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Publication Information & Recommended Citation

Hathaway, James C. "The Structure of Entitlement under the Refugee Convention." In *The Rights of Refugees Under International Law*, 2nd ed., 173–311. Cambridge: Cambridge University Press, 2021.
doi:10.1017/9781108863537.004.

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THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW

Second Edition

JAMES C. HATHAWAY

University of Michigan Law School



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of
education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781108495899

DOI: 10.1017/9781108863537

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First published 2005

7th Printing 2018

Second Edition 2021

Printed in the United Kingdom by TJ Books Limited, Padstow Cornwall

A catalogue record for this publication is available from the British Library.

ISBN 978-1-108-49589-9 Hardback

ISBN 978-1-108-81091-3 Paperback

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“[D]ecisions had at times given the impression that it was a conference for the protection of helpless sovereign states against the wicked refugee. The draft Convention had at times been in danger of appearing to the refugee like the menu at an expensive restaurant, with every course crossed out except, perhaps, the soup, and a footnote to the effect that even the soup might not be served in certain circumstances.”

Mr. Rees, International Council of Voluntary Agencies (Nov. 26, 1951)

“[I]t was clearly in the best interests of refugees that [the Refugee Convention] should be cast in a form which would be acceptable to governments, thus inducing them to accept at least certain commitments . . . Otherwise, they would be obliged to enter reservations which would probably exclude even those minimum commitments. Liberalism which was blind to the facts of reality could only beat the air.”

Mr. Rochefort, Representative of France (Nov. 30, 1951)

In memory of Luis Peral Fernández (1967–2019)

CONTENTS

<i>Table of Concordance to the Refugee Convention and Protocol</i>	<i>page</i> xiv
<i>Acknowledgments</i>	xix
<i>Table of Cases</i>	xxii
<i>Table of Treaties and Other International Instruments</i>	1
<i>Abbreviations for Courts and Tribunals Cited</i>	lxvii
Introduction	1
1 The Evolution of the Refugee Rights Regime	10
1.1 International Aliens Law	10
1.2 International Protection of Minorities	17
1.3 League of Nations Codifications of Refugee Rights	19
1.4 The Convention relating to the Status of Refugees	26
1.4.1 Substantive Rights	29
1.4.2 Reservations	31
1.4.3 Temporal and Geographical Restrictions	35
1.4.4 Duties of Refugees	37
1.4.5 Non-impairment of Other Rights	50
1.5 Post-Convention Sources of Refugee Rights	53
1.5.1 Protocol relating to the Status of Refugees	54
1.5.2 Conclusions and Guidelines on International Protection	56

1.5.3 Regional Refugee Rights Regimes	67
1.5.3.1 African Union	68
1.5.3.2 European Union	72
1.5.3.3 Organization of American States	77
1.5.3.4 League of Arab States	81
1.5.3.5 Association of Southeast Asian Nations	82
1.5.4 International Human Rights Law	84
1.5.5 Duty not to Discriminate against Non-citizens, including Refugees	102
1.5.5.1 Categorical Approval of Differentiation based on Citizenship	108
1.5.5.2 Unwarranted Deference to State Assertions of Reasonableness	112
1.5.5.3 Failure to Ensure Substantive Equality	119
2 An Interactive Approach to Interpreting Refugee Rights	128
2.1 The Perils of “Ordinary Meaning”	134
2.2 Context	139
2.3 Object and Purpose, Conceived as Effectiveness	148
2.4 But What About State Practice?	161
3 The Structure of Entitlement under the Refugee Convention	173
3.1 Attachment to the Asylum State	176
3.1.1 Subject to a State’s Jurisdiction	181
3.1.2 Physical Presence	193
3.1.3 Lawful or Habitual Presence	196
3.1.4 Lawful Stay	212
3.1.5 Durable Residence	216
3.2 The General Standard of Treatment	219
3.2.1 Assimilation to Aliens	224
3.2.2 Exemption from Reciprocity	225

3.2.3 Exemption from Insurmountable Requirements	232
3.2.4 Rights Governed by Personal Status	237
3.3 Exceptional Standards of Treatment	255
3.3.1 Most-Favored-National Treatment	257
3.3.2 National Treatment	261
3.3.3 Absolute Rights	264
3.4 Prohibition of Discrimination between and among Refugees	265
3.5 Restrictions on Refugee Rights	291
3.5.1 Suspension of Rights for Reasons of National Security	292
3.5.2 Exemption from Exceptional Measures	303
4 Rights of Refugees Physically Present	312
4.1 Right to Enter and Remain in an Asylum State (<i>Non-refoulement</i>)	313
4.1.1 Beneficiaries of Protection	340
4.1.2 Nature of the Duty of <i>Non-refoulement</i>	355
4.1.2.1 Non-admittance	357
4.1.2.2 Ejection	359
4.1.2.3 “Voluntary Repatriation”	360
4.1.2.4 Failure to Identify Refugees	362
4.1.2.5 International Zones and Excision	365
4.1.2.6 “Protection Elsewhere” (“First Country of Arrival” and “Safe Third Country”) Regimes	366
4.1.2.7 “Safe Country of Origin” Rules	375
4.1.3 Extraterritorial <i>Refoulement</i>	379
4.1.3.1 Unilateral Extraterritorial Deterrence	379
4.1.3.2 Cooperative Extraterritorial Deterrence	390
4.1.4 Individuated Exceptions	399
4.1.4.1 Danger to National Security	406
4.1.4.2 Danger to the Asylum State Community	413
4.1.4.3 No Balancing Requirement	418

1.5.3 Regional Refugee Rights Regimes	67
1.5.3.1 African Union	68
1.5.3.2 European Union	72
1.5.3.3 Organization of American States	77
1.5.3.4 League of Arab States	81
1.5.3.5 Association of Southeast Asian Nations	82
1.5.4 International Human Rights Law	84
1.5.5 Duty not to Discriminate against Non-citizens, including Refugees	102
1.5.5.1 Categorical Approval of Differentiation based on Citizenship	108
1.5.5.2 Unwarranted Deference to State Assertions of Reasonableness	112
1.5.5.3 Failure to Ensure Substantive Equality	119
 2 An Interactive Approach to Interpreting Refugee Rights	 128
2.1 The Perils of “Ordinary Meaning”	134
2.2 Context	139
2.3 Object and Purpose, Conceived as Effectiveness	148
2.4 But What About State Practice?	161
 3 The Structure of Entitlement under the Refugee Convention	 173
3.1 Attachment to the Asylum State	176
3.1.1 Subject to a State’s Jurisdiction	181
3.1.2 Physical Presence	193
3.1.3 Lawful or Habitual Presence	196
3.1.4 Lawful Stay	212
3.1.5 Durable Residence	216
3.2 The General Standard of Treatment	219
3.2.1 Assimilation to Aliens	224
3.2.2 Exemption from Reciprocity	225

3.2.3 Exemption from Insurmountable Requirements	232
3.2.4 Rights Governed by Personal Status	237
3.3 Exceptional Standards of Treatment	255
3.3.1 Most-Favored-National Treatment	257
3.3.2 National Treatment	261
3.3.3 Absolute Rights	264
3.4 Prohibition of Discrimination between and among Refugees	265
3.5 Restrictions on Refugee Rights	291
3.5.1 Suspension of Rights for Reasons of National Security	292
3.5.2 Exemption from Exceptional Measures	303
4 Rights of Refugees Physically Present	312
4.1 Right to Enter and Remain in an Asylum State <i>(Non-refoulement)</i>	313
4.1.1 Beneficiaries of Protection	340
4.1.2 Nature of the Duty of <i>Non-refoulement</i>	355
4.1.2.1 Non-admittance	357
4.1.2.2 Ejection	359
4.1.2.3 “Voluntary Repatriation”	360
4.1.2.4 Failure to Identify Refugees	362
4.1.2.5 International Zones and Excision	365
4.1.2.6 “Protection Elsewhere” (“First Country of Arrival” and “Safe Third Country”) Regimes	366
4.1.2.7 “Safe Country of Origin” Rules	375
4.1.3 Extraterritorial <i>Refoulement</i>	379
4.1.3.1 Unilateral Extraterritorial Deterrence	379
4.1.3.2 Cooperative Extraterritorial Deterrence	390
4.1.4 Individuated Exceptions	399
4.1.4.1 Danger to National Security	406
4.1.4.2 Danger to the Asylum State Community	413
4.1.4.3 No Balancing Requirement	418

4.1.5 Qualified Duty in the Case of Mass Influx?	423
4.1.6 An Expanded Concept of <i>Non-refoulement</i> ?	435
4.1.6.1 <i>Opinio Juris?</i>	441
4.1.6.2 Consistent State Practice?	450
4.1.6.3 Other Duties of <i>Non-refoulement</i>	459
4.2 Freedom from Arbitrary Detention and Penalization for Illegal Entry	464
4.2.1 Beneficiaries of Protection	488
4.2.1.1 Presentation to Authorities within a Reasonable Period of Time	492
4.2.1.2 Breach Necessitated by Urgency of Search for Protection	495
4.2.1.3 Persons or Organizations Assisting Refugees	507
4.2.2 Non-penalization	511
4.2.3 Expulsion	519
4.2.4 Provisional Detention and Other Restrictions on Freedom of Movement	521
4.2.4.1 Freedom from Arbitrary Detention	523
4.2.4.2 Other Restrictions on Movement	537
4.2.4.3 Mandatory Termination of Refugee Detention and Other Restrictions on Movement	540
4.2.4.4 Conditions of Detention	547
4.3 Physical Security	550
4.3.1 Right to Life	566
4.3.2 Freedom from Torture, Cruel, Inhuman, or Degrading Treatment	571
4.3.3 Security of Person	578
4.4 Necessities of Life	581
4.4.1 Freedom from Deprivation	584
4.4.2 Access to Food and Shelter	594
4.4.2.1 Food	621
4.4.2.2 Water	624
4.4.2.3 Clothing	625

4.4.2.4 Housing	627
4.4.3 Access to Healthcare	630
4.5 Property Rights	641
4.5.1 Movable and Immovable Property Rights	645
4.5.2 Tax Equity	656
4.6 Family Rights	664
4.6.1 Family Unity	683
4.6.2 Family Reunification	687
4.7 Freedom of Thought, Conscience, and Religion	697
4.8 Education	730
4.8.1 Elementary Education	745
4.8.2 Secondary and Other Education	757
4.9 Documentation of Identity and Status	765
4.10 Judicial and Administrative Assistance	779
4.10.1 Documentation	792
4.10.2 Access to Courts	797
5 Rights of Refugees Lawfully or Habitually Present	809
5.1 Protection from Expulsion	811
5.1.1 Constraints before Lawful Presence	818
5.1.2 Constraints after Lawful Presence	830
5.1.3 Procedural Constraints on Expulsion	833
5.1.4 Substantive Constraints on Expulsion	841
5.1.5 Right to Non-coercive Departure	856
5.2 Freedom of Residence and Internal Movement	860
5.3 Self-Employment	886
5.4 Intellectual Property Rights	901
5.5 Assistance to Access the Courts	915

6 Rights of Refugees Lawfully Staying	925
6.1 Right to Work	925
6.1.1 Wage-Earning Employment	931
6.1.2 Fair Working Conditions	966
6.1.3 Social Security	978
6.2 Professional Practice	993
6.3 Public Relief and Assistance	1011
6.4 Housing	1028
6.5 Freedom of Expression and Association	1048
6.6 International Travel	1085
7 Rights of Solution	1128
7.1 Repatriation	1134
7.1.1 Fundamental Change of Circumstances	1143
7.1.2 Restoration of Protection	1147
7.1.3 The Risky Notion of “Voluntary Repatriation”	1150
7.1.4 General Declarations of Cessation	1156
7.1.5 Lawful Mandated Repatriation	1161
7.1.6 Compelling Reasons Exception	1171
7.2 Voluntary Reestablishment	1177
7.3 Resettlement	1189
7.4 Naturalization	1206
<i>Appendices</i>	
1 <i>Convention relating to the Status of Refugees (1951)</i>	1222
2 <i>Protocol relating to the Status of Refugees (1967)</i>	1238
3 <i>Universal Declaration of Human Rights (1948)</i>	1242

CONTENTS

xiii

<i>4 International Covenant on Civil and Political Rights (1966)</i>	1249
<i>5 International Covenant on Economic, Social and Cultural Rights (1966)</i>	1269
<i>Select Bibliography</i>	1280
<i>Index</i>	1303

The Structure of Entitlement under the Refugee Convention

The universal rights of refugees are today derived from two primary sources – general standards of international human rights law,¹ and the Refugee Convention itself.² As the analysis in Chapter 1 makes clear, the obligations derived from the Refugee Convention remain highly relevant, despite the development since 1951 of a broad-ranging system of international human rights law. In particular, general human rights norms do not address many refugee-specific concerns; general economic rights are defined as duties of progressive implementation and may legitimately be denied to non-citizens by less developed countries; not all civil rights are guaranteed to non-citizens, and most of those which do apply to them can be withheld on grounds of their lack of nationality during national emergencies; and the duty of non-discrimination under international law has not always been interpreted in a way that guarantees refugees the substantive benefit of relevant protections.³

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

¹ See generally Chapter 1.5.4.

² “[O]nce they achieve refugee status, not merely are they safeguarded from return home but they secure all of the other manifold benefits provided for under the Convention relating to the Status of Refugees”: *Secretary of State for the Home Department v. AH (Sudan)*, [2007] UKHL 49 (UK HL, Nov. 14, 2007), at [32], per Lord Brown; “What is clear is that signatories to the Refugee Convention are bound to accord to those who have been determined to be refugees the rights that are specified in those [international] instruments”: *Plaintiff M70/2011 v. Minister for Immigration and Citizenship*, (2011) 244 CLR 144 (Aus. HC, Aug. 31, 2011), at [117], per Kiefel J. But see *Negusie v. Attorney General*, 555 US 511 (US SC, Mar. 3, 2009), at 3, in which Scalia J. (concurring) advocated the (internationally erroneous) view that “[a]sylum is a benefit accorded by grace, not by entitlement.”

³ These concerns are developed in detail in Chapters 1.5.4 and 1.5.5.

⁴ See Chapter 2.3 at note 141.

This chapter examines the fairly intricate way in which rights are attributed and defined under the Refugee Convention. Most fundamentally, the refugee rights regime is not simply a list of duties owed by state parties equally to all refugees.⁵ An attempt is instead made to grant enhanced rights as the bond strengthens between a particular refugee and the state party in which he or she is present. While all refugees benefit from a number of core rights, additional entitlements accrue as a function of the nature and duration of the attachment to the asylum state. The most basic set of rights inheres as soon as a refugee comes under a state's de jure or de facto jurisdiction; a second set applies when he or she enters a state party's territory; other rights inhere only when the refugee is lawfully or habitually within the state's territory; some when the refugee is lawfully staying there; and a few rights accrue only upon satisfaction of a durable residency requirement.⁶ Before any given right can be claimed by a particular refugee, the nature of his or her attachment to the host state must therefore be defined. The structure of the attachment system is incremental: because the levels build on one another (a refugee in a state's territory is also under its jurisdiction; a refugee lawfully or habitually present is also present; a refugee lawfully residing is also lawfully present; and a refugee durably

⁵ Australian courts have favored the formal view that rights are owed only to other contracting states, not to refugees themselves: *NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2005] HCA 6 (Aus. HC, Mar. 2, 2005), at [27]; *MZQAP v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2005] FCAFC 35 (Aus. FFC, Mar. 15, 2005), at [3]. Because the Refugee Convention is an international treaty, it is of course technically true that individuals are not themselves parties. But the same is true for all international human rights treaties, which has not impeded general consensus that in pith and substance it is human beings who are the true rights holders under such accords, despite being reliant on states individually and collectively to enforce those treaty-based rights. As the Inter-American Court of Human Rights observed, human rights treaties "are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting states"; rather, "their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the state of their nationality and all other contracting states": *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)* (Advisory Opinion OC-3/83) (IACtHR, Sept. 8, 1983), at [50], quoting *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)* (Advisory Opinion OC-2/82) (IACtHR, Sept. 24, 1982), at [29]. The European Court of Human Rights has similarly noted that "the purpose of the High Contracting Parties in concluding the [European Convention on Human Rights] was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order . . . [I]t follows that the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves": *Austria v. Italy*, App. No. 788/60, 4 Eur. YB HR 116 (ECtHR, Jan. 11, 1961), at 140.

⁶ See Chapter 3.1.

residing is also lawfully residing), rights once acquired are retained for the duration of refugee status.⁷

Second, as under the 1933 Convention⁸ and the predecessor regime of aliens law,⁹ the standard of treatment owed to refugees is defined through a combination of absolute and contingent criteria. A few rights are guaranteed absolutely to refugees, and must be respected even if the host government does not extend these rights to anyone else, including its own citizens.¹⁰ More commonly, the standard for compliance varies as a function of the relevant treatment afforded another group under the laws and practices of the receiving country. Under these contingent rights standards, refugees are entitled to be assimilated either to nationals of a most-favored state, or to citizens of the asylum state itself.¹¹ If no absolute or contingent standard is specified for a given right, refugees benefit from the usual standard of treatment applied to non-citizens present in the asylum state.¹² In applying this general residual standard, however, refugees must be exempted from any criteria which a refugee is inherently unable to fulfill,¹³ and may not be subjected to any exceptional measures applied against the citizens of their state of origin.¹⁴

Third, an asylum state may not grant preferred treatment to any subset of the refugee population. The interaction of the Refugee Convention's endogenous rule of non-discrimination and the general duty of non-discrimination requires that all refugees benefit from equal access to rights in the host country.¹⁵

Fourth and finally, states enjoy a limited discretion to withhold some rights from particular refugees on the grounds of national security.¹⁶ In contrast to treaties such as the Civil and Political Covenant,¹⁷ however, the Refugee

⁷ "The structure of the 1951 Convention reflects [a] 'layering' of rights": "Letter from R. Andrew Painter, UNHCR Senior Protection Officer, to Robert Pauw," (2003) 80 *Interpreter Releases* 423, at 427.

⁸ See Chapter 1.3 at notes 34–35.

⁹ See Chapter 1.1 at note 8. Refugee rights have "been forged on the basis of the legal categories inherited from the law of aliens which were refined and adapted to the specific situation of refugees": V. Chetail, *International Migration Law* (2019) (Chetail, *International Migration Law*), at 183.

¹⁰ See Chapter 3.3.3.

¹¹ See Chapters 3.3.1 and 3.3.2. It will be recalled that this approach establishes a built-in equalization and adjustment mechanism, since contingent rights vary as a function of the relevant treatment afforded another group under the laws and practice of the state party. See Chapter 1.1 at note 9.

¹² See Chapter 3.2. ¹³ See Chapter 3.2.3. ¹⁴ See Chapter 3.5.2.

¹⁵ "A successful claimant will, of course, be entitled to all the benefits that are set out in Articles 2–34 of the Convention without discrimination as to race, religion or country of origin": *Januzi and Hamid v. Secretary of State for the Home Department*, [2006] UKHL 5 (UK HL, Feb. 15, 2006), at [46]. See also Chapter 1.5.5.

¹⁶ See Chapter 3.5.1.

¹⁷ "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required

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

The enforcement of these rights is to be accomplished by the attribution to UNHCR of a surrogate protector role comparable to that played by the various High Commissioners during the League of Nations era,¹⁸ supplemented by the non-derogable agreement of state parties to submit any dispute regarding interpretation or application of the Refugee Convention to the International Court of Justice.¹⁹ There is moreover potential for the national courts and tribunals of many state parties to enforce refugee rights directly, and for United Nations and other human rights bodies to take account of refugee-specific obligations in the interpretation of generally applicable human rights obligations.

3.1 Attachment to the Asylum State

Refugees are entitled to an expanding array of rights as their relationship with the asylum state deepens.²⁰ At the lowest level of attachment, some refugees are simply subject to a state's *jurisdiction*, in the sense of being under its control or

by the exigencies of the situation, *provided that such measures are not inconsistent with their other obligations under international law* and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision [emphasis added]: International Covenant on Civil and Political Rights, 999 UNTS 172 (UNTS 14668), adopted Dec. 16, 1966, entered into force Mar. 23, 1976 ("Civil and Political Covenant"), at Art. 4(1)–(2). The provision requiring continuing respect for "other obligations under international law" clearly imports the duty of state parties to the Refugee Convention to implement their duties under that treaty even when derogation from Covenant rights is allowed. With regard to the right of derogation under the Civil and Political Covenant, see UN Human Rights Committee, "General Comment No. 29: Derogations during a State of Emergency" (2001), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 184.

¹⁸ See Chapter 1.3.

¹⁹ Convention relating to the Status of Refugees, 189 UNTS 2545 (UNTS 2545), done July 28, 1951, entered into force Apr. 22, 1954 ("Refugee Convention"), at Art. 38. State parties to the Protocol relating to the Status of Refugees, 606 UNTS 8791 (UNTS 8791), done Jan. 31, 1967, entered into force Oct. 4, 1967 ("Refugee Protocol") may, however, enter a reservation to International Court of Justice jurisdiction with respect to matters arising under the Protocol. Angola, Botswana, Congo, El Salvador, Ghana, Jamaica, Malawi, Rwanda, St. Vincent and the Grenadines, Tanzania, and Venezuela have chosen to exercise this option: https://treaties.un.org/pages>ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=V-5&chapter=5&lang=en, accessed Feb. 1, 2020. But see Chapter 1.5.1 at note 185.

²⁰ As observed by the Supreme Court of the United Kingdom, "[t]he rights that attach to the status of refugee under the Convention depend in each case on the possession of some degree of attachment to the contracting State in which asylum is sought . . . An examination of the Convention shows that it contemplates five levels of attachment to the contracting states": *R (ST, Eritrea) v. Secretary of State for the Home Department*, [2012] UKSC 12 (UK SC, Mar. 21, 2012), at [21].

authority. A greater attachment is manifest when the refugee is physically present *within a state's territory*. A still more significant attachment is inherent when the refugee is deemed to be *lawfully or habitually present* within the state. The attachment is greater still when the refugee is *lawfully staying* in the country. Finally, a small number of rights are reserved for refugees who can demonstrate *durable residence* in the asylum state. As the refugee's relationship to the asylum state is solidified over the course of this five-part assimilative path,²¹ the Convention requires that a more inclusive range of needs and aspirations be met.

The drafters' decision to grant refugee rights on an incremental basis reflected the experience of states confronted with the unplanned arrival of refugees at their frontiers. While asylum states outside Europe continued mainly to receive refugees preselected for resettlement,²² several European countries were already faced with what has today become the dominant pattern of refugee flows, namely the unplanned and unauthorized arrival of refugees at a state's borders. The drafters of the Convention explicitly considered how best to align the refugee rights regime with this transition from an essentially managed system of refugee migration, to a mixed system in which at least some refugees would move independently:

[T]he initial reception countries were obliged to give shelter to refugees who had not, in fact, been properly admitted but who had, so to speak, imposed themselves upon the hospitality of those countries. As the definition of refugee made no distinction between those who had been properly admitted and the others, however, the question arose whether the initial reception countries would be required under the convention to grant the same protection to refugees who had entered the country legally and those who had done so without prior authorization.²³

The compromise reached was that any unauthorized refugee, whether already inside or seeking entry into a state party's territory, would benefit from the

²¹ But see Chetail, *International Migration Law*, at 181 ("Albeit attractive, this conceptualization of the refugee status as an assimilative process remains an *a posteriori* and essentially doctrinal reconstruction"). Chetail's general concern that the increasingly demanding requirements following from levels of attachment are not always matched by equally demanding standards of treatment (*ibid.* at 182; see Chapters 3.2 and 3.3) is of course true – no doubt reflecting the fact that the assimilationist goal was not pursued in an absolutist way but was rather attenuated by considerations of practical and political viability. It remains, however, that the five levels of attachment plainly reference a gradual deepening of the connection between the refugee and asylum state.

²² "The Chairman, speaking as the representative of Canada, observed that the question raised by the initial reception countries did not apply to his country, which was separated by an ocean from the refugee zones. Thanks to that situation, all refugees immigrating to Canada were *ipso facto* legally admitted and enjoyed the recognized rights granted to foreigners admitted for residence": Statement of Mr. Chance of Canada, UN Doc. E/AC/32/SR.7, Jan. 23, 1950, at 12.

²³ Statement of Mr. Cuvelier of Belgium, *ibid.*

protections of the Refugee Convention.²⁴ Such refugees would not, however, immediately acquire all the rights of “regularly admitted” refugees, that is, those pre-authorized to enter and to reside in an asylum state.²⁵ Instead, as under then-prevailing French law, basic rights would be granted to all refugees, with additional rights following as the legal status of the refugee was consolidated.²⁶

The Refugee Convention implements this commitment by defining a continuum of legal attachment to the asylum state. Under this approach, some refugee rights accrue and must be provisionally honored even before the formal assessment of refugee status. While this might at first blush appear counterintuitive²⁷ – after all, refugee rights belong to *refugees*, not to every person who simply *claims* to be a refugee – refugee status is not contingent on formal recognition. Rather,

[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.²⁸

²⁴ “It did not, however, follow that the convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties . . . [W]hether or not the refugee was in a *regular position*, he must not be turned back to a country where his life or freedom could be threatened [emphasis added]”: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 11–12.

²⁵ Refugees affirmatively resettled are, of course, still refugees, requiring governments “to take into account the legal consequences” of a removal decision: *Minister for Immigration and Border Protection v. Le*, [2016] FCAFC 120 (Aus. FFC, Sept. 9, 2016), at [46]. An earlier decision had sensibly opined that “[i]f the applicant had been assessed by the UNHCR to be a refugee . . . then Australia, having accepted the applicant for resettlement and as a contracting party to the Convention, would have to have given regard to whether Australia’s obligations to the applicant continued under the Convention before it took any step to return the applicant to Vietnam”: *Nguyen v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2004] FCA 757 (Aus. FC, June 17, 2004), at [60].

²⁶ “[T]he problem would be seen more clearly if it were divided into three different aspects: the first concerned the treatment of refugees before they had reached an understanding with the authorities of the recipient countries; the second referred to their right to have their situation regularized and the conditions in which that was to be done; the third dealt with their rights after they had been lawfully authorized to reside in the country, which meant, in the case of France, after they were in possession of a residence card and a work card”: Statement of Mr. Rain of France, UN Doc. E/AC/32/SR.15, Jan. 27, 1950, at 15.

²⁷ See e.g. the remarks of Heydon J. in *Plaintiff M70/2011 v. Minister for Immigration and Citizenship*, (2011) 244 CLR 144 (Aus. HC, Aug. 31, 2011), at [215]–[216].

²⁸ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, re-issued 1992 and 2019) (UNHCR, *Handbook*), at [28].

As Justice Kirby observed in the High Court of Australia, the Refugee Convention

establishes a process by which a person becomes “recognized” as a refugee. In using the language of “recognition,” rather than “rendering,” “becoming,” or “constituting,” the [Convention] connotes a process whereby a person, who already is a refugee, gains “formal recognition” as such within the country of refuge. Recognition does not render a person a “refugee.” It simply recognizes the status as one that preceded the recognition. That is why the process is commonly described as merely “declaratory.”²⁹

This understanding that refugee status recognition is declaratory has been explicitly recognized by the Inter-American Court of Human Rights,³⁰ as well as by several senior national courts.³¹ It is also codified in the legislation of the European Union³² and in the national laws of a number of countries.³³

²⁹ *Minister for Immigration and Multicultural and Indigenous Affairs v. QAAH of 2004*, [2006] HCA 53 (Aus. HC, Nov. 15, 2006), at [96], per Kirby J. (dissenting).

³⁰ “Given the declarative nature of the determination of refugee status . . . the States parties to the 1951 Convention . . . must recognize this status, based on the respective fair and competent proceedings”: *Pacheco Tineo v. Bolivia*, Ser. C No. 272 (IACtHR, Nov. 25, 2013), at [147].

³¹ “True it is . . . as para. 28 of the *Handbook* neatly points out, that someone recognised to be a refugee must by definition have been one before his refugee status has been determined”: *R (Hoxha) v. Special Adjudicator*, [2005] 1 WLR 1063 (UK HL, Mar. 10, 2005), at [60]; *accord R (ST, Eritrea) v. Secretary of State for the Home Department*, [2012] UKSC 12 (UK SC, Mar. 21, 2012), at [21]. “Under the Refugee Convention, refugee status depends on the circumstances at the time the inquiry is made; it is not dependent on formal findings”: *Németh v. Canada*, [2010] 3 SCR 281 (Can. SC, Nov. 25, 2010), at [50]. “[A] person who satisfies the conditions of art. 1(A)(2) is a refugee regardless of whether he or she has been formally recognised as such pursuant to a municipal law process”: *YLS v. Refugee and Protection Officer*, [2017] NZCA 582 (NZ CA, Dec. 12, 2017), at [53]. “Every refugee is, initially, also an asylum applicant; therefore, to protect refugees, asylum applicants must be treated on the assumption that they may be refugees until their status has been determined. Without such a rule, the principle of *non-refoulement* would not provide effective protection for refugees, because applicants might be rejected at the frontier or otherwise returned to persecution on the grounds that their claim had not been established”: *Kenya National Commission on Human Rights v. Attorney General*, Constitutional Petition No. 227 of 2016 (Ken. HC, Feb. 9, 2017), at [17]; and *Cishahayo Saidi v. Minister of Home Affairs*, Dec. No. CCT 107/17 (SA CC, Apr. 24, 2018), at [34].

³² “The recognition of refugee status is a declaratory act”: EU Qualification Directive (2011), at Preamble, [21]. Indeed, “[t]he fact that being a ‘refugee’ . . . is not dependent on formal recognition is borne out by the wording of article 21(2) of [the Qualification Directive], which states that a ‘refugee’ may, in accordance with the conditions laid down . . . be refouled ‘whether formally recognised or not’”: *M v. Czech Republic, X and X v. Belgium*, Dec. Nos. C-391/16, C-77/17, and C-78/17 (CJEU, May 14, 2019), at [90].

³³ Law No. 26.165, Art. 2 (Argentina, 2006); Law No. 9.474, Art. 26 (Brazil, 1997); Decree No. 36831-G, Arts. 14 and 107 (Costa Rica, 2011); Refugee and Complementary Protection Act, Arts. 12, 47 (Mexico, 2011).

Because persons who are in fact refugees – albeit still awaiting formal status assessment – are rights holders at international law, genuine refugees would be fundamentally disadvantaged if their rights were withheld pending status assessment.³⁴ Put simply, unless status assessment is virtually immediate, a state party withholding refugee rights pending positive status assessment would be unable to implement its Refugee Convention obligations in good faith.³⁵ This dilemma can, however, be easily resolved by granting any person who claims to be a Convention refugee³⁶ the provisional benefit of those rights which are not predicated on regularization of status, in line with the Convention's own attachment requirements.³⁷ Governments wishing to be

³⁴ This concern was acknowledged by Kiefel J. in the High Court of Australia: *Plaintiff M70/2011 v. Minister for Immigration and Citizenship*, (2011) 244 CLR 144 (Aus. HC, Aug. 31, 2011), at [216]. The English Court of Appeal earlier opined in *Khaboka v. Secretary of State for the Home Department*, [1993] Imm AR 484 (Eng. CA, Mar. 25, 1993) “that a refugee is a refugee both before and after his claim for asylum as such may have been considered and accepted . . . It is common sense and a natural reading of article 31(1). The term ‘refugee’ means what it says. It will include someone who is subsequently established as being a refugee”: ibid. at 489; affirmed in *R v. Navabi*, [2005] EWCA Crim 2865 (Eng. CA, Nov. 11, 2005), at [5]. As observed in *Jahangeer*, whether a refugee is entitled to particular rights is a function of the level of attachment which governs access to that right. The court in this case was clearly anxious that an interpretation that withheld refugee rights until after status recognition could work a serious injustice, particularly as regards the right in Art. 16(1) of the Refugee Convention to access the courts. “[T]he use of the word ‘refugee’ [in Art. 16(1)] is apt to include the aspirant, for were that not so, if in fact it had to be established that he did fall within the definition of ‘refugee’ in article 1, he might find that he could have no right of audience before the court because the means of establishing his status would not be available to him so that he could not have access to the courts of this country on judicial review”: *R v. Secretary of State for the Home Department, ex parte Jahangeer*, [1993] Imm AR 564 (Eng. QBD, June 11, 1993), at 566.

³⁵ “The principle of good faith underlies the most fundamental of all norms of treaty law – namely, the rule *pacta sunt servanda* . . . Where a third party is called upon to interpret the treaty, his obligation is to draw inspiration from the good faith that should animate the parties if they were themselves called upon to seek the meaning of the text which they have drawn up”: I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984), at 119–120. To the same end, Chetall invokes the notion of effectiveness (*effet utile*), suggesting that “amongst several possible interpretations the one that best guarantees the practical effect of the relevant provision shall prevail. Any other interpretation that would exclude asylum seekers from *non-refoulement* would defeat the very object and purpose of the [Refugee] Convention as a whole”: Chetall, *International Migration Law*, at 188.

³⁶ Indeed, “the wish to apply for asylum does not have to be expressed in any particular form. It may be expressed by means of a formal application, but also by means of any conduct which signals clearly the wish of the person concerned to submit an application for protection”: *ND and NT v. Spain*, Dec. Nos. 8675/15 and 8697/15 (ECtHR, Feb. 13, 2020), at [180].

³⁷ These include rights which are subject to no level of attachment, rights which inhere in refugees simply physically present, and – once the requirements for status verification have been met – rights which are afforded to refugees who are lawfully or habitually present: see Chapters 3.1.1, 3.1.2, and 3.1.3. More sophisticated rights (those that require lawful stay, or durable residence: see Chapters 3.1.4 and 3.1.5) need be granted only after affirmative

relieved of this presumptive (if minimalist) responsibility toward persons claiming protection have the legal authority to take steps to expedite formal determination of refugee status, including by resort to a fairly constructed procedure for “manifestly unfounded claims” if necessary,³⁸ with Convention rights summarily withdrawn from persons found through a fair inquiry not to be Convention refugees. Such an approach enables a state to meet its obligations toward genuine refugees who seek its protection in a manner that is consistent with the duty to ensure that at least certain basic rights accrue even before regularization of status.³⁹

3.1.1 *Subject to a State’s Jurisdiction*

While most rights in the Refugee Convention inhere only once a refugee is either in, lawfully or habitually in, lawfully staying, or durably residing in an asylum country, a small number of core rights are defined to apply with no qualification based upon level of attachment.⁴⁰

verification of refugee status. Importantly, all rights provisionally respected can be immediately withdrawn in the event an applicant is found not to be a Convention refugee.

³⁸ Manifestly unfounded claims are “those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum”: UNHCR Executive Committee Conclusion No. 30, “The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum” (1983), at [(d)].

³⁹ In a decision addressing exclusion from refugee status under Art. 1(F)(b), the High Court of Australia impliedly endorsed the view that refugee status is to be provisionally presumed pending the outcome of a status inquiry. Chief Justice Gleeson in a majority judgment observed that “[w]hatever the operation of the expression ‘admission … as a refugee’ in other systems of municipal law, in Australia there would be nothing to which the language could apply. It would be necessary to read the words ‘prior to his admission to that country as a refugee’ as meaning no more than ‘prior to his entry into that country.’ The preferable solution is to read the reference to ‘admission … as a refugee’ as a reference to putative admission as a refugee”: *Minister for Immigration and Multicultural Affairs v. Singh*, (2002) 186 ALR 393 (Aus. HC, Mar. 7, 2002). Justice Callinan, in dissent, similarly observed that “[c]ontrary to a submission made in this court … I am of the opinion that the words ‘prior to his admission to that country as a refugee’ should be understood to mean ‘prior to his entry into the country in which he seeks or claims the status of a refugee.’ Otherwise the purpose of the Convention would be subverted in that the nature of the applicant’s prior criminal conduct could only be explored after he had been accorded refugee status”: *ibid.*

⁴⁰ See Refugee Convention, at Arts. 3 (“non-discrimination”), 13 (“movable and immovable property”), 16(1) (“access to courts”), 20 (“rationing”), 22 (“education”), 29 (“fiscal charges”), 33 (“prohibition of expulsion or return – ‘refoulement’”), and 34 (“naturalization”). No real significance should be given to the fact that the Convention’s provision on naturalization is not constrained by a level of attachment since, as elaborated below, this provision really is not the basis for any rights at all, but is more in the nature of non-binding advice to states: see Chapter 7.4. Certain contextual rights also apply immediately, including those set by Arts. 5 (“respect for other rights”), 6 (“exemption from insurmountable

To understand when these rights are owed, the starting point for analysis is the plain language of the Refugee Convention itself, read in context.⁴¹ Notably, all but a very small number of core refugee rights *are* reserved for those who reach a state's territory, or who meet the requirements of a higher level of attachment. This decision generally to constrain the application of rights on a territorial or other basis creates a contextual presumption that no such limitation was intended to govern the applicability of the rights subject to no such textual limitation. To assert that the few rights which are explicitly subject to no level of territorial attachment should nonetheless be treated as though they were so constrained would run afoul of the basic principle of interpretation that a good faith effort should be made to construe the text of a treaty in the light of its context – which clearly includes the balance of the provisions of the treaty itself.⁴²

This contextually sound understanding of the Convention's plain language is buttressed by the Convention's drafting history.⁴³ In some cases, the intention was explicitly to give refugees rights in state parties with which they had no territorial connection. As regards property rights,⁴⁴ for example, the drafters debated, but ultimately rejected, higher levels of attachment because they wished to ensure that refugees could claim property rights in any state party on the same basis as other non-resident aliens.⁴⁵ Similarly, the absence of a level of attachment for purposes of the right to tax equity⁴⁶ was driven by the goal of ensuring that state parties would limit any effort to tax refugees not present on their territory by reference to the rules applied to non-resident citizens.⁴⁷ The right of access to the courts⁴⁸ was also broadly framed specifically to ensure that refugees had access to the courts of all state parties, not just those of a country where they might be physically present.⁴⁹ In each of these cases, the failure to stipulate a level of attachment was designed to grant refugees rights in places where they might never be physically present.

In other cases, the absence of a territorial attachment criterion reflects a judgement about the critical nature of the rights concerned. The decision

requirements"), 7(1) ("aliens generally" default), 8 ("exemption from exceptional measures"), and 12 ("respect for personal status").

⁴¹ See Chapter 2.2. ⁴² See Chapter 2.2 at note 57. ⁴³ See Chapter 2.3 at note 94 ff.

⁴⁴ Refugee Convention, at Art. 13. See generally Chapter 4.5.

⁴⁵ See Chapter 4.5.1, note 1973.

⁴⁶ Refugee Convention, at Art. 29. See generally Chapter 4.5.2.

⁴⁷ See Chapter 4.5.2 at note 2054.

⁴⁸ Refugee Convention, at Art. 16(1). See generally Chapter 4.10.

⁴⁹ See Chapter 4.10 at note 2793 ff. Taking account of interaction with relevant provisions of the Civil and Political Covenant, Art. 16(1) of the Refugee Convention may in some circumstances have relevance also to enabling refugees to access courts to enforce refugee rights violated extraterritorially: see Chapter 4.10 at note 2812.

not to stipulate any level of attachment for purposes of access to elementary education,⁵⁰ for example, followed from the drafters' determination to honor the "urgent need" for, and compulsory nature of, access by all to the most basic forms of education in line with the formula of the Universal Declaration of Human Rights – and specifically to ensure that even non-resident refugee children had access to schooling.⁵¹ While not explicitly debated, access to whatever rationing systems might exist for the distribution of consumer basics⁵² could reflect a comparable value judgement that refugees cannot at any time be abandoned with no means to survive. The two other rights subject to no attachment requirement – the duty of non-discrimination (between and among refugees)⁵³ and the obligation not to return refugees, directly or indirectly, to a place where they risk being persecuted for a Convention reason (*non-refoulement*)⁵⁴ – represent the minimum requirements for ensuring that any refugee is, by virtue of his or her refugeehood, positioned to engage the protections stipulated by the Convention. As UNHCR has observed, "to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of *non-refoulement* would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established."⁵⁵

The position that these rights accrue even to refugees outside a state's territory is not, however, tantamount to suggesting that a refugee anywhere in the world may invoke Convention rights subject to no level of attachment against any state party. As a general matter, states do not assume international legal duties to all persons wherever located, but only to persons under their jurisdiction⁵⁶ – and "the jurisdictional competence of states is primarily

⁵⁰ Refugee Convention, at Art. 22. See generally Chapter 4.8.

⁵¹ See Chapter 4.8 at note 2506. This approach is not rendered unworkable by virtue of practical concerns, for example the viability of delivering elementary education immediately, or while onboard a ship. Even those rights which inhere immediately clearly do so only on their own terms. As regards public education, for example, refugees need only receive "the same treatment as is accorded to nationals." Thus, there is no breach of refugee law if refugees are subject only to the same delays or constraints in establishing educational facilities that might apply, for example, to citizens living in a comparably remote area. But such considerations must be addressed with the same promptness and effectiveness that would apply in the case of citizens of the state party.

⁵² Refugee Convention, at Art. 20. See generally Chapter 4.4.1.

⁵³ Refugee Convention, at Art. 3. See generally Chapter 3.4.

⁵⁴ Refugee Convention, at Art. 33. See generally Chapter 4.1.

⁵⁵ UNHCR, "Note on International Protection," UN Doc. A/AC.96/815 (1993), at [11].

⁵⁶ This foundational principle was not recognized in the early jurisprudence of the European Court of Human Rights, which seemed to impose liability wherever a state party to the European Convention on Human Rights had "effective control": see e.g. *Cyprus v. Turkey*, (2001) 35 EHRR 30 (ECtHR [GC], May 10, 2001), at [77]–[78]. In *Banković et al. v. Belgium et al.*, 11 BHRC 435 (ECtHR [GC], Dec. 12, 2001), at [59], the European Court of Human

territorial.”⁵⁷ But states do not only exercise jurisdiction within their own territory. Rather, as observed by the International Court of Justice (ICJ) in its seminal *Israeli Wall* decision, states may also “exercise jurisdiction outside their national territory.”⁵⁸ This understanding aligns with the view of the UN Human Rights Committee⁵⁹ that “a [state] must respect and ensure ...

Rights varied its approach to require evidence of “the same concept of ‘jurisdiction’ which exists in general international law”: M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011), at 21. As Milanovic observes, “[t]here is in principle nothing wrong with the *Banković* approach to interpreting the notion of state jurisdiction . . . by reference to general international law . . . I am not arguing that the word ‘jurisdiction’ should be given a special meaning autonomous to human rights law. Rather, the word has several different and equally ordinary meanings in general international law itself, and the question is which of those meanings – which of those *concepts* – the jurisdiction clauses of human rights treaties refer to”: *ibid.* at 53. Indeed, the core problem with the *Banković* decision was that it erroneously assumed a presumption against extraterritoriality in public international law’s view of jurisdiction (*Banković*, at [61]). If, however, “jurisdiction” is properly understood to require simply a meaningful connection to the state, the linkage of the notion of jurisdiction in human rights law to the more general concept in public international law is not only sound, but strategically wise as a means of enabling continued evolution of the concept. Indeed, as Wilde has observed, “the term has been understood in the extraterritorial context as a connection between the state, on the one hand, and either the territory in which the relevant acts took place . . . or the individual affected by them”: R. Wilde, “The Extraterritorial Application of International Human Rights Law on Civil and Political Rights,” in S. Sheeran and Sir N. Rodley eds., *Routledge Handbook of International Human Rights Law* 635 (2013) (Wilde, “Extraterritorial Application”), at 641. In recent years, the open-ended language about the meaning of jurisdiction adopted in the *Banković* decision has been refined in a way that brings European regional human rights law to a position on the meaning of jurisdiction that is both more authentically representative of the true meaning in public international law, and substantially in line with that adopted by the UN Human Rights Committee and affirmed by the ICJ: see text at note 62 ff. A less optimistic view of the continuing influence of *Banković* is, however, taken in E. Roxstrom and M. Gibney, “Human Rights and State Jurisdiction,” (2017) 18(2) *Human Rights Review* 129.

⁵⁷ *Banković et al. v. Belgium et al.*, 11 BHRC 435 (ECtHR [GC], Dec. 12, 2001), at [59]. A Grand Chamber of the same court recently affirmed that “the concept of ‘jurisdiction’ for the purposes of Article 1 of the [European] Convention must be considered to reflect the term’s meaning in public international law . . . Under that law, the existence of a fence located some distance from the border does not authorise a State to unilaterally exclude, alter or limit its territorial jurisdiction, which begins at the line forming the border”: *ND and NT v. Spain*, Dec. Nos. 8675/15 and 8697/15 (ECtHR, Feb. 13, 2020), at [109].

⁵⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep 136, at [109]; see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, [2005] ICJ Rep 168, at [216] (quoting *Israeli Wall* in finding that international human rights law is “applicable ‘in respect of acts done by a State in the exercise of its jurisdiction outside its own territory’”).

⁵⁹ For reasons set out in Chapter 2.2 at note 88, it is appropriate to seek guidance in the approach taken by international human rights law – expressly part of the Convention’s context by virtue of its Preamble, and an appropriate touchstone in view of the holdings of leading courts that the object and purpose of refugee law is to provide for the surrogate or substitute protection of human rights.

rights . . . to anyone within the power or effective control of the [state], even if not situated within the territory of the [state].”⁶⁰ The ICJ has similarly determined that duties under the Racial Discrimination Convention – which are subject to no territorial limitation (and are thus akin to those Refugee Convention duties which are subject to no level of attachment) – “appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.”⁶¹

Recent jurisprudence suggests at least three situations in which refugees outside a state’s territory are under its jurisdiction and hence entitled to claim the benefit of Convention rights subject to no level of attachment.⁶²

First, a refugee is under a state party’s jurisdiction if located in a territory over which that state exercises effective control, most notably by way of military occupation.⁶³ The jurisdictional obligations of the occupying state stem from *de facto* control alone;⁶⁴ lawfulness is not

⁶⁰ UN Human Rights Committee, “General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant” (2004), UN Doc. HRI/GEN/1/Rev.7, at [10]. See also UN Committee against Torture, “General Comment No. 2: Implementation of Article 2 by States Parties” (2008), UN Doc. CAT/c/GC/2, at [16]. See generally Wilde, “Extraterritorial Application.”

⁶¹ *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Order on the Indication of Provisional Measures (Georgia v. Russian Federation)*, [2008] ICJ Rep 353, at [109]. The general agreement among international and regional tribunals on this point is described in A. Klug and T. Howe, “The Concept of State Jurisdiction and the Applicability of the *Non-refoulement* Principle to Extraterritorial Interception Measures,” in B. Ryan and V. Mitsilegas eds., *Extraterritorial Immigration Control: Legal Challenges* 69 (2010), at 75–91.

⁶² The analysis that follows is in large measure an updated version of that first presented in T. Gammeltoft-Hansen and J. Hathaway, “*Non-refoulement* in a World of Cooperative Deterrence,” (2015) 53(2) *Columbia Journal of Transnational Law* 235, at 257 ff.

⁶³ *Banković et al. v. Belgium et al.*, 11 BHRC 435 (ECtHR [GC], Dec. 12, 2011), at [71]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, [2005] ICJ Rep 168, at [179]. For other cases involving effective control over territory, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep 136, at [102]–[114]; *Loizidou v. Turkey*, 23 EHRR 513 (ECtHR [GC], Dec. 18, 1996); *Coard v. United States, Case 10.951*, Report 109/99 (IAComHR, Sept. 29, 1999); *Salas et al. v. United States, Case 10.573*, Report 31/93 (IAComHR, Oct. 4, 1993). Indeed, the notion of jurisdiction based on “effective control” has been held to encompass situations in which extraterritorial environmental harm is caused by a state failing to take steps to prevent the precipitating actions within its own territory: *Advisory Opinion on the Environment and Human Rights* (Advisory Opinion OC-23/17), Ser. A) No. 23 (IACtHR, Nov. 15, 2017), at [81]–[82], [93].

⁶⁴ Y. Dinstein, *The International Law of Belligerent Occupation* (2009) (Dinstein, *Belligerent Occupation*), at 35. Indeed, “[a]djudicative and quasi-adjudicative bodies have applied this territorial principle to other scenarios that fall short of full occupation but still involve *de facto* control – lawful or unlawful – of some physical domain within the borders of another State . . . This includes application to peacekeepers, who are assigned to a particular territory but remain the responsibility of the troop-contributing State to the extent that the nationality State has the ability to ensure that its troops respect the rights of the local

required.⁶⁵ What matters is that the state is adjudged to exercise overall control of a defined territory for some period of time, and to the exclusion of the territorial state.⁶⁶ For example, the ICJ held in its *Israeli Wall* opinion that Israel's human rights obligations apply to "all conduct by the State party's authorities or agents in [the occupied] territories that affect the enjoyment of rights . . . and fall within the ambit of State responsibility of Israel under the principles of public international law."⁶⁷ Much the same result was reached by the European Court of Human Rights in *Cyprus v. Turkey*, finding that responsibility followed not simply because relevant actions had been taken by government agents, but more generally from the relevant act or omission having taken place within an area of effective control.⁶⁸

Second, jurisdiction is established in relation to a refugee who is "in the territory of another State but who [is] found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State."⁶⁹ States have, for example, been found to have jurisdiction over individuals within their embassy or consulate,⁷⁰ or who are onboard craft or vessels registered in their country, or which are flying their

populace": B. Van Schaack, "The United States: Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change," (2014) 90 *International Law Studies* 20, at 38.

⁶⁵ As is also the case under the Fourth Geneva Convention, the lawfulness of such military operations is in principle irrelevant to the obligations imposed on the occupying power. See Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (UNTS 973), done Aug. 12, 1949, entered into force Oct. 21, 1950, at Art. 2; *Hirsi Jamaa v. Italy*, (2012) 55 EHRR 21 (ECtHR [GC], Feb. 23, 2012), at [97] (noting that "responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory").

⁶⁶ Dinstein, *Belligerent Occupation*, at 38. The Supreme Court of the United States was thus correct to find US jurisdiction on the grounds that "Guantanamo Bay is in every practical respect a United States territory": *Rasul v. Bush*, 124 S. Ct. 2686 (US SC, June 28, 2004), at 2700 (per Kennedy J. concurring).

⁶⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep 136, at [110], quoting "Concluding Observations of the Human Rights Committee: Israel," UN Doc. CCPR/CO/78/ISR, Aug. 5, 2003, at [11].

⁶⁸ *Cyprus v. Turkey*, (2001) 35 EHRR 30 (ECtHR [GC], May 10, 2001), at [77].

⁶⁹ *Issa et al. v. Turkey*, (2004) 41 EHRR 567 (ECtHR, Nov. 16, 2004), at [71].

⁷⁰ For example, in the context of a human rights claim by two Afghan refugee claimants who had escaped Australia's Woomera Detention Center and entered the British Consulate in Melbourne where they "were told that while they were in the Consulate they would be kept safe," the English Court of Appeal determined that it was "content to assume (without reaching a positive conclusion on the point) that while in the Consulate the applicants were sufficiently within the control of the consular staff to be subject to the [international human rights] jurisdiction of the United Kingdom": *R (B) v. Secretary of State for Foreign and Commonwealth Affairs*, [2004] EWCA Civ 1344 (Eng. CA, Oct. 18, 2004), at [66]. The Court noted the decision in *WM v. Denmark*, (1992) 73 DR 193 (EComHR, Oct. 14, 1992)

flag.⁷¹ It is also acknowledged that a state has jurisdiction over individuals held on its military bases, in detention centers, or in other closed facilities controlled by the extraterritorially acting state.⁷²

Indeed, the European Court of Human Rights has found jurisdiction to be established even by the simple act of boarding a migrant vessel, the emphasis being placed in such cases on the de facto control exercised over the individuals concerned.⁷³ This focus on the exercise of control as a means of establishing human rights jurisdiction can perhaps be seen most clearly in cases involving state agents forcibly apprehending and transporting an individual to their state's territory.⁷⁴ Courts have emphasized that the logic of finding jurisdiction in such a situation is the importance of stymying the evasion of obligations, since it would be "unconscionable . . . to permit a State party to perpetrate violations of [human rights] in the territory of another State, which violations it could not perpetrate within its own territory."⁷⁵ Thus, as observed in *Al-Skeini*, jurisdiction may arise solely from "the exercise of physical power and control over the person in question."⁷⁶

in which a citizen of the German Democratic Republic inside the Danish Embassy was determined to be under Danish jurisdiction for human rights purposes: *ibid.* at [64]–[66].

⁷¹ *Medvedyev et al. v. France*, (2010) 51 EHRR 39 (ECtHR [GC], Mar. 29, 2010), at [65]; *Banković et al. v. Belgium et al.*, 11 BHRC 435 (ECtHR [GC], Dec. 12, 2011), at [73]. See generally *WM v. Denmark*, (1992) 73 DR 193 (EComHR, Oct. 14, 1992); *W v. Ireland*, [1983] ECHR 17 (EComHR, Feb. 28, 1983); *X v. United Kingdom*, (1977) 12 DR 73 (EComHR, Dec. 15, 1977); *X v. Federal Republic of Germany*, Application No. 1611/62 (EComHR, Sept. 25, 1965); *Al-Jedda v. United Kingdom*, (2011) 53 EHRR 23 (ECtHR [GC], July 7, 2011); *Al-Saadoon and Mufdhi v. United Kingdom*, (2010) 51 EHRR 9 (ECtHR, Mar. 2, 2010), at [19].

⁷² See *Al-Saadoon and Mufdhi v. United Kingdom*, (2010) 51 EHRR 9 (ECtHR, Mar. 2, 2010), at [19]; *Al-Skeini et al. v. Secretary of State for Defense*, [2007] UKHL 26 (UK HL, June 17, 2007), at [25]; *Hess v. United Kingdom*, (1975) 2 DR 72 (EComHR, May 28, 1975); *Hassan v. United Kingdom*, [2014] ECHR 1145 (ECtHR [GC], Sept. 16, 2014), at [78].

⁷³ *Al-Skeini et al. v. United Kingdom*, (2011) 53 EHRR 18 (ECtHR [GC], July 7, 2011), at [136]; *Medvedyev v. France*, (2010) 51 EHRR 39 (ECtHR [GC], Mar. 29, 2010), at [65].

⁷⁴ See e.g. *Ramirez v. France*, (1996) 86-B DR 155 (EComHR, June 24, 1996), at 162; *Reinette v. France*, (1989) 63 DR 189 (EComHR, Oct. 2, 1989), at [2]; *Freda v. Italy*, (1980) 21 DR 250 (EComHR, Oct. 7, 1980), at 256; *Öcalan v. Turkey*, [2005] ECHR 282 (ECtHR [GC], May 12, 2005), at [93]; *Stocke v. Germany*, (1991) 13 EHRR 839 (ECtHR, Mar. 19, 1991); *Casariego v. Uruguay*, HRC Comm. No. 56/1979, UN Doc. CCPR/C/13/D/56/1979, decided July 29, 1981, at [10.3]; *Burgos v. Uruguay*, HRC Comm. No. 52/1979, UN Doc. CCPR/C/13/D/52/1979, decided July 29, 1981, at [12.3].

⁷⁵ *Burgos v. Uruguay*, HRC Comm. No. 52/1979, UN Doc. CCPR/C/13/D/52/1979, decided July 29, 1981, at [12.3]; see also *Issa et al. v. Turkey*, (2004) 41 EHRR 567 (ECtHR, Nov. 16, 2004), at [71].

⁷⁶ *Al-Skeini et al. v. United Kingdom*, (2011) 53 EHRR 18 (ECtHR [GC], July 7, 2011), at [136]. Most cases to date have involved situations of full physical custody by way of arrest or kidnapping. In *Al-Saadoon*, for example, the Court emphasized "the total and exclusive" control exercised by the United Kingdom over the military bases in Iraq: *Al-Saadoon and Mufdhi v. United Kingdom*, (2010) 51 EHRR 9 (ECtHR, Mar. 2, 2010), at [88].

Similarly, in the *Marine I* case,⁷⁷ the UN Committee Against Torture was called upon to consider Spain's human rights liability stemming from the rescue of some 369 Asians and Africans in waters off the West African coast. After boarding the *Marine I* to provide emergency healthcare, Spanish authorities towed the vessel to the Mauritanian port of Nouadhibou where the passengers were disembarked and placed at a former fishing plant under Spanish authority. Most were repatriated, though twenty-three persons who resisted repatriation remained at the fishing plant guarded by Spanish security forces for five months under conditions alleged to be rights-violative. The Committee Against Torture concluded that Spain exercised jurisdiction both during the interception and throughout the detention in Mauritania, noting that:

[J]urisdiction must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention ... In the present case ... the State party maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou. In particular, the State party exercised, by virtue of a diplomatic agreement concluded with Mauritania, constant de facto control over the alleged victims during their detention in Nouadhibou. Consequently, the Committee considers that the alleged victims are subject to Spanish jurisdiction insofar as the complaint that forms the subject of the present communication is concerned.⁷⁸

Beyond its value as a clear affirmation that an intercepting state retains jurisdiction even when its control over persons is exercised on the territory of another country, the *Marine I* case makes a more general point that jurisdiction can be established under the control or authority principle where detention is effected on an indirect basis:

[T]he jurisdiction of a State party refers to any territory in which it exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. In particular ... such jurisdiction must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention.⁷⁹

⁷⁷ *JHA v. Spain*, CAT Comm. No. 323/2007, UN Doc. CAT/C/41/D/323/2007, decided Nov. 11, 2008.

⁷⁸ Ibid. at [8.2]. The case was nonetheless declared inadmissible because the complainant was not expressly authorized to act on behalf of the victims. The Committee affirmed this understanding of jurisdiction in *Sonko v. Spain*, CAT Comm. No. 368/2008, UN Doc. CAT/C/47/D/368/2008, decided Nov. 25, 2011, at [10.3] (finding that jurisdiction was exercised by the Spanish Civil Guard in relation to four swimmers who were intercepted along the coast between Belionex and Benzú and later (unilaterally) forced off the officials' vessel in Moroccan territorial waters).

⁷⁹ Ibid.

Third – assuming there is neither territorial nor personal control – recent case law suggests that a refugee is under a state party's jurisdiction if located in a territory where that state exercises relevant public powers abroad. In *Al-Skeini*,⁸⁰ the key question was whether the United Kingdom had jurisdiction over civilians killed in the course of security operations by British soldiers in Basrah. Rather than determining the issue of responsibility simply by reference to either territorial or personal control, the European Court of Human Rights instead observed that:

[T]he Court has recognised the exercise of extraterritorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government . . . Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of [international law] thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State.⁸¹

In other words, where states are entitled to exercise public powers abroad, jurisdiction for human rights purposes will follow under certain circumstances.⁸² This point was made particularly clearly by the Court in a case involving an eighteen-year-old Moldovan killed at a peacekeeping security checkpoint under Russian command:

[I]n certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction . . . This may include the exercise of extra-territorial jurisdiction by a Contracting State when, in accordance with custom, treaty or other agreement, *its authorities carry out executive functions on the territory of another State* . . . In the present case, the checkpoint in question, situated in the security zone, was manned and commanded by Russian soldiers *in accordance with the agreement* putting an end to the military conflict in the Transdnisterian region of Moldova . . . Against this background, the Court

⁸⁰ *Al-Skeini et al. v. United Kingdom*, (2011) 53 EHRR 18 (ECtHR [GC], July 7, 2011), at [102], [130]–[150].

⁸¹ *Ibid.* at [135].

⁸² The European Court of Human Rights affirmed the “public powers” approach to jurisdiction in *Jaloud v. Netherlands*, [2014] ECHR 1292 (ECtHR [GC], Nov. 20, 2014), at [145]. While there are aspects of the *Jaloud* decision that suggest that jurisdiction was anchored in personal control over the individuals at the checkpoint (see A. Sari, “*Jaloud v. Netherlands*: New Directions in Extra-Territorial Military Operations,” www.ejiltalk.org, Nov. 24, 2014), the Court emphasized that the conduct in question was attributable to the state [151], [154]–[155] and that the state’s actions taken were pursuant to various memoranda of understanding [146]–[147], factors that are consistent with the public powers approach to jurisdiction.

considers that, in the circumstances of the present case, Vadim Pisari was under the jurisdiction of the Russian Federation [emphasis added].⁸³

Three requirements must be met for jurisdiction to be established on the basis of the exercise of public powers abroad.

First, the legal authority of the extraterritorial state to act must be established in “accordance with custom, treaty or other agreement.”⁸⁴ Excluded therefore are situations such as an unlawful invasion in which public powers are effectively usurped by the foreign state. But because some “other agreement” falling short of custom or treaty suffices, even relatively informal agreements – memoranda of understanding, an exchange of letters – are enough to show the requisite consent.⁸⁵

Second, the activities undertaken must be fairly characterized as a “public power[] normally to be exercised by that Government.”⁸⁶ The notion of public power is not well-defined in international law, and may thus give rise to disagreement in some cases. But since the court in *Al-Skeini* made clear that “public powers” include not just security or civil administration, but also executive and judicial functions,⁸⁷ there can be little doubt that the exercise of migration control – being a core law enforcement task and exclusive sovereign prerogative – constitutes a public power.⁸⁸

Third, the breach of human rights resulting from the exercise of public powers must be attributable to the extraterritorially acting state, rather than to the territorial state.⁸⁹ The real link required would be readily established where, for example, the state in question has actually deployed officers or vessels engaged directly in

⁸³ *Pisari v. Republic of Moldova and Russia*, [2015] ECHR 403 (ECtHR, Apr. 21, 2015), at [33].

⁸⁴ Ibid. at [139], quoting *Al-Skeini et al. v. United Kingdom*, (2011) 53 EHRR 18 (ECtHR [GC], July 7, 2011), at [135].

⁸⁵ See *Jaloud v. Netherlands*, [2014] ECHR 1292 (ECtHR [GC], Nov. 20, 2014), at [146]–[147] (noting that “[t]he practical elaboration of the multinational force was shaped by a network of Memoranda of Understanding defining the interrelations between the various armed contingents present in Iraq”).

⁸⁶ Ibid. at [139], quoting *Al-Skeini et al. v. United Kingdom*, (2011) 53 EHRR 18 (ECtHR [GC], July 7, 2011), at [135].

⁸⁷ Ibid. at [139], [143]–[148], quoting *Al-Skeini et al. v. United Kingdom*, (2011) 53 EHRR 18 (ECtHR [GC], July 7, 2011), at [130]–[139].

⁸⁸ As Emmerich de Vattel noted in *The Law of Nations*, every sovereign nation retains the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases or upon such conditions as it may see fit to prescribe: E. de Vattel, 2 *The Law of Nations* (1883), at §§ 94, 100. State practice confirms this principle: see e.g. *Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc., et al.*, 509 US 155 (US SC, Jan. 12, 1993), at 199; *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at [45].

⁸⁹ *Al-Skeini et al. v. United Kingdom*, (2011) 53 EHRR 18 (ECtHR [GC], July 7, 2011), at [135].

enforcement.⁹⁰ But under general principles of international law, conduct is also attributable to a state where private actors or third state authorities act under its direction and control,⁹¹ or where effective control is retained over officials, including those carrying out migration control as part of an international organization.⁹²

Assuming, then, that jurisdiction can be established when a state exercises effective control over territory, authority over individuals, or undertakes public powers abroad, what of the situation in which more than one state can be said simultaneously to have jurisdiction? Effective control over territory is normally exclusive, but neither authority over individuals nor the exercise of public powers necessarily preempts the simultaneous jurisdiction of a territorial or cooperating state. Can the state acting extraterritorially be held to exercise jurisdiction in the case of such non-exclusivity?

The traditional view in human rights law that only a single state can be said to exercise jurisdiction in a given context⁹³ has been largely rejected, with human rights law now more closely aligned with the dominant position in public international law that two or more states may simultaneously exercise jurisdiction and hence be simultaneously responsible.⁹⁴ In other words, the fact that several states have jurisdiction does not diminish the individual responsibility of any particular state.⁹⁵

⁹⁰ This was the case, for example, in *Pisari v. Republic of Moldova and Russia*, [2015] ECHR 403 (ECtHR, Apr. 21, 2015), where the relevant actions were taken by “peacekeeping military forces belonging to the Russian Federation”: *ibid.* at [9].

⁹¹ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, [1986] ICJ Rep 14; “Draft Articles on Responsibility of States for Internationally Wrongful Acts,” UN Doc. A/56/10, Ch. IV.E.1, adopted Nov. 2001 (International Law Commission, “Draft Articles”), at Arts. 8, 17. See generally J. Crawford, *State Responsibility: The General Part* (2013) (Crawford, *State Responsibility*), at 126–132, 146–161.

⁹² See *Al-Jedda v. United Kingdom*, (2011) 53 EHRR 23 (ECtHR [GC], July 7, 2011), at [80]; International Law Commission, “Draft Articles on the Responsibility of International Organizations,” [2011] *United Nations Juridical Yearbook* 393, at Art. 7; Crawford, *State Responsibility*, at 422–434.

⁹³ If only one state could exercise jurisdiction, this would make shared responsibility for the breach of human rights obligations implausible. See e.g. *Hess v. United Kingdom*, (1975) 2 DR 72 (EComHR, May 28, 1975).

⁹⁴ International Law Commission, “Draft Articles,” at Art. 47; Crawford, *State Responsibility*, at 325–328, 333–334.

⁹⁵ International Law Commission, “Draft Articles,” at Art. 47(1); Crawford, *State Responsibility*, at 333–334. See generally T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (2011), at 100–208. This bedrock principle of public international law can be seen, for example, in the reasoning of the ICJ in the *Certain Phosphate Lands* case, in which the Court rejected the Australian argument that a finding of individuated liability against it was foreclosed by the fact that its trusteeship of Nauru was shared with New Zealand and the United Kingdom. “Australia has raised the question whether the liability of the three States would be ‘joint and several’ (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share.

In line with this more general approach, the human rights cases of *Al-Skeini* and *Hirsi* expressly rejected an “all or nothing” approach to jurisdiction, finding that “rights can be ‘divided and tailored.’”⁹⁶ Thus, for example, in *Ilașcu*, the European Court of Human Rights held that both Moldova and Russia had exercised jurisdiction – Russia due to its decisive influence over the local Transnistrian regime, Moldova through its de jure sovereignty over the area – and determined that simultaneous yet differentiated human rights responsibility followed.⁹⁷ The Court also rejected the view that the Netherlands had no jurisdiction over a command checkpoint in Iraq manned by its troops simply because the United Kingdom – as a formal occupying power – might also have jurisdiction there. To the contrary, the Court found in *Jaloud* that a party “is not divested of its ‘jurisdiction’ . . . solely by dint of having accepted the operational control of . . . a United Kingdom officer.”⁹⁸ The same principle has been found to apply where distinct actions by more than one state result in a common harm, as is clear from the ruling in *MSS v. Belgium and Greece* determining that Belgium was in breach for returning the applicant to Greece contrary to the duty of *non-refoulement*, even as it found that Greece was itself liable for the failure to establish adequate asylum procedures and to avoid the ill-treatment of those seeking its protection.⁹⁹

In sum, rights under the Refugee Convention not subject to an express level of attachment are owed even to refugees not physically present in the territory of a state party. In some cases – rights to property, tax equity, and access to the courts – the literal framing of the rights without any stipulation of territorial attachment is shown by the historical record to follow from an intention to enable refugees to vindicate rights beyond their physical location. In other instances, the decision to allocate core dignity and protection rights without any attachment requirement aligns with the basic object and purpose of a treaty predicated on refugees being able to access protection. In consonance

This . . . is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia”: *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, [1992] ICJ Rep 240, at [48].

⁹⁶ *Al-Skeini et al. v. United Kingdom*, (2011) 53 EHRR 18 (ECtHR [GC], July 7, 2011), at [137]; *Hirsi Jamaa v. Italy*, (2012) 55 EHRR 21 (ECtHR [GC], Feb. 23, 2012), at [74].

⁹⁷ *Ilașcu et al. v. Moldova and Russia*, (2005) 40 EHRR 46 (ECtHR [GC], July 8, 2004), at [376]–[394]; see also *Drozd and Janousek v. France and Spain*, (1992) 14 EHRR 745 (ECtHR, June 26, 1992), at [91]–[96].

⁹⁸ *Jaloud v. Netherlands*, [2014] ECHR 1292 (ECtHR [GC], Nov. 20, 2014), at [143].

⁹⁹ *MSS v. Belgium and Greece*, (2011) 53 EHRR 28 (ECtHR [GC], Jan. 21, 2011).

with the human rights law context of the Refugee Convention, these rights are owed to any refugee under the jurisdiction of a state party.¹⁰⁰ A state party exercises jurisdiction and is thereby bound to respect those Convention rights not subject to an attachment requirement in relation to refugees located in a territory over which the state party exercises effective control; if the refugees themselves are subject to that state party's effective authority and control, whether lawfully or not, outside that state's territory; or if the refugees are subject to the state party's exercise of public powers in another country by way of agreement with the latter state. A state may moreover be found to have jurisdiction, and hence owe duties of protection to refugees, even when one or more other states also has jurisdiction; in such a situation, states have simultaneous (even if differentiated) responsibilities.

3.1.2 Physical Presence

Several additional rights – to freedom of religion, to receive identity papers,¹⁰¹ to freedom from penalization for illegal entry,¹⁰² and to be subject to only necessary and justifiable constraints on freedom of movement – accrue to all refugees who are simply “in” or “within” a contracting state’s territory.¹⁰³ Any

¹⁰⁰ “In view of the purposes and objects of human rights treaties, there is no a priori reason to limit a state’s obligation to respect human rights to its national territory. Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside national territory, the presumption should be that the state’s obligation to respect the pertinent human rights continues. That presumption could be rebutted only when the nature and content of a particular right or treaty language suggest otherwise”: T. Meron, “Extraterritoriality of Human Rights Treaties,” (1995) 89(1) *American Journal of International Law* 78, at 80–81.

¹⁰¹ “Since Art. 27 contains no [status recognition] qualification of the right to be issued with identity papers, this provision would seem to encompass asylum applicants in accordance with the notion of *presumptive refugee status*, as based on the declaratory nature of status recognition”: J. Vedsted-Hansen, “Article 27,” in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 1165 (2011), at 1173. The UNHCR’s advice that such identity documents must be issued only upon status recognition (UNHCR, “Identity Documents for Refugees,” UN Doc. EC/SCP/33, July 20, 1984, at [11], [18]) is therefore unsound, as Vedsted-Hansen notes: *ibid.*

¹⁰² But see G. Noll, “Article 31,” in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 1243 (2011), at 1258, arguing that “[t]he word ‘enter’ denotes acts that are directly related to a concrete process of ‘passing within the boundaries of a country’ which, if uninterrupted, would be likely to succeed . . . As long as interception is attributable to the intercepting State . . . the refugee will be protected under Art. 31 in relation to that State [emphasis added].” The equation of where the refugee would have been but for interception with where that refugee actually is cannot be reconciled to the plain language of Art. 31, which speaks to refugees who “enter or are present,” with no language including attempted entry or planned-for presence.

¹⁰³ See Refugee Convention, at Arts. 4 (“religion”), 27 (“identity papers”), 31(1) (“non-penalization for illegal entry or presence”), and 31(2) (“movements of refugees unlawfully in the country of refuge”). This basic principle was recently recognized by the European

refugee physically present, lawfully or unlawfully, in territory under a state's jurisdiction may invoke these rights.¹⁰⁴ This conclusion follows not only from the plain meaning of the language of "in" or "within,"¹⁰⁵ but also from the express intention of the drafters,¹⁰⁶ who insisted that these rights be granted even to "refugees who had not yet been regularly admitted into a country."¹⁰⁷ This position is also consistent with the context of the Convention as a whole, most notably with the approach taken to the provisional suspension of rights in the context of a national emergency.¹⁰⁸

Under general principles of territorial jurisdiction, this level of attachment enfranchises, for example, not only refugees within a state's land territory, but those on its inland waterways or territorial sea,¹⁰⁹ including on islands,

Court of Justice: *ND and NT v. Spain*, Dec. Nos. 8675/15 and 8697/15 (ECtHR, Feb. 13, 2020), at [183].

¹⁰⁴ But see *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14 (Aus. HC, Apr. 11, 2002), per Justices McHugh and Gummow: "Nor does the Convention specify what constitutes entry into the territory of a contracting state so as then to be in a position to have the benefits conferred by the Convention. Rather, the protection obligations imposed by the Convention upon contracting states concern the status and civil rights to be afforded refugees who are within the contracting states." While somewhat unclear, the passage might be read to suggest that rights which inhere upon mere presence in a state may be withheld on the basis that, as a matter of law, the state has determined the person not to have formally entered its territory. Such an approach would confuse mere physical presence with lawful presence (see Chapter 3.1.3). The fact that the drafters did not elaborate the meaning of "in" or "within" a state's territory simply confirms the self-evident plain meaning of those terms, i.e. physical presence in the territory of the state in question.

¹⁰⁵ See G. Stenberg, *Non-expulsion and Non-refoulement* (1989), at 87: "The statement that a person is present in the territory of a State indicates that he is physically within its borders."

¹⁰⁶ Mr. Larsen of Denmark persuaded the Ad Hoc Committee to draw up "a number of fairly simple rules for the treatment of refugees not yet authorized to reside in a country": Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 22. To similar effect, the representative of the International Refugee Organization stressed the importance of including in the Convention "provisions concerning refugees who had not yet been regularly admitted": *ibid.* at 18.

¹⁰⁷ *Ibid.* at 18. The Danish representative similarly distinguished between "refugees regularly resident" and "those . . . who had just arrived in the initial reception country": Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.16, Jan. 30, 1950, at 11.

¹⁰⁸ The interpretation of the Refugee Convention as granting rights even prior to formal verification of status is buttressed by the specific incorporation of Art. 9 in the Refugee Convention, which allows governments provisionally to suspend the rights of persons not yet confirmed to be refugees if the asylum state is faced with war or other exceptional circumstances. It follows from the inclusion of this provision in the Convention that, absent such extreme circumstances, states must honor Convention rights pending verification of status. See generally Chapter 3.5.1.

¹⁰⁹ See e.g. UNHCR Executive Committee Conclusion No. 97, "Conclusion on Protection Safeguards in Interception Measures" (2003), at [(a)(i)]: "The State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons."

islets, rocks, and reefs; it includes also those in the airspace above each of these.¹¹⁰ As a matter of international refugee law, therefore, Australia's decision to excise thousands of its islands,¹¹¹ and ultimately the entirety of Australia,¹¹² from its so-called "migration zone" was of no force or effect: any refugee present in an excised place remains in Australian territory and thus entitled to rights owed to refugees physically present. Similarly, the US policy of refusing to protect Cuban refugees deemed "wet foot" arrivals¹¹³ – including in one instance fifteen refugees found clinging to an old Key West bridge no longer connected to land¹¹⁴ – is patently unlawful, as such refugees are clearly within the US territorial sea and therefore physically present in the United States.

A state's territory moreover includes both its ports of entry¹¹⁵ and so-called "international zones" within a state's territory.¹¹⁶ As recently affirmed by a Grand Chamber of the European Court of Human Rights,

the special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction.¹¹⁷

To the extent that a state acquires additional territory by accretion, cession, conquest, occupation, or prescription,¹¹⁸ it is also bound to honor rights that apply at this second level of attachment in such territory.

¹¹⁰ J. Crawford, *Brownlie's Principles of Public International Law* (2012) (Crawford, *Brownlie's Public International Law*), at 203.

¹¹¹ A. Vogl, "Over the Borderline: A Critical Inquiry into the Geography of Territorial Excision and the Securitisation of the Australian Border," (2015) 38(1) *University of New South Wales Law Journal* 114, at 126.

¹¹² O. White, "Australia: Removing a Country from the Migration Zone," May 27, 2013, <https://jrs.org.au/australia-removing-a-country-from-the-migration-zone/>, accessed Feb. 1, 2020.

¹¹³ R. E. Wasem, "Cuban Migration to the United States: Policy and Trends," Congressional Research Service, June 2, 2009, at 16–17.

¹¹⁴ D. Fears, "Immigration Issue Threatens GOP's Florida Stronghold; Cuban Americans Angry Over 'Wet Foot' Policy," *Washington Post*, Feb. 17, 2006.

¹¹⁵ G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (2007) (Goodwin-Gill and McAdam, *Refugee in International Law*), at 207.

¹¹⁶ *Amuur v. France*, [1996] ECHR 25 (ECtHR, June 25, 1996).

¹¹⁷ *ND and NT v. Spain*, Dec. Nos. 8675/15 and 8697/15 (ECtHR, Feb. 13, 2020), at [110].

¹¹⁸ See generally M. Shaw, *International Law* (2014), at 358–376. The Supreme Court of the United Kingdom thus sensibly concluded that "the Refugee Convention continues to apply to the [unceded Sovereign Base Authority areas of Cyprus] . . . in the same way as it applied to the whole colony of Cyprus before 1960 . . . The United Kingdom is, as a matter of international law, bound by the Convention and Protocol as such": *R (Tag Eldin Bashir) v. Secretary of State for the Home Department*, [2018] UKSC 45 (UK SC, July 30, 2018), at [71]–[72].

A state is not, however, required to grant rights defined by this level of attachment to refugees with whom it may come into contact in territory under the full sovereign authority of another state, including in particular refugees who arrive at a state's embassy or other diplomatic post abroad. While such premises are under the flag state's jurisdiction and immune from intrusion,¹¹⁹ they are neither assimilated to the territory of the state that established the diplomatic mission, nor otherwise free from the legal control of the territorial state.¹²⁰ Because a diplomatic post is not a part of the territory of the state whose interests it represents, the primary responsibility to honor the rights of any refugees physically present there falls to the country in which the post is located.¹²¹

3.1.3 *Lawful or Habitual Presence*

Refugees who are not simply physically present, but who are also *lawfully or habitually present* in the territory of a state party, are further entitled to claim the rights that apply at the third level of attachment.

¹¹⁹ Vienna Convention on Diplomatic Relations, 500 UNTS 95 (UNTS 7310), done Apr. 18, 1961, entered into force Apr. 24, 1964, at Art. 22.

¹²⁰ *Asylum Case (Colombia v. Peru)*, [1950] ICJ Rep 266. The reference to "special arrangements" in the Vienna Convention on Diplomatic Relations, at Art. 41, has however been said to "allow[] for bilateral recognition of the right to give asylum to political refugees within the mission": Crawford, *Brownlie's Public International Law*, at 403. The traditional practice of Latin American states to honor a grant of diplomatic asylum is codified in the Caracas Convention on Diplomatic Asylum, OAS Doc. OEA/Ser.X/1, entered into force Dec. 29, 1954.

¹²¹ If the "refugees" in question are nationals of the territorial state, they have no entitlement to refugee rights as they will not have satisfied the alienage requirement of the Convention refugee definition. See generally A. Grahl-Madsen, *The Status of Refugees in International Law* (vol. I, 1966) (Grahl-Madsen, *Status of Refugees I*), at 150–154; J. Hathaway and M. Foster, *The Law of Refugee Status* (2014) (Hathaway and Foster, *Refugee Status*), at 17–23; and Goodwin-Gill and McAdam, *Refugee in International Law*, at 63. A more interesting question arises with regard to third-country nationals who arrive at a consulate or embassy. To the extent that consular or embassy officials have jurisdiction over such persons in line with norms of customary international law (see Chapter 3.1.1 at note 70), the state in whose consulate or embassy the refugee is located is logically bound to respect those rights not subject to territorial or a higher level of attachment (including, for example, the duty of *non-refoulement*). It would, in this sense, exercise jurisdiction concurrently with the territorial state. Yet only the territorial state would be bound to honor those rights which require physical presence in a state's territory, or a higher level of attachment. See *R (B) v. Secretary of State for Foreign and Commonwealth Affairs*, [2004] EWCA Civ 1344 (Eng. CA, Oct. 18, 2004), at [88], finding that in the case of Afghan refugee claimants at risk of torture who escaped Australian detention and entered the British Consulate in Melbourne, "international law must surely permit the officials . . . to do all that is reasonably possible, including allowing the victim to take refuge in the diplomatic premises . . . In such circumstances, the [European Convention on Human Rights] may well impose a duty on a Contracting State to afford diplomatic asylum."

Lawful presence entitles refugees to be protected against expulsion, enjoy a more generous guarantee of internal freedom of movement, and engage in self-employment.¹²² Lawful presence was broadly conceived¹²³ to include refugees in any of three situations.

First, a refugee is lawfully present if admitted to a state party's territory for a fixed period of time, even if only for a few hours.¹²⁴ Whether the refugee resides elsewhere and is merely transiting through the second state¹²⁵ or is sojourning there for a limited time,¹²⁶ his or her presence is lawful so long as it is officially sanctioned. This clarification was thought particularly important to enable refugees living near a frontier to pursue commercial interests in a neighboring state.¹²⁷ As the French

¹²² See Refugee Convention, at Arts. 18 ("self-employment"), 26 ("freedom of movement"), and 32 ("expulsion").

¹²³ The French representative described this level of attachment as "a very wide term applicable to any refugee, whatever his origin or situation. It was therefore a term having a very broad meaning": Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 12. Indeed, the equally authoritative French language text of Arts. 18, 26, and 32 speaks to "un réfugié se trouvant régulièrement sur leur territoire," the ordinary meaning of which signifies a refugee whose presence is in some sense officially authorized or accepted, but not predicated on having a formal legal status.

¹²⁴ Robinson, for example, concludes that "the mere fact of lawfully being in the territory, even without any intention of permanence, must suffice": N. Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation* (1953) (Robinson, *History*), at 117. Weis opines that "physical presence, even on a temporary stay or visit, [is] sufficient": P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (posthumously pub'd., 1995) (Weis, *Travaux*), at 152.

¹²⁵ "Mr. Guerreiro (Brazil) asked whether the phrase 'refugees lawfully in their territory' was intended to cover refugees in transit through a territory ... Mr. Henkin (United States of America) explained that the provisions ... were really intended to apply to all refugees lawfully in the country, even those who were not permanent residents. There was no harm in the provision even if it theoretically applied to refugees who were in a country for a brief sojourn, since the individuals would hardly seek the benefit of the rights contemplated": Statements of Mr. Guerreiro of Brazil and Mr. Henkin of the United States, UN Doc. E/AC.32/SR.25, Feb. 10, 1950, at 5. See also Statement of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 17, that rights allocated at this second level of attachment would accrue to refugees "merely passing through a territory."

¹²⁶ "The expression 'lawfully in their territory' included persons entering a territory even for a few hours, provided that they had been duly authorized to enter": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 14; see also Statements of Mr. Henkin of the United States at UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 20 and 32.

¹²⁷ "The difficulties raised were ... not academic, at least in the case of refugees living near a frontier": Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 18. For example, it was suggested that the rights granted to refugees lawfully present in a state would accrue even to "a [refugee] musician [who] was staying

delegate remarked, “it could not be argued that where there was no residence, the situation was irregular.”¹²⁸

Second and of greater contemporary importance, the stage between “irregular” presence and the recognition or denial of refugee status, including the time required for exhaustion of any appeals or reviews, is also a form of “lawful presence.”¹²⁹ Presence is lawful in the case of “a person . . . not yet in possession of a residence permit but who had applied for it and had the receipt for that application. *Only those persons who had not applied, or whose applications had been refused, were in an irregular position* [emphasis added].”¹³⁰ The drafters recognized that refugees who travel without pre-authorization to a state party, but who are admitted to a process intended to assess their suitability for admission to that state, should “be considered, for purposes of the future convention, to have been regularly admitted.”¹³¹ So long as a refugee has provided authorities with the information that will enable them to consider

for one or two nights in a country”: Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 16–17.

¹²⁸ Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 20. “For example, there were aliens lawfully in France without being resident. As evidence of that he mentioned the case of Belgian nationals, who needed only an identity card to spend a few hours in France. They would be in France lawfully, even though not resident”: *ibid.* But see *Plaintiff M47/2012 v. Director-General of Security*, [2012] HCA 46 (Aus. HC, Oct. 5, 2012) in which the High Court of Australia determined that a Sri Lankan Tamil admitted to Australian territory on Christmas Island on the basis of a “special purpose visa” that expired fifty minutes after his arrival was not “lawfully present” upon arrival at Christmas Island. Justice Heydon was emphatic that “[t]he fact that he arrived with a visa which quickly expired does not alter the fact that he has not been lawfully in Australia”: *id.* at [293]. This counterfactual conclusion is at odds with both the drafting history of the Refugee Convention and earlier Australian precedent: see e.g. *Rajendran v. Minister for Immigration and Multicultural Affairs*, (1998) 166 ALR 619 (Aus. FFC, Sept. 4, 1998).

¹²⁹ The French description of the three phases through which a refugee passes distinguished the second step of “regularization” of status from the third and final stage at which “they had been lawfully authorized to reside in the country”: Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.15, Jan. 27, 1950, at 15.

¹³⁰ *Ibid.* at 20.

¹³¹ Statement of Mr. Henkin of the United States, *ibid.* at 20. The inappropriateness of the equation of a “lawful presence” with admission to permanent residence was explicitly confirmed at the Conference of Plenipotentiaries by its President, who expressed the view that “such a suggestion would probably cover the situation in the United States of America, where there were [only] two categories of entrants, those legally admitted and those who had entered clandestinely. But it might not cover the situation in other countries where there were a number of intermediate stages; for example, certain countries allowed refugees to remain in their territory for a limited time”: Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.14, July 10, 1951, at 17. The only response to this clarification was an assertion by the representative of the United States that his country’s system was not quite as simple as the President had implied. No delegate, however, challenged the accuracy of the President’s understanding of “lawful presence” as including refugees subject to the various “intermediate stages” which a country might establish for refugees coming directly to its territory.

his or her entitlement to refugee status – in particular, details of personal and national identity, and the facts relied upon in support of the claim for admission – there is clearly a legal basis for the refugee's presence.¹³² The once irregularly present refugee is now lawfully present,¹³³ as he or she has satisfied the administrative requirements established by the state to consider which persons who arrive without authorization should nonetheless be allowed to remain there.¹³⁴

¹³² Consistent with the duty of states to implement their international legal obligations in good faith (see Chapter 2.3 at note 129), it must be possible for all Convention refugees to fulfill any such requirements. Excluded, therefore, are any requirements that are directed to matters unrelated to refugee status, including suitability for immigration on economic, cultural, personal, or other grounds. Account must also be taken of any genuine disabilities faced by particular refugees, for example by reason of language, education, mistrust, or the residual effects of stress or trauma, which may make it difficult for them to provide authorities with the information required to verify their refugee status. Because refugee status assessment involves a *shared responsibility* between the refugee and national authorities (see UNHCR, *Handbook*, at [196]), it is the responsibility of the receiving state to take all reasonable steps to assist refugees to state their claims to protection with clarity. See generally W. Kälin, "Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing," (1986) 20 *International Migration Review* 230; J. Hathaway, *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (1994); A. Leiss and R. Boesjes, *Female Asylum Seekers* (1994); UNHCR, "Refugee Children: Guidelines on Protection and Care" (1994); R. Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (1994); UNHCR, "Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum" (1997); and H. Evans Cameron, *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake* (2018).

¹³³ Referring to this drafting history, UNHCR helpfully observes that "[w]hilst the term 'regularly admitted' did not eventually find its way into the 1951 Convention it informed the concept of 'lawfully in': UNHCR, *Handbook on Protection of Stateless Persons* (2014), at 48, n. 81. Grahl-Madsen suggests one potentially important exception to this general principle. He argues that a refugee who is detained pending verification of his claim to Convention refugee status (presumably on grounds that meet the justification test of Art. 31(2) of the Convention) can no longer be considered to be "lawfully" present: Grahl-Madsen, *Status of Refugees II*, at 361–362. This conclusion is clearly tenable, though not based on decisions reached during the drafting process. A detained refugee claimant would still be entitled to those rights which are not restricted to refugees whose presence is lawful, i.e. the rights defined by the first level of attachment.

¹³⁴ After reviewing the various approaches to interpreting "lawful presence," a recent study commissioned by UNHCR refers to the understanding posited here as "the most appropriate interpretation of Article 26, particularly in the African setting. Under this reading, the right to freedom of movement takes effect as soon as a refugee does all in his or her power to apply for asylum in the state. This would take into account state practice (i.e. the procedure for applying), allow for security and protection concerns surrounding registration in times of mass influx, remove the potential for state abuse and fit logically within the five levels of attachment set out in the 1951 Convention": N. Maple, "Rights at Risk: A Thematic Investigation into How States Restrict the Freedom of Movement of Refugees on the African Continent," Oct. 2016, at 7.

There is strong, albeit not unanimous,¹³⁵ judicial affirmation that persons admitted to a refugee status assessment process are “lawfully present” (though not yet “lawfully staying”).¹³⁶ The Full Federal Court of Australia determined in *Rajendran* that a Sri Lankan applicant whose refugee case had yet to be determined was “lawfully in” Australia by virtue of his provisional admission under domestic regulations for purposes of pursuing his claim.¹³⁷ The South African Supreme Court of Appeal similarly found that “[a]fter an asylum seeker permit has been issued to him or her, the asylum seeker cannot be regarded as an ‘illegal foreigner’.”¹³⁸ Thus, a person undergoing status assessment “remains ‘lawfully present’ in the country . . . [H]is presence in this country is lawful (albeit precarious and permissive).”¹³⁹ In much the same vein, the Irish Court of Appeal determined that when a mother and her children “arrived in Ireland and immediately claimed asylum . . . [t]hey were

¹³⁵ Marx notes, for example, that “[t]he German Federal Constitutional Court . . . has repeatedly stated that Art. 26 [on freedom of movement of ‘lawfully present’ refugees] applies only to refugees whose refugee status has been finally determined . . . Yet, the residence of asylum seekers cannot simply be regarded as a matter of what domestic law says . . . [which] blurs the important distinction of the 1951 Convention between the terms ‘lawfully staying’ and ‘lawfully present’”: R. Marx, “Article 26,” in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 1147 (2011) (Marx, “Article 26”), at 1161.

¹³⁶ There is also occasional affirmation in domestic law, e.g. Article 8 of the Netherlands Law on Foreign Nationals of 2000, providing that “[a] foreign national shall be lawfully resident in the Netherlands . . . pending a decision on an application for the issue of a residence permit [on the basis of refugee status]”: cited in *JN v. Staatssecretaris voor Veiligheid en Justitie*, Dec. No. C-601/15 PPU (CJEU, Feb. 15, 2016). See also I. Zamfir, “Refugee Status Under International Law,” EU Parliamentary Research Service, Oct. 27, 2015, at 3/4 (“The second tier of rights are to be granted when refugees are ‘lawfully present’ in the host state (for example while their asylum claim is processed”).

¹³⁷ “In the present case, Mr. Rajendran entered the country on a visitor’s visa. He now holds a bridging visa. If his application for a [refugee status-based] protection visa is ultimately unsuccessful . . . that visa will cease to have effect at the time stipulated in the relevant Migration Regulations . . . whereupon he will cease both to be lawfully in Australia and to be able to invoke Article 32”: *Rajendran v. Minister for Immigration and Multicultural Affairs*, (1998) 166 ALR 619 (Aus. FFC, Sept. 4, 1998). The logic of this position was more recently recognized by a judge in the Full Federal Court, who noted that “[t]he Migration Act uses the concept of a visa as the delineation between lawful and unlawful non-citizens . . . A visa is a statutory form of executive permission . . . There are two broad kinds of visa: temporary and permanent . . . The former constitutes permission to travel to and enter Australia, and remain during a specified period; until a specified event happens; or while the holder has a specified status”: *Minister for Immigration and Border Protection v. SZVCH*, [2016] FCAFC 127 (Aus. FFC, Sept. 14, 2016), at [75]–[76], per Mortimer J.

¹³⁸ *Mustafa Aman Arse v. Minister of Home Affairs*, Dec. No. 25/2010 (SA SCA, Mar. 12, 2010), at [19]. Similarly, the child of a person seeking recognition of refugee status is “a child who is lawfully in this country”: *Minister of Home Affairs v. Watchenuka*, (2004) 1 All SA 21 (SA SCA, Nov. 28, 2003), at [36], per Nugent J.A.

¹³⁹ *Jannatu Alam v. Minister of Home Affairs*, Dec. No. 3414/2010 (SA HC, Eastern Cape, Feb. 9, 2012), at 6–7.

not then unlawfully present . . . [despite the fact that] they did not have a right to live in Ireland, unless successful in their asylum application.”¹⁴⁰ And the Court of Justice of the European Union ruled that a person who would be removable but for his claim to be a refugee was “lawfully present” in the Czech Republic. The Court observed not only that EU law entitles asylum-seekers to remain in a Member State during the examination of their claims,¹⁴¹ but insisted more generally that “lawful presence” must be construed in a purposeful manner:

[I]t is clearly apparent . . . that an asylum seeker, independently of the granting of [a residence] permit, has the right to remain in the territory of the Member State concerned at least until his application has been rejected at first instance, and cannot therefore be considered to be “illegally staying”.¹⁴²

This understanding has moreover been embraced by the UNHCR:

Given the declaratory nature of refugee status, Article 32 is . . . applicable to asylum-seekers, including those who have entered the country illegally but have since entered the asylum procedures and may therefore be considered as “authorized” to be present in the territory of the country and lawfully therein.¹⁴³

¹⁴⁰ *CI and Others v. Minister for Justice, Equality, and Law Reform*, [2015] IECA 192 (Ir. CA, July 30, 2015), at [44]. See also *Agha v. Minister for Social Protection*, [2017] IEHC 6 (Ir. HC, Jan. 17, 2017), finding that a person undergoing refugee status assessment benefits from “a restricted consent pending the determination of the status of the asylum seeker,” though such consent does not amount to lawful stay (*ibid.* at [40]).

¹⁴¹ *Mehmet Arslan v. Czech Republic*, Dec. No. C-534/11 (CJEU, May 30, 2013), at [44].

¹⁴² *Ibid.* at [48].

¹⁴³ UNHCR, “Response to the Constitutional Court of Ecuador query regarding International Treaty No. 0030-13-TI,” Apr. 17, 2015, at 8. See also UNHCR, “Observations on the proposed amendments to the Danish Aliens legislation,” Oct. 31, 2016, at 3 (“The words ‘lawfully in’ included in Article 32 of the 1951 Convention impl[y] that the refugee is present on the territory of the host country in an authorized manner, under applicable national legislation, even if the refugee is authorized to remain only on a temporary basis. UNHCR is of the view that Article 32 should be extended to asylum-seekers lawfully in the territory of a contracting State, including those who have entered the country illegally but have since entered the asylum procedures and may therefore be considered as ‘authorized’ to be present in the territory of the country”); UNHCR, Intervention before the European Court of Human Rights in the case of *Saadi v. United Kingdom*, Mar. 30, 2007, at [27] (“UNHCR considers that the better view is that status regularisation, for the purposes of Art. 31(2), occurs once the asylum seeker submits to and meets the host State’s legal requirements to have his claim evaluated . . . Thus, once the domestic law formalities for access into the determination procedures have been complied with, status is regularised . . . and Art. 26 governs the position”); and UNHCR, “Statement on the reception conditions of asylum-seekers under the Dublin procedure,” filed in Court of Justice of the European Union case of *CIMADE and GISTI v. Ministry of the Interior*, Dec. No. C-179/11, Aug. 1, 2011, at [4.1.3] (“The rights which apply to refugees physically in or lawfully in the territory of the concerned State are applicable to asylum-seekers”).

In contrast, in *ST (Eritrea)*¹⁴⁴ the UK Supreme Court determined that “lawful presence” is an issue that “must be determined solely with reference to domestic law,”¹⁴⁵ even if that law deems presence prior to formal recognition of status to be unlawful. In reaching this conclusion, the Court sidelined the reasoning of the House of Lords in the 2005 case of *Szoma*¹⁴⁶ that a person undergoing refugee status assessment was lawfully present by virtue of “express written authority of an immigration officer provided for by statute.”¹⁴⁷ It instead relied on an unwieldy amalgam of deference to the much earlier House of Lords case of *Bugdaycay*,¹⁴⁸ an unfortunate UNHCR

¹⁴⁴ *R (ST, Eritrea) v. Secretary of State for the Home Department*, [2012] UKSC 12 (UK SC, Mar. 21, 2012).

¹⁴⁵ Ibid. at [13]. Indeed, one member of the Court wrote, “As to what [lawfully present] means, I see no warrant for interpreting the article as prohibiting the expulsion of a refugee who is not lawfully present on the basis of domestic law, *but whose expulsion would contravene Convention norms* [emphasis added]”: ibid. at [64], per Lord Dyson (concurring). This echoes the approach of the European Court of Human Rights interpreting the phrase “lawfully within the territory of a State” under regional human rights law to “refer[] to the domestic law of the State concerned. It is for the domestic law and organs to lay down the conditions which must be fulfilled for a person’s presence in the territory to be considered ‘lawful’”: *Omwenyeke v. Germany*, Dec. No. 44294/04 (ECtHR, Nov. 20, 2007), at [1]. A comparable, though somewhat less demanding, standard has been suggested by the New Zealand Court of Appeal, which determined that a person positively determined to be a Convention refugee was not lawfully present because he had “not been granted a permit to enter New Zealand”: *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Sept. 30, 2004), at [32]–[33]. See also the approval of the UK approach voiced in the High Court of Australia at note 152.

¹⁴⁶ *Szoma v. Secretary of State for the Department of Work and Pensions*, [2005] UKHL 64 (UK HL, Oct. 27, 2005). See generally C. Sawyer, “Elephants in the Room, or A Can of Worms: *Szoma* and Lawful Presence in the United Kingdom,” (2007) 14 *Journal of Social Security Law* 86. The Supreme Court noted simply that it approved of counsel’s decision not to rely on *Szoma* since “[t]he ancient maxim *verba accipienda sunt secundum subjectam materiam* (words are to be understood according to the subject-matter with which they deal) provides the best guide to the meaning that should be given to what Lord Brown said in [*Szoma*]”: *R (ST, Eritrea) v. Secretary of State for the Home Department*, [2012] UKSC 12 (UK SC, Mar. 21, 2012), at [38]. But given the generality of *Szoma*’s common sense approach to the meaning of words, the maxim might reasonably be thought not to be relevant.

¹⁴⁷ *Szoma v. Secretary of State for the Department of Work and Pensions*, [2005] UKHL 64 (UK HL, Oct. 27, 2005), at [28].

¹⁴⁸ *R v. Secretary of State for the Home Department, ex parte Bugdaycay*, [1987] AC 514 (UK HL, Feb. 19, 1987), at 526, determining that not even temporary admission to the UK gave rise to lawful presence under British law. There is no indication that relevant portions of the Convention’s drafting history – e.g. those speaking to both temporary admission, and to presence before status was regularized as examples of lawful presence (see text at notes 128 and 130) – were drawn to the attention of the House of Lords. With the benefit of these insights, at least a core international understanding of “lawful presence” for refugee law purposes might well have been identified. In any event, Lord Bridge was clearly led to conclude against finding temporarily present persons to be “lawfully in” the country because of a mistaken belief that “if [this] argument is right, it must apply equally to any

note,¹⁴⁹ and speculation about what states likely intended¹⁵⁰ to conclude that a refugee “is not lawfully present in the United Kingdom if she does not have leave to enter or remain in this country,”¹⁵¹ which would occur only if and when refugee status is affirmatively determined.¹⁵²

person arriving in this country . . . whether he is detained or temporarily admitted pending a decision on his application for leave to enter. It follows that the effect of the submission, if it is well-founded, is to confer on any person who can establish that he has the status of a refugee . . . but who arrives in the United Kingdom from a third country, an indefeasible right to remain here, since to refuse him leave to enter and direct his return to the third country will involve the United Kingdom in the expulsion of a ‘refugee lawfully in their territory’ contrary to article 32(1)”: *ibid.* at 526. But states may lawfully (and often do) interpose an eligibility determination procedure to determine whether some other state may be said to have primary responsibility to determine the claim to refugee status. Because a refugee not yet found eligible to pursue his or her claim is not yet lawfully present, Art. 32 does not govern his or her removal (though Art. 33 remains applicable): see Chapter 5.1 at note 46 ff.

¹⁴⁹ “[T]he UNHCR states in “Lawfully Staying”: A Note on Interpretation” (1988) that its conclusion from the *travaux* is that the ‘lawfulness’ of the stay is to be judged against national rules and regulations governing such a stay . . . [Because] there is no consensus among the commentators that lawful presence should be given an autonomous meaning or what that meaning should be . . . we must take our guidance from what the framers of the Convention must be taken to have agreed to, as understood by the UNHCR”: *R (ST, Eritrea) v. Secretary of State for the Home Department*, [2012] UKSC 12 (UK SC, Mar. 21, 2012), at [33]–[34]. While the Court suggests that there is a lack of consistency in international scholarly commentary, there is in fact a strong consensus in favor of the approach taken here: see note 153.

¹⁵⁰ “A refugee who is lawfully present in the territory of a contracting state is entitled to the same treatment as regards self-employment as is accorded to aliens generally who are in the same circumstances: article 18. He must also be accorded the right to choose his place of residence and to move freely within the territory, subject to any regulations that are applicable to aliens generally in the same circumstances: article 26. The notifications that have been issued to the appellant from time to time, which require her to reside at an address notified to her by an immigration officer, to report to an immigration official every two months and not to work or engage in any business unless she has explicitly been granted permission to do so, make it plain that she is not being accorded the rights referred to in these articles. They are rights the granting of which a sovereign state could be expected to reserve to itself, in just the same way as it would wish to reserve to itself the decision as to whether a refugee should be granted permission to enter in its territory . . . It seems unlikely that the contracting states would have agreed to grant a refugee the freedom to choose their place of residence and to move freely within their territory before they had decided, according to their own domestic laws, whether or not to admit to the territory in the first place”: *ibid.* at [36]–[37].

¹⁵¹ *R (ST, Eritrea) v. Secretary of State for the Home Department*, [2012] UKSC 12 (UK SC, Mar. 21, 2012), at [24]. The court was emphatic that lawful presence “implies that his presence is not just being tolerated”: *ibid.* at [32].

¹⁵² This understanding was subsequently affirmed by the Court of Appeal in *Hannah Blakesley v. Secretary of State for Work and Pensions*, [2015] EWCA Civ 141 (Eng. CA, Feb. 26, 2015), at [41]: “His/her presence only becomes ‘lawful’ under UK law when the proper authority . . . has determined that the person is a refugee.” Two judges of the High Court of Australia subsequently voiced approval of this approach. “In *R (ST) v. Secretary of*

This minority view of “lawful presence” – predicated on complete deference to domestic law, in particular to domestic laws purporting to deem all presence prior to recognition of refugee status to be unlawful – is problematic for at least three reasons.¹⁵³

State for the Home Department … the United Kingdom Supreme Court construed ‘lawfully’ as it appears in Art. 32 as meaning ‘lawful according to the domestic laws of the contracting state.’ This construction should be accepted”: *Plaintiff M47/2012 v. Director-General of Security*, [2012] HCA 46 (Aus. HC, Oct. 5, 2012), at [94], per Gummow J. Similarly, Justice Hayne was content to assume that rights requiring only lawful presence “should be read as meaning that the refugee has been granted the right to live in that state under the domestic law of that state”: ibid. at [217]. In line with this view, a subsequent decision of the Full Federal Court found that a recognized refugee to whom the Minister had opted not to provide a visa was “not ‘lawfully’ in Australia (because he has no visa) [and as such] does not have the benefit of other protection obligations in the Refugee Convention”: *NBMZ v. Minister for Immigration and Border Protection*, [2014] FCAPC 38 (Aus. FFC, Apr. 9, 2014), at [120].

¹⁵³ The weight of scholarly opinion is at odds with the approach taken in *ST (Eritrea)*. Grahl-Madsen suggests that “a refugee’s presence may, on the face of it, be ‘illegal’ according to some set of rules (e.g. aliens legislation), yet ‘legal’ within a wider frame of reference (e.g. international refugee law)": Grahl-Madsen, *Status of Refugees II*, at 363. As Edwards observes, Grahl-Madsen’s conclusion (which Edwards adopts) mirrors the approach advanced here, namely “that one might be unlawfully in the territory according to national immigration laws, yet still be lawfully in the territory for the purposes of the 1951 Convention”. Marx writes that “[t]he term ‘lawfully present within a country’ according to refugee law … includes persons in a refugee status determination procedure who are at least lawfully present for the purposes of seeking refugee status … [T]he term ‘lawfully within a territory’ … is not simply a matter of what domestic law says … [R]efugee law, in this regard, supersedes domestic regulations”: Marx, “Article 26,” at 1156–1157. The outlier position is that of Goodwin-Gill and McAdam, who assert that lawful presence for purposes of Art. 32 means presence “on a more or less indefinite basis”: Goodwin-Gill and McAdam, *Refugee in International Law*, at 525. As Edwards observes, “Goodwin-Gill and McAdam’s view defers too heavily to national immigration laws (which vary), rather than to the essence of the 1951 Convention”: A. Edwards, “Article 18,” in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 973 (2011), at 978; indeed, “[t]o adopt Goodwin-Gill and McAdam’s approach would [be to] permit States parties simply to refuse to grant rights or status and thereby avoid their obligations”: A. Edwards, “Article 17,” in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 951 (2011) (Edwards, “Article 17”), at 965. Goodwin-Gill and McAdam moreover offer no legal argument to justify this clear deviation from the express provisions of the Convention, relying instead on a bald appeal to the importance of achieving consistency with relevant state practice. State practice may, of course, assist in establishing the interpretation of a treaty provision: Vienna Convention on the Law of Treaties, 1155 UNTS 331 (UNTS 18232), done May 23, 1969, entered into force Jan. 27, 1980 (Vienna Convention), at Art. 31(3)(b). However, state practice standing alone cannot give rise to a legal norm which may be relied upon to challenge the applicability of a conflicting treaty stipulation: see generally Chapter 2.4. In any event, there is – as described at note 135 ff. – significant state practice that accords with the view that “lawful presence” requires less than “lawful stay,” with only the latter notion denoting stay “on a more or less indefinite basis”: see Chapter 3.1.4. Another dissenting view is expressed by Livnat, who suggests that

First, as noted in the concurrence of Lord Dyson in *ST (Eritrea)* itself, it is difficult to see on the basis of the plain meaning of the words that a person granted official permission to be present while his or her asylum claim is being assessed is not lawfully present:

Without statutory intervention, it might be difficult to decide whether a person who has been granted temporary admission pending determination of her application for asylum is lawfully present in the territory. It is not self-evident that she is not lawfully present in these circumstances. After all, she is physically present in the territory and her presence has been authorized by the state, admittedly for a limited period.¹⁵⁴

Indeed, as UNHCR has opined, “to be ‘lawfully in’ a State party, . . . presence in the country needs to be authorized by the State. The concept encompasses both presence which is explicitly sanctioned and also that which is known and not prohibited, taking into account all personal circumstances of the individual.”¹⁵⁵

Second, a definition of “lawful presence” that requires an ongoing right to remain in the asylum country conflates “lawful presence” with “lawful stay,”¹⁵⁶ thereby effectively eliminating one of the Convention’s five levels of attachment.¹⁵⁷ Even as the drafters varied the level of attachment applicable to specific rights, they expressly opted to grant some rights at an intermediate point between “physical presence” and “lawful stay” – namely, “lawful presence.” Yet under the interpretation adopted in *ST (Eritrea)* there is no such intermediate point. Refugees would move directly from being merely

while complete deference to national law “is clearly wrong,” lawful presence should be flexibly conceived in a manner that promotes the restoration of “refugees’ stability and psychological well-being” and which promotes “burden-sharing through international cooperation”: Y. Livnat, “Compulsory Secondary Movement and Article 32 of the Refugee Convention,” *reflaw.org*, Aug. 28, 2019. Rather than defining “lawful presence” in general terms, he proposes four factors that align the meaning of lawful presence with his views on the circumstances in which Art. 32 ought not to impede compulsory secondary movement (*ibid.*). This instrumentalist approach is, however, difficult to reconcile to both the interpretive requirements of the Vienna Convention (see Chapter 2) and to the fact that the third level of attachment governs rights other than Art. 32.

¹⁵⁴ *R (ST, Eritrea) v. Secretary of State for the Home Department*, [2012] UKSC 12 (UK SC, Mar. 21, 2012), at [56], per Lord Dyson (concurring). In line with this understanding, the House of Lords had earlier determined specifically that “[a]n asylum seeker . . . may commit a criminal offence by entering this country illegally. But on making his claim to the authorities, he may be granted temporary admission. His presence is no longer illegal”: *Mark v. Mark*, [2005] UKHL 42, (UK HL, June 30, 2005), at [48].

¹⁵⁵ UNHCR, *Handbook on Protection of Stateless Persons* (2014), at [135].

¹⁵⁶ See Chapter 3.1.4.

¹⁵⁷ This result was ironically reached by the UK Supreme Court in the very case that recognized that “[a]n examination of the Convention shows that it contemplates five levels of attachment to the contracting states”: *R (ST, Eritrea) v. Secretary of State for the Home Department*, [2012] UKSC 12 (UK SC, Mar. 21, 2012), at [21].

physically (but “irregularly”) present, to securing simultaneously all the rights associated with both “lawful presence” and “lawful stay” when and if permission to remain is granted.¹⁵⁸ Such an approach not only fails to comport with the explicit structure of the Convention, but also offends the fundamental principle that “[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”¹⁵⁹

Third, an understanding of “lawful presence” based exclusively on deference to the domestic law of the asylum country is not a contextually sound means of interpreting an international treaty. While the drafting history supports the view that “lawful presence” should take national standards as the point of departure,¹⁶⁰ there is no reason to see such deference as absolute. To the contrary, as the UN Human Rights Committee has insisted, “[t]he question whether an alien is ‘lawfully’ within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, *provided they are in compliance with the State’s international obligations* [emphasis added].”¹⁶¹ A state’s general right to determine the scope of lawful presence is thus constrained by the impermissibility of deeming presence to be unlawful in circumstances when the Refugee Convention¹⁶² and other norms of international law deem presence to be lawful.¹⁶³

¹⁵⁸ See Robinson, *History*, at 117.

¹⁵⁹ *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (WTO AB, Apr. 29, 1996), at 23. The *ut res magis valeat quam pereat* principle requires a reading of “all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously”: *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (WTO AB, Dec. 14, 1999), at [81].

¹⁶⁰ As much is clear from the fact that the drafters agreed that if a state grants a refugee even very short-term permission to enter its territory, that refugee is – for the duration of that domestically granted status – lawfully present in that country: see text at note 124.

¹⁶¹ UN Human Rights Committee, “General Comment No. 27: Freedom of Movement” (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at [4]. See also *Amuur v. France*, [1996] ECHR 25 (ECtHR, June 25, 1996), at [50], holding that lawfulness is not simply a question of compliance with national law.

¹⁶² *Kaya v. Haringey London Borough Council*, [2001] EWCA Civ 677 (Eng. CA, May 1, 2001), at para. 31. For this reason, an understanding of “lawful presence” that effectively obviates this level of attachment by conflating it with “lawful stay” is not sound, as it contravenes the very structure of the Refugee Convention itself. See Chapter 2.2 regarding the interpretive role of internal context.

¹⁶³ It is persuasive that the International Criminal Court has determined that in understanding which persons are “lawfully present” for purposes of understanding the crime of deportation or forcible transfer of populations, “whether a person lived in a location for a sufficient period of time to meet the requirements for residency or whether he or she has been accorded such status under immigration laws is irrelevant”: *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Trial Judgment (ICTY, June 10, 2010), at [900].

Of particular importance, the jurisprudence of the United Nations Human Rights Committee interpreting the right to freedom of internal movement under the Civil and Political Covenant (which inheres in all persons “lawfully within the territory of a State”)¹⁶⁴ is consistent with the view that persons allowed to remain in a state while their refugee claims are assessed are “lawfully present” in the asylum state. In *Celepli v. Sweden*,¹⁶⁵ the Human Rights Committee considered the claim of a rejected refugee claimant formally ordered to be expelled to Turkey, but not in fact removed on humanitarian grounds. Despite the issuance of the expulsion order, the Committee determined the applicant to be “lawfully present” in Sweden:

The Committee notes that the author’s expulsion was ordered on 10 December 1984, but that this order was not enforced and that the author was allowed to stay in Sweden, subject to restrictions on his freedom of movement. The Committee is of the view that, following the expulsion order, the author was lawfully in the territory of Sweden, for purposes of article 12, paragraph 1, of the Covenant, only under the restrictions placed upon him by the State party.¹⁶⁶

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

[t]he question whether an alien is “lawfully” within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State’s international obligations. In that connection, the Committee has held that an alien who entered the State illegally, but whose status *has been regularized*, must be considered to be lawfully within the territory [emphasis added].¹⁶⁷

¹⁶⁴ Civil and Political Covenant, at Art. 12(1).

¹⁶⁵ *Celepli v. Sweden*, HRC Comm. No. 456/1991, UN Doc. CCPR/C/51/D/456/1991, decided Mar. 19, 1993.

¹⁶⁶ Ibid. at [9.2]. This approach was affirmed in *Karker v. France*, HRC Comm. No. 833/1998, UN Doc. CCPR/C/70/D/833/1998, decided Oct. 26, 2000, at [9.2], involving a Tunisian refugee suspected of terrorism and confined by French authorities when deemed non-deportable.

¹⁶⁷ UN Human Rights Committee, “General Comment No. 27: Freedom of Movement” (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at [4].

This analysis blends neatly with the understanding of the Refugee Convention set out above.¹⁶⁸ A rejected refugee claimant whom the state has decided not to remove on humanitarian grounds is, in the view of the Human Rights Committee, a person whose status has “been regularized” and hence one who must be considered to be – at least for the duration of that permission to remain – “lawfully present.” This conclusion makes sense because such a person, like a person seeking recognition of his or her refugee status, has satisfied the administrative requirements established by the state to determine which non-citizens should be allowed to remain on a provisional basis in its territory. It makes clear that lawful presence is an intermediate category that occupies the ground between illegal presence on the one hand, and a right to stay on the other.

In addition to authorized short-term presence and presence while undergoing refugee status verification, the Refugee Convention foresees a third form of lawful presence. In many asylum countries, particularly in the less developed world, there is no mechanism in place to assess the refugee status of persons who arrive to seek protection.¹⁶⁹ Even states with formal systems may on occasion opt to suspend status determination procedures for some or all asylum-seekers, who are thereupon assigned to an alternative (formal or informal) protection regime.¹⁷⁰ In either of these situations – including where governments divert refugees into so-called “temporary protection” regimes¹⁷¹ – a refugee’s presence should be deemed lawful.¹⁷² This is because

¹⁶⁸ See text at note 123 ff. The Court of Justice of the European Union has notably determined that the withdrawal or non-recognition of refugee status under regional law operates without prejudice to entitlements under the Refugee Convention. If such a person is “authorized, on another legal basis, to stay lawfully in the territory of the member state concerned ... article 14(6) of [the Qualification Directive] in no way prevents that member state from guaranteeing that the person concerned is entitled to all the rights which the Geneva Convention attaches to ‘being a refugee’: *M v. Czech Republic, X and X v. Belgium*, Dec. Nos. C-391/16, C-77/17, and C-78/17 (CJEU, May 14, 2019), at [106].

¹⁶⁹ See e.g. Lawyers’ Committee for Human Rights, *African Exodus: Refugee Crisis, Human Rights and the 1969 OAU Convention* (1995), at 29–30.

¹⁷⁰ For example, the temporary protection policies adopted by some European states in response to the arrival of refugees from Bosnia-Herzegovina actually diverted asylum-seekers away from formal processes to adjudicate refugee status, or at least suspended assessment of status for a substantial period of time: Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, *Report on Temporary Protection in States in Europe, North America and Australia* (1995), at 79, 118.

¹⁷¹ Kälin writes that “lawful presence” “refers to presence authorized by law which ... may be of a temporary nature. Thus, these provisions may be invoked by those among the temporarily protected who are Convention refugees”: W. Kälin, “Temporary Protection in the EC: Refugee Law, Human Rights, and the Temptations of Pragmatism,” (2001) 44 *German Yearbook of International Law* 221 (Kälin, “Temporary Protection”), at 221.

¹⁷² “Generally, an alien is considered to be ‘lawfully’ in a territory if he possesses proper documentation ... has observed the frontier control formalities, and has not overstayed

the decision not to authenticate refugee status, whether generally or as an exceptional measure, must be considered in the context of the government's legal duty to grant Convention rights to all persons in its territory who are *in fact* refugees, whether or not their status has been assessed.¹⁷³ The Supreme Court of Papua New Guinea therefore sensibly determined that refugees brought to that country against their will by Australian officials were "lawfully in PNG by reason of the exemption granted by the Minister,"¹⁷⁴ the absence of formal status determination notwithstanding.

This third variant of "lawful presence" follows from the *prima facie* legal right of individuals seeking protection to present themselves in the territory of a state which has chosen to adhere to the Refugee Convention. By choosing to become a party to the Convention, a state party signals its preparedness to grant rights to refugees who reach its jurisdiction. A state that wishes to protect itself against the possibility of receiving non-genuine claims is free to establish a procedure to verify the refugee status of those who seek its protection. But if a state opts not to adjudicate the status of persons who claim to be Convention refugees, it must be taken to have acquiesced in the asylum-seekers' assertion of entitlement to refugee rights, and must immediately grant them those Convention rights defined by the first three levels of attachment.¹⁷⁵ This is

the period for which he has been allowed to stay by operation of law or by virtue of 'landing conditions.' He may also be 'lawfully' in the territory even if he does not fulfil all the said requirements, *provided that the territorial authorities have dispensed with any or all of them* and allowed him to stay in the territory anyway [emphasis added]": Grahl-Madsen, *Status of Refugees II*, at 357. UNHCR has adopted the view that "[u]nder international refugee law, both refugees and asylum-seekers, in respect of the latter this includes those who are registered as asylum-seekers as well as those who have announced their intention to seek asylum *but who have yet to be registered officially* because of, for example, administrative delays, are considered 'lawfully in' the territory for the purposes of benefitting from [Art. 26] [emphasis added)": UNHCR, "Amicus Brief, *Kituo Cha Sheria v. Attorney-General*, High Court of Kenya, July 27, 2013," at [7.2].

¹⁷³ The critical point is that refugee status determination is merely a declaratory, not a constitutive, process. Convention rights inhere in a person who is in fact a Convention refugee, whether or not any government has recognized that status: see Chapter 3.1 at note 28 ff.

¹⁷⁴ *Belden Norman Namah v. Minister for Foreign Affairs and Immigration*, Dec. No. SC1497 (PNG SCJ, Apr. 26, 2016), at [58]. The Court also noted "that the asylum seekers were brought into PNG against their will but otherwise have entered and remain lawfully in the country": *ibid.* at [69].

¹⁷⁵ Indeed, it is arguable that "[i]f a refugee's presence in the territory of a state party to the Convention is not unlawful, in that the state is aware, or should be aware, of the refugee's presence and the state is unable or unwilling to remove the refugee, then the refugee's presence may be regarded as lawful for the purposes of the Refugee Convention": "The Michigan Guidelines on the Right to Work," 31 *Michigan Journal of International Law* 293 (2010), at [7]. The argument in favor of seeing presence as lawful based on official tolerance or acquiescence would seem especially strong if the state is aware of the refugee's presence and *unwilling* (rather than simply *unable*) to remove him or her.

because while the Convention does not require states formally to determine refugee status,¹⁷⁶ neither does it authorize governments to withhold rights from persons who are in fact refugees because status assessment has not taken place. A general or situation-specific decision by a state party not to verify refugee status therefore amounts to an implied authorization for Convention refugees to seek protection without the necessity of undergoing a formal examination of their claims. In such circumstances, lawful presence is presumptively coextensive with physical presence.

Lawful presence can come to an end in a number of ways. For refugees resident in another state who were authorized to enter on a strictly temporary basis, lawful presence normally concludes with the refugee's departure from the territory. The lawful presence of a sojourning refugee may also be terminated by the issuance of a deportation or other removal order¹⁷⁷ issued under a procedure that meets the requirements of the Refugee Convention, in particular Art. 33. In the case of a refugee whose presence has been regularized by admission to a refugee status verification procedure, or who has sought protection in the territory of a state that operates no such mechanism, lawful presence terminates only if and when a final determination is made either not to recognize, or to revoke, protection in a particular case. A final decision that an individual does not qualify for refugee status, including a determination made under a fairly administered process to identify manifestly unfounded claims to refugee status,¹⁷⁸ renders an unauthorized entrant's continued presence unlawful, and results in the forfeiture of all Convention rights provisionally guaranteed during the status assessment process.¹⁷⁹ Similarly, a determination that an individual has ceased to be a refugee on the grounds set out in Art. 1(C) of the Convention eliminates the legal basis for the former refugee's presence in the state.¹⁸⁰

In addition to rights that apply once a refugee is lawfully present, two Convention rights – to enjoy protection of intellectual property rights¹⁸¹ and to benefit from assistance to access the courts¹⁸² – are reserved for refugees who are “habitually resident” in an asylum state. This is a standard borrowed

¹⁷⁶ The decision on whether or not to establish such a system is within the discretion of each state party: UNHCR, *Handbook*, at [189].

¹⁷⁷ “The expression ‘lawfully within their territory’ throughout this draft convention would exclude a refugee who, while lawfully admitted, has over-stayed the period for which he was admitted or was authorized to stay or who has violated any other condition attached to his admission or stay”: “Report of the Ad Hoc Committee on Statelessness and Related Problems,” UN Doc. E/1618, Feb. 17, 1950, at Annex II (Art. 10).

¹⁷⁸ See Chapter 3.1 at note 38. ¹⁷⁹ Ibid.

¹⁸⁰ See generally Grahl-Madsen, *Status of Refugees I*, at 367–412; Hathaway and Foster, *Refugee Status*, at 462–499; and Goodwin-Gill and McAdam, *Refugee in International Law*, at 135–149.

¹⁸¹ Refugee Convention, at Art. 14. ¹⁸² Ibid. at Art. 16(2).

from private international law,¹⁸³ the meaning of which is both fungible and evolving.¹⁸⁴ It identifies an individual's "home" on a basis that has traditionally been thought to be less demanding than common law notions of domicile,¹⁸⁵ drawing on a broad-ranging factual inquiry into the identification of an individual's center of interests.¹⁸⁶ Simply put, it seeks to identify the state to which an individual "has 'the most real connexion.'"¹⁸⁷

This standard might be thought both more and less demanding than the notion of "lawful presence." On the one hand, while "residence" ("résidence") is based on a factual inquiry to identify the place which is the center of one's interests,¹⁸⁸ the qualifier "habitual" may be said to require "residence of some standing or duration"¹⁸⁹ – thus opening the door to a subjective assessment that could delay the acquisition of rights. On the other hand, Metzger is correct to insist that residence can in principle be habitual without also being lawful¹⁹⁰ – meaning that rights might be acquired earlier than under the lawful presence benchmark. But neither tendency is common. Belgian law, for example, defines habitual residence as "the place where a natural person has established his main residence"¹⁹¹ without insisting upon any particular duration of presence. And while not dispositive, it is

¹⁸³ The notion of "habitual residence" dates back to at least the 1896 Hague Convention on Civil Procedure, adopted Nov. 14, 1896, entered into force Apr. 27, 1899, 88 British & Foreign State Papers 555. The concept is thought first to have emerged in bilateral treaties of the 1880s; P. Beaumont and P. McElevy, *The Hague Convention on International Child Abduction* (1999), at 88.

¹⁸⁴ "Apart from being acceptable to lawyers of both the common law and civil law traditions, the strength of habitual residence lies in its flexibility, a characteristic particularly valued in the regulation of jurisdiction": L. Collins, *Dicey and Morris on the Conflict of Laws* (2019), at 199.

¹⁸⁵ Given developments in the common law notion of "domicile" this may no longer be true. See Chapter 3.2.4 at note 362.

¹⁸⁶ The habitual residence inquiry is retrospective and oriented to the identification of objective indicators that suggest "the place where the person has established, on a fixed basis, his permanent or habitual centre of interests, with all relevant facts being taken into account for the purpose of determining such residence": Explanatory Report to the Brussels II Convention, OJ 1998 C221/27. As the New Zealand refugee tribunal has opined, "the question of whether habitual residence [has] been established is a question of fact to be determined on the circumstances of each case, but the individual should be able to show that he or she has made it the centre of his or her interests": *Refugee Appeal No. 72635/01* (NZ RSAA, Sept. 6, 2002), at [116].

¹⁸⁷ Law Reform Commission of Ireland, "Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws" (1981), at [21].

¹⁸⁸ See note 186. ¹⁸⁹ Grahl-Madsen, *Status of Refugees I*, at 160.

¹⁹⁰ A. Metzger, "Article 14," in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 895 (2011) (Metzger, "Article 14"), at 905.

¹⁹¹ Belgium, Private International Law Code (July 16, 2004) (unofficial translation), at Art. 4.2.1.

generally agreed that illegality of presence is a strong proxy against a finding of habitual residence.¹⁹²

In practice, then, the standards of lawful presence and habitual residence converge to a very significant extent, with both concepts requiring more than simple physical presence and neither being dependent on the formal recognition of refugee status. As such, and despite their different points of emphasis, both lawful presence and habitual residence define a middle ground between simply having arrived in an asylum country and having been formally authorized to stay there on an ongoing basis.

3.1.4 Lawful Stay

Those refugees who are not simply lawfully or habitually present in a country's territory, but who are *lawfully staying* there, benefit from additional rights: freedom of association, the right to engage in wage-earning employment and to practice a profession, access to public housing and welfare, protection of labor and social security legislation, and entitlement to travel documentation.¹⁹³ There was extraordinary linguistic confusion in deciding how best to label this fourth level of attachment.¹⁹⁴ The term "lawfully staying" was ultimately incorporated in the Convention as the

¹⁹² B. Rentsch, *Der gewöhnliche Aufenthalt im System des Europäischen Kollisionsrechts* (2017) (Rentsch, *Der gewöhnliche Aufenthalt*) (noting that while illegality does not preclude the establishment of habitual residence, it is treated in most European states as a strong proxy against it). For example, the Austrian Asylum Board has taken the view that only authorized presence can be habitual residence: *SW v. Federal Authority*, Dec. No. 201.440/0-II/04/98 (Au. UBAS, Mar. 20, 1998). Only a modestly more liberal position was taken in Germany, finding that illegal presence could be deemed habitual residence because authorities had initiated no measures to terminate the illegal presence, thus acquiescing in the continued presence: Dec. No. 10 C 50.07 (Ger. FAC, Feb. 26, 2009). It thus overstates the position to argue that "the lawful presence or staying of the refugee is without significance for the application of Art. 14. Intellectual property protection is granted both to legal and illegal refugees": Metzger, "Article 14," at 905.

¹⁹³ Refugee Convention, at Arts. 15 ("right of association"), 17 ("wage-earning employment"), 19 ("liberal professions"), 21 ("housing"), 23 ("public relief"), 24 ("labour legislation and social security"), and 28 ("travel documents"). In *specific circumstances*, the benefit of Arts. 7(2) ("exemption from reciprocity") and 17(2) (exemption from restrictive measures imposed on aliens in the context of "wage-earning employment") may also be claimed: see Chapters 3.2.2 and 6.1.1.

¹⁹⁴ "The Chairman emphasized that the Committee was not writing Anglo-American law or French law, but international law in two languages. The trouble was that both the English-speaking and the French-speaking groups were trying to produce drafts which would automatically accord with their respective legal systems and accepted legal terminology": Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 25.

most accurate rendering of the French language concept of “résident régulièrement,” the meaning of which was agreed to be controlling.¹⁹⁵

Most fundamentally, “résidence régulière” is not synonymous with such legal notions as domicile or permanent resident status.¹⁹⁶ Instead, the drafters emphasized that it was the refugee’s de facto circumstances which determine whether or not the fourth level of attachment is satisfied.¹⁹⁷ The notion of “résidence régulière” is “very wide in meaning . . . [and] implie[s] a settling down and, consequently, a certain length of residence.”¹⁹⁸ While neither a prolonged stay¹⁹⁹

¹⁹⁵ “The Committee experienced some difficulty with the phrases ‘lawfully in the territory’ in English and ‘résident régulièrement’ in French. It decided however that the latter phrase in French should be rendered in English by ‘lawfully staying in the territory’: “Report of the Style Committee,” UN Doc. A/CONF.2/102, July 24, 1951. The same conclusion is reached by M. Teichmann, “Article 15,” in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 909 (2011), at 923; and A. Edwards, “Article 19,” in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 983 (2011), at 963–964 (“The term ‘lawfully staying’ is based on a translation of the French term ‘résident régulièrement’”).

¹⁹⁶ “He could not accept ‘résident régulièrement’ if it was to be translated by ‘lawfully resident,’ which would not cover persons who were not legally resident in the English sense. It would not, for example, cover persons staying in the United States on a visitor’s visa, and perhaps it might not even cover persons who had worked for the United Nations for five years in Geneva. The word ‘residence’ in English, though not exactly equivalent to ‘domicile,’ since it was possible to have more than one residence, had much of the same flavour”: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 24. But see the contrary interpretation of the Canadian government implicit in its reservation to the Refugee Convention, <https://treaties.un.org/>, accessed Feb. 1, 2020: “Canada interprets the phrase ‘lawfully staying’ as referring only to refugees admitted for permanent residence; refugees admitted for temporary residence will be accorded the same treatment with respect to the matters dealt with in Articles 23 and 24 as is accorded visitors generally.”

¹⁹⁷ “[T]here were two alternatives: either to say ‘résident régulièrement’ and ‘lawfully resident,’ or to say ‘lawfully’ in which case ‘résident’ must be omitted, otherwise, there would be too many complications in the translation of the various articles . . . [I]t would be better to say ‘régulièrement,’ since ‘légalement’ seemed too decidedly legal”: Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 33–34. In the context of a judgment interpreting the distinct, but related, notion of “habitual residence,” the House of Lords insisted upon comparable flexibility and sensitivity to specific facts. “It is a question of fact . . . Bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, ‘durable ties’ with the country of residence or intended residence, and many other facts have to be taken into account. The requisite period is not a fixed period. It may be longer where there are doubts. It may be short”: *Nessa v. Chief Adjudication Officer*, Times Law Rep, Oct. 27, 1999 (UK HL, Oct. 21, 1999).

¹⁹⁸ Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 12.

¹⁹⁹ “[T]he expression ‘résident régulièrement’ did not imply a lengthy stay, otherwise the expression ‘résidence continue’ . . . would have been employed”: Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 17.

nor the establishment of habitual residence²⁰⁰ is required, the refugee's presence in the state party must be ongoing in practical terms.²⁰¹

The most straightforward example of lawful stay is, of course, ongoing presence consequent to the formal recognition of refugee status. Once a state has formally verified refugee status, there is no basis to question the continuing right of the refugee to live in that country for the duration of risk in his or her country of origin.²⁰²

Second, refugees in receipt of "temporary protection" who have become de facto settled in the host state²⁰³ are to be considered to be "résident régulièrement":

[I]n all those articles the only concrete cases that could arise were cases implying some degree of residence, if only temporary residence; and temporary residence would be covered by the present wording, at least as far as France was concerned . . . That was why he also considered, for reasons of principle, that having abandoned the idea of "*résidence habituelle*," and accepted the concept of "*résidence régulière*," the French delegation had conceded as much as it could.²⁰⁴

Indeed, the British representative, in attempting to translate the French concept to English, proposed the phrase "lawfully resident (temporarily or otherwise)."²⁰⁵ The American representative, however, argued that *any* English language formulation that included the word "resident" would fail accurately to capture the broad meaning conveyed by the French understanding of "résident." In English, he suggested, the word "resident" would not

²⁰⁰ "In the articles in question, the term used in the French text had been 'résidence habituelle' which implied some considerable length of residence. As a concession, the French delegation had agreed to substitute the words 'résidence régulière' which were far less restrictive in meaning": Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 12.

²⁰¹ The French representative suggested that the refugee's presence would have to be "more or less permanent" to satisfy the third level of attachment: Statement of Mr. Juvigny of France, *ibid.*

²⁰² Goodwin-Gill and McAdam, *Refugee in International Law*, at 526; Edwards, "Article 17," at 964. While it is suggested by some that UNHCR recognition of status similarly renders a refugee "lawfully staying" in a state party (see e.g. "The Michigan Guidelines on the Right to Work," 31 *Michigan Journal of International Law* 293 (2010), at [8]), this would only be true if the state in which the refugee is present has consented formally or in practice to recognize such decisions by the UNHCR.

²⁰³ "[T]hese guarantees [can] be invoked by the Convention refugees who are among the temporarily protected persons only after a certain period when it becomes clear that return is not imminent and that the country of refuge has become 'home' for the persons concerned, at least for the time being": Kälin, "Temporary Protection," at 222. See also S. Leckie and E. Simperingham, "Article 21," in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 1003 (2011), at 1015.

²⁰⁴ Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 15.

²⁰⁵ Statement of Sir Leslie Brass of the United Kingdom, *ibid.* at 29.

encompass a temporary stay.²⁰⁶ It was therefore important to draft an English language text that would not be open to misinterpretation, for example, by denying rights to refugees staying “for a number of months.”²⁰⁷ The result of the Ad Hoc Committee’s deliberations was therefore a decision to translate “résidant régulièrement” into English as “lawfully living in their territory.”²⁰⁸

The Conference of Plenipotentiaries maintained the French language formulation of the fourth level of attachment as “résidant régulièrement,” but reframed it in English as “lawfully staying in their territory.”²⁰⁹ This minor terminological shift brought the English language phrasing even more closely into line with the broadly inclusive meaning of “résidant régulièrement.” In any event, the Conference resolved any linguistic ambiguity once and for all by explicitly agreeing that the French concept of “résidant régulièrement” is to be regarded as the authoritative definition of the fourth level of attachment,²¹⁰ thus clearly including any refugee in receipt of temporary protection.

Third, a refugee is lawfully staying if allowed to remain on a de facto ongoing basis in a country that does not operate a formal refugee status determination

²⁰⁶ “[I]n the light of the exposition given by the representative of France there might prove to be a distinction of substance between the English and French texts . . . It appeared that ‘résidant régulièrement’ covered persons temporarily resident, except for a very short period, whereas according to English law he understood the word ‘resident’ could not apply to a temporary stay”: Statement of Mr. Henkin of the United States, *ibid.* at 14. It was for this reason that the American representative objected to the British proposal, *ibid.* at 29, which he referred to as “a contradiction in terms”: Statement of Mr. Henkin of the United States, *ibid.* at 29.

²⁰⁷ “[H]e did not understand the exact connotation of the French word ‘résidant,’ but apparently it could be applied to persons who did not make their home in a certain place but stayed there for a number of months. Such persons would apparently be ‘résidant régulièrement’ but they would not, in the United States of America at least, be lawfully resident. To be lawfully resident in a place, a man must make his home there; it need not be his only home but it must be a substantial home”: Statement of Mr. Henkin of the United States, *ibid.* at 26.

²⁰⁸ “The English text referred to refugees ‘lawfully in the territory’ while the French referred to a refugee ‘régulièrement résidant,’ the literal English equivalent of the latter phrase having a more restrictive application. Re-examining the individual articles, it was decided in most instances that the provision in question should apply to all refugees whose presence in the territory was lawful . . . In one case [the right to engage in wage-earning employment] the Committee agreed that the provision should apply only to a refugee ‘régulièrement résidant’ on the territory of a Contracting State. The English text adopted is intended to approximate as closely as possible the scope of the French term”: “Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session,” UN Doc. E/1850, Aug. 25, 1950 (Ad Hoc Committee, “Second Session Report”), at 12.

²⁰⁹ “Report of the Style Committee,” UN Doc. A/CONF.2/102, July 24, 1951.

²¹⁰ *Ibid.* at [5]. See also Grahl-Madsen, *Status of Refugees II*, at 351–352: “Against this background it seems justified to give precedence to the French term and not to ponder too much over the difference between the expressions ‘lawfully staying’ and ‘lawfully resident’ . . . Both expressions apparently mean the same thing.”

system.²¹¹ It may, of course, be difficult in practical terms to pinpoint the precise moment when provisional presence becomes ongoing if there are no formal declarations of status.²¹² One approach, proposed by Grahl-Madsen, is to see a refugee as lawfully staying when, after reporting to authorities, he or she is permitted to remain beyond the maximum timeframe set by law for visa-free stay.²¹³ Such an understanding is consistent with the basic structure of the Refugee Convention, which does not require states formally to adjudicate status or assign any particular immigration status to refugees,²¹⁴ and which is content to encourage, rather than to require, access to naturalization or other forms of permanent status.²¹⁵

In sum, the fourth level of attachment set by the Refugee Convention requires officially sanctioned, ongoing presence in a state party, whether or not there has been a formal declaration of refugee status, grant of the right of permanent residence, or establishment of domicile there.²¹⁶

3.1.5 Durable Residence

A specific test of durable residence – three years’ residence – governs eligibility for exemption from both requirements of legislative reciprocity²¹⁷ and any

²¹¹ “Fulfilment of the requirement ‘lawfully staying’ does not depend on formal recognition of refugee status”: J. Vedsted-Hansen, “Article 28,” in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 1177 (2011), at 1204. Indeed, it might logically be contended that a refugee is lawfully staying where there has been a prolonged delay in reaching a decision on refugee status. The logic of the acquisition of the rights associated with lawful stay in such circumstances is clear from the decision of the Supreme Court of Ireland – in the case of an asylum-seeker whose claim had been pending for more than eight years – that “in the circumstances where there is no temporal limit on the asylum process, then the absolute prohibition on seeking of employment . . . is contrary to the constitutional right to seek employment”: *NVH v. Minister for Justice and Equality*, [2017] IESC 35 (Ir. SC, May 30, 2017), at [20]–[21].

²¹² Goodwin-Gill and McAdam suggest that as a practical matter, “evidence of permanent, indefinite, unrestricted or other residence status, recognition as a refugee, issue of a travel document, or grant of a re-entry visa, will raise a strong presumption that the refugee should be considered as lawfully staying in the territory of a contracting State. It would then fall to that State to rebut the presumption by showing, for example, that the refugee was admitted for a limited time and purpose, or that he or she is in fact the responsibility of another State”: Goodwin-Gill and McAdam, *Refugee in International Law*, at 526.

²¹³ In an era when “three months seem[ed] to be almost universally accepted as the period for which an alien may remain in a country without needing a residence permit,” Grahl-Madsen suggested “if he is in possession of a residence permit (or its equivalent) entitling him to remain there for more than three months, or if he actually is lawfully present in a territory beyond a period of three months after his entry (or after his reporting himself to the authorities, as the case may be)”: Grahl-Madsen, *Status of Refugees II*, at 353–354.

²¹⁴ See Chapter 3.1.3 at note 173.

²¹⁵ Refugee Convention, at Art. 34. See generally Chapter 7.4.

²¹⁶ This framing is endorsed in Edwards, “Article 17,” at 964.

²¹⁷ Refugee Convention, at Art. 7(2).

restrictive measures imposed on the employment of aliens.²¹⁸ In calculating the three years, it is important to recall that the drafters defined “résidence” broadly, and did not equate it with such legal notions as domicile or permanent resident status.²¹⁹ But even this broad understanding of residence was understood to require *officially sanctioned*, ongoing presence in the state party.²²⁰ It is therefore doubtful that a period of residence should be calculated to include periods of *illegal* presence.²²¹ It is, on the other hand, reasonable to take the view that “[s]hort absences from the contracting State of residence do not interrupt the [residence] period.”²²²

Refugee Convention, Art. 10 Continuity of Residence

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

In line with their focus on factual continuity of residence rather than formalism, the drafters made specific provision to accommodate the predicament of persons forcibly deported during the Second World War. Those refugees who elected to remain in the territory of the state to which they had been deported would be considered to have been resident in that country during the period of enforced presence.²²³ Even though the state to which deportation had been effected may not have legally consented to their entry,

²¹⁸ Ibid. at Art. 17(2)(a). An earlier exemption from alien employment restrictions is required in the case of a refugee who was already exempt from such requirements at the time the Convention entered into force for the state party; or where the refugee is married to, or the parent of, a national of the state party: ibid. at Art. 17(2).

²¹⁹ See Chapter 3.1.4, note 207. ²²⁰ Ibid. at note 127.

²²¹ But see A. Skordas, “Article 7,” in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 715 (2011) (Skordas, “Article 7”), at 750 (“The three-year period begins from the moment at which the refugee finds him- or herself in the host country, even if he or she has entered illegally”). Even the more arguable claim of Edwards – that “residence” begins with the lodging of an asylum application (see Edwards, “Article 17,” at 969) – is not self-evidently correct since the drafters viewed the satisfaction of requirements to have access to status verification as giving rise to lawful “presence,” not lawful “stay” (“résidence” in the French text): see Chapter 3.1.3 at notes 129–130. It is less clear that illegal presence is necessarily to be excluded from the notion of habitual residence: see note 192.

²²² Skordas, “Article 7,” at 750. ²²³ Refugee Convention, at Art. 10(1).

the focus on de facto residence led to an agreement that “the country to which a person had been deported would accept the period spent there as a period of regular residence.”²²⁴

Recognizing that other refugees would prefer to have the time spent in enforced sojourn abroad credited toward the calculation of their period of residence in the state from which they had been removed, the drafters agreed that a victim of deportation²²⁵ could elect to be treated as continually resident in the country from which the deportation was effected.²²⁶ Even though such a refugee had not actually been resident in the contracting state during the time he or she was subject to deportation, “[t]he authors of the Convention sought to mitigate the results of interruption of residence not due to the free will of the refugee, and to provide a remedy for a stay without *animus* and without permission, which are usually required to transform one’s ‘being’ in a certain place into ‘residence.’”²²⁷

The resultant Art. 10 of the Convention is today only of hortatory value,²²⁸ as it formally governs only the treatment of Second World War deportees.²²⁹ Nonetheless, the debates on Art. 10 make clear that the calculation of a period of residence should in principle be carried out with due regard to the particular disabilities faced by refugees.²³⁰ In keeping with the spirit of Art. 10 of the Convention, this suggests that the period of residence be calculated to include either a period of enforced presence in the state party, or the time during which continuous residence was interrupted by forces beyond the refugee’s control.²³¹

²²⁴ Statement of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 7.

²²⁵ “It presumably was not intended to refer to persons displaced by the Government of the country on account of their suspicious or criminal activities, but only to persons forcibly displaced by enemy or occupying authorities”: Statement of Mr. Perez Perozo of Venezuela, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 12.

²²⁶ Refugee Convention, at Art. 10(2). ²²⁷ Robinson, *History*, at 96.

²²⁸ The restrictive language was adopted notwithstanding a plea to extend the benefit of Art. 10 to all refugees. “[I]t was an important matter . . . to be credited, as constituting residence, with the time spent . . . in enforced displacement, or with the period before or after such displacement, in cases where the refugee had returned to his receiving country to re-establish his residence there. The latter provision was all the more useful in view of the fact that, under certain national legislation, the period of residence normally had to be extended if residence was interrupted. Nevertheless, the provisions of article [10(2)] merely remedied an occasional situation caused by the second world war, without providing any [general] solution”: Statement of Mr. Rollin of the Inter-Parliamentary Union, UN Doc. A/CONF.2/SR.10, July 6, 1951, at 7.

²²⁹ The article was arguably obsolete even at the time the Refugee Convention came into force, as nearly a decade had elapsed since the end of the Second World War and few, if any, rights were conditioned on continuous residence of more than five years.

²³⁰ See Chapter 3.2.3 at note 310 ff.

²³¹ Skordas argues that time spent in a country of first arrival pending assignment to another country for status verification should be included in the period of residence: Skordas, “Article 7,” at 750. While he forthrightly acknowledges that this is an entirely “teleological

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

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

3.2 The General Standard of Treatment

Once the rights to which a particular refugee is entitled have been identified on the basis of the level of attachment test outlined above,²³² the next step is to define the required standard of treatment. Many rights in the Convention are expressly defined to require implementation on the basis of either a contingent or an absolute standard of achievement. These are referred to here as "exceptional standards of treatment," the interpretation of which is addressed below.²³³ Absent express provision of this kind, however, refugees are to be treated at least as well as "aliens generally."²³⁴ This baseline or residual standard²³⁵ defines the substantive standard of compliance with

interpretation [that would enable refugees] . . . to add the time they spent in different countries": ibid., such an approach would be an interruption of presence beyond the refugee's control and hence consonant with the spirit of Art. 10. As Schmahl observes, "Art. 10, para. 2 wants to mitigate the results of an interruption of residence not due to the free will of the refugee": S. Schmahl, "Article 10," in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 805 (2011), at 813.

²³² See Chapter 3.1. ²³³ See Chapter 3.3. ²³⁴ Refugee Convention, at Art. 7(1).

²³⁵ Objection has been taken to referring to this as the Convention's "minimum" standard on the grounds that contemporary extrinsic norms applicable to aliens generally may at times require more robust protection than cognate provisions of the Convention: see Skordas, "Article 7," at 719, 733. While this is of course sometimes true (see Chapter 1.4.5), it

Convention duties that are not framed to require an exceptional standard of treatment.²³⁶

Refugee Convention, Art. 7(1)

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

Art. 7(1) is not a purely endogenous provision; rather, like Art. 5,²³⁷ it is an important means of ensuring that refugees secure the benefit of whatever exogenous rights or benefits are “accorded to aliens generally.” At the time of the Convention’s drafting – before the advent of modern human rights law²³⁸ – the body of international law most obviously available to “aliens generally” was international aliens law. This assimilation of refugees to “aliens generally” under international aliens law would, however, provide little assurance of meaningful protection. This is because the primary responsibility to protect the interests of aliens is attributed to their state of nationality, which is expected to engage in diplomatic intervention to secure respect for the human rights of its citizens abroad.²³⁹ International aliens law was conceived very much within the traditional contours of international law: the rights created are the rights of national states, enforced at their discretion under the rules of diplomatic protection and international arbitration. While injured aliens might benefit indirectly from the assertion of claims by their national states, they can neither require action to be taken to vindicate their loss, nor even compel their state to share with them whatever damages are recovered in the event of a successful claim.²⁴⁰

As weak as aliens law was as a source of rights in general, it was worse still for refugees. Because refugees are by definition persons whose country of nationality either cannot or will not protect them, traditional aliens law –

remains that Art. 7 does set the residual *minimum* standard for the treatment of refugees, albeit not necessarily a *minimal* standard.

²³⁶ See Chapter 3.2.1. ²³⁷ See Chapter 1.4.5. ²³⁸ See Chapter 1.5.4.

²³⁹ See Chapter 1.1 at note 12. The International Law Commission has recommended that in addition to the state of nationality, an asylum state also be allowed to exercise diplomatic protection in relation to “recognized” refugees who are “lawfully and habitually resident”: International Law Commission, “Draft Articles on Diplomatic Protection,” UN Doc. A/61/10 (2006), at Art. 8. Critically, however, diplomatic protection may not be exercised in respect of “an injury caused by an internationally wrongful act of the State of nationality of the refugee”: ibid. at Art. 8(3). And since the asylum state cannot of course seek a remedy against itself, the two states most likely in practice to infringe a refugee’s rights – the state of origin and the state of refuge – remain beyond the reach of aliens law.

²⁴⁰ “The fate of the individual is worse than secondary in this scheme: it is doctrinally non-existent, because the individual, in the eyes of traditional international law, like the alien of the Greek city-State regime, is a non-person”: R. Lillich, *The Human Rights of Aliens in Contemporary International Law* (1984) (Lillich, *Rights of Aliens*), at 12.

with protection entirely in the hands of one's own state – could be expected to provide them with few benefits.²⁴¹ For this reason, an essential aspect of international refugee protection has always been to provide surrogate international protection under the auspices of an international agency – presently UNHCR – which is to undertake the equivalent of diplomatic intervention on behalf of refugees.²⁴²

Aware of the weaknesses of international aliens law as a source of refugee rights, Art. 7(1) of the Convention is broadly framed to incorporate by reference all general sources of rights for non-citizens.²⁴³ Urged by the American delegate to ensure that the general standard "should cover all rights to be granted to refugees and not only those which were actually specified in the draft convention,"²⁴⁴ the report of the First Session of the Ad Hoc Committee succinctly notes that "[t]he exemption from reciprocity relates not only to rights and benefits specifically covered by the draft convention, but also to such rights and benefits not explicitly mentioned in the draft Convention."²⁴⁵ Simply put, refugees cannot be excluded from any rights which the asylum state ordinarily grants to other foreigners.²⁴⁶ Thus, the general standard of Art.

²⁴¹ While no longer sustainable in view of the obligations assumed by adherence to the United Nations Charter and subsequent human rights accords, the classical predicament of persons without a nationality is nicely captured in L. Oppenheim, *International Law: A Treatise* (1912), at 369: "It is through the medium of their nationality only that individuals can enjoy benefits from the existence of the Law of Nations . . . Such individuals as do not possess any nationality enjoy no protection whatever, and if they are aggrieved by a State they have no way to redress, there being no State that would be competent to take their case in hand. As far as the Law of Nations is concerned, apart from morality, there is no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals."

²⁴² See Chapter 1.3 at note 24 ff.

²⁴³ Skordas correctly observes that Art. 7 "links the 1951 Convention with external legal regimes"; "[t]hough it seems rather neglected, old-fashioned, and awkwardly worded, Art. 7 is an important provision of the 1951 Convention because it enables the co-evolution of the refugee regime with aliens law and international human rights law": Skordas, "Article 7," at 719, 753. Art. 5 of the Refugee Convention (see Chapter 1.4.5) similarly requires that "rights and benefits" granted to refugees apart from the Refugee Convention may not be impaired.

²⁴⁴ Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 4.

²⁴⁵ "Report of the Ad Hoc Committee on Statelessness and Related Problems," UN Doc. E/1618, Feb. 17, 1950 (Ad Hoc Committee, "First Session Report"), at Annex II. Even as the attitude of states toward the timing and scope of exemption from reciprocity hardened over the course of the drafting process, there was no weakening of this basic commitment to comprehensive application of the general standard of treatment: see Refugee Convention, at Art. 7(5) ("The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21, and 22 of this Convention *and to rights and benefits for which this Convention does not provide* [emphasis added]").

²⁴⁶ It has been suggested that some possible sources of rights for aliens in general, including in particular migration laws and treaties, are excluded from the ambit of Art. 7: Skordas, "Article 7," at 737, 742–743. While such agreements cannot of course detract from the

7(1) ensures that refugees may claim not only the narrow range of rights set by international aliens law,²⁴⁷ but also the benefit of any legal obligations (for example, those set by the Human Rights Covenants)²⁴⁸ which govern the treatment of aliens in general.

Conversely, the drafters were clear that the residual standard in Art. 7(1) does not entitle a refugee to claim the benefit of agreements negotiated with special partner states,²⁴⁹ for example those united in an economic or customs union.²⁵⁰ Because exceptional rights of this kind do not ordinarily inhere in “aliens generally,” the baseline standard of treatment was understood to allow them to be withheld from refugees.²⁵¹ The drafters, however, limited their

rights otherwise available to refugees, neither is there any reason to deny refugees whatever benefits such laws and treaties might provide to aliens generally. See also Refugee Convention, at Art. 5.

²⁴⁷ See Chapter 1.1 at notes 5–7. ²⁴⁸ See Chapter 1.5.4.

²⁴⁹ See e.g. Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 5; Statement of Mr. Larsen of Denmark, *ibid.*; and Statement of the International Refugee Organization, in United Nations, “Compilation of the Comments of Governments and Specialized Agencies on the Report of the Ad Hoc Committee on Statelessness and Related Problems,” UN Doc. E/AC.32/L.40, Aug. 10, 1950 (United Nations, “Compilation of Comments”), at 34–35: “The main reason why the Ad Hoc Committee decided to change the wording of the Article relating to reciprocity . . . was that it did not wish the Article to relate to treaty provisions conferring preferential treatment on aliens of a particular nationality. It is certain that since 1933 there has been a general development in the granting of preferential treatment to aliens of a particular nationality on the basis of customs, political and economic associations founded on geographical or historical connections. It may be held that some qualification should be made to the original formula concerning reciprocity, as included in the Conventions of 1933 and 1938, in order to overcome any misinterpretation which may lead to the belief that an article concerning the exemption from reciprocity might have as a consequence the legal entitlement for refugees to the benefits of preferential treatment.”

²⁵⁰ “[C]ountries such as Belgium, which were linked to certain other countries by special economic and customs agreements, did not accord the same treatment to all foreigners. Belgium, for example, placed nationals of the Benelux countries for certain periods on a quasi-equal footing with Belgian citizens”: Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 5. Mr. Cuvelier subsequently repeated “that refugees could not benefit from reciprocal treatment in cases where the right or privilege in question was granted solely as a result of an international agreement between two countries”: Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 4. The Israeli delegate thereupon suggested, and the Committee agreed, that “that interpretation should be placed on the record”: Statement of Mr. Robinson of Israel, *ibid.* As helpfully clarified by the British delegate, refugees cannot automatically claim the benefit of “a special treaty between two countries”: Statement of Sir Leslie Brass of the United Kingdom, *ibid.* Thus it was agreed that “The Article will confer these rights on refugees; they would otherwise be prevented from having them in view of their lack of nationality. The Article is not intended to relate to rights specifically conferred by bilateral treaty and which are not intended to be enjoyed by aliens generally”: “Comments of the Committee on the Draft Convention,” UN Doc. E/AC.32/L.32/Add.1, Feb. 10, 1950, at 3.

²⁵¹ Special guarantees of reciprocal treatment, such as those negotiated by partner states in an economic or customs union, do not automatically accrue to refugees. The benefits of such

discussion to the issue of truly special agreements benefitting the nationals of a small number of states.²⁵² Despite an entreaty from the American representative, no consensus was reached on whether rights and benefits flowing from more broadly subscribed agreements could be similarly withheld from refugees.²⁵³ In principle, however, both the plain language and specificity of the concerns raised during the drafting process suggest that where the standards are not exceptional, but rather in practice define the rights of most non-citizens in a state, then these rights – as the dominant standard for non-citizens – accrue also to refugees under the “aliens generally” rule of Art. 7(1).²⁵⁴

forms of diplomatic reciprocity are normally extended to refugees only where the Refugee Convention stipulates that refugees are to be treated either as “most-favored foreigners,” or on par with the nationals of the asylum state. “[A] distinction should be drawn between the clause relating to exemption from reciprocity and the provisions of some articles which specified whether refugees should be accorded the most favorable treatment or be subject to the ordinary law. Where such provisions were set forth in an article there was no need to invoke the clause on exemption from reciprocity. It was obvious, in fact, that where refugees were accorded the most favorable treatment there would be no point in invoking the clause respecting exemption from reciprocity . . . The paragraph on exemption from reciprocity would apply only where articles failed to define the treatment accorded to refugees”: Statement of Mr. Giraud of the Secretariat, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 6. See generally Chapter 3.3.1.

²⁵² For example, the French representative asked, “If the French Government and a small State concluded a treaty providing for certain rights to be granted to Frenchmen, and the same rights to be granted to nationals of that State in France, was the advantage granted to the citizens of a single country to be accorded by France to all refugees? . . . Was it when there was reciprocal treatment with one or two other States or when there was such treatment with a very large number of other States? . . . France was prepared to give refugees the treatment given to aliens generally, but did not intend to give better treatment to refugees than that given to the majority of aliens”: Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 11–12.

²⁵³ “It was also necessary to cover cases where reciprocity treaties existed with many countries and were hence equivalent to legislative reciprocity. The representative of France had raised the question of how many such treaties must exist, whether 5 or 50. He could not himself suggest a draft but the Drafting Committee would have to, so long as it was clear what was desired”: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 16. In fact, the issue was resolved neither by the Drafting Committee, nor by any subsequent body that participated in the preparation of the Refugee Convention.

²⁵⁴ Two commentators object to this plain meaning approach to the identification of the “aliens generally” benchmark (“the majority of aliens,” per the French representative: see note 252). Grahl-Madsen opines that “[i]t would have been more relevant to speak of ‘aliens belonging to the majority of states.’ It is entirely feasible that ‘the majority of aliens’ belong to a single foreign State with which a treaty of favourized treatment exists; in spite of their number those foreign nationals would not be ‘aliens generally’”: A. Grahl-Madsen, *Commentary on the Refugee Convention 1951* (1963, pub’d. 1997) (Grahl-Madsen, *Commentary*), at 29. While this approach resonates with the question put by the American drafter (see note 253), it seems an odd standard. If, for example, there were aliens from thirty countries in a given state, and a particular right inhered in those from twenty of those countries but who made up collectively only 10 percent of the alien

3.2.1 Assimilation to Aliens

The second and more specific function of Art. 7(1) is to set the endogenous baseline standard of treatment for refugee rights codified in the Convention itself. Committed to not asking states to do more for refugees than what was reasonable, the baseline contingent standard set by Art. 7(1) requires only that a given Convention right be implemented to the extent it is generally extended to non-citizens in that country. In some cases this will afford refugees little – for example, if non-citizens are barred from owning property, then refugees may similarly be barred. But conversely if there is a general right of access to property by non-citizens – as evinced by, for example, relevant domestic laws or practices, a pervasive pattern of bilateral or multilateral agreements, or de facto enjoyment of the right by most aliens – then the baseline standard requires that refugee property rights be honored to the same extent.

Indeed, even as the drafters recognized the importance of not conceiving the baseline standard in Art. 7(1) in a way that might ask too much of states, they showed a determination to encourage states not to be content with doing only the bare minimum required. Thus, all but one of the substantive Convention rights that require implementation only at the baseline “aliens generally” standard²⁵⁵ – rights to property, self-employment, professional practice, housing, and secondary and higher education – are actually phrased to require

population, that right would, under Grahl-Madsen’s approach, be said to inhere in “aliens generally” – despite it being unavailable to 90 percent of non-citizens. This seems a proposition difficult to square with the plain meaning of “generally.” Conversely, Skordas has objected to the notion of a “numerical-quantitative element” of any kind, arguing instead that “[i]t is more appropriate to define the ‘generality’ of treatment on the basis of the scope of the relevant provisions *ratione personae*. The meaning of ‘general treatment’ is not in fact determined by the 1951 Convention itself, but by the legal instruments and norms themselves that are potentially applicable to aliens or refugees”: Skordas, “Article 7,” at 736. Not only does this seem to make the exogenous component of Art. 7(1) redundant in view of Art. 5 (if a given right is generally available to non-citizens *ratione personae* then it accrues to them, including refugees: see Chapter 1.4.5), but if this approach were adopted, refugees could easily be denied the benefit of rights available to most non-citizens. For example, in an EU state where other EU nationals make up the majority of the state’s non-citizen population, EU rights – specifically directed *ratione personae* only to EU nationals – would not accrue under the “aliens generally” standard. On the other hand, a quantitative approach to “aliens generally” would entitle refugees to treatment in line with that provided to the (quantitative) clear majority of non-citizens, that is the EU standard of treatment.

²⁵⁵ The exception is the right to freedom of movement set by Art. 26, which requires only that refugees be allowed to “choose their place of residence and to move freely within [the state party’s] territory, subject to any regulations applicable to aliens generally in the same circumstances”: Refugee Convention, at Art. 26. While there is no textual requirement to grant refugees internal mobility rights on terms “as favorable as possible,” whatever constraints are to be imposed on freedom of movement must derive from “regulations,” not simply from the exercise of bureaucratic or other discretion or directive. See Chapter 5.2.

“treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally.”²⁵⁶ As the Belgian delegate insisted, this form of words requires more than simply adherence to the principle of non-discrimination.²⁵⁷ Rather, the “treatment as favourable as possible” language requires a state party to give consideration in good faith to the non-application to refugees of limits generally applied to aliens.²⁵⁸ It was inspired by the hope that “refugees would be granted not the most favorable treatment, but a treatment more favorable than that given to foreigners generally.”²⁵⁹ The spirit of this responsibility is nicely captured by the comments of the British government that it would be prepared to “consider sympathetically the possibility of relaxing the conditions upon which refugees have been admitted.”²⁶⁰

3.2.2 *Exemption from Reciprocity*

Refugee Convention, Art. 7 Exemption from Reciprocity

...

2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.
3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.
4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity

²⁵⁶ Refugee Convention, at Arts. 13, 18, 19, 21, and 22.

²⁵⁷ The matter arose in the context of a French criticism that an American proposal to grant refugees “the most favorable treatment possible and, in any event, not less favorable than that given to foreigners generally as regards housing accommodations” was unnecessary in view of the duty of non-discrimination. In response, the Belgian delegate “pointed out that the United States text was not redundant, inasmuch as it required the High Contracting Parties not merely not to discriminate against refugees, but to ensure them ‘the most favorable treatment possible’: Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 13. The impermissibility of discrimination between refugees and other non-citizens is nonetheless clear: Skordas, “Article 7,” at 736.

²⁵⁸ “[C]ontracting parties are ... expected to initiate administrative procedures or studies for exploring the possibilities of according, or extending at least some additional rights and benefits to refugees, even if they are not legally obliged to do so”: Skordas, “Article 7,” at 752.

²⁵⁹ Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 14. Under this intermediate standard, a government should at least consider providing preferential treatment for refugees. See also Statement of Mr. Kural of Turkey, *ibid.* at 15.

²⁶⁰ United Nations, “Compilation of Comments,” at 40.

to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.

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

Under traditional notions of aliens law, the very existence of relevant rights for aliens can depend on the efforts of the refugee's state of nationality.²⁶¹ Each state was entitled to determine for itself whether any rights would be granted to non-citizens beyond the limited range of rights guaranteed to all aliens under general principles of law.²⁶² While some countries routinely granted aliens most of the rights extended to their own citizens, many conditioned the rights of non-citizens on reciprocity: put simply, aliens would receive from a host state only such rights as their state of origin was prepared to grant in its territory to citizens of the host state.

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

²⁶¹ "At the root of the idea of the juridical status of foreigners is the idea of reciprocity. The law considers a foreigner as a being in normal circumstances, that is to say, a foreigner in possession of a nationality. The requirement of reciprocity of treatment places the national of a foreign country in the same position as that in which his own country places foreigners": United Nations, "Memorandum by the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems," UN Doc. E/AC.32/2, Jan. 3, 1950 (Secretary-General, "Memorandum"), at 28. "Reciprocity refers to the interdependence of obligations assumed by participants within the legal schemes created by human rights law ... In other words, obligations are reciprocal if their creation, execution and termination depend on the imposition of connected obligations on others. International law, being a system based on the formal equality and sovereignty of States, has arisen largely out of the exchange of reciprocal rights and duties between States": R. Provost, "Reciprocity in Human Rights and Humanitarian Law," (1994) 65 *British Yearbook of International Law* 383 (Provost, "Reciprocity"), at 383.

²⁶² These included recognition of the alien's juridical personality, respect for life and physical integrity, and personal and spiritual liberty within socially bearable limits. Aliens were afforded no political rights, though resident aliens were subject to reasonable public duties. In the economic sphere, there was a duty of non-discrimination among categories of aliens allowed to engage in commercial activity. There was also an obligation to provide adequate compensation for denial of property rights where aliens were allowed to acquire private property. Finally, aliens were to be granted access to a fair and non-discriminatory judicial system to enforce their basic rights. See generally A. Roth, *The Minimum Standard of International Law Applied to Aliens* (1949) (Roth, *Minimum Standard*), at 134–185; and Chapter 1.1.

no practical purpose served by the application of rules of reciprocity to refugees:

[R]efusal to accord national treatment to foreigners in the absence of reciprocity is merely an act of mild retaliation. The object [of reciprocity] is to reach, through the person of the nationals concerned, those countries which decline to adopt an equally liberal regime . . . But what country or which Government can be reached through the person of a refugee? Can the refugee be held responsible for the legislation of his country of origin? Clearly, the rule of reciprocity, if applied to refugees, is pointless and therefore unjust. The injury caused to refugees by the application of this rule is substantial since the rule constantly recurs in texts governing the status of foreigners. Since the condition of reciprocity cannot be satisfied, refugees are denied the enjoyment of a whole series of rights which are accorded in principle to all foreigners.²⁶³

State approaches to reciprocity fall into two broad categories.²⁶⁴ States embracing the theory of “diplomatic reciprocity” grant rights to non-citizens only to the extent that such rights are provided for by interstate agreement. The alternative legislative or de facto reciprocity approach conditions non-citizen rights on the existence of reciprocal domestic laws (or sometimes practice) in the alien’s country of origin. A critical distinction between the two approaches is that whereas diplomatic reciprocity assumes no non-citizen rights beyond what has been negotiated, states committed to legislative or de facto reciprocity “usually grant foreigners the same rights as their subjects, reserving however the power to apply retorsion to the nationals of countries where aliens generally or their subjects alone [were] handicapped by the particular disability in question.”²⁶⁵

²⁶³ Secretary-General, “Memorandum,” at 29, citing statement of the French government when submitting the 1933 Refugee Convention for legislative approval.

²⁶⁴ The definition of recognized approaches to reciprocity is not without confusion. Borchard, for example, identifies only two systems, namely diplomatic and legislative reciprocity: E. Borchard, *The Diplomatic Protection of Citizens Abroad* (1915) (Borchard, *Diplomatic Protection*), at 71–72. In contrast, the document prepared by the United Nations Department of Social Affairs, “A Study of Statelessness,” UN Doc. E/1112, Feb. 1, 1949 (United Nations, “Statelessness”), at 17–18, which served as the basis for drafting of the Refugee Convention, argues that there are two approaches to reciprocity, namely diplomatic and de facto. While de facto reciprocity as defined by the UN Study and legislative reciprocity as defined by Borchard are comparable in that the referent for duties owed to aliens is a domestic, rather than an international standard, it is clear that a number of the Refugee Convention’s drafters insisted upon the relevance of the dichotomy between reciprocity systems based on domestic legislation, as contrasted with those based on domestic practice, in the partner state. See in particular comments of Mr. Perez Perozo of Venezuela, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 3; and the exchange between the representatives of the Netherlands and Belgium at the Conference of Plenipotentiaries, UN Doc. A/CONF.2/SR.24, July 17, 1951, at 22.

²⁶⁵ Borchard, *Diplomatic Protection*, at 72.

The predecessor 1933 Refugee Convention exempted refugees from all requirements of reciprocity.²⁶⁶ This clause of course had no impact on states that did not condition the treatment of refugees on reciprocity in any event. Importantly, its implications for states which relied on diplomatic reciprocity were also relatively modest. Because diplomatic reciprocity does not work from an underlying presumption that aliens should receive full rights, exemption from reciprocity in diplomatic reciprocity states brought refugees only within the ranks of the residual category of foreigners. Exemption from reciprocity had, however, significant ramifications for countries that conditioned alien rights on legislative or de facto reciprocity, since exemption from reciprocity revived the presumption underlying that theory that aliens should be assimilated to nationals, thereby effectively requiring national treatment for refugees.²⁶⁷

This historical background is important for understanding the approach taken in the current Refugee Convention. It was initially proposed that, as under the 1933 Convention, refugees protected by the 1951 Convention should simply be assimilated to the citizens of states with which the asylum country enjoyed a reciprocity arrangement.²⁶⁸ While some states – including in particular Denmark²⁶⁹ and the United States²⁷⁰ – supported this position, France pointed to the fact that only three of the eight state parties to the 1933 Convention had actually accepted the duty to exempt refugees from reciprocity.²⁷¹ Arguing the importance of pragmatism, it successfully proposed

²⁶⁶ “The enjoyment of certain rights and the benefit of certain favours accorded to foreigners subject to reciprocity shall not be refused to refugees in the absence of reciprocity”: Convention relating to the International Status of Refugees, 159 LNTS 3663, done Oct. 28, 1933, entered into force June 13, 1935 (1933 Refugee Convention), at Art. 14.

²⁶⁷ See Chapter 3.2.

²⁶⁸ “The enjoyment of the rights and favours accorded to foreigners subject to reciprocity shall not be refused to refugees (and stateless persons) in the absence of reciprocity”: Secretary-General, “Memorandum,” at 28.

²⁶⁹ “Denmark used reciprocity simply as a means to ensure that Danes in foreign countries received the privileges that were granted to nationals of those countries in Denmark. In such cases he felt that refugees should be granted the same privileges although there could be no question of reciprocity”: Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 18–19.

²⁷⁰ “[I]n the United States of America as in the United Kingdom, problems of reciprocity did not arise but . . . he, too, had no objection to the inclusion of the article for the sake of countries differently situated . . . The main object was to ensure that aliens should not be penalised because they had no nationality and that where privileges were generally enjoyed by aliens, through treaties or in any other way, refugees should have the same privileges”: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 15–16.

²⁷¹ Only Bulgaria, France, and Italy did not enter a reservation or qualification to Art. 14 of the 1933 Convention: United Nations, “Statelessness,” at 93–97. It is noteworthy that Bulgaria and Italy routinely assimilated aliens to foreigners in any event, and France relied on diplomatic reciprocity (thereby allowing it to reserve a category of privileged aliens,

an alternative formulation premised on the denial to refugees of all rights conditioned on diplomatic reciprocity, and stipulating that rights conditioned on legislative or de facto reciprocity would accrue to refugees only after residing for a number of years in the asylum country.²⁷² States that relied on legislative or de facto reciprocity would thereby find themselves on a similar footing with countries that embraced diplomatic reciprocity.²⁷³

The general standard of treatment under the Refugee Convention is thus premised on the continued existence of preferred aliens regimes in states that rely on diplomatic reciprocity, in which refugees may not insist that they be afforded rights reserved by treaty for the citizens of countries with which the asylum state has a special relationship.²⁷⁴ Art. 7(2) moreover caters specifically for states that embrace the legislative or de facto approach to reciprocity, the goal being to avoid imposing significantly more onerous responsibilities on them than on diplomatic protection countries.²⁷⁵ This result was attenuated by delaying the time at which refugees are granted the benefit of rights ordinarily subject to legislative or de facto reciprocity,²⁷⁶ deferring exemption from legislative reciprocity until a refugee has resided in an asylum state for three years.²⁷⁷

exemption from reciprocity notwithstanding). The article was not in force for any legislative or de facto reciprocity state where it would clearly have had the greatest impact.

²⁷² “The enjoyment of certain rights and the benefit of certain privileges accorded to aliens subject to reciprocity shall not be refused to refugees in the absence of reciprocity in the case of those enjoying them at the date of signature of the present Convention. As regards other refugees, the High Contracting Parties undertake to give them the benefit of these provisions upon completion of [a certain period of] residence”: France, “Proposal for a Draft Convention,” UN Doc. E/AC.32/L.3, Jan. 17, 1950 (France, “Draft Convention”), at 4.

²⁷³ Only refugees who enjoyed exemption from reciprocity under the 1933 Convention or another pre-1951 instrument are entitled immediately to be assimilated to the ranks of privileged foreigners: Refugee Convention, at Art. 7(3).

²⁷⁴ See Chapter 3.2.1.

²⁷⁵ While the text of the articles speaks only to “legislative reciprocity,” it is clear from the drafting history that this term was used in contradistinction to “diplomatic reciprocity.” As observed by its Belgian co-sponsor, the term “legislative reciprocity” “was emphatically not designed to exclude *de facto* reciprocity”: Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.24, July 17, 1951, at 22. There is a logical basis for this assertion, grounded in differing ways of categorizing approaches to reciprocity. See Chapter 3.2.

²⁷⁶ The Ad Hoc Committee agreed that “a legal obligation in this sense would be acceptable only in regard to refugees who had resided in the country for a given period”: Ad Hoc Committee, “Second Session Report,” at 12. Austria was one of the few states present that relied primarily on legislative reciprocity. Because it was a country of first asylum for large numbers of refugees who would ultimately be granted resettlement elsewhere, a three-year delay in according exemption from reciprocity effectively met its most pressing concerns. See Comments of the Government of Austria, in United Nations, “Compilation of Comments,” at 5, 32.

²⁷⁷ The determination of when the requirement of “three years’ residence” has been satisfied should be made in accordance with the spirit of Art. 10 (“continuity of residence”): see Chapter 3.1.5. Skordas makes the intriguing argument that once the three-year deferral

The net result is that the general standard of treatment under the modern Refugee Convention endorses a significant, though not complete, retrenchment from the requirement of the 1933 Refugee Convention that refugees should be exempted from all reciprocity requirements. By virtue of Art. 7(1)'s limited duty to accord to refugees all rights that inhere in "aliens generally," refugees may presumptively be refused any diplomatic reciprocity rights which accrue only to preferred nationals, such as those of partner states in an economic or political union.²⁷⁸ In reliance on Art. 7(2), states may also withhold for up to three years any rights that are reserved for the nationals of states which have met the requirements of legislative or *de facto* reciprocity.

Some drafters clearly recognized the inappropriateness of subjecting refugees to the harshness of reciprocity.²⁷⁹ While unable to overcome the protectionist views of the majority of states, they nonetheless secured an amendment that shields many pre-1951 refugees from any attempt to reduce rights based on reciprocity principles.²⁸⁰ Of greater contemporary relevance, Art. 7 was also amended to oblige states to give consideration to the waiver of legislative and *de facto* reciprocity requirements before the lapse of the three-year residency requirement.²⁸¹ As

period has been satisfied in one state party, any other state party in which the refugee may reside must also exempt that refugee from its requirements of legislative reciprocity: Skordas, "Article 7," at 751. While the language ("in the territory of the Contracting States") might justify that conclusion, there is no support in the drafting record for this broad scope of application.

²⁷⁸ But "paragraph 2 of article [7] must be interpreted in the light of paragraph 1": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 7. As such, if and when rights formally subject to reciprocity are in fact generally enjoyed by most non-citizens in a given country, refugees must receive the benefit of these rights as well: see Chapter 3.2.1. Thus, if for example the majority of non-citizens in a given country are European Union nationals refugees must be assimilated to EU nationals for purposes of rights allocation.

²⁷⁹ "According to [the draft of Art. 7(3)] . . . certain refugees would continue to enjoy the reciprocity which they had previously enjoyed; that included the legislative reciprocity mentioned in the second paragraph, as well as diplomatic and *de facto* reciprocity. On the other hand, new refugees would . . . enjoy exemption from reciprocity only after a period of three years' residence in the receiving country. He appreciated the reasons for which certain States felt obliged to limit the rights of new refugees in that way, but pointed out that there were other States which visualized the possibility of extending the idea of reciprocity even to non-statutory refugees": Statement of Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.24, July 17, 1951, at 21–22.

²⁸⁰ "Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State": Refugee Convention, at Art. 7(3).

²⁸¹ "The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3": Refugee Convention, at Art. 7(4). The Ad Hoc Committee had "expressed the hope that States would give sympathetic consideration to extending rights, as far as possible, to all refugees without

Robinson²⁸² and Weis²⁸³ affirm, Art. 7(4) is not merely hortatory, but requires governments to give real attention to the logic of continued application of reciprocity requirements to refugees. While not formally obliged to grant rights subject to legislative or de facto reciprocity during the first three years a refugee resides in its territory, Art. 7(4) “uses the word ‘shall’ to indicate that it *requires* the states to consider favorably the possibility of acceding such rights.”²⁸⁴

In any event, it is today doubtful that states also bound by the International Covenant on Civil and Political Rights may validly withhold refugee rights on the grounds of an absence of reciprocity.²⁸⁵ The Covenant’s general guarantee of non-discrimination requires that rights allocated by a state to any group presumptively be extended to all persons under its jurisdiction.²⁸⁶ Legislative and de facto reciprocity are particularly vulnerable, as the decision to deny rights to only those aliens whose national states have not agreed to reciprocal treatment is explicitly a means of pressuring other *states* to grant protection to foreign citizens.²⁸⁷ As observed by the American representative to the Ad Hoc

regard to reciprocity, particularly where the rights have no relation to the requirements of residence, as for example, compensation for war damages and persecution”: Ad Hoc Committee, “Second Session Report,” at 11–12.

²⁸² “[T]he [Ad Hoc] Committee expressed the hope that states would give sympathetic consideration to extending rights, as far as possible, to all refugees without regard to reciprocity, particularly where the rights have no relation to the requirements of residence. This ‘hope’ was transformed by the Conference [of Plenipotentiaries] into a special clause which must have more meaning than ‘hope.’ It is a recommendation to the Contracting States . . . In other words, a state cannot be forced to accord these rights, but there must be a well-founded reason for refusing their accordance”: Robinson, *History*, at 88–89.

²⁸³ “It is only a recommendation, but imposes nevertheless a mandatory obligation to consider favourably the granting of wider rights and benefits”: Weis, *Travaux*, at 57.

²⁸⁴ Robinson, *History*, at 89.

²⁸⁵ This is certainly the case where the rights in question are themselves guaranteed by international law. For example, the UN Human Rights Committee has expressed the view that “the provisions in [Azerbaijan’s] legislation providing for the principle of reciprocity in guaranteeing Covenant rights to aliens are contrary to articles 2 and 26 of the Covenant”: “Concluding Observations of the Human Rights Committee: Azerbaijan,” UN Doc. CCPR/CO/73/AZE, Nov. 12, 2001, at [20]. An analysis of the role of reciprocity in international human rights law asserts the potential value of reciprocity in the context of a system which still lacks a centralized enforcement mechanism. It nonetheless insists that countermeasures must be carefully targeted, lest the goals of human rights law be undermined. “At a general level, the notion of enforcing human rights law through disregard for its norms seems incompatible with this rationale, indeed, the *raison d'être*, of that body of law . . . [A] mechanism that would permit infringements of human rights to be echoed by further infringements of human rights would undoubtedly undermine the structure of human rights as a body of compulsory norms limiting the actions of the State”: Provost, “Reciprocity”, at 444–445.

²⁸⁶ See Chapter 1.5.5 at note 453.

²⁸⁷ Whether preferred rights secured by special forms of diplomatic reciprocity are equally vulnerable to attack on the basis of the duty of non-discrimination is less clear. Where enhanced rights are granted only to citizens of those states with which the asylum country

Committee, “[t]he purpose of making . . . rights subject to reciprocity was to encourage other countries to adopt an equally liberal regime towards foreigners in their territory. Naturally there was nothing to be gained by making the rights subject to reciprocity where a refugee was concerned.”²⁸⁸ In view of the impossibility of advancing the explicitly instrumentalist goals of most reciprocity regimes through the persons of refugees,²⁸⁹ an attempt to rely on the restrictive portions of Art. 7 is unlikely to meet modern understandings of the duty of non-discrimination, the broad margin of appreciation afforded state parties notwithstanding.²⁹⁰

3.2.3 Exemption from Insurmountable Requirements

Refugee Convention, Art. 6 The Term “In the Same Circumstances”

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

As previously noted, most Convention rights that require implementation only at the baseline standard – rights to property, self-employment, professional practice, housing, and post-primary education²⁹¹ – are textually framed to require “treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.” Governments are also allowed to restrict the internal mobility of refugees lawfully present in their territory “subject to any regulations applicable to aliens generally in the same circumstances.”²⁹² The same phrase is used to modify the duty to assimilate refugees to the nationals of most-favored states in relation to the rights to association and to wage-earning employment: “the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.”²⁹³

is linked in a form of political or economic union, for example, this may be said to reflect an effective assimilation of those aliens to the political or economic community of the partner state. The non-discrimination analysis ought therefore to focus on whether the rights in question can be said to reflect the unique abilities and potentialities of members of a shared political and economic community. See Chapter 1.5.5 at note 448 ff.

²⁸⁸ Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 2.

²⁸⁹ See text at note 263. ²⁹⁰ See Chapter 1.5.5 at note 484 ff.

²⁹¹ Refugee Convention, at Arts. 13, 18, 19, 21, and 22. ²⁹² Ibid. at Art. 26.

²⁹³ Ibid. at Arts. 15, 17. Comparable phrasing is employed to define the duty of tax equity in Art. 29 (“[no] taxes . . . other or higher than those which are . . . levied on their nationals in similar situations”).

This language reflects the view of the drafters that where refugee rights are defined to require only the baseline standard of treatment – that is, assimilation to aliens generally – refugees should have to qualify in essentially the same way as other aliens. The initial approach of the Ad Hoc Committee was quite strict, suggesting that refugees should have to meet “the same requirements, including the same length and conditions of sojourn or residence, which are prescribed for the national of a foreign state for the enjoyment of the right in question.”²⁹⁴ The Committee rejected proposals that would have required states to judge comparability solely on the basis of terms and conditions of stay in the asylum state.²⁹⁵ The Belgian and American representatives argued that such an approach was too restrictive, but were able to persuade the Committee only that governments should be entitled to consider a wide variety of criteria in determining whether a refugee is truly similarly situated to other aliens granted particular rights.²⁹⁶

At the Conference of Plenipotentiaries, the Australian delegate lobbied unsuccessfully to grant states even more discretion to withhold rights from refugees. Mr. Shaw proposed “[t]hat nothing in this Convention shall be deemed to confer upon a refugee any right greater than those enjoyed by other aliens.”²⁹⁷ This position was soundly denounced, and ultimately withdrawn.²⁹⁸ As the Austrian representative observed, “[i]f it were to be posited that refugees should not have rights greater than those enjoyed by other aliens, the Convention seemed pointless, since its object was precisely to provide for specially favourable treatment to be accorded to refugees.”²⁹⁹ The Conference nonetheless agreed that where rights are defined at the baseline “aliens generally” standard, governments could legitimately deny access to particular rights on the grounds that a given refugee is not truly “in the same circumstances” as other aliens enjoying the right in question.

In line with the thinking of the Ad Hoc Committee, representatives to the Conference of Plenipotentiaries were not persuaded that states should have to judge the comparability of a refugee’s situation on the basis solely of the

²⁹⁴ Ad Hoc Committee, “Second Session Report,” at 15.

²⁹⁵ Proposal of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 9; and Proposal of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 23.

²⁹⁶ Statements of Mr. Herment of Belgium and Mr. Henkin of the United States, UN Doc. E/AC.32/SR.42, Aug. 24, 1950, at 24.

²⁹⁷ Proposal of Australia, UN Doc. A/CONF.2/19, July 3, 1951.

²⁹⁸ See e.g. criticisms voiced by Mr. Herment of Belgium and Mr. von Trutzschler of the Federal Republic of Germany, UN Doc. A/CONF.2/SR.6, July 4, 1951, at 5–6.

²⁹⁹ Statement of Mr. Fritzler of Austria, *ibid.* at 6. “Acceptance of any part of the Australian revision would have, in effect, rendered meaningless the various protections granted to refugees when fleeing for their lives”: G. Ben-Nun, “The Israeli Roots of Article 3 and Article 6 of the 1951 Refugee Convention,” (2014) 27(1) *Journal of Refugee Studies* 101, at 117.

conditions of his or her sojourn or residence.³⁰⁰ As Grahl-Madsen observed, “[i]n most countries certain rights are only granted to persons satisfying certain criteria, for example with regard to age, sex, health, nationality, education, training, experience, personal integrity, financial solvency, marital status, membership of a professional association or trade union, or residence, even length of residence within the country or in a particular place. There may also be strict rules for proving that one possesses the required qualifications, e.g. by way of specified diplomas or certificates.”³⁰¹

Broader concerns of this kind were likely of importance to the drafters. The Belgian delegate, for example, expressly suggested that evidence of occupational or professional qualification might be a legitimate ground upon which to condition access to certain rights.³⁰² The British representative insisted that the notion of “in the same circumstances” was “defined in its implications, not in its meaning.”³⁰³ While conditions of residence or sojourn were obviously the primary concerns,³⁰⁴ it would be undesirable to particularize all possible grounds for defining similarity of circumstances “since that might result in the vigorous application of all possible requirements applicable to foreigners in the country of asylum.”³⁰⁵ Thus, Art. 6 is framed in open-ended language,³⁰⁶ allowing governments “some latitude . . . to decide within the general conception that refugees were not to have more privileged treatment than aliens generally as to the conditions which must be fulfilled.”³⁰⁷

This discretion is not, however, absolute. Apart from the requirements now imposed by general principles of non-discrimination law,³⁰⁸ the major caveat to the prerogative granted states to define the basis upon which the comparability of a refugee’s situation is to be assessed is the duty to exempt refugees from

³⁰⁰ The United Kingdom representative sought to restrict the comparison to only “requirements as to length and conditions of sojourn or residence,” but withdrew his proposal in the face of substantial disagreement. See Statements of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.34, July 25, 1951, at 16; and UN Doc. A/CONF.2/SR.35, July 25, 1951, at 36.

³⁰¹ Grahl-Madsen, *Commentary*, at 23.

³⁰² “To give an example, it might be that a refugee would wish to procure a document allowing him to exercise a profession or ply a trade. The element of sojourn or residence would count, of course, but other considerations might also come into play, such as the kind of trade or profession the refugee wished to engage in”: Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.34, July 25, 1951, at 17.

³⁰³ Statement of Mr. Hoare of the United Kingdom, *ibid.* at 17. ³⁰⁴ *Ibid.* at 16.

³⁰⁵ Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 35.

³⁰⁶ “[T]he treatment of foreigners was not necessarily uniform, but would depend in many instances upon the individual’s circumstances and claims to consideration”: Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.3, July 3, 1951, at 22.

³⁰⁷ Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.35, July 25, 1951, at 35.

³⁰⁸ See Chapter 1.5.5.

insurmountable requirements. Even as governments insisted on the authority to require refugees to qualify for rights and benefits on the same terms as other aliens, they recognized that the very nature of refugeehood – for example, the urgency of flight, the severing of ties with the home state, and the inability to plan for relocation – may sometimes make compliance with the usual criteria a near-impossibility:

For example, in some eastern European countries a person had to fulfil certain qualifications relating to residence in order to be eligible for social security. The definition ... was too rigid, and would weaken the Convention ... The special circumstances of refugees must be recognized.³⁰⁹

The validity of this concern was endorsed without opposition, leading the Conference of Plenipotentiaries to adopt a joint British-Israeli amendment to require governments to exempt refugees from requirements “which by their nature a refugee is incapable of fulfilling.”³¹⁰

As suggested by the concerns of the Israeli representative that led to the redrafting of Art. 6,³¹¹ general criteria based on length of sojourn or residence may be relied on to assess the entitlement of refugees, but may not be mechanistically applied.³¹² Some flexibility to take account of difficulties faced by refugees in meeting the usual standard is clearly called for.³¹³ For example, Grahl-Madsen suggests that requirements to produce certificates of nationality, or documentation of educational or professional qualification or experience acquired in the refugee’s country of origin may sometimes fall within the insurmountable requirements exception.³¹⁴ This does not mean that refugees should be admitted to jobs for which they are truly unqualified, but simply that if “the refugee is unable to produce a certificate from the university in the country of origin where he graduated, he must be allowed to prove his possession of the required academic degree by other means than the normally required diploma.”³¹⁵ In line

³⁰⁹ Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.5, July 4, 1951, at 19.

³¹⁰ The proposal was adopted on a 22–0 (2 abstentions) vote: UN Doc. A/CONF.2/SR.26, July 18, 1951, at 10.

³¹¹ See text at note 309.

³¹² As the Court of Justice of the European Union insisted in determining whether beneficiaries of subsidiary protection could be subject to a restriction on freedom of residence not applied to other social security recipients, the test is whether “those groups are not in an objectively comparable situation as regards the objective pursued”: *Kreis Warendorf v. Ibrahim Alo and Amira Osso v. Region Hannover*, Dec. Nos. C-443/14 and C-444/14 (CJEU, Mar. 1, 2016), at [54].

³¹³ “The object of the phrase ‘in the same circumstances’ is, thus, to clarify that the treatment of refugees compared to that of foreigners and nationals need not necessarily be uniform, but depends in many instances upon the refugee’s special status and his or her situation”: R. Marx and F. Macht, “Article 6,” in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 707 (2011), at 713.

³¹⁴ Grahl-Madsen, *Commentary*, at 23. ³¹⁵ Ibid.

with this optic, the Supreme Court of Ireland ordered that a flexible approach be taken to documentation of the marriage of a Somali refugee given the collapse in governmental administration in his home country.³¹⁶ More generally, the very nature of the refugee experience may have denied the individual the time to amass or to carry all relevant documentation when leaving his or her country, and there may be no present means to compel authorities there to issue the requisite certification from abroad.³¹⁷

The net result is a fair balance between a general principle of assimilating refugees to other aliens – both in the positive sense of granting them access to particular benefits, and in the negative sense of requiring compliance with the usual rules for entitlement to those benefits – and the equally obvious need to render substantive justice to refugees in the application of those principles.³¹⁸ Even when implementation is required only to the same extent granted aliens generally, whatever impediments an individual refugee faces by virtue of the uprooting and dislocation associated with refugeehood should not be relied upon to deny access to rights.

³¹⁶ “In the present case, the Minister was confronted with an application based on a clear assertion of a marriage ceremony with legal effect in Somalia, combined with the total loss of any possibility of producing documentary proof. The Minister is essentially required to make an assessment based on all the evidence ... He must consider the assertion made by the applicant that a marriage has taken place and assess [its] credibility, based on all the circumstances. He is not bound to accept a bald assertion but should consider it in combination with all other circumstances. One of those circumstances will be the reason offered for inability to produce a certificate”: *Hassan and Saeed v. Minister for Justice, Equality, and Law Reform*, [2013] IESCE 8 (Ir. SC, Feb. 20, 2013), at [52].

³¹⁷ See Weis, *Travaux*, at 46–47.

³¹⁸ The spirit of this imperative was clearly recognized by the UK Supreme Court in considering whether rules on refugee family reunification for “the child of a parent” would extend to a child for whom a British resident family member had taken responsibility under traditional Islamic Kafala rules after the death of her father. Finding that British law excluded such a relationship, the Court nonetheless called for amendment of the law, noting that it “accept[ed] ... that under the rules AA is treated less favourably than the adoptive siblings, largely because of the tragic circumstances in which parental responsibility passed to her brother-in-law, taken with the lack of any functioning legal system allowing for formal adoption in the country from which she comes”: *AA (Somalia) v. Entry Clearance Officer (Addis Ababa)*, [2013] UKSC 81 (UK SC, Dec. 18, 2013), at [24]–[25]. The same court more recently determined that application of the minimum income rules governing family sponsorship generally could result in unjustifiable harshness if applied to a refugee given the “insurmountable obstacles to the couple living together” in the refugee’s country of origin: *R (SS Congo) v. Entry Clearance Officer, Nairobi*, [2017] UKSC 10 (UK SC, Feb. 22, 2017), at [102], [104]–[105].

3.2.4 Rights Governed by Personal Status

Refugee Convention, Art. 12 Personal Status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.
2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

As Verhellen notes, when refugees leave their country to seek protection they not only face the challenge of documenting their relationships and consequent entitlements in relation to such fields as legal capacity, family status, and rights of succession,³¹⁹ but more fundamentally they often confront

the complicated issue of the so-called limping legal relationships or relationships/personal status which one legal order considers lawful and valid, but another legal order does not. Dealing with limping legal relationships is one of the core tasks of private international law, which aims for as much cross-border continuity and harmony as possible in people's identities, personal and/or family status.³²⁰

Because different legal systems apply different rules to determine such questions, a “connecting factor” must be identified to resolve the conflict of laws dilemma. Of the three dominant approaches – looking to “nationality,” “domicile,” or “habitual residence” – Art. 12 of the Refugee Convention requires that “domicile” be treated as the determinative connecting factor.

Which forms of personal status are governed³²¹ by reference to the rules applying in the refugee’s country of domicile? While the Chairman of the Ad

³¹⁹ On this issue, see Chapter 4.9.

³²⁰ J. Verhellen, “Cross-Border Portability of Refugees’ Personal Status,” (2018) 31(4) *Journal of Refugee Studies* 427 (Verhellen, “Cross-Border Portability”), at 433.

³²¹ The meaning of “governed” in Art. 12(1) is itself a vexed question. Metzger provides a thoughtful analysis of this question, concluding that “Article 12, para. 1 should be read as a direct choice of law rule wherever the former connection of the refugee to his country of origin is the only international aspect of the case whereas all other elements are located in the forum State. Such a case should be treated as a purely internal case without further analysis of the general choice of law principles of the forum . . . However, a different solution should be applied in cases in which additional international aspects and connecting factors are involved, e.g. if the refugee and his [or her] spouse have different nationalities or if in the case of

Hoc Committee was insistent that the Convention provide a clear definition of relevant forms of personal status,³²² the majority of Committee members successfully resisted his plea.³²³ The French and British delegates argued that it was unlikely that any agreement was possible on this subject, given its extraordinary legal complexity,³²⁴ leading to the decision that “it would be for each State which signed the convention to interpret the expressions within it within the framework of its own legislation and in the light of the concepts that were most akin to its own juridical system.”³²⁵ But this domestic discretion should be informed by “the Secretariat study . . . [which] was an adequate exposé of the concept of personal status. It was for the contracting states to decide finally upon the elements of that status, in the light of the interpretation given by the Secretariat and of the records of the Committee meetings, without, however, being bound by those texts.”³²⁶

The Secretariat’s Study refers to three types of personal status governed by Art. 12.³²⁷ The first, “[a] person’s capacity (age of attaining majority, capacity of the married woman, etc.),”³²⁸ elicited no debate during the drafting of the Convention. While the primary concern of the Study involved the preservation of the property rights of married women (discussed below),³²⁹ comparable

succession, real estate is located in another country. Here, Art. 12, para. 1 should be read as a ‘modifier’ of the respective choice of law rule of the forum. The general principles of conflict of laws of the forum should apply, including the doctrine of *renvoi*, but with the exception that any referral to the law of the country of origin of the refugee for issues of personal status must be avoided, whether by other connecting factors (such as the first common domicile of spouses), or by *renvoi*. This approach prevents discrimination against the refugee: A. Metzger, “Article 12,” in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 863 (2011) (Metzger, “Article 12”), at 875–876.

³²² Statements of the Chairman, Mr. Chance of Canada, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 3, 11. The same concern was expressed by the Egyptian representative to the Conference of Plenipotentiaries, Mr. Mostafa, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 10: “It would . . . be desirable for the Convention to define what was meant by personal status. The question was undoubtedly a very complex one, and might involve lengthy discussion.”

³²³ The Israeli delegate argued that the Committee “would have to choose between an ideal convention, which would obtain only a few signatures, and a less satisfactory document which would be ratified by a greater number of States. If the Committee did not want the convention to become a dead letter, it must place a limit upon its ambitions”: Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 6.

³²⁴ “[I]t would be dangerous for the Ad Hoc Committee to follow the course advocated by the Chairman . . . Indeed, it was unlikely that such a definition would be in harmony with the various legislations of the States signatories . . . Such a notion should not . . . be defined in a convention dealing solely with refugees, but rather in an instrument dealing with private international law in general”: Statement of Mr. Rain of France, *ibid.* at 4. See also Statement of Sir Leslie Brass of the United Kingdom, *ibid.* at 5: “He did not consider that the members of the Committee were competent to work out definitions of that kind.”

³²⁵ Statement of Mr. Larsen of Denmark, *ibid.* at 4.

³²⁶ Statement of Mr. Robinson of Israel, *ibid.* at 8. See also Statements of Sir Leslie Brass of the United Kingdom, *ibid.*; Mr. Kural of Turkey, *ibid.*; and Mr. Rain of France, *ibid.* at 9.

³²⁷ United Nations, “Statelessness,” at 24. ³²⁸ *Ibid.* ³²⁹ See text at note 373 ff.

dilemmas might arise for a woman coming from a state in which women are not allowed to have independent legal or economic status. Such a woman might find – if reference were made by the reception state to the rules on status in the country of origin – that “[s]he [could] neither sign a lease, acquire property nor open a bank account. Her economic activity [would be] hampered and her chances of settling down and becoming assimilated [would be] jeopardized.”³³⁰ By virtue of Art. 12, however, the refugee woman is entitled to have her personal status assessed by reference to the norms prevailing in her new country of domicile (or residence, if domicile had yet to be acquired). Similarly, a refugee coming from a country in which the age of majority is, for example, twenty-one years old to an asylum state in which an individual is deemed an adult at eighteen years old, is entitled to the benefit of that lower age of majority.

The second head of personal status identified in the Study is status relevant to “family rights (marriage, divorce, recognition and adoption of children, etc.) . . . [and] [t]he matrimonial regime in so far as this is not considered a part of the law of contracts.”³³¹ It seems clear that these forms of status were uppermost in the minds of the drafters,³³² in particular because some states had taken the view that the non-citizen status of refugees meant that authorities in the asylum country could not apply their own rules to decide on eligibility for entry into or dissolution of a marriage.³³³ But by virtue of Art. 12’s stipulation that the personal status of refugees is to be governed by the rules of the domicile state, “[t]he authorities of the country of [domicile] will therefore be competent to celebrate marriages in accordance with the rules regarding form and substance of the place where the marriage is celebrated. Similarly courts will be competent to decree divorces in accordance with the *lex fori* establishing the conditions for divorce.”³³⁴ The breadth of relevant forms of status is clear from the explanatory notes to the paragraph of the draft article originally specifically devoted to family law matters, which observed “that personal status includes family law (that is to say filiation, adoption, legitimation, parental authority, guardianship and curatorship, marriage and divorce) and the law concerning successions.”³³⁵ While this paragraph was later deleted as a superfluous elaboration of the basic rule set out in paragraph 1, it is clear that there was agreement that a broad-ranging set of refugee family law status concerns is to be governed by the law of the

³³⁰ United Nations, “Statelessness,” at 25. ³³¹ Ibid. at 24. ³³² See text at notes 327–337.

³³³ Among the specific concerns identified in the Study were requirements to produce identity or other documents available only from the authorities of the country of origin, the production of civil registration documents, and possession of particular kinds of residence permits: United Nations, “Statelessness,” at 25–26.

³³⁴ Ibid. at 25. ³³⁵ Secretary-General, “Memorandum,” at 25.

domicile state,³³⁶ whatever the rules generally applicable to other non-citizens.³³⁷

Third and finally, the Study suggests that Art. 12 governs personal status relevant to issues of “[s]uccession and inheritance in regard to movable and in some cases to immovable property.”³³⁸ Specific reference was required because of the ambiguity about whether such concerns were squarely matters of family law status.³³⁹ The qualified phrasing (“and in some cases to immovable property”) follows from the fact that inheritance of real property is not in all jurisdictions a matter regulated by personal status.³⁴⁰ Clearly, the duty to assess a refugee’s personal status by reference to the rules of the domicile state gives the refugee no practical advantage where personal status is not relevant (for citizens or others) to particular forms of succession or inheritance.

It should be emphasized that these three forms of personal status – namely, status relevant to personal capacity, family rights and the matrimonial regime, and succession and inheritance – were agreed to simply as general points of

³³⁶ Some substantive concerns were raised in relation to the details of the proposed Art. 12(2) (see e.g. the comments of Mr. Guerreiro of Brazil, UN Doc. E/AC/32/SR.9, Jan. 24, 1950, at 5). But in the end, no objection was taken to the request of the representative of the International Refugee Organization “to include in the Committee’s report a paragraph explaining that paragraph 2 had been deleted because, in the opinion of the Committee, paragraph 1 fully covered the points raised in paragraph 2 and also because the law differed considerably in various States, particularly with regard to the questions referred to in paragraph 2. The report might then state that the Committee had unanimously agreed that the questions dealt with in paragraph 2 ought not to be governed by the rules concerning the substance, form and competence of the national law, even in the countries in which such questions were usually governed by that law”: Statement of Mr. Weis of the IRO, *ibid.* at 13–14. The actual text of the relevant passage in the Committee’s report is significantly more succinct. It notes simply that “[t]he Committee decided that it was not necessary to include a specific reference to family law, as this was covered by paragraph 1”: Ad Hoc Committee, “First Session Report,” at Annex II.

³³⁷ “[T]he main purpose was to regulate the position of those countries where aliens were subject to their own national law”: Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 9. This was unequivocally accepted by, for example, the French delegate, who agreed that “there could be no further question of applying national law to the personal status of refugees and there was no distinction to be made between the various countries”: Statement of Mr. Rain of France, *ibid.*

³³⁸ United Nations, “Statelessness,” at 24.

³³⁹ The French delegate posed a question (which was never answered on the record) to the Secretariat, namely “whether it considered that the law of succession was part of family law and whether it should therefore be understood that the rules of substance of the country of domicile . . . applied both to family law, particularly to the celebration and dissolution of marriage, and to the law of succession”: Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 6.

³⁴⁰ “In matters of succession . . . the transfer of real estate [in Brazil] was carried out in accordance with the legislation of the country where the real estate was, and not in accordance with that of the refugee’s country of domicile”: Statement of Mr. Guerreiro of Brazil, *ibid.* at 5.

reference.³⁴¹ They neither bind states as a matter of formal law, nor restrict the forms of personal status potentially governed by Art. 12.³⁴²

The choice of domicile as the connecting factor for the determination of a refugee's personal status amounted to a rejection of the approach taken under the 1938 Refugee Convention, which had applied the traditional civil law rule that the personal status of a refugee or other non-citizen would be determined by reference to the law of the country of which the individual was a national.³⁴³ Under that approach, the courts of an asylum country applied the legal standards of the alien's country of citizenship to determine whether a refugee child had been validly adopted, whether a refugee was entitled to an interest in his or her spouse's property by virtue of marriage, or whether a will made by a refugee abroad was legally valid.

Some civil law states still rely on nationality as the relevant connecting factor in conflict of laws situations – including important refugee-receiving countries such as China, France, the Netherlands, and Turkey. While that approach is today on the wane,³⁴⁴ it remained one of the two dominant options at the time

³⁴¹ See text at note 326. A recent analysis agrees that reliance on this study “is the preferable approach given that the main goal of the 1951 Convention is to ensure uniformity in the treatment of refugees . . . [T]he issues mentioned explicitly in the ‘Study of Statelessness’ are [best] used as a proxy to define ‘personal status.’ Those subject matters should be characterized as core issues of the personal status in the sense of Art. 12 . . . However, the ‘Study of Statelessness’ should not prevent the authorities of a contracting State from characterizing matters not mentioned explicitly as being subject to Art. 12”: Metzger, “Article 12,” at 871–872.

³⁴² Indeed, the British representative observed “that the definition given in the Secretariat study gave only a very vague idea of the concept of personal status”: Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 8. The Turkish delegate concurred, noting that “[i]n point of fact, the concept of personal status would be determined by the laws and customs of each country, with due regard to the preparatory work of the convention”: Statement of Mr. Kural of Turkey, *ibid.*

³⁴³ Convention on the Status of Refugees coming from Germany, 192 LNTS 4461, at Art. 6. The primary exception related to refugees who had no citizenship; the personal status of such refugees was determined by reference to their country of domicile or habitual residence. As such “paragraph 1 introduces an innovation. It makes no distinction between refugees who are stateless *de jure* and those who are stateless only *de facto*. In point of fact persons in either category no longer enjoy the protection of their countries of origin”: Secretary-General, “Memorandum,” at 25.

³⁴⁴ There is today much support for a third option – “habitual residence” – based in no small part on the influence of Hague Conventions on Private International Law. While of some influence in the common law world, many civil law countries (including in particular those that are members of the European Union) that previously took nationality as their point of reference have now opted instead to rely on habitual residence. The habitual residence inquiry is retrospective and oriented to the identification of objective indicators that suggest “the place where the person has established, on a fixed basis, his permanent or habitual centre of interests, with all relevant facts being taken into account for the purpose of determining such residence”: Explanatory Report to the Brussels II Convention, OJ 1998 C221/27. The refugee’s intentions are given some weight under this approach, but

of the Convention's drafting, and enjoyed some support as a conceptually straightforward means of enabling refugees to seek asylum without thereby jeopardizing pre-existing basic entitlements. But the majority of the drafters of the 1951 Convention felt that it was ethically wrong to hold refugees hostage to personal status rules which prevailed in the countries which they had fled. The Danish representative advanced the argument that "[r]efugees should not be treated by the host country in accordance with the very laws – such as the Nürnberg Laws – that might have caused them to become refugees."³⁴⁵ As summarized by Mr. Giraud of the Committee Secretariat,

A refugee was characteristically a person who had broken with his home country and who no longer liked its laws. That fact constituted a strong reason for not applying to him the laws of his home country. Furthermore, it would make for more harmonious relations if the laws of the country in which the refugee had established domicile or residence were applied to him.³⁴⁶

The logic of not binding refugees to personal status rules in force in their country of origin thus has much in common with the basic premise of the duty to exempt refugees from exceptional measures. As discussed below,³⁴⁷ it would make little sense to stigmatize a refugee as an enemy alien on the basis of his or her formal possession of the nationality of a state the protection of which the refugee does not enjoy. Similarly, it was felt wrong that refugees should be forever held hostage to principles governing their personal status in the country of origin, even if inconsistent with the rules determining personal status in the asylum state where the refugee now lived.

Principled concerns were not, however, solely responsible for the decision to depart from the precedent under which the rules of the refugee's country of citizenship generally determined his or her personal status. To the contrary, the driving force for reform appears to have been the practical experience of the International Refugee Organization, which was concerned that the traditional nationality rule had caused real problems for refugees in the field of family rights, particularly in regard to the capacity to enter into marriage, and

not the central role they are assigned under the domicile inquiry. But see Rentsch, *Der gewöhnliche Aufenthalt*, arguing that a comprehensive framework for understanding habitual residence must be grounded in an individual's intention to settle somewhere.

³⁴⁵ Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 2. See also Statement of Mr. Robinson of Israel, *ibid.*: "It would hardly be fair to say that a man who had fled from his country with the intention of never going back retained his nationality . . . [N]o refugee should be forced to accept the laws of the country of which he was a national." Mr. Cha of China insisted that "refugees should be treated in accordance with the laws of the country which had given them asylum," invoking his country's aversion to the extraterritorial application of national laws: *ibid.*

³⁴⁶ Statement of Mr. Giraud of the Secretariat, *ibid.* at 4. ³⁴⁷ See Chapter 3.5.2.

the ability to dissolve a marriage.³⁴⁸ Reliance on the status rules of the refugee's country of citizenship was moreover said to be fraught with administrative difficulty.³⁴⁹ An example offered by the Israeli delegate to the Conference of Plenipotentiaries gives some sense of this concern:

Taking, by way of example, the case of a person whose place of origin was Vilna, and who had sought asylum in a country where in matters of international private law the courts applied the law of the country of origin, the courts would have to establish whether they should apply the Polish Civil Code, that of Lithuania before its annexation by the Soviet Union, or the Soviet Civil Code for the constituent republics of the Union. Such a decision would involve political considerations, and courts in some countries might be unwilling to go into such matters.³⁵⁰

The alternative recommended by the Secretariat was to allow refugees instead to have their personal status determined by the rules that prevail in his or her country of domicile.³⁵¹ As understood in the common law world where it is the norm, the state of domicile is the place where the refugee is both

³⁴⁸ "The IRO had experienced great difficulties in cases where the principle of domicile and residence had not been applied": Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 5. More specifically, "the question of the right to contract marriage raised difficulties: countries which had so far applied the national law did so only in so far as it did not conflict with their public policy. It might therefore happen that the same consideration of domestic public policy might be raised in deciding the capacity of the refugee to contract marriage under the law of his country of domicile or residence. Moreover, the dissolution of marriages raised a question of competence: the courts of many countries refused to decree a dissolution of marriage if the national law of the person concerned was not obliged to recognize the validity of their ruling": Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 3-4.

³⁴⁹ "In practice, the application of their own national law to refugees would involve great difficulties. Even if they had kept their own nationality, the authorities of their country of origin were unfavourably disposed towards them, and if a court of a reception country were to apply to those authorities for information needed to establish their personal status, it would presumably have difficulty obtaining such data": Statement of Mr. Kural of Turkey, UN Doc. E/AC.32/SR.7, Jan. 23, 1950, at 13. See also Statement of Mr. von Trutzschler of the Federal Republic of Germany, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 11: "There were grave technical objections to applying the law of the country of origin."

³⁵⁰ Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 11-12.

³⁵¹ If a refugee does not have a country of domicile, Art. 12 as adopted does allow for reference to the rules on personal status of the refugee's country of "residence." "[T]he two criteria – domicile and residence – were not simply juxtaposed in the paragraph under consideration: it was to be noted that the law of the country of domicile was to be applied in the first instance, the law of the country of residence to be applied only if the country of the refugee's domicile was unknown or in doubt. While preference was thus given to the criterion of domicile, the notion of residence had been introduced because it was often easier to establish residence than domicile": Statement of Mr. Giraud of the Secretariat, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 4-5. This is, however, strictly a back-up rule. "Decisions should . . . be based wherever possible on 'domicile,' and only exceptionally on

physically present³⁵² and in which he or she intends to reside on an indefinite basis.³⁵³ It was thus assumed that this would ordinarily be the country of asylum,³⁵⁴ facilitating the work of domestic courts involved in the adjudication of refugee rights.³⁵⁵

Such a solution would be to the advantage of the refugees, and would be welcomed also by other inhabitants of the country who may have legal proceedings with refugees, and by the courts of the country. Courts will be freed from the very difficult task of deciding which law is applicable and of discovering what are the provisions of foreign laws in a particular regard. Moreover, in some countries, courts may exercise jurisdiction with regard to aliens only if their decisions are recognized by the courts of the country of nationality of the alien. The present provisions would, by applying the law of domicile or of residence, eliminate this limitation with regard to refugees.³⁵⁶

In the end, even the French representative – who had tabled an opposing draft, under which personal status would have continued to be decided by reference to the rules of the refugee's country of nationality³⁵⁷ – was persuaded that a refugee's personal status should instead be governed by the standards applicable in his or her country of domicile.³⁵⁸ As summarized by the Danish representative,

'residence': Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 6.

³⁵² There is no requirement that the physical presence be of any particular duration: *White v. Tenant*, (1888) 31 W. Va. 790 (US WVSCA, Dec. 1, 1888). Nor (as discussed at note 362) must the presence be lawful presence.

³⁵³ "[I]t has again and again been laid down that a change of domicil from the domicil of origin must be made *animo et facto*. The factum is the bare fact of residence within the new domicil . . . [But] [t]he bare fact is not sufficient. If therefore the residence is absolutely colourless and there is nothing else the *animus* remains unproved": *Bowie or Ramsay v. Liverpool Royal Infirmary*, [1930] AC 588 (UK HL, May 27, 1930), at 594. "The intention which is required for the acquisition of a domicile is the intention to reside permanently or for an unlimited time in a country": L. Collins et al., *Dicey, Morris and Collins on the Conflict of Laws* (2019), at 144.

³⁵⁴ "[T]he principle applied in this article is the most simple because in the majority of cases a refugee adopts the country of asylum as his domicile and thus the personal status will easily be established and reference to foreign law will be avoided": Robinson, *History*, at 102.

³⁵⁵ "Whereas during normal times, when there were few foreigners in a country, the application of the national law would not cause insurmountable difficulties, the courts would be inundated with work if, at a time when the number of refugees amounted to hundreds of thousands, they had to refer in each case to a national law with which they were unfamiliar": Statement of Mr. Kural of Turkey, UN Doc. E/AC.32/SR.7, Jan. 23, 1950, at 14.

³⁵⁶ Ad Hoc Committee, "First Session Report," at Annex II.

³⁵⁷ France, "Draft Convention," at 3–4.

³⁵⁸ Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 5. "The Committee was, in fact, trying to bring about the application of a new rule in countries

With regard to refugees, the Committee had decided that their personal status would be governed by the law of their country of domicile . . . That being the case, all other criteria had been abandoned. Consequently, in those states where the law of the country of domicile . . . was applied, refugees would receive the same treatment as other aliens; in other countries, they would be granted a special status.³⁵⁹

The assessment of a refugee's personal status by reference to the rules of his or her country of domicile is not, however, without its challenges. As a practical matter, intentions can be notoriously difficult to assess, especially for persons like refugees whose options and preferences are unsettled.³⁶⁰ And at the conceptual level, it is awkward to reconcile domicile's "intention to reside on an indefinite basis" requirement with the legally transitory nature of refugee status which presupposes that refugees' presence is only for the duration of a risk the duration of which is usually unknown.³⁶¹ In practice, however, common law precedents show that domicile is remarkably malleable in ways that enable it by and large to meet the needs of refugees as the drafters intended.

To start, the first leg – the "physical presence" requirement – is precisely that. In a seminal 2005 decision, the UK Supreme Court made clear that even unlawfully present persons can acquire a domicile of choice:

[T]he reality of her presence and intention, the merits of her case, and the quality of her connections with the laws of this country are no different

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

³⁵⁹ Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 11.

³⁶⁰ A. Iyer, "Domicile and Habitual Residence," (1985) 6 *Singapore Law Review* 115, at 119.

³⁶¹ As a matter of principle, there is some force to the original assertion of the French representative that reliance on the rules of a refugee's country of nationality was often more consistent with "the national traditions of the refugees" themselves: Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.8, Jan. 23, 1950, at 3. Indeed, the only non-governmental intervention on this issue opposed the shift to the determination of personal status based on the rules of domicile on the grounds that it failed to recognize the desire of many refugees ultimately to return to their country of origin. "That a political refugee who had a horror of his country of origin, and had no intention whatsoever of returning to it, should find himself given the personal status provided by the legislation of the host government seemed reasonable. But would it be reasonable, it might still be asked, to impose on refugees who were still attached to their country of origin and lived only in the hope of returning to it (as formerly the German anti-fascists had done and as the Spanish Republicans were doing at present), a personal status which might vary considerably according to their country of residence, and to adopt that measure, according to changes in circumstances in the country of domicile, without the person affected having an opportunity of expressing his own desires on the matter?": Statement of Mr. Rollin of the Inter-Parliamentary Union, UN Doc. A/CONF.2/SR.10, July 6, 1951, at 8.

from what they would have been had she formed her intention to remain just before her limited leave ran out in April 1998. Hence . . . it seems to me that there is no reason in principle why a person whose presence here is unlawful cannot acquire a domicile of choice in this country.³⁶²

Taken together with the long-standing principle that domicile can be immediately established so long as there is at some moment a co-existence of intent and physical presence,³⁶³ it seems clear that refugees can liberate themselves from the rules governing in their home country quite quickly.³⁶⁴ A South African court determined, for example, that an individual appealing the rejection of his asylum application had established South African domicile:

[I]t is clearly plaintiff's intention, if permitted, to settle in South Africa for an indefinite period . . . He is making every effort to remain here; he has applied for refugee status; he has launched or is about to launch court proceedings in order to review and set aside the refusal to grant him such status. In this regard it cannot be said that his application for review has no reasonable prospects of success . . . There is further nothing to refute plaintiff's assertion that he has the intention to settle here indefinitely if permitted.³⁶⁵

There have also been developments on the understanding of the requisite intention that work in favor of refugee autonomy.

First, involuntary arrival in a country does not mean that the required intention to remain in a country cannot subsequently emerge. Under the notion of a “domicile of choice,” the jurisprudence accepts that if the refugee can provide circumstantial evidence of the emergence of a voluntary intention to remain despite the involuntary basis of his or her arrival, domicile may be established.³⁶⁶ Indeed, the intention may change over time:

³⁶² *Mark v. Mark*, [2005] UKHL 42 (UK HL, June 30, 2005), at [48]–[49].

³⁶³ “It is not, as a matter of law, necessary that the residence be long in point of time: residence for a few days or even for part of a day is enough. Indeed, an immigrant can acquire a domicile immediately upon his arrival in the country in which he intends to settle”: *Collins, Dicey* (2019), at 143.

³⁶⁴ “To establish domicile . . . the husband must satisfy the Court on the balance of probabilities that he formed the intention to reside indefinitely in Australia coincidentally with his lawful presence here . . . [A] domicile of choice may be acquired even though the legality of a person's presence may vary over time provided that lawful presence coincides at some point with the requisite intention”: *Shao-Qi Wu and Leah Rechel Wu*, [1994] Fam. CA 45 (Aus. FC, May 3, 1994), at [6].

³⁶⁵ *Alam v. Minister of Home Affairs*, [2012] ZAACPEHC 22 (SA HC, Feb. 16, 2012).

³⁶⁶ “The expressions ‘voluntary’ and ‘of free choice’ . . . certainly do not mean that the *de cujus* must be shown to have been unaffected by compelling reasons of a kind that could dictate the course of his conduct. Dr. Cheshire correctly points out . . . that it cannot be said that a man's residence is not voluntary, and therefore not sufficient to constitute domicile, if it originated in inexorable necessity”: *Armstead v. Armstead*, [1954] Vic LR 733 (Aus. Vic. SC, Sept. 3, 1954), at 734.

It is clear in my judgment that the intention does not have to be shown to have been immutable. It would be rarely that a man can be shown to have set up his home in a new country with the intention that his decision to live there and make his home there should be irrevocable.³⁶⁷

It follows that if when a refugee first arrives she has no intention to remain but subsequently develops that intention – however quickly or slowly – domicile allows an immediate adjustment of the point of reference for rights at whatever time that new intention emerges. It thus facilitates a quick and flexible validation of the refugee's intentions.

Second, it is generally understood that “domicile” may be established without showing an intention to remain permanently. It is rather enough to show an intention to remain indefinitely even if the possibility of continued residence is contingent on external factors – precisely the case for most refugees.³⁶⁸ This means that so long as the refugee intends to stay in the asylum country on an ongoing, indefinite basis he can establish his domicile there. There is no need to make a definitive “I will never leave” sort of decision.

Third and related, many courts interpreting domicile have rejected the old approach that held that if there was an intention to return upon some specific contingency then there was no domicile (because the intent to remain was lacking). There is instead now support for the view that if the contingency cannot reasonably be anticipated it may be too vague to overcome other evidence of an intention to remain in the asylum country, thus allowing domicile to be established.³⁶⁹ In truth, the application of this doctrine to refugees is not entirely clear since for many refugees the contingency – the restoration of protection in the home country – is clear, even if the likelihood

³⁶⁷ *Inland Revenue Commissioners v. Bullock*, [1976] 1 WLR 1178 (Eng. CA, June 25, 1976), at 1184.

³⁶⁸ The US Supreme Court opined more than 100 years ago the view that “[t]he requisite animus is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely”: *Gilbert v. David*, (1915) 235 US 561 (US SC, Jan. 5, 1915), at 569, adopting the language of *Price v. Price*, 156 Pa. St. 617 (US SCPa, July 18, 1895), at 626. The traditional approach to domicile nonetheless included a rebuttable presumption that the involuntary arrival of refugees meant that they did not intend to reside indefinitely in the asylum country: *In re Evans*, [1947] Ch 695 (Eng. ChD, July 9, 1947).

³⁶⁹ “[T]he testator's hope was that he could go on living his accustomed and very pleasant life . . . to the end of his days . . . The only circumstance on the happening of which he expressed any intention of leaving England was if he was no longer able to live an active life on the farm . . . But that contingency is altogether indefinite. It has no precision at all . . . [T]he vagueness of the notion, coupled with the fact that the testator's mode of life was wholly congenial to him, is such that one must be left in the greatest doubt whether, in the end, it had any reality in the testator's mind at all”: *Furse v. IRC*, [1980] 3 All ER 838 (Eng. ChD, July 7, 1980), at 846.

of its eventuation is not. Yet as *Dicey* points out, the flexibility of “domicile” still seems to validate refugee intentions:³⁷⁰

If a political refugee intends to return to the country from which he fled as soon as the political situation changes, he retains his domicile there unless the desired political change is so improbable that his intention is discounted and treated merely as an exile’s longing for his native land; but if his intention is not to return to that country even when the political situation has changed, he can acquire a domicile of choice in the country to which he has fled.³⁷¹

Yet even as the drafters chose a connecting factor – domicile – that clearly facilitates the ability of refugees to align their personal status with the rules of the asylum country, they were equally clear that it would be wrong to impose such a realignment on refugees. Because the goal was simply to *enable* refugees quickly to have their personal status assessed by reference to asylum country norms if that was in line with their intentions, the drafters included a second paragraph – Art. 12(2) – that enables a refugee to opt to continue to have his or her personal status determined by reference to the rules of his or her country of origin.³⁷² Under this provision, “[r]ights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State.” Two matters were of particular concern.

First, it was felt “undesirable to modify without reason the capacity of married women or the matrimonial regime.”³⁷³ To the extent that the position of women in the country of origin was superior to that which prevailed in the asylum state, application of the general rule of Art. 12 (that is, determination of personal status on the basis of the rules of the country of domicile) might result in a deprivation of acquired rights:

³⁷⁰ Intentions are not, however, the same as desires. So for example in the case of a Greek Cypriot who fled to the UK after the Turkish invasion of his country and who lived in the UK for some fifty years, it was held that “[o]f his attachment to, his love for, Cyprus, there is no doubt. That his truly free choice, looking back over 50 years, would not have been to live [in the UK] for most of his life, there is also no doubt. My judgment is that his intentions, as his behaviour, adapted over time to his circumstances”. *Cyganik v. Agulian*, [2005] EWHC 444 (Eng. ChD, Mar. 23, 2005), at [91].

³⁷¹ Collins, *Dicey* (2019), at 156–157.

³⁷² “Paragraph 2 is the result of the generally accepted validity of ‘acquired (or vested) rights’ which ought not be disturbed”: Robinson, *History*, at 103.

³⁷³ Secretary-General, “Memorandum,” at 26. See also Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 8: “[P]aragraph 2 provided for exceptional treatment for refugees in a very narrow field . . . The paragraph as a whole mainly concerned property rights connected with marriage, in respect of which it would be difficult for refugees to comply with the law of their country of domicile.”

At the time of their marriage these women may have been residing in their country of origin and have possessed the nationality of that country. In many cases, under their national law, marriage did not diminish their capacity but required the complete separation of the property of each spouse. Having become [a refugee] and being resident in a reception country the law of which restricts the capacity of married women and, where there is no marriage contract, requires the married couple to observe a matrimonial regime differing from that of separate estate, a woman in this position often finds her rights actually disputed.³⁷⁴

Second, the French representative voiced his desire to ensure respect for spousal rights resulting from “the acts of religious authorities to whom refugees were amenable, if performed in countries admitting the competence of such authorities.”³⁷⁵ If only secular marriage were authorized in the asylum state, a refugee couple might find that its union was not recognized there.

In each case, there was agreement that it would be inappropriate to allow the operation of the general rule in Art. 12(1) to force the refugee to give up his or her status-based acquired rights.³⁷⁶ In a fundamental sense, then, Art. 12(2) goes a substantial distance toward meeting the view that greater deference should be paid to the preferences of the refugees themselves about how their personal status should be determined.³⁷⁷ While not allowing refugees to elect the basis upon which their personal status is decided, Art. 12 read as a whole will often give refugees the best of both worlds. For example, a woman who

³⁷⁴ United Nations, “Statelessness,” at 25.

³⁷⁵ Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.9, Jan. 23, 1950, at 14.

³⁷⁶ Paragraph 2 of Art. 12 expressly exempts “[r]ights previously acquired by a refugee and dependent on personal status, *more particularly rights attaching to marriage* [emphasis added].” While less explicit than the Secretary-General’s original draft (which set out that “rights attaching to marriage” included “matrimonial system, legal capacity of married women, etc.”: Secretary-General, “Memorandum,” at 24), the deletion of the explanatory language was without any evident substantive effect: Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 15. Moreover, when the American representative suggested the deletion of the explicit reference to marital rights altogether, the Chairman successfully argued “that those rights were indeed of particular importance and that special reference should be made to them”: Statement of the Chairman, Mr. Chance of Canada, *ibid.* On the question of marital rights acquired by virtue of a religious ceremony, the drafting history records that “[t]he Chairman explained, after consultation with the representative of the Assistant Secretary-General, that the Secretariat had considered that the provisions of [paragraph 2] covered all acquired rights including those resulting from the acts of religious authorities to whom the refugees were amenable, if performed in countries admitting the competence of such authorities”: Statement of the Chairman, Mr. Chance of Canada, *ibid.* at 14. The French representative thereupon withdrew his amendment that would have explicitly made this point, “not because there was any intention to rescind those provisions but because they were covered by the general terms of . . . the Secretariat draft”: Statement of Mr. Rain of France, *ibid.* at 15.

³⁷⁷ The case for a “people-centered” approach is thoughtfully advanced in Verhellen, “Cross-Border Portability.”

comes from a country where the separate legal identity of women is not recognized is entitled under Art. 12(1) to claim the benefit of a more progressive status regime in her new country of domicile. But if the status of women is inferior in the domicile state to that which prevailed in her state of origin, she may nonetheless invoke Art. 12(2) to insist on respect for rights previously acquired under the more favorable regime.

In its original form, the savings clause set out in Art. 12(2) would have applied broadly to “[r]ights acquired under a law other than the law of the country of domicile.”³⁷⁸ On the suggestion of the Belgian representative,³⁷⁹ and taking account of the British delegate’s insistence that the more limited goal of Art. 12(2) was to ensure that “an individual’s personal status and acquired rights before he became a refugee should be respected,”³⁸⁰ the Second Session of the Ad Hoc Committee amended the text to refer to rights “previously acquired.”³⁸¹ The essential concern was that while refugees should not be forced to forfeit status-based rights acquired prior to their admission to their new state of domicile, asylum states should not be obligated to respect any rights acquired by a refugee who might choose to leave his or her new domicile state temporarily in order to acquire rights not available in that country.

This point was expressly canvassed during debate on a (subsequently deleted) paragraph which stipulated that “[w]ills made by refugees . . . in countries other than the reception country, in accordance with the laws of such countries, shall be recognized as valid.”³⁸² While the explanatory comment on the paragraph made clear that its purpose was to preserve the legal force of wills made by the refugee pre-departure to seek asylum, but which had not been amended to conform to the specific requirements of the state of reception,³⁸³ the Belgian delegate observed that there might well be a conflict between the text itself and its principled objective:

Thus in the case of a Polish refugee who had spent some time in Germany and had then taken up permanent residence in Belgium, a will made in Poland would, according to the comment, be valid in Belgium, whereas according to [the text] it would be valid if it had been made either in Poland or in Germany.³⁸⁴

³⁷⁸ Secretary-General, “Memorandum,” at 24.

³⁷⁹ Statement of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 4.

³⁸⁰ Statement of Sir Leslie Brass of the United Kingdom, *ibid.* at 8.

³⁸¹ Ad Hoc Committee, “Second Session Report,” at 17.

³⁸² Secretary-General, “Memorandum,” at 24.

³⁸³ “It frequently happens that refugees have made a will in their country of origin in accordance with the provisions of the law of that country and are convinced that the will they brought away with them remains valid. The will may not however conform to the rules as regards form and substance of the country of residence. As a result, persons who believe they have taken the necessary steps to protect the interests of their next of kin die intestate”: *ibid.* at 26.

³⁸⁴ Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 17.

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

considered that it was reasonable to include in the article relating to the personal status of refugees a provision guaranteeing the validity of wills made by them *before their arrival in the countries which became their country of domicile or residence*. On the other hand, he did not see why that provision should be drafted so as to grant the refugees, after their arrival in the country of domicile or of residence, the privilege of making wills in other countries in accordance with the laws of those countries and of having those wills recognized as valid in the reception countries; privileges of that nature were never granted to aliens and there was consequently no reason why they should be given to refugees [emphasis added].³⁸⁵

Similarly, the Chairman and the French representative affirmed that the focus should be on whether the will had been drawn up prior to arrival in the asylum country, regardless of where it had been drawn up.³⁸⁶ A purposive interpretation of Art. 12(2) would thus safeguard status-based rights acquired prior to arrival in the asylum country, whether in the refugee's state of origin or in any intermediate country.

The decision to delete a specific textual reference to the continuing validity of wills made by refugees before arrival in the asylum state was reached for two reasons.³⁸⁷ On the one hand, it was felt that there was no need to affirm the legality of wills simply because the formalities of their execution abroad did not correspond with those of the domicile state.³⁸⁸ As the Belgian representative

³⁸⁵ Statement of Mr. Larsen of Denmark, *ibid.* at 17. See also Statement of Mr. Rain of France, *ibid.* at 19: "A refugee who had made a will in his country of origin *or in transit* thought that his will was valid . . . That was what the text said; that was, in fact, what should be said. The only amendment necessary was to make it clear that the provision applied to wills made before arrival in the country of reception [emphasis added]."

³⁸⁶ "[I]f the provision were made only for wills drawn up in the country of origin, [the paragraph] would be of academic interest only; there was every reason to believe that the country of origin would not be prepared to allow the heirs to take possession of the property left to them, even if it was still in existence": Statement of the Chairman, Mr. Chance of Canada, *ibid.* at 19.

³⁸⁷ It is important to note, however, that "the vote in favour of the deletion of the reference to wills should not be interpreted as weakening in any way the force of the paragraph . . . dealing with acquired rights": Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 4. In response, "[t]he Chairman confirmed Mr. Rain's interpretation of the vote. The reference to wills had been deleted because it would entail conflict with domestic law. The courts of reception countries could be relied upon to deal fairly with refugees in the matter": Statement of the Chairman, Mr. Chance of Canada, *ibid.*

³⁸⁸ "[T]here seemed to be general agreement regarding the validity of wills made by refugees in their country of origin in so far as the form was concerned": Statement of Mr. Cuvelier of Belgium, *ibid.* at 3.

observed, “if the only purpose of [the provision] was to recall the principle *locus regit actum*, the paragraph was wholly unnecessary, inasmuch as the principle was generally recognized and respected.”³⁸⁹ Conversely, there was no agreement to honor refugee wills executed prior to arrival to the extent that they contained substantive provisions contrary to the laws of the asylum state.³⁹⁰ The British representative “feared that the proposal would actually permit the refugee, by his will, to alter the law of the reception country. For example . . . a refugee residing in England could, by means of a will made in his country of origin, tie up property in England in perpetuity.”³⁹¹ The example provided by the Danish delegate was perhaps more poignant: “Some countries, such as Denmark, did not allow the testator to disinherit his children; the children must be assured of their rightful share, and the testator could dispose freely of the remaining portion only. Other countries, such as the United Kingdom, allowed the testator to dispose of the whole of his estate as he pleased.”³⁹² In the end, the drafters acknowledged only a commitment in principle to encourage courts in asylum countries “wherever possible, [to] give effect to the wishes of the [refugee] testator.”³⁹³ On matters of substance, however, most states felt that the substantive validity of refugee wills should be subject to the usual legal and public policy concerns taken into account by the asylum country.³⁹⁴

Indeed, the drafters agreed to a public policy limitation on the duty to honor the previously acquired status-based rights of refugees. Following from the debate about refugee wills, it was agreed by the Ad Hoc Committee “that the

³⁸⁹ Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 18. The Secretariat had, in fact, suggested that this was the sole purpose of the paragraph. “[T]he Secretariat had intended to refer to the form of a will rather than to its provisions. For example, the will of a Russian refugee in France would be recognized as valid with respect to form; the validity of its provisions, however, would have to be determined according to local law or, in the case of landed property, according to the law of the country in which the property was situated”: Statement of Mr. Giraud of the Secretariat, *ibid.* In fact, however, the explanatory notes to the draft under consideration make clear that the paragraph was intended to safeguard refugee wills “as regards form and substance”: Secretary-General, “Memorandum,” at 26.

³⁹⁰ “A will drawn up in the country of origin might contain clauses which were not in conformity with the laws of the country of residence, particularly those dealing with public order”: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 2.

³⁹¹ Statement of Sir Leslie Brass of the United Kingdom, *ibid.* at 3.

³⁹² Statement of Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.9, Jan. 24, 1950, at 17.

³⁹³ Ad Hoc Committee, “First Session Report,” at Annex II.

³⁹⁴ “The Chairman, speaking as the representative of Canada, acknowledged that the Government of the reception country would have to make some derogation to domestic law, thus placing the refugee in a favoured position. It might therefore be wiser to delete [the specific reference to refugee wills]”: Statement of Mr. Chance of Canada, UN Doc. E/AC.32/SR.10, Jan. 24, 1950, at 3. The provision was thereupon deleted by a vote of 7–2 (2 abstentions): *ibid.*

article did not require rights previously acquired by a refugee to be recognized by a country if its law did not recognize them on grounds of public policy or otherwise. It had been decided that the provisions of the article were in any case subject to that general reservation, which was implied and need not therefore be written into it.³⁹⁵ The Conference of Plenipotentiaries, however, decided to make the public policy limitation explicit. Mr. Hoare of the United Kingdom proposed that the phrase, “provided the right is one which would have been recognized by the law of that State had he not become a refugee,”³⁹⁶ be added to Art. 12(2). This amendment would meet his concern “that States should not be required to respect rights previously acquired by a refugee when they were contrary to their own legislation. A State could not protect a right which was contrary to its own public policy.”³⁹⁷ The specific example considered by the Conference was “the position of a divorced refugee who had obtained his divorce in a country the national legislation of which recognized divorce, but [who] was resident in a country, like Italy, where divorce was not recognized.”³⁹⁸ It was agreed that the asylum country could not reasonably be asked to issue documentation certifying the divorce, since “if a particular country did not recognize divorce, it could not possibly issue a certificate authenticating such a status . . . [T]he right [must be] one which would have been recognized by the law of the particular State had the person in question [not] become a refugee.”³⁹⁹ This may be technically right, since Art. 12(2) requires only respect for previously acquired, status-based rights, not an affirmative duty to certify such entitlements.⁴⁰⁰

³⁹⁵ Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.41, Aug. 23, 1950, at 8. See also Statement of Mr. Weis of the International Refugee Organization, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 9: “He wondered whether . . . rights [should be made] dependent not only on compliance with the formalities prescribed by the law of the country of domicile but also on the [exigencies] of public order.”

³⁹⁶ Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.25, July 17, 1951, at 4.

³⁹⁷ Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 13. See also Statements of Mr. Schurch of Switzerland, *ibid.* at 12: “Swiss law recognized acquired rights, but only subject to provisions concerning public order”; and the President, Mr. Larsen of Denmark, *ibid.* at 15: “It was essential to make some provision ensuring that such rights did not conflict with the legislation of the country in which the refugee became domiciled.”

³⁹⁸ Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.25, July 17, 1951, at 4–5.

³⁹⁹ Statement of Mr. Hoare of the United Kingdom, *ibid.* at 5.

⁴⁰⁰ Of more concern, however, the Belgian and French representatives opined that “[t]he purpose of the United Kingdom amendment was to place refugees on the same footing as aliens in respect of rights dependent on personal status . . . [I]n the case cited by the French representative the courts of the receiving country would have to decide whether they would have recognized a divorce granted in the same circumstances to two aliens who were not refugees”: Statement of Mr. Herment of Belgium, *ibid.* at 5–6. See also Statement of Mr. Rochefort of France, *ibid.* at 6. While the context of the remark suggests a more limited purport (“[I]n principle States which forbid divorce did so only to their own

The final requirement for reliance by a refugee on Art. 12(2) is that he or she comply, “if this be necessary, with the formalities required by the law of [the contracting] State.” This requirement was in the original draft of the Convention, and mirrors the precedents of the 1933 and 1938 Refugee Conventions.⁴⁰¹ The essential purpose of this requirement is “to protect the interests of third parties.”⁴⁰² Robinson suggests, for example, that “the law of the country in which recognition is sought may prescribe that foreign adoptions have to be confirmed by [a] local court or that the special matrimonial regime (separation of property or the right of the husband to administer the property of his wife) be registered in certain records.”⁴⁰³ This requirement is thus not a substantive limitation on the scope of Art. 12(2) rights, but merely an acknowledgment that a refugee’s previously acquired rights are not immune from the asylum state’s usual requirements to register or otherwise give general notice of the existence of rights as a condition precedent to their invocation.

In sum, Art. 12 of the Convention should be interpreted in a way that maximizes the autonomy of refugees. By mandating the adoption of the flexible notion of domicile rather than either nationality or habitual residence as the presumptive connecting factor for defining personal relationships, the Convention codifies a rule that pays maximum deference to what the individual refugee himself or herself actually intends. And because that general rule is

nationals. It was solely for reasons of public order that a State might decide not to recognize divorces between foreigners or not to authorize them to divorce in its territory”: Statement of Mr. Herment of Belgium, *ibid.* at 5), the comment as stated cannot be reconciled to the text of Art. 12, read as a whole. The essential reason for Art. 12 is precisely to exempt refugees from the rules ordinarily applying to (non-refugee) aliens (see Weis, *Travaux*, at 107: “The main intent of the provision is, indeed, to subtract the refugee from the application of the law of the country of his nationality, considering that they have left that country and that that law may have undergone changes with which the refugees do not agree”), not to assimilate them to aliens. And while the British amendment – which was unfortunately not discussed further before being approved by the Conference (see UN Doc. A/CONF.2/SR.25, July 17, 1951, at 9) – was clearly intended to authorize state parties to refrain from the recognition of forms of previously acquired status which were “contrary to its own public policy” (Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.7, July 5, 1951, at 13), there is absolutely no basis to assert that its goal was to undermine the already agreed, essential goals of Art. 12. Thus, a reception state which does not recognize divorce as a matter of public law or policy cannot be compelled by virtue of Art. 12(2) to recognize a refugee’s rights flowing from divorce. If, on the other hand, the reception state has no domestic impediment to divorce, but refrains for policy reasons from recognizing the rights following from the divorce abroad of non-citizens, it would nonetheless be required by Art. 12(2) to recognize the rights of refugees accruing from divorce. In essence, the only legal or public policy concerns which are relevant to Art. 12(2) are those which apply generally in the reception state, not those which apply to non-citizens or a subset thereof. Robinson, for example, suggests that “rights resulting from polygamy in a country where it is prohibited” (Robinson, *History*, at 103) could legitimately be resisted under the public policy exception to Art. 12(2).

⁴⁰¹ Secretary-General, “Memorandum,” at 26. ⁴⁰² *Ibid.* ⁴⁰³ Robinson, *History*, at 104.

subject to a savings clause allowing a refugee to opt instead to have personal status assessed by reference to previously acquired rights, there is little risk that the need to seek protection will strip the refugee of status-based rights of importance to him or her.

3.3 Exceptional Standards of Treatment

Where refugee rights are guaranteed in the Convention only at the baseline level of assimilation to aliens generally – rights to internal freedom of movement, property, self-employment, professional practice, housing, and post-primary education⁴⁰⁴ – the net value of the Refugee Convention may indeed be minimal. For the most part, states are required to grant these rights to refugees only to the extent they have freely chosen to extend comparable entitlements to other admitted aliens. Conversely, if only citizens or most-favored foreigners (or no non-citizens at all) are entitled to these rights, they may legitimately be denied to refugees. As the American representative to the Ad Hoc Committee succinctly observed, “when the Convention gave refugees the same privileges as aliens in general, it was not giving them very much.”⁴⁰⁵

The major caveat to this conclusion follows from the fact that the general standard of treatment under Art. 7(1) incorporates by reference all general norms of international law.⁴⁰⁶ As noted above, this means that general principles both of international aliens law and of international human rights law accrue automatically to the benefit of refugees.⁴⁰⁷ International aliens law adds to the baseline standard of treatment at least in a negative sense: while refugees need not be granted the right to acquire private property, their legitimately acquired property may not be taken from them without adequate compensation.⁴⁰⁸ As there is still no agreement on the codification of an affirmative right to own private property as a matter of international human rights law, even this modest protection is of some value.⁴⁰⁹

In most cases, the greatest value of general norms of international human rights law is in supplementing the content of refugee rights defined at the “aliens generally” standard of treatment. For example, the Civil and Political Covenant guarantees freedom of internal movement to “everyone” lawfully

⁴⁰⁴ See Chapter 3.2.1.

⁴⁰⁵ Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 7.

⁴⁰⁶ To similar effect, Art. 5 of the Convention provides that “[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from the Convention,” thereby incorporating by reference for example standards of international human rights law, which generally apply to all persons subject to a state’s jurisdiction: see Chapter 1.4.5.

⁴⁰⁷ See Chapter 3.2.1. ⁴⁰⁸ See Roth, *Minimum Standard*, at 134 ff.

⁴⁰⁹ The right of refugees to protection of property is discussed at Chapter 4.5.1.

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⁴⁰⁷ See Chapter 3.2.1. ⁴⁰⁸ See Roth, *Minimum Standard*, at 134 ff.

⁴⁰⁹ The right of refugees to protection of property is discussed at Chapter 4.5.1.

within a state's territory, subject only to specific types of limits applied on a non-discriminatory basis.⁴¹⁰ By virtue of Art. 7(1) of the Refugee Convention, once refugees are lawfully present – that is, once they have been admitted to a status verification procedure, placed in a temporary protection regime, or authorized de facto to remain without investigation of their need for protection⁴¹¹ – any continuing constraints on internal freedom of movement must thereafter be justified by reference to the standards of the Civil and Political Covenant.⁴¹²

Similarly, the other four refugee rights defined at the “aliens generally” baseline standard of treatment – rights to self-employment, professional practice, housing, and secondary and higher education – are the subject of cognate rights in the Economic, Social and Cultural Covenant.⁴¹³ At least in developed states,⁴¹⁴ the incorporation by reference of these norms under Art. 7(1) of the Refugee Convention means that the rights must be guaranteed on the terms set by the Covenant to refugees without discrimination.⁴¹⁵

Happily, most rights in the Refugee Convention are not extended to refugees just at the baseline standard, but at a higher standard: on par with the rights extended to most-favored foreigners, to the same extent granted citizens of the asylum state, or simply in absolute terms. Where a right is defined to require treatment at any of these higher levels, protections beyond the general standard accrue to refugees.⁴¹⁶ By explicitly requiring states to meet an

⁴¹⁰ Civil and Political Covenant, at Arts. 12 and 2(1). As previously noted, aliens have been held by the Human Rights Committee to benefit from protection against discrimination on the grounds of “other status”: see Chapter 1.5.5 at note 462.

⁴¹¹ See Chapter 3.1.3.

⁴¹² The right of refugees to enjoy internal freedom of movement is discussed at Chapters 4.2.4 and 5.2.

⁴¹³ Economic, Social and Cultural Covenant, at Arts. 6(1), 11(1), and 13(2)(b).

⁴¹⁴ As discussed above, because the Economic, Social and Cultural Covenant authorizes less developed states to withhold economic rights from non-citizens the dilemma for the majority of refugees who are protected in such states may be real: see Chapter 1.5.4 at note 432 ff.

⁴¹⁵ The broad margin of appreciation afforded states under prevailing notions of non-discrimination law remains problematic, however: see Chapter 1.5.5 at note 484 ff.

⁴¹⁶ “[A] distinction should be made between the clause relating to exemption from reciprocity and the provisions of some articles which specified whether refugees should be accorded the most favorable treatment or be subject to the ordinary law. Where such provisions were set forth in an article there was no need to invoke the clause on exemption from reciprocity. It was obvious, in fact, that where refugees were accorded the most favorable treatment there would be no point in invoking the clause respecting exemption from reciprocity”: Statement of Mr. Giraud of the Secretariat, UN Doc. E/AC.32/SR.11, Jan. 25, 1950, at 5–6. The representative of the United Kingdom took the lead on this issue, noting that he “did not see how there could be any question of a reciprocity provision applying except in cases where the treatment of the refugee was to be the same as that accorded to foreigners generally”: Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.23, Feb. 3, 1950, at 4–5. This led the Chairman to observe that “the draft

exceptional standard of treatment, the Convention requires that refugees benefit from treatment superior to that enjoyed by aliens generally.⁴¹⁷ Indeed, the pervasive incorporation of these exceptional standards of treatment means that the Refugee Convention is in many ways at least as generous as – and in some cases, more generous than –earlier refugee conventions which relied simply on a waiver of requirements of reciprocity for refugees.⁴¹⁸ Chetail thus correctly observes that “the recurrent referral back to states parties’ domestic laws is both a major specificity of the [Refugee] Convention and the guarantor of its effectiveness.”⁴¹⁹

3.3.1 Most-Favored-National Treatment

Two rights in the Refugee Convention – the rights to freedom of non-political association⁴²⁰ and to engage in wage-earning employment⁴²¹ – are guaranteed to refugees to the same extent enjoyed by most-favored foreigners.⁴²² This means that refugees may automatically claim the benefit of all guarantees of

proposed by the United Kingdom representative accurately stated what was in the minds of the Committee members and he would therefore invite them to accept it”: Statement of the Chairman, Mr. Chance of Canada, *ibid.* at 6.

⁴¹⁷ See e.g. Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.36, Aug. 15, 1950, at 11: “His delegation believed that refugees should be treated better than other aliens in some respects, and that the provisions in the draft Convention which accorded better treatment to refugees than to aliens were not of such major importance as to create grave problems for many countries. Therefore, if it could be agreed that in general a minimum treatment should be accorded to refugees and that that treatment should be no worse than that given to aliens in general, and that in some respects the refugees should even have certain advantages, the articles could safely be left to the Drafting Committee.”

⁴¹⁸ See Chapter 3.2.2 at note 266.

⁴¹⁹ V. Chetail, “Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law,” in R. Rubio-Marin ed., *Human Rights and Immigration* 19 (2014) (Chetail, “Are Refugee Rights Human Rights?”), at 42. Chetail regrettably overclaims by then suggesting that “[a]ccordingly, and contrary to conventional wisdom, there exist as many refugee statuses as states parties to the [Refugee] Convention, insofar as the content of the applicable standards to aliens and nationals is primarily determined by the legislation of each individual state”: *ibid.* This view confuses refugee status with refugee rights, the former being non-variable. The logic of the variability of rights, however, follows from Chetail’s general observation that contingent refugee rights are a major “guarantor of [the treaty’s] effectiveness,” in that it does not impose on states duties beyond their capacities. In any event, it is not the case that the content of refugee rights is determined “primarily . . . by the legislation of each individual state” since core rights are in fact defined in absolute terms (see Chapter 3.3.3) and others may be based on de facto attribution, rather than simply on the basis of legislation.

⁴²⁰ The rights of refugees to freedom of expression and association are discussed at Chapter 6.5.

⁴²¹ The right of refugees to engage in wage-earning employment is discussed at Chapter 6.1.

⁴²² Refugee Convention, at Arts. 15, 17(1).

associative freedom and to engage in employment extended to the nationals of any foreign state. Refugees may nonetheless still be granted less favorable treatment in relation to these rights than that enjoyed by citizens of the host country, subject to the requirements of non-discrimination law.⁴²³

As earlier observed, governments were not prepared routinely to assimilate refugees to the citizens of states with which they had special economic or political relationships.⁴²⁴ There was a general belief, however, that the right to work (and the related right to freedom of association, particularly to join trade unions) warranted treatment at this standard. In proposing that refugees enjoy preferred access to the right to work, the French representative observed that

it was legitimate and desirable to accord the most favourable treatment to refugees to engage in wage-earning employment, and not only the treatment accorded to foreigners generally, because refugees by their very nature were denied the support of their Governments and could not hope for governmental intervention in their favour in obtaining exceptions to the general rule by means of conventions. France was thus merely being faithful to the spirit which had heretofore guided United Nations action in favour of refugees: the purpose of that action was to obtain for refugees the advantages which Governments sought to have granted to their own subjects.⁴²⁵

As the American representative to the Ad Hoc Committee put it, “without the right to work, all other rights were meaningless.”⁴²⁶

The Committee therefore agreed to break with precedent,⁴²⁷ and based the Convention’s right to work on a French proposal that refugees be granted “the most favourable treatment given to nationals of a foreign country.”⁴²⁸ Governments accepted this exceptional standard of treatment with clear awareness of the impact of their decision. In its comments on the Ad Hoc Committee’s draft, for example, Austria recognized that the standard amounted to a “most favoured nation clause” that would require that “hundreds of thousands of refugees” be assimilated to the “relatively small” number of foreigners traditionally granted most-favored-national access to

⁴²³ See Chapter 1.5.5. ⁴²⁴ See Chapter 3.2 at note 249.

⁴²⁵ Statement of Mr. Rain of France, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 2.

⁴²⁶ Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 12.

⁴²⁷ “[T]he text proposed by the French delegation represented an advance upon the provisions of previous conventions . . . While it was understandable that some delegations should hesitate to accept the innovation . . . it would be surprising if the Committee should wish to retreat from the results obtained by the previous Conventions, and to end with a text which would contribute nothing towards the improvement of the conditions of the refugee”: Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 8–9.

⁴²⁸ France, “Draft Convention,” at 6.

employment.⁴²⁹ The United Kingdom commented that this standard would mean that refugees would be allowed to work as steamship pilots, a job traditionally reserved for British and French citizens.⁴³⁰ Belgium insisted that it would be forced to enter a reservation to the article “in view of the economic and customs agreements existing between Belgium and certain neighbouring countries.”⁴³¹ Norway indicated that it, too, would have to reserve on the exceptional standard of treatment because of “the regional policy of the Scandinavian countries in respect of the labor market.”⁴³²

The inevitability of reservations notwithstanding,⁴³³ the President of the Conference of Plenipotentiaries appealed to states to “seek the golden mean, and, if possible, by precept and example, to encourage others to withdraw their reservations at a later stage. If the Conference worked along those lines he believed it might be possible to arrive at a just and effective instrument.”⁴³⁴ In the end, the Conference rejected the two extremes – assimilation of refugees to nationals,⁴³⁵ and treatment at the residual standard of the rights of aliens

⁴²⁹ United Nations, “Compilation of Comments,” at 43.

⁴³⁰ Ibid. at 44; Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 14.

⁴³¹ Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 8.

⁴³² Statement of Mr. Anker of Norway, *ibid.* at 14.

⁴³³ As observed by the Chairman of the Ad Hoc Committee, “[i]t had, of course, been realised that the inclusion of provisions which, without representing ideals to strive for, were too generous for some Governments to accept, would lead to their making reservations, but it had been thought that such a course might in the long run have a good effect even on Governments which felt themselves unable to accord the treatment prescribed in the Convention immediately upon signing it. Other such cases had arisen in the past where refugees and those who had the interests of refugees at heart had addressed appeals to Governments applying low standards, pointing to the higher standards applied by other Governments, and so had gradually produced an improvement in their policies”: Statement of the Chairman, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.37, Aug. 16, 1950, at 11–12. In fact, in addition to the six states (Austria, Botswana, Burundi, Iran, Latvia, and Sierra Leone) that have reserved Art. 17 in its entirety, seventeen others have rejected the most-favored national standard of treatment (Angola, Belgium, Brazil, Cabo Verde, Denmark, Finland, Ireland, Luxembourg, Malawi, Netherlands, Norway, Portugal, Spain, Sweden, Uganda, Zambia, and Zimbabwe): <https://treaties.un.org>, accessed Dec. 21, 2020. Yet Mr. Larsen’s optimism has been partly borne out. The reservations to Art. 17 entered by Australia, Brazil, Greece, Italy, Liechtenstein, Malta, and Switzerland have been revoked, and that entered by Papua New Guinea has been dramatically limited: *ibid.*

⁴³⁴ Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.9, July 6, 1951, at 14. As the American representative stated, it was best to “incorporate in the convention a clause providing for a real improvement in the refugees’ [right to work], even if that clause were to result in reservations which, it might be hoped, would not be very numerous or extensive”: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.13, Jan. 26, 1950, at 8.

⁴³⁵ This approach was strongly promoted by Yugoslavia, with the support of Germany. See UN Doc. A/CONF.2/SR.9, July 6, 1951, at 4–5.

generally⁴³⁶ – and agreed that refugees would be entitled to engage in employment on the basis of “the most favourable treatment accorded to nationals of a foreign country in the same circumstances.”⁴³⁷

In addition to the relevant references made by the drafters of the Convention,⁴³⁸ a helpful sense of the breadth of this exceptional standard of treatment can be distilled from the text of the reservations and declarations entered by state parties which have not agreed to grant most-favored-national treatment to refugees. Critically, most-favored-national treatment includes the benefits of bilateral and multilateral arrangements with special partner states. The “preferential treatment” which the nationals of Brazil and Portugal enjoy in each other’s territory,⁴³⁹ the “privileges” of Danish, Finnish, Norwegian, and Swedish citizens in each of those countries;⁴⁴⁰ and the “rights which, by law or by treaty” are granted by Spain to the nationals of Andorra, the Philippines, Portugal, and Latin America are examples.⁴⁴¹ The benefits of special regional and sub-regional arrangements are included⁴⁴² – for example, the privileges enjoyed by nationals of states belonging to the East African Community and the African Union.⁴⁴³ More generally, most-favored-national treatment includes any privileges accorded to foreign citizens under “special co-operation agreements,”⁴⁴⁴ “commonwealth-type” arrangements,⁴⁴⁵ “agreements . . . for the purpose of establishing special conditions for the transfer of labor,”⁴⁴⁶ “establishment” treaties,⁴⁴⁷ and by virtue of any “customs, economic or political agreements.”⁴⁴⁸ Perhaps most important, the very nature of the most-favored-national standard means that it is inherently subject to evolution.⁴⁴⁹ As observed by Robinson,

⁴³⁶ “A country such as Italy . . . could definitely not consider assuring commitments regarding the employment or naturalization of foreign refugees, which could only add to the difficulties already confronting the Italian economy . . . [T]he Italian Government could do no more than allow refugees to benefit by the laws and regulations concerning work, employment, salaried professions, insurance and so on, which at the moment applied to all aliens resident in Italy”: Statement of Mr. Del Drago of Italy, *ibid.* at 9.

⁴³⁷ Refugee Convention, at Art. 17(1). The language in Art. 15 (right of association) is the same.

⁴³⁸ See text at note 428 ff.

⁴³⁹ See reservations of Brazil and Portugal: <https://treaties.un.org>, accessed Dec. 21, 2020.

⁴⁴⁰ See reservations of Denmark, Finland, Norway, and Sweden: *ibid.* Interestingly, while arrangements with Iceland are safeguarded by each of these four countries, Iceland appears not to have entered a comparable reservation with regard to the privileges of the citizens of Denmark, Finland, Norway, and Sweden: *ibid.*

⁴⁴¹ See reservation of Spain: *ibid.*

⁴⁴² See reservations of Belgium, Iran, Luxembourg, Netherlands, Spain, and Uganda: *ibid.*

⁴⁴³ See reservation of Uganda: *ibid.* ⁴⁴⁴ See reservation of Angola: *ibid.*

⁴⁴⁵ See reservation of Portugal upon acceding to the Protocol: *ibid.* See also reservation of Spain, safeguarding special rights with the nationals of “the Latin American countries”: *ibid.*

⁴⁴⁶ See reservation of Norway: *ibid.* ⁴⁴⁷ See reservation of Iran: *ibid.*

⁴⁴⁸ See reservations of Belgium, Iran, Luxembourg, and Netherlands: *ibid.*

⁴⁴⁹ For example, in February 2001 Australia and New Zealand reduced the rights automatically afforded each other’s citizens, including new requirements for citizenship, social

the “most favorable treatment accorded to nationals of a foreign country” is a dynamic concept: it varies from country to country, and from time to time. Every new agreement with a foreign country may create a new basis for the treatment, and the expiration of existing conventions may reduce the scope of the treatment.⁴⁵⁰

3.3.2 *National Treatment*

Refugees are to be assimilated to citizens of the asylum state for purposes of religious freedom,⁴⁵¹ the protection of artistic and industrial property rights,⁴⁵² entitlement to assistance to access the courts (including legal aid),⁴⁵³ participation in rationing schemes,⁴⁵⁴ enrollment in primary education,⁴⁵⁵ inclusion in public welfare systems,⁴⁵⁶ entitlement to the benefits of labor legislation and social security,⁴⁵⁷ and for purposes of tax liability.⁴⁵⁸ This exceptional standard of treatment explicitly proscribes any attempt to justify distinctions between the treatment of refugees and the treatment of citizens, as these articles usually require that the rights afforded refugees be “the same” as those enjoyed by nationals.⁴⁵⁹ Taxes imposed on refugees may not be “other or higher than those which are or may be levied on [the host state’s] nationals in similar situations.”⁴⁶⁰ And perhaps most interesting, refugees enjoy “treatment at least as favorable as that accorded to ... nationals”⁴⁶¹ to practice their religion and to ensure the religious education of their children. As elaborated below, this is the only provision in the Convention premised on an explicit commitment to substantive equality between refugees and citizens.⁴⁶²

security eligibility, and family reunification. In 2016 they complemented that change by agreeing to ease the path to permanent residence for each other’s citizens: www.loc.gov/law/foreign-news/article/australian-new-zealand-prime-ministers-announce-agreement-on-pathway-to-citizenship-for-new-zealanders/, accessed Feb. 1, 2020.

⁴⁵⁰ Robinson, *History*, at 110. ⁴⁵¹ See Chapter 4.7. ⁴⁵² See Chapter 5.4.

⁴⁵³ See Chapter 5.5. ⁴⁵⁴ See Chapter 4.4. ⁴⁵⁵ See Chapter 4.8. ⁴⁵⁶ See Chapter 6.3.

⁴⁵⁷ See Chapters 6.1.2 and 6.1.3. ⁴⁵⁸ See Chapter 4.5.2.

⁴⁵⁹ Refugee Convention, at Arts. 14, 16(2), 20, 22(1), 23, and 24(1). ⁴⁶⁰ *Ibid.* at Art. 29.

⁴⁶¹ *Ibid.* at Art. 4.

⁴⁶² Substantive equality may, however, be more generally required by virtue of the interaction of the Refugee Convention with Art. 26 of the Civil and Political Covenant: see Chapter 1.5.5 at note 455. In practice, steps to ensure substantive equality for refugees may be critically important, even as they may also be politically fraught. For example, an analysis of the social service response to refugees arriving in low income parts of Glasgow – predicated on no differentiation between refugees and other low income residents – showed “that some asylum seekers did have specialist needs which were not being met within the current structure of statutory service provision ... [For example, as explained by one respondent,] ‘[s]ervices that have been there for years have been very well established for the indigenous population, and now they’re trying to slot people from other countries and cultures into these services and sometimes it’s just not appropriate ... Not

With the exception of the right to religious freedom, each of these rights was defined to require assimilation to citizens in the first draft of the treaty proposed by the Secretary-General in January 1950.⁴⁶³ The explanations provided there for requiring national treatment are instructive. In some cases, the goal was consistency with prior or cognate international law. Equality in regard to taxation had already been required by the 1933 Refugee Convention,⁴⁶⁴ and there was a pattern of bilateral and multilateral treaties, including those negotiated under the auspices of the ILO, that assimilated aliens to nationals for purposes of social security.⁴⁶⁵ There were practical reasons to grant refugees national treatment under labor legislation, namely that “it was in the interests of national wage-earners who might have been afraid [that] foreign labor, being cheaper than their own, would have been preferred.”⁴⁶⁶ Similarly, while the right of refugees to sue and be sued “in principle . . . is not challenged, in practice there are insurmountable difficulties to the exercise of this right by needy refugees: the obligation to furnish *cautio judicatum solvi* and the refusal to grant refugees the benefit of legal assistance make this right illusory.”⁴⁶⁷

In two cases, the importance of assimilation was cited to justify national treatment. Primary education should be available on terms of equality with nationals “because schools are the most rapid and most effective instrument of assimilation.”⁴⁶⁸ An appeal to principle was relied on to justify national treatment with regard to artistic and industrial property rights, “since intellectual and industrial property is the creation of the human mind and recognition is not a favour.”⁴⁶⁹ And finally, simple fairness was said to require the equal treatment of refugees and nationals with regard to both access to rationing and systems for public relief. Rationing regulated the distribution of items “of prime necessity,”⁴⁷⁰ and “[p]ublic relief can hardly be refused to refugees who are destitute because of infirmity, illness or age.”⁴⁷¹

The one national treatment right added to the Secretary-General’s list is the right to religious freedom. A non-governmental representative to the Conference of Plenipotentiaries noted that “the negative principle of non-discrimination as expressed in article 3” did not “ensure the development of

all the services that are there are appropriate”: K. Wren, “Supporting Asylum Seekers and Refugees in Glasgow: The Role of Multi-Agency Networks,” (2007) 20(3) *Journal of Refugee Studies* 391, at 407. Yet politically “[a] perceived longer-term neglect of local needs has meant that the requirements of new asylum seekers have had to compete with a range of other acute needs associated with poverty and exclusion . . . [so that in political terms] ‘[y]ou can’t be seen to be making preferential treatment available to asylum seekers’”: *ibid.* at 406.

⁴⁶³ Secretary-General, “Memorandum.” ⁴⁶⁴ *Ibid.* at 31. ⁴⁶⁵ *Ibid.* at 38.

⁴⁶⁶ *Ibid.* at 37. ⁴⁶⁷ *Ibid.* at 30.

⁴⁶⁸ *Ibid.* at 38. It was also noted that primary education “satisfies an urgent need,” in consequence of which it was already compulsory in most states: *ibid.*

⁴⁶⁹ *Ibid.* at 27. ⁴⁷⁰ *Ibid.* at 38. ⁴⁷¹ *Ibid.* at 39.

the refugee's personality.⁴⁷² It was important, he suggested, that the Convention contain a "positive definition of the spiritual and religious freedom of the refugee."⁴⁷³ The delegates to the Conference agreed, noting that religious freedom conceived in affirmative terms is an "inalienable"⁴⁷⁴ right.

There were nonetheless concerns that the first working draft, in which what became Art. 4 was framed as an absolute right,⁴⁷⁵ imposed too stringent an obligation on states.⁴⁷⁶ As the Canadian representative commented, "[i]t was well known that certain sects often committed in the name of their religion acts contrary to *l'ordre public et les bonnes moeurs*".⁴⁷⁷ Yet it was recognized that the alternative of authorizing states to invoke regulatory or public order limits on religious freedom had, in practice, resulted in hardship for refugees. The compromise position suggested by the President of the Conference was that refugees should benefit from "the same treatment in respect of religion and religious education . . . as . . . nationals."⁴⁷⁸

This approach was, however, rejected by the Conference. The Holy See argued that assimilation to nationals was insufficient because "in countries where religious liberty was circumscribed, refugees would suffer."⁴⁷⁹ It was important, he said, "to guarantee refugees a minimum of religious liberty in such countries."⁴⁸⁰ His point was not that refugees benefit from "preferential treatment" vis-à-vis citizens.⁴⁸¹ Nonetheless, purely formal parity with nationals was not sufficient:

⁴⁷² Statement of Mr. Buensod of Pax Romana, UN Doc. A/CONF.2/SR.11, July 9, 1951, at 9–10.

⁴⁷³ Ibid. at 10.

⁴⁷⁴ Statements of Msgr. Comte of the Holy See and Mr. Montoya of Venezuela, UN Doc. A/CONF.2/SR.30, July 20, 1951, at 11–12.

⁴⁷⁵ "The Contracting States shall grant refugees within their territories complete freedom to practice their religion both in public and in private and to ensure that their children are taught the religion they profess": UN Doc. A/CONF.2/94.

⁴⁷⁶ Egypt, Luxembourg, and the Netherlands all felt that an affirmative right to religious freedom should be subject to the requirements of "national law": Statements of Mr. Sturm of Luxembourg, Mr. Mostafa of Egypt, and Baron van Boetzelaer of the Netherlands, UN Doc. A/CONF.2/SR.30, July 20, 1951, at 11–14. Belgium and even the Holy See felt a "public order" limitation would be acceptable: Statements of Mr. Herment of Belgium and Msgr. Comte of the Holy See, *ibid.* at 14.

⁴⁷⁷ Statement of Mr. Chance of Canada, *ibid.* at 17.

⁴⁷⁸ Statement of the President, Mr. Larsen of Denmark, *ibid.* at 17.

⁴⁷⁹ Statement of Msgr. Comte of the Holy See, UN Doc. A/CONF.2/SR.33, July 24, 1951, at 7.

⁴⁸⁰ *Ibid.* The French representative agreed, but noted that such a position "had been rejected [in the Style Committee] on the grounds that Contracting States could not undertake to accord to refugees treatment more favorable than that they accorded to their own nationals": Statement of Mr. Rochefort of France, *ibid.* at 7–8. The British representative bluntly observed that the Holy See's approach might "be open to interpretation as an innuendo to the effect that the treatment of nationals in respect of religious freedom was not as liberal as it might be": Statement of Mr. Hoare of the United Kingdom, *ibid.* at 8.

⁴⁸¹ Statement of Msgr. Comte of the Holy See, *ibid.* at 8.

His sole concern was that [refugees] should be given equal treatment with nationals. It was known that, precisely on account of their position as refugees, they are frequently handicapped in the practice of their religion. It was with that consideration in mind that he had put forward his amendment.⁴⁸²

This argument for substantive equality led the representative of the Holy See to propose a unique standard of treatment, namely that refugees should enjoy “treatment at least as favorable as that accorded . . . nationals.”⁴⁸³ Governments are thus obliged not to deny refugees any religious freedom enjoyed by citizens, and moreover commit themselves in principle to take measures going beyond strict formal equality in order to recognize “that religious freedom as an abstract principle might be of little value if divorced from the practical means of ensuring it.”⁴⁸⁴

3.3.3 *Absolute Rights*

The balance of the Refugee Convention’s substantive rights⁴⁸⁵ – that is, those defined to require treatment neither at the “aliens generally” baseline standard, nor at one of the two exceptional standards (assimilation to most-favored foreigners, or to the citizens of the asylum country) – are absolute obligations. For the most part, the decision not to set a contingent standard of treatment follows logically from the fact that there is no logical comparator group for these rights. Refugees are, for example, entitled to turn to the host country for administrative assistance, identity papers, and travel documents (because, unlike both citizens and most aliens, refugees have no national state willing to provide them with such facilities).⁴⁸⁶ Other rights follow from the unique nature of refugeehood: the right to avoid penalties for unauthorized entry, to avoid expulsion or *refoulement*, to the recognition of pre-existing rights based on personal status, and to take assets abroad in the event of resettlement.⁴⁸⁷

The absolute nature of the right of refugees to access the courts of state parties⁴⁸⁸ (though entitlement to legal aid and to waiver of technical requirements for access inheres in refugees only to the extent granted to citizens of the refugee’s place of residence)⁴⁸⁹ follows the precedents of international aliens

⁴⁸² Ibid.

⁴⁸³ The Conference approved this revised language 20–0 (1 abstention): ibid. at 9.

⁴⁸⁴ Statement of Mr. Petren of Sweden, ibid. at 9. It is clear, however, that Art. 4 does not oblige governments to take specific affirmative measures to advance the religious freedom of refugees. See Chapter 4.7 at notes 2305–2307.

⁴⁸⁵ A number of the Convention’s articles do not establish free-standing rights, but define the context within which enumerated rights must be implemented. See Refugee Convention, at Arts. 2, 3, 5–12(1), and 35–46.

⁴⁸⁶ Ibid. at Arts. 25, 27, and 28. ⁴⁸⁷ Ibid. at Arts. 12(2), 30–33. ⁴⁸⁸ Ibid. at Art. 16(1).

⁴⁸⁹ Ibid. at Art. 16(2). See Chapter 5.5.

law⁴⁹⁰ and the 1933 Convention, and elicited no debate.⁴⁹¹ While Art. 34's provisions on the assimilation and naturalization of refugees are likewise subject to no contingency, there is really no substantive right contained in this provision. State parties are encouraged to facilitate the integration of refugees, but are under no binding duty to do so.

3.4 Prohibition of Discrimination between and among Refugees

The general purpose of the legal duty of non-discrimination is to ensure "that individuals should be judged according to their personal qualities."⁴⁹² Consideration has already been given to such key questions as the differences between formal equality ("equality before the law") and substantive equality ("equal protection of the law"); the relative importance of intention and effects in assessing whether discrimination of either kind is demonstrated; and the extent to which international law requires positive efforts to remedy unjustifiable distinctions, rather than just a duty to desist from discriminatory conduct.⁴⁹³ The earlier focus was on whether the broad duty of non-discrimination – in particular, that set by Art. 26 of the Civil and Political Covenant – might actually be sufficient in and of itself to require the equal protection of refugees and other non-citizens, in which case-specific norms of aliens and refugee law might be rendered essentially superfluous. Based on a close examination of the jurisprudence of the Human Rights Committee, however, the conclusion was reached that despite its textual breadth, Art. 26 could not yet be relied upon dependably to enfranchise non-citizens.⁴⁹⁴ In particular, account was taken of the Committee's tendency simply to accept some categorical distinctions (often including non-citizenship) as an inherently reasonable basis upon which to treat people differently; a pattern of unjustifiably broad deference to national perceptions of reasonable justification; and, in particular, only a nascent preparedness to take seriously the discriminatory effects of facially neutral laws. The conclusion was therefore reached that despite its value to counter some types of differential treatment, non-discrimination law has not yet evolved to the point that refugees and other non-citizens can safely assume that it will provide a sufficient answer to the failure to grant them rights on par with citizens.

The analysis here draws on some of these same principles, but to investigate a different question. Even if many distinctions in the ways that non-citizens, including refugees, are treated relative to citizens are deemed reasonable, does

⁴⁹⁰ See Chapter 1.1 at note 7.

⁴⁹¹ "[I]n principle the right of a refugee to sue and be sued is not challenged": Secretary-General, "Memorandum," at 30.

⁴⁹² S. Fredman, *Discrimination Law* (2011) (Fredman, *Discrimination*), at 109.

⁴⁹³ See Chapter 1.5.5. ⁴⁹⁴ Ibid. at note 471 ff.

the legal duty of non-discrimination nonetheless provide a meaningful response to more specific types of disfranchisement which may be experienced by subsets of the refugee population?

To a real extent, the inappropriateness of differential allocations of rights between and among refugees is clear from the fact that the language of the Refugee Convention presupposes that whatever entitlements are held by virtue of refugee status should inhere in *all* refugees. In setting the refugee definition, the drafters of the Convention were at pains carefully to limit the beneficiary class. They excluded, for example, persons who have yet to leave their own country, who cannot link their predicament to civil or political status, who already benefit from surrogate national or international protection, or who are found not to deserve protection.⁴⁹⁵ Beyond these explicit strictures, however, refugees are conceived as a generic class, all members of which are equally worthy of protection.⁴⁹⁶

Yet there are in fact often significant differences in the way that particular subsets of Convention refugees are treated by states. In some cases, this is because a state plays politics with refugee protection. For many years, the United States pursued a formal policy of interdiction and routine detention of Haitian refugees, even as – for clearly political reasons – it not only allowed Cuban refugees free access to its territory, but gave them an expedited path to permanent residency in the US.⁴⁹⁷ China also has taken a politicized approach to asylum in refusing recognition to any refugee seeking protection from its North Korean ally.⁴⁹⁸

⁴⁹⁵ See generally Grahl-Madsen, *Status of Refugees I*; and Hathaway and Foster, *Refugee Status*.

⁴⁹⁶ The possibility of limiting protection to pre-1951 and European refugees has been prospectively abolished by the advent of the 1967 Refugee Protocol: see Chapter 1.5.1.

⁴⁹⁷ “The United States has singled out Cubans and Haitians for diametrically opposite treatment. Cubans who quit their island are assisted in coming to the US, are called political refugees, and are given asylum, while Haitians who leave their island are labeled economic migrants, interdicted at sea, and returned to Haiti”: N. and N. Zucker, “United States Admission Policies Toward Cuban and Haitian Migrants,” paper presented at the Fourth International Research and Advisory Panel Conference, Oxford, Jan. 5–9, 1994, at 1. “After it was accused of discrimination, the Carter administration granted Haitians the status of ‘entrants,’ on par with Cubans; however, in mid-1981 the Reagan administration reinstated differential treatment and began incarcerating apprehended Haitians ... [President Clinton] pledged to change the policy ... [but he] reversed himself immediately after taking office to prevent a flood of refugees that would weaken his political base in Florida”: A. Zolberg, “From Invitation to Interdiction: US Foreign Policy and Immigration since 1945,” in M. Teitelbaum and M. Weiner eds., *Threatened Peoples, Threatened Borders: World Migration and US Policy* 144 (1995), at 145–146. The failure of the American judiciary to end the double standard is described in T. James, “A Human Tragedy: The Cuban and Haitian Refugee Crises Revisited,” (1995) 9(3) *Georgetown Immigration Law Journal* 479.

⁴⁹⁸ “China, North Korea’s principal ally, claims it is bound by its treaty obligations to Pyongyang”: “Inside the Gulag,” *Guardian*, July 19, 2002, at 23. “[T]he underlying reason

Most commonly, differentiation is based on the nationality of refugees. Israel's designation by law of refugees arriving from sub-Saharan Africa as "infiltrators" has resulted in the long-term detention of Eritrean and Sudanese refugees.⁴⁹⁹ Yemen grants government-issued identification documents with entitlement to reside and work in the country only to Somali refugees,⁵⁰⁰

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

⁴⁹⁹ The enactment of the Anti-Infiltration Law "branded all sub-Saharan Africans who entered Israel from Egypt as 'infiltrators'" and provided for their extended detention: Human Rights Watch, "Make Their Lives Miserable: Israel's Coercion of Eritrean and Sudanese Asylum Seekers to Leave Israel" (Sept. 2014), at 21. More generally, claims by Eritrean and Sudanese asylum-seekers are rarely recognized, a result dramatically at odds with international trends. Government-issued data confirm that, of a total of 5,573 refugees from Sudan and Eritrea who submitted claims for protection between 2009 and early 2015, only four applicants (0.07%) were recognized in contrast with an international recognition rate of 87% and 56% for Eritreans and Sudanese respectively: I. Lior, "Israel has Granted Refugee Status to Only Four Sudanese and Eritrean Asylum Seekers," *Haaretz*, Feb. 19, 2015. Moreover, although Israeli immigration policies resulted in dreadfully low recognition rates for refugees generally (0.25%), the statistics issued demonstrate a recognition rate over five times higher (0.37%) for refugees of all other nationalities combined than for their Eritrean and Sudanese counterparts (0.07%): *ibid.*

⁵⁰⁰ "All Somali refugees receive government-issued identification documents (ID) that accord them the right to live and work in Yemen. But non-Somali refugees are not issued these or any other official identification documents; they receive only a form issued by UNHCR acknowledging that the agency has recognized them as refugees": Human Rights Watch, "Hostile Shores: Abuse and *Refoulement* of Asylum Seekers and Refugees in Yemen," Dec. 20, 2009, at 41. These problems were exacerbated by the government's issuance of various orders to deport all non-Somali refugees. See R. Jureidini, "Mixed Migration Flows: Somali and Ethiopian Migration to Yemen and Turkey" (2010), at 77. More generally, "[i]f the security forces intercept a mixed group of Somalis and Ethiopians who have arrived together, they typically stop the group and divide them by nationality. The Somalis in the group are either let go or provided with transportation to the UNHCR-run transit point at Bab-el-Mandeb. The Ethiopians in the group are all arrested and put on a fast

leaving Ethiopian and other refugees in destitution. India has allowed Tibetan refugees full access to employment, but limited – in some cases severely – the opportunities to earn a livelihood for refugees from Sri Lanka and, in particular, those from Bangladesh.⁵⁰¹

Nationality-based discrimination even occurs at the most basic level of status recognition. In 2010, Australia invoked “evolving circumstances”⁵⁰² to impose a blanket suspension on the processing of all protection claims from the nationals of only two countries, Sri Lanka and Afghanistan,⁵⁰³ leaving all “irregular maritime arrivals” from those two countries in indefinite detention.⁵⁰⁴ Sudan has recognized the refugee status of persons arriving from neighboring countries (except Chad), but has expected refugees from Arab states “to stay on an informal and unofficial basis.”⁵⁰⁵ Most egregiously, there is increasingly a determination to systematize nationality-based denials of access to protection. The European Union has gone farthest, providing by treaty that member states are ordinarily to declare any refugee claim from

track towards deportation or refoulement”: Human Rights Watch, “Hostile Shores,” at 26, 29.

⁵⁰¹ Tibetan refugees have been issued certificates of identity which enable them to undertake gainful employment, and even to travel abroad and return to India. Sri Lankan refugees, in contrast, have been allowed to engage only in self-employment, while Bangladeshi refugees have not been allowed to undertake employment of any kind: B. Chimni, “The Legal Condition of Refugees in India,” (1994) 7(4) *Journal of Refugee Studies* 378, at 393–394.

⁵⁰² Australia, Minister for Foreign Affairs and Trade, “Changes to Australia’s immigration processing system,” Apr. 9, 2010, <https://reliefweb.int/report/afghanistan/changes-australias-immigration-processing-system>, accessed Feb. 1, 2020.

⁵⁰³ Apparently issued in response to the termination of the civil war in Sri Lanka and the armed conflict in Afghanistan, the prematurity of this determination is evidenced by the fact that UNHCR had yet to issue its latest review of conditions in both countries and, more importantly, the repeated acts of violence that caused flows of refugees to continue unabated during the relevant time period: “Cynical Ploy Denies Refugee Obligations,” *Canberra Times*, Apr. 10, 2010. Human Rights Watch rightly criticized the order as a thinly veiled attempt to deter the arrival of refugees and highlighted the suspension of processing on the basis of nationality as “discriminatory on its face. While asylum procedures are suspended for Afghans and Sri Lankans because the situations in their countries are ‘evolving,’ asylum procedures will apparently keep apace for nationals of countries that are not evolving, including countries that have produced far fewer refugees than either Afghanistan or Sri Lanka”: Human Rights Watch, “Letter to Australian Minister of Immigration Chris Evans on Processing New Asylum Claims from Sri Lanka and Afghanistan,” Apr. 14, 2010.

⁵⁰⁴ “Irregular maritime arrivals claiming asylum will continue to be subject to mandatory detention, including those subject to the suspension”: Australia, Minister for Foreign Affairs and Trade, “Changes to Australia’s immigration processing system,” Apr. 9, 2010, <https://reliefweb.int/report/afghanistan/changes-australias-immigration-processing-system>, accessed Feb. 1, 2020.

⁵⁰⁵ UN Committee on the Elimination of Racial Discrimination, “Concluding Observations of the Committee on the Elimination of Racial Discrimination: Sudan,” UN Doc. CERD/C/304/Add.116, Apr. 27, 2001, at [15].

a citizen of any EU country to be “manifestly unfounded.”⁵⁰⁶ The EU has also embraced the notion of so-called “safe country of origin” rules, subjecting whole refugee groups defined by nationality to truncated procedures.⁵⁰⁷ Canada emulated the EU’s approach until 2019,⁵⁰⁸ constraining the procedural rights of refugee claimants from more than forty listed countries.⁵⁰⁹

⁵⁰⁶ “Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in [exceptional] cases”: Protocol on Asylum for Nationals of Member States of the European Union, annexed to the Treaty establishing the European Community, OJ 1997 C340/1, at 103 (Nov. 10, 1997) (“Aznar Protocol”). As Stern observes, “[t]he essential purpose of the [Aznar] Protocol . . . [is] to provide EU Member States a basis for refusing to accept an asylum application lodged by an EU national; a refusal based not [on] an individual assessment of the case but on political decisions in general . . . [A] majority of EU Member States appears to consider the Protocol binding and thus applies the principle set out therein”: R. Stern, “At a Crossroad? Reflections on the Right to Asylum for European Union Citizens,” (2014) 33(2) *Refugee Survey Quarterly* 54 (Stern, “At a Crossroad?”), at 61–62.

⁵⁰⁷ Parliament and Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013 L180/60 (“EU Procedures Directive”), at Annex I. “[F]or a claim to be expedited as ostensibly unfounded, both the listing of a country as safe and a failure to establish personal circumstances rebutting the presumption are required in the individual case. This, however, entails a higher burden of proof to be discharged by nationals of listed countries as opposed to . . . the shared burden of proof normally applicable in asylum procedures”: Asylum Information Database (AIDA), “Safe Countries of Origin: A Safe Concept?” *AIDA Legal Briefing No. 3*, Sept. 2015, at 9. See generally M. Hunt, “The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future,” (2014) 26(4) *International Journal of Refugee Law* 500.

⁵⁰⁸ “Canada was not only emulating [European safe country of origin] practices, but also, informed by the Aznar Protocol, effectively barring asylum seekers from the EU”: C. Costello, “Safe Country? Says Who?,” (2016) 28(4) *International Journal of Refugee Law* 601 (Costello, “Safe Country?”), at 616. As Macklin rightly notes in this regard, “[a]sylum policies tend to migrate across borders with notably greater ease than asylum seekers themselves”: A. Macklin, “A Safe Country to Emulate? Canada and the European Refugee,” in H. Lambert et al. eds., *The Global Reach of European Refugee Law* 99 (2013), at 99. The ways in which deterrent practices are shared among developed countries are carefully analyzed in D. Ghezelbash, *Refugee Lost: Asylum Law in an Interdependent World* (2018).

⁵⁰⁹ Immigration and Refugee Protection Act, SC 2001, s. 109.1(2)(a). This policy was ended in May 2019: www.canada.ca/en/immigration-refugees-citizenship/services/refugees/claim-protection-inside-canada/apply/designated-countries-policy.html, accessed Feb. 1, 2020. Countries were designated by the Minister on the basis of past outcomes, leading to concern that “risk designations do not reflect *present* conditions in the country of origin. Indeed . . . these processes may be liable to be self-perpetuating, in that designation will in likelihood have a significant impact on rejection rates (given the truncated procedural entitlements, meaning that there will be a higher likelihood of false negative decisions), which, in turn, may provide the basis for designation”: Costello, “Safe Country?,” at 617.

Governments may also treat refugees differently on account of their religion. Hungary and Slovakia, for example, resisted the regional resettlement of non-Christian refugees from Greece,⁵¹⁰ while the United States issued a ban on the resettlement of refugees from several countries that were initially identified on the basis of their predominantly Muslim populations.⁵¹¹ India similarly proposed in 2019 to grant citizenship to resident minority faith refugees from Afghanistan, Bangladesh, and Pakistan who entered the country before 2015, but deliberately excluded Muslim refugees from that initiative.⁵¹²

Gender and sexual identity can play an important role in limiting access to refugee rights, as was the case for women refugees from Bhutan when Nepal refused to provide food and shelter to other than male heads of refugee households.⁵¹³ Conversely, in Jordan male refugee spouses of Jordanian women have restricted access to residence permits, employment, and public healthcare services, and are barred by law from conferring citizenship on their children.⁵¹⁴ And gay, lesbian and other sexual minority refugees in South

⁵¹⁰ R. Noack, "This Map Helps Explain Why Some European Countries Reject Refugees, and Others Love Them," *Washington Post*, Sept. 8, 2015; see also "Migrant Crisis: Slovakia 'Will Only Accept Christians,'" BBC, Aug. 18, 2015.

⁵¹¹ A. Burns, "2 Federal Judges Rule Against Trump's Latest Travel Ban," *New York Times*, Mar. 15, 2017. "The order didn't explicitly single out Muslim immigrants. But to many, the connection was clear enough on its own. After all, before candidate Trump promised to bar immigration based on country, he'd called for a 'total and complete shutdown of Muslims entering the United States': D. Lind, "The Rise, Fall, and Partial Resurrection of Trump's Travel Ban, Explained," *Vox*, June 26, 2017. In June 2018, however, the US Supreme Court upheld the travel ban on a 5–4 vote: *Trump v. Hawaii*, (2018) 138 S. Ct. 2392 (US SC, June 26, 2018). In early 2020 the Trump administration expanded the scope of the ban to include an additional six countries with "substantial Muslim populations" – Burma (Myanmar), Eritrea, Nigeria, Sudan, Kyrgyzstan, and Tanzania: Z. Kanno-Youngs, "US Adds 6 Countries, Including Nigeria, to Restricted Travel List," *New York Times*, Feb. 1, 2020, at A9. The fact that not all of these states are mainly Muslim was suggested to be an effort "to circumvent claims that the ban was religious discrimination": "Muslim Ban Should End, not Expand: Groups Slam Trump Travel Ban," *Al Jazeera*, Jan. 31, 2020.

⁵¹² "The Indian government's claim that the citizenship law aims to protect religious minorities rings hollow by excluding Ahmadiyya from Pakistan and Rohingya from Myanmar," said Meenakshi Ganguly, South Asia director [for Human Rights Watch]. "The bill uses the language of refuge and sanctuary, but discriminates on religious grounds in violation of international law": Human Rights Watch, "India: Citizenship Bill Discriminates Against Muslims," Dec. 11, 2019.

⁵¹³ "This policy . . . imposes particular hardship on women trying to escape abusive marriages. Either these women must stay in violent relationships, leave their relationships (and thus relinquish their full share of aid packages), or marry another man, in which case they lose legal custody of their children": Human Rights Watch, "Nepal/Bhutan: Refugee Women Face Abuses," Sept. 24, 2003. See generally Human Rights Watch, "Trapped by Inequality: Bhutanese Refugee Women in Nepal" (2003).

⁵¹⁴ This policy, applied generally to non-citizens, contrasts with the approach taken to female refugee spouses, who are automatically granted citizenship rights by virtue of their marriage to Jordanian men: J. Emanuel, "Discriminatory Nationality Laws in Jordan

Africa report that law enforcement officials have ignored their pleas for protection from physical and verbal abuse, often allowing their attackers to go free.⁵¹⁵

Differential treatment may even be based on a refugee's mode of arrival. Since the early 1990s, Australian law has provided for the routine and ongoing detention of refugees arriving to seek protection if they present themselves without a valid entry visa.⁵¹⁶ Canada allows for designation by the Minister of any group of two or more refugee claimants as "irregular arrivals" if, for example, they arrive with false documentation believed to have been provided by smugglers.⁵¹⁷ Refugees so designated are subject to automatic detention and may not be considered to be "lawfully present" in Canada, leading one commentator to observe that they are afforded "little more than protection from refoulement."⁵¹⁸ A 2013 amendment to New Zealand law similarly provides for

and their Effect on Mixed Refugee Families," Research Paper 2012-4 (2012), at 9–10. One of the law's most alarming effects – that it renders stateless any children born to such couples – has been attenuated by the passage in 2014 of a law granting certain privileges to affected children. But the exclusion of male refugee spouses from core rights remains intact: R. Husseini, "Gov't Announces Privileges for Children of Jordanian Women Married to Foreigners," *Jordan Vista*, Nov. 9, 2014; E. Oddone, "Jordanian Progeny Gain Ground in Nationality Fight," *Al Jazeera*, May 5, 2015.

⁵¹⁵ Organization for Refuge, Asylum, and Migration, "Blind Alleys: The Unseen Struggles of Lesbian, Gay, Bisexual, Transgender and Intersex Urban Refugees in Mexico, Uganda, and South Africa," Part II: Country Findings: South Africa, Feb. 2013, at 9-12. "Despite South Africa's liberal anti-discrimination and immigration laws with regards to LGBTI persons, such laws are not always respected or enforced . . . LGBTI individuals in South Africa have reported experiencing unfair treatment and verbal and physical abuse, including by law enforcement and other state officials . . . Police officers often ignore cases involving foreigners and mock LGBTI persons when they report a crime. At times, law enforcement officers physically and sexually assault LGBTI refugees and asylum seekers": PLE Against Suffering Oppression and Poverty, "Economic Injustice: Employment and Housing Discrimination Against LGBTI Refugees and Asylum Seekers in South Africa" (2013), at 3, 5.

⁵¹⁶ Parliament of Australia, "Immigration detention in Australia," Mar. 20, 2013, www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Detention, accessed Feb. 1, 2020.

⁵¹⁷ Protecting Canada's Immigration System Act, S.C. 2012, c. 17.

⁵¹⁸ A. Neylon, "Ensuring Precariousness: The Status of Designated Foreign National under the Protecting Canada's Immigration System Act 2012," (2015) 27(2) *International Journal of Refugee Law* 297, at 298. In December 2012, it was reported that "[f]or the first time since a new refugee law was passed last June, the federal government has declared that five different groups of Romanian refugee claimants, who entered Canada on five different occasions over a period of several months, are to be designated as a single group. The consequences of designation are two weeks to one year in prison for every member of the group over fifteen years of age, and secondly, separation from their families for more than five years, even if they are accepted as refugees": Canadian Association of Refugee Lawyers, "Press Release: Canadian Association of Refugee Lawyers (CARL) Challenges the Legality of Group Designation of Five Groups of Refugee Claimants," Dec. 6, 2012.

the non-reviewable detention of asylum-seekers and others arriving as part of a “mass arrival group” for an initial period of up to six months.⁵¹⁹

In sum, refugees are frequently subjected to differences in treatment based on factors extraneous to their need for protection. The net result is a critical challenge to the notion that a universal common denominator of rights can be said to follow from refugee status.

Refugee Convention, Art. 3 Non-discrimination

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

Economic, Social and Cultural Covenant, Art. 2

...

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Civil and Political Covenant, Art. 2(1)

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

Civil and Political Covenant, Art. 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons

⁵¹⁹ The 2013 Immigration Amendment Act provides for the detention of asylum-seekers and others arriving in a group of thirty or more persons: New Zealand, Immigration Amendment Act 2013, Act 2013 No. 39, assented to June 18, 2013. The law authorizes the detention of such groups for up to six months initially, with the possibility to renew every twenty-eight days thereafter: Immigration Amendment Act 2013, s. 11 amending s. 307 of the Immigration Act 2009; see also Amnesty International, “Demanding Real Protection: Strong Human Rights Framework Needed to Address Failures to Protect,” Submission to the UN Universal Periodic Review of New Zealand, Feb. 2014, at 5.

equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The drafting history of the Refugee Convention provides little guidance on the substantive reach of Art. 3's duty of non-discrimination. The Swiss delegate, for example, acknowledged only "measures of a humiliating character" to be discriminatory.⁵²⁰ Egypt tried unsuccessfully to exclude action necessary for the maintenance of public order from the scope of discrimination.⁵²¹ No interest was shown in a Greek effort to ensure that actions necessary for "public safety" were immune from scrutiny under Art. 3.⁵²² The most precise comment on the meaning of non-discrimination was offered by the American representative, who thought that discrimination meant "denying to one category of persons certain rights and privileges enjoyed by others in identical circumstances."⁵²³ In line with principles of treaty interpretation earlier described,⁵²⁴ this conceptual uncertainty should be remedied by taking account of the parameters of the duty of non-discrimination elaborated under the terms of cognate treaties – including, for example, under the Human Rights Covenants, described above.⁵²⁵ Most fundamentally, this means that even a differential allocation of rights on the basis of a prohibited ground will not amount to discrimination if demonstrated to meet international standards of "reasonableness."⁵²⁶

In drafting Art. 3, consensus was reached on the critical point that the duty of non-discrimination is not restricted to actions taken within a state's territory, but governs as well a state's actions toward persons seeking to enter its territory. While the English language draft of Art. 3 produced by the Second Session of the Ad Hoc Committee appeared to prohibit only discrimination by a state "against a refugee within its territory,"⁵²⁷ the French language formulation was not predicated on successful entry into a state's territory.⁵²⁸ At the Conference of Plenipotentiaries,

⁵²⁰ Statement of Mr. Schurch of Switzerland, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 15.

⁵²¹ Statement of Mr. Mostafa of Egypt, UN Doc. A/CONF.2/SR.5, July 4, 1951, at 12. The British delegate thought that "the acknowledged right of any State to safeguard the requirements of public order and morality was extraneous to the subject-matter of Article 3," while the Dutch representative argued that "[i]t would be dangerous to add a provision to Article 3 which would to some extent emasculate it": Statements of Mr. Hoare of the United Kingdom and Baron van Boetzelaer of the Netherlands, *ibid.* at 14.

⁵²² Statement of Mr. Philon of Greece, *ibid.* at 12–13.

⁵²³ Statement of Mr. Warren of the United States of America, *ibid.* at 4.

⁵²⁴ See Chapter 2.2.

⁵²⁵ The practice of the Human Rights Committee in interpreting the duty of non-discrimination is described in Chapter 1.5.5.

⁵²⁶ See Chapter 1.5.5 at note 468. ⁵²⁷ UN Doc. E/1850, Aug. 25, 1950, at 15.

⁵²⁸ "Aucun Etat contractant ne prendra de mesures discriminatoires sur son territoire, contre un réfugié en raison de sa race, de sa religion ou de son pays d'origine": UN Doc. A/CONF.2/72, July 11, 1951, at 1. See also Statement of the President, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 19.

the non-reviewable detention of asylum-seekers and others arriving as part of a “mass arrival group” for an initial period of up to six months.⁵¹⁹

In sum, refugees are frequently subjected to differences in treatment based on factors extraneous to their need for protection. The net result is a critical challenge to the notion that a universal common denominator of rights can be said to follow from refugee status.

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the French delegate successfully argued against the narrowness of the duty proposed in the English text:

[T]he statement that the State should not discriminate against a refugee within its territory on account of his race, religion or country of origin seemed to suggest that the State was perfectly entitled to discriminate against persons *wishing* to enter its territory, that was to say, against persons not yet resident in its territory. He therefore proposed that the words “within its territory” be deleted.⁵²⁹

The rationale for the territorial limitation captured in the draft English language text had, in fact, been simply to ensure that states were left complete freedom to administer their own systems of immigration law.⁵³⁰ Once it was recognized that the admission of refugees to durable asylum or permanent residency is not in any event governed by the Refugee Convention,⁵³¹ it proved possible to secure the consent of states to a duty of non-discrimination with extraterritorial application.⁵³² In line with the fact that Art. 3 governs all rights in the Refugee Convention, including Art. 33’s duty of *non-refoulement*, the American interdiction of Haitian asylum-seekers on the high seas, while simultaneously allowing Cuban asylum-seekers to come to the United States,⁵³³ thus raised an issue within the purview of Art. 3’s duty of non-discrimination.

In contrast to the agreement on this point, there was real debate about the substantive breadth of Art. 3. As initially conceived, the provision was intended to prohibit discrimination not only against particular subsets of the refugee population, but against refugees in general. The Belgian draft of Art. 3 submitted to the Ad Hoc Committee provided that: “The High Contracting Parties shall not discriminate against refugees on account of race, religion or country of origin, *nor because*

⁵²⁹ Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 18–19.

⁵³⁰ “The history of the drafting of Article 3 showed that if the words ‘within its territory’ were deleted, the Convention would affect the whole field of immigration policy . . . There was no subject on which Governments were more sensitive or jealous regarding their freedom of action than on the determination of immigration policies . . . If the proposed deletion were made, certain Governments might feel that their policy of selection was affected by the Convention, and they might accordingly be hesitant about acceding to it”: Statement of Mr. Warren of the United States of America, UN Doc. A/CONF.2/SR.5, July 4, 1951, at 5.

⁵³¹ “It was noted during the discussion that . . . the Convention does not deal either with the admission of refugees (in countries of first or second asylum) or with their resettlement (in countries of immigration)": “Report of the Committee Appointed to Study Article 3,” UN Doc. A/CONF.2/72, July 11, 1951, at 3.

⁵³² “It was thought that the words ‘within its territory’ in the place where they occurred in the English text could be interpreted *a contrario* as permitting such discrimination outside the territory of the Contracting State. *A document drawn up under the auspices of the United Nations ought not to be susceptible to such an interpretation* [emphasis added]”: ibid. at 2. The consensus definition of this Committee – which deleted the limitation “within its territory” – was the basis for the version of Art. 3 finally adopted: UN Doc. A/CONF.2/SR.18, July 12, 1951, at 18, and UN Doc. A/CONF.2/SR.24, July 17, 1951, at 19–21.

⁵³³ See text at note 497.

they are refugees [emphasis added].”⁵³⁴ The latter part of the duty – imposing a duty not to discriminate on the basis of refugee status itself – did not survive the Conference of Plenipotentiaries, though some delegates clearly believed it should be retained. For example, the French representative insisted that equality between groups of refugees was an insufficiently inclusive goal, as “if all refugees received equally bad treatment, the State concerned could claim to have observed the provisions of Article 3.”⁵³⁵ Particularly where all refugees in a given asylum state belong to the same race or religion, or come from the same country, skewed rights allocations that are in substance racially, religiously, or nationally motivated might not be caught by a simple prohibition of discrimination *between classes of refugees* (since all refugees would be equally harmed). Some representatives therefore identified the need for a stronger commitment to prohibit the kinds of discriminatory actions that generate refugee flows in the first place.⁵³⁶

Despite these concerns, the Israeli delegate successfully moved the deletion of Art. 3’s prohibition of discrimination against refugees in general on the grounds that this issue was already regulated by the Convention’s provisions on required standards of treatment.⁵³⁷ This position was in line with the view he had earlier expressed in the Ad Hoc Committee that priority should be given to the express language which defined the various levels of obligation:

It was important to clear up the exact place of Article 3 in the Convention and its relation to the other articles. It proclaimed a principle, but the exact conditions under which refugees might enjoy the benefits conferred by it were enumerated in later articles. There was nothing abnormal about that. The United Nations Charter itself began by speaking of the “sovereign equality” of all members of the United Nations and then proceeded to divide those members into great Powers and small Powers, permanent and non-permanent members of the Security Council, members with the right of veto and members without. There would be no objection to retaining Article 3 as formulated, on the understanding that its function was to

⁵³⁴ Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 11.

⁵³⁵ Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 18.

⁵³⁶ “Such a provision was all the more necessary because most refugees had left their countries of origin in order to escape discrimination on grounds of race, religion, or political opinion”: Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 11.

⁵³⁷ Statement of Mr. Robinson of Israel, UN Doc. A/CONF.2/SR.4, July 3, 1951, at 17–19. While the textual modification to Art. 3, in which the words “nor because they are refugees” were deleted, arguably determines this issue, it should be noted that even after the adoption of the Israeli motion, remarks of the Australian, French, and American delegates during the final substantive discussion of this article support a broader reading: UN Doc. A/CONF.2/SR.5, July 4, 1951, at 7–9. Moreover, the final language proposed by the Style Committee was said to be primarily designed to restrict the substantive ambit of this duty of non-discrimination to actions of a kind regulated by the Refugee Convention: UN Doc. A/CONF.2/72, July 11, 1951, at 3.

establish a principle to which the exceptions would be specified in later articles, as was usual practice in any legal instrument.⁵³⁸

It is, of course, true that the extent of permissible differentiation between refugees and citizens in the delivery of rights is explicitly set out in the Refugee Convention's mixed contingent and absolute rights structure.⁵³⁹ Many of the rights in regard to which the issue of discrimination vis-à-vis nationals might arise are required to be implemented only to the extent that they are guaranteed to some other category of non-citizens.⁵⁴⁰ The Refugee Convention thus clearly presumes the legitimacy of treating refugees less favorably than citizens with respect to any of the rights defined by a contingent standard less than nationality. For example, Art. 17 requires only that refugees benefit from "the most favorable treatment accorded to nationals of a foreign country in the same circumstances" as regards the right to work. In view of this clear language, the structure of the Refugee Convention argues against a finding of discrimination simply because refugees enjoy access to work on terms less favorable than those extended to citizens.

Conversely, a duty of non-discrimination between citizens and refugees would add nothing to the force of those rights already defined to mandate implementation on terms of parity with citizens. All refugees must be assimilated to nationals in terms of the rights to rationing, primary education, and fair taxation.⁵⁴¹ Where the relevant degree of attachment is satisfied, refugees are also entitled to national treatment in regard to religion and religious education, artistic rights and industrial property, public relief, labor legislation, social security, and legal assistance and security for costs before the courts.⁵⁴² The duty to implement these rights on terms of parity with nationals is actually more powerful than a duty of non-discrimination relative to nationals would be, since the issue of reasonable differentiation inherent in non-discrimination analysis simply does not arise.

As discussed earlier,⁵⁴³ the prohibition of generalized discrimination against refugees is in any event now largely achieved by the binding duty of non-discrimination subsequently codified in the Human Rights Covenants.

⁵³⁸ Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 9.

⁵³⁹ See Chapters 3.2 and 3.3.

⁵⁴⁰ Freedom of association and the right to engage in employment are guaranteed at the level of most-favored-national treatment; the rights to private property, internal freedom of movement, housing, and to engage in self- and professional employment are granted to refugees only to the extent afforded aliens generally.

⁵⁴¹ Refugee Convention, at Arts. 20, 22, and 29.

⁵⁴² See Chapter 3.3.2. Equality of treatment with regard to religion and religious education is guaranteed to all refugees "within the territory"; rights to public relief, and to benefit from labor and social security legislation, to all refugees who are "lawfully staying"; and the protection of artistic rights and industrial property and access to legal assistance and avoidance of security for costs to refugees who are "habitually resident."

⁵⁴³ See Chapter 1.5.5.

Art. 2 of each of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights prohibits discrimination on the basis of a list of grounds, including “other status.”⁵⁴⁴ Relying on this open-ended formulation, the duty of non-discrimination has been authoritatively interpreted to establish the general rule “that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens,”⁵⁴⁵ and specifically to require that rights not be limited to citizens of a state, but that they “must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers [and] refugees.”⁵⁴⁶ Unlike Art. 3 of the Refugee Convention (which prohibits only discrimination of particular kinds against refugees – namely on the basis of race, religion, or country of origin), the duty set by the Covenants is thus fully inclusive, prohibiting every kind of status-based discrimination (including on the basis of refugee status) in relation to a right established by the Covenants.

This guarantee of non-discrimination found in Art. 2 of each of the Human Rights Covenants therefore partly fills the gap left by the limited prohibition of discrimination *against refugees in general* in the Refugee Convention.

First, where a given right is found in both the Refugee Convention and one of the Covenants, Art. 2 of the Covenants disallows discrimination relative to nationals. In such circumstances, it is simply not necessary to rely on the relevant refugee right in order to contest treatment below national treatment. Since virtually all rights in the Covenants must be implemented without discrimination between nationals and non-citizens,⁵⁴⁷ refugees who invoke

⁵⁴⁴ Ibid. at note 389.

⁵⁴⁵ UN Human Rights Committee, “General Comment No. 15: The Position of Aliens under the Covenant” (1986), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at [2].

⁵⁴⁶ UN Human Rights Committee, “General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant” (2004), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at [10]. While this General Comment interprets only the Civil and Political Covenant, it is reasonable to assume that the virtually identical prohibition of discrimination on the basis of “other status” in the Economic, Social and Cultural Covenant will be similarly interpreted to protect the entitlement of aliens to national treatment in relation to its catalog of rights. While not explicitly endorsing an interpretation that includes aliens, the treaty’s supervisory committee nonetheless determined that “[a] flexible approach to the ground of ‘other status’ is . . . needed in order to capture other forms of differential treatment that . . . are of a comparable nature to the expressly recognized grounds . . . These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization”: UN Committee on Economic, Social and Cultural Rights, “General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)” (2009), UN Doc. E/C.12/GC/20, July 2, 2009, at [27]. The relevance of the minor differences in the language of the prohibition of discrimination in the two Human Rights Covenants is discussed in Chapter 1.5.5, note 400.

⁵⁴⁷ Civil and Political Covenant, at Art. 2(1).

the cognate Covenant protection can effectively avoid the lower standard of treatment prescribed by the Refugee Convention.

For example, Art. 15 of the Refugee Convention guarantees freedom of association to refugees only to the extent of “the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.” The failure to grant refugees the same associational rights as citizens would therefore not contravene the terms of the Refugee Convention. On the other hand, because the right to freedom of association is also established by Art. 22 of the Civil and Political Covenant and by Art. 8 of the Economic, Social and Cultural Covenant, refugees can invoke Art. 2 of the Covenants as the basis for asserting the same *prima facie* entitlement to associational rights as nationals. It would then fall to the state party denying equal treatment to advance the case that the distinction between refugees and citizens should be adjudged reasonable.⁵⁴⁸ In addition to freedom of association, refugees may rely on parallel provisions in the Covenants (which are subject to a general duty of non-discrimination) to assert a right to national treatment in access to employment, housing, and internal freedom of movement,⁵⁴⁹ each of which is guaranteed by the Refugee Convention only at a lower contingency level.⁵⁵⁰

Second, reliance on the Covenants to assert a duty of non-discrimination relative to nationals may actually allow refugees to contest a broader range of substantive disfranchisement. This is because the Covenants guarantee a significant number of rights not provided for at all in the Refugee Convention. In particular, the Civil and Political Covenant establishes the rights to life, to freedom from slavery, against torture, cruel, inhuman, and degrading treatment, to liberty and security of the person, freedom of thought, conscience, and religion, to leave the country, to equality before courts and tribunals,⁵⁵¹ against retrospective application of criminal law, to recognition as

⁵⁴⁸ See Chapter 1.5.5.

⁵⁴⁹ Only refugees who are “lawfully in the territory of a State Party” may claim the right to non-discrimination relative to nationals in regard to internal freedom of movement and choice of place of residence: Civil and Political Covenant, at Art. 12(1).

⁵⁵⁰ Under the Refugee Convention, the rights to self-employment, professional employment, housing, and internal freedom of movement are granted to refugees only to the extent afforded to aliens generally (Arts. 18, 19, 21, and 26). Access to wage-earning employment is guaranteed to refugees at the most-favored-national level (Art. 17). The comparable provisions in the Human Rights Covenants make no differentiation between the entitlement of nationals and aliens (Economic, Social and Cultural Covenant, at Arts. 6 and 11; Civil and Political Covenant, at Art. 12, which does, however, require lawful presence in the state’s territory).

⁵⁵¹ International aliens law also prohibits discrimination by courts against aliens (including refugees) in the adjudication of claims involving core rights, such as legal status, physical security, personal and spiritual liberty, and some economic and property rights. While not enforceable by refugees themselves, this customary norm of international aliens law can nonetheless be invoked as evidence of a principled, legally defined limitation on discrimination. See generally Chapter 1.1.

a person, to protection of family, children, and privacy, against advocacy of hatred or discrimination, to freedom of opinion, expression, and assembly, and to the protection of minority rights.⁵⁵² Additional rights derived from the Economic, Social and Cultural Covenant include guarantees of just and favorable working conditions, adequate food and clothing, protection of the family (including of mothers and of children), secondary and higher education, social security, access to healthcare, and participation in cultural life.⁵⁵³ Each of these rights must in principle be guaranteed to non-citizens, including refugees, without discrimination relative to nationals.

Beyond the context-specific duty of non-discrimination derived from Art. 2 of the Covenants, additional value may also be secured from Art. 26 of the Civil and Political Covenant. As elaborated earlier, Art. 26 establishes a general duty to guarantee everyone equality before the law and the equal protection of the law without discrimination.⁵⁵⁴ As a matter of principle, this overarching duty should be understood to compel states not only to avoid any intentional disfranchisement of refugees, but also affirmatively to adopt measures which provide refugees with the substantive benefit of all public goods.⁵⁵⁵ In theory, even the levels of attachment set by the Refugee Convention are themselves subject to scrutiny under Art. 26 to ensure that the withholding of benefits from some refugees is justifiable.

The major challenge to the efficacy of the various non-discrimination rights set by the Human Rights Covenants is that, as previously described, the contemporary practice of the Human Rights Committee has been to defer to state perceptions of “reasonableness” in determining whether a given form of differentiation amounts to discrimination.⁵⁵⁶ Whether the assessment occurs under one of the endogenous Art. 2 guarantees or in relation to the more generally applicable Art. 26, a refugee arguing that inequality of treatment is discriminatory must make the case that certain kinds of differential allocation should be understood to be impermissible as a general matter, or at least in particular circumstances. Given the mixed success in advancing this argument on behalf of non-citizens generally,⁵⁵⁷ it is by no means clear that general norms of non-discrimination law will, in practice, make up for the decision to exclude discrimination against refugees in general from the scope of Art. 3 of the Refugee Convention. On the other hand, reliance on the Human Rights Covenants can at least compel states to justify differential treatment of refugees as a class, which Art. 3 of the Refugee Convention cannot.

Denied a role in prohibiting discrimination against refugees as a group, the purpose of Art. 3 of the Refugee Convention as finally adopted is instead to

⁵⁵² Civil and Political Covenant, at Arts. 6–11, 12(2), 14–21, 23–24, and 27.

⁵⁵³ Economic, Social and Cultural Covenant, at Arts. 7, 9–13, and 15.

⁵⁵⁴ See Chapter 1.5.5 at note 453. ⁵⁵⁵ Ibid. at note 459. ⁵⁵⁶ Ibid. at note 469.

⁵⁵⁷ Ibid. at note 471 ff.

disallow any discrimination in the allocation of Convention rights between and among refugees on the basis of race, religion, or country of origin. While not requiring that all groups of refugees who arrive in an asylum country be treated identically, Art. 3 establishes a presumption that differential treatment based on any of the enumerated grounds is illegitimate. This presumption would apply, for example, in the case of India's decision to grant permission to work to Tibetan refugees, even as Sri Lankan refugees were restricted to self-employment and Bangladeshi refugees afforded no right to earn a livelihood,⁵⁵⁸ or its decision to naturalize long-staying refugees, but to deny that consideration to Muslim refugees.⁵⁵⁹

The text of Art. 3 makes clear, however, that it applies only to matters that are regulated by the Refugee Convention.⁵⁶⁰ Those who drafted the provision emphasized that “[t]he members of the Committee were in full agreement in their adherence to the principle of non-discrimination, in their desire to reach an acceptable (preferably a unanimous) solution *which should cover the whole Convention*, and in their determination *not to 'legislate' beyond the Convention* [emphasis added].”⁵⁶¹ Their particular concern was to avoid any implication that states are subject to a duty to administer their immigration laws in a non-discriminatory way.⁵⁶² Art. 3 is not therefore a generalized prohibition of discrimination, but speaks only to invidious differentiation in the implementation of rights set by the Refugee Convention.⁵⁶³

Despite this fundamental constraint, it must be recognized that implementation of a Convention right may be implicated even in actions or policies which are not on their face linked to a right protected by the Convention. For example, the nature of the refugee status determination procedure is not specifically regulated by the Refugee Convention, thus suggesting that discrimination in relation to procedural matters would be unlikely to infringe Art. 3. But where, as in the case of Australia's decision to suspend the processing of Afghan and Sri Lankan refugees, there is a consequential breach of a right protected by the Convention (in this case, subjection to indefinite detention,

⁵⁵⁸ See text at note 501. ⁵⁵⁹ See text at note 512.

⁵⁶⁰ “Article 3 of the 1951 Convention is an article that becomes relevant only if another provision of the 1951 Convention is affected, as it is an *accessory* prohibition of discrimination”: R. Marx and W. Staff, “Article 3,” in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 643 (2011) (Marx and Staff, “Article 3”), at 647.

⁵⁶¹ “Report of the Committee Appointed to Study Article 3,” UN Doc. A/CONF.2/72, July 11, 1951, at 3.

⁵⁶² See text at note 530.

⁵⁶³ “The non-discrimination provision in article 3 is limited to the application of ‘the provisions of this convention.’ Article 3 does not contain a freestanding non-discrimination provision. It resembles the weak provision in article 14 of the European Convention on Human Rights (1950)”: *R v. Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55 (UK HL, Dec. 9, 2004), at [43].

contrary to Arts. 31(2) and 26 of the Convention),⁵⁶⁴ there is nationality-based discrimination contrary to Art. 3.

Of particular contemporary importance, procedural discrimination can give rise to a heightened risk of unjustified rejection and removal from the asylum state, thus indirectly engaging Art. 33's duty of *non-refoulement*.⁵⁶⁵ Whatever the usual level of safety in a country, the notion that a given country is inherently safe for all in consequence of which normal procedural rules can be dispensed with is clearly dubious⁵⁶⁶ – a fact apparent to the UK Supreme Court in agreeing with a gay man's challenge to the designation of Jamaica as a safe country of origin.⁵⁶⁷ Because the failure properly to identify and protect a refugee is the foreseeable consequence of a truncated assessment procedure of the kind established by European "safe country of origin"⁵⁶⁸ or Canadian "designated country of origin"⁵⁶⁹ regimes, the duty of non-discrimination set by Art. 3 of the Refugee Convention is infringed.⁵⁷⁰ Simply put, in such a case

⁵⁶⁴ See text at notes 502–504; and Chapters 4.2.4 and 5.2. ⁵⁶⁵ See Chapter 4.1.

⁵⁶⁶ "Such a list is capable of giving rise to accusations of arbitrariness by comparison with other countries not on the list": *Detention Action v. Secretary of State for the Home Department*, [2014] EWHC 2245 (Eng. QBD, July 9, 2014), at [89].

⁵⁶⁷ The Court noted that "there was a serious risk of persecution of gays and other members of the LGBT community, [a] community . . . estimated to amount to between 5% and 10% of the population [even though] there is no such risk affecting the remainder of the population": *R (Jamar Brown, Jamaica) v. Secretary of State for the Home Department*, [2015] UKSC 8 (UK SC, Nov. 26, 2014), at [1]. The Supreme Court more generally questioned the viability of arriving at a sound determination of which states of origin could be deemed safe, observing that "[f]or a serious risk of persecution to exist in general, i.e. as a general feature of life in the relevant country, it must be possible to identify a recognisable section of the community to whom it applies, but to require it to be established that the relevant minority exceeds x% of the population is open to several objections. The first is the absence of any yardstick for determining what x should be. If the Home Secretary was entitled to conclude that 10% was insufficient, would the same apply to 15%, 20%, or 25%? It is no answer to say that it is a question of degree for the judgment of the Home Secretary, within a wide margin of appreciation, if there is simply no way of deciding it": *ibid.* at [22].

⁵⁶⁸ See text at note 507. ⁵⁶⁹ See text at notes 508–509.

⁵⁷⁰ But see *HIE and BA v. Refugee Applications Commissioner*, Dec. No. C-175/11 (CJEU, Jan. 13, 2013), in which the Court of Justice of the European Union failed to recognize this risk in a challenge by two refugee claimants to the fast-tracking of their claims pursuant to Ireland's designation of Nigeria as a safe country of origin. Noting the "importance of expediency in processing asylum applications" (*ibid.* at [60]) and adopting the view that "nationality of the applicant plays a decisive role" (*ibid.* at [71]) in refugee status assessment, the Court ruled "that the nationality of the applicant for asylum is an element which may be taken into consideration to justify the prioritized or accelerated processing of an asylum application" (*ibid.* at [73]), though "that prioritized procedure must not deprive applicants . . . of [regional procedural] guarantees" (*ibid.* at [74]). This ruling seems to ignore the fact that even if basic procedural guarantees are respected, *all* persons of a given nationality receive a truncated examination of their refugee claim, giving rise to a differentiated risk of rejection and consequential denial of refugee rights (including to protection against *refoulement*) based solely on their nationality.

the *refoulement* would occur because of subjection to a process that stereotyped refugees based simply on their country of origin.⁵⁷¹ As the Canadian Federal Court recognized in overturning a provision in the Canadian “designated country of origin” (DCO) regime that denied appeal rights to applicants from the listed states,

[t]he distinction drawn between the procedural advantage now accorded to non-DCO refugee claimants and the disadvantage suffered by DCO refugee claimants . . . is discriminatory on its face. It also serves to further marginalize, prejudice, and stereotype refugee claimants from DCO countries . . . Moreover, it perpetuates a stereotype that refugee claimants from DCO countries are somehow queue-jumpers or bogus claimants . . .⁵⁷²

There will, however, be cases in which a Convention right is implicated neither directly nor indirectly in the discrimination. For example, because the Refugee Convention does not provide specifically for a right to physical security, South Africa’s failure to take steps to avoid assaults on sexual minority refugees⁵⁷³ is immune from scrutiny under the Refugee Convention’s endogenous non-discrimination rule. Yet because Art. 9(1) of the Civil and Political Covenant establishes a right to security of person that inheres in all persons subject to a state’s jurisdiction,⁵⁷⁴ refugees left unprotected for reasons of their sexual identity may invoke Art. 2(1) of that treaty to contest the discrimination.⁵⁷⁵

Indeed, the Civil and Political Covenant is a critical resource even when a given interest is explicitly protected under neither the Refugee Convention nor any cognate human rights treaty. There is, for example, no legal duty to

⁵⁷¹ This contrasts with the notion of a “manifestly unfounded” claim, in which assignment to an accelerated procedure is based not on *group stereotype*, but rather on the fact that the *individual* claim is “clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum”: UNHCR Executive Committee Conclusion No. 30, “The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum” (1983), at [(d)].

⁵⁷² *YZ v. Canada*, [2015] FC 892 (Can. FC, July 23, 2015), at [124]–[125]. UNHCR’s stance is more tepid, though ultimately acknowledges the same concern (“notions such as ‘safe country of origin’ . . . should be applied so as not to result in improper denial of access to asylum procedures, or to violations of the principle of *non-refoulement*”: Executive Committee Conclusion No. 87, General Conclusion on International Protection (1999), at [(j)]). As applied in practice, UNHCR’s position “has been to insist on safeguards, rather than to condemn these practices outright”: Costello, “Safe Country?,” at 606. For example, responding to the Canadian plan to establish a “designated country of origin” list, UNHCR noted that it “does not oppose the introduction of a ‘designated’ or ‘safe country of origin’ list as long as this is used as a procedural tool to prioritize or accelerate the examination of applications in carefully circumscribed situations”: UNHCR, “Submission on Bill C-31, ‘Protecting Canada’s Immigration System Act,’ May 2012, at [31].

⁵⁷³ See text at note 515. ⁵⁷⁴ See Chapter 4.3.3. ⁵⁷⁵ See Chapter 1.5.5.

resettle refugees from abroad. As such, policies of Hungary, Slovakia,⁵⁷⁶ and the United States⁵⁷⁷ to bar Muslim refugees from affirmative relocation programs are beyond the purview of Art. 3 of the Refugee Convention (and indeed of similar internal non-discrimination guarantees in other human rights treaties). But because the guarantee of equal benefit of the law without discrimination set by Art. 26 of the Civil and Political Covenant applies even to matters not regulated by the Covenant, “[i]t prohibits discrimination in law or in fact in any field regulated and protected by public authorities.”⁵⁷⁸ As such, to the extent a state regulates refugee resettlement – which Hungary, Slovakia, and the United States all do, whether under the auspices of regional or domestic law⁵⁷⁹ – they must abide by the duty of non-discrimination in the design and administration of resettlement programs, meaning they may not lawfully discriminate against Muslim or other subsets of refugees.

A second concern is that the Refugee Convention’s duty of non-discrimination is textually limited to the three listed grounds of race, religion, and country of origin. While true, the protection against discrimination on grounds of “country of origin” is of particular value, given the prevalence of discrimination against refugees based upon their citizenship. There can be little doubt, for example, that this ground is sufficient to contest the nationality-based refusal of Yemen to recognize the refugee status of other than Somalis,⁵⁸⁰ or to challenge China’s refusal to protect refugees from North Korea.⁵⁸¹ A purposive reading of prohibition of discrimination on grounds of “country of origin” would moreover extend also to practices and policies aimed at refugees from a given group or category of states. Thus, Israel’s stigmatization of sub-Saharan African refugees as illegal “infiltrators,”⁵⁸² or Sudan’s refusal to provide Arab refugees with the protected status accorded refugees from immediately adjacent states,⁵⁸³ is also inconsistent with the Convention’s duty of non-discrimination. Equally clearly, European Union states may not lawfully treat a refugee claim as “manifestly unfounded” simply because it is made by the national of another EU country⁵⁸⁴ – knowing, as Costello observes, that “although the consequences of designation are mainly procedural, they seem to be fatal in practice.”⁵⁸⁵ Because the presumption of safety

⁵⁷⁶ See text at note 510. ⁵⁷⁷ See text at note 511.

⁵⁷⁸ UN Human Rights Committee, “General Comment No. 18: Non-discrimination” (1989), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at [12]. See generally Chapter 1.5.5.

⁵⁷⁹ See text at notes 510–511. ⁵⁸⁰ See text at note 500. ⁵⁸¹ See text at note 498.

⁵⁸² See text at note 499. ⁵⁸³ See text at note 505. ⁵⁸⁴ See text at note 506.

⁵⁸⁵ Costello, “Safe Country?,” at 609. Indeed, an analysis prepared by the Canadian Immigration and Refugee Board shows that although EU law authorizes an exemption from the “manifestly unfounded” designation in four limited circumstances, in practice the narrowness of the authorized exemptions results in the rejection of “virtually all” claims by EU citizens as manifestly unfounded: Immigration and Refugee Board of Canada, “European Union: Application of the Protocol on Asylum for Nationals of Member States of the European Union (2013 – June 2015),” July 9, 2015, at 2–3. In

that underlies the EU's "Aznar Protocol" is factually unsound,⁵⁸⁶ the de facto denial of access to the refugee system to nationals of EU countries amounts to a breach of Art. 3's duty not to discriminate on the basis of origin.⁵⁸⁷

It remains, however, that Art. 3's restriction to only three grounds is oddly conceived. It does not, for example, replicate the United Nations Charter's prohibition of discrimination on the grounds of race, sex, language, or religion.⁵⁸⁸ Even though the drafters expressed a desire to conform to the Universal Declaration of Human Rights,⁵⁸⁹ they refused to sanction an open-ended duty of non-discrimination of the kind contained in the Universal Declaration.⁵⁹⁰ Nor does it include the Universal Declaration's explicit

2014, for example, Belgium – which has formally resiled from the EU approach, correctly insisting that it would examine all claims on their individual merits in order to meet its Refugee Convention obligations – issued all ten of the positive refugee status decisions by EU states in relation to EU nationals: *ibid.* at 3. The Belgian refusal to adopt the EU approach is legally sound, since "[a]s a matter of law, Member States remain free to fulfill their international legal obligations towards refugees and asylum-seekers, including that enshrined in Article 3 of the Refugee Convention not to discriminate on the grounds of nationality": M.-T. Gil-Bazo, "The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law," (2008) 27(3) *Refugee Survey Quarterly* 33, at 43. Indeed, international law arguably requires such action.

⁵⁸⁶ As Stern's analysis shows, EU citizens, in particular those of Roma ethnicity, *do* in fact seek and secure refugee status recognition in other countries; and EU guarantees of freedom of movement are not sufficient to enable at-risk EU citizens simply to enter another EU country without need of accessing the asylum system: Stern, "At a Crossroad?", at 66–73. See also E. Guild and K. Zwaan, "Does Europe Still Create Refugees? Examining the Situation of the Roma," (2014) 40(1) *Queen's Law Journal* 141.

⁵⁸⁷ As Stern succinctly concludes, "discrimination on the basis of nationality becomes the rule," rather than the exception: Stern, "At a Crossroad?", at 62.

⁵⁸⁸ Charter of the United Nations, 1 UNTS 16, adopted June 26, 1945, at Art. 1(3). In a dissenting opinion in the Full Federal Court of Australia, the view was taken that where differential treatment of certain refugees resulted largely from their inability to communicate in English, this was – if examined on the basis of effects – discrimination on grounds of national origin. "[T]o say that any differential impact is suffered not because of national origin, but rather as a result of individual personal circumstances, appears to me to adopt a verbal formula which avoids the real and practical discrimination which flows as a result of the operation of the [twenty-eight-day limit to seek review]": *Sahak v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 215 (Aus. FFC, July 18, 2002), per North J. The majority of the Court, however, was of the view that "such discrimination or disadvantage as arose from the practical operation of . . . the Act . . . does not deprive persons of one race of a right that is enjoyed by another race, nor does it provide for differential operation depending upon the race, color, or national or ethnic origin of the relevant applicant. For example, persons whose national origin is Afghani or Syrian are able to take advantage of the relevant right if their comprehension of the English language is sufficient, or if they have access to friends or professional interpreters so as to overcome the language barrier": *ibid.*

⁵⁸⁹ Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 11.

⁵⁹⁰ The Yugoslavian delegate, Mr. Makiedo, unsuccessfully proposed that the list be made open-ended by the addition of the words "or for other reasons": UN Doc. A/CONF.2/SR.4, July 3, 1951, at 13.

references to color, sex, language, political or other opinion, social origin, property, or birth as prohibited bases of discrimination.⁵⁹¹ While some of the drafters defended the scope of Art. 3 on the basis of its symmetry with the usual grounds on which refugees were persecuted, the failure to make reference to political opinion as a prohibited ground of discrimination was acknowledged to be at odds with this understanding of the purpose of Art. 3.⁵⁹²

A particularly disturbing discussion occurred in response to a proposal that sex be included as a prohibited ground of discrimination.⁵⁹³ Some states took umbrage at the mere suggestion that any government might be guilty of sex discrimination,⁵⁹⁴ while others clearly acknowledged that sex discrimination was common, but ought not to be challenged.⁵⁹⁵ One state actually defended its opposition to including sex as a prohibited basis of discrimination by arguing that to prohibit discrimination on the basis of sex might interfere with cigarette distribution quotas.⁵⁹⁶ The lack of serious and principled intellectual

⁵⁹¹ Universal Declaration of Human Rights, UNGA Res. 217A(III), Dec. 10, 1948, at Art. 2.

⁵⁹² "Political opinion," together with race and religion, was acknowledged to be one of the three traditional grounds that led persons to seek protection as refugees: Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.24, Feb. 3, 1950, at 11. Yet it was omitted in the statement of the President of the Conference of Plenipotentiaries that "the original idea underlying Article 3 [was] that persons who had been persecuted on account of their race or religion, for example, should not be exposed to the same danger in their country of asylum": UN Doc. A/CONF.2/SR.5, July 4, 1951, at 10. The Yugoslavian delegate later sought (unsuccessfully) to justify an open-ended list of prohibited grounds of discrimination on the basis that "[t]he President had suggested that the text was satisfactory because it in fact enumerated all the reasons for which refugees were generally persecuted. There were, however, others, such as the holding of certain political opinions": Statement of Mr. Makiedo of Yugoslavia, *ibid.* at 12.

⁵⁹³ The omission of sex from the Convention's prohibition of discrimination was noted by Baroness Hale in *Fornah v. Secretary of State for the Home Department*, [2006] UKHL 46 (UK HL, Oct. 18, 2006), at [84].

⁵⁹⁴ "He would . . . oppose the insertion of the words 'and sex' which would imply that certain countries at present practised discrimination on grounds of sex. Such was not the case": Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.5, July 4, 1951, at 9. It is interesting to consider whether this position should be taken as an acknowledgment that reception countries *were* engaged in discrimination on the enumerated grounds of race, religion, and country of origin.

⁵⁹⁵ "If that were done . . . States whose legislation provided for different hours of work for men and women, for instance, might be hesitant to accede to the Convention": Statement of Mr. Warren of the United States, *ibid.* at 10. "The President added that . . . married women might be prevented by national legislation from establishing their own domiciles. The inclusion of a reference to sex in Article 3 might therefore present legislative difficulties for the State in question": Statement of the President, *ibid.*

⁵⁹⁶ "[T]he inclusion of a reference to sex might well conflict with national legislation, and he was therefore opposed to it as well. To quote one example, during a tobacco shortage in Austria the ration for women had been smaller than that for men. It had been alleged in the constitutional courts that that was a violation of the equality of the sexes, but the finding of the courts had been that women needed less tobacco than men. Thus, to include the reference to sex might bring the Convention into conflict with national legislation,

engagement in this discussion confirms the essentially arbitrary approach to the decision on which substantive grounds to include in Art. 3. The final 17–1 (5 abstentions) vote in opposition to any expansion of the scope of Art. 3 makes clear, however, that there is no basis upon which to argue that the Refugee Convention was intended to grant refugees the benefit of a comprehensive duty of non-discrimination.⁵⁹⁷ The women refugees denied equal access to health facilities, food, and educational opportunities by Nepal⁵⁹⁸ or the male refugees denied work and other benefits that would ordinarily accrue by virtue of marriage to a Jordanian citizen⁵⁹⁹ would thus appear to be beyond the protective reach of Art. 3.

This is, however, no longer the case for the overwhelming majority of refugees located in states that are also parties to the Civil and Political Covenant. In those countries, the interaction between the Refugee Convention and the guarantee of equal benefit of the law without discrimination set by Art. 26 of the Civil and Political Covenant now effectively remedies the limited reach of Art. 3's text. Art. 3 of the Refugee Convention clearly establishes that there was an explicit intention to insulate refugee rights from discrimination (albeit then on the basis of only the three enumerated grounds). Art. 26 of the Civil and Political Covenant, in turn, today requires that any rights (including to non-discrimination) allocated to one group be presumptively extended to all.⁶⁰⁰ Taken together, the protections of Art. 3 of the Refugee Convention must now be read to apply generally, that is without discrimination based upon *any of the grounds* set by Art. 26, namely race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶⁰¹

Given this legal evolution, an especially interesting question is whether discrimination based upon a refugee's mode of arrival in the asylum country is caught by the prohibition of discrimination based on "other status." This concern now arises, for example, in the context of Australia's indefinite detention of "irregular arrivals,"⁶⁰² New Zealand's special regime for the long-term detention of "mass arrivals,"⁶⁰³ and Canada's "designated foreign

because a woman refugee might not obtain as many cigarettes as a male refugee": Statement of Mr. Fritzer of Austria, *ibid.* at 11. The trivialization of the importance of sex discrimination – not to mention the fact that cigarette distribution is clearly not within the substantive ambit of the Refugee Convention – attest to a shockingly weak grasp of the issues at hand.

⁵⁹⁷ *Ibid.* at 12. Interestingly, the observer from the Confederation of Free Trade Unions resurrected the issue of amending Art. 3 to embrace sex discrimination during the final reading of the Convention. There is no reported discussion of her proposal, the present text of Art. 3 being adopted without amendment by a vote of 21–0 (1 abstention): UN Doc. A/CONF.2/SR.33, July 24, 1951, at 7.

⁵⁹⁸ See text at note 513. ⁵⁹⁹ See text at note 514. ⁶⁰⁰ See Chapter 1.5.5 at note 453.

⁶⁰¹ Civil and Political Covenant, at Art. 26. ⁶⁰² See text at note 516.

⁶⁰³ See text at note 519.

national” regime which imposes detention and other rights deprivations on refugees who are “irregular” arrivals (for example, because a smuggler facilitated their entry without documentation).⁶⁰⁴

The Human Rights Committee has provided little systematic guidance on the meaning of the residual category of “other status.”⁶⁰⁵ Its general approach has been to insist on the “all encompassing character of the terms of this article,”⁶⁰⁶ equating “other status” simply with an “identifiably distinct category,”⁶⁰⁷ and finding, for example, that it would “not exclude that ‘residence’ may be a status that prohibits discrimination.”⁶⁰⁸ This approach aligns neatly with the general goal of non-discrimination law to ensure that “individuals should be judged according to their *personal qualities* . . . [which] tenet is contravened if the treatment is based on their *status* [emphasis added].”⁶⁰⁹

Following this approach, there is no reason to see a group defined by mode of arrival as other than members of an “identifiably distinct category” and hence as protected from discrimination on the basis of “other status.” Whatever deference to immigration-based categories might otherwise be thought fair,⁶¹⁰ there is no warrant to depart from the ordinary meaning of “other status” in order to insulate from scrutiny a category defined in contravention of Art. 31 of the Refugee Convention’s express prohibition of the “impos[ition of] penalties, on account of their illegal entry or presence, on refugees.”⁶¹¹ Indeed, regimes such as those adopted by Australia⁶¹² and

⁶⁰⁴ See text at notes 517–518.

⁶⁰⁵ S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2013), at [23.27]. The authors list various statuses found to qualify as “other status”: ibid. at [23.29]. See also J. Pobjoy, “Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection,” (2010) 34 *Melbourne University Law Review* 181, at 206.

⁶⁰⁶ *Vuolanne v. Finland*, HRC Comm. No. 265/1987, decided Apr. 7, 1989, at [9.6].

⁶⁰⁷ *B d. B v. Netherlands*, HRC Comm. No. 273/1989, decided Mar. 30, 1989, at [6.7].

⁶⁰⁸ *Pohl v. Austria*, HRC Comm. No. 1160/2003, decided July 9, 2004, at [9.4].

⁶⁰⁹ Friedman, *Discrimination*, at 109. See generally Chapter 1.5.5.

⁶¹⁰ In one case, the Human Rights Committee has suggested that it would apply its “objective and reasonable” framework (see Chapter 1.5.5) to the definition of which forms of identity attract the duty of non-discrimination: *Gueye v. France*, HRC Comm. No. 196/1985, decided Apr. 3, 1989, at [9.4] (“A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26”).

⁶¹¹ See Chapter 4.2. The Refugee Convention is appropriately considered in the application of the Civil and Political Covenant to refugees as part of the legal “context” of the Covenant: see Chapter 2.2 at note 88.

⁶¹² See text at note 516. It has been argued by some that Australia’s policy is essentially driven by considerations of race. “Boat people are predominantly South-East Asian asylum-seekers who come to Australia by sea without authority . . . They are all unlawful non-citizens . . . Although Australia had a detention policy, it had been used only for specific cases and only for individuals until the arrival of the boat people. It was activated to incarcerate this particular group. This discriminatory response arose out of the fear of Australia’s ‘significant

Canada⁶¹³ that stigmatize a subset of refugees for doing only what international law expressly allows them to do – arriving without pre-authorization to seek protection – ought not only to be scrutinized as discrimination based on “other status,” but should not survive scrutiny as reasonable policies given their flaunting of international legal duties. The New Zealand system – imposing differential treatment only on “mass arrivals”⁶¹⁴ – also treats some refugees differently based simply upon their mode of arrival, and therefore also raises an issue of differentiation based on “other status.” In contrast to the unlawful stigmatization of “irregular arrivals” by Australia and Canada, however, the New Zealand policy may well be adjudged “reasonable” and thus non-discriminatory. Both the drafting history of the Refugee Convention and relevant UNHCR Executive Committee standards provide support for granting states some flexibility to engage in categorical differentiation in the context of a true “mass influx,”⁶¹⁵ though of course the extent of the differentiation based on that category would itself still need to be shown to be objective and reasonable.⁶¹⁶

Just as Art. 31 of the Refugee Convention sensibly informs an understanding of impermissible differentiation based on “other status,” so too Art. 3 of the Refugee Convention is helpful as an interpretive aid to Art. 26 of the Civil and Political Covenant, assisting in tackling the central question in non-discrimination analysis of whether a differential allocation of refugee rights may be found to be “reasonable.” In answering this question, reliance should be placed on the fact that Art. 3 of the Refugee Convention defines a series of entitlements that are presumptively to follow from refugee status. These include not only rights that mirror those found in the Covenants and elsewhere (e.g. freedom of movement, right to work), but also other rights uniquely relevant to the situation of refugees (e.g. non-penalization for illegal entry,

other: Asia”: D. McMaster, *Asylum Seekers: Australia’s Response to Refugees* (2001), at 2–3. Alternatively, Fonteyne suggests that the underlying basis for discrimination might be the region (or countries) of origin. “[T]he policy in effect violate[d] the non-discrimination standard mandated by Article 3 of the Refugee Convention (as only boat people, and not on-shore applicants are routinely detained, and boat people in reality predominantly come from particular geographic regions)”: J.-P. Fonteyne, “Illegal Refugees or Illegal Policy?”, in Australian National University Department of International Relations ed., *Refugees and the Myth of the Borderless World* 16 (2002), at 16. The issue of whether discrimination against “boat people” was a violation of the duty of non-discrimination on the basis of “other status” was not adjudicated by the Human Rights Committee in *A v. Australia*, HRC Comm. No. 560/1993, UN Doc. CCPR/C/59/D/560/1993, decided April 30, 1997. Australia’s detention of the “boat people” was, however, found to violate Arts. 9(1), 9(4), and 2(3) of the Civil and Political Covenant.

⁶¹³ See text at notes 517–518. ⁶¹⁴ See text at note 519.

⁶¹⁵ See Chapter 4.1.5. UNHCR Executive Committee Conclusions on International Protection are properly understood to be interstate agreements that form part of the context for interpretive purposes: see Chapter 2.2. at note 80 ff.

⁶¹⁶ See Chapter 1.5.5 at note 468.

non-refoulement, and access to identity documents). A state party seeking to justify differential protection of some part of the refugee population on any status-based ground therefore faces a particular hurdle when the subject matter of the differentiation is a right expressly guaranteed in the Refugee Convention itself: because these are rights that are explicitly intended to inhere in persons who are refugees *simply because* they are refugees, the government withholding these rights should be expected to overcome that presumption in seeking to demonstrate the reasonableness of its failure to treat all refugees equally.

Despite both its direct and indirect value to contesting discrimination against subsets of the refugee population, the efficacy of Art. 3 is nonetheless sometimes questioned on the grounds that it appears to be overridden by Art. 5 of the Refugee Convention, which provides that “[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.”⁶¹⁷ Because “nothing” in the Convention impairs Art. 5, it is arguable that the article entitles states to grant superior rights to preferred categories of refugees, so long as no class receives treatment below the minimum standard of treatment required by the Convention.⁶¹⁸ Particularly because Art. 5 was originally incorporated in the Convention immediately after the duty of non-discrimination,⁶¹⁹ it may therefore be read to authorize governments to depart from the principle of Art. 3 if a subset of the refugee population is thereby benefitted.⁶²⁰

Importantly, though, there is nothing in Art. 5 that *requires* a reading that abrogates Art. 3’s duty of non-discrimination. Moreover, construing Art. 5 in a way that would allow discrimination might reasonably be contested by reliance on the duty to interpret a treaty in a manner that avoids internal conflict.⁶²¹ On the other hand, no conflict arises if Art. 5 is understood simply as an invitation to governments to agree to higher standards than those mandated by the Refugee Convention,⁶²² not as countenancing the granting of privileges to only a select subset of refugees. The latter result is in any event

⁶¹⁷ See generally Chapter 1.4.5.

⁶¹⁸ See e.g. S. Blay and M. Tsamenyi, “Reservations and Declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,” (1990) 2(4) *International Journal of Refugee Law* 527 (Blay and Tsamenyi, “Reservations”), at 556–557.

⁶¹⁹ UN Doc. E/AC.32/SR.43, Sept. 28, 1950, at 14.

⁶²⁰ See Weis, *Travaux*, at 44; Robinson, *History*, at 76; Marx and Staff, “Article 3,” at 648.

⁶²¹ “The terms of a treaty norm must, first of all, be interpreted ‘in their context’ (Art. 31(1) of the Vienna Convention). This context includes, particularly, all the other terms of the treaty in which the norm is set out . . . Only if one of . . . two norms explicitly goes against the other norm is the presumption against conflict rebutted”: J. Pauwelyn, *Conflict of Norms in Public International Law* (2003), at 247. See also Chapter 2.2 at note 57.

⁶²² There was clearly interest in encouraging states to grant protections that exceed those stipulated by the Refugee Convention. See e.g. the exchange between Mr. Warren of the United States and Mr. Herment of Belgium: UN Doc. A/CONF.2/SR.5, July 4, 1951, at 8. See generally Chapter 1.4.5.

now compelled by Art. 26 of the Civil and Political Covenant, which as previously noted requires equal protection of the law without discrimination “in any field regulated and protected by public authorities.”⁶²³ Thus, for example, if access to the labor market on terms of parity with nationals is granted immediately to any subset of the refugee population, it must be extended to all absent a showing of differing capabilities and potentialities sufficient to justify the preferred treatment of only a subset of the refugee population.

So, what is the present day net value of Art. 3 of the Refugee Convention?

There is no doubt that the Covenants today are now the most critical source of relevant protection,⁶²⁴ setting a critical guarantee of non-discrimination in relation to rights not guaranteed under the Refugee Convention, as well as significantly expanding the list of grounds on which discrimination is not allowed. Art. 26 of the Civil and Political Covenant is of particular importance, setting a broad-ranging duty of equal protection of the law in relation to any matter regulated by a state – including, therefore, a state’s refugee protection system.

Yet the Refugee Convention remains relevant. Most importantly, Art. 3 of the Refugee Convention plays a complementary role to the Covenants by defining a core sphere of interests in regard to which the allocation of differential rights to refugees or subsets of the refugee population should be presumed not to be justifiable – making it clear, for example, that refugee-specific concerns such as immunity from penalization for unlawful entry or presence, the issuance of identity and travel documents, protection from expulsion or *refoulement*, and access to naturalization must be implemented without discrimination. Indeed, even where cognate rights are protected under both general human rights law and the Refugee Convention, the often greater specificity of Convention rights allows Art. 3 to expand or clarify the scope of a protected interest – for example, that non-discriminatory access to the general right to food includes non-discriminatory access to rationing systems,⁶²⁵ and that non-discriminatory access to the courts includes non-discriminatory access to legal assistance.⁶²⁶

In addition to Art. 3, the Refugee Convention as a whole is of value in applying generic non-discrimination norms to refugees. As shown above,⁶²⁷ for example, the Refugee Convention helps in the refugee-specific analysis of the scope of protected categories – for example, looking to Art. 31 of the

⁶²³ UN Human Rights Committee, “General Comment No. 18: Non-discrimination” (1989), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at [12]. See Chapter 1.5.5 at note 455.

⁶²⁴ There is much force in the view that “Article 3 of the Geneva Convention has . . . largely – if not totally – been neutralized by Article 26 of the Covenant” (Chetail, “Are Refugee Rights Human Rights?,” at 49), though as described below the Refugee Convention plays a critical complementary role to the general non-discrimination norms.

⁶²⁵ See Chapter 4.4.1. ⁶²⁶ See Chapters 4.10 and 5.5. ⁶²⁷ See text at note 610 ff.

Convention to conclude that the prohibition of discrimination based on “other status” should include discrimination based on a refugee’s mode of arrival. The Convention’s levels of attachment⁶²⁸ can also be of real value in understanding what forms of differentiation should be understood to be “reasonable” and hence non-discriminatory – meaning, for example, that any attempt to treat refugee children less well than citizens in terms of access to basic education⁶²⁹ or rules on the employment of some or all refugees that fall short of most-favored-national standards⁶³⁰ should, because they fall below the Refugee Convention’s minimum standard of treatment, be understood to fall short of what is reasonable and thus be deemed presumptively discriminatory.

In each of these ways, Art. 3 and companion provisions of the Refugee Convention serve as an important contextual check on the possibility of interpretations that might undermine the value to refugees of the general duty of non-discrimination.

3.5 Restrictions on Refugee Rights

A state that makes no reservation to the terms of the Convention, and which does not avail itself of the formal option to limit its obligations temporally⁶³¹ or geographically,⁶³² may validly restrict refugee rights under only very narrow circumstances. The Refugee Convention – in contrast, for example, to the Civil and Political Covenant – does not grant governments a general right to suspend or withhold Convention rights, even in emergency situations. Apart from a small number of Convention rights specifically subject to limitations for reasons of security or criminality,⁶³³ the only lawful restrictions on refugee rights are those

⁶²⁸ See Chapter 3.1. ⁶²⁹ See Chapter 4.8. ⁶³⁰ See Chapter 6.1.

⁶³¹ This can be achieved by acceding to the Refugee Convention, without also acceding to the Refugee Protocol. See Chapter 1.4.3 at note 88.

⁶³² A state may restrict its obligations to persons who became refugees as the result of events occurring in Europe by acceding to the Refugee Convention, but not to the Refugee Protocol, and making a declaration at the time of signature, ratification, or accession specifying that it is governed by the interpretation of the refugee definition set out in Art. 1(B)(1)(a) of the Refugee Convention. Those states which became parties to the Refugee Convention and which elected to adopt the interpretation set out in Art. 1(B)(1)(a) prior to 1967 may also validly retain that geographical limitation, even while broadening the temporal scope of their obligations by accession to the Refugee Protocol. Other governments that opt to bind themselves to refugees without temporal limitation by accession to the Refugee Protocol must, however, also accept obligations without geographical limitation. See Chapter 1.4.3 at notes 89–90.

⁶³³ These include Art. 33 (*non-refoulement*: “may not, however, be claimed . . . [if] danger to the security of the country . . . or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”); Art. 32 (freedom from expulsion: “save on grounds of national security or public order”); and Art. 28 (travel documents: “unless compelling reasons of national security or public order otherwise require”). See generally Chapters 4.1.4, 5.1, and 6.6.

taken in accordance with Art. 9 of the Convention, providing for the provisional suspension of refugee rights on national security grounds during a war or other grave emergency – and even these measures must come to an end once refugee status is verified. Nor may refugees be subject to peacetime measures of retaliation or retorsion imposed on the grounds of their formal nationality.

3.5.1 Suspension of Rights for Reasons of National Security

Refugee Convention, Art. 9 Provisional Measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

The drafters of the Convention considered, but did not adopt, an all-embracing power of derogation in time of national crisis.⁶³⁴ The British proponent of the derogation clause wanted governments to be in a position to withhold rights from refugees if faced with a mass influx during wartime or other crisis. Because it would be impossible immediately to verify whether each person should be excluded from refugee status on security grounds,⁶³⁵ he argued that governments required some breathing space in order to avoid granting rights to persons who might be found to represent a danger to the host state.⁶³⁶

His concern was valid, since a significant number of rights accrue to refugees even before their status has been formally determined.⁶³⁷ Yet, as the

⁶³⁴ “A contracting State may at a time of national crisis derogate from any particular provision of this Convention to such extent only as is necessary in the interests of national security”: Proposal of the United Kingdom, UN Doc. E/AC/32/L.41, Aug. 15, 1950.

⁶³⁵ Refugee Convention, at Art. 1(F). The exclusion clauses which form an integral part of the definition of refugee status also provide critical safeguards for governments. On this topic, see generally Grahl-Madsen, *Status of Refugees I*, at 262–304; and Hathaway and Foster, *Refugee Status*, at 524–598.

⁶³⁶ “He recalled the critical days of May and June 1940, when the United Kingdom had found itself in a most hazardous position; any of the refugees within its borders might have been fifth columnists, masquerading as refugees, and it could not afford to take chances with them. It was not impossible that such a situation could be reproduced in the future”: Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 8. See also the comments of Mr. Theodoli of Italy, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 20: “[T]he main concern was to know whether at a time of crisis the Contracting States could resort to exceptional measures. He referred to the situation of Italy at the outset of the war when thousands of refugees had flocked to the frontiers of Italy.”

⁶³⁷ See generally Chapters 3.1.1, 3.1.2, and 3.1.3. The assurance of the representative of the United States that “the doubts of the United Kingdom representative might be resolved by

American delegate insisted, it was equally important that any exception to the duties owed refugees be limited to “very special cases.”⁶³⁸ The focus of attention therefore became how to ensure that states faced with a critical emergency could protect vital national security interests during the time required to investigate particular claims to refugee status.⁶³⁹ The resultant Art. 9 is carefully circumscribed,⁶⁴⁰ reflecting the desire to strike a balance between the legitimate concerns of war-torn states and those of the refugees who fled to them.⁶⁴¹ As the sole general provision on derogation in the Convention, a government must either meet the requirements of Art. 9 or “the whole Refugee Convention remains plainly applicable even in times of armed conflict.”⁶⁴²

the fact that any Government would be free to hold that any individual was not a *bona fide* refugee, in which case none of the provisions of the convention would apply to him” failed to recognize this critical point: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 8. See also UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 19.

⁶³⁸ Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 21. In particular, Mr. Henkin agreed that the Convention “ought not to prevent Governments in time of war from screening refugees to weed out those who were posing as such for subversive purposes.” His concern was simply that “any limitation . . . ought to be defined more precisely than had been proposed, rather than leaving it open to countries to make far-reaching reservations. He would like the limitation to be as narrow as was possible”: Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 6.

⁶³⁹ “The President recalled that . . . there had been no doubt that dangerous persons, such as spies, had to be dealt with under national laws. The question had then been raised as to the action to be taken in respect of refugees on the declaration of a state of war between two countries, which would make it impossible for a particular State to make an immediate distinction between enemy nationals, in the country, supporting the enemy government, and those persons who had fled from the territory of that enemy country. The Ad Hoc Committee had come to the conclusion that, while a government should not be in a position to treat persons in the latter category as enemies, it would need time to screen them”: Statement of the President, Mr. Larsen, UN Doc. A/CONF.2/SR.6, July 4, 1951, at 15.

⁶⁴⁰ Art. 9 is thus not in any sense the “*carte blanche*” suggested by Davy: U. Davy, “Article 9,” in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 781 (2011) (Davy, “Article 9”), at 784.

⁶⁴¹ Art. 9 contrasts, for example, with the cognate provision in the Civil and Political Covenant, which allows for the *ongoing* suspension of rights in the context of the *broader category* of a “public emergency which threatens the life of the nation and the existence of which is officially proclaimed”: Civil and Political Covenant, at Art. 4(1). As separate treaties, the Refugee Convention and other applicable human rights treaties must be independently implemented in good faith. It is therefore not the case that “[t]he limitations deriving from human rights law also delineate the State powers under Art. 9 of the 1951 Convention if and when the measures interfere with relevant human rights” in consequence of which “provisional measures under Art. 9 have, over time, become outdated by human rights law”: Davy, “Article 9,” at 791, 803.

⁶⁴² V. Chetail, “Armed Conflict and Forced Migration: A Systematic Approach to International Humanitarian Law, Refugee Law, and International Human Rights Law,”

In line with its limited objective, Art. 9 does not authorize generalized derogation on an ongoing basis,⁶⁴³ but only as a provisional measure “pending a determination by the Contracting State that that person is in fact a refugee.”⁶⁴⁴ A state that wishes to avail itself of the provisional measures authority must therefore proceed to verify the claims to refugee status of all

in A. Clapham and P. Gaeta eds., *The Oxford Handbook of International Law in Armed Conflict* 700 (2014), at 713. See also D. Cantor, “Laws of Unintended Consequence: Nationality, Allegiance and the Removal of Refugees during Wartime,” in D. Cantor and J. Durieux eds., *Refuge from Inhumanity: War Refugees and International Humanitarian Law* 345 (2014) (Cantor, “Unintended Consequence”), at 366 (“[W]e should be clear that the existence of a set of circumstances triggering the threshold provisions of [international humanitarian law] does not serve to displace *en masse* the legal effect of international refugee law . . . [T]he fact that the Refugee Convention already takes into account the factor of military necessity in times of war shows clearly that it is not, as a body of law, subject to derogation but rather continues to apply during armed conflict”). Edwards in contrast makes a far-reaching claim that there is an implied right of derogation borne of state practice (A. Edwards, “Temporary Protection, Derogation and the 1951 Refugee Convention,” (2012) 13(2) *Melbourne Journal of International Law* 595 (Edwards, “Temporary Protection”), at 624), a case based on the dubious assumption that state practice under the Convention amounting to subsequent agreement can establish, rather than simply interpret, law: see Chapter 2.4. Conversely, Durieux and McAdam argue for a treaty-based right to derogate from refugee obligations that takes no account of the role of Art. 9: J.-F. Durieux and J. McAdam, “Non-refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies,” (2004) 16(1) *International Journal of Refugee Law* 4.

⁶⁴³ Nor may states rely on their domestic laws to deny refugee rights based on security concerns on an ongoing (rather than provisional) basis. As the Court of Justice of the European Union observed in response to the withholding of a residence permit from a refugee believed to support the Turkish PKK, “[a]s those rights conferred on refugees result from the granting of refugee status and not from the issue of the residence permit, the refugee, as long as he holds that status, must benefit from [refugee] rights”: *HT v. Land Baden-Württemberg*, Dec. No. C-373/13 (CJEU, June 24, 2015), at [97]. See also *M v. Czech Republic, X and X v. Belgium*, Dec. Nos. C-391/16, C-77/17, and C-78/17 (CJEU, May 14, 2019), at [108], finding that “there is no way of interpreting [EU law] as having the effect of encouraging . . . States to shirk their international obligations as resulting from the Geneva Convention by restricting the rights that those persons derive from that convention.”

⁶⁴⁴ Convention, at Art. 9. Despite the clear language of this provision, it has been suggested that a “determination . . . that that person is in fact a refugee” does not mean what it says; rather, “[t]he ultimate aim of the determination under Art. 9 is not to clarify refugee status according to the criteria in Art. 1, but to find out whether the individuals concerned – bound via their nationality to a country engaged in severe hostilities against their host country – are (still) loyal to their country of nationality and, hence, a security risk for their host country”: Davy, “Article 9,” at 800. This approach is not only contrary to the plain language and drafting history of the article, but would allow a state effectively to suspend its obligations in perpetuity. Yet even the Australian representative – who argued perhaps most strenuously for a wide-ranging power of derogation – made clear “that it was never his delegation’s intention to open the way to an indefinite extension of the circumstances in which states could take exceptional measures”: Statement of Mr. Shaw of Australia, UN Doc. A/CONF.2/SR.6, July 4, 1951, at 14.

persons whose rights are thereby suspended.⁶⁴⁵ If a particular person is found not to be a Convention refugee, including on the basis of criminal or other exclusion under Art. 1(F), no rights under the Refugee Convention accrue, and removal from the territory or the imposition of other restrictions is allowed.⁶⁴⁶ If, on the other hand, an individual is found to satisfy the Convention refugee definition,⁶⁴⁷ Art. 9 establishes a presumption that the provisional measures shall come to an end.⁶⁴⁸

The duty to terminate provisional measures upon refugee status recognition does not mean, however, that the government of the asylum country is prevented from protecting itself against risks to its national security. It must, however, ground its actions in the authority of a particular article of the Convention, rather than relying on the generic authority of Art. 9.⁶⁴⁹ The drafters moreover made provision for the possibility that in some cases security concerns might not be fully investigated even by the time of status recognition, an understandable possibility in the context of war or other exceptional circumstances. Concerned that if the authorities of an asylum state were denied the ability to investigate even late-breaking security risks in a specific case they might take a less generous attitude toward the admission of refugees,⁶⁵⁰ the

⁶⁴⁵ “During the war . . . [i]t was impossible to give all persons entering the country as refugees a thorough security examination, which had to be deferred till exceptional circumstances made it necessary”: Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 8. As Robinson observes, “[t]he purpose of Art. 9 is to permit the wholesale provisional internment of refugees in time of war, followed by a screening process”: Robinson, *History*, at 95.

⁶⁴⁶ Countervailing domestic or international legal obligations, for example duties to avoid removal under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (UNTS 24841), adopted Dec. 10, 1984, entered into force June 26, 1987, may operate independently to prevent removal from the asylum country.

⁶⁴⁷ Robinson argues that the provisional measures “have to be suspended if the person involved can prove conclusively his status as a refugee”: Robinson, *History*, at 95. The literal meaning of Art. 9 cannot, however, sustain this interpretation. The requirement that in the case of a refugee “the continuance of such measures [must be] necessary in his case in the interests of national security” is, however, a sufficient basis to argue that absent such a finding, provisional measures must be terminated.

⁶⁴⁸ Contrary to both the express language and drafting history of Art. 9, Davy argues that provisional measures may be applied not only to refugees who have not yet been recognized, but also to “individuals who have – on the basis of a formal determination or just informally – been admitted as refugees. They might all be subjected to provisional measures”: Davy, “Article 9,” at 801.

⁶⁴⁹ See text at note 644.

⁶⁵⁰ “In his country refugees were granted legal status after a previous examination on their entering the country; later information obtained sometimes threw new light on their possible danger to the community. If the State were not permitted to take measures against refugees in the light of such later information, it would be less willing to accord them citizen status”: Statement of Mr. Winter of Canada, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 10.

drafters approved an exception to the presumption that a positive determination of refugee status ends the application of provisional measures.⁶⁵¹ If there is a specific finding in regard to a particular refugee “that such measures are still necessary *in his case* in the interests of national security [emphasis added],”⁶⁵² provisional measures may be continued for the time it takes to investigate those concerns. As an exception to the general purpose of Art. 9, however, this authority must be restrictively construed. In particular, it authorizes only the continuance of provisional measures, not the establishment of indefinite restrictions in the interests of national security.⁶⁵³ Nor does it provide any general authority to limit the rights of persons already recognized to be Convention refugees.⁶⁵⁴

As noted above,⁶⁵⁵ the primary concern of the drafters was to enable states at war to intern refugee claimants pending status assessment.⁶⁵⁶ As adopted, however, Art. 9 authorizes the suspension of rights other than freedom of movement.⁶⁵⁷ Indeed, the plain language of Art. 9 suggests that in an appropriate case a state might suspend any of the rights set by the Refugee Convention.⁶⁵⁸ Cantor nonetheless sensibly argues that because the goal is to

⁶⁵¹ Edwards' view (*pace* Davy, “Article 9,” at 800) that “[t]he suspension of rights continues until refugee status is granted, or if recognized as a refugee, *the measures can remain in place as long as they are necessary* [emphasis added]” (Edwards, “Temporary Protection,” at 622–623) seems to take no account of the clear language of Art. 9 mandating a specific determination that individuated continuation of measures post-recognition remains necessary.

⁶⁵² UN Doc. E/1850, Aug. 25, 1950, at 16. There is no indication that the rephrasing of the provision (“that the continuance of such measures is necessary in his case”) was intended to effect a substantive change of any kind. *Quaere* therefore the logic of Edwards' invocation of unspecified parts of the *travaux préparatoires* to justify her rejection of a presumptive duty to terminate special measures upon recognition: Edwards, “Temporary Protection,” at 623, n. 156.

⁶⁵³ This is clear both from the reference to the continuance of “such measures,” and from the inclusion of the provision as part of an article expressly dedicated to provisional measures.

⁶⁵⁴ Art. 9 authorizes the “continuance” of provisional measures in exceptional cases, but not their initiation or reestablishment.

⁶⁵⁵ See note 636.

⁶⁵⁶ “Everyone would agree that a Government in time of crisis might be forced to intern refugees in order to investigate whether they were genuine or not and therefore a possible danger to the security of the country”: Statement of Mr. Bienenfeld of the World Jewish Congress, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 18. See also Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.28, July 19, 1951, at 6: “The kind of action which he envisaged States might take under the provisions of [Art. 9] would be, for example, the wholesale immediate internment of refugees in time of war, followed by a screening process, after which many could be released.”

⁶⁵⁷ “Nothing in this Convention shall prevent a Contracting State . . . from taking provisionally measures which it considers to be essential”: Refugee Convention, at Art. 9.

⁶⁵⁸ For example, the British representative to the Ad Hoc Committee had “wished to explain that the term ‘exceptional measures’ covered not only internment but such measures as restrictions on the possession of wireless apparatus, in order to prevent the reception of

enable *provisional* measures, suspension of protection against expulsion or *refoulement* – the consequence of which would ordinarily be permanent – is not permissible by reliance on Art. 9.⁶⁵⁹

Just as the purport of Art. 9 is not limited to the drafters' main concern to enable states to detain refugees, neither is the triggering event for Art. 9 limited to the drafters' primary preoccupation with granting flexibility to states at "war." Art. 9 rather grants state parties the discretion to withhold rights from refugees "in time of war *or other grave and exceptional circumstances* [emphasis added]." This is not to suggest, for example, that serious economic difficulties warrant a suspension of rights.⁶⁶⁰ Nor was it intended that this general language would allow a government to invoke "public order" concerns,⁶⁶¹ or even general national security "interests."⁶⁶² It was understood that more than

code messages and the conversion of receiving into transmitting apparatus": Statement of Sir Leslie Brass of the United Kingdom, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 8.

⁶⁵⁹ Cantor, "Unintended Consequence," at 368; see also C. Wouters, *International Legal Standards for the Protection from Refoulement* (2009), at 132. Cantor's other reason for adopting this position – that each of Arts. 32 and 33 (on expulsion and *refoulement* respectively) contains an endogenous provision enabling states to deny protection for reasons of national security – is less persuasive, as the drafters might well have sought to liberate states from the strictures of those internal provisions when an asylum state is faced with war or a comparable situation. Edwards takes a different view, arguing "that the text reflects merely that nothing in the *Convention* prohibits derogation. It does not follow that derogation is permissible against *all* of the rights in the *Convention*": Edwards, "Temporary Protection," at 623. This leads her to contend that "non-discrimination provisions" and "the most fundamental of rights" (she mentions Arts. 3, 4, 8, and 33 as possible candidates) are not derogable under Art. 9: 624, 631. Davy in contrast opines that "Article 9 does not specify the articles of the 1951 Convention from which the contracting States may derogate. And Art. 9 does not contain a list of certain 'core rights' deemed non-derogable": Davy, "Article 9," at 783.

⁶⁶⁰ Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 21.

⁶⁶¹ A suggestion to adopt this traditional formulation made by Mr. Perez Perozo of Venezuela was not taken up by the drafters: UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 10. Thus, for example, the suggestion by Zimbabwe that it would "round up" urban refugees not employed or attending school in urban centers and remove them to refugee camps because "[s]ome of the refugees could end up being destitute or getting involved in illegal activities or prostitution for survival" would not be justified under Art. 9; see *Daily News* (Harare), May 20, 2002. But see Edwards, "Temporary Protection," at 623.

⁶⁶² This language was suggested by Mr. Shaw of Australia: UN Doc. A/CONF.2/SR.6, July 4, 1951, at 13. It was, however, "felt that there might be reasonable grounds for objecting to the Australian proposal that the phrase 'or in the interests of national security' should be inserted, since it would enable a State to take exceptional measures at any time, and not only in time of war or a national emergency": Statement of Mr. Hoare of the United Kingdom, *ibid.* at 14. See also Statements of Mr. Chance of Canada and Baron van Boetzelaer of the Netherlands, *ibid.* In the result, only a subset of national security concerns, namely those that arise during war or other grave and exceptional circumstances, were deemed sufficient to justify provisional measures. Kenya's forcible removal of refugees from urban areas to designated camps because of "security challenges in . . . urban centres and the need to streamline the management of refugees" (Kenya, Cabinet

just “grave tension”⁶⁶³ is required; the circumstances must also truly be “exceptional.”⁶⁶⁴

It is surely true that there is a “grave and exceptional circumstance” affecting national security if the government of the asylum state is faced with the risk of overthrow by illegal means.⁶⁶⁵ There is also little doubt that national security may also be at risk where there is a fundamental threat to a state’s citizens, wherever they may be located.⁶⁶⁶ But as Lord Slynn observed for the House of Lords in *Rehman*, “I do not accept that these are the only examples of action which makes it in the interests of national security to deport a person.”⁶⁶⁷

Secretary for Interior and Coordination of National Government, “Press Statement: Refugees and National Security Issues,” Mar. 20, 2014; see also “Kenya Orders All Refugees Back into Camps,” *Al Jazeera*, Mar. 26, 2014) therefore fails to demonstrate attention to the truly exceptional circumstances required by Art. 9.

⁶⁶³ Yet the Conference of Plenipotentiaries noted that “the expression ‘national emergency’ seemed unduly restrictive”: Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.6, July 4, 1951, at 14. The Australian delegate proposed the language “time of grave tension, national or international,” which was explicitly rejected by the Conference of Plenipotentiaries: UN Doc. A/CONF.2/SR.6, July 4, 1951, at 16. The French view that derogation should be allowed in the event of “cold war, approximating to a state of war, tension, a state of emergency or an international crisis calling for certain precautions” must therefore also be taken to have been impliedly rejected: *ibid.* at 14.

⁶⁶⁴ This language was proposed by the representative of the Netherlands, and adopted by the British delegate in the motion which ultimately was approved at the Conference of Plenipotentiaries: *ibid.* at 16.

⁶⁶⁵ “It must be borne in mind that . . . each government had become more keenly aware of the current dangers to its national security. Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against the country of their asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency”: Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.16, July 11, 1951, at 8. See also Statement of Mr. Chance of Canada, *ibid.*: “In drafting [Art. 33], members of [the Ad Hoc] Committee had kept their eyes on the stars but their feet on the ground. Since that time, however, the international situation had deteriorated, and it must be recognized, albeit with reluctance, that at present many governments would find difficulty in accepting unconditionally the principle [of *non-refoulement*].” This is in line with the classic concern that “[i]f a refugee is spying against his country of residence, he is threatening the national security of that country . . . The same applies if he is engaged in activities directed at the overthrow by force or other illegal means of the government of his country of residence, or in activities which are directed against a foreign government, which as a result threatens the government of the country of residence with intervention of a serious nature”: A. Grahl-Madsen, “Expulsion of Refugees,” in P. Macalister-Smith and G. Alfredsson eds., *The Land Beyond: Collected Essays on Refugee Law and Policy* by Atle Grahl-Madsen 7 (2001), at 8.

⁶⁶⁶ This was accepted even at the initial hearing level: *Rehman v. Secretary of State for the Home Department*, [1999] INLR 517 (UK SIAC, Sept. 7, 1999), per Potts J., at 528. This decision was subsequently considered in *Secretary of State for the Home Department v. Rehman*, [2000] 3 WLR 1240 (Eng. CA, May 23, 2000); and in *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47 (UK HL, Oct. 11, 2001), discussed below.

⁶⁶⁷ *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47 (UK HL, Oct. 11, 2001), per Lord Slynn of Hadley, at [16].

In line with greater contemporary concern about the risks of terrorism,⁶⁶⁸ senior courts have embraced a more ample understanding of national security.⁶⁶⁹ They have expressed concern that the traditional definition of national security, under which there was a requirement to show the risk of a direct impact on the host state,

limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defense but democracy, the legal and constitutional systems of the state, need to be protected. I accept that there must be a real possibility of an adverse effect on the [host state] for what is done by the individual under inquiry, but I do not accept that it has to be direct or immediate.⁶⁷⁰

⁶⁶⁸ “It seems to me that, in contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the United Kingdom. The means open to terrorists both in attacking another state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist, may be capable of reflecting on the safety and well-being of the United Kingdom or its citizens. The sophistication of means available, the speed of movement of persons and goods, the speed of modern communication, are all factors which may have to be taken into account in deciding whether there is a real possibility that the national security of the United Kingdom may immediately or subsequently be put at risk by the action of others”: *ibid.* On the other hand, Davy advocates a restrictive understanding of national security, leading her to opine that “threats pertaining to international terrorism do not qualify as ‘other grave and exceptional circumstances’ within the meaning of Art. 9, at least as long as the threats do not coincide clearly with inter-State hostilities”: Davy, “Article 9,” at 794–795.

⁶⁶⁹ Interpreting the similar notion of “public security,” the Court of Justice of the European Union recently determined that “this concept covers both the internal and external security of a Member State . . . Internal security may be affected by, *inter alia*, a direct threat to the peace of mind and physical security of the population of the Member State concerned . . . As regards external security, this may be affected by, *inter alia*, the risk of a serious disturbance to the foreign relations of that Member State or to the peaceful coexistence of nations”: *K v. Netherlands*, Dec. No. C-331/16 (CJEU, May 2, 2018), at [42]. See also *JN v. Staatssecretaris voor Veiligheid en Justitie*, Dec. No. C-601/15 PPU (CJEU, Feb. 15, 2016), at [66]; and *HT v. Land Baden-Württemberg*, Dec. No. C-373/13 (CJEU, June 24, 2015), at [78]. Scholarly opinion is divided on this question, with for example Davy arguing for “keeping the meaning of the term narrow,” specifically limited to “the integrity of the State only” (Davy, “Article 9,” at 797), while Edwards would include even “serious disturbances to public order” as within the scope of national security: Edwards, “Temporary Protection,” at 623.

⁶⁷⁰ *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47 (UK HL, Oct. 11, 2001), per Lord Slynn of Hadley, at [16]. See also *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Oct. 1, 2004), at [135]: “It is clear from the *travaux préparatoires* for the Refugee Convention that there was intended to be a margin of appreciation for States in the interpretation of that phrase . . . Indeed, one would expect that views on security could well differ between States, depending on the particular circumstances of those States . . . Views as to what would constitute a danger to national security can also legitimately change over time.”

Thus, the House of Lords in *Rehman* expressly authorized the executive to adopt a “preventative or precautionary” approach to the assessment of risks to national security,⁶⁷¹ finding that “[t]he United Kingdom is not obliged to harbour a terrorist who is currently taking action against some other state (or even in relation to a contested area of land claimed by another state) if that other state could realistically be seen by the [executive] as likely to take action against the United Kingdom and its citizens.”⁶⁷²

The Supreme Court of Canada not only endorsed the logic of the *Rehman* decision, but defined a relatively liberal evidentiary framework for meeting the broadened test of a risk to national security. In *Suresh*, the Court first acknowledged that not every danger to the public of a host state rises to the level of a threat to national security,⁶⁷³ and that it was generally accepted that “under international law the state must prove a connection between the terrorist activity and the security of the deporting country.”⁶⁷⁴ In line with the House of Lords, it held that “possible future risks must be considered,”⁶⁷⁵ and that the risk to national security “may be grounded in distant events that indirectly have a real possibility of harming Canadian security.”⁶⁷⁶ But in defining how the ultimate question of a “real and serious possibility of adverse effect [on] Canada”⁶⁷⁷ should be proved, the Supreme Court of Canada went beyond the approach of the House of Lords to endorse what appears to be an evidentiary presumption grounded in modern global interdependence, namely that proof of a risk to the security of another country is generally probative of a threat to Canadian national security:

International conventions must be interpreted in the light of current conditions. It may once have made sense to suggest that terrorism in one country *did not necessarily implicate* other countries. But after the year 2001, that approach is no longer valid [emphasis added].⁶⁷⁸

The implied assertion that terrorism in one country necessarily implicates the security of other countries is surely an empirical overstatement. But if understood to suggest simply that a connection is more likely than not, there are good grounds to accept the notion of a (rebuttable) presumption, namely that proof of risk to the most basic interests of one state by reason of the refugee’s actions justifies a *prima facie* belief that the refugee poses a risk to the national

⁶⁷¹ *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47 (UK HL, Oct. 11, 2001), per Lord Slynn of Hadley at [17].

⁶⁷² Ibid. at [19]. ⁶⁷³ *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002), at [84].

⁶⁷⁴ Ibid. at [85], citing J. Hathaway and C. Harvey, “Framing Refugee Protection in the New World Disorder,” (2001) 34(2) *Cornell International Law Journal* 257, at 289–290.

⁶⁷⁵ *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002), at [88].

⁶⁷⁶ Ibid. The views of the House of Lords and Supreme Court of Canada on this point were adopted by the New Zealand Court of Appeal in *Attorney General v. Zaoui*, Dec. No. CA20/04 (NZ CA, Oct. 1, 2004), at [147].

⁶⁷⁷ *Suresh v. Canada*, [2002] 1 SCR 3 (Can. SC, Jan. 11, 2002), at [88]. ⁶⁷⁸ Ibid. at [87].

security of his or her host state. This more moderate notion seems to infuse the Court's summary of the meaning of national security:

[A] person constitutes a “danger to the security of Canada” if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be “serious,” in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible [emphasis added].⁶⁷⁹

In sum, a refugee poses a risk to the host state’s national security if his or her presence or actions give rise to an objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host state’s most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions.⁶⁸⁰

Importantly, though, even where a risk to national security is shown, Art. 9 authorizes officials to take only “measures which [the state] considers to be essential to the national security in the case of a particular person [emphasis added].” While this language makes clear that states are entitled to make this assessment for themselves, the right of self-judgement must still be exercised in good faith.⁶⁸¹ While provisional measures may be taken collectively against all refugees, or in relation to a national or other subset of the refugee

⁶⁷⁹ Ibid. at [90].

⁶⁸⁰ While the drafters were primarily concerned to enable nationality-based withholding of rights, Davy’s position that *only* nationality-based measures are authorized by Art. 9 is not in keeping with the much more general language adopted: see Davy, “Article 9,” at 792, 794, 802. Edwards arguably goes too far in the opposite direction, suggesting that “derogations must be applied on an individual basis, based on the merits of that case, and they cannot be taken solely on the basis of nationality (per arts. 3 and 8)”: Edwards, “Temporary Protection,” at 622. This approach is not only at odds with the intentions of the drafters, but seems mistakenly to assume that all nationality-based differential treatment is discriminatory. In fact, only such treatment that is not objective and reasonable is discriminatory, a point conceded by Edwards herself: ibid. at 622.

⁶⁸¹ “[I]nternational practice, in particular the jurisprudence of the ICJ in ... *Djibouti v. France*, supports the conclusion that self-judging treaty exceptions, unless they are clearly framed otherwise, do not constitute a bar to jurisdiction but merely modify the standard of review ... This standard, as widely agreed, is whether the state in question has relied on a self-judging clause in good faith”: S. Schill and R. Briese, “If the State Considers’: Self-Judging Clauses in International Dispute Settlement,” (2009) 13(1) *Max Planck Yearbook of United Nations Law* 61, at 139. As the British drafter observed, “[i]t had therefore been decided that there should be a blanket provision whereby, *in strictly defined circumstances of emergency*, derogation from any of the provisions of the Convention would be permitted in the interests of national security [emphasis added]”: Statement of Mr. Hoare of the United Kingdom, UN Doc. A/CONF.2/SR.28, July 19, 1951, at 6. See also Davy, “Article 9,” at 798 (“Although Art. 9 explicitly accords discretion to States, their discretion is not unlimited. [They must] use their powers under Art. 9 in good faith”).

population,⁶⁸² a wholesale suspension of rights will only be justifiable as “essential” in response to an extremely compelling threat to national security. More generally, a restriction will only be “essential” if it is clearly framed and implemented in a manner that truly responds to the threat to national security.⁶⁸³ As observed by the High Court of Kenya in a challenge to the government’s order requiring all refugees to live in camps for reasons of national security,

it is incumbent upon the State to demonstrate that in the circumstances . . . a specific person’s presence or activity in the urban areas is causing danger to the country and that his or her encampment would alleviate the menace . . . A real connection must be established between the affected persons and the danger to national security posed and how the indiscriminate removal of all urban refugees would alleviate the insecurity threats in those areas.⁶⁸⁴

In sum, provisional measures suspending refugee rights may only be taken in time of war or comparable exceptional circumstances, and on the basis of a good faith assessment that they are essential to protection of the receiving state’s most vital national interests. The specific actions authorized are broad-ranging, though they must be logically connected to eradication of the security

⁶⁸² The reference to measures “in the case of a particular person” was agreed to without any substantive discussion, apparently on the grounds that the original reference to “any person” was unduly general relative to the usual reference in the Convention to “refugees”: UN Doc. A/CONF.2/SR.6, July 4, 1951, at 13. Grahl-Madsen advocates a literal interpretation, under which a state should “restrict the applicability of provisional measures to individual persons, thus ruling out large scale measures against groups of refugees”: Grahl-Madsen, *Commentary*, at 45. The concern, however, is that the drafters clearly did intend to give states leeway to take provisional measures against whole groups, including in particular large-scale provisional internment of persons arriving as part of a mass influx during a war or comparably grave circumstances: see text at notes 635–636. See also Davy, “Article 9,” at 800; and Edwards, “Temporary Protection,” at 624. An interpretation in line with this object and purpose can align with the text, since measures are taken in the case of a particular person whether they are *directed against* a particular person, or simply *define the treatment* of a particular person on the basis of a generalized assessment.

⁶⁸³ The requirement that the provisional “measures . . . be essential . . . in the case of a particular person [emphasis added]” suggests that the government in question should satisfy itself that the consequential violation of the human rights of particular refugees is an unavoidable necessity to avert the security risks occasioned by war or other exceptional circumstances. A refusal to sanction resort to “avoidable” provisional measures is consistent with the insistence of the drafters that this authority be “exceptional” and reserved for “very special cases”: see text at notes 637–639. Davy suggests that the threshold test should be whether “ordinary measures, i.e. non-derogating measures, proved or are plainly inadequate for the maintenance of national security”: Davy, “Article 9,” at 794.

⁶⁸⁴ *Kituo Cha Sheria et al. v. Attorney General*, Petitions Nos. 19 and 115 of 2013 (Ken. HC, July 26, 2013), at [87]. The result in this case was later overturned on different grounds in *Samow Mumin Mohamed et al. v. Cabinet Secretary, Ministry of Interior*, Dec. No. 206-2011 (Ken. HC, June 30, 2014).

concern and be justifiable as essential, taking full account of the particularized harms consequentially occasioned. Provisional measures may not be of indefinite duration, but instead normally come to an end if and when an individual's refugee status is formally verified. While they may exceptionally be continued where case-specific national security concerns have not been resolved by the time refugee status is formally determined, provisional measures may not otherwise be applied against persons recognized as Convention refugees.

3.5.2 *Exemption from Exceptional Measures*

Refugee Convention, Art. 8 Exemption from Exceptional Measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.

Outside the context of war or comparable crisis – addressed by Art. 9⁶⁸⁵ – the drafters of the Refugee Convention opposed any general right of states to suspend refugee rights.⁶⁸⁶ Of particular concern was the practice following the Second World War of subjecting refugees to confiscatory and other penalties imposed on enemy aliens:

After the Second World War, many refugees who had been persecuted by the Governments of the Axis countries were subjected to exceptional measures taken against the nationals of enemy countries (internment, sequestration of property, blocking of assets, etc.) because of the fact that formally they were still *de jure* nationals of those countries. The injustice of such treatment was finally recognized and many administrative measures (screening boards, special tribunals, creation of a special category of “non-enemy” refugees, etc.) were used to mitigate the practice.⁶⁸⁷

To ensure that refugees would not be stigmatized by the fact of their formal nationality,⁶⁸⁸ the International Refugee Organization played an

⁶⁸⁵ See Chapter 3.5.1. Because Art. 9 clearly provides that “[n]othing in this Convention [emphasis added]” prevents a state from taking provisional measures “in time of war or other grave and exceptional circumstances,” that clause ousts the general rules of Art. 8 where applicable.

⁶⁸⁶ See Chapter 3.5.1 at notes 643–644. ⁶⁸⁷ Secretary-General, “Memorandum,” at 48.

⁶⁸⁸ The nature of the dilemma is neatly summarized in Ad Hoc Committee, “First Session Report,” at 42: “Unless a refugee has been deprived of the nationality of his country of origin he retains that nationality. Since his nationality is retained, exceptional measures applied . . . to such nationals would be applied to him. The article provides therefore that

instrumental role in persuading governments to adopt Art. 44 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War:

[T]he Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any Government.⁶⁸⁹

As the Secretary-General convincingly argued, “[i]f this rule is to be applied in time of war, a similar rule must *a fortiori* be applied in time of peace. The object of Art. [8] is to remove both the person and property and interest of refugees from the scope of exceptional measures.”⁶⁹⁰

Nor was the concern of the drafters restricted to the particular measures that had been taken at the end of the Second World War. The French representative to the Ad Hoc Committee observed that refugees were sometimes penalized during peacetime on the grounds of their formal nationality by subjection to both retaliatory measures and restrictions resulting from economic or financial crisis.⁶⁹¹ While states required a margin of discretion to withhold rights from persons claiming refugee status during wartime, Mr. Juvigny insisted that there was no basis to assert a comparable prerogative during peacetime.⁶⁹² The decision was therefore taken to separate the rules relating to exceptional measures applicable only during war or

exceptional measures shall not be applied only on the grounds of his nationality.” The French delegate to the Ad Hoc Committee indicated that “the word ‘formally’ meant ‘legally’: Statement of Mr. Juvigny, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 7. Grahl-Madsen concludes that “[t]he word ‘formally’ means ‘legally’ or *de jure*, that is to say, according to the municipal law of the State concerned”: Grahl-Madsen, *Commentary*, at 40.

⁶⁸⁹ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (UNTS 973), done Aug. 12, 1949, entered into force Oct. 21, 1950, at Art. 44. The Red Cross has affirmed that Art. 8 of the Refugee Convention “clearly reflects Article 44 of the Fourth Geneva Convention”: “Humanitarian Debate: Law, Policy, Action,” (2001) 83(843) *International Review of the Red Cross* 633.

⁶⁹⁰ Secretary-General, “Memorandum,” at 48. “[T]he assumption of the Article is that, under certain circumstances, international law permits exceptional measures, defined as (punitive, preventive, or formally wrongful) measures employed by a State *vis-à-vis* another State or the nationals of another State, especially in times of conflict or dispute”: U. Davy, “Article 8,” in A. Zimmermann ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* 755 (2011) (Davy, “Article 8”), at 757; see also Edwards, “Temporary Protection,” at 621 (“[A]rt. 8 actually carves out an exception to the generally accepted position at international law”).

⁶⁹¹ Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 5.

⁶⁹² The French representative noted the importance of “making a distinction between two types of exceptional measures . . . namely: on the one hand, measures taken in peacetime or during crises of a non-military type . . . and, on the other hand, measures taken in exceptional circumstances which affected peace or national security. The provisions relating to the latter type of measures would naturally be more severe than the former”: *ibid.*

comparable emergencies (Art. 9) from those governing measures which might be taken at any time (Art. 8).⁶⁹³

The logic of exempting refugees from measures of retaliation or retorsion is fairly straightforward. The sorts of penalties sometimes applied against the citizens of a particular nationality during peacetime – for example, freezing or blocking of assets, the denial of visas, or curbing of civil liberties⁶⁹⁴ – are intended to punish or pressure the state of nationality to act or refrain from acting in a particular way. As observed above in the discussion of reciprocity,⁶⁹⁵ there is little reason to believe that a state which is the target of acts of retaliation or retorsion would be influenced by the suffering of persons who have rejected its protection by the act of seeking refugee status. The injustice of including refugees in the scope of exceptional measures is therefore clear.

The context governed by Art. 8 is quite broad.⁶⁹⁶ It was agreed, for example, that Art. 8 governs resort to exceptional measures during a “cold war, approximating a state of war, tension, a state of emergency or an international crisis calling for certain internal precautions.”⁶⁹⁷ There could also be a temporary dispute between states, for example in consequence of trade concerns or the failure to pay damages.⁶⁹⁸ Diplomatic relations may have been suspended or

⁶⁹³ “The measures referred to in article [8] were not designed only for times of emergency. A second paragraph should be added to cover the particular case of emergency in which the rights of refugees could be restricted, but only as little as was absolutely necessary”: Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.34, Aug. 14, 1950, at 22. In the Report of the Ad Hoc Committee, the two concerns were therefore addressed in different paragraphs of the same article. The Report notes simply that “the Committee thought it advisable to add a paragraph in order to clarify the application of this article in regard to measures related to national security in time of war and national emergency”: Ad Hoc Committee, “Second Session Report,” at 12. The Conference of Plenipotentiaries adopted a British proposal (UN Doc. A/CONF.2/26) to separate the two paragraphs into distinct articles of the Convention: UN Doc. A/CONF.2/SR.6, July 4, 1951, at 16.

⁶⁹⁴ In historical context, exceptional measures have included “the duty of certain foreign nationals to register, internment, deportation, the prohibition to land or to embark, the assignment of residence, restrictions on the changing of names, restrictions with respect to professions or employment, restrictions with respect to communications or associations, or restrictions with respect to property (appointment of custodians) and to transactions in foreign currency, gold, or silver”: Davy, “Article 8,” at 772.

⁶⁹⁵ See Chapter 3.2.2 at note 263.

⁶⁹⁶ “[I]t was impossible to legislate for future possible contingencies . . . It was, therefore, important that [Art. 8] should be made as flexible as possible”: Statement of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.26, July 19, 1951, at 9. It is not textually limited to peacetime, though it can clearly be ousted by the more specific language of Art. 9 during time of war or other critical national emergency: see Chapter 3.5.1.

⁶⁹⁷ Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.6, July 4, 1951, at 14.

⁶⁹⁸ In the Ad Hoc Committee, the Israeli representative “inquired whether the article was broad enough to include possible retaliation and retorsion by countries against subjects of States with which they had a temporary disagreement. He did not think that exceptional measures of that kind should apply to refugees from countries against whose subjects such

broken off completely. In all such circumstances, whatever measures may be taken en bloc against the citizens of the offending state may not be applied against refugees,⁶⁹⁹ irrespective of the duration and character of a particular refugee's presence.⁷⁰⁰

There are two important qualifications to this general rule.

First, the duty to exempt refugees from exceptional measures governs only measures taken solely on the grounds of nationality.⁷⁰¹ Because the objective of Art. 8 is to avoid unfairly stigmatizing refugees on the basis of their possession of a formal, but *de facto* ineffective, nationality,⁷⁰² only "wholesale measures"⁷⁰³ defined by nationality contravene Art. 8. Robinson observes that

measures were directed": Statement of Mr. Robinson of Israel, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 7. The Chairman, Mr. Chance of Canada, confirmed that such measures would be precluded by Art. 8: *ibid.* at 8.

⁶⁹⁹ The claim that "[e]xceptional measures within the meaning of Art. 8 of the 1951 Convention must be individualized" (Davy, "Article 8," at 772) is odd, given both the class-based nature of the historical exceptional measures that motivated the drafting of Art. 8 and the fact that Art. 8 refers to "measures which may be taken against the person, property or interests of *nationals* of a foreign State [emphasis added)": Refugee Convention, at Art. 8.

⁷⁰⁰ Indeed, as Grahl-Madsen suggests, because Art. 8 is not framed to require territorial attachment it likely operates to exempt a refugee from nationality-based exceptional measures in any country that exercises jurisdiction over him or her. "There can be no doubt that the Article applies to all Convention refugees, irrespective of whether they are present in the territory of the Contracting State concerned, and irrespective of the duration and character of their presence (legal or illegal). Consequently country A may not apply exceptional measures (for example sequestration of property) to a refugee from country B who has found asylum and is living in country C": Grahl-Madsen, *Commentary*, at 40. Davy's criticism of Grahl-Madsen's position (see Davy, "Article 8," at 769) needlessly invokes the notion of "special title" at international law, rather than focusing on the more clearly applicable notion of the level of attachment for Art. 8 rights.

⁷⁰¹ "[T]he word 'solely' ... indicated that, while exceptional measures could be taken against refugees, they could not be taken on the grounds of nationality alone": Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.21, Feb. 2, 1950, at 7. This understanding was affirmed by both the Turkish representative, *ibid.*, and by the Chairman, Mr. Chance of Canada, *ibid.* at 8: "[T]he article would prevent exceptional measures of retaliation or retorsion from being applied to refugees solely on the grounds of their nationality."

⁷⁰² "Article 8 does not mention former nationals of a foreign State. If, however, measures are taken against persons solely because they are, or have been (at any time) or are suspected of being, nationals of a certain State, it goes without saying that the case will fall within the scope of Article 8": Grahl-Madsen, *Commentary*, at 40. See also Statement of the President, Mr. Larsen of Denmark, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 6; and Robinson, *History*, at 93–94: "[I]n practice denaturalized citizens of an enemy state or persons whose origin was in such a state were frequently subjected to all or some of the measures taken against nationals. A proper interpretation of Art. 8 would lead us to the conclusion that mere former citizenship or origin in such a state cannot *a fortiori* be a reason for the application of exceptional measures to a refugee."

⁷⁰³ Weis, *Travaux*, at 75.

a state is free to apply to a refugee exceptional measures if they are taken on grounds other than his [formal] nationality. Thus Art. 8 . . . would not hinder the application of exceptional measures on account of the economic or political activity or special unwanted contacts of a refugee, if such activity or contacts are, in general, a reason for applying all or some of the exceptional measures.⁷⁰⁴

As this analysis suggests, the critical issue is the generality of the measure in question.⁷⁰⁵ So long as the exceptional measure is not aimed simply at persons of a particular nationality, but is instead applicable to all persons who meet the contingent standard that governs the right suspended, then refugees cannot complain when they too are subject to its impact.⁷⁰⁶ For example, refugees are entitled to property rights on terms “not less favourable than [those] accorded to aliens generally in the same circumstances.”⁷⁰⁷ Confiscatory exceptional measures applied to all aliens (whatever their nationality) would thus not contravene Art. 8. On the other hand, refugees are entitled to access rationing systems on terms of equality with nationals of the asylum state.⁷⁰⁸ Exceptional measures directed to aliens generally cannot therefore lawfully be applied against refugees, since refugees are outside the scope of the group legally subject to the measures. Importantly, though, even exceptional measures that do not contravene Art. 8 may nonetheless be challenged on the basis of the general duty of non-discrimination,⁷⁰⁹ though the margin of appreciation usually accorded states may undercut the utility of that remedy.⁷¹⁰

Second, the goal of Art. 8 is to ensure that exceptional measures defined by nationality do not, in practice, result in the denial of rights to refugees. The

⁷⁰⁴ Robinson, *History*, at 91.

⁷⁰⁵ See Grahl-Madsen, *Commentary*, at 39: “The reference to ‘nationals of a foreign State’ considerably restricts the applicability of the Article. It does not apply to measures which may be taken against stateless persons as such, or against aliens generally, not to speak of measures which are directed at one’s nationals and aliens without discrimination.”

⁷⁰⁶ “The Belgian representative appeared to be opposed to any possibility of interning refugees; the text however only prohibited such internment if it were effected simply on account of the refugees’ nationality. In 1939–40, and at later periods, the French authorities had interned not only aliens, but also a few French nationals suspected of fifth-column activities. Such a measure, which only conditions of crisis could justify, could not be prohibited under article [8]”: Statement of Mr. Juvigny of France, UN Doc. E/AC.32/SR.35, Aug. 15, 1950, at 7.

⁷⁰⁷ Refugee Convention, at Art. 13. ⁷⁰⁸ Ibid. at Art. 20.

⁷⁰⁹ The general duty to ensure equal protection of the law without discrimination under Art. 26 of the Civil and Political Covenant applies to all laws and policies: see Chapter 1.5.5. Davy’s concerns about the salience of non-discrimination law do not take account of this broader obligation: Davy, “Article 8,” at 765. In any event, and contrary to Davy’s claim that Art. 8 conflicts with the endogenous guarantee of non-discrimination in Art. 3, Art. 8 “is a non-discrimination principle, reemphasizing the non-discrimination clause in art. 3”: Edwards, “Temporary Protection,” at 621.

⁷¹⁰ See Chapter 1.5.5 at note 484 ff.

Swedish government waged a determined battle at the Conference of Plenipotentiaries to ensure that Art. 8 was not understood to require governments to rewrite domestic laws that fail to codify an exemption from exceptional measures in the case of refugees. Originally, the Swedish objective seemed to be to grant states a near-complete right to decide for themselves when refugees should benefit from an exemption from exceptional measures.⁷¹¹ But as the Belgian representative noted, the validation of state discretion to define the circumstances in which exemption is warranted “would considerably reduce the rights accorded to refugees by the Convention.”⁷¹² More specifically:

It was . . . to be feared that [the Swedish approach] would result in a regime of arbitrary decisions, since countries of residence would be at liberty either not to apply to a refugee the exceptional measures which they might be obliged to take against the person, property or interests of other nationals of his country of origin, or to grant certain exemptions in the case of such refugees. Refugees would therefore have no absolute right to exemption from the application of those measures, and decisions as to the cases in which exemption was appropriate would be left to Governments.⁷¹³

Even more emphatically, the Canadian representative asserted that the Swedish initiative resulted in an approach to Art. 8 that was “guilty of the unhappy fault of, so to speak, taking away with one hand what it gave with the other. In its original form, and before an attempt had been made to take into account the circumstances and laws of a certain country, the article had consisted of a simple and straightforward statement.”⁷¹⁴

Confronted with such direct attacks, the Swedish government sought to downplay the significance of the amendment it had sponsored to the text of

⁷¹¹ Sweden asserted that “[o]ne could easily imagine cases in which it would appear fully justified to maintain the confiscation of the property of a refugee even if that property, in his hands, did not constitute a menace to national security. A person might for instance have fled from Nazi Germany at a very late stage of the Second World War after having been a militant Nazi up to then. Should States decide to take certain measures against the nationals of another State, it would have to be left to their administrations to decide whether refugees from the country in question could be exempted from them”: Statement of Mr. Petren of Sweden, UN Doc. A.CONF.2/SR.27, July 18, 1951, at 28–29. Yet, as the British representative subsequently observed (UN Doc. A/CONF.2/SR.28, July 19, 1951, at 8), each state party would first have to determine whether or not the individual in question even qualified as a refugee. In the case cited by the Swedish delegate, there is good reason to believe that exclusion from refugee status under Art. 1(F)(a) is a real possibility. In any event, it is unclear that a militant Nazi fleeing Nazi Germany would in any sense have a well-founded fear of being persecuted in Nazi Germany.

⁷¹² Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.27, July 18, 1951, at 31.

⁷¹³ Statement of Mr. Herment of Belgium, UN Doc. A/CONF.2/SR.28, July 19, 1951, at 8.

⁷¹⁴ Statement of Mr. Chance of Canada, UN Doc. A/CONF.2/SR.34, July 25, 1951, at 18.

Art. 8. It insisted that the addition of the words “or shall provide for appropriate exemptions in respect of such refugees”⁷¹⁵ was simply intended to allow governments the option of meeting their Art. 8 obligation either by way of a generic exemption for refugees from exceptional measures, or by extending case-specific exemptions to all refugees.⁷¹⁶ Whichever option is taken, the result is the same, namely, a mandatory duty to exempt refugees from exceptional measures.⁷¹⁷ As the President of the Conference concluded, “the problem turned on the question of whether the application of certain measures should be ensured by means of automatic legislation or by means of exemptions. *In either case the obligations of the State would be the same* [emphasis added].”⁷¹⁸

In a last-minute effort to capture the essence of this consensus,⁷¹⁹ the Canadian representative persuaded delegates to accept an oral amendment to the previously accepted Swedish phrasing of Art. 8. Sadly, the precise language chosen can be construed in a way that gives rise to the very concern that both the Canadian delegate and the Conference as a whole appeared determined to avoid.⁷²⁰ Instead of the Swedish language “or shall provide for appropriate exemptions in respect of such refugees,”⁷²¹ the Canadian amendment adopted by the Conference provides that state parties whose domestic legislation prevents the granting of en bloc exemption from exceptional measures to

⁷¹⁵ UN Doc. A/CONF.2/37.

⁷¹⁶ The French representative’s view of the Swedish approach was that it “was very far from suggesting measures of an illiberal nature. It laid upon states the obligation to grant certain exemptions at the time when they were unable to observe the general principle enunciated in the article. If that principle was not acceptable to States, they would enter a general reservation to the article. He would interpret the words ‘ou accorderont’ as imposing an obligation to grant exemptions”: Statement of Mr. Rochefort of France, UN Doc. A/CONF.2/SR.34, July 25, 1951, at 20.

⁷¹⁷ “Either legislation could be passed exempting certain categories of aliens from the application of the enemy property act, or some arrangement could be made to enable such persons to claim the return of their property provided they could substantiate their right to restoration. Those two possibilities must both be allowed for, or administrative difficulties would arise”: Statement of Mr. Petren of Sweden, UN Doc. A/CONF.2/SR.28, July 19, 1951, at 8.

⁷¹⁸ Statement of the President, Mr. Larsen of Denmark, UN Doc. A/CONF.2/SR.34, July 25, 1951, at 19.

⁷¹⁹ “[H]e believed that the meeting was on the brink of agreement. There was no objection to the general principle that no exceptional measures should be applied to a refugee solely on account of his nationality”: Statement of Mr. Chance of Canada, *ibid.* at 22.

⁷²⁰ “The Conference posed the question whether the word ‘shall’ should be interpreted as being mandatory or permissive and came out firmly in favor of the first interpretation[.]. With regard to substance if not to form, the obligations of the Contracting States would be the same whether they based themselves on the first or the second sentence”: Grahl-Madsen, *Commentary*, at 41. Robinson, however, takes the view that “the second sentence (included by the Conference) considerably restricts the import of this article . . . It is obvious that the sentence was included in order to ‘appease’ states which are not or would not be willing to accept the general rule as expressed in the first sentence”: Robinson, *History*, at 90–91.

⁷²¹ UN Doc. A/CONF.2/37.

refugees “shall, *in appropriate cases*, grant [exemptions] in favour of such refugees [emphasis added].”⁷²² Thus, even though the Swedish government had been content with language that appeared quite clearly to impose a mandatory duty to exempt all refugees (albeit via a process of particularized exemptions), the literal text of the Canadian amendment – which includes the qualifying phrase “*in appropriate cases*” – may be read to suggest that there will be some cases in which exemption will not be appropriate, and hence not necessary.⁷²³

This is clearly a case in which reliance simply on the plain language of the treaty would result in an interpretation that is inconsistent not only with the general purpose of the Refugee Convention, but moreover with the express intention of every state that addressed the intended scope of Art. 8 at the Conference of Plenipotentiaries.⁷²⁴ This unhappy result can easily be avoided, however, by seeing the reference to “appropriate cases” not as an invitation to deny exemption to some refugees, but as a shorthand reference to “refugees who would otherwise have been caught by nationality-based exceptional measures.” The second sentence of Art. 9 does make clear, however, that states need not formally enact exemptions from exceptional measures that accrue to the benefit of refugees, so long as they are prepared in practice dependably to grant refugees exemption from such measures.⁷²⁵

Art. 8 sadly remains of contemporary relevance to refugees. While states impose nationality-based exceptional measures much less frequently than in the past,⁷²⁶ the ability effectively to contest any such measures based only on the general duty not to discriminate in international law remains

⁷²² The oral amendment proposed by Canada referred to “exceptions” rather than “exemptions”: Statement of Mr. Chance of Canada, UN Doc. A/CONF.2/SR.34, July 25, 1951, at 22.

⁷²³ See e.g. Robinson, *History*, at 93: “What these cases are depends on what the law provides; in other words, by domestic legislation the state can fix the instances in which exemption is granted but the limits cannot be such as to refuse exemption when it would not threaten the proper application of the measures and their contemplated effects.”

⁷²⁴ Despite the clear drafting history and context, Davy seems to rely on bald text erroneously to suggest that the second clause of Art. 8 is an “escape clause,” “allow[ing] for a derogation . . . from the principle laid down in the first sentence”: Davy, “Article 8,” at 768, 765. This is not so. The second clause merely enables the duties under the first sentence to be met by dependably and routinely granting refugees exemptions from exceptional measures rather than by legislating generally to exempt refugees from all such measures, as the first clause assumes.

⁷²⁵ Robinson argues that “[i]f, as seems to be the case, ‘legislation’ refers not only to past but also to future laws, the second sentence is an ‘invitation’ to enact [legislation prohibiting en bloc exemption from exceptional measures for refugees], wherever it does not yet exist. From the viewpoint of a state it is undoubtedly more prudent not to be bound by a general rule of exemption”: Robinson, *History*, at 93. It is unclear that this is so. Given the consensus in favor of a duty to exercise discretion in favor of refugees, the net result may simply be increased processing costs for the asylum country.

⁷²⁶ Yet as Davy rightly observes, “[i]n the United States, exceptional measures are still an issue today, now coined ‘emergency economic powers’”: Davy, “Article 8,” at 772.

unclear.⁷²⁷ As analyzed in detail above, the drafters of the Civil and Political Covenant recognized that states enjoy latitude to allocate some rights differentially without engaging in discriminatory conduct.⁷²⁸ This ambiguity is reflected in the jurisprudence of the UN Human Rights Committee related to non-citizens: even as the Committee has insisted that nationality-based differentiation cannot be assumed to be reasonable and hence non-discriminatory, it nonetheless takes the view that “it is necessary to judge every case on its own facts.”⁷²⁹ Under this approach, for example, the Committee has found nationality-based differentiation under bilateral treaties, in national regulations governing access to administrative appeals, and under domestic processes for security assessment to be reasonable and thus not discriminatory.⁷³⁰ An especially worrisome signal is moreover sent by the fact that while the fungible emergency derogation authority under the Covenant prohibits discrimination on a number of grounds, nationality is not among them.⁷³¹

In this context, the unambiguous guarantee in Art. 8 of the Convention – that refugees must always be exempted from nationality-based exceptional measures, whether that exemption is achieved by general enactment or by the routine and dependable granting of exceptions – is a powerful bulwark against refugees being disfranchised in the context of interstate strife between their country of origin and their asylum state.⁷³²

⁷²⁷ “The extent to which refugees are presently privileged by the article depends on the permissibility of exceptional measures under international law in general. The more human rights law or humanitarian law undermine the legitimacy of exceptional measures, the fewer the privileges [that] derive from the provisions of Art. 8”: Davy, “Article 8,” at 758.

⁷²⁸ See Chapter 1.5.5 at note 450.

⁷²⁹ Ibid. at note 483. The conclusion that exceptional measures always violate Art. 26 of the Covenant is thus overly optimistic: see Davy, “Article 8,” at 777.

⁷³⁰ See Chapter 1.5.5 at note 471 ff.

⁷³¹ Civil and Political Covenant, Art. 4(1) (which prohibits discrimination under emergency derogation authority only to the extent that it is “solely on the grounds of race, colour, sex, language, religion or social origin”). Even the more specialized Racial Discrimination Convention, which disallows race-based discrimination (said to include “national origin”) during even an emergency, nonetheless allows nationality-based differentiation that is adjudged non-discriminatory – i.e. that is found to be objective and reasonable, raising the specter of deference to state understandings of what is required in a particular circumstance: International Convention on the Elimination of All Forms of Racial Discrimination, 60 UNTS 195 (UNTS 9464), Dec. 21, 1965, entered into force Jan. 4, 1969, at Arts. 1(3), 2, 5.

⁷³² There is no basis for Edwards’ view that “Article 8 does not, however, exempt entirely refugees from exceptional measures; only if the measures are discriminatory in nature”: Edwards, “Temporary Protection,” at 622. To the contrary, whereas international human rights law *does* require evidence of discrimination, Art. 8 makes no reference to discrimination but instead requires simply that “the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality”: Refugee Convention, at Art. 8.