years. These international human rights conventions generally regulate th treatment of all persons subject to a state's jurisdiction, and are therefore critica sources of enhanced protection for refugees. Art. 5 of the Refugee Convention makes clear that the drafters were aware that refugees would be protected b additional rights acquired under the terms of other international agreements and that they specifically intended that this should be so. The next section examines the most important of these complementary sources of refugee right that have come into existence since the drafting of the Refugee Convention.

2.5 Post-Convention sources of refugee rights

Apart from the minority of refugees who continued to benefit from specia arrangements negotiated by the International Refugee Organization or cod fied in earlier treaties, the internationally defined rights of most refugees i 1951 were essentially limited to those set by the Refugee Convention. A shown above, international aliens law was of no real benefit to refugees, sinc refugees have no national state likely to view injuries done to them as a matte of official concern.[126] A general system of conventional international human rights law had yet to emerge. The scope of universal norms of human right law, then as now, was decidedly minimalist.[127]

Since 1951, authoritative interpretations of rights set by the Refuge Convention have been issued, and some binding enhancements to refuge specific rights secured at the regional level. Advances in refugee rights sin 1951 have, however, largely occurred outside of refugee law itself. Wh aliens law has yet to evolve as a meaningful source of protection, the dev opment of a pervasive treaty-based system of international human rights l has filled many critical gaps in the Refugee Convention's rights regim Because treaty-based human rights are framed in generic terms, howev there is a continuing role for the Refugee Convention in responding to t particular disabilities that derive from involuntary migration. It is non theless clear that the evolution of human rights conventions that includ refugees within their scope has resulted in a net level of legal protectio significantly greater than envisaged by the Refugee Convention. By synthes ing refugee-specific and general human rights, it is now possible to respon most critical threats to the human dignity of refugees.

2.5.1 Protocol relating to the Status of Refugees

There have been few formal changes to the refugee rights regime since t entry into force of the Refugee Convention. The 1967 Refugee Protocol

[126] See chapter 2.1 above, at p. 79. [127] See chapter 1.2 above.

treaty which incorporates the Refugee Convention's rights regime by refer-ence,[128] and extends those protections to all refugees by prospectively elim-inating the Convention's temporal and geographical limitations for those countries which choose to be bound by it. The Protocol is not, as is com-monly believed, an amendment to the 1951 Convention: as Weis has observed, "[w]ith the entry into force of the Protocol there exist, in fact, two treaties dealing with the same subject matter."[129] The Full Federal Court of Australia has reached the same conclusion, noting that states may accede to the Protocol without first becoming a party to the Convention, and that those which do so are immediately bound to grant the rights described in the Convention to a broader class of persons – that is, to modern refugees from all parts of the world – than would have been the case by accession to the Convention itself.[130]

More ominously, and in contrast to the provisions of the Refugee Convention, countries which are bound only by the Protocol have the option at the time of accession to deny other state parties the right to refer a dispute regarding their interpretation or application of the Protocol to the International Court of Justice.[131] One of the two countries eligible to have made this election, Venezuela, has in fact excluded the Court's

Refugee Protocol, Art. I(1).

P. Weis, "The 1967 Protocol relating to the Status of Refugees and Some Questions relating to the Law of Treaties," (1967) *British Yearbook of International Law* 39, at 60. More specifically, "[t]he procedure for revision of the 1951 Convention, as provided for in its terms, was not resorted to in view of the urgency of extending its personal scope to new groups of refugees and of the fact that the amended treaty would have required fresh consent by the states parties to the Convention. Instead, a new instrument, the 1967 Protocol relating to the Status of Refugees, was established, which does not amend the 1951 Convention and modifies it only in the sense that States acceding to the Protocol accept the material obligations of the Convention in respect of a wider group of persons. As between the state parties to the Convention, it constitutes an *inter se* agreement by which they undertake obligations identical *ratione materiae* with those provided for in the Convention for additional groups of refugees not covered by the Convention on account of the dateline of 1 January 1951. As regards states not parties to the Convention, it constitutes a separate treaty under which they assume the material obligations laid down in the Convention in respect of refugees defined in Art. 1 of the Protocol, namely those covered by Art. 1 of the Convention and those not covered by reason of the dateline": ibid. at 59.

Minister for Immigration and Multicultural Affairs v. Savvin, (2000) 171 ALR 483 (Aus. FFC, Apr. 12, 2000), per Katz J. Justice Katz thus concludes that "for parliament to describe the 1951 Convention as having been 'amended' by the 1967 Protocol is inaccu-rate. At the same time, however, for a state like Australia, which was already bound by the 1951 Convention before acceding to the 1967 Protocol, the error is one of no practical significance": ibid.

Under Art. VII(1) of the Refugee Protocol, a state may enter a reservation regarding Art. IV of the Protocol, which establishes the right of other state parties to refer a dispute to the International Court of Justice. In contrast, Art. 42 of the Refugee Convention, which

jurisdiction.[132] Several other states which have acceded to the Protocol, but which are also parties to the Convention, have purported to make a similar election. Yet because of the mandatory provisions regarding the Court's jurisdiction contained in the Convention, a dispute involving one of these states – Angola, Botswana, China, Congo, El Salvador, Ghana, Jamaica, Rwanda, and Tanzania – may still be referred to the International Court of Justice so long as it involves the interpretation or application of the Convention, rather than of the Protocol. As the substantive content of the two treaties is largely identical, it would seem open to a state party to the Convention to refer a dispute involving interpretation of the refugee definition or of refugee rights, so long as the subject matter is not uniquely relevant to post-1951 refugees.

A decade after the advent of the Protocol, the United Nations Conference on Territorial Asylum considered, but ultimately rejected, the codification of a new treaty which would set a clear right to enduring protection for refugees. It reached agreement in principle to require states to facilitate the admission of a refugee's spouse and minor or dependent children, and explicitly to interpret the duty of *non-refoulement* to include "rejection at the frontier."[133] The Conference was also of the view that the enjoyment of refugee rights could legitimately be made contingent on compliance with the laws of the state of asylum. No effort has been made, however, either to resuscitate the asylum convention project, or to formalize as matters of law the consensus achieved on either family reunification or the scope of the duty of *non-refoulement*.

2.5.2 *Conclusions and guidelines on international protection*

Rather than formulate new refugee rights, the focus of effort since 1975 has been to elaborate the content of existing standards in non-binding resolutions adopted by the state members of the agency's governing body, the Executive Committee of the High Commissioner's Program. These "Conclusions on the International Protection of Refugees"[134] have addressed

addresses the scope of permissible reservations to that treaty, does not allow states to enter a reservation to Art. 38, the equivalent of Art. IV of the Protocol. "While the Convention provides for obligatory jurisdiction of the International Court of Justice in any dispute relating to its interpretation or application, one reason for the Protocol was for some States to be able to make reservations to this jurisdictional clause": Sohn and Buergenthal, *Movement of Persons*, at 113.

[132] The other eligible country, the United States of America, did not elect to exclude the jurisdiction of the International Court of Justice. Because the option is available only at the time of accession, the United States cannot make such an election in the future.

[133] UN Doc. A/CONF.78/12, Feb. 4, 1977. See generally A. Grahl-Madsen, *Territorial Asylum* (1980).

[134] These are periodically published in looseleaf form in UN Doc. HCR/IP/2, and are collected at www.unhcr.ch (accessed Nov. 20, 2004). UNHCR has also issued "A Thematic Compilation of Executive Committee Conclusions" (March 2001), which organizes relevant Executive Committee Conclusions under sixty major chapters.

such matters as non-rejection and *non-refoulement*,[135] exemption from penalties for illegal entry,[136] conditions of detention,[137] limits on expulsion and extradition,[138] family unity,[139] the provision of identification documents,[140] physical security,[141] and the rights to education[142] and to undertake employment.[143] An effort has also been made to interpret rights to respond to the special vulnerabilities of refugees who are children,[144] women,[145] elderly,[146] or caught up in a large-scale influx.[147] While not matters of law, these standards have strong political authority as consensus resolutions of a formal body of government representatives expressly responsible for "providing guidance and forging consensus on vital protection policies and practices."[148] The Canadian Federal Court of Appeal has thus appropriately recognized that Executive Committee Conclusions are deserving of real deference:

> [I]n Article 35 of the [Refugee] Convention the signatory states undertake to cooperate with the Office of the United Nations High Commissioner for Refugees (UNHCR) in the performance of its functions and, in particular, to facilitate the discharge of its duty of supervising the application of the Convention. Accordingly, considerable weight should be given to recommendations of the Executive Committee of the High Commissioner's Program on issues relating to refugee determination

[135] See UNHCR Executive Committee Conclusions Nos. 1 (1975), 5 (1977), 6 (1977), 17 (1990), 22 (1981), 29 (1983), 50 (1988), 52 (1988), 55 (1989), 62 (1990), 65 (1991), 68 (1992), 71 (1993), 74 (1994), 77 (1995), 81 (1997), 82 (1997), and 85 (1998), available at www.unhcr.ch (accessed Nov. 20, 2004).

[136] Ibid. at Nos. 44 (1986), 55 (1989), and 85 (1998).

[137] Ibid. at Nos. 3 (1977), 7 (1977), 36 (1985), 44 (1986), 46 (1987), 47 (1987), 50 (1988), 55 (1989), 65 (1991), 68 (1992), 71 (1993), 85 (1998), and 89 (2000).

[138] Ibid. at Nos. 7 (1977), 9 (1977), 17 (1980), 21 (1981), 44 (1986), 50 (1988), 55 (1989), 61 (1990), 68 (1992), 71 (1993), 79 (1996), and 85 (1998).

[139] Ibid. at Nos. 1 (1975), 9 (1977), 15 (1979), 22 (1989), 24 (1989), 47 (1987), 74 (1994), 84 (1997), 85 (1998), and 88 (1999).

[140] Ibid. at Nos. 8 (1977), 18 (1980), 24 (1981), 35 (1984), 64 (1990), 65 (1991), 72 (1993), 73 (1993), and 91 (2001).

[141] Ibid. at Nos. 20 (1980), 25 (1982), 29 (1983), 44 (1986), 45 (1986), 46 (1987), 48 (1987); 54 (1988), 55 (1989), 58 (1989), 72 (1993), 74 (1994), 77 (1995), 87 (1999), and 98 (2003).

[142] Ibid. at Nos. 47 (1987), 58 (1989), 59 (1989), 74 (1994), 77 (1995), 80 (1996), 84 (1997), and 85 (1998).

[143] Ibid. at Nos. 50 (1988), 58 (1989), 64 (1990), and 88 (1999).

[144] Ibid. at Nos. 47 (1987), 59 (1989), 72 (1993), 73 (1993), 74 (1994), 79 (1996), 85 (1998), 87 (1999), and 89 (2000).

[145] Ibid. at Nos. 32 (1983), 39 (1985), 46 (1987), 54 (1988), 60 (1989), 64 (1990), 68 (1992), 71 (1993), 73 (1993), 74 (1994), 77 (1995), 79 (1996), 81 (1997), 85 (1998), 87 (1999), and 89 (2000).

[146] Ibid. at Nos. 32 (1983), 85 (1998), 87 (1999), and 89 (2000).

[147] Ibid. at Nos. 19 (1980), 22 (1981), 25 (1982), 44 (1986), 81 (1997), 85 (1998), and 100 (2004).

[148] Ibid. at No. 81 (1997).

and protection that are designed to go some way to fill the procedural void in the Convention itself.[149]

Specifically, UNHCR's authority under Article 35 of the Refugee Convention[150] is a sufficient basis for the agency to require state parties to explain treatment of refugees that does not conform to the Conclusions on Protection adopted by the agency's governing body. This authority to require the international community to engage in a dialogue of justification is comparable to the human rights *droit de regard* enjoyed by the General Assembly:[151] UNHCR may legitimately expect states to respond to concerns about the adequacy of refugee protection as measured by reference to Conclusions adopted by the state members of its Executive Committee, though it has no power to require compliance with those or any other standards.[152]

It is less clear, however, to what extent standards recommended by UNHCR, but which have not been adopted as a Conclusion of its Executive Committee, are to be afforded comparable deference. There is a traditional practice of giving particular weight to the UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*,[153] a comprehensive analysis of the basic precepts of refugee law prepared at the behest of the Executive Committee more than a quarter of a century ago.[154] The Supreme Court of

[149] *Rahaman v. Minister of Citizenship and Immigration*, 2002 ACWSJ Lexis 1026 (Can. FCA, Mar. 1, 2002), per Evans JA. To similar effect see *Attorney General v. E*, [2000] 3 NZLR 257 (NZ CA, July 11, 2000), at 269.

[150] "The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees ... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention": Refugee Convention, at Art. 35(1).

[151] See chapter 1.2.3 above, at pp. 46–47.

[152] States recently affirmed "the fundamental importance of UNHCR as the multilateral institution with the mandate to provide international protection to refugees ... and recall[ed] [their] obligations as States Parties to cooperate with UNHCR in the exercise of its functions; [and] [u]rge[d] all states to consider ways that may be required to strengthen the implementation of the 1951 Convention and/or 1967 Protocol and to ensure closer cooperation between States Parties and UNHCR to facilitate UNHCR's duty of supervising the application of the provisions of these instruments": "Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees," UN Doc. HCR/MMSP/2001/09, Dec. 13, 2001, incorporated in Executive Committee of the High Commissioner's Programme, "Agenda for Protection," UN Doc. EC/52/SC/CRP.9/Rev.1, June 26, 2002, at Part I, paras. 8–9. The challenge of ensuring meaningful supervision and enforcement of the Refugee Convention is briefly taken up in the Epilogue below, at pp. 992–998.

[153] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979, reedited 1992) (UNHCR, *Handbook*).

[154] In 1977, the Executive Committee "[r]equested the Office to consider the possibility of issuing – for the guidance of Governments – a handbook relating to procedures and criteria for determining refugee status": UNHCR Executive Committee Conclusion

the United States, for example, determined that "the Handbook provides significant guidance" on the interpretation of refugee law;[155] the British House of Lords has gone farther, acknowledging that by virtue of UNHCR's statutory authority, "[i]t is not surprising ... that the UNHCR Handbook, although not binding on states, has high persuasive authority, and is much relied on by domestic courts and tribunals."[156] Yet not even the *Handbook* is treated as a source of legal obligation. The House of Lords has warned that the *Handbook* "is of no binding force either in municipal or international law,"[157] while the New Zealand Court of Appeal has similarly insisted that the *Handbook* "cannot override the function of [the decision-maker] in determining the meaning of the words of [the Refugee] Convention."[158] Indeed, courts have recently become increasingly guarded in their appraisal of the *Handbook*'s authority,[159] finding, for example, that it is "more [of] a practical guide ... than ... a document purporting to interpret the meaning of relevant parts of the Convention."[160] In its most recent statement on point, the House of Lords observed only that the *Handbook* "is recognized as an important source of guidance on matters to which it relates"[161] – a significantly less enthusiastic endorsement than the same court issued just two years earlier.[162]

The decline in the deference afforded the *Handbook* is no doubt largely attributable to the increasing dissonance between some of its positions and

No. 8, "Determination of Refugee Status" (1977), at para. (g), available at www.unhcr.ch (accessed Nov. 20, 2004).

Immigration and Naturalization Service v. Cardoza Fonseca, (1987) 480 US 421 (US SC, Mar. 9, 1987), at 439, n. 22.

R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer, [2001] 2 WLR 143 (UK HL, Dec. 19, 2000), per Lord Steyn. The *Handbook* has been treated as solid evidence of the current state of international practice on interpretation of refugee law: *R (Hoxha) v. Secretary of State for the Home Department*, [2002] EWCA Civ 1403 (Eng. CA, Oct. 14, 2002), at para. 36.

R v. Secretary of State for the Home Department, ex parte Bugdaycay, [1987] AC 514 (UK HL, Feb. 19, 1987), per Lord Bridge of Harwich at 525; cited with approval in *M v. Attorney General*, [2003] NZAR 614 (NZ HC, Feb. 19, 2003).

S v. Refugee Status Appeals Authority, [1998] 2 NZLR 291 (NZ CA, Apr. 2, 1998), at 300. See also *M v. Attorney General*, [2003] NZAR 614 (NZ HC, Feb. 19, 2003).

In *WAGO of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, 194 ALR 676 (Aus. FFC, Dec. 20, 2002), the Australian Full Federal Court declined to find any error in the determination that the provisions in the UNHCR *Handbook* "were not part of the law of Australia and did not provide grounds for legal review of the Tribunal's decision."

NADB of 2001 v. Minister for Immigration and Multicultural Affairs, [2002] FCAFC 326 (Aus. FFC, Oct. 31, 2002). See also *Todea v. MIEA*, (1994) 20 AAR 470 (Aus. FC, Dec. 22, 1994), at 484.

Sepet and Bulbul v. Secretary of State for the Home Department, [2003] UKHL 15 (UK HL, Mar. 20, 2003), at para. 12.

See text above, at n. 156.

those which have resulted from the intensive period of judicial activism in refugee law, which began in the early 1990s. In contrast to earlier times when there were few authoritative decisions on the content of refugee law, many state parties today have developed their own, often quite comprehensive, judicial understandings of many aspects of international refugee law. Where no domestic precedent exists, courts are increasingly (and appropriately) inclined to seek guidance from the jurisprudence of other state parties to the Convention.[163] In this more mature legal environment, UNHCR's views on the substance of refugee law – at least where these are not formally codified through the authoritative process of Executive Committee decision-making – will inevitably not be treated as uniquely pertinent, but will instead be considered and weighed as part of a more holistic assessment of the current state of refugee law obligations.

Indeed, the recent proliferation of various forms of UNHCR position papers on the interpretation of refugee law has made it increasingly difficult for even state parties committed to a strong UNHCR voice to discern the precise agency position on many key protection issues. Of greatest concern, the agency's Department of International Protection has commenced release of "Guidelines on International Protection"[164] under a process approved in only the most general terms by its Executive Committee.[165] While explicitly intended to be "complementary" to the standards set out in the *Handbook*,[166] the standards at times appear to conflict with the advice of the *Handbook*.[167] Such conflicts have not gone unnoticed by courts: in a recent decision, for example, the Full Federal Court of Australia declined to follow the approach to criminal law exclusion recommended in the *Handbook*, preferring to adopt the tack endorsed in the UNHCR's Global Consultations process and subsequently codified in a Guideline on International Protection.[168] Similarly, the Canadian Federal Court of Appeal relied upon the "less categorical" approach taken to the definition of a "manifestly unfounded claim" in UNHCR's Global Consultations process to conclude that there is no international consensus on the meaning of this term – even though the judgment acknowledged the existence of a formally adopted Executive Committee conclusion directly on point, characterized by the Court as providing for a "restricted meaning" to be given to the notion.[169] In contrast, the New Zealand Court of Appeal declined to give significant weight to the new wave of UNHCR institutional positions because of their questionable legal pedigree:

> The Guidelines do not, however, have a status in relation to interpretation of the Refugee Convention that is equal to that of the resolutions of the UNHCR Executive Committee ... I have focussed ... on the Executive Committee's views which in any event I regard as the most valuable guide for the Court.[170]

[163] See J. Hathaway, "A Forum for the Transnational Development of Refugee Law: The IARLJ's Advanced Refugee Law Workshop," (2003) 15(3) *International Journal of Refugee Law* 418.

[164] As of September 2004, six sets of Guidelines had been issued by UNHCR: UN Docs. HCR/GIP/02/01 (gender-related persecution); HCR/GIP/02/02 (membership of a particular social group); HCR/GIP/03/03 (cessation); HCR/GIP/03/04 (internal relocation alternative); HCR/GIP/03/05 (exclusion); and HCR/GIP/04/06 (religion-based claims).

[165] At its fifty-third session, the UNHCR's Executive Committee requested UNHCR "to produce complementary guidelines to its *Handbook on Procedures and Criteria for Determining Refugee Status*, drawing on applicable international legal standards, on State practice, on jurisprudence and using, as appropriate, the inputs from the debates in the Global Consultations' expert roundtable discussions": Executive Committee of the High Commissioner's Program, "Agenda for Protection," UN Doc. EC/52/SC/CRP.9/Rev.1, June 26, 2002, at Part III, Goal 1, Point 6. The Executive Committee clearly did not intend that these guidelines should be the sole, or even the primary, means of advancing the development of refugee law, since it simultaneously agreed that the agency should "explore areas that would benefit from further standard-setting, such as [Executive Committee] Conclusions or other instruments to be identified at a later stage": ibid. at Goal 1, Point 7.

[166] Executive Committee of the High Commissioner's Program, "Agenda for Protection," UN Doc. EC/52/SC/CRP.9/Rev.1, June 26, 2002, at Part III, Goal 1, Point 6.

[167] For example, on the question of what has traditionally been referred to as the "internal flight alternative," the *Handbook* directs attention to the retrospective question of whether the applicant "could have sought refuge in another part of the same country": UNHCR, *Handbook*, at para. 91. Yet in its "Guideline on International Protection: Internal Flight or Relocation Alternative," UN Doc. HCR/GIP/03/04 – expressly said to be a "supplement" to the *Handbook* – UNHCR suggests that assessment should instead focus on "whether the proposed area provides a meaningful alternative in the future. The forward-looking assessment is all the more important": ibid. at para. 8. The point is not that the new standard is less appropriate than that set by the *Handbook*, but simply that the effort to promote inconsistent approaches will only engender confusion and lack of respect for UNHCR standard-setting. Adding to this concern, while the new Guidelines are in principle intended to "draw on" the expert advice received during the agency's Global Consultations process (Executive Committee of the High Commissioner's Program, "Agenda for Protection," UN Doc. EC/52/SC/CRP.9/Rev.1, June 26, 2002, at Part III, Goal 1, Point 6), the Guidelines at times diverge from even the formal conclusions reached through that process. See e.g. J. Hathaway and M. Foster, "Membership of a Particular Social Group," (2003) 15(3) *International Journal of Refugee Law* 477, at para. 44. Yet in at least one case, an appellate court gave weight to the new Guidelines on the express grounds that "[t]hey ... result from the Second Track of the Global Consultations on International Protection Process": *Minister for Immigration and Multicultural Affairs v. Applicant S*, [2002] FCAFC 244 (Aus. FFC, Aug. 21, 2002).

[168] "By consensus, it was agreed [at the Lisbon Expert Roundtable of the Global Consultations] on the question of balancing [the risks of return against the seriousness of the crime committed] ... [that] state practice indicates that the balancing test is no longer being used in common law and in some civil law jurisdictions": *NADB of 2001 v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 326 (Aus. FFC, Oct. 31, 2002).

[169] *Rahaman v. Minister of Citizenship and Immigration*, 2002 ACWSJ Lexis 1026 (Can. FCA, Mar. 1, 2002).

[170] *Attorney General v. Refugee Council of New Zealand Inc.*, [2003] 2 NZLR 577 (NZ CA, Apr. 16, 2003), per McGrath J. at para. 111. Justice Glazebrook gave the Guidelines somewhat greater weight, noting that "it is also appropriate to have regard to ... the

We thus find ourselves at a moment of significant normative confusion on the appropriate source of UNHCR institutional advice on the substance of international refugee law. The critical role of UNHCR in providing Art. 35 guidance to state parties is compromised not only by the sheer volume of less-than-fully-consistent advice now emanating from a multiplicity of UNHCR sources, but more fundamentally by recent efforts to draft institutional positions at such a highly detailed level that they simply cannot be reconciled with the binding jurisprudence of state parties. It would therefore be in the best interest of all that general principles of refugee law interpretation intended to be taken seriously by state parties be codified in formal, and clearly authoritative, resolutions of the UNHCR's Executive Committee. More detailed guidance may sensibly be gleaned from a compendium of norms prepared by the agency itself, but that advice should rather be presented in a unified form that does not risk the confusion or conflicts of the present array of the *Handbook*, Guidelines, and various other UNHCR position papers. More preliminary thinking is best presented as such, with any effort at codification by the agency delayed until there is truly a clear and principled consensus achieved in the jurisprudence of state parties.

2.5.3 *Regional refugee rights regimes*

Regional refugee law in Africa establishes auxiliary rights for refugees in that region. The Convention governing the Specific Aspects of Refugee Problems in Africa[171] requires participating states of the African Union (formerly the Organization of African Unity) to "use their best endeavors consistent with their respective legislation[ ] to receive refugees and to secure [their] settlement" until and unless voluntary repatriation is possible.[172] The duty of *non-refoulement* is explicitly recognized within the region to prohibit rejection at the frontier, and to apply whenever there is a risk to the refugee's "life, physical integrity, or liberty."[173] Equally important, states bind themselves to take account of the security needs of refugees, settling them away from the frontier with their country of origin.[174] In return, refugees are to respect the asylum state's laws and comply with public order measures. They are also prohibited from engaging in "subversive activities against any Member State of the OAU," and even from expressing political or other views if "likely to cause tension between Member States."[175] The African Convention therefore goes beyond the basic indifference of the Refugee Convention to the political rights of refugees,[176] and purports to deny some forms of political free speech as the cost of enhanced basic protection rights.[177]

The Cartagena Declaration of 1984[178] has been recommended to states in the Americas by the General Assembly of the Organization of American States.[179] Although it is not a binding agreement akin to the African Union's treaty, the Cartagena Declaration provides a clear statement of the region's optic on desirable protections for refugees. The inclusive African reading of the duty of *non-refoulement* and that region's undertaking to ensure the physical protection of refugees are adopted by the OAS.[180] There are moreover commitments to refugee integration, self-sufficiency, employment, and family reunification.[181] The Cartagena Declaration explicitly affirms the continuing value of the Refugee Convention's rights regime,[182] and does not condition its expanded definition of refugee rights on the renunciation of political or other activity. To date, however, it has not been formalized as a matter of binding law.

2.5.4 *International human rights law*

While there has been only modest evolution of the refugee rights regime since 1951, the broader field of international human rights law has undergone exponential change. The Refugee Convention was only the second major human rights convention adopted by the United Nations.[183] The only contemporaneous formulation of international human rights was the Universal Declaration of Human Rights, an unenforceable General Assembly resolution.[184] Today, on the other hand, binding international human rights law has been established by the 1966 Human Rights Covenants, specialized universal accords, and regional human rights regimes in Europe, Africa, and the Americas. As the UNHCR's Executive Committee has observed, the modern duty of protection therefore

Guidelines . . . because the Immigration Service refers to them . . . and cannot be seen to 'pick and choose' the parts it wishes to comply with. It is also relevant that New Zealand will be judged in the light of those Guidelines by the Office of UNHCR in its monitoring role": ibid. at para. 271.

171 Convention governing the Specific Aspects of Refugee Problems in Africa, 10011 UNTS 14691, done Sept. 10, 1969, entered into force June 20, 1974 (OAU Convention).

172 Ibid. at Arts. II(1) and V. 173 Ibid. at Art. II(3). 174 Ibid. at Art. II(6).

175 Ibid. at Art. III. 176 See chapter 2.4.4 above, at pp. 100–101.

177 While the African treaty's failure to guarantee political rights to refugees is likely not in contravention of the Refugee Convention itself (see chapter 6.7 below, at pp. 882–885), its sweeping prohibition on political activities cannot be reconciled to duties under the Covenant on Civil and Political Rights: see chapter 6.7 below at pp. 897–905.

178 OAS Doc. OEA/Ser.L/II.66, Doc.10, Rev.1, at 190–193 (OAS Cartagena Declaration).

179 See UNHCR, "OAS General Assembly: an Inter-American Initiative on Refugees," (1986) 27 *Refugees* 5.

180 OAS Cartagena Declaration, at Part III(5), (6), and (7).

181 Ibid. at Part III(6), (11), and (13). 182 Ibid. at Part III(8).

183 The Refugee Convention was preceded by the Convention on the Prevention and Punishment of the Crime of Genocide, UNGA Res. 260A(III), adopted Dec. 9, 1948, entered into force Jan. 12, 1951.

184 See chapter 1.2.3 above, at p. 45.

goes beyond simply respecting the norms of refugee law; it includes also the obligation "to take all necessary measures to ensure that refugees are effectively protected, including through national legislation, and in compliance with their obligations under international human rights and humanitarian law instruments bearing directly on refugee protection."[185]

Indeed, the maturation of human rights law over the past half-century has to a certain extent filled the vacuum of protection that required the development of a refugee-specific rights regime in 1951. As a preliminary matter, it might therefore be asked whether the rights regime set by the Refugee Convention retains any independent value in the modern era of general guarantees of human rights.

It is certainly true that refugees will sometimes find it in their interests to rely on generally applicable norms of international human rights law, rather than on refugee-specific standards.[186] Of greatest significance to refugees, nearly all internationally recognized *civil rights* are declared to be universal and not subject to requirements of nationality.[187] The International Covenant on Civil and Political Rights generally extends its broad-ranging protection to "everyone" or to "all persons."[188] Each contracting state undertakes in Art. 2(1) to ensure the rights in the Covenant "to all individuals within its territory and subject to its jurisdiction ... 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." While nationality is not included in this illustrative list, it has been determined to be embraced by the residual category of "other status."[189] Thus, the Human Rights Committee has explicitly affirmed that "the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens must receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed by the Covenant."[190] More recently, the Committee has held that rights may not be

[185] UNHCR Executive Committee Conclusion No. 81, "General Conclusion on International Protection" (1997), at para. (e), available at www.unhcr.ch (accessed Nov. 20, 2004).

[186] The UNHCR Executive Committee has, for example, affirmed "that States must continue to be guided, in their treatment of refugees, by existing international law and humanitarian principles and practice bearing in mind the moral dimension of providing refugee protection": UNHCR Executive Committee Conclusion No. 50, "General Conclusion on International Protection" (1988), at para. (c), available at www.unhcr.ch (accessed Nov. 20, 2004).

[187] The exceptions are that only citizens are granted the rights to vote, to run for office, and to enter the public service: Civil and Political Covenant, at Art. 25.

[188] See chapter 2.5.5 below, at pp. 127–128.

[189] One commentator prefers to ground his analysis in the notion of nationality as a "distinction of any kind": Lillich, *Rights of Aliens*, at 46.

[190] UN Human Rights Committee, "General Comment No. 15: The position of aliens under the Covenant" (1986), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 140, para. 2.

limited to citizens of a state, but "must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers [and] refugees."[191] The Civil and Political Covenant is therefore a critical source of rights for refugees, mandating attention to matters not addressed in the Refugee Convention, such as the rights to life and family, freedoms of opinion and expression, and protection from torture, inhuman or degrading treatment, and slavery.

On the other hand, because the Covenant on Civil and Political Rights is addressed primarily to persons who reside in their state of citizenship, it does not deal with refugee-specific concerns, including recognition of personal status, access to naturalization, immunity from penalization for illegal entry, the need for travel and other identity documents, and especially protection from *refoulement*. Moreover, even where the subject matter of the Civil and Political Covenant is relevant to refugees, the Covenant often formulates rights on the basis of inappropriate assumptions. For example, the Civil and Political Covenant sets guarantees of fairness in judicial proceedings, but does not deal with the more basic issue of access to a court system.[192] Yet refugees and other aliens, unlike citizens, are not always able freely to invoke judicial remedies. Perhaps most ominously, governments faced with genuine public emergencies are authorized to withdraw all but a few core civil rights from non-citizens,[193] even if the measures taken would ordinarily amount to impermissible discrimination on grounds of national origin, birth, or other status.[194] In the result, though the Covenant on Civil and Political Rights in

[191] UN Human Rights Committee, "General Comment No. 31: The nature of the general legal obligations of states parties to the Covenant" (2004), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 192, para. 10.

[192] Compare Civil and Political Covenant, at Arts. 14–16, with the Refugee Convention, at Art. 16.

[193] The rights which cannot be suspended are the rights to life; freedom from torture, cruel, inhuman, or degrading treatment or punishment; freedom from slavery; freedom from imprisonment for contractual breach; freedom from *ex post facto* criminal law; recognition as a person; and freedom of thought, conscience, and religion: Civil and Political Covenant, at Art. 4(2).

[194] Ordinarily, emergency derogation must not be imposed in a discriminatory way. However, the grounds of impermissible discrimination for emergency derogation purposes explicitly omit reference to several of the general grounds on which discrimination is prohibited under the Civil and Political Covenant. The omissions include discrimination on the grounds of political or other opinion; national origin; property; birth or other status. Compare Civil and Political Covenant, at Arts. 2(1) and 4(1). The UN Special Rapporteur on the Rights of Non-Citizens has suggested that "[t]his omission, according to the *travaux préparatoires*, was intentional because the drafters of the Covenant understood that States may, in time of national emergency, have to discriminate against non-citizens within their territory": UN Commission on Human Rights, "Preliminary Report of the Special Rapporteur on the Rights of Non-Citizens," UN Doc. E/CN.4/Sub.2/2001/20, June 6, 2001, at para. 37.

principle extends its protections to refugees, it does not dependably provide for all basic civil rights needed to address their predicament.

The continuing value of refugee-specific rights despite the advent of broad-ranging international human rights law is even more apparent in the field of *socioeconomic rights*. While the basic non-discrimination obligation under the International Covenant on Economic, Social and Cultural Rights[195] is essentially indistinguishable from that set by the Civil and Political Covenant,[196] developing countries are authorized to decide, considering their economic situation, the extent to which they will guarantee the economic rights of the Convention to non-nationals.[197] If subjected to this fundamental limitation, the vast majority of the world's refugees (who are located in the less developed world) might be denied employment or subsistence rights. The Refugee Convention, in contrast, sets absolute, if less exigent, expectations of states in the field of economic rights.

Second, as with the Civil and Political Covenant, the substantive formulation of general socioeconomic rights in the Economic, Social and Cultural Covenant does not always provide sufficient contextual specificity to ensure respect for the most critical interests of refugees. For example, while the Economic, Social and Cultural Covenant establishes a general right to an

[195] International Covenant on Economic, Social and Cultural Rights, UNGA Res. 2200A(XXI), adopted Dec. 16, 1966, entered into force Jan. 3, 1976 (Economic, Social and Cultural Covenant).

[196] Two kinds of distinction are sometimes asserted. First, while state parties to the Civil and Political Covenant agree to *grant* rights to all without discrimination, the contemporaneously drafted Economic, Social and Cultural Covenant requires only an undertaking that whatever rights are granted may be *exercised* without discrimination: compare Civil and Political Covenant, at Art. 2(1) and Economic, Social and Cultural Covenant, at Art. 2(2). Superficially, this would suggest that whereas the Civil and Political Covenant prohibits limitation of the category of rights holders, the formulation in the Economic, Social and Cultural Covenant does not. In fact, however, the various rights in the Economic, Social and Cultural Covenant are granted to "everyone" or "all," nullifying any practical distinction between the non-discrimination clauses in the two Covenants. Second, the non-discrimination provision in the Civil and Political Covenant seems to be more inclusively framed than its counterpart in the Economic, Social and Cultural Covenant. Whereas the former prohibits "distinction of any kind, such as" a distinction based on the listed forms of status, the Economic, Social and Cultural Covenant prohibits "discrimination of any kind as to" the enumerated types of status. But unless it is suggested that no differentiation, even on patently reasonable grounds, can ever be permissible in relation to rights under the Civil and Political Covenant, no concrete consequences flow from use of the word "distinction" rather than "discrimination." Nor does it matter that one Covenant prohibits discrimination "such as" that based on certain grounds, while the other proscribes discrimination "as to" those same grounds. Because the list under both Covenants includes the generic term "other status," the net result in each case is an inclusive duty of non-discrimination, including, for example, non-discrimination in relation to refugees and other aliens.

[197] Economic, Social and Cultural Covenant, at Art. 2(3).

adequate standard of living, it does not explicitly guarantee equal access to rationing systems, a matter of frequent immediate concern to involuntary migrants in war zones and other areas of crisis.[198]

Most critically, generally applicable socioeconomic rights are normally conceived simply as duties of progressive implementation.[199] Under the Economic, Social and Cultural Covenant, for example, states are required simply to "take steps" progressively to realize Economic, Social and Cultural rights to the extent possible within the limits of their resources.[200] The Refugee Convention, on the other hand, treats socioeconomic rights on par with civil and political rights. They are duties of result, and may not be avoided because of competition within the host state for scarce resources.

2.5.5 Duty of equal protection of non-citizens

As among the various protections now guaranteed by international human rights law, the duty of non-discrimination clearly has the potential to be of greatest value to refugees. Because it is an overarching principle governing the allocation of a wide array of, in particular, public goods, the legal duty of non-discrimination can be an effective means by which to address the need to enfranchise refugees on a multiplicity of fronts. To the extent that the main concern of refugees is to be accepted by a host community, a guarantee of non-discrimination might in fact be virtually the only legal guarantee that many refugees require.

The value of protection against discrimination is, of course, a function of how that duty is framed. As McCrudden has observed,

> There is no one legal meaning of equality or discrimination applicable in the different circumstances; the meanings of equality and discrimination are diverse. There is no consistency in the circumstances in which stronger or weaker concepts of equality and discrimination currently apply. There is no one organizing principle or purpose underlying the principles of equality and non-discrimination currently applicable; the justifications offered for the legal principles of equality and non-discrimination are diverse.[201]

[198] Compare Economic, Social and Cultural Covenant, at Art. 11, with Refugee Convention, at Art. 20.

[199] In the case of the Civil and Political Covenant, the Human Rights Committee has observed that "[t]he requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State": UN Human Rights Committee, "General Comment No. 31: The nature of the general legal obligations imposed on states parties to the Covenant" (2004), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 192, para. 14.

[200] Economic, Social and Cultural Covenant, at Art. 2(1).

[201] C. McCrudden, "Equality and Discrimination," in D. Feldman ed., *English Public Law* (vol. XI, 2004) (McCrudden, "Equality"), at para. 11.02.

Despite the breadth of possible applications, Fredman helpfully suggests that the common core of non-discrimination law is to ensure "that individuals should be judged according to their personal qualities. This basic tenet is contravened if individuals are subjected to detriment on the basis only of their status, their group membership, or irrelevant physical characteristics."[202]

The core understanding of non-discrimination thus requires simply that irrelevant criteria not be taken into account in making allocations: it is essentially a fairly formal prohibition of arbitrariness, which requires that any unequal treatment be "properly justified, according to consistently applied, persuasive, and acceptable criteria."[203] It follows, of course, that not every differential allocation is discriminatory: the concern is to draw a line between invidious (discriminatory) and socially acceptable (non-discriminatory) distinctions. While this can be a vexed question, international human rights law normally stipulates grounds on which distinctions are presumptively arbitrary, including where allocations are based on forms of status or personal characteristics which are either immutable or fundamental to one's identity. Because decisions predicated on such criteria are clearly prone to stereotypical and hence arbitrary assumptions, they undermine the duty to consider individuals on their own merits.

Non-discrimination law's insistence on non-arbitrariness is often more rigorously conceived where "prized public goods"[204] – including human rights – are at stake. This may, for example, take the form of heightened scrutiny or insistence on a proportionality test in the assessment of the rationality of the differential allocation under scrutiny. Critically, non-discrimination may also be conceived in a way that moves the principle beyond simply a prohibition of allocations shown to be based on irrelevant or otherwise arbitrary criteria (which requires often difficult, if not impossible, comparative assessments) to include also a prohibition of conduct which *in effect*, even if not by design, results in an arbitrary allocation at odds with the duty to ensure that individuals are treated in accordance with their particular merits. Indeed, formal equality of treatment may itself result in discrimination. As Fredman writes, "treating people in the same way regardless of their differing backgrounds frequently entrenches difference."[205] Most important of all, non-discrimination may be understood to be not only a prohibition of arbitrary allocations – whether by design, or as measured by effects – but also an affirmative guarantee of equal opportunity. Under such an understanding, non-discrimination requires public authorities "to do more than ensure the absence of discrimination . . . but also to act positively to promote equality of opportunity between different groups

[202] S. Fredman, *Discrimination Law* (2001) (Fredman, *Discrimination*), at 66.
[203] McCrudden, "Equality," at para. 11.71.
[204] Ibid. at para. 11.76.
[205] Fredman, *Discrimination*, at 106.

throughout all policy making and in carrying out all those activities to which the duty applies."[206]

The core guarantee of non-discrimination in international human rights law is that found in Art. 26 of the Civil and Political Covenant. This unique and broadly applicable guarantee of non-discrimination provides that:

> 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 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.[207]

While there are many other guarantees of non-discrimination – for example, Art. 2 in each of the Human Rights Covenants, and Art. 3 of the Refugee Convention – Art. 26 is unique in that its ambit is not limited to the allocation of simply the rights found in any one instrument. Art. 26 rather governs the allocation of all public goods, including rights not stipulated by the Covenant itself. As summarized in General Comment 18 of the Human Rights Committee,

> [A]rticle 26 does not merely duplicate the guarantee already provided for in article 2 [of the Civil and Political Covenant] but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.[208]

[206] McCrudden, "Equality," at para. 11.187.
[207] Civil and Political Covenant, at Art. 26.
[208] UN Human Rights Committee, "General Comment No. 18: Non-discrimination" (1989), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 146, para. 12. This principle has been affirmed in the jurisprudence of the Human Rights Committee, including, for example, in *Pepels v. Netherlands*, UNHRC Comm. No. 484/1991, UN Doc. CCPR/C/51/D/484/1991, decided July 15, 1994, at para. 7.2; and *Pons v. Spain*, UNHRC Comm. No. 454/1991, UN Doc. CCPR/C/55/D/454/1991, decided Oct. 30, 1995, at para. 9.3. In *Teesdale v. Trinidad and Tobago*, UNHRC Comm. No. 677/1996, UN Doc. CCPR/C/74/D/677/1996, decided Apr. 1, 2002, for example, the Committee "recall[ed] its established jurisprudence that article 26 of the Covenant prohibits discrimination in law and in fact in any field regulated and protected by public authorities": ibid. at para. 9.8. It thus determined that it had the authority to determine whether the discretionary decision of the President regarding whether to commute a death sentence was exercised in a discriminatory way.

The first branch of Art. 26, equality before the law, is a relatively formal prohibition of negative conduct: it requires simply that there be no discrimination in the enforcement of existing laws. Several delegates to the Third Committee of the General Assembly argued that this guarantee of procedural non-discrimination, standing alone, was insufficient. For example, the representative of the Philippines observed that the obligation to ensure equality before the law would not preclude states from "providing for separate but equal facilities such as housing, schools and restaurants for different groups."[209] The Polish delegate agreed, pointing out that even much South African *apartheid*-era legislation could be reconciled to a guarantee of equality before the law.[210] These concerns suggested the need for a duty of non-discrimination addressed not just to the process of law enforcement, but to the *substance* of laws themselves.

The precedent drawn upon by the drafters of the Civil and Political Covenant was the principle advanced in the Universal Declaration of Human Rights of a right to *equal protection of the law*.[211] As reframed in the Covenant, the equal protection component of Art. 26 is an extraordinarily inclusive obligation, requiring that "the legislature must refrain from any discrimination when enacting laws ... [and] is also obligated to prohibit discrimination by enacting special laws and to afford effective protection against discrimination."[212] While commentators are not unanimous in their interpretation of Art. 26,[213] both the literal text of this article and an appreciation of its drafting history suggest that this provision was designed to be an extraordinarily robust guarantee of non-discrimination including, in particular, an affirmative duty to prohibit discrimination and effectively to protect all persons from discrimination.[214]

It is true that the provision was originally drafted as no more than a guarantee of "equality before the law," and that the second sentence's prohibition of discrimination was amended to reinforce this purpose by linking the duty of non-discrimination to the goal of equality before the

[209] UN Doc. A/C.3/SR.1098, at para. 25. [210] UN Doc. A/C.3/SR.1101, at para. 21.

[211] "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination": Universal Declaration, at Art. 7.

[212] Nowak, *ICCPR Commentary*, at 468.

[213] A narrow view of the scope of Art. 26 is argued by Vierdag, who concludes that "[t]he starting point was, and remained, to provide a guarantee of 'equality before the law.' All later additions were proposed and adopted with the strengthening of this principle in mind": E. Vierdag, *The Concept of Discrimination in International Law, with a Special Reference to Human Rights* (1973), at 126.

[214] See Nowak, *ICCPR Commentary*, at 462–465.

law through insertion of the words "[i]n this respect." As Nowak correctly observes, however, an intervening amendment expanded the scope of the first sentence's guarantee to include also the sweeping notion of "equal protection of the law." In the result, the correlative phrase "[i]n this respect" is logically read to require the prohibition of discrimination and the effective protection against discrimination in *both* senses stipulated in the first sentence, namely equality before the law *and* equal protection of the law.[215]

Refugees and other non-citizens are entitled to invoke Art. 26's duty to avoid arbitrary allocations and its affirmative duty to bring about non-arbitrary allocations since the Human Rights Committee has determined "that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens,"[216] a principle explicitly determined to extend to refugees and asylum-seekers.[217] Because the second branch of Art. 26 – the duty to ensure "equal protection of the law" – may reasonably be read to set an obligation to take the steps needed to offset the disadvantages which involuntary alienage creates for the enjoyment of rights,[218] it might even be thought that Art. 26 would be a sufficient basis

[215] "[S]ince the adoption of the Indian amendment, the passage 'in this respect' no longer relates only to equality before the law but also to equal protection of the law. That this involves two completely different aspects of the principle of equality was made unmistakably clear by the Indian delegate": ibid. at 464–465.

[216] UN Human Rights Committee, "General Comment No. 15: The position of aliens under the Covenant" (1986), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 140, para. 2. In the Committee's decision of *Karakurt v. Austria*, UNHRC Comm. No. 965/2000, UN Doc. CCPR/C/74/D/965/2000, decided Apr. 4, 2002, two members of the Committee took the opportunity to affirm that "[i]n [their] view distinctions based on citizenship fall under the notion of 'other status' in article 26": ibid. at Individual Opinion of Members Rodley and Scheinen. While General Comment No. 15 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.

[217] 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, 192, at para. 10.

[218] In *Nahlik v. Austria*, UNHRC Comm. No. 608/1995, UN Doc. CCPR/C/57/D/608/1995, decided July 22, 1996, the Committee was faced with an objection by Austria that "the communication [was] inadmissible ... since it relates to alleged discrimination within a private agreement, over which the State party has no influence. The Committee observes that under articles 2 and 26 of the Covenant the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of States parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment": ibid. at

to require asylum states to bring an end to any laws or practices that set refugees apart from the rest of their community.[219]

Despite the apparent extraordinary potential of Art. 26, however, it is unlikely in practice to prove a sufficient mechanism for the full enfranchisement of refugees. This is because Art. 26, like common Art. 2 of the Covenants,

para. 8.2. In *Waldman v. Canada*, UNHRC Comm. No. 694/1996, UN Doc. CCPR/C/67/D/694/1996, decided Nov. 3, 1999, the Human Rights Committee observed that "[t]he material before the Committee does not show that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools. Accordingly, the Committee rejects the State party's argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation": ibid. at para. 10.4 – implying that differentiation which *was* directed to combating disadvantage would not likely be found to be discriminatory. Such a construction is in line with the jurisprudence of many developed states with respect to comparably framed domestic guarantees of non-discrimination. "What is required by Congress is the removal of artificial, arbitrary, unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification": *Griggs v. Duke Power Co.*, 401 US 424 (US SC, Mar. 8, 1971), at 430–431. "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups": *President of the Republic of South Africa v. Hug CCT*, (1997) 4 SA 1 (SA CC, Apr. 8, 1997).

219 But in *Sahak v. Minister for Immigration and Multicultural Affairs*, [2002] FCAFC 215 (Aus. FFC, July 18, 2002), the Full Federal Court of Australia was called upon to consider whether there was a breach of the duty of non-discrimination contained in Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, UNGA Res. 2106A(XX), adopted Dec. 21, 1965, entered into force Jan. 4, 1969 (Racial Discrimination Convention). Under Art. 5, states "undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... [t]he right to equal treatment before the tribunals and all other organs administering justice": ibid. at Art. 5(a). The claim involved persons seeking recognition of their refugee status who did not speak English, and who were detained in a facility with only limited availability of interpreters. They had done everything in their power to meet the twenty-eight-day deadline for applying for judicial review of the rejection of their refugee claims but could not comply because of lack of documentation, interpreters, and lawyers in the detention facility. Their argument that the judicial review rules amounted, in effect, to race-based discrimination was, however, rejected on the formal grounds that "the Act does not deprive persons of one race of a right [to judicial review] that is enjoyed by another race, nor does it provide for differential operation depending on 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 ... Any differential effect ... is not based on race, color, descent or national or ethnic origin, but rather on the individual personal circumstances of each applicant." North J, in dissent, opted for an effects-based understanding of the duty of non-

does not establish a simple guarantee of equal protection of the law for refugees or any other group.[220] While initially proposed as such, the right as ultimately adopted is in fact an entitlement "*without any discrimination* to the equal protection of the law [emphasis added]."[221] To give effect to this formulation, the Human Rights Committee inquires whether a differential allocation of rights is "reasonable and objective."[222] If the differentiation is found to meet this test, it is not discriminatory and there is accordingly no duty either to desist from differentiation or to take positive steps to equalize opportunity under Art. 26.

Three particular trends in the application of the "reasonable and objective" standard may work against the interests of refugees and other non-citizens. First, the Committee has too frequently been prepared to recognize

discrimination, writing that "to 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." Invoking the decision of the US Supreme Court in *Griggs v. Duke Power Co.*, 401 US 424 (US SC, 1971), at 430–431, he concluded that "[t]o approach anti-discrimination provisions in [a formal, intent-based] way would rob them of much of their intended force."

220 But see T. Clark and J. Niessen, "Equality Rights and Non-Citizens in Europe and America: The Promise, the Practice, and Some Remaining Issues," (1996) 14(3) *Netherlands Quarterly of Human Rights* 245, in which it is argued that the duty of non-discrimination requires the minimization of distinctions between aliens and nationals.

221 The original amendment of India to add to the first sentence the words "and are entitled to equal protection of the law" (UN Doc. A/C.3/L.945) was sub-amended by a proposal of Argentina and Chile (UN Doc. A/C.3/L.948) to insert between the words "are entitled" and "to equal protection of the law" the words "without any discrimination": UN Doc. A/5000, at para. 103 (1961).

222 For example, the Committee determined in *Broeks v. Netherlands*, UNHRC Comm. No. 172/1984, decided Apr. 9, 1987, at para. 13, that "[t]he right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26." See also *Danning v. Netherlands*, UNHRC Comm. No. 180/1984, decided Apr. 9, 1987; and *Zwaan-de Vries v. Netherlands*, UNHRC Comm. No. 182/1984, decided Apr. 9, 1987. At one point, the test appeared to have been watered down to a simple assessment of "reasonableness." In *Simunek et al. v. Czech Republic*, UNHRC Comm. No. 516/1992, UN Doc. CCPR/C/54/D/516/1992, decided July 19, 1995, the Committee held that "[a] differentiation which is compatible with the provisions of the Covenant and is based on reasonable grounds does not amount to prohibited discrimination within the meaning of article 26": ibid. at para. 11.5. But the traditional "reasonable and objective" formulation has been affirmed in more recent jurisprudence: see e.g. *Oord v. Netherlands*, UNHRC Comm. No. 658/1995, UN Doc. CCPR/C/60/D/658/1995, decided July 23, 1997, at para. 8.5; *Foin v. France*, UNHRC Comm. No. 666/1995, UN Doc. CCPR/C/67/D/666/1995, decided Nov. 3, 1999, at para. 10.3; *Waldman v. Canada*, UNHRC Comm. No. 694/1996, UN Doc. CCPR/C/67/D/694/1996, decided Nov. 3, 1999, at para. 10.4; and *Wackenheim v. France*, UNHRC Comm. No. 854/1999, UN Doc. CCPR/C/67/D/854/1999, decided July 15, 2002, at para. 7.4.

differentiation on the basis of certain categories, including non-citizenship, as presumptively reasonable. Second and related, the Committee has paid insufficient attention to evidence that generally applicable standards may impact differently on differently situated groups, thereby failing to do justice to a substantive understanding of the right to equal protection of the law.[223] And third and most generally, the Human Rights Committee routinely affords governments an extraordinarily broad margin of appreciation rather than engaging in careful analysis of both the logic and extent of the differential treatment.

Turning to the first concern, some kinds of differentiation seem simply to be assumed to be reasonable by the Human Rights Committee. The Committee, for example, apparently feels that it is self-evidently reasonable to deny unmarried spouses the social welfare rights granted to married spouses,[224] or to withhold general guarantees of legal due process from

[223] "Fair equality of opportunity differs from the simple non-discrimination principle ... in being positive as well as negative in its requirements and in taking into account some of the prior existing disadvantages ... The two principles differ also in the conception of the social processes of inequality on which they tend to be grounded. A demand for fair equality of opportunity is more often than not based on a recognition of the structural sources of unequal opportunity and in particular on an acceptance of what has become known as 'institutional discrimination.' Finally, fair equality of opportunity, again unlike the simple non-discrimination principle, requires questions to be asked not only about the precise basis on which the good being distributed is deserved but also about the nature of the good being distributed": C. McCrudden, "Institutional Discrimination," (1982) 2(3) *Oxford Journal of Legal Studies* 303, at 344–345.

[224] "[T]he decision to enter into a legal status by marriage, which provides, in Netherlands law, both for certain benefits and for certain duties and responsibilities, lies entirely with the cohabiting persons. By choosing not to enter into marriage, Mr. Danning and his cohabitant have not, in law, assumed the full extent of the duties and responsibilities incumbent on married couples. *Consequently*, Mr. Danning does not receive the full benefits provided for in Netherlands law for married couples [emphasis added]": *Danning v. Netherlands*, UNHRC Comm. No. 180/1984, decided Apr. 9, 1987, at para. 14. See also *Sprenger v. Netherlands*, UNHRC Comm. No. 395/1990, UN Doc. CCPR/C/44/D/395/1990, decided Mar. 31, 1992. The use of the conjunction "consequently" erroneously suggests a logical nexus between the absence of the legal duties and responsibilities of married spouses and ineligibility for social welfare benefits. Whatever reasonable differentiation may be made between married and unmarried cohabitants, the needs of couples of both classes for income support consequent to the disability of one partner are not obviously distinct. The Human Rights Committee did not, however, even consider this question. The Committee has recently affirmed this approach in its decision of *Derksen v. Netherlands*, UNHRC Comm. No. 976/2001, UN Doc. CCPR/C/80/D/1976/2001, decided Apr. 1, 2004, at para. 9.2: "The Committee reiterates that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The Committee recalls that it has earlier found that a differentiation between married and unmarried couples does not amount to a violation of article 26 of the Covenant, since married and unmarried couples are subject to different legal regimes and the decision whether or not to enter into a legal status by marriage lies entirely with the [cohabiting] persons."

military conscripts.[225] On the basis of the drafting history of the Covenant, there is a clear risk that differentiation based on lack of citizenship may similarly be assumed to be reasonable, in at least some circumstances.

Specifically, several delegations, including the Indian representative who spearheaded the drive to include the guarantee of equality before the law, made it clear that they were not suggesting that all distinctions between nationals and aliens should be eradicated.[226] The non-discrimination clause was said not to prohibit measures to control aliens and their enterprises, particularly since Art. 1 of the Covenant guarantees the right of peoples to permanent sovereignty over their natural wealth and resources.[227] An effort to confine Art. 26's protection against discrimination to "citizens" rather than to "all persons" was not adopted,[228] but this decision was predicated on a general agreement that it is sometimes reasonable to distinguish between citizens and aliens.[229] The critical point is that the drafters of the Civil and Political Covenant recognized that states enjoy latitude to allocate some rights differentially on the basis of citizenship, without thereby running the risk of engaging in discriminatory conduct of the kind prohibited by Art. 26, or by common Art. 2 of the Covenants.

The extent to which the Human Rights Committee will deem differentiation based on citizenship to be the basis for objective and reasonable categorical differentiation remains unclear. On the one hand, the Committee has adopted the view that where particular categories of non-citizens are treated differently (both from each other, and from citizens) by virtue of the terms of a bilateral treaty based on reciprocity, the treaty-based origin of the distinction can justify a general finding that it is based on objective and reasonable

[225] "He merely alleges that he is being subjected to different treatment during the period of his military service because he cannot appeal against a summons like a civilian. The Committee observes that the Covenant does not preclude the institution of compulsory military service by States parties, even though this *means* that the rights of individuals may be restricted during military service, within the exigencies of such service [empahsis added]": *RTZ v. Netherlands*, UNHRC Comm. No. 245/1987, decided Nov. 5, 1987, at para. 3.2. See also *MJG v. Netherlands*, UNHRC Comm. No. 267/1987, decided Mar. 24, 1988; and *Brinkhof v. Netherlands*, UNHRC Comm. No. 402/1990, UN Doc. CCPR/C/48/D/402/1990, decided July 27, 1993, at para. 6.2. While the Committee suggests that military status "means" that due process rights may be restricted, it is incredible that the Human Rights Committee would not even ask *why* it was necessary to deprive all conscripts of their general legal right to contest a summons.

[226] See UN Docs. E/CN.4/SR.122, at 5–7; E/CN.4/SR.173, at paras. 46, 67, and 76; and E/CN.4/SR.327, at 7.

[227] Statement of the Representative of France, UN Doc. E/CN.4/SR.173, at para. 19.

[228] This oral proposal by the Representative of Indonesia (UN Doc. A/C.3/SR.1102, at para. 48) was ultimately withdrawn.

[229] See UN Docs. A/C.3/SR.1098, at paras. 10 and 55; A/C.3/SR.1099, at paras. 18, 26, 31, and 36; A/C.3/1100, at para. 10; A/C.3/SR.1101, at paras. 40, 43, and 53; A/C.3/SR.1102, at paras. 17, 24, 27, 29, and 51.

grounds, and is therefore non-discriminatory.[230] More recently, though, the Committee has insisted that a categorical approach to deeming differentiation based upon citizenship to be reasonable cannot always be justified:

> Although the Committee had found in one case ... that an international agreement that confers preferential treatment to nationals of a State party to that agreement might constitute an objective and reasonable ground for differentiation, no general rule can be drawn therefrom to the effect that such an agreement in itself constitutes a sufficient ground with regard to the requirements of article 26 of the Covenant.[231]

This second case involved a challenge to Austria's assertion that the applicant's status as a non-citizen of Austria or the European Economic Area barred him from holding a post on a work council to which he had been elected. In addressing the complaint of discrimination based on citizenship, the Committee helpfully determined that

> it is necessary to judge every case on its own facts. With regard to the case at hand, the Committee has to take into account the function of a member of a work council, i.e., to promote staff interests and to supervise compliance with work conditions ... In view of this, it is not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work council solely on their different nationality. Accordingly, the Committee finds that the author has been the subject of discrimination in violation of article 26.[232]

In the result, the Committee's position seems to be that while in some circumstances it will be reasonable to exclude non-citizens as a category from

[230] "The Committee observes ... that the categories of persons being compared are distinguishable and that the privileges at issue respond to separately negotiated bilateral treaties which necessarily reflect agreements based on reciprocity. The Committee recalls its jurisprudence that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26": *Oord v. Netherlands*, UNHRC Comm. No. 658/1995, UN Doc. CCPR/C/60/D/658/1995, decided July 23, 1997, at para. 8.5.

[231] *Karakurt v. Austria*, UNHRC Comm. No. 965/2000, UN Doc. CCPR/C/74/D/965/2000, decided Apr. 4, 2002, at para. 8.4.

[232] Ibid. The unwillingness to assume nationality to be a valid ground for differential treatment is clear also from an earlier decision of the Committee in response to a complaint brought by 743 Senegalese nationals who had served in the French army prior to independence in 1960. The Committee found that French legislation that froze their military pensions on the grounds of nationality (while simultaneously allowing for increases to the pensions of comparably situated retired soldiers of French citizenship) was not based on objective and reasonable criteria, and was therefore discriminatory. It observed that "[t]here has been a differentiation by reference to nationality acquired upon independence. In the Committee's opinion, this falls within the reference to 'other status' in the second sentence of article 26": *Gueye v. France*, UNHRC Comm. No. 196/1985, decided Apr. 3, 1989, at para. 9.4.

the enjoyment of rights, there are other situations in which citizenship (or lack thereof) cannot be deemed a valid ground of categorical differentiation. The present moment can thus be most accurately described as one of legal uncertainty on this point: until and unless the jurisprudence of the Human Rights Committee assesses the propriety of categorical differentiation based on citizenship across a broader range of issues, it will be difficult to know which forms of exclusion are likely to be found valid, and which are in breach of Art. 26.

A second and related concern is that the Human Rights Committee has traditionally shown only modest willingness to act on the principle that a rule that applies to everyone can nonetheless be discriminatory where the rule's application impacts differently on different groups of people. In *PPC v. Netherlands*,[233] for example, the issue was whether an income support law that determined eligibility for assistance on the basis of revenue during the month of September alone was discriminatory. The applicant had received an income in excess of the minimum wage during only two months of the year, of which September was one. On the basis of consideration of nothing other than his September income, PPC was denied access to the income support program. In considering his complaint, the Human Rights Committee, however, did not even consider the fact that the applicant was clearly in no different need than a person who had received identical income during a month other than September, and who would consequently have been granted benefits under the law:

> [T]he scope of article 26 does not extend to differences of results in the application of common rules in the allocation of benefits ... Such determination is ... uniform for all persons with a minimum income in the Netherlands. Thus, the Committee finds that the law in question is not *prima facie* discriminatory.[234]

The Committee's highly formalistic understanding of equality is also clear in its response to a challenge to the legality of a Quebec language law that denied merchants the right to advertise in other than the French language. The Committee found no evidence of discrimination against the English-speaking minority in that province on the grounds that the legislation

[233] UNHRC Comm. No. 212/1986, decided Mar. 24, 1988.

[234] *PPC v. Netherlands*, ibid. at para. 6.2. Like the Swedish school benefits cases, discussed below, at pp. 140–141, the facts in this case may not amount to discrimination, since the differential rights allocation was not the result of stigmatization on the grounds of actual or imputed group identity. This does not, however, make the differentiation "reasonable." As discussed below, the Committee's unwillingness to scrutinize the application of facially neutral rules on the basis of this skewed understanding of "reasonableness" has resulted in the failure to recognize discrimination against linguistic minorities, women, and immigrants.

contained only "general measures applicable to all those engaged in trade, regardless of their language."[235] The views of the Committee take no account of the fact that the impact of the language law on French and English speakers was in fact quite different. Whereas most French language merchants could continue to communicate with their majority clientele in their preferred language (French), the law prohibited most English language merchants from advertising to their principal customer base in its preferred language (English). The Human Rights Committee did not even inquire into whether there was *in fact* a difference in the impact of the law on English and French language merchants, noting simply that "[t]his prohibition applies to French speakers as well as to English speakers, so that a French speaking person wishing to advertise in English, in order to reach those of his or her clientele who are English speaking, may not do so. Accordingly the Committee finds that the [English-speaking merchant] authors have not been discriminated against on the ground of their language."[236]

The Human Rights Committee's reluctance to engage with the discriminatory ramifications of facially neutral laws has ironically led it to countenance real discrimination even against groups, such as women and minorities, whose equality rights it has otherwise insisted upon. For example, after the Committee declared discriminatory a Dutch unemployment benefits system that imposed tougher eligibility criteria for women than for men, the Netherlands government abolished the facially discriminatory requirement. Women who would have received benefits but for the subsequently abolished criterion were, however, prevented from making a retroactive claim on the grounds that they were not in fact unemployed on the date they made their claims for retroactive benefits. Finding that both men and

[235] *Ballantyne and Davidson v. Canada* and *McIntyre v. Canada*, UNHRC Comm. Nos. 359/1989 and 385/1989 (joined on Oct. 18, 1990), UN Docs. CCPR/C/40/D/359/1989 and CCPR/C/40/D/385/1989, decided Mar. 31, 1993, at para. 11.5. See also *Singer v. Canada*, UNHRC Comm. No. 455/1991, UN Doc. CCPR/C/51/D/455/1991, decided July 26, 1994.

[236] *Ballantyne and Davidson v. Canada* and *McIntyre v. Canada*, UNHRC Comm. Nos. 359/1989 and 385/1989 (joined on Oct. 18, 1990), UN Docs. CCPR/C/40/D/359/1989 and CCPR/C/40/D/385/1989, decided Mar. 31, 1993, at para. 11.5. This is a case that cried out for nuanced analysis under the affirmative action rubric. There are some important social reasons that suggest the need to reinforce the place of the French language in Quebec society, but the Committee ought logically to have given careful consideration to whether the particular approach adopted was reasonable in the sense of adequately taking account of the individuated capabilities and potentialities of persons outside the beneficiary group. Relevant issues would include whether the legislation impairs the rights of members of the non-beneficiary class more than is necessary to accomplish its objectives, and whether the negative impact of the affirmative action program on members of the non-beneficiary group is disproportionate to the good thereby sought to be achieved for those within the target group. See text below, at p. 139, n. 252.

women were allowed to claim retroactive benefits only if unemployed, the Human Rights Committee dismissed the allegation of discrimination.[237]

This result completely misses the salient point that limiting the ability to make a retroactive claim *in practice* had radically different consequences for men and women. Whereas men could have claimed the benefits at the time they were unemployed (because they were eligible to do so), women were legally prevented from receiving benefits because of the then-prevailing discriminatory eligibility requirement. The apparently neutral demand that all applicants be unemployed at the time of requesting retroactive benefits – when the state itself stood in the way of women complying with that facially neutral requirement – was most certainly discriminatory in its effect. A genuinely non-discriminatory retroactivity rule ought to have accommodated the legal disability formerly imposed on women.

Of greatest concern to refugees, a similar superficiality of analysis has unfortunately informed the Committee's consideration of cases involving allegations of discrimination against non-citizens. For example, restrictions on the right to family unity imposed by immigration controls have received short shrift. In *AS v. Canada*, the Committee ruled that the refusal to allow the applicant's daughter and grandson to join her in Canada because of their economic and professional status did not even raise an issue potentially cognizable as discrimination.[238] Yet surely it is clear that the family reunification rules impact disproportionately on recent immigrants and other non-citizens, and can – if not objective and reasonable – discriminate against them in relation to their human right to live with their families.

Similarly, in *Oulajin and Kaiss v. Netherlands*,[239] the Human Rights Committee upheld a Dutch law that paid child support in respect of the natural children of Dutch residents wherever the children might live, but which denied support for foster children who were not resident in the Netherlands. Dutch authorities argued that this distinction was reasonable because whereas a "close, exclusive relationship ... is presumed to exist in respect of one's own children ... it must be made plausible in respect of foster children."[240] In fact, however, the bar on payment to foster children

[237] *VdM v. Netherlands*, UNHRC Comm. No. 478/1991, UN Doc. CCPR/C/48/D/478/1991, decided July 26, 1993; *Araujo-Jongen v. Netherlands*, UNHRC Comm. No. 418/1990, UN Doc. CCPR/C/49/D/418/1990, decided Oct. 22, 1993; *JAMB-R v. Netherlands*, UNHRC Comm. No. 477/1991, UN Doc. CCPR/C/50/D/477/1991, decided Apr. 7, 1994.

[238] UNHRC Comm. No. 68/1980, decided Mar. 31, 1981. It was held that the negative resettlement assessment was "in conformity with the provisions of existing Canadian law, the application of which did not in the circumstances of the present case give rise to any question of discrimination": ibid. at para. 8.2(c).

[239] *Oulajin and Kaiss v. Netherlands*, UNHRC Comm. Nos. 406/1990 and 426/1990, UN Docs. CCPR/C/46/D/406/1990 and CCPR/C/46/D/426/1990, decided Oct. 23, 1992.

[240] Ibid. at para. 2.5.

resident abroad was absolute, and could not be dislodged by evidence of a de facto close and exclusive relationship. The migrant workers who appealed to the Committee pointed out that both their natural and foster children were being raised under precisely the same conditions in Morocco, and that the presumption of a weaker bond between parents and foster children that gave rise to the statutory prohibition of payments to non-resident foster children was rooted in a stereotypical Western understanding of family obligations. The separation of the migrant workers from their children, both natural and foster, was moreover a function of their limited rights as non-citizens. They had not wished to leave their children in Morocco, but were required to do so under the terms of their immigration authorizations.

Taking absolutely no account of the fundamentally different circumstances of migrant workers and Dutch citizens, the Committee found the support scheme to be non-discriminatory, as "applicants of Dutch nationality, residing in the Netherlands, are also deemed ineligible for child benefits for their foster children who are resident abroad."[241] More generally, four members appended an individual opinion in which they suggested that states should be free in all but the most egregious cases to allocate social benefits as they see fit, without fear of running afoul of Art. 26:

> With regard to the application of article 26 of the Covenant in the field of economic and social rights, it is evident that social security legislation, which is intended to achieve aims of social justice, necessarily must make distinctions. It is for the legislature of each country, which best knows the socio-economic needs of the society concerned, to try to achieve social justice in the concrete context. Unless the distinctions made *are manifestly discriminatory or arbitrary*, it is not for the Committee to reevaluate the complex socio-economic data and substitute its judgment for that of the legislatures of States parties [emphasis added].[242]

This unwillingness to consider the ways in which foreign citizenship or residence abroad may give rise to the need for special accommodation in order to achieve substantive equality is also apparent from the decision in *SB v. New Zealand*.[243] Entitlement to a New Zealand government pension was reduced by the amount of any other government pension, but not by any sums payable under a private pension. The complainant, an immigrant to New Zealand, argued that he stood at a disadvantage relative to native New Zealanders since all pensions in his country of origin were accumulated in a state-administered fund. Because all of his pension benefits therefore derived from a government-administered plan, they were counted against his entitlement to a New Zealand pension. A New Zealand national, on the other hand, who was allowed to contribute the same monies to a private pension scheme, would see no reduction in his entitlement to a New Zealand government pension. The Human Rights Committee saw no arguable claim of discrimination, invoking its standard reasoning that the law was not explicitly discriminatory in relation to non-citizens.[244] As in the case of the migrant workers' application for benefits in respect of their foster children, the Committee showed no sensitivity to the different way in which a facially neutral law can impact on persons who are not, or who have not always been, citizens of the country in question.

There is, however, cause for optimism in a series of cases contesting the validity of laws designed to effect restitution to persons deprived of property by Communist regimes.[245] These cases did not actually involve an allegation of discriminatory impact in the application of facially neutral laws: to the contrary, the laws being contested explicitly denied compensation to persons able to meet citizenship and other criteria.[246] Yet because the governments argued that despite the language of the relevant laws there had been no intention to discriminate against non-citizens, the Committee felt compelled to take up the question of discriminatory effects. It did so most clearly in its decision of *Adam v. Czech Republic*, where it specifically determined that there is no need to find an intention to discriminate in order to establish a breach of Art. 26:

> The State party contends that there is no violation of the Covenant because the Czech and Slovak legislators had no discriminatory intent at the time of the adoption of Act 87/1991. The Committee is of the view, however, that the intent of the legislature is not dispositive in determining a breach of article 26 of the Covenant, but rather the consequences of the enacted legislation. Whatever the motivation or intent of the legislature, a law may still contravene article 26 of the Covenant if its effects are discriminatory.[247]

[241] Ibid. at para. 5.4.

[242] Ibid. at para. 3 of the Individual Opinion of Messrs. Kurt Herndl, Rein Müllerson, Birame N'Diaye, and Waleed Sadi.

[243] UNHRC Comm. No. 475/1991, UN Doc. CCPR/C/50/D/475/1991, decided Mar. 31, 1994.

[244] "[T]he Act does not distinguish between New Zealand citizens and foreigners ... [A] deduction takes place in all cases where a beneficiary also receives a similar [government-administered] benefit ... from abroad": *SB v. New Zealand*, UNHRC Comm. No. 475/1991, UN Doc. CCPR/C/50/D/475/1991, decided Mar. 31, 1994, at para. 6.2.

[245] The seminal case was *Simunek et al. v. Czech Republic*, UNHRC Comm. No. 516/1992, UN Doc. CCPR/C/54/D/516/1992, decided July 19, 1995.

[246] For example, the issue in *Simunek et al. v. Czech Republic*, ibid., was whether the Czech government had discriminated by passing a law which granted restitution for property confiscated during the Communist era, but only to those who were citizens and permanent residents of the Czech Republic on September 30, 1991.

[247] *Adam v. Czech Republic*, UNHRC Comm. No. 586/1994, UN Doc. CCPR/C/57/D/586/1994, decided July 23, 1996.

This position has been affirmed in subsequent decisions dealing with laws that were similarly explicit in their denial of rights to non-citizens.[248]

The Committee's most direct affirmation that discrimination contrary to Art. 26 can be discerned on the basis of effects without proof of intent came in a decision which found a Dutch law to be discriminatory because it provided survivorship benefits for the children of unmarried parents, but only if they were born after a particular date. In that context, the Committee unambiguously affirmed that "article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons."[249] It remains to be seen whether the Committee will adopt the same approach when called upon to assess the reasonableness of rules which discriminate in fact against non-citizens despite their complete facial neutrality[250] – including, for example, rules on

[248] See e.g. *Blazek v. Czech Republic*, UNHRC Comm. No. 857/1999, UN Doc. CCPR/C/72/D/857/1999, decided July 12, 2001, at para. 5.8; and *Brok v. Czech Republic*, UNHRC Comm. No. 774/1997, UN Doc. CCPR/C/73/D/774/1997, decided Oct. 31, 2001, at para. 7.2.

[249] *Derksen v. Netherlands*, UNHRC Comm. No. 976/2001, UN Doc. CCPR/C/80/D/1976/2001, decided Apr. 1, 2004, at para. 9.3. See also *Althammer v. Austria*, UNHRC Comm. No. 998/2001, UN Doc. CCPR/C/78/D/1998/2001, decided Aug. 8, 2003, at para. 10.2, which noted that "a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionally affect persons having a particular race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds." Specifically as regards sex discrimination, the Human Rights Committee has taken the view that "[t]he State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women. States parties must provide information regarding the actual role of women in society so that the Committee may ascertain what measures, in addition to legislative provisions, have been or should be taken to give effect to these obligations, what progress has been made, what difficulties are encountered and what steps are being taken to overcome them": UN Human Rights Committee, "General Comment No. 28: The equality of rights between men and women" (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 178, para. 3.

[250] There is some cause for optimism in the Committee's recently expressed view that "an indirect discrimination may result from a failure to treat different situations differently, if the negative results of such failure exclusively or [disproportionately] affect persons of a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status": *Godfried and Pohl v. Austria*, UNHRC Comm. No. 1160/2003, UN Doc. CCPR/C/81/D/1160/2003, decided July 9, 2004.

immigration, child support, and pension entitlement adjudicated in earlier cases without the benefit of an effects-based analysis.[251]

The third and most fundamental concern about the Human Rights Committee's non-discrimination analysis is its tendency to assume the reasonableness of many state-sanctioned forms of differentiation, rather than to condition a finding of reasonableness on careful analysis. There has, in particular, been a reluctance to delve into the facts of particular cases in order to ensure that the differential treatment is actually proportionate to the social good thereby being advanced.[252] For example, the case of *Debreczeny v.*

[251] The specificity of the approach in the property restitution cases is clear from the views of the Committee that it has determined only that "a requirement in the law for citizenship as a necessary condition for restitution of property previously confiscated by the authorities makes an arbitrary, and, consequently, a discriminatory distinction between individuals who are equally victims of prior state confiscations, and constitutes a violation of article 26 of the Covenant": *Des Fours v. Czech Republic*, UNHRC Comm. No. 747/1997, UN Doc. CCPR/C/73/D/747/1997, decided Oct. 30, 2001, at para. 8.4. It is also important to note that in both the property restitution cases and even in the decision of *Derksen v. Netherlands*, UNHRC Comm. No. 976/2001, UN Doc. CCPR/C/80/D/1976/2001, decided Apr. 1, 2004, the impugned legislation was, in fact, explicit about the category of persons to whom benefits would be denied (non-citizens in the former cases, children born before a particular date in the latter decision). The Committee has yet to apply the indirect discrimination doctrine to a situation in which there is no such explicit limitation in the law or practice being scrutinized. Moreover, the Committee in *Derksen*, ibid., seemed at pains to make clear that the government's recent decision to extend survivorship benefits to the children of unmarried parents was critical to the finding of discrimination. "In the circumstances of the present case, the Committee observes that under the earlier [law] the children's benefits depended on the status of the parents, so that if the parents were unmarried, the children were not eligible for the benefits. However, under the new [law], benefits are being denied to children born to unmarried parents before 1 July 1996 while granted in respect of similarly situated children born after that date": ibid. at para. 9.3. Yet if the Committee is truly committed to an effects-based approach to the identification of indirect discrimination, it is unclear why a law designed along the lines of the former law – which provided benefits for the children of married parents, but not for the children of unmarried parents – would not amount to discrimination in fact against the children of unmarried parents. Indeed, the rejection in this same case of a claim by the child's mother for benefits on the grounds that she and her (now deceased) partner failed to be married and hence to establish entitlement under the survivorship regime applicable to spouses suggests the extraordinarily fragile nature of the Committee's new-found commitment to the eradication of indirect discrimination.

[252] For example, to determine whether a law that infringes a protected right may nonetheless be adjudged a "reasonable limitation" for Canadian constitutional law purposes, the Supreme Court of Canada has determined that the government's objective must be pressing and substantial, and that there is proportionality between means and end. To determine the latter question of proportionality, consideration should be given to whether the limitation on the right is carefully designed to achieve its objective; whether it constrains the right to the minimum extent truly necessary; and whether the benefit of the limitation outweighs the harm occasioned by infringement of the right: *R v. Oakes*,

Netherlands[253] involved a police officer who was excluded from membership on a municipal council by reason of a law deeming membership of the council to be incompatible with the subordinated position of a police officer to local authorities. While the Committee logically noted the "objective and reasonable" goal of avoiding conflicts of interest, it failed to explain why the *complete exclusion* of the police officer from holding local political office was a proportionate means to achieve that goal.[254]

Deference to state assertions of reasonableness is also evident in two cases against Sweden involving the denial of financial assistance for school meals and textbooks to children attending private schools. The Human Rights Committee found no reason to uphold the claims of discrimination on the grounds that the government might "reasonably and objectively" choose to treat public and private schools (not students) differently.[255] The Committee observed that students who wish to receive the benefits should exercise their option to attend a public school. Yet surely if "reasonableness" has any significance in the context of discrimination analysis, it should be to direct

[1986] 1 SCR 103 (Can. SC, Feb. 28, 1986). The importance of a law's objective cannot compensate for its patent over-breadth. As such, the Supreme Court of Canada has struck down legislation advancing critical objectives when the means adopted are not proportional to the objective, e.g. involving the protection of children from sexual offenders (*R v. Heywood*, [1994] 3 SCR 761 (Can. SC, Nov. 10, 1994)), the protection of female children from the harm caused to them by premature intercourse (*R v. Hess*, [1990] 2 SCR 906 (Can. SC, Oct. 4, 1990)) and the protection of persons from the health risks of tobacco use (*RJR-Macdonald Inc. v. Canada*, [1995] 3 SCR 199 (Can. SC, Sept. 25, 1995)).

253 UNHRC Comm. No. 500/1992, UN Doc. CCPR/C/53/D/500/1992, decided Apr. 3, 1995.

254 Similarly, the Committee upheld the reasonableness of the retroactive reclassification of a member of the Polish civic militia as a member of the prior regime's security forces, thereby making him ineligible for reappointment in the post-Communist government: *Kall v. Poland*, UNHRC Comm. No. 552/1993, UN Doc. CCPR/C/60/D/552/1993, decided July 14, 1997. In a dissenting opinion, Members Evatt and Medina Quiroga wrote that "it has to be examined whether the classification of the author's position as part of the Security Police was both a necessary and proportionate means for securing a legitimate objective, namely the re-establishment of internal law enforcement services free of the influence of the former regime, as the State party claims, or whether it was unlawful or arbitrary and or discriminatory, as the author claims": ibid.

255 In *Blom v. Sweden*, UNHRC Comm. No. 191/1985, decided Apr. 4, 1988, the Committee declared that "[i]n deciding whether or not the State party violated article 26 by refusing to grant *the author, as a pupil* of a private school, an education allowance for the school year 1981/82, whereas *pupils* of public schools were entitled to education allowances for that period, the Committee bases its findings on the following observations. The State party's educational system provides for both private and public education. The State party cannot be deemed to act in a discriminatory fashion if it does not provide the same level of subsidy *for the two types of establishment*, when the private system is not subject to State supervision [emphasis added]": ibid. at paras. 10.2–10.3. That the Committee failed to grapple with the issue of whether there was truly a difference in the needs of the two classes of student is readily apparent from its reference to the legitimacy of withholding funds from one of two kinds of *establishment*.

attention to whether or not the differential rights allocation is made on the basis of real differences of need between the persons affected – here, the students attending the private schools and those in public schools. There is, however, no evidence that the Committee even canvassed this issue, much less that it found some reason implicitly to declare that *all students* in attendance at a private school are by virtue of that status in no need of personal financial assistance. In these cases reliance on a "reasonableness" test rather than on serious analysis of the real needs and interests of the persons involved served simply to legitimate state discretion.[256]

This extraordinary deference to state perceptions of reasonableness has even led the Committee to condone clear unfairness in the purported pursuit of justice. While some form of restitution was clearly called for in the case of Uruguayan civil servants dismissed by the former military government for their political affiliations, the Human Rights Committee in *Stalla Costa v. Uruguay*[257] did not even consider whether the particular affirmative action program adopted – which effectively blocked access to civil service recruitment for a whole generation of younger Uruguayans – was unduly intrusive on the rights of the non-beneficiary class. Instead, the Committee was content to find the program to be "reasonable and objective," observing simply that "[t]aking into account the social and political situation in Uruguay during the years of military rule, in particular the dismissal of many public servants ... the Committee *understands* the enactment ... by the new democratic Government of Uruguay as a measure of redress [emphasis added]."[258]

Indeed, it is "understandable" that the new government would wish to afford redress to the improperly fired civil servants. This general legitimation is precisely the result compelled by scrutiny of a differential rights allocation in relation to no more than a "reasonableness" test. That the program is "understandable" does not, however, make it non-discriminatory. A decision on this latter issue should have led the Committee to consider, for example, whether there were other means of redress open to the Uruguayan government that would not have had such a devastating impact on persons not previously employed by the state.

There are many other examples in which state-sanctioned differentiation is simply assumed to be reasonable without meaningful analysis. The Committee has rejected claims of discrimination based on an assumption of reasonable differentiation where social welfare benefits were calculated

256 The Swedish school benefits cases could, however, legitimately be rejected on the basis that they do not involve differentiation on the grounds of actual or imputed group identity. They may, in other words, be examples of arbitrariness in rights allocation, rather than discrimination as such. See generally text above, at p. 124.

257 UNHRC Comm. No. 198/1985, decided July 9, 1987.

258 *Stalla Costa v. Uruguay*, ibid. at para. 10.

based on a presumption of greater support from cohabiting family members than from non-related cohabitants;[259] where active and retired employees who were similarly situated economically were treated differently for purposes of pension calculation;[260] where compensation was paid to military personnel, but not to civilians, who were detained by enemy soldiers during wartime;[261] where a legal aid system funded counsel for the civil defendant in a criminal case at nearly three times the rate paid to counsel for the plaintiff;[262] where the government elected to bar only one of several forms of employment understood to be inconsistent with respect for human dignity, with severe economic consequences for the former employees;[263] and where a

[259] "In the light of the explanations given by the State party, the Committee finds that the different treatment of parents and children and of other relatives respectively, contained in the regulations under the Social Security Act, is not unreasonable nor arbitrary, and its application in the author's case does not amount to a violation of article 26 of the Covenant": *Neefs v. Netherlands*, UNHRC Comm. No. 425/1990, UN Doc. CCPR/C/51/D/425/1990, decided July 15, 1994, at para. 7.4.

[260] "In the instant case, the contested differentiation is based only superficially on a distinction between employees who retired before 1 January 1992 and those who retired after that date. Actually, this distinction is based on a different treatment of active and retired employees at the time. With regard to this distinction, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that the distinction was not objective or how it was arbitrary or unreasonable. Therefore, the Committee concludes that the communication is inadmissible": *Nahlik v. Austria*, UNHRC Comm. No. 608/1995, UN Doc. CCPR/C/57/D/608/1995, decided July 22, 1996, at para. 8.4.

[261] "As regards the claim that the exclusion of civilian detainees from entitlements under the War Pensions Act is discriminatory, the Committee notes from the information before it that the purpose of the Act is specifically to provide pension entitlements for disability and death of those who were in the service of New Zealand in wartime overseas, not to provide compensation for incarceration or for human rights violations. In other words if disability arises from war service it is irrelevant to the entitlement to a pension whether the person suffered imprisonment or cruel treatment by captors. Keeping in mind the Committee's prior jurisprudence according to which a distinction based on objective and reasonable criteria does not constitute discrimination within the meaning of article 26 of the Covenant, the Committee considers that the authors' claim is incompatible with the provisions of the Covenant and thus inadmissible": *Drake v. New Zealand*, UNHRC Comm. No. 601/1994, UN Doc. CCPR/C/59/D/601/1994, decided Apr. 3, 1997, at para. 8.5.

[262] "The Committee recalls that differences in treatment do not constitute discrimination, when they are based on objective and reasonable criteria. In the present case, the Committee considers that representation of a person presenting a civil claim in a criminal case cannot be equalled to representing the accused. The arguments advanced by the author and the material he provided do not substantiate, for purposes of admissibility, the author's claim that he is a victim of discrimination": *Lestourneaud v. France*, UNHRC Comm. No. 861/1999, UN Doc. CCPR/C/67/D/861/1999, decided Nov. 3, 1999, at para. 4.2.

[263] "The Committee is aware of the fact that there are other activities which are not banned but which might possibly be banned on the basis of grounds similar to those which justify the ban on dwarf tossing. However, the Committee is of the opinion that, given that the ban on dwarf tossing is based on objective and reasonable criteria and the author has not established that this measure was discriminatory in purpose, the mere fact that there may be other activities liable to be banned is not in itself sufficient to confer a discriminatory character on the ban on dwarf tossing. For these reasons, the Committee considers that, in ordering the above-mentioned ban, the State party has not, in the present case, violated the rights of the author as contained in article 26 of the Covenant": *Wackenheim v. France*, UNHRC Comm. No. 854/1999, UN Doc. CCPR/C/67/D/854/1999, decided July 15, 2002, at para. 7.5.

state's law codified a presumption that military officers of a predecessor state presented a risk to national security and were therefore ineligible for citizenship.[264] In a recent and particularly clear example of the Committee's abdication of its role seriously to examine the merits of a state's assertion of the reasonableness of differentiation, a twenty-year residence requirement for purposes of voting on self-determination for New Caledonia was upheld as non-discriminatory:

> [T]he Committee considers that, in the present case, the cut-off points set for the ... referendums from 2014 onwards are not excessive inasmuch as they are in keeping with the nature and purpose of these ballots, namely a self-determination process involving the participation of persons able to prove sufficiently strong ties to the territory whose future is being decided. This being the case, these cut-off points do not appear to be disproportionate with respect to a decolonization process involving the participation of residents who, over and above their ethnic origin or political affiliation, have helped, and continue to help, build New Caledonia through their sufficiently strong ties to the territory.[265]

[264] The law in question presumes that foreigners who have served in the armed forces of another country pose a threat to Estonian national security. In this case, "the Tallinn Administrative Court ... found that the author had not been refused citizenship because he had actually acted against the Estonian state and its security in view of his personal circumstances. Rather, for the reasons cited, the author was in a position where he could act against Estonian national security ... It observed that there was no need to make out a case of a specific individual threat posed by the author, as he had not been accused of engaging in actual activities against the Estonian state and its security": *Borzov v. Estonia*, UNHRC Comm. No. 1136/2002, UN Doc. CCPR/C/81/D/1136/2002, decided Aug. 25, 2004, at para. 2.5. The Committee nonetheless determined that "the State party concluded that a grant of citizenship to the author would raise national security issues generally on account of the duration and level of the author's military training, his rank and background in the armed forces of the then USSR ... [T]he author did enjoy a right to have the denial of his citizenship application reviewed by the courts of the State party. Noting, furthermore, that the role of the State party's courts in reviewing administrative decisions, including those decided with reference to national security, appears to entail genuine substantive review, the Committee concludes that the author has not made out his case that the decision taken by the State party with respect to the author was not based on reasonable and objective grounds": ibid. at para. 7.4.

[265] *Gillot v. France*, UNHRC Comm. No. 932/2000, UN Doc.CCPR/C/75/D/932/2000, decided July 15, 2002, at para. 14.7.

The Committee did not even examine the question whether "sufficiently strong ties" might be demonstrated by a period of residence significantly less than twenty years, much less the allegation that the goal of the requirement was to disfranchise an ethnic minority of the population.[266]

The critical difference that careful analysis of the reasonableness of differentiation can make is evident from examination of a pair of cases which alleged that the automatic prolongation of alternative military service was discriminatory in relation to genuine conscientious objectors. In *Järvinen v. Finland*,[267] the Human Rights Committee considered Finland's rule requiring conscientious objectors to military service to undertake alternative service for double the period of military service. The doubling of service time for conscientious objectors was said by the state to be justified on the grounds that it was necessary in order to discourage abuse of the non-combatant option. The Committee agreed, finding that the scheme was "reasonable" based on the importance of administrative workability, and because there was no intention to discriminate. No effort was made to assess whether the risk of abuse under the new system truly required such a significant disparity between the duration of military and alternative service, much less whether it was necessary to impose the prolonged service on persons willing to submit to careful scrutiny of their reasons for refusal to engage in military service.

In contrast, the Human Rights Committee more recently arrived at the opposite conclusion when it refused simply to accept the state party's assertion of reasonableness. In a series of decisions rendered against France on facts essentially indistinguishable from those considered in *Järvinen*, the Committee rejected the reasonableness of a double-time civilian service alternative imposed in the interests of ensuring that only true conscientious objectors would avoid military service:

> Any differentiation, as the Committee has had the opportunity to state repeatedly, must ... be based on reasonable and objective criteria. In this context, the Committee recognizes that the law and practice may establish differences between military and national alternative service and that such differences may, in a particular case, justify a longer period of service, provided that the differentiation is based on reasonable and objective criteria, *such as the nature of the specific service concerned or the need for a special training in order to accomplish that service*. In the present case, however, the reasons forwarded by the State party do not refer to such criteria or refer to criteria in general terms without specific reference to the author's case, *and are rather based on the argument that doubling the length of service was the only way to test the sincerity of an individual's convictions*. In the Committee's view, such argument does not satisfy the requirement that the difference in treatment involved in the present case was based on reasonable and objective criteria. In the circumstances, the Committee finds that a violation of article 26 occurred, since the author was discriminated against on the basis of his conviction of conscience [emphasis added].[268]

There could surely be no more compelling example of why a real injustice can be done when the assessment of reasonableness fails to scrutinize the reasons advanced by states for practices which raise *prima facie* claims of discrimination.[269] Regrettably, only a minority of the jurisprudence under Art. 26 takes up this question,[270] and none of it has thus far engaged in more sophisticated proportionality analysis.

266 "The authors also consider the period of residence determining the right to vote in referendums from 2014 onwards, namely 20 years, to be excessive. They again assert that the French authorities are seeking to establish an electorate of Kanaks and Caldoches for whom, moreover, the right to vote is maintained even in the event of lengthy absences from New Caledonia": *Gillot v. France*, ibid. at para. 3.10.

267 UNHRC Comm. No. 295/1988, decided July 25, 1990.

268 *Foin v. France*, UNHRC Comm. No. 666/1995, UN Doc. CCPR/C/67/D/666/1995, decided Nov. 3, 1999, at para. 10.3. See also *Maille v. France*, UNHRC Comm. No. 689/1996, UN Doc. CCPR/C/69/D/689/1996, decided July 10, 2000; and *Venier and Nicolas v. France*, UNHRC Comm. Nos. 690/1996 and 691/1996, UN Docs. CCPR/C/69/D/690/1996 and CCPR/C/69/D/691/1996, decided July 10, 2000.

269 See also *Young v. Australia*, UNHRC Comm. No. 941/2000, UN Doc. CCPR/C/78/D/941/2000, decided Aug. 6, 2003, in which the refusal of the Committee to defer to the government's assertion that it was "reasonable" to distinguish between same-sex and opposite-sex couples for purposes of entitlement to veterans' benefits led to a finding of discrimination contrary to Art. 26. In contrast to the usual pattern of deference, the Committee here noted that "[t]he State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced": ibid. at para. 10.4.

270 A somewhat unstructured analysis underpins some of the Committee's decisions. For example, in one case the Committee explicitly articulated the view that the disfranchisement of past property owners in favor of current tenants was rendered reasonable by virtue of the existence of a system to compensate the former owners. "The State party has justified the (exclusionary) requirement that current tenants of former State-owned residential property have a 'buy first option' even vis-à-vis the former owner of the property with the argument that tenants contribute to the maintenance of the property through improvements of their own. The Committee does not consider that the fact of giving the current tenants of former State-owned property priority in the privatization sale of such property is in itself unreasonable; the interests of the 'current tenants', who may have been occupying the property for years, are deserving of protection. If the former owners are, moreover, compensated on equal and non-discriminatory terms ... the interplay between Act XXV of 1991 and of Act LXVIII of 1993 can be deemed compatible with article 26 of the Covenant": *Somers v. Hungary*, UNHRC Comm. No. 566/1993, UN Doc. CCPR/C/53/D/566/1993, decided July 23, 1996, at para. 9.8. More recently, in *Love v. Australia*, UNHRC Comm. No. 983/2001, UN Doc.

The point is not that the Human Rights Covenants' guarantees of non-discrimination – in particular, Art. 26 of the Civil and Political Covenant – will never be of value to refugees and other non-citizens. To the contrary, non-discrimination law will be a critically important remedy for refugees if recent, positive developments continue and take hold – specifically, if there is clear rejection of the view that categorical distinctions based on citizenship are to be assumed to be reasonable; if there is a genuine preparedness to take account of the discriminatory effects of superficially neutral laws and practices; and if the nascent preparedness to begin real interrogation of state assertions of reasonableness continues. The Human Rights Committee has moreover shown an awareness that refugee rights should follow from their unique predicament as involuntary expatriates,[271] and has indicated a particular disinclination to find restrictions to be reasonable insofar as individuals are unable to comply by virtue of having been forced to seek refugee status abroad.[272] But all of these developments must be seen for what they are: modest and recent shifts away from what has traditionally been a rather

CCPR/C/77/D/983/2001, decided Mar. 25, 2003, a case involving an allegation of age discrimination in the context of a mandatory retirement requirement for commercial airline pilots, the Committee observed that "it is by no means clear that mandatory retirement age would generally constitute age discrimination. The Committee takes note of the fact that systems of mandatory retirement age may include a dimension of workers' protection by limiting the life-long working time, in particular when there are comprehensive social security schemes that secure the subsistence of persons who have reached such an age. Furthermore, reasons related to employment policy may be behind legislation or policy on mandatory retirement age ... [T]he Committee's task [is to assess] whether any particular arrangement for mandatory retirement age is discriminatory. In the present case, as the State party notes, the aim of maximising safety to passengers, crew and persons otherwise affected by flight travel was a legitimate aim under the Covenant. As to the reasonable and objective nature of the distinction made on the basis of age, the Committee takes into account the widespread national and international practice, at the time of the author's dismissals, of imposing a mandatory retirement age of 60. In order to justify the practice of dismissals maintained at the relevant time, the State party has referred to the ICAO regime which was aimed at, and understood as, maximising flight safety. In the circumstances, the Committee cannot conclude that the distinction made was not, at the time of Mr Love's dismissal, based on objective and reasonable considerations": ibid. at paras. 8.2–8.3.

271 "These victims of political persecution sought residence and citizenship in other countries. Taking into account that the State party itself is responsible for the departure of the authors, it would be incompatible with the Covenant to require them permanently to return to the country as a prerequisite for the restitution of their property or for the payment of appropriate compensation": *Simunek et al. v. Czech Republic*, UNHRC Comm. No. 516/1992, UN Doc. CCPR/C/54/D/516/1992, decided July 19, 1995, at para. 11.6.

272 In *Blazek v. Czech Republic*, UNHRC Comm. No. 857/1999, UN Doc. CCPR/C/72/D/857/1999, decided July 12, 2001, the Committee observed "that it cannot conceive that the distinction on grounds of citizenship can be considered reasonable in the light of the fact that the loss of Czech citizenship was a function of their presence in a State in which they were able to obtain refuge": ibid. at para. 5.8. This is consistent with Art. 6 of the Refugee Convention, which requires that refugees be exempted from requirements "which by virtue of their nature a refugee is incapable of fulfilling": Refugee Convention, at Art. 6. See generally chapter 3.2.3 below.

273 As the International Court of Justice has recently observed, the Human Rights Committee has appropriately insisted in other contexts of consideration on the proportionality of restrictions of rights before finding them to be lawful. "The Court would observe that the restrictions provided for under Article 12, paragraph 3, of the International Covenant on Civil and Political Rights [dealing with freedom of movement] are, by the very terms of that provision, exceptions to the right of freedom of movement contained in paragraph 1. In addition, it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends. As the Human Rights Committee put it, they 'must conform to the principle of proportionality' and 'must be the least intrusive instrument amongst those which might achieve the desired result' (CCPR/C/21/Rev.1/Add.9, General Comment No. 27, para. 14)": *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, decided July 9, 2004, at para. 136.

274 F. V. Garcia Amador et al., *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974), at 5, 129.

superficial and deferential jurisprudence on the meaning of non-discrimination. Until the recent evolution is solidified and enhanced by, for example, incorporation of an analytically rigorous proportionality test,[273] refugees and other non-citizens are still not positioned dependably to benefit from most of the rights guaranteed to citizens.

2.5.6 International aliens law

As the preceding discussion makes clear, the inadequacy of international human rights law as a response to the vulnerabilities of refugees is in part a function of its inattention to the concerns of aliens generally. Inapplicable assumptions and outright exclusions reflect the orientation of international human rights law to meeting the needs of most of the world's population, who are citizens of their state of residence. At least until a more inclusive understanding of non-discrimination law evolves on the international plane, refugees, like other non-citizens, cannot depend on the general system of human rights protection adequately to address those of their concerns that are specifically a function of non-citizenship.

The early response of the United Nations to this dilemma was essentially to deny it. The Special Rapporteur of the International Law Commission, F. V. Garcia-Amador, confidently proclaimed that there was no need for a special legal regime to benefit aliens. His draft codification of the rights of aliens provides that "aliens enjoy the same rights and the same legal guarantees as nationals," these being "the 'universal respect for, and observance of, human rights and fundamental freedoms' referred to in the Charter of the United Nations and in other general, regional and bilateral instruments."[274] As

previously shown, however, the Charter establishes only a limited duty of non-discrimination,[275] and the two Human Rights Covenants are not sufficiently attentive to the concerns and disabilities of aliens.[276] Because bilateral treaties do not enable aliens themselves to take action, but rather create rights between governments, they provide no effective recourse for refugees.[277] The upshot of Garcia-Amador's proposal, therefore, would have been to leave refugees with a fragmentary combination of rights derived from some treaties and general principles of law.[278]

A more forthright assessment of the problem was offered by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Baroness Diana Elles. She argued that the Universal Declaration of Human Rights was not a binding instrument, and could not therefore confer legal rights on aliens; that the Covenants on Human Rights offered at best patchwork protection to non-citizens; and that the many exclusions and permissible limitations in international instruments provided a substantively inadequate response to the vulnerabilities of persons outside their own country.[279] Although the Special Rapporteur's efforts were therefore clearly premised on the need to establish legally enforceable rights for aliens,[280] it is ironic that the product of her efforts within the Sub-Commission was itself completely unenforceable. The General Assembly adopted the Declaration on the Human Rights of Individuals Who are not

[275] See chapter 1.2.3 above, at p. 44. [276] See chapter 2.5.4 above, at pp. 121–123.

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

[278] "Admittedly, there is a body of opinion that may regard [codification of aliens' rights] as surplusage. Although the law governing the Responsibility of States for Injuries to Aliens was one of international law's first attempts to protect human rights, according to some authorities it has been preempted, in whole or in part, by the generation by the United Nations of new international human rights norms applicable to nationals and aliens alike. The fact that not all states subscribe to such norms and that, in any event, the machinery to implement them generally is non-existent or inadequate, is overlooked or ignored in such quarters. Thus, if one accepts the preemption argument, aliens actually may have less protection now than in years past": R. Lillich, "Editorial Comment: The Problem of the Applicability of Existing International Provisions for the Protection of Human Rights to Individuals Who are not Citizens of the Country in Which They Live," (1976) 70(3) *American Journal of International Law* 507, at 509.

[279] D. Elles, "Aliens and Activities of the United Nations in the Field of Human Rights," (1974) 7 *Human Rights Journal* 291, at 314–315.

[280] "What the Charter does not say is that there should be no distinction between alien and nationals ... [T]he alien, although his human rights and fundamental freedoms must be respected, may not necessarily expect equal treatment with nationals ... Continued violations of the rights of aliens in many parts of the world give grounds for doubting whether there are sufficient sanctions available against a host state without some judicial body of the highest quality and esteem, with the power to enforce judgements": "International Provisions Protecting the Human Rights of Non-Citizens," UN Doc. E/CN.4/Sub.2/393/Rev.1 (1979), at 5–7.

Nationals of the Country in which They Live,[281] but has yet to consider the codification of a binding catalog of rights for non-citizens.

Most recently, in August 2000 the Sub-Commission appointed Prof. David Weissbrodt as Special Rapporteur on the Rights of Non-Citizens, and charged him to prepare "a comprehensive study of the rights of non-citizens," which would "take into account the different categories of citizens regarding different categories of rights in countries of different levels of development with different rationales to be offered for such distinctions."[282] Weissbrodt's final report, delivered in May 2003,[283] takes a position between those of his two predecessors. Like Baroness Elles, he forthrightly catalogs the numerous ways in which non-citizens are explicitly excluded from many core treaty-based guarantees of human rights. His report acknowledges that political rights and freedom of internal movement are not clearly extended to non-citizens under the Civil and Political Covenant; that Art. 2(3) of the Economic Covenant allows poorer states to withhold economic rights from non-citizens; and that the International Convention on the Elimination of All Forms of Racial Discrimination does not preclude distinctions, exclusions, restrictions, or preferences between citizens and non-citizens.[284] He even alludes to possible reasons to question the value of non-discrimination law.[285]

Despite his recognition of the limitations of international human rights law, the thrust of Prof. Weissbrodt's report – like that of Garcia-Amador – is nonetheless that the human rights of non-citizens can be satisfactorily regulated under existing norms of international law.[286] This is, of course, a much more credible position today than it was when taken by Garcia-Amador in 1974.[287] To back up his position, the Special Rapporteur includes a summary

[281] UNGA Res. 40/144, adopted Dec. 13, 1985.

[282] "The rights of non-citizens: Preliminary report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2001.20, June 6, 2001, at paras. 4–5.

[283] "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23, May 26, 2003.

[284] Ibid. at paras. 18–22. Importantly, "[t]he Committee [on the Elimination of Racial Discrimination] ... affirms that article 1, paragraph 2, must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights": UN Committee on the Elimination of Racial Discrimination, "General Recommendation XI: Non-citizens" (1993), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, at 205, para. 3.

[285] "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23, May 26, 2003, at para. 23.

[286] "In general, international human rights law requires the equal treatment of citizens and non-citizens": ibid. at para. 1.

[287] See text above, at pp. 147–148.

of state practice in a number of countries,[288] and draws together the jurisprudence and concluding observations of the UN and regional human rights treaty bodies.[289] To the extent that work remains to be done – Weissbrodt pointed in a draft of his report, in particular, to the increasing number of distinctions among non-citizens *inter se*,[290] as well as barriers on access to citizenship,[291] and also provided a more broad-ranging (if somewhat eclectic) addendum of state practice which fails to respect the human rights of non-citizens[292] – the approach recommended is greater clarity and coordination among the standards applied by the existing human rights supervisory bodies,[293] not the establishment of new norms. For example, he suggests that there may indeed be particular value in vindicating the rights of non-citizens via scrutiny under the widely ratified Racial Discrimination Convention,[294] since most non-citizens are, in fact, racial minorities (remembering that "race" is defined therein to include *inter alia* national or ethnic origin[295]).

In essence, Weissbrodt provides a road map of how the existing legal norms of human rights law can more effectively be brought to bear on many of the problems faced by non-citizens around the world. Despite the obvious value to advocates and decision-makers of a report oriented in this way, the weakness of this approach is that it is prone to downplay the gaps in international human rights law. In particular, the report fails to grapple with the limited value of non-discrimination law as presently interpreted, including the problems for non-citizens that arise from the Human Rights Committee's often categorical approach to the definition of a "reasonable"

[288] In a very interesting self-reporting exercise, twenty-two governments submitted responses to a questionnaire prepared by the Special Rapporteur regarding their own standards and practice in relation to the rights of non-citizens: "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23/Add.4, May 26, 2003.

[289] See "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23/Add.1. While not directly relevant to the international standard of non-citizens' rights, Weissbrodt also cataloged relevant regional standards and jurisprudence: see "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23/Add.2, May 26, 2003.

[290] "The rights of non-citizens: Progress report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2002/25, June 5, 2002, at paras. 25–42.

[291] Ibid. at paras. 43–49.

[292] "The rights of non-citizens: Progress report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2002/25/Add.3, June 5, 2002. Weissbrodt's final report contains a more methodically organized (if still highly selective) indication of officially validated concerns: "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23/Add.3, Add.4, May 26, 2003.

[293] "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23, May 26, 2003, at paras. 31–33, 39–40.

[294] Ibid. at para. 34. [295] Racial Discrimination Convention, at Art. 1(1).

justification for differentiation; the breadth of the margin of appreciation it extends to governments; and its traditional disinclination to implement in practice its commitment in principle to an effects-based approach to the analysis of discrimination.[296] Indeed, the final report (optimistically) misstates the actual status of the Human Rights Committee's jurisprudence on non-discrimination, suggesting that justifications will be found to be reasonable only if "they serve a legitimate State objective *and are proportional to the achievement of that objective* [emphasis added]."[297]

More generally, the report simply does not aspire to provide solid answers to the underlying challenge of the exclusion of non-citizens from key parts of human rights law, including by the legal prerogative of less developed states to deny economic rights to non-citizens,[298] and by the general inability of non-citizens to claim some civil and political rights,[299] most especially when an emergency is proclaimed.[300] While the decision to defer consideration of these issues may derive from a politically realistic calculus, it remains that the Sub-Commission's most recent effort does not move us concretely towards a

[296] See chapter 2.5.5 above, at pp. 129–147.

[297] "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23, May 26, 2003, at paras. 1, 6, and 17. But see chapter 2.5.5 above, at pp. 139–145. Only one academic and one regional (not UN) decision are offered as support for this proposition: ibid. at n. 13. It is noteworthy that the (unwarranted) reference to "proportionality" did not feature in earlier drafts of the report, e.g. "The rights of non-citizens: Progress report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2002/25, June 5, 2002, at para. 28: "The Human Rights Committee has similarly observed in General Comment 18 that differences in treatment may be permissible under the Covenant 'if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant' (para. 13)."

[298] The report observes only that "[a]s an exception to the general rule of equality, it should be noted that article 2(3) must be narrowly construed, may be relied upon only by developing countries, and only with respect to economic rights": "The rights of non-citizens: Final report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2003/23, May 26, 2003, at para. 19.

[299] The report simply acknowledges that non-citizens do not enjoy full rights under Arts. 25 (political rights), 12(1) (internal freedom of movement), and 12(4) (freedom from deprivation of the right to enter one's own country), and notes the constraints on these limits set by the Human Rights Committee: ibid. at para. 18.

[300] This concern was given substantial attention in a draft version of Weissbrodt's report: see "The rights of non-citizens: Progress report of the Special Rapporteur," UN Doc. E/CN.4/Sub.2/2002/25, June 5, 2002, at paras. 13, 19–20. Specifically, it was observed that "[u]nlike the general anti-discrimination clause found in article 2(1), the derogation clause does not include 'national origin' among the impermissible grounds for discrimination. This omission, according to the *travaux préparatoires*, reflects the drafters' recognition that States often find it necessary to discriminate against non-citizens in time of national emergency": ibid. at para. 20. Interestingly, no comparable acknowledgment of this restriction is included in the final report of the Special Rapporteur.

strategy for engaging – even incrementally – with these foundational concerns.

Despite the absence of broadly based progress, some concrete normative progress has been achieved in the establishment of binding rights for at least a subset of non-citizens. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families entered into force on July 1, 2003, though only a small minority of states has thus far ratified it.[301] To the extent that refugees may avail themselves of this treaty's provisions, it helpfully imposes obligations to provide, for example, emergency healthcare, children's education, fair conditions and employment, and the right to be protected against abuse and attacks. More generally, non-citizens may invoke rights under the various conventions established by the International Labor Organization to regulate migration for employment purposes.[302] Governed by an amalgam of state, employer, and worker representatives, the ILO has produced several treaties on international labor standards which, when ratified by states, are legally binding. Additional guidance is often provided by more detailed recommendations, which do not have the force of law.[303] The ILO's progressive codification of migrant worker rights is an important source of enforceable socioeconomic rights for

[301] UNGA Res. 45/158, adopted Dec. 18, 1990, entered into force July 1, 2003. Only twenty-five states have both signed and ratified the treaty: www.unhchr.ch (accessed Nov. 19, 2004).

[302] In 1939, the ILO adopted Convention No. 66, the Convention concerning the Recruitment, Placing and Conditions of Labor of Migrants for Employment, together with the accompanying Recommendation No. 61, Recommendation concerning the Recruitment, Placing and Conditions of Labor of Migrants for Employment. Convention No. 66 never secured sufficient ratifications to enter into force. It was updated in 1949 by Convention No. 97, the Convention concerning Migration for Employment (Revised) and its Recommendation No. 86, Recommendation concerning Migration for Employment (Revised). Convention No. 97 came into force shortly after the adoption of the Refugee Convention, and is a parallel source of rights for refugees lawfully admitted to residence in a state party. The ILO has since produced Convention No. 143, the Migrant Workers (Supplementary Provisions) Convention, 1975 and the companion Recommendation No. 151, Migrant Workers Recommendation, 1975. The 1975 accord deals with migration in abusive conditions and provides for equality of opportunity and treatment of migrant workers. See generally International Labor Conference et al., *Conventions and Recommendations Adopted by the International Labor Conference, 1919–1966* (1966) (International Labor Conference et al., *Conventions and Recommendations*) and Lillich, *Rights of Aliens*, at 73–74.

[303] Of particular note is Recommendation No. 86 (1949) which proposes a model agreement for the regulation of labor migration. Several of these non-binding standards speak explicitly to the needs of refugees, regarded as a subset of persons who seek employment outside their own country. First, some additional rights are added to the binding list of matters to be guaranteed on terms of equality with nationals. These include rights to recognition of travel documents, adaptation assistance, naturalization, participation in collective labor agreements, private property, and of access to food and suitable housing. Second, equal access to trades and occupations is established, but only "to the extent permitted under national laws and regulations." Third, migrant workers who are "lawfully within" the territory are entitled to equality of treatment with respect to hygiene, safety, and medical assistance; and, as far as the state regulates such matters, to weekly rest days, admission to educational institutions, recreation, and welfare. Fourth, the model agreement extends most of these equality rights to refugees' family members, an entitlement not proposed for the families of other alien workers. See International Labor Conference et al., *Conventions and Recommendations*.

See generally F. Wolf, "Human Rights and the International Labour Organization," in Meron, *Human Rights in International Law*, at 273.

resident aliens, including those refugees who are lawfully admitted as immigrants to an asylum state. This is particularly so because ILO procedures allow enforcement action to be initiated not just by states, but equally by worker and employer organizations.[304] The critical limitation of the ILO standards is, however, that they apply only in states that voluntarily adhere to them, and generally regulate the treatment only of refugees lawfully admitted as immigrants to the state in question.

Overall, there is little doubt that non-citizens have benefited in important ways from the post-Convention evolution of international human rights law, particularly as regards their entitlement to claim most civil and political rights. On the other hand, a conservative approach has generally been taken to interpretation of broadly applicable guarantees of non-discrimination; emergency derogation can erode practical access to many civil and political rights; and poorer states remain legally entitled to exclude non-citizens from the enjoyment of most generally applicable economic rights. In these circumstances, the Refugee Convention remains a critical source of protection. In particular, it sets economic rights which must be honored in all countries; it insulates many key civil and political rights from derogation; and more generally, the Refugee Convention entrenches a broad range of entitlements which are fundamental to avoiding the specific predicaments of involuntary alienage. As such, refugee law must be understood still to be the cornerstone of the refugee rights regime, even as it has been buttressed in important ways by more general norms of human rights law.