in which he or she has established residence.

> Taking the case of the social security agreement between France and Belgium, and assuming that there was no additional protocol extending the benefits of that agreement to refugees, and further assuming that both France and Belgium ratified the draft Convention at present before the Conference, refugees moving from France to Belgium and *vice versa* would enjoy the benefits accruing to nationals even though there was no special agreement to that effect.
>
> Consequently, benefits enjoyed by nationals would be extended to refugees whose countries of domicile or of habitual residence were parties to the Convention and to a bilateral agreement relating to the maintenance of acquired rights and rights in the process of acquisition for their nationals, provided such refugees were able to fulfil the requirements to which such benefits were subject so far as nationals were concerned.[254]

Moreover, refugees are entitled to benefit not only from contributory arrangements which are in place between state parties when the refugee arrives in the asylum country, but also from any future arrangements which may come into force.[255] No special measures are required to enfranchise refugees, since "[t]he intention of paragraph 3 of article [24] was, of course, to extend such benefits to refugees *ipso facto*, without any special provisions to that end."[256]

[254] Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 5. This statement was made in response to a request from the Conference that Mr. Robinson review the drafting records of the Ad Hoc Committee on this point, and "enlighten the Conference at its next meeting": Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.10, July 6, 1951, at 24.

[255] Speaking to his amendment, which was adopted by the Conference (UN Doc. A/CONF.2/SR.11, July 9, 1951, at 7), the Belgian representative affirmed that his goal in proposing an amendment to para. 3 to include agreements "which may be concluded between them in the future" was "to enable refugees to benefit not only from existing social security measures, but also from any subsequent arrangements": Statement of Mr. Herment of Belgium, ibid. at 6.

[256] Statement of Mr. Robinson of Israel, ibid. at 7. This clarification was offered in response to a question from the Belgian delegate who wished to know "whether [the Israeli] representative thought that the agreements referred to should become automatically applicable to refugees as soon as the Convention had been ratified": Statement of Mr. Herment of Belgium, ibid. at 6. Upon receiving the quoted response from Mr. Robinson, the Belgian delegate "accepted the Israeli representative's interpretation": ibid. at 7. The fact that no specific mention of refugees in a relevant interstate agreement is required to enfranchise refugees does not, however, mean that the international agreement is automatically enforceable in domestic law. As Weis observes, "[w]hether the provision of [para.] 3 is self-executing depends on the national law of the Contracting State concerned. Where the provision is not self-executing, the Contracting State is obliged to take the necessary measures to extend the benefits of the agreement to refugees, be it by arrangement with the other Party to the agreement or by measures on the national level": Weis, *Travaux*, at 192–193.

States were, however, unwilling to undertake a comparable legal commitment where combined social security benefits should in principle be cost-shared with a state that is not a party to the Refugee Convention, including the refugee's country of origin. In these circumstances, governments were prepared to agree only that, as a matter of principle,[257] they would endeavor to provide refugees with the benefits stipulated under relevant social security agreements. Thus, paragraph 4 speaks to the situation of an individual:

> who, having accumulated certain social security rights in his home country and having moved to another country which had a social security benefits agreement with the former, then renounced the protection of his country of origin and became a refugee. Under what circumstances the contractual right to the benefits accruing under the bilateral agreement would be forfeited was a matter that could only be determined by the parties to the agreement in the light of its letter and of its spirit. A State, granting asylum to a refugee of the nature just described, would, however, not be prevented from granting benefits of its own free will to a person towards whom it might have no contractual obligations. The purpose of paragraph 4 was to provide for such a contingency, but, unlike paragraph 3, it took the form, not of a binding provision but of a recommendation.[258]

In contrast to the form in which it was proposed by the Ad Hoc Committee, paragraph 4 as adopted is not restricted only to agreements which may exist with a refugee's country of origin,[259] but extends also to agreements between the host country and any "non-contracting State." Thus, for example, a refugee's country of residence should make best efforts to secure additional social security benefits for the refugee based on work and social security contributions in a country of first asylum that is not a party to the Convention.[260] Also in contrast to the Ad Hoc Committee's approach,

[257] The American representative referred to para. 4 as "merely a recommendation, [and therefore] ... not [a matter] in respect of which a reservation was justified": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.38, Aug. 17, 1950, at 9.

[258] Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 6.

[259] "The Contracting States will give sympathetic consideration to extending to individual refugees so far as possible the benefits of similar agreements which may have been concluded by such Contracting States with the country of the individual's nationality or former nationality": Ad Hoc Committee, "Second Session Report," at 22.

[260] Indeed, Robinson sees this as the primary purpose of para. 4. "Para. 4 deals with rights accumulated in the refugee's first country of asylum, a non-Contracting State, to be exercised in his second country of asylum, a Contracting State. In such instances the Convention does not impose on the Contracting State an obligation to treat the refugee as if he were a national of the non-Contracting State, but only recommends such a treatment to the parties to the Convention": Robinson, *History*, at 127.

such efforts are expected to be made on behalf of all refugees similarly situated, not simply in individual cases.[261]

In sum, the general rule is that refugees lawfully staying in a state party are to be assimilated to that country's citizens for purposes of entitlement to all forms of social security. Indeed, refugees are entitled to better than national treatment where necessary to ensure that a social security death benefit is paid out to non-resident dependants. The major limitation on the right of refugees to national treatment in regard to social security involves the situation where a portion of the benefit due a refugee would ordinarily be paid at least in part by another country in which the refugee has accrued some measure of social security entitlement. Where there is no arrangement in place between the relevant governments to combine the entitlements to social security of persons who have worked and contributed in each jurisdiction, the refugee is entitled only to receive whatever benefits are owed under the domestic rules of the host country.

On the other hand, where there is a cost-sharing arrangement in place between the refugee's host state and the other country in which entitlement has accrued, the refugee should in principle receive the combined benefit. But if in fact the other country refuses to pay its share, the host state is liable to pay out only the part of the social security benefit to which the refugee is entitled under its domestic laws. This is so even if the citizens of the host country would, in similar circumstances, receive a supplementary payment from the government to "top up" the domestic portion – thus amounting to a departure from the basic principle of Art. 24 that refugees should be afforded national treatment.

The only circumstance in which a refugee is effectively insulated against the prospect of a reduced social security benefit based on the default of a country under an agreement for shared social security responsibility is where that other country is also a party to the Refugee Convention. If so, the host government must pay the refugee the whole of any combined benefit due to the refugee pursuant to its arrangement with the defaulting state, then rely on its right to seek redress from the defaulting government based on the latter's duty to extend the benefit of the arrangement to refugees under Art. 24 of the Refugee Convention. Where, however, the defaulting government is not a party to the Refugee Convention (and therefore may not be legally required to extend the benefit of social security cooperation agreements to refugees), the

[261] The amendment approved by the Ad Hoc Committee (see note 243 above) occurred in response to the proposal of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 8–9: "[T]he Style Committee might consider the desirability of deleting the word 'individual' before the word 'refugees' in the second line of paragraph 4, particularly if there was any risk of the retention of that word leading to discrimination between one refugee and another."

host state is under no legal duty to make up the shortfall. Art. 24(4) encourages, but does not require, state parties to do what they can to assist refugees in such a predicament.

6.2 Professional practice

While it is increasingly rare, the governments of some asylum states still do not allow refugee professionals to work in their territory. UNHCR observed in 1991 that

> [t]he majority of States require that aliens generally (including refugees) possess the necessary professional qualifications and that these be validated or recognized by the competent authorities before they are allowed to practise ... [However] [s]ome states have reserved the practice of certain professions such as law, medicine, engineering, architecture and teaching to their own nationals while, in some cases, allowing aliens to be employed in these fields on a contractual basis.[262]

The refusal to allow refugees to contribute their professional skills may have truly grave consequences. Despite both the shortage of medical care for most refugee groups, and the importance of understanding the language, culture, and health context of a specific refugee population,[263] some asylum countries have even prohibited refugee doctors from assisting their own people. For example, Ugandan refugee doctors were refused the opportunity to work among the Ugandan refugee population,[264] and Turkey denied Iraqi Kurdish doctors permission to work in the Kurdish refugee camps.[265]

More generally, refugees with professional qualifications in the less developed world face general barriers on access to work, including bars on non-citizens engaging in many or most forms of work,[266] or confinement to camps or settlements where the opportunities for professional practice may simply not exist.[267] In Nairobi, for example, "[t]rained teachers or civil administrators are forced to do sweeping jobs, if they are lucky."[268] In Sudan, Eritrean

[262] UNHCR, "Information Note on Implementation of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees," UN Doc. EC/SCP/66, July 22, 1991 (UNHCR, "Implementation"), at para. 84.

[263] See chapter 4.4.3 above, at pp. 507–511.

[264] N. Van Hear and B. Harrell-Bond, "Refugees and Displaced People: Health Issues," in UN Institute for Training and Research ed., *The Challenge of African Disasters* 61 (1991), at 65.

[265] Initiative for Human Rights in Kurdistan, "Silence is Killing Them: A Report on the Situation of the Kurdish Refugees in Turkey" (1990), at 12.

[266] See chapter 6.1 above, at pp. 730–738.

[267] See chapter 5.2 above, at pp. 696–704.

[268] T. Skari and E. Girardet, "Urban Refugees: Out of the Public Eye," (1985) 14 *Refugees* 14.

and Ethiopian medical doctors were able to work only under the auspices of healthcare programs sponsored by international aid agencies.[269]

Some states of the developed world also bar non-citizens from engaging in certain professions, most commonly including the civil service and military, but sometimes including also the legal profession, judiciary, law enforcement, medicine, engineering, architecture, and teaching.[270] France goes farther still, prohibiting non-citizens from working even as pharmacists or chartered accountants.[271] The Supreme Court of the United States has upheld bars on the employment of non-citizens as public school teachers,[272] but struck down citizenship requirements for lawyers, engineers, and notaries.[273] Switzerland denies most non-citizens the right to work as doctors, dentists, veterinarians, or pharmacists, but has enacted a specific legislative exception in favor of refugees who wish to engage in such work.[274] Similarly, Italy bars non-citizen journalists from working in its territory absent a reciprocity agreement favoring its own journalists, but it exempts refugee journalists from this restriction.[275] Belgium has traditionaly pursued a still more liberal policy, allowing refugees, including those awaiting verification of their claims, to secure a permit authorizing them to engage in professional practice for up to five years.[276]

Even where formal bars do not exist, the nearly universal practice of professional accreditation poses a significant barrier in practical terms for refugees who wish to resume their professional life in the asylum state. Professions may refuse to recognize certifications obtained outside the reception country, or require substantial apprenticeship in the host state; they may require that candidates be licensed in the particular discipline in their country of origin, effectively excluding applications for refugees whose home states did not regulate their profession; or they may subject foreign-trained individuals to certification examinations not required of citizens.[277] The result of

[269] El Bushra, "Educational Needs," at 23.

[270] UNHCR, "Implementation," at paras. 82, 84.

[271] Lambert, *Seeking Asylum*, at 172.

[272] *Ambach v. Norwick*, 441 US 68 (US SC, Apr. 17, 1979).

[273] *In re Griffiths*, 413 US 717 (US SC, June 25, 1973), re lawyers; *Examining Board of Engineers v. Flores de Otero*, 426 US 572 (US SC, June 17, 1976), re engineers; *Bernal v. Fainter*, 467 US 216 (US SC, May 30, 1984), re notaries public.

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

[275] G. D'Orazio, *International Academy of Comparative Law National Report for Italy* (1994), at 36.

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

[277] P. Cumming, *Access: Task Force on Access to Professions and Trades in Ontario* (1989). The report cites by way of example the fact that the Canadian province of Ontario requires foreign-trained dentists successfully to complete a four-part dental licensing examination from which the graduates of Canadian or American dental schools are exempt. The failure rate for the examination is said to be substantial: ibid. at 161.

these many requirements is that professional refugees "often cannot practice because there is no equivalence of degrees and qualifications, and they experience severe downward social mobility."[278]

By way of example, while Germany has lifted most citizenship requirements for professional practice, "asylees usually will have to pass special exams in order to be able to practise a liberal profession notwithstanding the fact that they might have longstanding professional experience."[279] A refugee from Afghanistan who was medical director and a consultant gynaecologist at the university hospital in Kabul explained the difference of treatment she experienced in France and in the United Kingdom:

> In France, working as a doctor was easy. After a language course and a voluntary hospital attachment, I was offered a part-time position running an obstetrics, gynaecology and family planning outpatients clinic ... In 1995, my husband was offered a position in the UK and we moved ...
>
> First I applied for Senior House Officer positions but apparently I'm overqualified. But for more senior positions I must pass the Membership of the Royal College of Obstetricians and Gynaecology exams. I've passed Part I, but now I'm told I can't sit Part II unless I have two to four years of work experience, so it's Catch 22. Without an interview, or even any feedback, I can't display my experience. In Kabul, I worked as a GP and a gynaecologist. I saw patients daily; I performed hundreds of operations; I lectured students; I published research papers. Here that counts for nothing.[280]

Even with significant support, the manager of the Skills Match program in the United Kingdom reported that only about 5 percent of refugee professionals found work truly commensurate with their qualifications. He observed that "demotion is the biggest problem for qualified asylum-seekers ... In my experience, the odd-job man can get cash jobs with little problem, but professional barriers prevent people such as lawyers and teachers getting work."[281]

Refugee Convention, Art. 19 Liberal professions

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising

[278] Joly, *Asylum*, at 58.

[279] R. Hofmann, *International Academy of Comparative Law National Report for Germany* (1994), at 19. See also R. Haines, *International Academy of Comparative Law National Report for New Zealand* (1994), at 37; and J. Vedsted-Hansen, *International Academy of Comparative Law National Report for Denmark* (1994), at 2.

[280] "Bordering on the ridiculous: The doctor who's not wanted," *Guardian*, Sept. 30, 2000, at 29, quoting Dr. Zhargona Tanin.

[281] R. Prasad, "Raekha Prasad on a scheme to harness the much-needed skills of refugees," *Guardian*, Jan. 24, 2001, at 6, quoting David Forbes of the Manchester-based organization, Skills Match.

> **a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.**
>
> **2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.**

It seems clear that the Secretary-General's draft of what became Art. 19 was motivated by a genuine concern for the predicament of refugees who found themselves in reception states where they could not exercise the only livelihood familiar to them:

> Access to the liberal professions, which are the most highly regulated of all and generally speaking, overcrowded in European countries, is, in principle, barred to foreigners. Where, however, treaty provisions exist, these professions are open to foreigners to some extent. It should be noted that there is a high proportion of members of the liberal professions among the refugees, including qualified and experienced scientists, engineers, architects and doctors holding diplomas equivalent to those required in the reception country. Such professional men, moreover, are not suited to any other occupation than their own.[282]

It was therefore recommended that professionally qualified refugees be assimilated to most-favored foreigners, allowing them access to at least those professional opportunities open to the citizens of partner and other closely affiliated countries.[283]

The drafters, however, showed little enthusiasm to guarantee even this fairly narrow opportunity for refugees to have privileged access to professional practice. To begin with, they decided not to work from the Secretary-General's proposal for Art. 19, but instead to base their drafting on the French government's proposal. The latter did not require most-favored-national treatment, but stipulated simply that governments would provide refugees with "as favourable treatment as possible" in accessing the professions.[284] The only concession made by France was that whatever treatment was granted would "be in no case inferior to the treatment afforded to foreigners generally."[285] This approach was contrary to the advice of the Secretary-General, who had noted that granting refugees only the same access to professions as

[282] Secretary-General, "Memorandum," at 35–36.
[283] The Secretary-General recognized that the alternative would be simply to grant refugees the same treatment as afforded aliens generally, but warned against that approach: Secretary-General, "Memorandum," at 36.
[284] France, "Draft Convention," at 6–7.
[285] Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 16.

aliens generally "would in practice be of little help to refugees, since in point of fact access to the professions is normally only accorded to foreigners – and even then with reservations – by virtue of treaty provisions."[286] The International Refugee Organization also opposed the "aliens generally" standard, arguing that "[i]n countries where the rights of aliens ... depend on reciprocity arising out of treaty arrangements it is doubtful that the formula as it now stands would ensure any rights for refugees."[287]

In what can only be described as an extraordinary contrast with discussion of the appropriate contingent standard for access to wage-earning employment,[288] no state representative at any stage of the drafting process advocated moving beyond the baseline ("aliens generally") standard of treatment. As the Chairman of the Ad Hoc Committee observed, "there was no question of according refugees the most favourable treatment given to foreigners by virtue of treaties, but merely the most favourable treatment possible."[289] Much less was there any interest in giving refugees the same rights as citizens to practice a profession: the Conference of Plenipotentiaries even rejected an Egyptian amendment that would have made explicit that refugees were *not* entitled to access professions reserved for citizens on the grounds that "it might be dangerous to refer to rights which could be covered by special regulations ... inasmuch as it might suggest to States the possibility of taking such action in respect of refugees."[290] As the Belgian representative to the Conference of Plenipotentiaries concluded, "the draft Convention gave refugees [only] the status of aliens"[291] with regard to the right to engage in professional practice.

The duty to assimilate refugees only to aliens generally requires, however, that where there is in practice true generality of access to a given right, the right in question automatically accrues to refugees as well. This means that if access to professional practice is only formally reserved for citizens (or subject to reciprocity arrangements) but in fact is generally granted to non-citizens, such access must be extended also to refugees.[292] The decision of Italy to allow refugee journalists to work in its territory, though that right is formally predicated on reciprocity, is thus in accord with this principle: given the generality of reciprocal arrangements, the right to journalistic practice is in fact open to most non-citizens, and thus owed to refugees as well.

[286] Secretary-General, "Memorandum," at 36.
[287] United Nations, "Compilation of Comments," at 39, 45.
[288] See chapter 6.1.1 above, at pp. 744–747.
[289] Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 17.
[290] Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 21.
[291] Statement of Mr. Herment of Belgium, ibid. at 21.
[292] See chapter 3.2.1 above, at pp. 199–200.

As well, the "treatment as favourable as possible" clause requires state parties to give consideration in good faith to the non-application to refugees of limits generally applied to aliens.[293] The Belgian decision to grant refugees free access to professional life, as well as the Swiss decision to exempt refugees from more particular exclusions applied to other non-citizens, are examples of action that is very much in accord with this expectation. But since the duty to consider preferential treatment of refugees is an obligation of process, not a duty of result,[294] Art. 19 provides little solid assistance to refugees in asylum states where only nationals (or privileged non-citizens) are entitled to engage in some or all forms of professional practice. As a matter of law, the Refugee Convention requires only that a refugee be granted access to professional practice to the same extent that, in law or in practice, such access is normally granted to most non-citizens.[295] Where states give due consideration to the issue, but decide ultimately to limit particular kinds of professional practice to their own citizens, there is no violation of the Refugee Convention. As such, it is possible that the refusals of Uganda and Turkey to allow refugee doctors to attend to the needs of refugee populations in their territories were not contrary to Art. 19, assuming that medical practice in those countries is effectively not open to non-citizens. But given the urgency of the situations faced by the refugees there and the failure to provide them with access to local medical assistance, those states would have a very difficult time demonstrating that they truly gave good faith consideration to the exemption of refugee doctors from the general prohibition of practice by non-citizen physicians.[296]

The Refugee Convention provides no significant relief from the most common impediment faced by non-citizens wishing to engage in a profession, that being the need to meet often quite exacting standards for licensing or accreditation. These rules are frequently administered by professional associations authorized by the government to regulate access to professional life. A non-citizen wishing to continue his or her professional life in a new country may be required to meet a variety of standards, including possession of particular academic qualifications, a positive assessment of experience or standing in the applicant's home country, and satisfactory completion of a period of local training or testing.

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

[294] As the Chinese representative insisted, "the provisions of article [19] as proposed by France had been applied in China already. It had done so of its own free will, but would hesitate to accept such provisions if they were imposed on it by a convention": Statement of Mr. Cha of China, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 17.

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

[296] Given the failure of the host states to provide medical attention in truly extreme cases, it is also likely that Uganda and Turkey breached Art. 12 of the Economic Covenant. See chapter 4.4.3 above, at p. 513.

The drafters of the Refugee Convention recognized that not all accreditation requirements were really designed to protect the public interest. Indeed, the Chairman of the Ad Hoc Committee candidly conceded that "in the United Kingdom and Canada liberal profession bodies admitted holders of local diplomas only ... [T]hat was because they wished to maintain a certain level of tradition ... [I]t was true, of course, that such a requirement reflected too rigid a spirit of exclusiveness."[297] But in contrast to the approach taken to wage-earning employment,[298] the drafters showed no interest in exempting refugees from even accreditation requirements designed simply to avoid competition with domestic professionals.[299] To the contrary, they made access to Art. 19 rights contingent on the refugee possessing a "diploma[ ] recognized by the competent authorities of [the host] state,"[300] thereby explicitly sanctioning the practice in many states of leaving such decisions to the professional bodies themselves. More generally, they adopted language under which Art. 19 rights inhere in "refugees ... desirous of practising a liberal profession" in order to signal that the mere possession of formal qualifications could under no circumstance give rise to an international legal entitlement to engage in professional life:

> [T]he form of words was vague, but ... it should remain so. The Committee was faced with two separate considerations: on the one hand, the recognition of diplomas and, on the other, the exercise of the professions. In Belgium a foreigner could practise medicine if he held a Belgian diploma or a diploma recognized as equivalent; on the other hand, no foreigner, no matter what his diploma, was allowed to practise as a lawyer.

[297] Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 16.

[298] See chapter 6.1 above, at pp. 741–747.

[299] "The Italian Government could not agree to a clause which might aggravate the existing internal situation caused by over-population and unemployment": Statement of Mr. Theodoli of Italy, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 20. Earlier, the French representative had similarly remarked "that the question gave rise to grave difficulties in France where there was a considerable number of refugees belonging to the liberal professions ... It should be understood that there were two types of interests: on the one hand, national interests which tended to reserve for some nationals exclusively, or to a very large extent, the exercise of liberal professions; on the other hand, the material interests of persons exercising those professions who were stubbornly defending their positions. It was the Committee's duty to see that States accorded refugees the most favourable treatment possible provided it did not conflict with national interests": Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 17–18.

[300] It was clarified, however, that the refugee need not arrive in the asylum state with a relevant diploma in order to benefit from Art. 19, but could invoke his or her rights once in possession of a diploma acquired in the host country or elsewhere: Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 16.

> It would be impossible therefore to adopt a definite form of words, as it could not be applied to all cases.[301]

At best, some value is secured by the obligation to assimilate refugees to aliens generally "in the same circumstances," which requires those undertaking an examination of professional qualifications to exempt refugees from general requirements which the refugee's particular circumstances render effectively insurmountable.[302] For example, a state which ordinarily requires proof that a non-citizen has been licensed in his or her discipline in the country of origin for accreditation would be required to waive this requirement in the case of a refugee who came from a state in which no system of professional regulation exists, or where professional registration was not open to the refugee for reasons related to his or her need for protection.

As if these several constraints were not enough, it was ultimately determined that Art. 19 could not be invoked by a refugee until he or she is "lawfully staying" in the territory of a state party. Interestingly, neither of the original drafts proposed any delay in the right to access professional practice based on attachment.[303] The report of the first session of the Ad Hoc Committee, however, limited professional practice to refugees "lawfully resident in their territory."[304] The only substantive debate on this question occurred at the Committee's second session, where it was agreed to revise the level of attachment downward simply to "lawfully in their territory"[305] in order to ensure that the right could be invoked by "persons entering a territory even for a few hours, provided that they had been duly authorized to enter."[306] As the American representative insisted, "his delegation wished to cover all refugees for however short a time they were lawfully in a territory."[307] Under this approach, Art. 19 could have been invoked, for example,

[301] Statement of Mr. Cuvelier of Belgium, ibid. at 18. The Chairman of the Ad Hoc Committee immediately concurred, noting that he "also thought that it was impossible to adopt a more definite formula; the High Contracting Parties should simply be invited to do their best to make the most liberal provisions possible": Statement of the Chairman, Mr. Chance of Canada, ibid.

[302] See chapter 3.2.3 above, at p. 208.

[303] The drafts prepared by the Secretary-General and by France simply granted Art. 19 rights to "refugees" without qualification: Secretary-General, "Memorandum," at 35; France, "Draft Convention," at 6.

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

[305] Ibid.

[306] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 14. The Chairman gave the example of "a person travelling through a country on his way back to his own country" who would be lawfully in the country of transit, and therefore entitled to exercise his or her profession there: Statement of the Chairman, Mr. Larsen of Denmark, ibid. at 15.

[307] Statement of Mr. Henkin of the United States, ibid. at 15.

by "a German refugee lawyer who periodically travelled from Sweden to Denmark to give consultations in a hotel for a period of three hours."[308]

In the end, however, the more restrictive view prevailed. While not formally debated there, the Conference of Plenipotentiaries reversed the Ad Hoc Committee's approach, deciding that Art. 19 rights would accrue only once a refugee is "lawfully staying" in a state party. In adopting this level of attachment, the Conference was probably influenced by the French view that the purpose of Art. 19 should be "to protect refugees residing in foreign territory, not merely staying there for a few hours."[309] But this more exacting level of attachment allows the right of professional practice to be denied not only to refugees present on a short-term basis, but also to most refugees awaiting the results of their refugee status claim and to refugees present in a state which opts not to assess refugee status,[310] at least until an ongoing presence is established in practical terms by the passage of time.[311]

It is therefore difficult to see Art. 19 as having any significant positive value for refugees. If no specific rule on access to the liberal professions had been included in the Refugee Convention, the ability of refugees to work in a professional capacity would presumably have been regulated by either the rule on self-employment, or by that dealing with wage-earning employment. Either of these approaches would have been more beneficial to refugees. Under Art. 18's provisions on self-employment, the refugee professional would have received no better standard of treatment than that now granted by Art. 19 ("treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances"), but that right would have accrued at an earlier point in time, namely when the refugee was simply "lawfully in" (rather than "lawfully staying") there.[312] If, on the other hand, the refugee professional's right to work had been governed by Art. 17's general rules on wage-earning employment, he or she would have been faced with the same contingent standard as that which governs Art. 19 ("lawfully staying"), but once qualified he or she would at least have been entitled to a higher standard of treatment, namely assimilation to the nationals of most-favored countries.[313] Under Art. 19, in contrast, the refugee professional is faced with the worst of both worlds: the point at which entitlement accrues is significantly delayed, and the right which is ultimately received is of little value. In pith and substance, then, Art. 19 is therefore most appropriately understood not so much as a source of refugee entitlement, but as a clawback provision directed to a subset of refugees who would otherwise have been able to invoke the more generous

[308] Statement of the Chairman, Mr. Larsen of Denmark, ibid. at 18.
[309] Statement of Mr. Juvigny of France, ibid. at 15.
[310] See chapter 3.1.3 above, at pp. 183–185. [311] See chapter 3.1.4 above, at pp. 186–187.
[312] See chapter 5.3 above. [313] See chapter 6.1 above.

provisions of either Art. 17 on wage-earning employment or Art. 18 on self-employment.[314]

The disinterest of the drafters in committing themselves to the meaningful enfranchisement of refugee professionals is perhaps most clear from the second paragraph of Art. 19, requiring government to "use their best endeavours" to secure the resettlement of professionally qualified refugees in affiliated territories. This approach seems to have been considered something of a "win–win" approach for both refugees and their host countries:

> Many countries were under pressure not to admit to their metropolitan territories refugees who might compete with professional workers resident there. In some colonial areas, however, there was an urgent need for qualified persons, and nationals of the metropolitan country were often reluctant to respond to that need. Colonial Governments which would not be willing to give refugees the opportunity of gainful employment in their profession in the metropolitan country might be quite prepared to send them into overseas territories.[315]

While the drafters rejected both a British effort to delete the paragraph altogether[316] and a French effort to frame Art. 19 as no more than vaguely hortatory,[317] not even this part of Art. 19 provides professional refugees with any significant benefit.

[314] Robinson reaches a comparable conclusion, at least in part. "It will make little difference (except for the diploma) whether a person is labelled a 'professional' or 'self-employed' because the treatment is the same. But it would make a considerable difference if he were classified as wage-earner instead of professional or *vice versa*": Robinson, *History*, at 118. The first part of Robinson's conclusion is, for reasons set out above, not accurate: the fact that self-employment rights accrue at a lower level of attachment than does the right to practice a liberal profession is a significant difference in many cases, e.g. refugees awaiting the results of status verification or present in a country that does not formally verify refugee status.

[315] Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.14, Jan. 26, 1950, at 3. See also Statement of Mr. Guerreiro of Brazil, ibid., who "agreed that the need for such qualified workers justified the settlement in colonial areas of refugees practising liberal professions."

[316] The British concern was that the duty amounted to an intrusion on the autonomy of subordinate territories: Statements of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 19; and at UN Doc. E/AC.32/SR.14, Jan. 26, 1950, at 2.

[317] The original language of the Secretary-General's proposal (Secretary-General, "Memorandum," at 35) required governments to "promote" resettlement, while a much softer approach was taken in the French draft (France, "Draft Convention," at 7), namely "as far as possible [to] facilitate" resettlement. The United States then advanced an intermediate view, under which the duty would have been to "encourage" resettlement: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 20. While this proposal was adopted by the Ad Hoc Committee, ibid., the language used by the Ad Hoc Committee is based on the subsequent suggestion of the

First, the duty under Art. 19(2) is really only to do whatever can already be done under the asylum country's own laws and policies.[318] While even the Secretary-General's draft did not attempt to require resettlement other than in accordance with national laws,[319] the British government persuaded governments to narrow the duty to require only such efforts as are "consistent[ ] with their laws and constitutional practices."[320] This language was further modified to refer simply to consistency with national laws and "constitutions" in order to make clear that no effort at odds with "constitutional usage"[321] would be expected. These changes were based on concern that "care should be taken not to offend the local authorities"[322] who in most cases were said to enjoy substantial autonomy in making immigration decisions. In the end, the duty of state parties under Art. 19(2) is really only to "do their best to convince the administrations of overseas territories that it [is] in their interest to attract refugees belonging to the liberal professions."[323]

Second, this duty to attempt to persuade does not apply to all subordinate territories of a state party. The broad approach taken by the Ad Hoc Committee,[324] based on the Secretary-General's rather expansive list of the entities which state parties should seek to influence,[325] was significantly constrained by the Conference of Plenipotentiaries. In keeping with the logical concern not to infringe the autonomy of administrators in subordinate territories, Art. 19(2) was reframed to refer only to a duty to exercise influence in relation to "territories for whose international relations [the state party is] responsible."[326] Even this formula was narrowed, based on British unwillingness to promote the establishment of professional refugees in

representative of the United Kingdom that governments commit themselves to "use their best endeavours . . . to secure the settlement of such refugees": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.14, Jan. 26, 1950, at 2, adopted by the Committee, ibid. at 4.

318 "It imposes upon [states] the moral obligation to try to secure such employment but only within the limits of existing legislation and the special rules governing the rights of the Contracting State in the dependent territory": Robinson, *History*, at 118.

319 Secretary-General, "Memorandum," at 35.

320 Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.14, Jan. 26, 1950, at 2.

321 Statement of Mr. Cuvelier of Belgium, ibid. at 3. This understanding was agreed to by the proponent of the amendment, Sir Leslie Brass of the United Kingdom, ibid. at 4.

322 Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 20. See also Statement of Sir Leslie Brass of the United Kingdom, ibid. at 19.

323 Statement of Mr. Rain of France, ibid. at 20.

324 The obligation of states was to encourage the resettlement of professional refugees to "colonies, protectorates or in Trust Territories under their administration": Ad Hoc Committee, "Second Session Report," at 20.

325 The original proposal extended to "colonies, protectorates and overseas territories, and . . . mandated or trust territories": Secretary-General, "Memorandum," at 35.

326 Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.34, July 25, 1951, at 24–25.

subordinate territories located near to the state party, and from which they might pose a competitive threat to nationals. Specifically, the British representative objected to any duty which might see more refugee professionals in "adjacent territories, like the Channel Islands, where the settlement of [professional] refugees must of necessity be governed by the same conditions as those obtaining in the United Kingdom itself."[327] The text as agreed therefore sets no duty to promote the settlement of refugee professionals in even dependent territories which might broadly be considered part of the state party's "metropolitan territory."

In sum, Art. 19(2) is no more than a minimalist form of compensation for the exclusion of refugee professionals from the benefit of the usual rules on either self-employment or wage-earning employment. It imposes only a duty to exercise suasion in line with existing national laws and constitutional usage, taking account in particular of the largely autonomous authority which many dependent territories enjoy over immigration. Even that duty of process applies only to those dependent territories whose international relations are under the authority of the state party, and which are not sufficiently proximate to the main territory of the state party to be considered part of its metropolitan territory.

There are potentially two means by which the rather bleak picture conceived by Art. 19 may be challenged. First, the limits of Art. 19 do not speak to all refugee professionals, but only to refugees who wish to practice a "liberal profession." While the notion of a "profession" as a branch of work is itself rather vague,[328] there is even less consensus on which professions may be said to be "liberal." Under the Secretary-General's proposal, for example, the term included, at a minimum, "qualified and experienced scientists, engineers, architects and doctors."[329] The drafters referred to lawyers and medical doctors as examples of persons who exercise a liberal profession,[330] but otherwise did not elucidate the term. Robinson, Weis, and Grahl-Madsen agree on a list of six liberal professions – physicians, dentists, veterinarians, lawyers, engineers, and architects – but otherwise disagree on the ambit of the term.[331]

[327] Statement of Mr. Hoare of the United Kingdom, ibid. at 25.

[328] For example, a profession may be defined simply as "a vocation or calling, especially one that involves some branch of advanced learning or science": *Concise Oxford Dictionary* 1092 (9th edn, 1995).

[329] Secretary-General, "Memorandum," at 36.

[330] See e.g. Statements of Mr. Cha of China, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 17; Mr. Cuvelier of Belgium, ibid. at 18; and the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.41, Aug, 23, 1950, at 18.

[331] Specifically, Robinson and Weis would add pharmacists and artists to the list of liberal professions, in at least some circumstances; Weis and Grahl-Madsen would include accountants; Robinson alone would include teachers; and Grahl-Madsen alone would

As a general principle, Grahl-Madsen suggests a fairly generous understanding of a liberal profession, focusing on two basic criteria. First, a "profession" is a type of work which requires formal qualification "normally confirmed by a diploma from a university, or a similar institution, or a licence from a State agency, a chartered society or some other legally competent body allowing him to practise."[332] Second, a "liberal" profession is one in which the individual "acts on his own, not as an agent of the State or as a salaried employee."[333] As he clearly insists, it would not make sense to classify an individual as a member of a liberal profession if, despite the possession of relevant formal qualifications, the work he or she proposes to undertake is not characterized by the independence of action which marks a liberal profession. Thus, "certain holders of academic diplomas are excluded from the application of the term, e.g. the clergy, judges, teachers, [and] scientists."[334]

Grahl-Madsen's relatively broad definition of a liberal profession was likely inspired by his desire to read Art. 19 in a way that would allow professional refugees "to receive the benefit of Article 19."[335] However, since Art. 19 is more accurately understood not as conferring a substantive benefit, but rather as limiting access to more generous rights which would otherwise accrue under Arts. 17 or 18, the human rights context of the Refugee Convention actually argues against giving this exception a broad reading. Helpful guidance on a somewhat more constrained approach to the definition of a "liberal profession" has recently been provided in a tax law decision of the European Court of Justice. In the Court's view, a liberal profession is an activity (1) of a marked intellectual character, (2) requiring a high-level qualification, (3) normally subject to clear and strict professional regulation, and (4) incorporating a personal element and a significant level of independence.[336] While clearly the Court did not have the particular objects and purposes of refugee law in mind when arriving at this formula, its guidance should nonetheless be instructive in that Art. 19 of the Refugee Convention appears to incorporate by reference a general term of art from outside the field of refugee law. Indeed, as Robinson observed, the intent was that "local authorities will decide in each case whether a person falls under the rubric 'liberal profession' or any other heading."[337]

treat interpreters and translators as members of a liberal profession: Robinson, *History*, at 118; Weis, *Travaux*, at 158; and Grahl-Madsen, *Commentary*, at 78. Weis would also include the salaried assistants to members of a liberal profession as liberal professionals themselves, while Grahl-Madsen would do so only if there are certain qualifications set by the state for undertaking such work: Weis, *Travaux*, at 158; Grahl-Madsen, *Commentary*, at 78–79.

[332] Grahl-Madsen, *Commentary*, at 78. [333] Ibid. [334] Ibid. [335] Ibid. at 79.

[336] *Urbing-Adam v. Administration de l'Enregistrement et des Domaines*, Dec. No. C-267/99 (ECJ, 2nd Ch., Oct. 11, 2001).

[337] Robinson, *History*, at 118.

To the extent that the European Court's logic is found persuasive, it helpfully limits the risk that any form of work requiring advanced education and involving largely independent activity is, for those reasons alone, deemed a liberal profession, thereby depriving the refugee of the more favorable treatment set out in Arts. 17 and 18. For example, neither France's restrictive approach to the employment of non-citizens, including refugees, as accountants and pharmacists, nor the refusal in parts of the United States to hire non-citizens as teachers could be justified on the basis of Art. 19. As wage-earners, refugees engaged in these forms of work would be entitled to benefit from the same treatment afforded most-favored foreigners in those countries, including the citizens of partner states.[338]

Even if the work which the refugee wishes to pursue cannot be classified as other than a liberal profession, a second and more general concern is that domestic laws or practices based on Art. 19 may breach the general duty of non-discrimination set by Art. 26 of the Civil and Political Covenant.[339] Art. 26 speaks to distinctions based on any form of status, and governs in any field regulated (directly or indirectly) by public authorities.[340] Its guarantee of equal protection of the law essentially requires that any distinction in the allocation of rights based on status be grounded in reasonable criteria. Thus, unless it can be shown that it is reasonable to disfranchise refugees who are liberal professionals relative to all other refugees,[341] the guarantee of equal protection of the law should operate to invalidate their exclusion from the more liberal rules on access to work set by Arts. 17 and 18.[342]

Showing the reasonableness of this sort of exclusion would likely be a difficult task. As Robinson warned, "[t]here is no clear-cut distinction between certain liberal professions (for instance, pharmacists, engineers) and either self-employment (owner of an engineering firm or a pharmacy)

[338] See chapter 6.1 above.

[339] See generally chapter 2.5.5 above. The duty of non-discrimination set by Art. 3 of the Refugee Convention itself is not relevant to this question, as it is textually limited to the prohibition of discrimination "as to race, religion, or country of origin": see chapter 3.4 above.

[340] See chapter 2.5.5 above, at pp. 123–125.

[341] While the UN Human Rights Committee has established an extraordinarily broad margin of appreciation for distinctions based on citizenship, there is no reason to believe that comparable deference would be forthcoming when the distinctions made govern the allocation of rights within the class of refugees, none of whom can claim the arguably special bond which citizenship entails: see chapter 2.5.5 above, at pp. 127–133. On the other hand, because of this margin of appreciation, it is less clear that the duty of non-discrimination would prove of assistance to refugee professionals faced with accreditation processes applied generally to non-citizens, but which set standards for qualification that appear significantly greater than required to ensure professional competence.

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

or wage-earner (non-self-employed engineer, pharmacist, chemist)."[343] Because the "bright line" is so unclear, it is difficult to imagine the principled basis for the much more rigorous approach adopted in Art. 19. If there is no sound basis for denying refugees who are liberal professionals the right to earn a livelihood on terms as favorable as those granted to all other refugee workers (who are either self-employed, wage-earners, or indeed members of professions not defined as liberal), then the duty of non-discrimination is a presumptive barrier to the establishment or continuation of policies based on the approach stipulated in Art. 19 of the Refugee Convention. If reliance on Art. 19 were to be invalidated, the right to work of refugees who are liberal professionals would be determined not by their status as liberal professionals, but on the basis of an objective assessment of the work to be undertaken as either self-employment or wage-earning employment.[344]

6.3 Public relief and assistance

Consideration was previously given to the various predicaments faced by refugees seeking to meet their basic needs upon arrival in an asylum country, or while waiting for a decision to be taken on the verification of their claim to refugee status.[345] For the most part, persons recognized as refugees, or who are otherwise allowed to stay in the host country on an ongoing basis, are less vulnerable than those in the early stages of seeking a state's protection, primarily because refugees lawfully staying are entitled to earn their living through work.[346] But for refugees unable to work, or for whom work is either unavailable or too poorly paid, it may still be impossible to meet even basic needs. Nor does the right of refugees to access social security programs necessarily provide an answer to their dilemma, as most such programs base entitlement on employment-based contributions. The refugee may not yet have been in a position to have worked and contributed in the host country, and his or her contributions made abroad may not be relevant to the qualification calculus.[347] As such, the question of access by refugees to a country's general system of social support is often key.

[343] Robinson, *History*, at 118.

[344] The invalidation of Art. 19 would, perhaps ironically, further the goal set by the Final Act of the Conference of Plenipotentiaries, which "[e]xpress[ed] the hope that the Convention ... will have value as an example exceeding its contractual scope": "Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons," 189 UNTS 37, adopted July 28, 1951, at Art. E.

[345] See generally chapter 4.4 above, and in particular discussion of the right of all refugees to be free from deprivation, to access food and shelter, and to receive basic healthcare in chapters 4.4.1, 4.4.2, and 4.4.3 respectively above.

[346] See chapter 6.1 above.

[347] See chapter 6.1.3 above.

As earlier described, refugees in much of the less developed world are expected to meet their own needs by independent economic activity undertaken in organized settlements.[348] Yet because self-sufficiency is rarely immediately achieved, refugees are typically provided for some period of time with food rations, as well as educational, health, and other basic community services.[349] For example, the Eastern Sudan Refugee Program focused on enabling refugees to meet their needs through the cultivation of sorghum and provision of seasonal labor to others, but nonetheless provided the members of vulnerable groups (that is, refugees with low incomes, pregnant women, nursing mothers, and young children) with access to preventative healthcare programs, medical services, and food supplements.[350] But it is not always possible for refugees ever to achieve real self-sufficiency. For example, the land assigned for farming may be too small, environmentally degraded, or too far from markets. In such circumstances, there is often a long-term need for a more general economic supplement program.

Too often there are no local funds to meet such needs and international donors cannot be found to fill the void. In the Ikafe refugee settlement in Uganda, for example, most refugees were able to grow some food, but drought and rocky conditions limited the success of harvests. Other refugees, including the old, sick, and injured, were unable to farm at all. Yet the World Food Program was unable to secure pledges sufficient to meet even basic nutritional requirements, forcing it to impose significant reductions in supplementary maize distributions to the refugees.[351]

There are also frequently real difficulties when a decision is taken by local or international authorities that refugees in a given settlement have reached an adequate level of self-sufficiency, such that assistance can be terminated. UNHCR and the Mexican government decided in 1986 that Guatemalan refugees should be able to meet their own needs from their increasing harvest

[348] See chapter 6.1 above, at p. 733.

[349] V. Lasailly-Jacob, "Government-Sponsored Agricultural Schemes for Involuntary Migrants in Africa: Some Key Obstacles to Their Economic Viability," in H. Adelman and J. Sorenson eds., *African Refugees: Development Aid and Repatriation* 213 (1994).

[350] As a result of these services, "the population's health and nutrition standards have improved, and immunization programmes have been very successful": 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* 197 (1994).

[351] N. van der Gaag, "Food and Fair Shares," [Sept. 1996] *New Internationalist* 14. Comparable problems persist. "Despite the dangers [of armed attack], the overwhelming majority of Sudanese refugees continued to live in nearly two dozen designated settlements in northern Uganda, where they had access to farmland. Farming plots were small and only semi-fertile, however, and the unsafe conditions forced some refugees to curtail their agricultural activities": US Committee for Refugees, *World Refugee Survey 2003* (2003), at 102.

yields, though the refugees protested that they were in fact only barely making ends meet.[352] Similarly, the World Food Program strictly enforced a two-year limit on the provision of food rations to Ethiopian refugees in Sudan on the grounds that self-sufficiency should be achieved within that timeframe. In fact, the refugees were not yet able to meet their own needs, forcing other agencies to step in to continue a food program for the members of vulnerable groups with no possibility of earning a living.[353] The problems may be particularly acute where transitional support has been provided to refugee settlements through a parallel support system (often internationally funded), rather than as part of the general system for meeting the needs of nationals. The separateness and consequent relative invisibility of such parallel programs frequently means that local officials fail to see themselves as in any sense responsible for refugee welfare when international aid ends, particularly when faced with their own endemic problems of limited resources and other pressing priorities.[354]

Refugees in less developed countries not living in organized settlements may receive even less public assistance than those who agree to live in organized settlements. A notable exception is South Africa, where the Constitutional Court struck down as unconstitutional laws which denied destitute Mozambican refugees the full benefit of national assistance programs, including child support and old-age dependency grants.[355] Elsewhere there are sometimes successful assistance projects directed towards self-settled refugees, including initiatives undertaken in the Kigoma region of Tanzania, in the Western Province of Zambia, and in Bas Zaïre.[356] But much more commonly, whatever assistance is available tends to be directed to refugees residing in government-approved settlements. In the result, "[a]n estimated 60 percent of the total number of refugees [in Africa] receive no aid of any sort."[357]

[352] "'We don't starve,' the refugees say, but often they have to be content with 'tortilla with salt,' which is rock bottom and the symbol of poverty": 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, at 20.

[353] El Bushra, "Educational Needs," at 22.

[354] L. Clark, "Key Issues in Post-Emergency Refugee Assistance in Eastern and Southern Africa," paper presented at the UNHCR/DMC Emergency Managers Training Workshop (1987) (Clark, "Post-Emergency"), at 16.

[355] The Court determined that the constitutional right of "everyone" to enjoy equality, social security, and the protection of children meant that laws that withheld relevant social benefits from non-citizens should be struck down: *Khosa et al. v. Minister of Social Development*, (2004) 6 BCRR 569 (SA CC, Mar. 4, 2004).

[356] Clark, "Post-Emergency," at 22.

[357] S. Ricca, *International Migration in Africa: Legal and Administrative Aspects* (1989), at 139. See also A. Hansen, "African Refugees: Defining and Defending Their Human Rights," in R. Cohen et al. eds., *Human Rights and Governance in Africa* (1993), at 153.

To some extent, UNHCR has sought to fill the assistance gap for self-settled refugees, particularly those living in urban areas. Despite the agency's efforts, the aid made available to urban and other self-settled refugees normally does not meet the refugees' real needs.[358] In Costa Rica, UNHCR cash allowances to Salvadoran refugees amounted at times to less than half the cost of basic food, and were then eliminated entirely.[359] Urban refugees in Cairo received 72 percent less assistance from UNHCR in 2002 than in 1998, leaving many refugee families well below Egypt's poverty line. As one Sudanese refugee living there explained,

> We now receive less than 100 Egyptian pounds a month. I could not find an apartment with an address. The only place I found is a tiny room in the shantytown with 20 people, where there is no running water and most definitely no electricity.[360]

Circumstances were so dire for refugees in Zimbabwe in 1998 that some 100 refugees besieged the UNHCR office in Harare to protest the lack of "meaningful allowances," taking two UNHCR officials hostage until funds were disbursed.[361]

For the most part, comparable problems do not exist in the developed world. Once their refugee status is recognized, most refugees in the North benefit from the same public assistance programs as are available to citizens. A notable exception is Denmark, which amended its laws in 2002 to withhold

[358] UNHCR "faces significant funding shortfalls. Based on the agency's original budget appeal, UNHCR last year suffered a deficit of about $160 million. However, the agency continues to reduce its budget in response to donor demands ... Budget problems consistently delay food deliveries, impede repairs to refugee schools and water systems, deprive refugee women of sanitary supplies, and impede efforts to move refugees to safer locations": Immigration and Migration Services of America, "Advocates Push for Increased Funding for MRA and ERMA in FY 2003," (2002) 23(4) *Refugee Reports*.

[359] Such was the case in 1983; assistance was increased in 1984, then cut off completely in 1985: Basok, *Heads Above Water*, at 57–58.

[360] "Hard times for Cairo's refugees," *UNHCR News Stories*, Nov. 25, 2002, quoting Marta Bole. More specifically, "[s]ix years ago, UNHCR assisted more than 4,400 refugees in Cairo with a $2.9 million budget, doling out on average $660 to each person over the year. [In 2002], with more than 9,000 refugees assessed to be in need of aid, UNHCR Cairo has only $1.5 million for its urban assistance program, or about $171 for each refugee": ibid.

[361] "Two senior local UNHCR officials, who were kept hostage for one night by the demonstrating refugees, were only set free yesterday afternoon after the Zimbabwean government intervened, and the refugees' delayed stipends were disbursed": L. Machipisa and J. Deng, "Refugees in Zimbabwe face hard times," *InterPress Service*, June 3, 1998. "While the refugees in Zimbabwe say they understand the problems facing UNHCR, they argue that their allowances in Zimbabwe should reflect the movement of the Zimbabwean dollar and the rising prices in the Southern African nation. The refugees say that their monthly stipends are paid late, and several have been evicted from their places of residence as a result": *SAPA*, June 4, 1998.

full welfare benefits from refugees until they are eligible for permanent resident permits – thus effectively excluding refugees from full social support for seven years.[362] But under the European Union's new rules, "Member States shall ensure that beneficiaries of refugee status . . . receive, in the Member State that has granted such status[ ], the necessary social assistance, as provided to nationals of that Member State."[363] Similarly, Canada assimilates refugees to citizens for purposes of its public assistance programs,[364] and Australia amended its rules governing disability support pensions in 1995 to ensure that refugees are exempted from the ten-year residence requirement imposed before benefits are paid to most immigrants.[365] In practice, however, even states which recognize the entitlement of refugees to be treated as citizens for purposes of public assistance may not always take the procedural steps needed to provide that access on terms of genuine equality. For example, in the United Kingdom the transition from the less generous regime governing assistance to persons awaiting the results of their claim to full entitlement is reported to be problematic for many refugees:

> Destitute families are having to wait six months or more for national insurance numbers, which should arrive in a fortnight. Without these numbers, the refugees cannot receive benefits, so they have no income and are unable to apply for any government help . . . The benefits agency needs immigration identification forms to allocate financial support. But . . . many of these forms are being misplaced or badly written, resulting in benefits being withheld.[366]

The situation in the North is much less positive for refugees channeled by states into so-called "temporary protection" or other auxiliary categories. The extent to which public relief and assistance are granted has traditionally varied significantly from one state to another.[367] Refugees in receipt of

[362] A. Osborn, "Danes justify harshest asylum laws in Europe," *Guardian*, June 29, 2002, at 15.

[363] EU Qualification Directive, at Art. 28. The practice of most European countries has traditionally been in line with this standard. For example, Denmark, France, Germany, Sweden, and the United Kingdom routinely granted formally recognized refugees the same treatment as citizens under their welfare laws: Lambert, *Seeking Asylum*, at 174–177.

[364] F. Crépeau and M. Barutciski, "The Legal Condition of Refugees in Canada," (1994) 7(2/3) *Journal of Refugee Studies* 239.

[365] "By an internal Departmental circular dated May 1994, it was noted that the Government was to introduce amending legislation, effective from 1 January 1995, providing that persons with refugee status could have access to DSP notwithstanding less than ten years' residence": *Scott v. Secretary, Department of Social Security*, [2000] FCA 1241 (Aus. FFC, Sept. 7, 2000).

[366] A. Chrisafis, "Christmas charity appeal: Beaten in Kabul, then left derelict in Leicester," *Guardian*, Dec. 12, 2001, at 11.

[367] IGC, *Temporary Protection*, at 96, 109, 153, 220, 245.

temporary protection in the United States have been granted access to some forms of food aid, but not to the major income support programs.[368] Refugees in receipt of temporary protection visas in Australia now receive special benefits, medical care, and trauma counseling, but cannot access the mainstream social welfare system.[369] This general approach to temporary protection replaced a variable system of entitlements, under which, for example, Australia allowed temporarily protected Chinese refugees access to its medical care system, but gave temporarily protected refugees from Sri Lanka and the former Yugoslavia access only to emergency healthcare.[370]

In Europe, the beneficiaries of temporary protection have also traditionally received inferior access to public assistance compared with persons formally recognized as refugees. Denmark, Germany, the Netherlands, and Sweden have provided the beneficiaries of temporary protection with only a minimal maintenance allowance, similar to that granted persons seeking recognition of their refugee status.[371] In Italy, temporarily protected refugees have been eligible only for employment-related social security.[372] This general pattern of differential treatment of persons in receipt of temporary protection was codified by the European Union in 2001. The new Council directive does not set a national treatment standard, but instead requires only that "Member States shall ensure that persons enjoying temporary protection have access to suitable accommodation or, if necessary, receive the means to obtain housing. The Member States shall make provision for persons enjoying temporary protection to receive necessary assistance in terms of social welfare and means of subsistence, if they do not have sufficient resources, as well as for medical care."[373]

[368] Ibid. at 234–235. "Under the new welfare law, these restrictions continue and others are added (no job training or federal share of unemployment insurance, for example) because TPS beneficiaries are considered to be 'non-qualified aliens' for purposes of public benefits": S. Martin and A. Schoenholtz, "Fixing Temporary Protection in the United States," in US Committee for Refugees, *World Refugee Survey 1998* (1998), at 40.

[369] J. Centenera, "ACT to help refugees with adjustment," *Canberra Times*, July 12, 2000, at A-1. Whereas refugees holding permanent visas have "[i]mmediate access to the full range of social security benefits," temporary protection visa holders have "[a]ccess only to Special Benefits for which a range of eligibility criteria apply": Refugee Council of Australia, "Position on Temporary Protection Visas," Nov. 1999. "Any Special Benefit entitlement [for TPV holders] is stringently means-tested and is reviewed every 13 weeks": Australian Department of Immigration and Multicultural and Indigenous Affairs, "Factsheet No. 64: Temporary Protection Visas," Aug. 28, 2003.

[370] IGC, *Temporary Protection*, at 49, 235.

[371] Liebaut, *Conditions 2000*, at 62–63, 122, 221, 286. See also IGC, *Temporary Protection*, at 83, 122, 153, 195. German courts were reported sometimes to have denied even this modest allowance to Bosnian refugees on grounds that their presence in Germany was motivated by a search for social assistance: Büllesbach, "Civil War Refugees," at 51.

[372] IGC, *Temporary Protection*, at 49, 132.

[373] EU Temporary Protection Directive, at Art. 13.

Refugee Convention, Art. 23 Public relief
The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

In view of the controversy which frequently exists regarding the right of refugees to benefit from public assistance programs, both the simplicity of Art. 23 and the ease with which its adoption was secured are quite astounding. Not only did Art. 23 effect a significant enhancement in entitlement beyond the standard of earlier refugee conventions, but it remains a provision without parallel in general international human rights law.

Under both the 1933 and 1938 treaties, certain refugees residing in state parties were entitled to "such relief and assistance as they may require, including medical attendance and hospital treatment."[374] But the right to receive relief and assistance was limited to several categories of refugees deemed inherently unable to earn their own living,[375] and was payable only to the same extent that relief and assistance were provided to most-favored foreigners. The drafters of the 1951 Convention abolished both limitations, opting to guarantee public relief and assistance to all refugees lawfully staying in a state's territory, and setting the standard for compliance as "the same treatment . . . as is accorded to their nationals."[376] Because there is nothing in the drafting history to suggest any implied limitation on Art. 23's broadly framed and inclusive text, Grahl-Madsen logically concludes that the provision requires that "refugees get the same material benefits [as citizens], with the same minimum of delay."[377] The provisions in the European Union's Qualification Directive which guarantee access to welfare by recognized refugees,[378] traditional Canadian practice, the inclusive approach to social welfare eligibility mandated by the South African Constitutional Court, and Australia's decision to exempt refugees from the waiting period for disability support imposed on other immigrants are all policies in line with this standard.

[374] Convention relating to the International Status of Refugees, 159 LNTS 3663, done Oct. 28, 1933, entered into force June 13, 1935 (1933 Refugee Convention), at Art. 9; Convention concerning the Status of Refugees coming from Germany, 4461 LNTS 61, done Feb. 10, 1938 (1938 Refugee Convention), at Art. 11.

[375] Specifically, the two treaties enfranchised "unemployed persons, persons suffering from physical or mental disease, aged persons or infirm persons incapable of earning a livelihood, children for whose upkeep no adequate provision is made either by their families or by third parties, pregnant women, women in childbed or nursing mothers": 1933 Refugee Convention, at Art. 9; 1938 Refugee Convention, at Art. 11.

[376] This approach was recommended in the French draft of Art. 23, which would have required national treatment for refugees regularly resident in a state party with regard to "insurance and social security (including industrial accident compensation) and all forms of public relief": France, "Draft Convention," at 7.

[377] Grahl-Madsen, *Commentary*, at 89. [378] EU Qualification Directive, at Art. 28.

On the other hand, Art. 23 was clearly contravened by the Danish decision to withhold access to the full national welfare system for the seven years required for a refugee to become eligible for a permanent resident permit. Similarly, Costa Rica acted contrary to Art. 23 when it failed to grant refugees access to its domestic family allowance system as UNHCR assistance to the refugees was reduced, and then ended altogether.[379] Indeed, the requirements of Art. 23 also call into question the administrative practices of the United Kingdom to the extent that they delay implementation of that country's formal commitment to the assimilation of recognized refugees to citizens for purposes of social welfare entitlement.

There are, however, two critical constraints on the right of a refugee to claim full access to national systems of public relief and assistance. First, this is a right only of a refugee who is "lawfully staying" in the state party concerned. Prior to that time, including both when a refugee is simply under a state's authority and even while status verification is not yet completed, the refugee may claim only the more modest guarantee of access to the necessities of life, previously considered in some depth.[380] In brief, the Convention requires that all refugees, whatever their attachment to the host country, be treated as nationals under whatever rationing systems may exist,[381] while the Economic Covenant sets a duty of progressive, non-discriminatory implementation of a more broadly framed right to an adequate standard of living, as well as an immediate duty to provide everyone with the essential core of the rights to food, shelter, healthcare, and education.[382] But none of these rights require the full assimilation of refugees to citizens for purposes of comprehensive access to social welfare systems.

This issue of attachment sometimes arises in the developed world when refugees are diverted into so-called "temporary protection." For reasons previously discussed, such refugees are "lawfully staying" and thus entitled to the benefit of Art. 23.[383] As such, Australia's new system under which many refugees are granted temporary protection visas which exclude them from access to the mainstream social support system is presumptively in breach of Art. 23. Unless the government can show that the various benefits offered under its special income support regime for such refugees are substantively equal to those available to its own citizens under general programs,[384] the program does not respect the duty to assimilate refugees to nationals for

[379] Since 1974, Costa Rica has relied on a combination of sales tax revenue and payroll taxes to fund a system of relief for indigent persons not entitled to a contributory pension: US Social Security Administration, "Social Security Programs throughout the World" (1999), available at www.ssa.gov (accessed Feb. 28, 2005).

[380] See chapter 4.4 above. [381] See chapter 4.4.1 above.

[382] See chapters 4.4.2, 4.4.3, and 4.8 above. [383] See chapter 3.1.4 above, at p. 188.

[384] See text below, at p. 812.

purposes of public relief and assistance.[385] Similarly, the terms of a settlement granting protection to Salvadoran and Guatemalans in the United States denied them access to the US asylum system, and diverted them into a temporary protection regime.[386] In such circumstances, application of the American rules that deny certain benefits to temporarily protected refugees, including access to its major income support programs, cannot be reconciled to Art. 23. The same was true of many traditional temporary protection initiatives in Europe which effectively gave some refugees, such as those from Bosnia, no choice but to accept protection under a temporary protection regime with less-than-full-Convention welfare rights.[387] While the new European Union rules on temporary protection also fail to ensure access to public welfare on terms of equality with citizens, they do not breach the Convention by virtue of the critical right of any person entitled to temporary protection to opt instead to claim Convention refugee status, including of course access to the Convention's right to benefit from public relief and assistance programs on the same terms as citizens.[388]

The other key limitation is that Art. 23 does not require a state to grant refugees any public relief or assistance unless it provides relief or assistance to its own citizens. It is a matter of some contention whether states are under any duty to establish a public welfare system,[389] and in practice many poorer

[385] The earlier Australian approach, under which temporarily protected refugees of different nationalities received different social welfare benefits, was likely in breach of both Art. 3 of the Refugee Convention and Art. 26 of the Civil and Political Covenant. See chapters 2.5.5 and 3.4 above.

[386] *American Baptist Churches v. Thornburgh*, 760 F Supp 796 (US DCNDCa, Jan. 31, 1991).

[387] See e.g. D. Sopf, "Temporary Protection in Europe After 1990: The 'Right to Remain' of Genuine Convention Refugees," (2001) 6 *Washington University Journal of Law and Policy* 109.

[388] EU Temporary Protection Directive, at para. 17(1). This provision ensures that a genuine refugee may not be compelled to accept protection under a lesser regime.

[389] Art. 9 of the Economic, Social and Cultural Covenant requires state parties to "recognize the right of everyone to social security, including social insurance." Both "social security" and "social insurance," however, are terms of art that are generally understood to refer to "the 'earned' ... benefits of workers and their families [as contrasted with] ... need-based assistance from public funds, raised through tax revenues": Scheinin, "Social Security," at 159. The best argument that there is at least a principled duty to "recognize" the right of everyone to a broader notion of (non-contributory) social assistance is that the Committee on Economic, Social and Cultural Rights has required states to report on compliance with Art. 9 by providing information on a broad range of "social security" initiatives, including "medical care, cash sickness benefits, old age benefits, invalidity benefits, survivors' benefits, employment injury benefits, unemployment benefits, [and] family benefits": "Revised Guidelines Regarding the Form and Content of Reports to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights," UN Doc. E/1991/23 (1992). Clearly some of these matters are more likely to be social assistance programs than true social security

states have failed to do so. Because Art. 23 requires only equivalency of treatment with that afforded citizens, there is no case to be made under Art. 23 in respect of the failure by asylum states such as Kenya,[390] Sudan,[391] and Uganda[392] to provide welfare assistance to refugees, since these states lack a meaningful social assistance program for their own nationals. In such situations, refugees can invoke only the more general guarantee of the right to an adequate standard of living, in particular to benefit from the four core rights – to basic food, shelter, education, and healthcare – which, as described earlier, must be provided to all persons whatever the circumstances of the host country.[393] The situation is not improved for refugees where the shortfall occurs because of the insufficiency of internationally funded aid, as there is presently no more than a principled obligation on the part of wealthier states to provide aid to poorer countries.[394]

But where social welfare systems do exist, even at a rudimentary level, the Refugee Convention is breached to the extent that refugees are not fully enfranchised under national initiatives. Thus, refugees lawfully staying in Mexico are entitled to benefit from that country's recently established education-based welfare program, which provides healthcare and cash payments to the mothers of poor children who remain in school.[395] It would no longer be lawful for the government and UNHCR to say, as they did in the 1980s, that

programs. To the extent that governments accede to this understanding of Art. 9, state practice may provide the basis for asserting a more general duty to establish a public welfare system, albeit in the context of the general duty to abide by the treaty only through progressive, non-discriminatory implementation.

390 Kenya lacks any major social support programs. While officially the country supports a National Social Security Fund and a National Hospital Insurance Fund, both programs appear to be near collapse and provide no real support to the poor: A. Obondoh, "Economic Inequalities and Social Exclusion – The Core Objects of the Structural Reform Agenda," *Eco News Africa*, Nov. 2001.

391 Sudan operates pension funds for public and private sector workers (the National Pensions Fund and the National Social Insurance Fund) but appears not otherwise to operate any form of social welfare program: United States Social Security Administration, "Social Security Programs throughout the World" (1999), available at www.ssa.gov (accessed Feb. 28, 2005).

392 Most social welfare programs within Uganda appear to be funded by international organizations and missionaries, which operate hospitals and rural clinics. Social welfare as such is not provided by the government: Microsoft Encarta, "People and Society – Uganda 2000," available at www.magic-safaris.com (accessed Aug. 12, 2002).

393 See chapter 4.4.2 above, at pp. 488–490. 394 Ibid. at pp. 491–494.

395 A. Krueger, "Economic sense," *New York Times*, May 2, 2002, at C2; J. Egan, "Mexico's welfare revolution," *BBC News Online*, Oct. 15, 1999, available at www.bbc.co.uk (accessed Feb. 28, 2005). "[B]y the start of 2000, the program had enlisted two million families in Mexico, or about one-tenth of the entire Mexican population": T. Schultz, "School Subsidies for the Poor: Evaluating a Mexican Strategy for Reducing Poverty," International Food Policy Research Institute FCND Discussion Paper No. 102, Mar. 2001, at 3.

refugees should sustain themselves without access to state support. This is so despite any shortfall of funds, or lack of international assistance. In this sense, Art. 23 of the Refugee Convention effectively enables refugees to avoid the general right under the Economic Covenant of poorer countries to limit the extent to which they will grant economic rights to non-citizens.[396] But this does not mean that the needs of refugees will necessarily be satisfied. For example, in Zimbabwe the only relief system not funded by private sector contributions is a basic healthcare program for low-paid workers.[397] So long as the benefits of this program are extended to refugees, the fact that cash allowances granted to refugees are viewed as inadequate does not infringe Art. 23.

As these examples make clear, the scope of the entitlement to benefit from public welfare programs under Art. 23 is quite broad.[398] The decision was made by the drafters not to define the intended beneficiaries of "public relief and assistance" in the text of the Convention since "such an enumeration was of necessity incomplete."[399] Instead, the drafters opted to defer to each state's own decision, "since it was, in point of fact, national legislation which determined the categories of persons eligible for public relief."[400] During the debates, however, no objection was taken to the Secretary-General's proposal that public relief would ordinarily be understood to include benefits paid to persons "suffering from physical or mental disease and incapable because of their condition or age of earning a livelihood for themselves and their families, and also to children without support."[401] Specific reference was also made to assistance to the blind,[402] hospital care,[403] and emergency relief[404] as forms of public relief or assistance.[405] Indeed, the only subject

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

[397] The healthcare program "[c]overs about 75% of the population. [It provides] [f]ree primary health care for those earning below Z$400 per month; proof must be provided. Government and mission hospitals serve rural areas; government and private hospitals and doctors are available in urban areas": US Social Security Administration, "Social Security Programs throughout the World" (1999), available at www.ssa.gov (visited Feb. 28, 2005).

[398] See Weis, *Travaux*, at 174: "What is meant by public relief and assistance depends on national law, but the concept should be interpreted widely."

[399] Statement of Mr. Metall of the International Labor Organization, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 7.

[400] Statement of Mr. Weis of the International Refugee Organization, ibid.

[401] Secretary-General, "Memorandum," at 39.

[402] Statement of Mr. Metall of the International Labor Organization, UN Doc. E/AC.32/2, Jan. 3, 1950, at 7; and Statement of Mr. Rain of France, ibid. at 8.

[403] Statement of Mr. Malfatti of Italy, UN Doc. E/AC.32/SR.38, Aug. 17, 1950, at 4.

[404] Ibid.

[405] Grahl-Madsen concludes that "[d]uring the discussion in the Ad Hoc Committee it was firmly stressed that public relief encompasses hospital treatment, measures of relief for

which generated any controversy was whether Art. 23 covered compensation in the event of unemployment. But the difference of view really reflected only the variant ways in which unemployment benefits are delivered in different states – in some via a contributory scheme, therefore more logically understood as a form of social security, in others via a state-funded program, thus properly deemed public relief or assistance.[406] In the end, the distinction will usually be of no practical significance to refugees, since refugees lawfully staying are entitled to national treatment under *both* social security and public relief and assistance initiatives.[407]

Not only are refugees entitled to access all of the same public relief and assistance benefits provided to citizens, but they may not be denied that relief or assistance on the grounds that under a particular country's system such benefits are provided only to citizens with a close affiliation to a particular region or community. Indeed, the drafters formally recorded the view that "refugees should not be required to meet any conditions of local residence or affiliation which may be required of nationals."[408] To the extent that a common system for implementation of the duty to treat refugees on terms of equality with citizens is felt inappropriate – for example, where the usual local residence requirement reflects the fact that it is the community itself that funds the public relief and assistance – it is open to the government to organize the logistics of equal treatment in whatever way it deems appropriate.[409]

the blind, as well as emergency relief. It may be taken for granted that the Article also covers the cases specified in Article [9] of the 1933 Convention": Grahl-Madsen, *Commentary*, at 88–89. The scope of Art. 9 of the 1933 Refugee Convention is set out above, at p. 806.

406 "[I]t would be difficult to mention the unemployed in article [23], because legislation concerning the unemployed varied according to the country; in Belgium, for example, unemployment was covered by insurance rather than by assistance": Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 5. On the other hand, the British representative felt that unemployment benefits should be mentioned in Art. 23 because under his country's system the insurance component of unemployment benefits "did not take effect until a certain number of contributions had been paid and it was granted for a specific period only, after which the unemployed person would, if necessary, receive assistance from public relief. That example would suffice to show that it was not superfluous to mention the unemployed in article [23]": Statement of Sir Leslie Brass of the United Kingdom, ibid. at 6–7.

407 See Robinson, *History*, at 124: "No difficulties will, as a rule, arise in practice concerning the delimitation between public relief and assistance on the one hand, and social security on the other, because the Convention provides for the same treatment, in both instances, except for the cases enumerated in Art. 24(1)(b)(i) and (ii)." With regard to the meaning of the latter limitations, see chapter 6.1.3 above, at pp. 778–781.

408 Ad Hoc Committee, "Second Session Report," at 13.

409 "The article, however, permitted the grant of relief and assistance in whatever way States desired; it did not specify the way": Statement of Mr. Henkin of the United States, UN

This matter was of particular concern to the Swiss delegate, who observed that in his country "indigent Swiss nationals were helped by the cantons and communes, whereas refugees were helped by charitable organizations to which the Confederation refunded all or 60% of the cost of the relief given. In that way, refugees did not have to apply to officials in small communes for whom it was perhaps more difficult to understand their special position."[410] To this, the Chairman of the Ad Hoc Committee replied that

> the Committee had not intended to interfere with the administrative systems of any country. It had merely endeavoured to secure the same public relief and assistance for refugees as for nationals. It did not matter whether relief and assistance were provided out of federal, cantonal, or municipal funds; the only thing that mattered was that the State should guarantee that in some way relief would be given to refugees.[411]

In short, it is the end result that counts:

> [T]he principle of article [23] was clear: the refugees should be accorded the same treatment with respect to public relief and assistance as was accorded to nationals, and it did not matter how the treatment was accorded, provided the results were the same.[412]

Perhaps the most interesting question is just what accounted for the decision of the drafters so comprehensively to embrace refugees in the public relief and assistance systems of state parties, even though they were well aware of the potential magnitude of the commitment being made.[413] Their decision was in part driven by pragmatic considerations, rooted in the view that the

Doc. E/AC.32/SR.38, Aug. 17, 1950, at 6. A state's right to design the mechanism for implementation must, of course, not breach any other duty under the Convention. For example, the Venezuelan representative noted that in his country refugees with infectious diseases were sometimes not treated in public hospitals and institutions, but were instead sent to medical facilities outside the country (something "[t]hat could not of course be done to a national"): Statement of Mr. Perez Perozo of Venezuela, ibid. at 7. The American and Canadian representatives seemed generally to view this practice as not contrary to Art. 23, though suggesting that its legality would be subject to Art. 32's rules on expulsion: Statements of Mr. Henkin of the United States and Mr. Winter of Canada, ibid.

410 Statement of Mr. Schurch of Switzerland, ibid. at 5.

411 Statement of the Chairman, Mr. Larsen of Denmark, ibid. at 5.

412 Statement of Mr. Henkin of the United States, ibid. at 6. As Grahl-Madsen put it, "what interested the drafters was the material situation, not procedure": Grahl-Madsen, *Commentary*, at 89.

413 At the Conference of Plenipotentiaries, the Italian delegate explicitly raised the issue of the real cost to state parties of complying with Art. 23. He noted that Italy had signed a specific agreement with the IRO under which it had admitted "a large number of refugees, 1,000 of whom had been hard-core cases requiring hospital treatment. In respect of those cases, the Italian Government had agreed to pay the same benefits as to Italians in respect of public assistance, for as long as the refugees concerned lived. That

provision of public relief and assistance to refugees lawfully staying in a state party is, at least over time, an economically efficient response.[414] But more fundamentally, there was clearly a strong sense that assimilating refugees to citizens for purposes of public relief and assistance was simply the right thing to do. As the Secretary-General's background study cogently observed, destitute refugees could not expect their country of origin to assume liability for their support in the host country, as most bilateral treaties on point required. Yet, unlike most non-citizens, they could not safely return home to benefit from their own country's support systems.[415] Since the needs of refugees are no less than those of citizens and their options for external support are essentially non-existent, it was recognized that there really was no ethical option but to assimilate them to citizens for purposes of access to public relief and assistance. In the simple but poignant words of the French representative to the Ad Hoc Committee, "it would be inhuman to deny such assistance to refugees."[416]

6.4 Housing

The majority of refugees who seek protection in the less developed world are expected to live in organized camps or settlements, even after the emergency reception phase has passed.[417] Indeed, some refugees must make do for substantial periods of time with makeshift dwellings. Refugees in Ethiopia,

represented a very considerable burden, particularly as there was small probability of their being able to work. Thus it would be very difficult for the Italian Government to give an undertaking in the terms of article [23] in respect of an indefinite number of refugees": Statement of Mr. Theodoli of Italy, UN Doc. A/CONF.2/SR.10, July 6, 1951, at 18. (In the result, Italy opted to enter a reservation to Art. 23, which it withdrew on Oct. 20, 1964.) Immediately after this comment by Italy, Art. 23 was unanimously adopted by the Conference without change: ibid. at 19.

414 "Apart from the humanitarian aspect of the matter, it was in the national interest to grant public relief to refugees, for the slight assistance provided at home involved much less expense than hospital treatment": Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 6.

415 "Most of the conventions dealing with public assistance contain certain stipulations which cannot be satisfied in the case of refugees, such as the requirement that the State of which the recipient of relief is a national should either repatriate him or assume liability for the cost of assistance": Secretary-General, "Memorandum," at 39.

416 Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 6.

417 "It is often host governments, who in their desire to have control over refugees and to discourage their permanent settlement, insist on the camp or organised settlement solution ... It is apparent that camp-confined refugees make better pawns in the international power play for donor assistance, both for host governments and for aid providers": T. Hoerz, "Refugees and Host Environments: A Review of Current and Related Literature," [Aug. 1995] *Deutsche Gesellschaft für Technische Zusammenarbeit* 18. The housing rights of refugees immediately upon arrival are discussed in chapter 4.4.2 above, at pp. 504–507.

for example, were left sheltering under the remaining shreds of eight-year-old plastic sheeting when funds ran out for UNHCR's Horn of Africa operation in the early 1990s.[418] Others are more fortunate: Afghan refugees in Pakistan were initially given only tents for shelter, but were later able to replace them with traditional mud-brick buildings.[419]

Settlements located in remote or marginal areas may be confronted with absolute shortages of essential building materials, or rising demand may drive the price of materials beyond what refugees or the agencies assisting them can afford to buy.[420] When aid is available, some donors are reluctant in practice to involve refugees in the design or building of housing, or to use local materials,[421] insisting instead on the use of foreign technologies and designs.[422] These have at times proved culturally inappropriate,[423] too expensive to maintain,[424] and even dangerous.[425] Many camps and settlements in which refugees live also suffer from shortcomings in design and layout. As Clark has written,

[418] "Violent winds blasting Hartisheik [refugee camp] have since torn the tarpaulin to shreds, although its tattered remains can still be seen woven into a patchwork quilt of old rags and wheat sacks that cover the *takul* from the ground up": "Shelter: No Place Like Home," (1996) 105 *Refugees* 12, at 12.

[419] H. Christensen, "Afghan Refugees in Pakistan," in H. Adelman and M. Lanphier eds., *Refuge or Asylum?* 178 (1990).

[420] "Access to building materials is the crucial element in the process of shelter consolidation; but these materials quickly become commodified and locally scarce. Even where materials like poles, mats, thatch and mud can be locally garnered, supply constraints and environmental degradation caused by excess demand in countries like Malawi ... and Rwanda ... can be exceptionally severe": 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) (Zetter, "Shelter Provision"), at 39–40.

[421] "[T]he global experience is that [housing] is best provided by the settlers themselves – first as temporary housing and then, as their incomes rise, as permanent housing": T. Scudder, "From Relief to Development: Some Comments on Refugee and Other Settlements in Somalia," Institute for Development Anthropology Working Paper, June 1981, at 35. Among the advantages of using local materials are lessened need for imports, reduced transportation costs, and lower capital investment: O. Sherrer, "Afghan Refugee Housing," (1990) 34 *Mimar* 43, at 47.

[422] "[T]oo often international agencies and donors, in their concern for the rapid deployment of emergency assistance, import foreign technologies and professional capacity because these are most readily at hand": Zetter, "Shelter Provision," at 37.

[423] Imported "A-frame" technology for refugees in Bangladesh, for example, was "culturally inappropriate without adaptation of the physical and social space around the dwelling": ibid. at 38.

[424] The maintenance of timber-framed buildings designed by European architects for refugees in Costa Rica was "unaffordable [for] many refugees": ibid.

[425] "[A] ... recent evaluation of shelter construction in Somali refugee camps in Kenya illustrates how, with insufficient technical advice and limited NGO capability, prefabricated shelter was being erected which was structurally dangerous": ibid.

> The spacial layout and design of a settlement can obviously have a profound effect on its viability and on the quality of life of the settlers. Too often these decisions reflect little input as to how they would prefer to live. It is ironic to listen to aid officials complain about the lack of community spirit in a settlement where the residents have been forced to live spread out along the roadways, with no village structure to draw them together in the first place.[426]

Once settlements are established, they have a tendency to grow to an unwieldy size and to suffer from overcrowding. This can be the result of government policies which fail to acknowledge the need for additional refugee accommodation:

> Once a settlement has opened there is a great temptation to continue to send newly arrived refugees (or spontaneously settled refugees who have been rounded up by the host government) to the site. The plan may be to expand the settlement, or to use it as a transit center or holding camp, while planning an additional settlement or hoping for repatriation. The government is often reluctant to accept the need for additional settlements, feels constrained by the lack of staff resources, or is disinclined to go through the search and negotiations to provide another settlement site.[427]

Such policies led Zetter to conclude that typical camps, comprising between 20,000 and 30,000 refugees, are far too large "to function effectively either as social communities or for the logistical and managerial requirements for which they are established."[428] With services stretched beyond capacity, problems of water supply, sanitation, and waste disposal frequently lead to a serious deterioration of health.[429] The lack of privacy and the inability effectively to patrol sprawling refugee settlements is moreover a major contributor to the exposure of refugees to violent attacks.[430]

The location of refugee camps and settlements is also a key determinant of their success. But political considerations and the assumed temporariness of the refugees' presence means "almost invariably, that refugees are settled in the most marginal areas."[431] In the cases of Croatia and Bosnia, for example, short-term administrative convenience led to the assignment of refugees to inexpensive government-owned land which lacked the topography, natural

[426] Clark, "Post-Emergency," at 16. A positive example is, however, provided by the settlements for Angolan refugees in Zaïre, where "the decision was made to design the settlement to reflect the culture of the refugees as closely as possible": ibid.

[427] B. Stein and L. Clark, "Older Refugee Settlements in Africa," Refugee Policy Group Paper (1986), at 21.

[428] Zetter, "Shelter Provision," at 49.

[429] This was the case, for example, for refugees from Togo in Benin and for Bhutanese refugees in Nepal: ibid.

[430] See chapter 4.3 above, at pp. 443–444.

[431] Zetter, "Shelter Provision," at 78.

ecology or climatic conditions to enable the refugees to become self-sustaining.[432] Clearly, the viability of settlements is undermined in locations "where the carrying capacity of the land is most fragile, building materials are scarcest, access to productive resources and alternative sources of employment [are] most limited, and the environment is vulnerable to degradation."[433] This was true of the refugee settlements in Eastern Sudan, which were located on marginal land with inadequate water supply.[434] Most seriously, refugee camps located near border areas may be prone to attack of the kind that occurred when Thai authorities denied Burmese refugees the right to move away from the frontier.[435]

Refugees in the South who avoid living in organized camps or settlements tend to replicate the settlement patterns of their host villages,[436] and to adapt more successfully to their new life circumstances.[437] There are notable exceptions, however. Chakma refugees from Bangladesh, settled in the Indian state of Arunachal Pradesh for more than two decades, were threatened in the 1990s with eviction from their homes by a union of student activists which the regional government was unwilling to counter.[438] Even when not confronted with such

[432] Ibid. at 56. See also S. Ellis and S. Barakat, "From Relief to Development: The Long-Term Effects of the 'Temporary' Accommodation of Refugees and Displaced Persons in the Republic of Croatia," (1996) 20(2) *Disasters* 111, at 113–114, observing that accommodation for refugees included "re-used postal trains that have been shunted on to a sideline and refitted to accommodate refugees ... This emergency, temporary accommodation has, due to the political and financial pressures on the Croatian government, become permanent."

[433] Zetter, "Shelter Provision," at 78.

[434] The lack of rainfall in eastern Sudan "makes life in the settlements highly precarious ... The fact that most land settlements are located in marginal areas means that the risk of crop failure is very high": Kibreab, "Sudan," at 49. "[M]ost settlements were located in marginalised barren lands where rainfall was inadequate, unevenly distributed, and absolutely undependable": T. Yousif, "Encampment at Abu Rakham in Sudan: A Personal Account," (1998) 2 *Forced Migration Review* 15, at 15.

[435] "Attacks in January on three refugee camps resulted in at least three deaths and left 7,000 homeless. Despite the obvious danger, Thai authorities refused to allow the refugees to move. Again in April, Burmese troops attacked the Ta Per Poo refugee camp, razing eighteen houses. The international outcry ... prompted Thai authorities to move some of the camps away from the border, but most of the approximately twenty-five camps remained where they were": Human Rights Watch, *World Report 1998* (1998), at 211–212. See chapter 4.3 above, at pp. 445–446.

[436] In Malawi, for example, self-settled refugee housing is "in the form of dense clusters grouped around small open spaces, usually indistinguishable from and often integrated with host villages": Zetter, "Shelter Provision," at 55.

[437] "[T]he empirical evidence demonstrates that spontaneous settled refugees exercise far greater flexibility than their encamped counterparts in selecting more environmentally sustainable locations in which to locate, or in adopting more sustainable settlement practices": ibid. at 74.

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

direct aggression, self-settled refugees may still have difficulty meeting their housing needs because of shortages of building materials and of property.[439] These challenges are often compounded by the decision of many governments to deny self-settled refugees access to the relief programs made available to refugees who agree to live in organized camps or settlements.[440]

Refugees attempting self-settlement in urban areas may face even greater difficulty in securing adequate housing. They tend to concentrate in neighborhoods with dilapidated housing and which lack basic services such as water, electricity, and sanitation.[441] An influx of refugees onto the housing market also tends to drive rents upward and to result in the imposition of unfair rental conditions. In the Pakistani city of Peshawar, for example, the property shortages that followed from the arrival of many Afghan refugees led "not surprisingly, to escalating rents and inequitable leasing conditions. Refugees adopted strategies to minimize costs, such as leasing property in groups."[442] In Sudan, the plight of urban refugees was increased by the decision to prohibit non-citizens from purchasing housing, which left them entirely dependent on the rental sector.[443]

In the developed world, there are few formal barriers to accessing accommodation for settled refugees.[444] An important exception is those refugees granted "temporary protected" or another form of auxiliary status, who are sometimes treated only on par with persons seeking recognition of refugee status and required to live in reception centers.[445] In the German federal state of Saxony-Anhalt, "temporarily protected" Bosnians were granted access to subsidized housing and rent subsidies, but only if this arrangement was determined to be less expensive than accommodation in a collective center.[446] Local authorities in parts of Bavaria refused to provide welfare assistance to meet the private housing costs of the Bosnians, forcing many to turn to homeless shelters. Indeed, Bavarian authorities refused to provide even

[439] Zetter, "Shelter Provision," at 73.

[440] See chapter 6.1 above, at pp. 733–734. A notable exception is Malawi, which included self-settled refugees in its relief and assistance programs: Zetter, "Shelter Provision," at 75.

[441] Kuhlman, "Organized Versus Spontaneous," at 130. Kuhlman adds that the reverse "could have been achieved if the aid spent on [settlements] had been used to assist self-settled refugees": ibid.

[442] Zetter, "Shelter Provision," at 73.

[443] "Because they do not possess Sudanese citizenship they cannot buy houses and are dependent on the rental sector. However, the lack of rented houses has led to a sharp rise in rents": J. Post, "Considerations on the Settlement of Urban Refugees in Eastern Sudan" (1983), at 6.

[444] The accommodation challenges and rights of refugees seeking recognition of their status are addressed in chapter 4.4.2 above, at pp. 480–484.

[445] This has been the traditional practice in Belgium, the Netherlands, Norway, and Sweden: IGC, *Temporary Protection*, at 7–8.

[446] Büllesbach, "Civil War Refugees," at 45–46.

such emergency housing to Bosnian refugees until forced by the courts to do so.[447] Under the recent European Union directive, however, there is a general, if vaguely framed, obligation to "ensure that persons enjoying temporary protection have access to suitable accommodation or, if necessary, receive the means to obtain housing."[448]

The housing options in the North for persons recognized as Convention refugees are less constrained. For example, European Union law now requires that states "ensure that beneficiaries of refugee ... status have access to accommodation under equivalent conditions as other third country nationals legally resident in their territories."[449] Yet those who choose to live in large urban centers are frequently confronted by generalized shortages of affordable housing.[450] Coupled with the refugees' usually limited financial resources, lack of contacts, unfamiliarity with neighborhoods, and lack of awareness of services,[451] the challenge of locating affordable and decent housing in large cities is often quite real. Refugees' efforts to locate housing may also be frustrated by practices such as those reported in Canada, where real estate agents tend to direct refugees of particular ethnic backgrounds into specific neighborhoods,[452] or by racist refusals to rent to people of color. In Italy, for example, many apartment advertisements specifically state that no "stranieri" – foreigners – need apply, and non-citizens are not given standing in the courts to contest their exclusion.[453]

In the Netherlands and Scandinavia, responsibility to meet the housing needs of refugees is often assigned to a particular municipality.[454] Chronic shortages of accommodation in many states often result in long delays before

[447] Ibid. at 45.

[448] EU Temporary Protection Directive, at Art. 13(1). An earlier proposal for this rule was framed simply in aspirational terms, providing that states "shall, where necessary, endeavour to offer suitable housing facilities, or adequate means to obtain such housing": "Note from the Presidency of the European Union to the Working Party on Asylum," EU Doc. 12617/98, Nov. 9, 1998.

[449] EU Qualification Directive, at Art. 31.

[450] Lambert, *Seeking Asylum*, at 184. Lambert notes that Belgium is an exception, being "one of the rare countries where modest accommodation can be found for reasonable prices": ibid.

[451] See generally R. Murdie et al., "Housing Issues Facing Immigrants and Refugees in Greater Toronto: Initial Findings from the Jamaican, Polish and Somali Communities," in E. Komut ed., *Housing Question of the "Others"* (1996) (Murdie, "Housing Issues"), at 179–183.

[452] Ibid. at 185–188.

[453] "[T]hey of course have no standing to sue in courts. So some immigrants turn to crime. Foreigners now constitute roughly a quarter of all those in jail or out on bail in Italy": J. Smith, "Europe bids immigrants unwelcome; Natives resent changes in 'their way of life,'" *Washington Post*, July 23, 2000, at A-01.

[454] While refugees who are able to find their own accommodation may settle where they wish, severe housing shortages make this option unrealistic in practice for most refugees: Liebaut, *Conditions 2000*, at 219, 58, 77, 235, and 283.

accommodation is located. In Sweden, for example, refugees have been required to wait as long as two to three years to acquire a permanent residence.[455] Refugees may also face real discrimination in accessing public housing. In Denmark, some local councils declared refugees non-admissible to housing facilities,[456] while the Swedish municipality of Sjöbo gained international notoriety for its refusal to allow fifteen refugees to access its subsidized accommodation.[457]

In other countries, including Austria, Canada, France, New Zealand, and Spain, refugees have access to subsidized public housing on the same terms as citizens. Refugees are often also eligible for supplemental assistance, such as the loans generally available in Germany for a rental deposit, and in-kind donations of furniture, kitchen equipment, and other essentials.[458] In Canada, public housing is often located far from basic amenities, and may not be designed to accommodate the extended families of many refugee groups.[459] In the United Kingdom, the challenge of finding subsidized housing is reported to have reached crisis proportions, especially for many single people and members of minority groups.[460]

Some Northern states make little effort to provide housing assistance to refugees. In Italy, refugees may be able to find shelter in one of the limited number of accommodation centers open to foreigners generally, which are free for the first sixty days. Most refugees, however, must seek accommodation on the private market, as only some regions allow refugees and other non-citizens to access the general stock of public housing.[461] Malta similarly provides refugees with little assistance to acquire adequate housing, in consequence of which "[m]any have to rent at exorbitant prices and others live in terrible conditions":[462]

[455] Lambert, *Seeking Asylum*, at 186.

[456] The Ministry of the Interior halted the practice: J. Vedsted-Hansen, *International Academy of Comparative Law National Report for Denmark* (1994), at 3.

[457] T. Hammar, "The Integration or Non-Integration of Refugee Immigrants," in G. Rystad ed., *Uprooted: Forced Migration as an International Problem in the Post-War Era* 179 (1990), at 181.

[458] See European Council on Refugees and Exiles, *Legal and Social Conditions for Asylum Seekers in Western European Countries, 2003* (2003) (ECRE, *Conditions 2003*); Liebaut, *Conditions 2000*; and Lambert, *Seeking Asylum*, at 184–188.

[459] Murdie, "Housing Issues," at 188.

[460] Lambert observes that refugees with families are given preferred housing benefits, and that blacks are often housed in inferior accommodation by local authorities: Lambert, *Seeking Asylum*, at 187.

[461] Liebaut, *Conditions 2000*, at 174.

[462] (1999) 57 *JRS Dispatches* (Oct. 1, 1999). Indeed, the United Nations Committee on the Rights of the Child "expressed [concern] ... at the limited access of refugee children to ... housing": Committee on the Rights of the Child, "Concluding Observations of the Committee on the Rights of the Child: Malta," UN Doc. CRC/C/15, Add.129, June 2, 2000, at para. 43.

> I recently visited one refugee who is sharing a two roomed "flat" with two other refugees. The flat has tiles which are black with damp, the walls dark with filth, with mice and cockroaches crawling through a grating which leads to a neighbour's basement. The drain pipes in the yard leak so the floor is always wet, and the walls of the yard are green with slime. The toilet is in a room built of wood and corrugated iron in the yard, the roof is missing in places and so are some bits of the wall ... [The] toilet is out of order. To top it all, this yard is actually a passage to upper flats which house more refugees. So even if it was in use, it would still be embarrassing to use it.[463]

While the housing programs of Portuguese municipalities are in principle open to all persons in need, in practice applicants have often been denied assistance unless they have at least one Portuguese family member.[464] In Russia, refugees have no right to rent housing; in the result, many are destitute and homeless.[465]

> **Refugee Convention, Art. 21 Housing**
> **As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying 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.**

> **Economic, Social and Cultural Covenant, Art. 11(1)**
> **The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate ... housing ...**

It was not initially intended that the Refugee Convention would expressly address the right of refugees to housing. None of the predecessor treaties had done so,[466] and the Secretary-General did not propose any change from past

[463] (1999) 57 *JRS Dispatches* (Oct. 1, 1999).

[464] "[T]his requirement makes housing almost impossible for refugees [to obtain]": F. Liebaut and J. Hughes eds., *Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries* (1997), at 194.

[465] R. Redmond, "Old Problems in a New World," (1993) 94 *Refugees* 28, at 29–30. "The asylum problems for the 'foreigner refugees' are exacerbated by a series of technical and substantive problems on the ground: for instance, there is no settlement or provision for staying before, during, or after the asylum claim is made ... In one situation, when Somalis were evicted from ... [a] home in a district of Moscow, the act was legitimised on the grounds of their unworthiness": E. Voutira, "Vestiges of Empire: Migrants, Refugees and Returnees in Post-Soviet Russia," (1996) 7(3) *Oxford International Review* 52, at 56.

[466] Weis, *Travaux*, at 163.

practice. Indeed, because the right of refugees to acquire housing was considered to be an aspect of Art. 13's guarantee of movable and immovable property rights,[467] the Secretariat was initially skeptical that any further reference to housing would be helpful.[468]

This is an important starting point, since many housing concerns are in fact most appropriately addressed by invocation of other Convention-based or general international human rights. In line with the Secretariat's observation, both Sudan's denial to refugees of the right to buy a home and Russia's refusal to allow refugees freely to rent apartments or other accommodation raise property rights concerns. Art. 13 of the Convention expressly includes not only the right of refugees to own property, but also to benefit from "leases and other contracts relating to movable and immovable property."[469]

Nor is the right to property the only basis for insistence upon what may broadly be thought of as housing rights. The duty of states to ensure the physical security of refugees is breached by those African states that require refugees to live in overcrowded camps which cannot be effectively patrolled, and by the Thai assignment of Burmese refugees to live in a border zone prone to armed conflict.[470] In at least the latter case, the right to life is also jeopardized.[471] The forcible expulsion of refugees from their homes is another clear example of activity that may breach the duty to protect life and basic physical security, as was observed by the Supreme Court of India in response to efforts by private groups to drive Chakma refugees from their homes:

> The State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit anybody or any group of persons ... to threaten the Chakmas ... No State Government worth the name can tolerate such threats ... The State Government must act impartially and carry out its legal obligation to safeguard the life, health and well-being of Chakmas residing in the State without being inhibited by local politics ...
>
> Except in accordance with law, the Chakmas shall not be evicted from their homes and shall not be denied domestic lives and comfort therein. The quit notices and ultimatums issued ... [are] tantamount to threats to the life and liberty of each [and] every Chakma, [and] should be dealt with ... in accordance with law.[472]

[467] See chapter 4.5.1 above, at pp. 523–525.

[468] "[I]n Mr. Humphrey's opinion, the provisionally adopted article [13] might be considered to cover the question in a certain sense": Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 11.

[469] Refugee Convention, at Art. 13. See chapter 4.5.1 above, at pp. 523–524.

[470] See chapter 4.3.3 above.

[471] See chapter 4.3.1 above, at p. 452.

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

When Togolese refugees in Benin and Bhutanese refugees in Nepal became ill because they were forced to live in overcrowded camps lacking water, sanitation, and waste disposal services, their right to health was violated.[473] And the right of refugees to enjoy freedom of residence and internal movement is infringed by the practice of many Southern countries to confine refugees in camps or settlements, and by the traditional insistence of some European countries, including Belgium, the Netherlands, Norway, and Sweden, that refugees granted "temporary protection" live in state-sanctioned centers.[474] More generally, the Committee on the Elimination of Racial Discrimination has invoked the duty of non-discrimination to insist upon fair access to housing, specifically in the context of Italian treatment of the Roma.[475] When any of these more general rights is infringed, there is no need to rely upon a right to housing in order to secure protection.

The incorporation in the Refugee Convention of a specific provision addressed to housing rights resulted from the decision described earlier to adopt the text of the ILO's Migration for Employment Convention as the basis for the Refugee Convention's Art. 24(1)(a) guaranteeing fair conditions of employment to refugee workers.[476] One of the ILO guarantees not imported into the Refugee Convention was the right of migrant workers to benefit from national treatment with regard to employee accommodation.[477] In agreeing to the omission of this provision from the Refugee Convention, the American representative to the Ad Hoc Committee gave notice that "although he did not think the reference to housing should be inserted at that point in the convention, he felt it should be included at a later stage. It might form the subject of a separate article which would apply to the whole draft convention and not only to the provisions regarding labour."[478]

[473] See chapter 4.4.3 above, particularly at p. 513 (regarding the duty to ensure basic healthcare in even very poor states).

[474] See chapter 5.2 above, at pp. 707–708.

[475] UN Committee on the Elimination of Racial Discrimination, "Concluding Observations on the Report of Italy," UN Doc. CERD/C/5/Misc.32/Rev.3, Mar. 18, 1999.

[476] See chapter 6.1.2 above, at pp. 765–769.

[477] Ibid. at note 183.

[478] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.14, Jan. 26, 1950, at 10. Several governments were opposed to this initiative. Denmark, for example, argued that "the *Migration for Employment Convention* had been prepared in the interests of a group who desired to become productive members of a national community. Refugees constituted a different group; many of them were unfitted to make any constructive contribution to the life of the community. For that reason he was uncertain whether the provisions of the ILO document could be made to apply to the case of refugees": Statement of Mr. Larsen of Denmark, ibid. at 9. The Chinese representative did not wish to accept any obligation on this matter, noting that "[h]is own country, devastated by war and suffering from a grave shortage of housing, had taken urgent measures, following the end of the Second World War, to relieve the suffering of the refugees; these measures had often placed the refugees in a more advantageous position, from the point

The goal of the American project was not to reiterate the property rights protections of Art. 13. Mr. Henkin wished instead to ensure that "refugees might benefit under any social welfare measures taken by States with a view to providing housing accommodation for certain categories of persons."[479] Thus, as Robinson opines, Art. 21 "deals with rent control and assignment of apartments and premises."[480] Similarly, Grahl-Madsen logically contends that the right of refugees to housing under Art. 21 includes "not only the obtaining of [a] dwelling-place, but also participation in schemes for financing of the construction of dwelling-places (cf. the expression 'housing schemes')."[481]

These examples help to establish a workable boundary between rights grounded in Art. 21's provisions on housing, and those more appropriately conceived as aspects of a public relief program governed by Art. 23. The distinction will often be important, since refugees lawfully staying in an asylum country must be assimilated to nationals for purposes of public relief,[482] whereas Art. 21's provisions on housing require only that they receive "treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances." For reasons described below,[483] this standard of treatment clearly falls short of a duty to treat refugees on par with citizens of the kind set by the public relief provisions of Art. 23.

In practice, the boundary between a housing program and a public relief initiative will often be blurred, requiring the delineation between Arts. 21 and 23 to be made on the basis of the essential goal of the official initiative in question. Despite the American delegate's reference to Art. 21 as focused on the "social welfare" aspect of housing, it is difficult to see why a state that assists the destitute or disabled by direct cash payments should be bound to the higher standard of Art. 23, whereas a government that provides such persons with in-kind access to free or subsidized accommodation would have to meet only the lower test of Art. 21. For this reason, and taking particular

of view of housing, than many Chinese nationals. He felt that the matter of housing should be left to the initiative and control of the individual Governments": Statement of Mr. Cha of China, ibid. at 10. The decision to include an article on housing was only narrowly approved on a 5–2 (4 abstentions) vote: ibid.

[479] Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 11.

[480] Robinson, *History*, at 120. Weis goes still farther, arguing that Art. 13 includes "housing schemes and allocation of premises for the exercise of one's occupation": Weis, *Travaux*, at 163. Weis provides no justification, however, for his view that the right of refugees to "housing" includes the right to premises from which to engage in business; as a matter of ordinary construction, this conclusion is suspect.

[481] Grahl-Madsen, *Commentary*, at 84.

[482] See chapter 6.3 above, at p. 806.

[483] See text below, at pp. 826–827.

account of the broad scope of Art. 23,[484] initiatives which provide housing benefits to sub-populations on the basis of need should be deemed in pith and substance to be forms of relief or assistance subject to the requirements of Art. 23. Thus, the denial of public housing to refugees by some Danish and Swedish municipalities, as well as the refusal of Saxony and Bavaria to extend generally available housing assistance benefits to temporarily protected refugees, are examples of policies in breach of the duty to assimilate lawfully staying refugees to citizens for welfare purposes. Art. 23 similarly requires Italy and Malta to enfranchise refugees within any scheme to assist homeless or poorly housed nationals – not simply to provide them with whatever aid is normally afforded to other non-citizens.

In contrast, policies or programs which regulate or control housing in general terms – for example, rent controls, landlord–tenant laws, or schemes to assist in the construction or purchase of a home – are more appropriately understood to be governed by the provisions of Art. 21. As originally proposed, Art. 21 would have regulated only housing matters "regulated by laws *and* regulations or . . . subject to the control of *Governmental* authorities [emphasis added]."[485] But the Ad Hoc Committee decided that the provisions of Art. 21 should apply also "in so far as [housing] lies within the discretion of local governmental authorities."[486] This view is reflected in the decision to amend the text initially to refer to matters subject to the control "of *governmental* authorities [emphasis added],"[487] then finally to speak simply to matters under the control "of public authorities."[488] In the result, the Refugee Convention's guarantee of housing rights applies whenever a refugee claims the benefit of a housing policy or program over which some level of government[489] exercises authority, whether that official control is formal (by law or regulation) or simply practical (administration, oversight, or review).[490] Thus, the fact that public housing is administered by regional

[484] See chapter 6.3 above, at pp. 810–811.

[485] This was the language submitted to the Ad Hoc Committee by Mr. Henkin of the United States, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 12.

[486] Statement of the Chairman, Mr. Chance of Canada, ibid. at 13. Speaking as the representative of Canada, Mr. Chance had earlier voiced his approval for Art. 21 "on the condition that it was compatible with the federal laws in force in his country": ibid. at 12.

[487] "Decisions of the Committee on Statelessness and Related Problems taken at the meetings of 3 February 1950," UN Doc. E/AC.32/L.28, Feb. 3, 1950, at 2.

[488] Ad Hoc Committee, "First Session Report," at Annex I. This language is consistent with the text of the predecessor ILO Convention on migrant worker rights: see chapter 6.1.2 above, at p. 767.

[489] "It is an obligation incumbent not only on the state but also on all other public authorities (municipalities, regional self-governments)": Robinson, *History*, at 120.

[490] The agreement that regulatory (as opposed to statutory) involvement is sufficient to bring Art. 21 into play is clear from the change to a disjunctive formulation ("regulated

authorities in the Netherlands, the United Kingdom, and most of Scandinavia is sufficient to engage Art. 21.

Indeed, while there is little doubt about the principle that purely private housing programs are exempt from the requirements of the Convention's provision on housing,[491] the breadth of modern-day regulation of private activity in the field of housing, particularly to guard against discrimination, may mean that in practice there are few aspects of housing policy that will escape scrutiny under Art. 21. For example, the real estate profession is officially regulated in Canada, and there is landlord–tenant law in Italy. The fact that Art. 21's scope extends to any aspect of housing "regulated by laws or regulations or ... subject to the control of public authorities" may well mean that refugees should be able to invoke the article to require Canada to take action in response to the propensity of some real estate agents to direct refugees into ethnic neighborhoods with substandard accommodation, or to insist that Italy counter the refusal of many Italian landlords to rent to refugees.[492]

The real value of Art. 21 is nonetheless limited in two fundamental ways. First, an amendment late in the drafting process raised the required level of attachment for access to housing rights from simply refugees "lawfully in" a state's territory[493] to refugees "lawfully staying in" the territory. The benefit of Art. 21 may therefore be claimed only by refugees present on an ongoing basis, including, for example, recognized refugees and refugees granted so-called "temporary" or other durable forms of status.[494] No explanation was given for this shift.[495] While likely prompted by concern not to exacerbate acute postwar housing shortages for their own citizens,[496] the result is that Art. 21 – in essence, an auxiliary property rights provision – is accessible to only a subset of refugees able to invoke the more general guarantee of property rights set by Art. 13 of the Convention.[497]

by laws or regulations"): "Decisions of the Committee on Statelessness and Related Problems taken at the meetings of 3 February 1950," UN Doc. E/AC.32/L.28, Feb. 3, 1950, at 2. This amended text was in line with the original ILO precedent: see chapter 6.1.2 above, at pp. 766–767.

[491] See Grahl-Madsen, *Commentary*, at 84: "If housing is left entirely to private enterprise, the State is not obliged to interfere and pass laws simply in order to ensure that refugees will find suitable accommodation."

[492] The challenge in each of these situations is that a state party need only provide refugees with the same protection as is afforded aliens generally in the same circumstances. Where this is little or nothing, Art. 21 provides little practical value to refugees. See text below, at pp. 826–827.

[493] This formulation was endorsed at all stages of the work of the Ad Hoc Committee, including in its final report: Ad Hoc Committee, "Second Session Report," at 20.

[494] See chapter 3.1.4 above.

[495] The altered language seems to have been agreed to in the Style Committee: "Report of the Style Committee," UN Doc. A/CONF.2/102.

[496] See the comments of the British and Chinese delegates at note 410 above.

[497] See chapter 4.5.1 above, at pp. 526–527.

Second, Art. 21 sets no firm qualitative guarantee of any rights beyond those which inhere in "aliens generally in the same circumstances." This duty is "not merely [an obligation] not to discriminate against refugees."[498] It rather has affirmative content in the sense of incorporating by reference all general sources of relevant rights,[499] and requiring that governments consider in good faith the more complete enfranchisement of refugees.[500] But in practice, it may nonetheless amount to a guarantee of very little, if any, protection.[501] Despite the early plea of the French government,[502] and a Yugoslav initiative advanced at the Conference of Plenipotentiaries,[503] most governments were not prepared to grant refugees all of the housing rights provided to their own citizens, preferring to reserve the right to limit special housing programs to at least some parts of their own populations. For example, the representative of the United Kingdom argued that

> In his own country it would be difficult to guarantee exactly equal treatment for refugees in the matter of housing, since the housing shortage was acute and the matter had to be dealt with on the basis of need. It was also felt that a certain degree of preference as regards housing should be given to some categories of nationals, such as ex-servicemen.[504]

[498] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 13.

[499] See chapter 3.2.1 above, at p. 197.

[500] See chapter 3.2.1 above, at p. 200. It may also be relevant that there is a duty to exempt refugees from the application of general requirements for access to housing which cannot in practice be met in view of the refugee's particular circumstances: see chapter 3.2.3 above.

[501] This point was made by the International Refugee Organization, which argued that "in many countries it is not possible to speak of general treatment in relation to . . . housing. These matters are frequently subject to administrative regulations which are often framed with other objects in view than the distinction between nationals and aliens, e.g. service in national armies, local residential qualifications, etc., or leave much discretion to the competent authorities": United Nations, "Compilation of Comments," at 40.

[502] The French delegate "had altered his opinion and was now convinced that the reference [in the ILO migrant workers treaty used as a precedent] was to general housing . . . and that in cases where such legislation existed, equal treatment should be accorded to refugees and nationals. That was the more liberal interpretation, which . . . he believed his Government would endorse": Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.14, Jan. 26, 1950, at 9.

[503] "[I]t would be unfair to refugees in countries where housing was controlled by the public authorities if they were treated differently from nationals in respect of housing. Unless refugees were given identical treatment, it would be impossible for them to secure accommodation": Statement of Mr. Makiedo of Yugoslavia, UN Doc. A/CONF.2/SR.10, July 6, 1951, at 10–11. His amendment to this effect (UN Doc. A/CONF.2/31, at 2) was defeated on a 9–1 (7 abstentions) vote: ibid. at 11.

[504] Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.14, Jan. 26, 1950, at 8.

The vagueness of the new European Union directive applicable to temporarily protected refugees – requiring only that they receive "access to suitable accommodation" – cannot therefore be criticized by reference to Art. 21 for failing to codify any particular qualitative standard.[505] Indeed, the European Union's decision to enfranchise recognized refugees on par with legally resident third-country nationals, as well as the traditional practice of states such as Austria, Canada, France, and Spain to assimilate refugees to citizens for purposes of access to public housing are, while commendable, clearly standards in excess of the requirements of the Refugee Convention. As described above,[506] while the concomitant duty to treat refugees "as favourably as possible" is not purely hortatory, neither does it compel governments to grant refugees special benefits, even relative to other non-citizens. Thus, there is no violation of Art. 21 when refugees must endure the same hardships in accessing housing as other non-citizens. This is the case, for example, under the Portuguese practice of giving preference in accessing public housing to families – including refugee families – with at least one citizen member.[507]

On the other hand, the "aliens generally" standard of treatment does incorporate by reference all general sources of legal entitlement,[508] including notably Art. 11 of the Covenant on Economic, Social and Cultural Rights. While of most critical importance to those refugees unable to satisfy Art. 21's level of attachment (and therefore analyzed previously in some depth in defining the right of all refugees – even those who have no legal status in an asylum state – to be assisted in acquiring the necessities of life[509]), Art. 11 of the Economic Covenant is of value even to those refugees able to satisfy the higher attachment criterion of Art. 21 of the Refugee Convention. This is because the guarantees set by the Economic Covenant establish an authoritative qualitative baseline for the attribution of housing rights to refugees, thereby compensating somewhat for the substantive fungibility of Art. 21.

Invoking Art. 11 of the Economic Covenant to establish the minimum acceptable content of the housing rights of aliens generally (and all other persons), refugees may lawfully insist that an asylum country grant them not less than the housing rights set by general international law. Importantly, the Committee on Economic, Social and Cultural Rights has emphasized that

[505] The regional notion of "suitability" must not, however, fall below the international legal standard of "adequacy": see text below, at pp. 827–829.

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

[507] The better argument in this situation would be that the duty of non-discrimination has not been met. But even here, the margin of appreciation afforded states to privilege their own nationals may foreclose any remedy: see chapter 2.5.5 above, at pp. 130–133.

[508] See chapter 3.2.1 above, at p. 197.

[509] See chapter 4.4.2 above.

Art. 11 of the Economic Covenant does not simply establish a right to housing, but rather to "an *adequate* standard of living ... including *adequate* ... housing [emphasis added]."[510] Governments are moreover required to provide all persons under their jurisdiction with an effective domestic remedy against violation of their core housing rights.[511] Because international law defines the right to housing as requiring governments to meet at least this basic qualitative standard ("adequacy"), the Committee has observed that the essential requirement of Art. 11(1) is that "everyone"[512] must enjoy the right "to live somewhere in security, peace and dignity."[513] It has moreover elaborated a set of standards against which to assess compliance.

Thus, the Committee has determined that housing is only adequate if it is affordable; accessible to all, including in particular the disadvantaged; and located in a place that is not impractically remote and which affords reasonable access to services, materials, facilities, and infrastructure.[514] This standard is not met when governments, such as those of Bosnia, Croatia, and Sudan, force refugees to live in marginal areas where they have little chance of becoming self-sustaining. The refusal of some asylum countries to allow refugee settlements to expand in a way that ensures the continuing viability of infrastructure to meet the needs of their inhabitants is also a failure to ensure adequate housing.

More specifically, the accommodation itself must be habitable, meaning that it provides protection from the elements and other hazards, and it must be culturally appropriate.[515] This standard was clearly not met when refugees in Ethiopia were left for prolonged periods attempting to shelter under old plastic sheeting. The Canadian practice of providing little or no public housing sufficient to meet the needs of the traditional extended families of many refugee groups, while clearly less egregious, is nonetheless a failure to provide culturally adequate housing. Housing is also adequate only if it can be enjoyed with reasonable security of tenure.[516] In particular, the Committee has concluded that "instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant

[510] "The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights": UN Committee on Economic, Social and Cultural Rights, "General Comment No. 4: The right to adequate housing" (1991), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 19, para. 1.

[511] Ibid. at para. 18.

[512] "The right to adequate housing applies to everyone ... In particular, enjoyment of this right must, in accordance with Article 2(2) of the Covenant, not be subject to any form of discrimination": ibid. at para. 6.

[513] Ibid. at para. 7. [514] Ibid. at para. 8. [515] Ibid. at para. 8. [516] Ibid. at para. 8.

principles of international law."[517] The efforts to expel Chakma refugees from their homes in India were therefore in breach not only of basic security rights as described above, but also of the right to adequate housing.

In implementing housing rights, governments are under a duty to give special attention to the housing needs of "social groups living in unfavorable conditions";[518] they are expected to seek out international aid where necessary to comply with the duty to ensure adequate housing;[519] and they are bound to engage in "extensive genuine consultation with, and participation by, all of those affected, including the homeless."[520] There is therefore no basis for receiving states to cut off housing aid to refugees who prefer to self-settle, rather than to live in organized camps or refugee communities. This is particularly so since, as previously noted, refugees lawfully present enjoy the right to choose their own place of residence.[521] There is also a failure to respect the right to adequate housing when local authorities and the aid agencies working with them fail meaningfully to involve refugees in the planning of their homes and communities.

6.5 Intellectual property rights

As in the case of housing rights, no prior refugee treaty expressly dealt with the issue of intellectual property rights. This is likely because such protection was thought to have been unnecessary. Refugees would not typically have encountered any difficulty claiming intellectual property rights, since non-citizens have routinely been understood to be entitled to assert such interests. And while some states condition the enforcement of intellectual property rights in their courts on the existence of reciprocity – meaning that the citizens of the state in which enforcement is sought can claim comparable protections in the refugee's country of citizenship – these barriers to enforcement abroad of intellectual property claims did not apply to refugees. This is because earlier refugee treaties included a general duty to exempt refugees from any requirements of reciprocity.[522]

[517] Ibid. at para. 18. The duty to avoid forced eviction has been elaborated in a specific general comment: UN Committee on Economic, Social and Cultural Rights, "General Comment No. 7: The right to adequate housing: forced evictions" (1997), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 46. The applicability of this protection to refugees is described in detail in chapter 4.4.2 above, at pp. 504–506.

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

[519] Ibid. at para. 10. [520] Ibid. at para. 12. [521] See chapter 5.2 above.

[522] See chapter 3.2 above, at p. 195.

But the 1951 Convention ended this blanket exemption of refugees from reciprocity requirements (diplomatic reciprocity requirements now being preserved, and even legislative and de facto reciprocity requirements being waived only after three years' residence in a state party).[523] Without the benefit of an exemption from reciprocity rules, many refugees would, in practice, have been unable to protect their intellectual property rights outside their country of origin.[524]

> **Refugee Convention, Art. 14 Artistic rights and industrial property**
> **In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.**

> **Economic, Social and Cultural Covenant, Art. 15(1)(c)**
> **The States Parties to the present Covenant recognize the right of everyone . . . to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.**

Both the Secretary-General and French government drafts of the Refugee Convention proposed avoiding the effect of reciprocity requirements by mandating the assimilation of refugees to most-favored foreigners for purposes of enforcing intellectual property rights.[525] That is, refugees present in any state party would have been automatically entitled to invoke whatever mechanisms to protect intellectual property that country was willing to make available to the citizens of any foreign country "by treaty or usage,"[526]

[523] See chapters 3.2.1 and 3.2.2 above.

[524] There was agreement that this would be inequitable, since intellectual property "is the creation of the human mind and recognition is not a favour": Secretary-General, "Memorandum," at 27.

[525] "In respect of industrial and intellectual property (copyright, industrial property, patents, licences, trademarks, designs and models, trade names, etc.), refugees (and stateless persons) shall enjoy the most favourable treatment accorded to nationals of foreign countries": ibid. The French draft of the convention took essentially the same approach, though with a slightly different list of the interests to be protected. Specifically, the French proposal omitted the protection of "licences" found in the Secretary-General's draft and added a reference to "scientific property": France, "Draft Convention," at 4.

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

including procedures open only to the nationals of countries united in special economic or other associations. This approach would not have imposed any particular model on a given state party, but would have required that every refugee be granted the best protection afforded any non-citizen.

Even at the first session of the Ad Hoc Committee, however, the British delegate expressed concern about this approach. Despite his acceptance of the clear need to exempt refugees from reciprocity requirements in the enforcement of intellectual property rights, he questioned whether the assimilation of refugees to most-favored foreigners was the right mechanism to adopt.[527] Additional force was given to this argument when the Chairman of the Ad Hoc Committee drew the attention of representatives to an expert report addressing the Berne Convention on the Protection of Literary and Artistic Works.[528] The gist of this analysis was that the Berne Convention, the main treaty regulating the transnational enforcement of rights in literary and artistic property, did not provide for the enfranchisement of non-citizens on the same terms as the nationals of most-favored countries.[529] Instead, it established a uniform standard for the enforcement of intellectual property claims abroad, based on whether the individual seeking enforcement was a citizen of a state party to the relevant treaty:

> Taking Denmark as an example, any Dane who wrote a book had the Danish copyright wherever the book might be published. The same was true if the author was a national of a country adhering to the Berne Convention. If the author was a national of a country not adhering to the Convention, his rights were safeguarded in Denmark only if the book was first published there. Finally, the rights of a stateless author had no protection anywhere. With regard to the last of those situations, some change was certainly needed; but supposing that a national of a country not adhering to the Berne Convention became a refugee and fled to another country not adhering to that Convention, it would be unfair if merely by becoming a refugee he were to receive better treatment than a citizen of his country of refuge.[530]

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

[528] 828 UNTS 221, done Sept. 9, 1886, revised in Stockholm, July 14, 1967 (Berne Convention). Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 20.

[529] "[E]xisting conventions on the subject ... applied to nationals rather than to refugees, hence such a clause was needed for the protection of the latter": Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 8.

[530] Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 20–21.

Concern about fairness arose because if a refugee's asylum country were not itself a party to the Berne Convention, its nationals would have no guarantee of most-favored-national treatment when seeking to enforce intellectual property rights in a third country. But a refugee residing in that asylum state, if entitled to most-favored-national treatment in any state party to the Refugee Convention, would be able to claim preferred rights in the third country and, to that extent, would enjoy a benefit not open to the citizens of his or her host state. It was generally felt that the Refugee Convention should compensate for the disadvantages of refugeehood, but not operate in a way that was significantly different from the general approach under the Berne Convention.[531]

Thus, the Ad Hoc Committee affirmed that it was entirely reasonable to avoid the penalization of a refugee because of the failure of his or her country of origin to assist other countries to enforce the intellectual property rights of their citizens – after all, since a refugee is by definition a person who no longer enjoys the protection of the home state, there is little logic to holding him or her hostage to the whims of that country. On this basic point, the drafters went beyond what the Secretary-General had proposed, deciding that in the asylum state refugees should be assimilated to citizens (not just most-favored foreigners) for purposes of enforcing their intellectual property rights. But since the enforcement *abroad* of intellectual property rights was generally contingent on the individual coming from a state party to the intellectual property treaty regime, refugees should not be able to avoid that essential premise set by the Berne Convention.[532] It was felt that justice could be done to refugees simply by substituting their country of residence for their country of citizenship in determining where, and to what extent, they could enforce

[531] The United Kingdom, for example, "cannot agree to accord refugees in respect of these matters the most favourable treatment accorded to nationals of foreign countries. They would, however, be prepared to consider sympathetically the possibility of according refugees the same protection as the nationals of the country in which they are resident, subject to the same conditions and formalities as apply to such nationals": United Nations, "Compilation of Comments," at 41.

[532] "If a book was first published in the United Kingdom, any author could secure the United Kingdom copyright; if it was published in a country adhering to the Berne Convention, the author could also secure that copyright ... The United Kingdom proposal was therefore that refugees in their country of residence should receive the rights normally accorded to nationals of that country ... The rights they would receive for books first published in other countries would not depend on whether those countries were signatories to the Convention or not": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 21–22. See also Statement of Mr. Herment of Belgium, ibid. at 22: "[T]he difficulties referred to could perhaps be avoided by according a refugee the same treatment as was accorded to nationals of the country in which he found himself ('national treatment')."

their intellectual property claims in foreign countries.[533] The Drafting Committee therefore recommended a text based on these points of consensus,[534] and which provided the essential model approved for the Convention:[535]

> In respect of the protection of industrial property, such as inventions, designs of models, trade marks, trade names, etc., and of rights in literary, scientific and artistic works, a refugee shall be accorded in the country in which he is resident, the same protection as is accorded to nationals of that country. In the territory of another Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he is resident.[536]

As such, Art. 14 entitles a refugee to enforce intellectual property rights, whether in the asylum country or in another state party to the Refugee Convention, to exactly the same extent as a citizen of his or her asylum country.[537] In essence, it effected an indirect amendment of the Berne Convention for state parties to the Refugee Convention, requiring those states to assimilate refugees living in their country to their own citizens for purposes of the reciprocal enforcement of intellectual property rights.

[533] "'[N]ational treatment' should not ... apply to refugees resident in a country not a signatory to the Convention": Statement of Mr. Herment of Belgium, ibid. at 22. While the Chairman based his remarks on the assumption that the Berne Convention was designed to protect the rights of publishers as well as those of authors, his analysis is comparable. "The fairest solution would be to provide for 'national treatment' in the country where the publisher was resident, and in other countries for the same treatment as was normally accorded to citizens of that country, and also to provide for protection of the copyright in any country where the book might first be published": Statement of the Chairman, Mr. Larsen of Denmark, ibid.

[534] "Article [14] was revised by the Committee to bring this provision into conformity with existing Conventions on the subject": Ad Hoc Committee, "Second Session Report," at 12.

[535] The President of the Conference of Plenipotentiaries observed that "[t]he question of nationality entered into the matter, inasmuch as the recognition, for example, of a person's rights in his literary, scientific or artistic works depended on whether the country of which he was a national or in which he resided had signed the relevant international convention. To quote an example, it might reasonably be asked why a refugee from a country which had not acceded to such a convention and who resided in a country of asylum which had also not signed the convention should, when residing in Switzerland for a few days, be given the same protection in that respect as a Swiss national": Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 21.

[536] "Report of the Drafting Committee," UN Doc. E/AC.32/L.40, Aug. 10, 1950 at Art. 9.

[537] As Weis concludes, "[t]he scope of the rights depends on the municipal law of the country concerned and the international conventions to which it is a party": Weis, *Travaux*, at 122.

The substantive scope of the interests protected by Art. 14 is not, however, restricted to the issue of literary and artistic rights on which debate focused.[538] To the contrary, the Refugee Convention expressly protects "industrial property," and was amended to add a reference to "inventions."[539] More generally, the nature of the interests protected includes the refugee's "literary, artistic *and scientific* rights [emphasis added]."[540] The only substantive reduction from the scope of protection originally proposed by the Secretary-General was to eliminate the references to "licences,"[541] "copyright,"[542] and "patents,"[543] decisions prompted by a desire to refer only to "the thing protected" and not to "a method of protection."[544] Instead of guaranteeing refugees access simply to these particular modes of protecting intellectual property rights, the drafters opted to insert a more comprehensive duty to grant refugees "the same protection" as enjoyed by citizens of the host country. Thus, refugees are entitled to protect and assert their intellectual property rights via licenses, patents, or copyright, in addition to any other means of protecting their interests which may be made available to nationals.[545]

[538] "The scope of Art. 14 does not produce any doubts: it is the totality of creations of the human mind": Robinson, *History*, at 108.

[539] The addition of this reference was not formally debated, but was included in the draft adopted at the second session of the Ad Hoc Committee: Ad Hoc Committee, "Second Session Report," at 18.

[540] Ad Hoc Committee, "First Session Report," at Annex I. The initial drafts were concerned predominantly with industrial property: see text above, at p. 830, n. 525.

[541] No reference to "licenses" was made in the French government's initial proposal for what became Art. 14: see text above, at p. 830, n. 525. While there was no debate specifically on this point, the reference was omitted from the text as adopted at the second session of the Ad Hoc Committee: Ad Hoc Committee, "Second Session Report," at 18.

[542] The British representative "reserved the position of his government regarding copyright provisions in the article" at the first session of the Ad Hoc Committee: Statement of Sir Leslie Brass, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 8. While not the subject of a recorded discussion, the reference to copyright was omitted in the text adopted at that first session: Ad Hoc Committee, "First Session Report," at Annex I.

[543] The French representative expressed some concern at the decision of the Drafting Committee to delete the express reference to patents: Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 8. The American representative agreed with this concern: Statement of Mr. Henkin, ibid.

[544] Statement of Sir Leslie Brass of the United Kingdom, ibid. at 9. In response to the French and American proposal to reinsert a reference to patents, "[t]he Chairman felt that such an insertion would be illogical, since article [14] made no reference to the means of affording protection. In English, a 'patent' was a means of protecting an invention": Statement of the Chairman, Mr. Larsen of Denmark, ibid. at 8.

[545] For example, the British representative noted that "[i]n the case of a trademark, it was the registration which afforded protection and in the case of an invention it was the patent": Statement of Sir Leslie Brass of the United Kingdom, ibid. at 9.

The net utility of Art. 14 in assisting refugees to enforce their *industrial* property rights was nonetheless, at least initially, quite limited.[546] This is because the provisions of Berne's parallel treaty, the Paris Convention for the Protection of Industrial Property,[547] already provided protection superior to that granted by Art. 14 at the time of the Refugee Convention's adoption:

> Persons *within the jurisdiction* of each of the countries of the Union shall, as regards the protection of industrial property, enjoy in all other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to their nationals [emphasis added].[548]

In contrast, Art. 14 of the Refugee Convention only provides an exemption from reciprocity for refugees who are "habitually resident" in a state party, and entitles such refugees to enforce their rights abroad only to the same extent as citizens of their host country are able to do. At least in 1951, the only net benefit of Art. 14 for refugees residing in a state party to the Paris Convention would have been the Refugee Convention's insistence that the asylum country protect resident refugees' industrial property rights domestically on the same terms as it did those of its own citizens (but this was not generally a problem in any event).

Ironically, the benefits secured by refugees under Art. 14 of the Refugee Convention have today been effectively reversed. The Berne Convention was amended in 1967 to provide that "[a]uthors who are not nationals of one of the countries of the Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country."[549] Art. 14 of the Refugee Convention therefore does not improve upon this general language for purposes of enabling refugees to enforce their literary and artistic claims abroad.[550] On the other hand, amendments to the Paris Convention may have given rise to at least some need for the protections of Art. 14. The earlier language of that treaty, under which it was sufficient simply to be "within the jurisdiction" of a state party to claim exemption from reciprocity in other countries, was deleted.

[546] The debates of the Ad Hoc Committee were suspended on the motion of the Israeli delegate to obtain expert advice on the best way to protect intellectual property interests beyond those covered by the Berne Convention, but there is no indication of any effort substantively to tailor Art. 14 to address the broader range of issues: UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 23.

[547] 828 UNTS 11851, done Mar. 20, 1883, revised in Stockholm July 14, 1967 (Paris Convention).

[548] This is the language of the treaty as it existed at the time of the Refugee Convention's drafting, subsequent to the London Amendment of June 2, 1934: (1938) 4459 LNTS 19, at Art. 2(1).

[549] Berne Convention, at Art. 3(2).

[550] The Berne Convention is today subscribed to by 157 states: status of ratifications available at www.wipo.int (accessed Nov. 20, 2004).

Non-citizens must today be "domiciled . . . in the territory of one of the countries of the Union" to be treated as a citizen for purposes of enforcing their industrial property rights abroad. This is a marginally more exacting requirement than the Refugee Convention's rule that Art. 14 rights inhere in refugees who are "habitually resident" in a state party.[551]

The "habitual residence" language of Art. 14 was adopted just after the decision was made to grant refugees the same protection of intellectual property rights as enjoyed by citizens of their host country. Against the backdrop of that expansion of the scope of Art. 14, the drafters felt compelled to ensure that the beneficiary class was not "too wide in scope."[552] The Conference of Plenipotentiaries therefore dropped the reference to granting refugees the same rights as the nationals of their country of "residence" – understood in some European countries to include even a country of short-term de facto presence[553] – in favor of the present rule, which requires that intellectual property rights be protected by state parties on the same terms as those of the citizens of the refugee's country of "habitual residence."[554] Importantly, however, "habitual residence" was agreed not to be the equivalent of the more formal notion of "domicile."[555] While the drafters clearly intended that refugees who had stayed for no more than a short time in any

[551] On the other hand, the Paris Convention has been subscribed to by 168 states, more than are parties to the Refugee Convention: status of ratifications available at www.wipo.int (accessed Nov. 20, 2004).

[552] Statement of Mr. Fritzer of Austria, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 19.

[553] For example, the Austrian representative noted that "[u]nder the existing text [which granted rights to refugees based on 'residence'], a refugee would be entitled to enjoy the protection referred to even if he only stayed in the country for a few days. In the opinion of the Austrian delegation, it was necessary to specify in the text that a refugee must be more than a temporary visitor. He was therefore proposing that the words 'in which he is resident' should be replaced by the phrase 'in which he has his habitual residence or, if he has no habitual residence, in which he resides'": Statement of Mr. Fritzer of Austria, ibid. See also Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.8, July 5, 1951, at 5: "Two types of residence were indeed recognized: habitual residence and temporary residence."

[554] "The term 'habitual residence' was introduced to distinguish it from purely temporary residence": Weis, *Travaux*, at 123. See also Robinson, *History*, at 107: "The change [to refer to 'habitual residence'] was made to denote that a stay of short duration was not sufficient."

[555] Sweden pressed for the incorporation of the notion of domicile (see Statement of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 19), but the French government objected that "the concept of 'domicile,' entailing as it did certain disadvantages from the legal point of view, involved difficulties": Statement of Mr. Rochefort of France, ibid. at 20. The Belgian representative similarly argued that "it would not be possible to require of a refugee that he possess a domicile": Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.8, July 5, 1951, at 5. More fundamentally, the representative of Colombia provided a principled rationale for referring to habitual residence rather than to domicile in the context of Art. 14. "There was a difference between rights

asylum country could not yet benefit from Art. 14,[556] they were equally emphatic that intellectual property rights should be protected as soon as the refugee had established some form of de facto ongoing presence in a state party.[557] As such, the Refugee Convention has present-day value as a means

dependent on personal status and other civil rights, for example, property rights such as those under discussion. In the former case, the concept of 'domicile' might be suitable, but the concept of 'residence' was preferable so far as artistic rights and industrial property were concerned": Statement of Mr. Giraldo-Jaramillo of Colombia, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 20. This reasoning was endorsed by the representative of the United Kingdom, who observed that "[t]he use of the well-known and clearly defined term 'domicile' was appropriate in article [12], as it constituted a criterion for determining the laws that should apply in respect of the personal status of a refugee. As, however, the restriction aimed at in article [14] was merely in respect of the period of residence in a receiving country, he considered it would be wrong to introduce the term 'domicile' into the text of that article": Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.8, July 5, 1951, at 6. Thus, Robinson concludes that "the exercise of the right was not made dependent on 'permanent residence' or 'domicile' because it was felt that it was too far-reaching [a] concept for the enjoyment of civil rights": Robinson, *History*, at 107.

[556] The approach initially proposed to the Conference of Plenipotentiaries by the Austrian representative would have granted intellectual property rights equivalent to those enjoyed by the nationals of the country "in which [the refugee] has his habitual residence or, if he has no habitual residence, in which he resides": Statement of Mr. Fritzer of Austria, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 19, citing UN Doc. A/CONF.2/38. In eventually agreeing to drop his opposition to this form of words, the Swedish representative insisted that "the words 'or, if he has no habitual residence, in which he resided' [be] deleted": Statement of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.8, July 5, 1951, at 7. The Austrian representative "accepted the Swedish amendment to his proposal": Statement of Mr. Fritzer of Austria, ibid.

[557] "[I]f 'domicile' seemed too narrow, and 'residence' too wide a concept, 'habitual residence' constituted a happy medium ... While it was true that [the phrase] might lack legal precision, it should be remembered that refugees found themselves in a *de facto* position before they enjoyed a *de jure* position": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.8, July 5, 1951, at 7–8. See also Statement of Mr. Hoare of the United Kingdom, ibid. at 6: "[T]he restriction aimed at in Article [14] was merely in respect of the period of residence in a receiving country." Even the Swedish representative, who had argued for the alternative language of "domicile," acknowledged that "the Swedish delegation was mainly concerned with eliminating the idea of residence pure and simply," in consequence of which it could accept the Austrian reference to "habitual residence": Statement of Mr. Petren of Sweden, ibid. at 5. In line with these understandings, Grahl-Madsen concludes that "refugees do not have to have a permanent residence or domicile. With the exception of new refugees who have not yet habitual residence anywhere, it is difficult to envisage a refugee having no habitual residence": Grahl-Madsen, *Commentary*, at 60. Robinson notes simply that "'[h]abitual residence' means residence of a certain duration, but it implies much less than permanent residence": Robinson, *History*, at 107. This leads him logically to conclude that "it is difficult to envisage a refugee having no habitual residence except new refugees who did not yet succeed in establishing 'habitual residence' anywhere": ibid.

of protecting the literary and artistic property rights of refugees who are habitually resident, but not domiciled, in a state party.

More critically, Art. 14 also grants refugees rights in relation to systems for the protection of intellectual property which have emerged since the drafting of the Refugee Convention, such as the specialized treaty regime for the protection of the performers and producers of "phonograms" (audio recordings). Under the Rome Convention of 1961, the ability of producers and performers to enforce abroad their intellectual property interests in phonograms – that is, in the performance itself, rather than in the musical score on which the performance was based – is reserved for persons who are "nationals" of a contracting state party.[558] The same is true of the more specialized treaties which build upon the Rome Convention, including the 1971 accord prohibiting the unauthorized duplication of phonograms[559] and the more recent 1996 World International Property Organization treaty on the same subject.[560] Yet in any state party to the Refugee Convention, Art. 14 requires that refugees be treated as citizens of their state of habitual residence. In the result, refugees are entitled to enforce their phonogram rights in a country that is also a party to the Rome Convention on the same terms as a national of their host country.

This ability of Art. 14 to provide a safeguard against any enforcement regime that might not enfranchise refugees is of continuing importance. Arguably the most important contemporary treaty on the subject, the World Trade Organization's recent Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods ("TRIPS Agreement"),[561] requires only that the "nationals" of state parties be

[558] International Convention for the Protection of Performers [and] Producers of Phonograms and Broadcasting Organisations, done Oct. 26, 1961, entered into force May 18, 1964 (Rome Convention), at Art. 2(1).

[559] "Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public": Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, done Oct. 29, 1971, at Art. 2.

[560] "Contracting Parties shall accord the protection provided under this Treaty to the performers and producers of phonograms who are nationals of other Contracting Parties": WIPO Performances and Phonograms Treaty, done Dec. 20, 1996, at Art. 3(1).

[561] 33 ILM 81, Dec. 15, 1993 (TRIPS Agreement). "TRIPS expands the scope of GATT's most-favored nation and national-treatment principles to intellectual property rights as they affect the trade in products protected by such rights. Most-favored nation treatment requires that any protection and rights granted to *nationals* of any Member must be accorded to *nationals* of all Members [emphasis added]": N. Telecki, "The Role of Special 301 in the Development of International Protection of Intellectual Property Rights After the Uruguay Round," (1996) 14 *Boston University International Law Journal* 187, at 193.

guaranteed the right to enforce their intellectual property rights,[562] except to the extent that one of the core predecessor intellectual property treaties contains rules to assimilate non-citizen residents.[563] In the case of phonograms, the TRIPS Agreement simply defers to the narrow definition of the Rome Convention. Yet by virtue of Art. 14 of the Refugee Convention, this definition cannot be relied upon to exclude habitually resident refugees from access to enforcement procedures.

It remains, however, as both Weis and Grahl-Madsen conclude, that a refugee who has yet to establish habitual residence in any state party would be entitled only to whatever protection of intellectual property rights is enjoyed by aliens generally, in line with the residual standard of Art. 7(1) of the Refugee Convention.[564] Those who view the Universal Declaration of Human Rights as a source of law[565] have suggested that this residual protection might be based on its Art. 27(2),[566] said to establish that "copyright ... has been given the rank of a human right."[567] This position is, however, difficult to reconcile to the more cautious approach taken in the formally binding Covenant on Economic, Social and Cultural Rights. Art. 15(1)(c) of the Covenant, which comes closest to a duty to protect intellectual property rights, actually establishes only a "recognition" of the right of everyone "*[t]o benefit from the protection of* the moral and material interests resulting from any scientific, literary or artistic production of which he is the author [emphasis added]."[568]

Effectively, this amounts to a duty of non-discrimination,[569] requiring only that any exclusion of non-citizens from systems for enforcing

[562] "Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property": TRIPS Agreement, at Art. 3.

[563] Ibid. at Art. 1(3).

[564] Grahl-Madsen, *Commentary*, at 61; Weis, *Travaux*, at 123.

[565] A more cautious position on this question is taken here: see chapter 1.2.3 above, particularly at pp. 44–46.

[566] "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author": Universal Declaration of Human Rights, UNGA Res. 217A(III), Dec. 10, 1948 (Universal Declaration), at Art. 27(2).

[567] I. Szabo, *Cultural Rights* (1974), at 45.

[568] Economic, Social and Cultural Covenant, at Art. 15(1)(c).

[569] As Melander writes, "[i]n spite of the impression given by reading the UN Charter, stressing cultural rights as an essential part of UN activities, it must be admitted that little attention has been paid to cultural rights, at least in comparison with other human rights": G. Melander, "Article 27," in A. Eide et al. eds., *The Universal Declaration of Human Rights: A Commentary* 429 (1992), at 429. Nor have private property rights been codified as a matter of binding international law: see chapter 4.5.1 above, at pp. 518–521. But it may be difficult for a state to justify withholding the protection of the law from non-citizens under general norms of non-discrimination law: see chapter 2.5.5 above.

intellectual property rights be justifiable. In view of the breadth of the "reasonableness" doctrine as conceived in international law and, in particular, taking account of the broad margin of appreciation granted states,[570] it is not self-evident that an asylum country's decision to withhold enforcement rights until habitual residence is established would be deemed discriminatory. Much less is there any guarantee that the refusal of a third state to allow refugees to enforce intellectual property rights in their courts would be adjudged discriminatory, given the accepted pattern of dispensing with reciprocity requirements only on the basis of express treaty obligations to that effect. As Eide concludes, the substantive bedrock for claims of this kind will normally need to be found in the more specialized intellectual property treaties,[571] assuming these have been adhered to by the country in which the refugee seeks to advance his or her claim.

In sum, the primary purpose of Art. 14 as conceived by the drafters – to allow refugees to enforce their literary and artistic rights outside their country of citizenship despite the prevalence of reciprocity requirements – is today largely superseded by the amended Berne Convention and the TRIPS Agreement (which incorporates by reference the expanded Berne definition, assimilating habitually resident non-citizens to nationals). But Art. 14 remains of value in ensuring that the industrial property rights of refugees who are habitually resident, even if not domiciled, in a state party can be enforced outside the asylum country. It also ensures that refugees benefit from new forms of intellectual property protection, such as that established to protect performance rights (phonograms), even when, as in the case of the pertinent Rome Convention, non-citizens are not otherwise enfranchised. Finally, the Refugee Convention's Art. 14 expressly precludes any effort by an asylum state to deny habitually resident refugees access to any system it offers its own citizens for enforcing their intellectual property rights, thereby avoiding the need for refugees to seek access on the basis of more fungible non-discrimination rules.

6.6 International travel

With few exceptions, international travel has long required the possession of a passport issued by a national government. Yet refugees often arrive without a passport from their country of origin, either because they were incapable of (safely) securing that document before departure, or because its destruction was effectively compelled to avoid visa controls, carrier sanctions, or other

[570] See chapter 2.5.5 above, at pp. 129–145.

[571] A. Eide, "Cultural Rights as Individual Human Rights," in A. Eide et al. eds., *Economic, Social and Cultural Rights: A Textbook* 236 (1995).

impediments to their escape and entry into an asylum state.[572] Even once inside the asylum country, refugees are not free to apply for a passport from the consular authorities of their country of origin, since to do so risks the cessation of their refugee status in accordance with Art. 1(C)(1) of the Convention.[573] In such circumstances, a refugee "would therefore be unable to leave the initial reception country if a document replacing the passport had not been established for their benefit."[574]

The Refugee Convention therefore provides for the issue to refugees of a Convention Travel Document (CTD) intended to serve the purpose of a national passport. UNHCR reports that while most state parties to the Refugee Convention make these documents available,[575] some states have failed to implement the legislative or administrative changes required to ensure the provision of travel documents to refugees.[576] Zambia, for example, has issued only internal identification documents to refugees for fear of incurring responsibility for their welfare while abroad.[577] Nigeria has refused to issue travel documents to refugees wishing to study abroad, purportedly on

[572] The drafters recognized that the use of false documents to seek asylum was sometimes unavoidable, and was not a basis for the penalization of refugees so long as the requirements of Art. 31(1) are met: see chapter 4.2.2 above, at pp. 405–406.

[573] "This Convention shall cease to apply to any person falling under the terms of section A if . . . [h]e has voluntarily re-availed himself of the protection of the country of his nationality": Refugee Convention, at Art. 1(C)(1). Indeed, the same clause may even be interpreted to authorize the termination of refugee status in the event a refugee who arrived with a national passport presents his or her national passport in order to secure entry into a third country. UNHCR seeks to limit the scope of Art. 1(C)(1) by, for example, arguing that there is "re-availment" only when a passport is both applied for and received, not simply when it is used for travel abroad: see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, re-edited 1992) (UNHCR, *Handbook*), at paras. 118–125. But this construction may be contested on the grounds that the presentation of a government's passport in order to secure entry into a third state amounts, in law, to an invocation of the issuing state's protective authority. Lambert observes that "[t]he Convention Travel Document (CTD) should be used in place of a national passport or identity card by the refugee; otherwise there is a serious risk that he or she will lose refugee status": Lambert, *Seeking Asylum*, at 163.

[574] Secretary-General, "Memorandum," at 41.

[575] UNHCR, "Note on follow-up to the earlier Conclusion of the Executive Committee on Travel Documents for Refugees," UN Doc. EC/SCP/48, July 3, 1987 (UNHCR, "Travel Documents Follow-Up"), at para. 2.

[576] Ibid. at para. 4. More recently, UNHCR pointed to administrative difficulties experienced by refugees in Slovenia (but "this problem has now been resolved"), and delays in the issuance of CTDs in states such as Poland: UNHCR, *Integration Rights and Practices with Regard to Recognized Refugees in the Central European Countries*, Eur. Series, vol. 5(1), July 2000, at 327.

[577] F. Ohaegbulom, "Human Rights and the Refugee Situation in Africa," in G. Shepherd and V. Nanda eds., *Human Rights and Third World Development* 197 (Ohaegbulom, "Refugee Situation in Africa") (1994), at 197.

the grounds that such documents are only to be granted to permanent residents.[578] A more common problem, however, is the provision to refugees of only non-standardized travel documents which do not include a clause guaranteeing the right of the refugee to reenter the issuing country. Kenya, Tanzania, and Uganda are among the states "that issue one-way travel documents that do not include an automatic right of return."[579] As UNHCR reports, "restrictions on the validity of the return clause or refusal of readmission can seriously reduce the value of the travel documents by discouraging other States from granting visas, and could even have wider consequences, e.g. jeopardizing educational schemes for refugees."[580]

In some states, including Switzerland and the United Kingdom, a travel document is not issued until refugee status has been formally recognized.[581] UNHCR reports that most governments will not issue a refugee travel document to a refugee who lives in another country, though they may do so in exceptional circumstances where it cannot be obtained from the country of residence.[582] There may also be geographical restrictions on the validity of refugee travel documents. Those issued by the United States, for example, are not valid for travel to a list of countries from which that country is politically estranged.[583] More frequently, travel is simply prohibited to the country of origin.[584]

There are often significant delays in the granting[585] or renewal[586] of travel documents. The ability of a refugee to secure a travel document may also be

[578] P. Tiao and Nigerian Civil Liberties Organization, "The Status of Refugee Rights in Nigeria" (1992), at 16.

[579] Ohaegbulom, "Refugee Situation in Africa." See also P. van Krieken, "African Refugee Law," (1981) 45/46 *Yearbook of the Association of Attenders and Alumni of the Hague Academy of International Law* 133, at n. 37, who writes that in Africa, "the regulations concerning the return clauses are quite often not applied correctly." The same point has been made by UNHCR, "Travel Documents for Refugees," paper presented at the Conference on the Legal and Social Aspects of African Refugee Problems, Oct. 1967, UN Doc. AFR/REF/CONF.1967/No.5, at 1.

[580] UNHCR, "Travel Documents Follow-Up," at para. 11.

[581] Lambert, *Seeking Asylum*, at 167.

[582] UNHCR, "Implementation," at 10.

[583] G. Goodwin-Gill, *The Refugee in International Law* (1994) (Goodwin-Gill, *Refugee in International Law*), at 302, n. 44.

[584] This is the case for Austria, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Spain, Sweden, and the United Kingdom: European Council on Refugee and Exiles, "Survey Provisions on Travel Documents and Visas for Refugees in the European Union" (2000), at 5, 9, 15, 26, 31, 35, 39, 42, 46, 51, 61, 64, and 68.

[585] "In certain countries . . . applications can take from six to twelve months to process. Such protracted periods lead to obvious hardship for refugees, and may delay resettlement and lead to loss of educational or employment opportunities": UNHCR, "Travel Documents Follow-Up," at para. 7.

[586] A number of states have not empowered their diplomatic or consular authorities to renew or extend travel documents: ibid. at para. 12.

compromised by disagreements between governments about which has the responsibility to issue documents when a particular refugee is thought to have ties to more than one state party.[587] Only in Europe has a comprehensive set of arrangements been put in place to resolve the details of transfer of responsibility to issue refugee travel documents.[588]

Valid refugee travel documents are reported to be routinely recognized by governments as the equivalent of a passport.[589] With the exception of state parties to the 1959 European Agreement on the Abolition of Visas for Refugees,[590] however, most countries require refugees granted a CTD also to hold valid transit or entry visas.[591] In general, issuing governments guarantee the right of the CTD holder to reenter their territory for the duration of the document's validity, though one state is reported to require all refugees to secure a reentry visa, while another requires a reentry visa only of refugees returning from a country whose nationals also need a visa.[592]

Refugee Convention, Art. 28 Travel documents

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

[587] Ibid. at paras. 13, 14.

[588] Under the European Agreement on Transfer of Responsibility for Refugees, 107 ETS, done Oct. 16, 1980 (European Agreement on Transfer of Responsibility for Refugees), responsibility is considered to be transferred after two years of legal and continuous stay in a second state, or sooner if the refugee has been granted a permanent stay, or allowed to stay for a period that exceeds the validity of the travel document upon which he or she entered the country.

[589] UNHCR, "Implementation," at 10.

[590] 31 ETS, done Apr. 20, 1959, entered into force Apr. 9, 1960. This agreement exempts refugees from visa requirements for visits of under three months. There are also various bilateral arrangements among European states to similar effect: UNHCR, "Travel Documents Follow-Up," at para. 20.

[591] UNHCR, "Implementation," at 11.

[592] Ibid. at 10–11.

Refugee Convention, Schedule

1. (1) The travel document referred to in article 28 of this Convention shall be similar to the specimen annexed hereto.

(2) The document shall be made out in at least two languages, one of which shall be English or French.

2. Subject to the regulations obtaining in the country of issue, children may be included in the travel document of a parent or, in exceptional circumstances, of another adult refugee.

3. The fees charged for issue of the document shall not exceed the lowest scale of charges for national passports.

4. Save in special or exceptional cases, the document shall be made valid for the largest possible number of countries.

5. The document shall have a validity of either one or two years, at the discretion of the issuing authority.

6. (1) The renewal or extension of the validity of the document is a matter for the authority which issued it, so long as the holder has not established lawful residence in another territory and resides lawfully in the territory of the said authority. The issue of a new document is, under the same conditions, a matter for the authority which issued the former document.

(2) Diplomatic or consular authorities, specially authorized for the purpose, shall be empowered to extend, for a period not exceeding six months, the validity of travel documents issued by their Governments.

(3) The Contracting States shall give sympathetic consideration to renewing or extending the validity of travel documents or issuing new documents to refugees no longer lawfully resident in their territory who are unable to obtain a travel document from the country of their lawful residence.

7. The Contracting States shall recognize the validity of the documents issued in accordance with the provisions of article 28 of this Convention.

8. The competent authorities of the country to which the refugee desires to proceed shall, if they are prepared to admit him and if a visa is required, affix a visa on the document of which he is the holder.

9. (1) The Contracting States undertake to issue transit visas to refugees who have obtained visas for a territory of final destination.

(2) The issue of such visas may be refused on grounds which would justify refusal of a visa to any alien.

10. The fees for the issue of exit, entry or transit visas shall not exceed the lowest scale of charges for visas on foreign passports.

11. When a refugee has lawfully taken up residence in the territory of another Contracting State, the responsibility for the issue of a new document, under the terms and conditions of article 28, shall be that of the competent authority of that territory, to which the refugee shall be entitled to apply.

12. The authority issuing a new document shall withdraw the old document and shall return it to the country of issue if it is stated in the document that it should be so returned; otherwise it shall withdraw and cancel the document.

13. (1) Each Contracting State undertakes that the holder of a travel document issued by it in accordance with article 28 of this Convention shall be readmitted to its territory at any time during the period of its validity.

(2) Subject to the provisions of the preceding sub-paragraph, a Contracting State may require the holder of the document to comply with such formalities as may be prescribed in regard to exit from or return to its territory.

(3) The Contracting States reserve the right, in exceptional cases, or in cases where the refugee's stay is authorized for a specific period, when issuing the document, to limit the period during which the refugee may return to a period of not less than three months.

14. Subject only to the terms of paragraph 13, the provisions of this Schedule in no way affect the laws and regulations governing the conditions of admission to, transit through, residence and establishment in, and departure from, the territories of the Contracting States.

15. Neither the issue of the document nor the entries made thereon determine or affect the status of the holder, particularly as regards nationality.

16. The issue of the document does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not confer on these authorities a right of protection.

Refugee Convention, Art. 11 Refugee seamen

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

Recommendation A of the Conference of Plenipotentiaries
The Conference, [c]onsidering that the issue and recognition of travel documents is necessary to facilitate the movement of refugees, and in particular their resettlement; [u]rges Governments which are parties to the Inter-Governmental Agreement on Refugee Travel Documents signed in London [on] 15 October 1946, or which recognize travel documents issued in accordance with the Agreement, to continue to issue or to recognize such travel documents, and to extend the issue of such documents to refugees as defined in article 1 of the Convention relating to the Status of Refugees or to recognize the travel documents so issued to such persons, until they shall have undertaken obligations under article 28 of the said Convention.

Civil and Political Covenant, Art. 12

. . .

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned right[ ] 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.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Despite its rather simple title, Art. 28 of the Convention is about much more than just the issuance to refugees of a Convention Travel Document (CTD). In line with earlier refugee treaties, this article commits governments to administer an interstate system which dispenses with the need for passports for travel by refugees between and through state parties. By virtue of Art. 28 and its Schedule, governments oblige themselves not only to issue CTDs, but more importantly to honor the refugee travel documents issued by other state parties, to make transit visas available to refugees as required, and to re-admit the holders of refugee travel documents issued by them. The net result is to establish a unified regime for international freedom of movement that exists in parallel to the more general passport-based system.

The CTD system is intended both to enable refugees "to travel on business or on a holiday"[593] and, perhaps more importantly, to make it possible for refugees to move beyond their state of first asylum in search of a durable home. As the British representative to the Ad Hoc Committee succinctly

[593] Statement of Mr. Hoeg of Denmark, UN Doc. A/CONF.2/SR.17, July 12, 1951, at 9.