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## Articles

# Human Rights, Refugees, and The Right 'To Enjoy' Asylum

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ALICE EDWARDS\*

## Abstract

Increasingly hard-line and restrictive asylum policies and practices of many governments call into question the scope of protections offered by the 1951 Convention relating to the Status of Refugees. Has the focus on the 1951 Convention been to the detriment and subordination of other rights and standards of treatment owed to refugees and asylum-seekers under international human rights law? Which standard applies in the event that there is a clash or inconsistency between the two bodies of law? In analysing the interface between international refugee law and international human rights law, this article looks at the right to family life and the right to work. Through this examination, content and meaning is offered to the almost forgotten component of the right 'to enjoy' asylum in Article 14(1) of the Universal Declaration of Human Rights 1948.

## 1. Introduction

Increasingly, many western governments are implementing hard-line or restrictive asylum policies and practices in order to deter and to prevent asylum-seekers from seeking refuge on their territory, including by interception and interdiction measures, visa controls, carrier sanctions, 'safe third country' arrangements, administrative detention, and/or restrictive interpretations of the refugee definition.<sup>1</sup> 'Increased detention, reduced welfare benefits and severe curtailment of self-sufficiency possibilities, coupled with restricted family reunification rights, have all been manifestations of this trend.'<sup>2</sup> The application of deterrence measures has more

\* Ph.D Candidate, The Australian National University. Alice Edwards is an international human rights and refugee lawyer. She has worked with the United Nations High Commissioner for Refugees in Geneva, Bosnia and Herzegovina, Rwanda, and Morocco. In 2004, she taught in the Faculty of Law, University of Tasmania. This article has been adapted from a dissertation submitted in partial fulfilment of the requirements for the LL.M degree at the University of Nottingham, 2003.

<sup>1</sup> M.J. Gibney, 'The state of asylum: democratization, judicialization and the evolution of refugee policy in Europe', *New Issues in Refugee Research: Working Paper No. 50* (UNHCR, Oct. 2001), at 1 and B. Gorlick, 'Human rights and refugees: enhancing protection through international human rights law', *New Issues in Refugee Research: Working Paper No. 30* (UNHCR, Oct. 2000), at 4.

<sup>2</sup> E. Feller, 'International refugee protection 50 years on: The protection challenges of the past, present and future' (2001) 83 (843) *Int'l Rev.Red Cross — Humanitarian Debate: Law, Policy, Action* 581, at 589.

recently been extended in some countries to recognised refugees, principally through the erosion of standards of treatment, including the ‘denial of some of the important social, economic and cultural rights guaranteed by the 1951 Convention [relating to the Status of Refugees (‘1951 Convention’<sup>3</sup>)]<sup>4</sup> and other rights guaranteed under international human rights law (‘IHRL’). In many developing countries, refugees are denied basic rights, often due to ‘a sheer lack of resources’.<sup>5</sup> To this end, a ‘disproportionate amount of energy and resources tends to be focused on determining *who* is a refugee’,<sup>6</sup> rather than on their treatment pre- and post- recognition. ‘Xenophobia and intolerance towards foreigners and in particular towards refugees and asylum-seekers have also increased in recent years’<sup>7</sup> and contribute to a hostile local environment in which reduced standards of treatment are tolerated or even seen as acceptable. ‘Although the vast majority of States have ratified the 1951 Convention/1967 Protocol, its application varies enormously, depending on the national, cultural, economic and social situation.’<sup>8</sup> ‘Clearly, the treatment of non-nationals is an area of persistent, serious and systematic human rights violations on a world scale.’<sup>9</sup>

Some governments justify their policies in light of 1951 Convention provisions, without further reference to other applicable human rights and humanitarian instruments.<sup>10</sup> Keeping international refugee law (‘IRL’) distinct from IHRL has played into the hands of governments choosing to flout minimum standards. Although reference to IHRL has gained momentum in refugee discourse in recent years, not least due to the work of academic commentators and advocates in this field, its focus in inter-governmental exchanges remains primarily located in the root causes of refugee flight, rather than in the deprivation of rights by host country practices. That is, the relevance of IHRL is most commonly seen as an issue for the country of origin, rather than also for the country of destination.<sup>11</sup>

<sup>3</sup> 189 UNTS 137. Adopted on 28 July 1951; entered into force on 22 Apr. 1954.

<sup>4</sup> S.R. Chowdhury, ‘A Response to the Refugee Problems in Post Cold War Era: Some Existing and Emerging Norms of International Law’, 7 *IJRL* 100, at 102, (1995).

<sup>5</sup> S.R. Chowdhury, *ibid.*, at 101.

<sup>6</sup> B. Gorlick, above n.1, at 6.

<sup>7</sup> V. Türk and F. Nicholson, ‘Refugee protection in international law: an overall perspective’, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, (Cambridge University Press, 2003) 3, at 4.

<sup>8</sup> C. D. de Jong, ‘The Legal Framework: The Convention relating to the Status of Refugees and the Development of Law Half a Century Later’, 10 *IJRL* 688, at 691, (1998).

<sup>9</sup> T. Clark, ‘Human Rights and Expulsion: Giving Content to the Concept of Asylum’, 4 *IJRL* 189, at 193, (1992).

<sup>10</sup> This article shall not consider obligations under international humanitarian law.

<sup>11</sup> See, Thematic Compilation of General Assembly and Economic and Social Council Resolutions — Human Rights and International Protection from 1981–2003, dated 1 Feb. 2003, at 211–217 for resolutions directed to human rights violations being the causes of mass displacement. See, also, EXCOM Conclusions Nos. 73(XLIV) of 1993; 80(XLVII) of 1996; 85(XLIV) of 1998, paras. (g) and (h); and 87(L) of 1999, para. (a).

For example, the Agenda for Protection, the so-called blueprint for future refugee protection, 'calls on States, intergovernmental organizations and UNHCR to examine the root causes of refugee movements ... and to devote greater resources, both human and financial, in developing respect for human rights, democratic values and good governance in *refugee-producing* countries ...'<sup>12</sup> (emphasis added). It does not address in any comprehensive manner treatment of refugees or asylum-seekers in host countries.

Although it is now the custom of the UNHCR to view refugee law as part and parcel of the broader international human rights framework, as seen in its first memorandum on human rights in 1997,<sup>13</sup> it does not always stress its obligatory nature, preferring merely to suggest that it offers helpful guidance to States in setting their own domestic standards.<sup>14</sup> This tentative approach is not altogether surprising given recent and recurring questions by States parties as to the continuing relevance of the 1951 Convention.<sup>15</sup> In fact, recourse to human rights law has evolved amid such criticisms that the 1951 Convention is redundant or that it is 'functionally inefficient, overly legalistic, complex, and difficult to apply within a world of competing [and changing] priorities ...'.<sup>16</sup> Human rights doctrine has frequently been resorted to in order to fill in the 'grey areas'<sup>17</sup> of refugee protection, in particular, in giving fuller meaning to the terms 'persecution' and 'social group' within the refugee definition,<sup>18</sup> in determining appropriate asylum procedures,<sup>19</sup> and in ensuring protection

<sup>12</sup> See, the Overview to the 'Agenda for Protection', UNHCR Executive Committee, 53<sup>rd</sup> session, UN doc. A/AC.96/965/Add.1, 26 June 2002, at 11.

<sup>13</sup> UNHCR, 'UNHCR and Human Rights', AHC Memorandum AHC/97/325, 6 Aug. 1997, in which it is stated, 'UNHCR stands for, and is entitled to invoke, the full array of rights, freedoms and principles related to refugee protection developed by the international community under the auspices of the UN or of regional organisations.'

<sup>14</sup> E.g., the Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, Geneva, 13 Dec. 2001, recognises 'the *importance* of other human rights and regional refugee protection instruments' (emphasis added), in para. 3.

<sup>15</sup> For summary of criticisms of the 1951 Convention, see G. Goodwin-Gill, 'Editorial: Asylum 2001 — A Convention and A Purpose' 13 *IJRL* 1–13 (2001).

<sup>16</sup> G. Goodwin-Gill, *ibid.*, at 1–2.

<sup>17</sup> G. Goodwin-Gill, *ibid.*, at 8.

<sup>18</sup> See, e.g., UNHCR, 'Guidelines on International Protection No.1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', UN doc. HCR/GIP/02/01, 7 May 2002; UNHCR, 'Guidelines on International Protection No.2: "Membership of a Particular Social Group" within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', UN doc. HRC/GIP/02/02, 7 May 2002. See, also, K. Daley and N. Kelley, 'Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence' 12 *IJRL* 148–174 (2000); A. Edwards, 'Age and gender dimensions in international refugee law' and R. Haines, 'Gender-Related Persecution', in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), at 46–80 and 319–350 respectively.

<sup>19</sup> See, e.g., G.P. Heckman, 'Securing Procedural Safeguards for Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law?' 15 *IJRL* 212–253 (2003); M. Alexander, 'Refugee status determination conducted by UNHCR' 11 *IJRL* 251–289 (1999).

to those who fail the narrow definition of a 'refugee' in the 1951 Convention and/or 1967 Protocol but who nonetheless need protection against *refoulement*.<sup>20</sup>

In the wake of the mass exodus of refugees fleeing Nazi, Fascist or Quisling regimes during and after World War II, the newly established United Nations General Assembly unanimously agreed the text of the Universal Declaration of Human Rights in 1948 ('UDHR').<sup>21</sup> Included within this landmark declaration is Article 14(1), the springboard for the subsequently concluded 1951 Convention. Article 14(1) provides that, 'Everyone has the right to seek and to enjoy asylum from persecution in other countries'. While considerable volumes of literature have focused on the so-called right to asylum, usually seen as the right to access refuge or 'to seek' asylum, little has been written about the correlative right 'to enjoy' that asylum. In light of the increasingly restrictive asylum policies and practices adopted by many governments, the scope and significance of the latter deserves a full review.

While this article cannot hope to examine the concept in all its forms and manifestations, it shall consider what is meant by the right 'to enjoy' asylum in terms of the standards of treatment owed to refugees and asylum-seekers. The inter-relationship between international and regional human rights law and refugee law is also explored. Understanding this inter-relationship is essential to be able to identify fully the obligations of countries of asylum vis à vis refugees and asylum-seekers on their territory. This ought to be the starting point of any determination of the applicable standards of treatment for refugees and asylum-seekers, yet it is one that is commonly overlooked. While it is now generally accepted that IHRL can 'support, reinforce or supplement refugee law',<sup>22</sup> little attention has been paid to the differing standards of treatment offered by the two bodies of law in respect of particular rights and to which standard applies in the event of an inconsistency or clash of provisions. Which standard takes precedence where the 1951 Convention is either silent as to the appropriate standard or offers a lower standard than IHRL? Does specificity override generality? Do subsequently assumed international obligations replace earlier ones? Or does the higher standard apply? Part 2 of this article is dedicated to conceptually understanding the interface between IRL and IHRL, with some reference being made to international treaty law. In addition, consideration is given to the origins and content

<sup>20</sup> See, e.g., O.C. Okafor and P.L. Okoronkwo, 'Re-configuring *Non-refoulement*? The *Suresh* Decision, "Security Relativism", and the International Human Rights Law Imperative' 15 *IJRL* 30–67 (2003); B. Gorlick, 'The convention and the committee against torture: a complementary protection regime for refugees' 11 *IJRL* 479–495 (1999).

<sup>21</sup> UNGA Res. 217A (III), 10 Dec. 1948.

<sup>22</sup> E. Mason, 'UNHCR, Human Rights and Refugees Collection and Dissemination of Sources', (1997) *Int'l J. Legal Info.* 35, at 40.

of Article 14(1) of the UDHR. This article also briefly reviews the link between standards of treatment and the search for durable solutions as a component part of asylum.

Parts 3 and 4 take this analysis a step further by examining two separate rights: the right to family life and the right to work. Both these rights have been carefully selected as they are important rights for refugees and asylum-seekers in their enjoyment of asylum, yet among the most controversial. Compared to IHRL, the 1951 Convention is silent as to the right to family life in its substantive provisions. Similarly, while the 1951 Convention includes a number of articles related to the right to work, the rights are limited by status qualifications and are granted on the basis of the standard of 'most-favoured-nation'. Furthermore, these rights are closely linked to the successful integration of refugees within host communities and the search for durable solutions. Thus, the two examples chosen draw together the key issues addressed in Part 2 and attempt to give meaning to the right 'to enjoy' asylum.

While noting the declaratory nature of refugee status, the term 'asylum-seeker' is used in this article to refer to individuals who have not yet been granted refugee status by the receiving State, whereas the term 'refugee' refers to those recognised as such under Article 1A(2) of the 1951 Convention, except where otherwise specified.

## 2. The human rights — refugee law interface

### 2.1 Conceptual narrative

'The refugee protection regime . . . has its origins in general principles of human rights.'<sup>23</sup> The inclusion of 'the right to seek and to enjoy asylum from persecution' in Article 14 of the UDHR alongside unanimously agreed human rights and fundamental freedoms squarely places IRL within the human rights paradigm. Moreover, reference in the Preamble to the 1951 Convention to the 1945 UN Charter, the UDHR and 'the principle that human beings shall enjoy fundamental rights and freedoms without discrimination' confirms that IRL was not intended to be seen in isolation from IHRL. The Preamble further notes that the UN has 'manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms'. There is, however, no specific reference to asylum or refugees in the UN Charter itself. Arguably such issues were considered to be subsumed within the wider discussion on human rights and fundamental freedoms at the time. It could hardly have been an oversight given the post-World War II environment and the large-scale refugee flows which,

<sup>23</sup> E. Feller, above n.2, at 582.

amongst other factors, precipitated the creation of the UN. The inclusion of Article 14 in the first declaration on the 'human rights and fundamental freedoms', as referred to in the UN Charter, supports this analysis.

The subsequent drafting of a separate treaty on refugees was a pragmatic response to the reality surrounding Europe after World War II. It in no way removes the issue of refugees outside the realm of human rights. At a minimum, Article 14 places the right to seek and to enjoy asylum within the human rights paradigm and represents unanimous acceptance by States of its fundamental importance. The Vienna Declaration on Human Rights and Programme of Action similarly reaffirmed the right to seek and to enjoy asylum in 1993.<sup>24</sup> While States were adamant that there should be no right to asylum in the International Covenant on Civil and Political Rights ('ICCPR'),<sup>25</sup> it is arguable that, whatever the intentions of the States parties at the time, the right to seek and enjoy asylum is implicit in the very existence of the 1951 Convention.<sup>26</sup> The right to a nationality in Article 15 of the UDHR was also not transferred to the ICCPR, except in relation to children.<sup>27</sup> Likewise, it is arguable that such a right had already been secured by the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.<sup>28</sup>

Moreover, regional instruments have clearly located the right to asylum within IHRL<sup>29</sup> and the UN General Assembly has consistently called on States to respect the rights of refugees.<sup>30</sup> Human rights treaty monitoring mechanisms have not distinguished between refugees, asylum-seekers or other individuals alleging an infringement of human rights on the territory of a State party. In fact, refugees and asylum-seekers are increasingly resorting to human rights mechanisms in the absence of a complementary apparatus under the 1951 Convention and/or its 1967

<sup>24</sup> Vienna Declaration and Programme of Action, UN World Conference on Human Rights, 1993, UN doc. A/CONF.157/23, 12 July 1993, para. 23.

<sup>25</sup> UNGA Res. 2200 A (XXI), 16 Dec. 1966; entered into force 23 Mar. 1976.

<sup>26</sup> Cf. R.K. Goldman and S.M. Martin, 'International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law', (1983) 5(3) *HRQ* 302, at 309–310. The lack of inclusion of a 'right to asylum' in the ICCPR has meant however that, in the absence of any monitoring bodies in relation to refugee law, the Human Rights Committee ('HRC') has been prevented from considering what may amount to 'fair procedure' for refugees, see *VMRB v. Canada*, HRC Communication No. 236/1987, 18 July 1998. See, also, M. Alexander, above n.19.

<sup>27</sup> Art. 24(3).

<sup>28</sup> 360 UNTS 117, 28 Sept. 1954; entered into force on 6 June 1960 and UN doc. A/CONF.9/15, 30 Aug. 1961; entered into force on 13 Dec. 1975, respectively.

<sup>29</sup> See, Art.22(9), 1969 American Convention on Human Rights, OAS Official Records, OEA/Ser.K/XVI/II, entered into force 18 July 1978 ('OAS Convention'); Art. 12.3, 1981 African Charter on Human and People's Rights, 21 ILM 59, entered into force 21 Oct. 1986 ('African Charter'). A notable exception is the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5, 4 Nov. 1950, entered into force 3 Sept. 1953 ('ECHR'), which omits a right to asylum.

<sup>30</sup> See, G.S. Goodwin-Gill, 'The Language of Protection', 1 *IJRL* 6 (1989), at 14–15 for an overview of relevant GA resolutions.

Protocol.<sup>31</sup> Furthermore, EXCOM in 1997 'reiterate[d] . . . the obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments'.<sup>32</sup> Most recently, States parties to the 1951 Convention and/or its 1967 Protocol reaffirmed their commitment to 'respect . . . the rights and freedoms of refugees' in a Declaration in December 2001.<sup>33</sup>

Conceptually, therefore, IRL and IHRL form part of the same legal schema and tradition. At first glance, this may not appear to be a major revelation. However, the isolation of IRL from developing human rights norms and institutions has meant that refugees and asylum-seekers have not always had recourse to the full range of rights to which they are entitled. While the 1951 Convention incorporates a collection of important rights, it is in no way comprehensive. Moreover, IHRL is especially relevant with respect to non-State-parties to the 1951 Convention and/or the 1967 Protocol that are otherwise parties to various human rights instruments, as well as its role in developing international customary rules that apply to all States.

## 2.2 The right to seek asylum

The origins of the 'right to seek and to enjoy asylum from persecution in other countries' can be traced back to the 'right of sanctuary' in ancient Greece, imperial Rome and early Christian civilisation.<sup>34</sup> Its modern equivalent was recognised by States in the form of Article 14 of the UDHR. Notably, initial drafting proposals that incorporated a correlative obligation 'to grant asylum' were not accepted.<sup>35</sup> Based on enduring

<sup>31</sup> 606 UNTS 267 (entered into force 4 Oct. 1967). E.g. *A v. Australia*, HRC Communication No. 560/1993; *Mutombo v. Switzerland*, Committee against Torture ('CAT') Communication No. 13/1993; *Khan v. Pakistan*, CAT Communication No. 15/1994; *Ismail Alan v. Switzerland*, CAT Communication No. 21/1995; *Aemei v. Switzerland*, CAT Communication No. 34/1995; *Tala v. Sweden*, CAT Communication No. 43/1996; *Pauline Muzonzo Paku Kisoki v. Sweden*, CAT Communication No. 41/1996; *Tapia Paez v. Sweden*, CAT Communication No. 39/1996; *Korban v. Sweden*, CAT Communication No. 88/1997; *Halil Haydin v. Sweden*, CAT Communication No. 101/1997; *Elmi v. Australia*, CAT Communication No. 120/1998. See, also, ECHR jurisprudence in *Soering v. United Kingdom*, Ser. A 161, 7 July 1989; *Chahal v. United Kingdom*, Judgment 70/1995/576/662, 15 Nov. 1996; *Ahmed v. Austria*, Judgment 71/1995/577/663, 17 Dec. 1996; and *Amuur v. France*, Reports 1996-III, 25 June 1996.

<sup>32</sup> Executive Committee Conclusion No. 82(XLVIII) on 'Safeguarding Asylum', 1997, para. (d)(vi). See, also, EXCOM Conclusions Nos. 19(XXXI) of 1980, para. (e); 22(XXXII) of 1981, para. B; and 36(XXXVI) of 1985, para. (f).

<sup>33</sup> Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol, above n.14, Operative para. 2.

<sup>34</sup> R.K. Goldman and S.M. Martin, above n.26, at 309.

<sup>35</sup> R. Plender and N. Mole, 'Beyond the Geneva Convention: constructing a *de facto* right of asylum from international human rights instruments', in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, (Cambridge University Press, 1999) 81, at 81. Cf. OAS Convention, above n.29, which provides in Art. 22(9) to the right 'to seek and be granted asylum in a foreign country', and Art. 12.3 of the African Charter, above n.29, which states: 'Every individual shall have the right when persecuted to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.'

principles of State sovereignty, '[t]he right to grant asylum remains a right of the State'.<sup>36</sup> In today's climate of heightened security concerns, arguments revolving around State sovereignty are gaining renewed vigour as the ultimate right of States to patrol their borders and to reject asylum-seekers at their frontiers.

The 1967 Declaration on Territorial Asylum,<sup>37</sup> the outcome of various failed attempts to agree a binding treaty, reiterates that the granting of asylum is an 'exercise of [State] sovereignty',<sup>38</sup> yet it reaffirms that the discretion of States in this regard is curtailed by the insertion of Article 3(1). This clause reads: 'No person [entitled to invoke Article 14 of the UDHR] shall be subjected to such measures as rejection at the frontier or, if he [or she] has already entered the territory in which he [or she] seeks asylum, expulsion or compulsory return to any State where he [or she] may be subjected to persecution.'<sup>39</sup> While 'States . . . retain, and jealously guard, the right to admit or to exclude aliens from their territory',<sup>40</sup> 'the notions [of] entry and presence are not the "very essence" of state sovereignty'.<sup>41</sup> In fact, as far as the question of sovereignty and the institution of asylum are concerned, the latter has more often been analysed from the point of view that the act of receiving refugees should not be seen as an interference with the refugee-producing country's sovereignty, as opposed to an interference with the host State's ability to admit non-nationals. Granting asylum in this sense is a 'lawful exercise of territorial sovereignty, not to be regarded by any State as an unfriendly act'.<sup>42</sup>

In spite of these long-held and re-emerging arguments on State sovereignty, some commentators assert that, although there is no right to be 'granted' asylum *de jure*, there may exist an implied right to asylum *de facto*,<sup>43</sup> or, at the very least, a right to apply for it. They argue that the discretion of States is not unfettered, being confined by treaty and other rules.<sup>44</sup> According to Joly, '... [S]tates do not have a completely free hand in deciding whom to admit with regard to

<sup>36</sup> C. Harvey, 'Taking Human Rights Seriously in the Asylum Context? A Perspective on the Development of Law and Policy', in F. Nicholson and P. Twomey (eds.), *Current Issues in UK Asylum Law and Policy*, (Ashgate, Dartmouth, 1998) 213, at 221.

<sup>37</sup> UNGA Res. 2312 (XXIX), 14 Dec. 1967. See, also, Report of the UN Conference on Territorial Asylum, UN doc. A/CONF.78/12, 21 Apr. 1977.

<sup>38</sup> Art. 1(1), 1967 Declaration on Territorial Asylum, *ibid*.

<sup>39</sup> Art. 3(1), 1967 Declaration on Territorial Asylum, above n.37.

<sup>40</sup> O. Andrysek, 'Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures', 9 *IJRL* 392, at 395, (1997).

<sup>41</sup> L. Henkin, 'An Agenda for the Next Century: The Myth and Mantra of State Sovereignty', (1994) *Virginia J. Int'l L.* 115, at 116.

<sup>42</sup> G. Goodwin-Gill, 'Editorial: Who to Protect, How . . . , and the Future?', 9 *IJRL* 1, at 2, (1997).

<sup>43</sup> See, T. Einarsen, 'The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum', 2 *IJRL* 361 (1990) and R. Plender and N. Mole, above n.35, at 364, for a similar analysis in relation to the 1951 European Convention on Human Rights.

<sup>44</sup> G. Goodwin-Gill, *The Refugee in International Law*, (2<sup>nd</sup> ed., Oxford University Press, 1996, reprinted 1998), at 202–203.



refugees'.<sup>45</sup> With the entry into force of the 1951 Convention, the right to seek and to enjoy asylum was further elaborated. While the UDHR is a non-binding instrument *per se*, arguably, as stated above, Article 14 is implicit within the 1951 Convention and its 1967 Protocol and is 'an important emerging norm of customary international law'.<sup>46</sup> As the French delegate concluded during the *travaux préparatoires*, the 'right to asylum was implicit in the Convention, even if it was not explicitly proclaimed therein, for the very existence of refugees depended on it'.<sup>47</sup> EXCOM Conclusion No. 82 'reaffirms that the institution of asylum . . . derives directly from the right to seek and enjoy asylum set out in Article 14(1)'.<sup>48</sup>

The right to seek asylum was reinforced by the inclusion of a specific prohibition on *refoulement* in the 1951 Convention,<sup>49</sup> including non-rejection at the frontier.<sup>50</sup> This prohibition has been buttressed by IHRL, in particular Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment ('CAT').<sup>51</sup> It is now largely agreed that the right against *refoulement* forms part of customary international law.<sup>52</sup> In addition, Articles 1 and 33 read together place a duty on States parties to grant, at a minimum, access to asylum procedures for the purpose of refugee status determination. Access to asylum procedures is also debatably an implied right under the 1951 Convention (although such procedures are not necessary to accord refugee protection), and is an accepted part of State practice. It has been asserted that without appropriate asylum procedures, obligations of *non-refoulement*, including rejection at the frontier, could be infringed.<sup>53</sup> The right to seek asylum is assisted by Article 13(2) of the UDHR, as reconfirmed in Article

<sup>45</sup> D. Joly, *Haven or Hell? Asylum Policies and Refugees in Europe*, (St. Martin's Press Inc., USA, 1996), at 1.

<sup>46</sup> S.R. Chowdhury, above n.4, at 105.

<sup>47</sup> G. Goodwin-Gill, *The Refugee in International Law*, above n.44, at 175.

<sup>48</sup> Executive Committee Conclusion No. 82(XLVIII) on 'Safeguarding Asylum', 1997, para. (b).

<sup>49</sup> Art. 33, 1951 Convention.

<sup>50</sup> EXCOM Conclusion No. 22(XXXII), 1981, Part IIA, para. 2. See, also, Art. 3(1), 1967 Declaration on Territorial Asylum, above n.37.

<sup>51</sup> HRC General Comment No. 20 (1992), para. 9, UN doc. HRI/GEN/1/Rev.6, 12 May 2003; CAT General Comment No. 1 (1996), UN doc. HRI/GEN/1/Rev. 6, 12 May 2003. See, also, Art. 3, ECHR and its jurisprudence, including particularly, *Soering*, *Chahal*, and *Ahmed*, above n.31. See, also, Art. II(3), OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1001 UNTS 45 (adopted on 10 Sept. 1969 and entered into force on 20 June 1974); Art. 5 of the OAS Convention, above n.29. See, for further analysis, O. Andrysek, above n.40.

<sup>52</sup> Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol, above n.14, Preambular para. 4. See, also, UNHCR, 'Summary Conclusions on Non-Refoulement', Global Consultations on International Protection, Lisbon Expert Roundtable 3–4 May 2001, organised by the UNHCR and the Carnegie Endowment for International Peace, Washington D.C. During the drafting of the Declaration of States parties, one of the only dissenting countries to recognising *non-refoulement* as part of custom was the US. See, also, E. Lauterpacht and D. Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), at 87–177.

<sup>53</sup> C. D. de Jong, above n.8, at 689 and A. Edwards, 'Tampering with Refugee Protection: The Case of Australia', 15 *IJRL* 192, at 197, (2003).

12(2) of the ICCPR, which provides that ‘Everyone has the right to leave any country, including his own . . .’. The right to leave any country and the right to seek asylum are two sides of the same coin in the refugee context. Although Article 13(2) of the UDHR does not mention a right ‘to enter any country’,<sup>54</sup> it would make a nonsense of the 1951 Convention if this was not intended, at least for the purposes of refugee status determination, especially where an individual has reached a country’s territory, such as its territorial seas or a waiting zone in an international airport.<sup>55</sup> Furthermore, Article 32 of the 1951 Convention prevents expulsion of a recognised refugee ‘save on grounds of national security or public order’. Article 13 of the ICCPR also refers to expulsion of aliens, although it ‘regulates only the procedure and not the substantive grounds for expulsion’.<sup>56</sup> In particular, it provides aliens with full opportunity to pursue remedies against expulsion, which may only be suspended for ‘compelling reasons of national security’.<sup>57</sup>

### 2.3 The right to enjoy asylum

Apart from offering a definition of a ‘refugee’ in Article 1, the 1951 Convention enumerates a range of rights owed to refugees in Articles 3 to 34. The 1951 Convention and/or its 1967 Protocol ‘clarify the minimum standards implicit in the application of Article 14 of the Universal Declaration . . .’.<sup>58</sup> In line with the object and purpose of the 1951 Convention, by virtue of a positive refugee status determination under Article 1A(2), States are bound to grant to refugees minimum standards of treatment contained therein. By doing so, a framework for the treatment of refugees and asylum-seekers in host countries has developed and the right to enjoy asylum has been transformed from an initially vague concept of temporary admission or stay<sup>59</sup> to one requiring host States to adhere to particular practices. The replacement of a right ‘to be granted’ asylum with a right ‘to enjoy’ asylum changed the tone and ramifications of the provision. In contrast to the right to seek asylum, the right *to enjoy* asylum suggests at a minimum a right ‘to benefit from’ asylum. While a State is not obligated to grant asylum, an individual, once admitted to the territory, is entitled ‘to enjoy’ it. According to a UN report, ‘asylum’ consists of several elements: to admit a person to the territory of a State, to allow the person

<sup>54</sup> L. Henkin, above n. 41, at 117.

<sup>55</sup> See, e.g., *Amuur v. France*, above n.31, in which the European Court of Human Rights stated that it was irrelevant that France referred to its airport holding area as an ‘international zone’ and that the applicants had not yet entered French territory according to French law; Art. 5 of the ECHR was still applicable.

<sup>56</sup> HRC General Comment No. 15 on ‘The Position of Aliens under the Covenant’, UN doc. CCPR/C/21/Rev.1, 19 May 1989, para. 10.

<sup>57</sup> B. Gorlick, above n.1, at 51.

<sup>58</sup> R.K. Goldman and S.M. Martin, above n.26, at 312.

<sup>59</sup> T. Clark, above n.9, at 190.

to remain there, to refuse to expel, to refuse to extradite and not to prosecute, punish or otherwise restrict the person's liberty.<sup>60</sup> The writer argues that it goes further than this by virtue of Articles 3 to 34 of the 1951 Convention,<sup>61</sup> as well as subsequent developments in IHRL. Thus, '[t]he right to *seek and enjoy* asylum is not an empty phrase'.<sup>62</sup>

While there is no doubt that the 1951 Convention is the 'foundation of the international system of refugee protection'<sup>63</sup> and that it remains relevant over fifty years after its adoption, it is not the sole repository of rights applicable to refugees and asylum-seekers. The rights enumerated in the 1951 Convention are limited guarantees for refugees and asylum-seekers and are not the range of rights available to them under IHRL. It ought to be acknowledged, however, that the 1951 Convention pre-dates the human rights covenants of the 1960s and incorporated a range of rights that have been further enhanced by developments in human rights law. The 1951 Convention covers a number of civil and political, as well as economic, social and cultural, rights. Specifically, it includes rights related to freedom of religion (Art. 3), property (Art. 13), artistic rights and industrial property (Art. 14), association (Art. 15), access to courts (Art. 16), wage-earning employment (Art. 17), self-employment (Art. 18), recognition of professional diplomas (Art. 19), and welfare, social security and education (Arts. 20 to 24). However, IRL is structured in such a way that '... gradations of treatment allowed by the Convention depend on notions such as lawfully staying, or merely present in the territory ...'<sup>64</sup> as well as a sliding scale of standards of treatment as favourable as nationals<sup>65</sup> to treatment accorded to foreign nationals or aliens.<sup>66</sup> The reciprocity philosophy of the 1951 Convention<sup>67</sup> can also act as a barrier to equal rights with nationals. Goodwin-Gill distinguishes four general categories on which the extent of a refugee's rights may be determined, namely 'simple presence', 'lawful presence', 'lawful residence', and 'habitual residence'.<sup>68</sup> Very few rights included in the 1951 Convention overtly apply to asylum-seekers. Articles 31 (non-penalisation) and 33 (*non-refoulement*) are two such

<sup>60</sup> C.L.C. Mubanga-Chipoya, Final Report, *The Right of Everyone to Leave any Country, including His Own, and to Return to His Country*, UN doc. E/C.4/Sub.2/1988/35, June 1988, at 103–6.

<sup>61</sup> Arts. 31, 32 and 33 already cover various aspects of the UN's concept of asylum.

<sup>62</sup> R. Plender and N. Mole, above n.35, at 82. Emphasis added.

<sup>63</sup> Statement by Mr Ruud Lubbers, former UN High Commissioner for Refugees, to the Ministerial Meeting of States Parties to the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, on 13 Dec., 2001, Geneva, Switzerland. See, also, Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol, above n.14, Preambular para. 2.

<sup>64</sup> UNHCR, 'Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems', Global Consultations on International Protection, 3<sup>rd</sup> Meeting, UN doc. EC/GC/01/17, 4 Sept. 2001, para. 3.

<sup>65</sup> E.g. Arts. 4, 20, 22, 23 and 24.

<sup>66</sup> E.g., Arts. 13, 15, 17, 18, 19, 21 and 26.

<sup>67</sup> Art. 7(1).

<sup>68</sup> G. Goodwin-Gill, *The Refugee in International Law*, above n.44, at 305–307. See, Part 4.2 The right to work under the 1951 Convention.

rights.<sup>69</sup> According to the UNHCR, the ‘gradations of treatment allowed by the Convention ... serve as a useful yardstick in the context of defining reception standards for asylum-seekers. At a minimum, the 1951 Convention provisions that are not linked to lawful stay or residence would apply to asylum-seekers in so far as they relate to humane treatment and respect for basic human rights’.<sup>70</sup> Most other rights are contingent upon status as a refugee. Given the declaratory nature of refugee status, they may also apply to asylum-seekers,<sup>71</sup> although this is not fully accepted by States. IHRL, in contrast, embodies a large number of rights relevant to refugees, including rights not mentioned in the 1951 Convention.

## 2.4 ‘Human’ rights and refugees

In determining applicable standards of treatment, the two key questions for refugees and asylum-seekers are: Do human rights standards apply to them? Which right prevails in the event of a conflict? One of the principal purposes of the UN is to promote and encourage ‘respect for the human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’.<sup>72</sup> The human rights provisions of the UN Charter are directly binding on Member States.<sup>73</sup> Similarly, the UDHR provides that ‘*All human beings* are born free and *equal in dignity and rights*’<sup>74</sup> (emphasis added) and that ‘*Everyone* is entitled to all the rights and freedoms set forth in this Declaration, 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’<sup>75</sup> (emphasis added). Although the UDHR is non-binding *per se*, it set the scene for the future elaboration of human rights standards which do not generally distinguish between nationals and non-nationals. In particular, these articles were later transferred to Article 2(1) of the ICCPR and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’).<sup>76</sup> Thus, IHRL has as its point of departure the principles of non-discrimination and equality. Basic human rights norms recognise that ‘[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic and general principle relating to the protection of human rights’.<sup>77</sup>

<sup>69</sup> UNHCR, ‘Reception of asylum-seekers’, above n.64, at 1.

<sup>70</sup> UNHCR, ‘Reception of asylum-seekers’, above n.64, at 1, referring to Executive Committee Conclusion No. 82 (XLVIII) on ‘Safeguarding Asylum’, 1997.

<sup>71</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Geneva, 1979, re-edited Jan. 1992), para. 28.

<sup>72</sup> Art. 1(3), 1945 UN Charter. See, also, Arts. 55(c) and 56.

<sup>73</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion ICJ Reports 1971.

<sup>74</sup> Art. 1.

<sup>75</sup> Art. 2.

<sup>76</sup> UNGA Res. 2200 A (XXI), 16 Dec. 1966; entered into force 3 Jan. 1976.

<sup>77</sup> HRC General Comment No. 18, UN doc. HRI/GEN/1/Rev.5, 1989, para. 1.

The non-discriminatory basis of IHRL supports the view that such rights are applicable to 'all individuals within [a State's] territory and subject to its jurisdiction'.<sup>78</sup> In this sense, IHRL is territory-based, not nationality-based, except where it is otherwise explicit in particular provisions.<sup>79</sup> Applying the maxim *expressio unius est exclusio alterius*, the fact that IHRL does not differentiate between nationals and non-nationals except in a few specific instances implies that aliens are included in all other provisions. 'Thus the general rule is that each one of the rights of the [ICCPR and the ICESCR] must be guaranteed without discrimination between citizens and aliens.'<sup>80</sup> Although 'nationality' is not specifically referenced in the non-discrimination clauses in either the ICCPR or the ICESCR, 'national origin' or 'other status' would clearly protect discrimination against refugees and asylum-seekers. In any event, Articles 2(1) and 2(2) of the ICCPR and ICESCR respectively are non-exhaustive and prohibit 'discrimination of any kind'. Article 26 of the ICCPR, as 'a free-standing guarantee of non-discrimination in relation to all rights',<sup>81</sup> has further been utilised to ensure protection of various rights, including economic ones.<sup>82</sup>

Thus, while asylum has long been 'rarely defined or placed in context, and often unattainable',<sup>83</sup> IHRL is a tool already available to give it supplementary meaning. After all, '[r]efugees are people too'.<sup>84</sup>

## 2.5 A clash of standards?

While it is clear that IHRL applies to refugees and asylum-seekers, the question remains what happens in the event of a clash of standards between the two bodies of law? Article 5 of the 1951 Convention states that '[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention'. The *travaux préparatoires* relating to Article 5 indicate that it was inserted as an attempt to safeguard more generous practices of some States that had been assumed voluntarily at the time of drafting. Although Article 5 is written in the past tense, it is foreseeable that it was intended to

<sup>78</sup> Art. 2(1), ICCPR.

<sup>79</sup> E.g. Art. 25 of the ICCPR on the right to take part in public affairs, to vote and be elected, and to have access to public service, is limited to 'citizens' only, while Art. 13 only applies to 'aliens'. See, also, Art. 2(3) of the ICESCR.

<sup>80</sup> HRC General Comment No. 15, above n.56, para. 2. See, also, *Loizidou v. Turkey*, Judgment (Merits and just satisfaction), ECHR Applic. No. 000153118/89, 18 Dec. 1996, in which the Court stated at para. 52, 'The obligation to secure ... the rights and freedoms set out in the Convention, derives from the fact of ... control [of territory].'

<sup>81</sup> S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, (Oxford University Press, 2000), at 524.

<sup>82</sup> See range of cases mentioned in S. Joseph, J. Schultz and M. Castan, *ibid.*, at 525.

<sup>83</sup> G. Goodwin-Gill, 'Refugee identity and protection's fading prospect', in F. Nicholson and P. Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, (Cambridge University Press, 1999) 220, at 225.

<sup>84</sup> D. Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) *Harvard Hum. Rts J.* 312.

equally apply to such practices that have taken on a legally binding character since then. That is, the 1951 Convention is subject to other, subsequently assumed obligations, either through treaty or custom. In this way, it is asserted that later, more generous obligations assumed by States under various human rights treaties that apply to ‘everyone’ and ‘all human beings’ supplement and enhance their obligations under IRL and, where there is an incompatibility, supersede them. If Article 5 of the 1951 Convention is read as a ‘successive clause’ or ‘conflict clause’, then Article 30(2) of the 1969 Vienna Convention on the Law of Treaties (‘VCLT’)<sup>85</sup> would support this interpretation.<sup>86</sup> Although the VCLT is not retroactive,<sup>87</sup> it is now regularly applied as custom.<sup>88</sup> It is also clear that one of the intentions of the Conference of Plenipotentiaries was to assure refugees the ‘widest possible exercise of their fundamental rights and freedoms’.<sup>89</sup> Subsequent EXCOM Conclusions have endorsed this objective. Thus, the higher standard must prevail.

Having said this, it ought to be acknowledged that Article 5 is not entirely unambiguous. If it is considered that Article 5 does not fully clarify the issue of successive treaties specifically, sub-articles 30(3) and (4) of the VCLT may offer useful guidance. They provide that where an earlier treaty is not terminated or suspended, the former applies only to the extent that its provisions are compatible with those of the later treaty. While there is no refugee-specific replacement for the 1951 Convention, there is an overlap in relation to particular provisions. As stated above, the 1951 Convention is a rights-based and rights-granting instrument. Its coverage in Articles 3 to 34 is of the same nature as some rights granted under various human rights instruments. An application of sub-articles 30(3) and (4) of the VCLT would mean that all the provisions of the 1951 Convention and/or 1967 Protocol remain on foot apart from those which are incompatible with IHRL instruments subsequently ratified. That is,

<sup>85</sup> 1155 UNTS 331, entered into force 27 Jan. 1980.

<sup>86</sup> Art. 30(2) provides: ‘When a treaty specifies that it is subject to, or that it is not to be considered incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.’

<sup>87</sup> Art. 4, VCLT.

<sup>88</sup> See, inter alia, *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, ICJ Reports 1995, at 6; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa Case) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, at 47 (refers to rules relating to termination on account of breach generally); *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, para 46 (refers to Arts. 60 & 62 VCLT); *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, paras. 45–47 (refers to Art. 56(2), VCLT); *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Jurisdiction of the Court*, Judgment, ICJ Reports 1973, paras. 17 and 23; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950; *Libya v. Chad*, ICJ Reports 1994, at 4, para. 41 (refers to Arts. 31 & 32, VCLT). See, also, See, D.J. Harris, *Cases and Materials on International Law*, (5<sup>th</sup> ed., Sweet and Maxwell, London, 1998), at 814; I. Sinclair, *The Vienna Convention on the Law of Treaties* (2<sup>nd</sup> ed., Manchester University Press, 1984), at 10–21.

<sup>89</sup> See, Preamble to the 1951 Convention.

where an earlier treaty outlines particular standards of treatment that are incompatible with a subsequent treaty, the latter prevails. An example would be earlier provisions that are more circumscribed or less generous than those of a later treaty. Conversely, where the earlier treaty offers a higher standard for a specifically-defined group of individuals, it would remain valid as representing an exception to a later treaty, unless otherwise provided for in the treaty itself. A good faith application of the IRL and IHRL, with due regard to their objects and purposes further requires that this is the appropriate interpretation.<sup>90</sup>

## **2.6 Durable solutions**

To take the above analysis to its logical conclusion, it would be an oversight not to mention briefly the clear link between standards of treatment in host countries for refugees and asylum-seekers and the realisation of durable solutions, including, particularly, opportunities for local integration. At the time of the drafting of the 1951 Convention, there was widespread recognition by States that local integration was a real solution to the plight of refugees.<sup>91</sup> In fact, historically, local integration was the preferred durable solution and repatriation was actively discouraged, as most of the refugees originated from communist countries.<sup>92</sup> The emphasis on voluntary repatriation as the 'primary' solution only arose at the end of the Cold War.<sup>93</sup>

Moreover, assimilation and naturalization are mentioned in Article 34 of the 1951 Convention and although framed in discretionary language, calling on States 'as far as possible to facilitate the assimilation and naturalization of refugees', they represent the natural end point of long-term stay in the country of asylum. The granting of citizenship is the final, not the only, form of local integration. In fact, it is the formalisation of the local integration solution. The right to family life and the right to work, for example, are also part of the local integration continuum. UNHCR has recently separated this process into 'self-reliance' and 'local integration', with the latter being the 'end product of a multifaceted and ongoing process, of which [the former] is but one part'.<sup>94</sup> The General Assembly

<sup>90</sup> International Law Commission's Commentary on VCLT, *YBILC* 1966, at 219.

<sup>91</sup> Art. 34, 1951 Convention and the 1950 Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res. 428(V), 14 Dec. 1950. See also, UNHCR, 'Local Integration', Global Consultations on International Protection, 4<sup>th</sup> Meeting, UN doc. EC/GC/02/6, 25 Apr. 2002, para. 3.

<sup>92</sup> See, G. Coles, 'Voluntary Repatriation: A Background Study' (UNHCR, Geneva, 1985); G. Loescher, 'UNHCR at Fifty: Refugee Protection and World Politics', in N. Steiner, M. Gibney and G. Loescher (eds.), *Problems of Protection: The UNHCR, Refugees, and Human Rights* (Routledge, New York, 2003) 3, at 9.

<sup>93</sup> B.S. Chimni, 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation' 5 *IJRL* 442-459 (1993).

<sup>94</sup> UNHCR, 'Local Integration', above n.91, para. 5.

has acknowledged that ‘the promotion of fundamental human rights is essential to the achievement of self-sufficiency and family security for refugees, as well as to the process of re-establishing the dignity of the human person and realizing durable solutions to refugee problems’.<sup>95</sup> Whether there is a *right* to a durable solution is another important issue, yet it is outside the parameters of this discussion. What is relevant to this analysis is the potential for the provisions of both the 1951 Convention and relevant international human rights instruments to give content and meaning to the concept of local integration, an important, albeit indirect, component of Article 14(1) of the UDHR.

### 3. The right to family life

#### 3.1 The refugee context

Family ties and life are significant facets in every society worldwide. For refugees and asylum-seekers their family life is often faced with threats to its survival and existence. ‘Refugees run multiple risks in the process of fleeing from persecution, one of which is the very real risk of separation from their families.’<sup>96</sup> As in other areas of refugee policy, host States have increasingly adopted restrictive measures, either through narrow definitions of who constitutes a family, the imposition of immigration-type criteria on reunification applications, such as length of residence, employment status, access to housing and/or earning capacity,<sup>97</sup> or even bars to family reunification until after a specified period of time has elapsed.<sup>98</sup> The UNHCR has referred to the ‘continuing disinclination of some States to facilitate family reunification’.<sup>99</sup> In addition, the negative impact that other refugee policies, such as detention of asylum-seekers, has on the right to family life is evident. ‘Even if in most [European] States family reunification is ruled by legislative instruments, administrative regulations are often used to complete legislation with practical aspects and can result

<sup>95</sup> UNGA Res. 44/137, 15 Dec. 1989, Preambular para. 10.

<sup>96</sup> K. Jastram and K. Newland, ‘Family Unity and Refugee Protection’ in E. Feller, V. Turk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, (Cambridge University Press, 2003) 555, at 555.

<sup>97</sup> European Council on Refugees and Exiles, ‘Updated Position on the Integration of Refugees in Europe’, Dec. 2002, para. 28.

<sup>98</sup> See, e.g., CRC Committee, ‘Concluding Observations on Australia’, UN doc. CRC/C/15/Add.79, 10 Oct. 1997, para. 30; ‘Concluding Observations on Finland’, UN doc. CRC/C/15/Add.132, 16 Oct. 2000, paras. 37–8; ‘Concluding Observations on Kenya’, UN doc. CRC/C/15/Add.160, 7 Nov. 2001, para. 56; ‘Concluding Observations on Norway’, UN doc. CRC/C/15/Add.126, 28 June 2000, paras. 32–3. See, also, UNHCR Regional Bureau for Europe, ‘Integration Rights and Practices with Regard to Recognised Refugees in the Central European Countries: Part II’, European Series, 1 July 2000, at 286–290.

<sup>99</sup> UNHCR, ‘Note on International Protection’, Executive Committee of the High Commissioner’s Programme, 52<sup>nd</sup> Session, UN doc. A/AC.96/951, 13 Sept. 2001, para. 78.



in a tougher or more favourable implementation of the law.<sup>100</sup> For example, administrative delays in determination procedures often compromise the protection of family life for asylum-seekers and refugees. 'Despite recognition of the family unit, its significance and its need for protection, obstacles to family reunification [and family formation with foreign spouses] are deep-rooted and manifold.'<sup>101</sup>

This part shall consider four particular issues for refugee families: family reunification; the ability to marry and to form a family with a foreign spouse; deportation and/or expulsion; and detention. The first two issues confront the fact that, apart from the Convention on the Rights of the Child ('CRC'),<sup>102</sup> there is no right to enter and to reside in another country for the purposes of family reunification. The latter two issues consider the inter-linkage between the right to family life and other rights of refugees.

### **3.2 Family unity and the 1951 Convention**

The Conference of Plenipotentiaries failed to include a substantive provision on the right to family life in the 1951 Convention. In fact, the first pronouncement on the right to seek and to enjoy asylum from persecution in Article 14 of the UDHR was classed as an individual right. Moreover, the 1951 Convention refers to 'the refugee' in the singular, without any mention of the refugee's family. While no substantive provision was included in the text of the 1951 Convention, the Final Act of the Conference adopted a specific recommendation that '[c]onsider[ed] that the unity of the family ... is an essential right of the refugee' and '[r]ecommend[ed] Governments to take the necessary measures for the protection of the refugee's family' with a view to ensuring that the unity of the family is maintained and for the protection of minors. This recommendation was adopted upon the suggestion of the representative of the Holy See who pointed out that although it was 'an obvious proposition' that refugee protection naturally implied the protection of their families, it 'would be wise to include a specific reference'.<sup>103</sup> Delegates agreed provided that such a recommendation 'did not detract from the "categorical view" of the preparatory *ad hoc* Committee on Refugees and Stateless Persons that "governments were under an obligation to take such action in respect of the refugee's family"'.<sup>104</sup> It also places the right to family life in the refugee context within a broader human rights framework by

<sup>100</sup> Inter-Governmental Consultation on Asylum, Refugee and Migration Policies in Europe, North America and Australia, 'Report on Family Reunification: Overview of Policies and Practices in IGC Participating States', 1997, at 17.

<sup>101</sup> C. Anderfuhren-Wayne, 'Family Unity in Immigration and Refugee Matters: United States and European Approaches', 8 *IJRL* 347, at 348, (1996).

<sup>102</sup> UNGA Res. 44/25, 20 Nov. 1989; entered into force 20 Sept. 1990. Art. 10, CRC.

<sup>103</sup> P. Weis (ed.), *The Refugee Convention 1951: The Travaux Préparatoires Analysed with a Commentary*, (Cambridge University Press, 1995), at 380.

<sup>104</sup> P. Weis (ed.), *ibid.*, at 381.

reference to the language in the UDHR. UNHCR's Handbook further notes that although there is no explicit inclusion of the right to family unity in the 1951 Convention, the first recommendation is 'observed by the majority of States, whether or not [they are] parties to the 1951 Convention or to the 1967 Protocol'.<sup>105</sup> EXCOM has been forthright in its reaffirmation of States' obligations to take measures to respect family unity and family reunion.<sup>106</sup>

In terms of substantive provisions, Article 12 of the 1951 Convention relating to personal status provides that '[r]ights previously acquired by a refugee and dependent on personal status, *more particularly rights attaching to marriage*, shall be respected by the Contracting State, subject to compliance, if this be necessary, with the formalities required by the laws of that State, provided that the right in question is one which would have been recognized by the law of that State had he [or she] not become a refugee' (emphasis added). Although Article 12 does not specifically deal with the issue of family unity (it deals with personal status) and it is limited to the domestic law of each State, it may be a helpful, albeit not incontestable, tool to reinforce arguments in favour of family unity, especially its focus on recognising pre-existing rights attaching to marriage.

Furthermore, it is common practice for States to grant 'derivative' status to family members of recognised refugees. This approach attests to the fact that States view — including in relation to refugees — that the sanctity of the family is paramount. It is also widely agreed that '[t]he object and purpose of the 1951 Convention implies that its rights are in principle extended to the family members of refugees'.<sup>107</sup> It is, therefore, possible to develop arguments that the right to family unity is an emerging right under customary international law in the refugee context, at least in so far as States recognise such rights when family members arrive together with the principal applicant.

### **3.3 The right to family life under international human rights law**

There are myriad provisions that elaborate the right to family life under IHRL, starting with Article 16(3) of the UDHR which provides that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. The importance of the family is underlined by the inclusion of provisions in both the ICCPR and the

<sup>105</sup> UNHCR's Handbook, above n.71, para. 183.

<sup>106</sup> See, Executive Committee Conclusions Nos. 1(XXVI) 1975, para. (f); 9(XXVIII) 1997; 24(XXXII) 1981; 84(XLVIII) 1997; 85(XLIX) 1998, paras. (u)–(x); and 88(L) 1999.

<sup>107</sup> UNHCR, 'Summary Conclusions on Family Unity', Global Consultations on International Protection, Geneva Expert Roundtable 8–9 Nov. 2001, organised by the UNHCR and the Graduate Institute of International Studies, para. 7.

ICESCR. Alongside the right to self-determination and equality/non-discrimination,<sup>108</sup> the right to family life is the only other right that received double protection by virtue of its inclusion in both these instruments. Article 17 of the ICCPR incorporates the right in the form of a prohibition upon 'arbitrary or unlawful interference with [one's] . . . family'. Furthermore, Article 23 adopts near identical wording as the UDHR and Article 24 addresses 'the protection of the rights of the child, as such or as a member of a family'.<sup>109</sup> In contrast, Article 10 of the ICESCR utilises more discretionary, albeit broadly conceived, language in stating that '[t]he widest possible protection and assistance *should* be accorded to the family' (emphasis added). In adding 'assistance' as a component of the right, it reiterates the positive obligations on States.

Additional protections of the family have been included in the CRC, including express provisions relevant to the protection of refugee children.<sup>110</sup> As with the ICCPR and the ICESCR, the rights enumerated under the CRC are to be applied 'without discrimination of any kind'.<sup>111</sup> Thus, there is a wide array of human rights instruments available to create a robust system of protection and assistance for the family. The right to family life has also been recognised by regional instruments<sup>112</sup> and in the domestic constitutions of a number of countries.<sup>113</sup> It is fair to say that legally the right to family life is far better protected under IHRL than under IRL.

Unfortunately, however, 'there [remains] no unified approach regarding a right to family unity or what family protection encompasses'.<sup>114</sup> In fact, the terminology differs between the various instruments, starting with the 'family' in the UDHR, ICCPR and the ICESCR, 'family life' in the 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms ('ECHR'), 'family environment' in the CRC and the 1989 African Charter on the Rights and Welfare of the Child, and 'family unity' in the IRL context.<sup>115</sup> In much scholarly literature, the right to family or to family life is treated synonymously with the right to family unity. The writer considers that family unity is a subset or characteristic of having a family life. For many refugee families, in order to enjoy a family life, the unity of the family is their critical concern. This may

<sup>108</sup> Arts. 1 and 2/3 of the ICCPR and the ICESCR respectively.

<sup>109</sup> HRC General Comment No. 19 on Article 23, UN doc. HRI/GEN/1/Rev.5, 26 Apr. 2001, para. 1.

<sup>110</sup> Arts. 10 and 22.

<sup>111</sup> Art. 2.

<sup>112</sup> Art. 17, OAS Convention; Arts. 8 and 12, ECHR; Art. 18, African Charter; Art. XVIII, 1990 African Charter on the Rights and Welfare of the Child, OAU doc. CAB/LEG/153/Rev.2.

<sup>113</sup> See, R. Plender, *International Migration Law*, (2<sup>nd</sup> rev. ed., 1988), at 366–7.

<sup>114</sup> C. Anderfuhren-Wayne, above n.101, at 348.

<sup>115</sup> G. van Bueren, 'The International Protection of Family Members' Rights as the 21<sup>st</sup> Century Approaches' (1995) 17(4) *HRQ* 732, at 733–734.

require 'not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated'.<sup>116</sup>

The fact that there is no right to enter, reside or immigrate, or to be granted asylum, in international law poses a direct conflict with the right to family life in two particular instances: (a) where family members are separated during refugee flight, or (b) where a recognised refugee wishes to marry a foreign spouse in order to found a family. The approach taken by most States in carefully guarding the admission of non-nationals onto their territory can be seen as an interference with an individual's right to family life. Some States also possess unreasonably cumbersome restrictions on entry of refugee spouses of their own nationals.

IHRL refers not only to families already constituted, but expressly protects the right to marriage and to form a family, that is, future families. Article 16(1) of the UDHR provides that '[m]en and women of full age without any limitation due to race, nationality or religion, have the right to marry and to found a family'. Similar wording is adopted in Article 23(3) of the ICCPR, although 'marriageable age' is the preferred terminology. Article 19(1) of the ICESCR calls for protection and assistance to the family 'particularly for its establishment and while it is responsible for the care and education of dependent children'. In this context, 'establishment' is taken to mean 'formation'.

### 3.4 The concept and definition of the family

'Although international treaty law salutes the family as the basic unit upon which society is organized, the family is still a concept in transition.'<sup>117</sup> In fact, there is no definition of 'family' under international law. The absence of an agreed definition has meant that States may define the term according to their own interests, culture and system. The UNHCR in its 'Note on International Protection' in 2001 specifically highlighted the fact that cultural discrepancies in definitions of the family have given rise to problems for family unity.<sup>118</sup> Yet, it ought to be acknowledged that the lack of a definition simultaneously allows scope for social and cultural variations of the family to be recognised and accepted as legitimate under international law. Along these lines, the Human Rights Committee has asserted that the family is to be given a broad interpretation so as 'to include all those comprising the family as understood in the society of the State party concerned',<sup>119</sup> subject to the fact that 'a state party does not have exclusive

<sup>116</sup> UNHCR, 'Summary Conclusions on Family Unity', above n.107, para. 5.

<sup>117</sup> G. van Bueren, above n.115, at 733.

<sup>118</sup> UNHCR, 'Note on International Protection', 2001, above n.99, para. 78.

<sup>119</sup> HRC General Comment No. 16 on Article 17, UN doc. HRI/GEN/1/Rev.5, 26 Apr. 2001, para. 5. See, also, HRC General Comment No. 19 on Article 23, above n.109, para. 2.

jurisdiction in defining a family, because the definition has to be “without discrimination”<sup>120</sup>. Similarly, the European Court of Human Rights has held that the ‘existence or non-existence of “family life” . . . is essentially a question of fact depending upon the real existence in practice of close personal ties’.<sup>121</sup> The UNHCR also supports and promotes a broad definition of the family, drawing on factors such as ‘emotional dependency’.<sup>122</sup> Some States have also accepted customary practices as influencing decisions in relation to families.<sup>123</sup> While this article cannot hope to resolve this ongoing debate, it is recognised that the failure to agree a definition of, or to elaborate guiding principles, on what constitutes a family unit, has produced a dichotomy. On the one hand, this absence has allowed States to circumvent their obligations under international law, while on the other hand, it has given scope for the recognition of culturally-influenced, as well as evolving forms, of the ‘family’ beyond the Eurocentric ‘nuclear family’.

### **3.5 Family reunification**

Apart from EXCOM Conclusions, which, although non-binding in a strict legal sense, reflect the views of EXCOM Member States and in the longer-term contribute to new customary practices, IRL offers little substantive guidance on the question of family reunification. Consistently, the UNHCR has called on States to adopt liberal and generous policies with respect to family reunification and promulgated similarly-oriented policy guidance,<sup>124</sup> albeit with mixed results. Guidance that is available tends to appeal to States’ humanitarian sensibilities and compassion, rather than to any strict legal obligations.<sup>125</sup> More recently the UNHCR, through its Global Consultations on International Protection, has drawn upon

<sup>120</sup> G. van Bueren, above n.115, at 734–735.

<sup>121</sup> *Lebbink v. The Netherlands*, App. No. 45582/99, 1 June 2004, para. 36. See, also, *X, Y and Z v. United Kingdom* (1997) 24 EHRR 143, para. 36. See, also, for an overview, H. Lambert, ‘The European Court of Human Rights and the right of refugees and other persons in need of protection to family reunion’ 11 *IJRL* 427–450, (1999).

<sup>122</sup> See, UNHCR, ‘Guidelines on Reunification of Refugee Families’, Geneva, July 1983, Part III. See, also, UNHCR *Resettlement Handbook* (Geneva, revised edition July 2002), at Part 4.6.5 and UNHCR, ‘Background Note: Family Reunification in the Context of Resettlement and Integration’, Annual Tripartite Consultations on Resettlement, 20–21 June 2001, para. 14.

<sup>123</sup> See, e.g., recent UK decision, *Singh v. Entry Clearance Office, New Delhi*, [2004] EWCA Civ. 1075, 20 July 2004, in which the Court of Appeal stated that as a matter of principle, it did not see why the fact that an adoption did not meet the requirements of relevant international instruments should invariably be a reason for according little weight to determining whether a family life exists or not. It allowed the appeal of a couple who had adopted their cousin’s son by a religious ceremony and afterwards a deed of adoption was executed between the natural parents and the adoptive parents, even though this practice was not recognised by UK courts.

<sup>124</sup> UNHCR, ‘Guidelines on Reunification of Refugee Families’, above n.122.

<sup>125</sup> See, e.g. UNHCR, ‘Guidelines on Reunification of Refugee Families’, above n.122, and European Council on Refugees and Exiles, ‘Position on Refugee Family Unification’, July 2000.

international human rights and humanitarian law to reinforce its policy position on the reunification of refugee families.<sup>126</sup>

Although there is no explicitly worded right to family reunification in international law, family unity is an essential component of the right to family life. Without a unified family, there is often no family life.<sup>127</sup> Family reunification in this sense may be the only practical means of giving effect to the right to family life in the case of separated refugee families. 'Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.'<sup>128</sup> Thus, 'the conclusion can be drawn that the admission of family members of a resident alien protects the family unit. Therefore, if a right should be recognised by States concerning the reunion of the family, it is more a right to enter and to live in the country of reception or a right to the protection of the family unit rather than a right to family reunification in itself'.<sup>129</sup> The writer finds that due to the strict approaches taken by States to the right to enter and to reside, the latter argument is more convincing.

Similarly, it can be strongly argued that '[r]efusal to allow family reunification may be considered as an interference with the right to family life or to family unity, especially where the family has no realistic possibilities of enjoying that right elsewhere'.<sup>130</sup> This so-called 'elsewhere' approach, largely developed by the European Court on Human Rights,<sup>131</sup> offers support to the plight of refugee families, either those seeking reunification of separated family members or those facing deportation and/or expulsion (see below). While this test has so far only been applied in Council of Europe Member States and in the context of migration cases, its potential applicability beyond these countries and cases is noteworthy. As yet, the HRC has not had to address this issue. This approach could resolve many of the obstacles to family reunification for refugees who by their very nature are unable to enjoy the right to family life except in the country of asylum. Having arisen in the context of immigration decisions, it has been subject to valid criticism by some commentators<sup>132</sup> and there

<sup>126</sup> See, UNHCR, 'Summary Conclusions on Family Unity', above n.107, para. 2. The UNHCR draft guidelines on family unity (draft as at July 2002) similarly refer to international human rights and humanitarian law [on file with the writer].

<sup>127</sup> Note however that a lack of cohabitation does not necessarily mean that there is no family life. See, e.g. *Berrahab v. The Netherlands*, A138 (1988), at 14.

<sup>128</sup> HRC General Comment No. 19 on Article 23, above n.109, para. 5.

<sup>129</sup> IGC, 'Report on Family Reunification', 1997, above n.100, at 16.

<sup>130</sup> UNHCR, 'Summary Conclusions on Family Unity', above n.107, para. 5.

<sup>131</sup> See, H. Lambert, above n.121.

<sup>132</sup> It has been criticised in that it discriminates against mixed nationality couples or where the family has substantial ties to the host territory and there are good reasons for not leaving that territory. For further analysis, see C. Anderfuhren-Wayne, above n.101, at 360–26 and H. Lambert, above n.121.

have been pushes toward the adoption of a so-called 'connections' test, that is, where a family can show that it has developed 'ties' to the host community by, for example, having lived in the country for a considerable time and/or founded a family there, they would be deemed to have good reasons for not leaving.<sup>133</sup> While this approach might also facilitate positive decision-making, it is an approach more favourable to migration than refugee cases. The latter, for example, may be unable to demonstrate sufficient 'ties' to the country of asylum, especially if they have not been in the country for long or where their family members have yet to be reunited. The Strasbourg Court would be encouraged not to discard the 'elsewhere' test in favour of a 'connections' test, but to accept the validity of both approaches.

With respect to refugee children and family reunification, the CRC has gone one step further than the ICCPR and the ICESCR by the inclusion of specific articles addressing this issue. Being the most widely ratified human rights instrument, the CRC offers substantial protection to refugee children. Article 9(1) of the CRC states that, subject to express exceptions, 'States Parties shall ensure that a child shall not be separated from his or her parents against their will'. Article 10(1) further provides that 'In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.' Reading these two provisions together, there is a strong intimation that where a child is separated from his or her parents against his or her will, there is a correlative obligation on States to process any application for family reunification in a positive, humane and expeditious manner. This is more than simply an obligation to efficiently process an application for family reunification as failing to grant reunification rights may bring a State Party into breach of the earlier provision not to forcibly separate children from their parents.<sup>134</sup> States Parties may be seen as indirectly contributing to the separation of a child from his or her parents by delaying consideration of family reunification applications or denying reunification without valid justifications. Moreover, doing so may breach the cardinal principle of the CRC to act in the 'best interests of the child'.<sup>135</sup> Article 22 of the CRC further notes that States parties shall cooperate with the UN and other agencies 'to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family'.<sup>136</sup> While Article 22 does

<sup>133</sup> See, *X v. Federal Republic of Germany*, App. No. 6357/73 and *Alam v. United Kingdom*, App. No. 2991/66.

<sup>134</sup> It ought to be noted that a number of States have entered reservations against Art. 10.

<sup>135</sup> See, e.g., *Pini v. Romania*, unreported judgment, ECHR, 22 June 2004, para. 144.

<sup>136</sup> It ought to be noted that a number of States have entered reservations against Art. 22.

not provide that the reunification need be in the country of asylum, it is arguable that upon an application of the 'elsewhere' test, this would be the most obvious result. Even though States may justify delaying reunification for asylum-seekers until after a positive asylum decision, it becomes unreasonable the longer the delay, particularly for asylum-seeking children. If the delay is unreasonably protracted, it might also constitute cruel, inhuman or degrading treatment.<sup>137</sup>

### 3.6 Family formation and marriage

Unlike family reunification, which has to be read into the right to family life, there is an explicit right to marry and to form a family in Article 23(2) of the ICCPR.<sup>138</sup> Such a right applies irrespective of one's status. 'The right to found a family implies, in principle, the possibility to procreate and live together.'<sup>139</sup> As stated above in relation to family reunification, States have a responsibility to adopt appropriate measures in order to allow the possibility of living together.<sup>140</sup> Most States respect the right to marry and to form a family for refugees living in their territory and wishing to marry someone also living in that society. Difficulties arise where a refugee wishes to marry and found a family with a foreign spouse not on the territory of the State party. It is not uncommon for refugees to want to marry individuals from their country of origin, due to their shared language, culture or religion. The applicant may be part of a numerically small ethnic, linguistic or cultural group within their host community, without realistic possibilities for finding a compatible spouse. Such proposed marriages raise questions of entry visas, documentation and potential fraud. They may also encroach on issues of gender equality where the proposed marriages are arranged or betrothals.

Whether the denial of entry of a foreign fiancé(e) amounts to an interference with the right to marry and to found a family has yet to be judicially examined. According to the European Court of Human Rights, the concept of family life could include 'intended' family life, that is, one's fiancé(e).<sup>141</sup> The 'elsewhere' or 'connections' test applied in respect of family reunification cases may prove relevant here also. For example, where the applicant is part of a minority ethnic, religious or cultural group in the host community, it might be unreasonable to expect that he or she will find a suitable spouse in that community. That is, his or her status as a refugee might suggest that without marrying a foreign spouse, he or she will not be able to enjoy the right to marry or to form a family 'elsewhere'. This will of course depend on the individual circumstances of

<sup>137</sup> E.g. under Art. 7 of the ICCPR, although compare with deportation cases listed below at n.148.

<sup>138</sup> See, also, Art. 12, ECHR and Art. 17(2), OAS Convention.

<sup>139</sup> HRC General Comment No. 19 on Article 23, above n.109, para. 5.

<sup>140</sup> HRC General Comment No. 19 on Article 23, above n.109, para. 5.

<sup>141</sup> *Abdulaziz and Balkandali v. United Kingdom*, Ser. A 94 (1985) 50.



the case, including in particular religious practices, customs and traditions. Where the 'intended' spouse is known to the family before their departure or arrangements for marriage were in place but were interrupted, it is also arguable that entry and residence are required in order to effect the marriage.

Where the foreign spouse is a resident or citizen of a country other than the refugee's country of origin, other factors arise. It would first be necessary to determine if they could live in the country of residence or citizenship of the intended spouse. It is not always the case that the country of refuge is the most desirable location, although it would be important that wherever the couple are granted the right to reside, the refugee is able to maintain the level of protection required of his or her status as a refugee. Considerations of the general situation in the country of destination, including any hostility to refugees generally and/or persons of their ethnic, religious, or cultural origin, would be relevant.

### **3.7 Deportation and/or expulsion**

'[G]iven the very serious consequences that the expulsion of refugees may have, this should only be resorted to in exceptional circumstances to protect national security or public order.'<sup>142</sup> Expulsions that are not pursued in the interests of national security or public order thereby breach Article 32 of the 1951 Convention. Arguably, one of the 'very serious consequences' is the break-up of the family unit and potential infringements of the right to family life. Article 13(1) of the ICCPR further specifies that, 'except where compelling reasons of national security otherwise require, [an alien lawfully in the territory of a State party] be allowed to submit reasons against expulsion and to have his [or her] case reviewed by . . . the competent authority . . .'. Attempts by States to expel or deport one member of an intact refugee family already in the country of asylum can affect family unity. In such cases, the State must balance a number of rights and considerations, which restrain its margin of action if it wishes to separate a family.<sup>143</sup> '[D]eportation or expulsion, could constitute an interference with the right to family unity unless justified in accordance with international standards.'<sup>144</sup> It may violate a number of important human rights provisions, including freedom from arbitrary or unlawful interference with the family, the entitlement of the family to protection by the State, and the right of the child to protection without discrimination.<sup>145</sup>

The European Court of Human Rights has applied a similar test to that which it employed in family reunification cases in finding that 'since it was

<sup>142</sup> E. Feller, above n.2, at 583.

<sup>143</sup> V. Türk and F. Nicholson, above n.7, at 34.

<sup>144</sup> UNHCR, 'Summary Conclusions on Family Unity', above n.107, para. 5.

<sup>145</sup> *Winata and Li v. Australia*, HRC Communication No. 930/2000, 16 Aug. 2001, para. 8.

*de facto* impossible for the applicant and his family to continue their life together outside Denmark, [deporting the applicant] would be disproportionate to the aims pursued and in violation of the right to respect for family life'.<sup>146</sup> While this case did not go as far as other Strasbourg and Geneva jurisprudence in finding that removal or deportation may lead the deporting State into breach of other obligations by returning an individual to a situation where his or her rights under the ECHR may be infringed, such as under the torture provisions,<sup>147</sup> it is open to such an analysis. It might also be arguable that separating family members by means of deportation or expulsion where that family has no realistic possibilities of enjoying that right elsewhere could amount to cruel, inhuman or degrading treatment or punishment, although this has yet to be supported by case law,<sup>148</sup> or infringe the 'best interests of the child' principle underlying the CRC. Clearly, in cases where there are serious reasons for the expulsion or deportation of the applicant, it raises the issue of competing interests.

### 3.8 Detention

The UN Working Group on Arbitrary Detention has noted that, '[A]rticle 14 of the [UDHR] guarantees the right to seek and to enjoy in other countries asylum from persecution. If detention in the asylum country results from exercising that right, such detention might be "arbitrary"'.<sup>149</sup> This article wishes to highlight briefly the issue of detention of refugees and asylum-seekers as far as it impacts on family life. It is arguable that the detention in separate facilities of refugee and asylum-seeking children

<sup>146</sup> *Amrollahi v. Denmark*, ECHR Application No. 56811/00, 11 July 2002.

<sup>147</sup> See, e.g., European Commission and Court jurisprudence: *X v. Federal Republic of Germany*, Application No. 1465/62; *Altun v. Federal Republic of Germany*, Application No. 10308/83; *Kirkwood v. United Kingdom*, Application No. 10479/83; *Soering v. United Kingdom*, above n.31; *Jabari v. Turkey*, ECHR Application No. 40035/98, 11 July 2000. See, T. Einarsen, above n.43. See, also, CAT Communication Nos. 130/1999 and 131/1999 (Sweden), 2 Sept. 2000; 99/1997 (Canada), 4 Sept. 2000; 149/1999 (Sweden), 24 Nov. 2000.

<sup>148</sup> Before the HRC it has been asserted that enforcement of a deportation order resulting in the permanent separation of an individual from his family and/or close relatives, and banishment from the only country the author ever knew and in which he grew up, amounts to cruel, inhuman and degrading treatment. The HRC declared the claim to be inadmissible on the basis of a lack of substantiation of the claim. See *Charles E. Stewart v. Canada*, HRC 538/1993. See, also, *Canepa v. Canada*, HRC 558/1993. See, also, *Francesco Madafferi et al. v. Australia*, HRC 1011/2001, separation from family pending removal would cause psychological and financial problems. HRC found violation of Article 10(1), but did not address Article 7. It ought to be noted that the Committee against Torture has not accepted that expulsion of a rejected asylum-seeker who was unable to return to his family and his home village amounted to torture, see *B.S.S. v. Canada*, Communication No. 183/2001, para. 11.5. The European Court of Human Rights has also similarly found that separation from family members will generally not reach the threshold level required of Art. 3 of the ECHR, see *Berrahab*, above n.127; *Moustaquim v. Belgium*, A193 (1991); *Beldjoudi v. France*, A234-A (1992).

<sup>149</sup> UN Working Group on Arbitrary Detention (1997), Report of the Working Group on the Question of the Human Rights of all Persons Subjected to Any Form of Detention or Imprisonment, UN doc. E/CN.4/1998/44.

from their parents or spouses from each other may amount to an arbitrary interference with their rights to family life, in addition to their rights to security of person and against cruel, inhuman or degrading treatment or punishment.<sup>150</sup> Detention may also amount to a penalty under Article 31(1) of the 1951 Convention.<sup>151</sup> UNHCR intermittently refers to the impact of detention on family life in its Revised Guidelines on Detention of Asylum-Seekers and Refugees, in particular stating that children and their primary caregivers should not be detained unless this is the only means of maintaining family unity.<sup>152</sup> Even though the Human Rights Committee has confirmed that detention of asylum-seekers is not *per se* in breach of Article 9(1) of the ICCPR, nor is there any rule of customary international law that would render all such detention arbitrary,<sup>153</sup> it has stated that a State party needs to demonstrate, in order to comply with Article 9, that 'there were not less invasive means of achieving the same ends ...'.<sup>154</sup> The Committee referred to reporting requirements, sureties or other conditions which would take account of the author's particular circumstances.<sup>155</sup> These cases do not however refer to whether detention would interfere with one's family life.

For children, there are a number of relevant provisions in the CRC which, taken singularly or in combination, would clearly find that detention of asylum-seeking or refugee children in separate facilities from their parents to be in violation of the CRC.<sup>156</sup> For adults separated from their spouses, recourse is made to general family life provisions of the ICCPR and the ICESCR. Even where children and their parents are housed together in respect of the right to live together, conditions may be so intolerable as to lead to family break-down and collapse. 'There is a growing body of evidence that prolonged detention of unspecified duration, ... can lead to serious, physical and psychological damage.'<sup>157</sup> Thus, in some cases, detention can interfere, on a permanent basis, with one's right to family life. Little analysis has yet been given to this aspect of detention by States parties, the UN or non-governmental organisations.

<sup>150</sup> Arts. 9 and 7 of the ICCPR respectively.

<sup>151</sup> See, EXCOM Conclusion No. 22 (XXXII) of 1981. See, also, G. Goodwin-Gill, 'Article 31: non-penalization, detention, and protection', in E. Feller, V. Turk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (Cambridge University Press, 2003) 185.

<sup>152</sup> UNHCR, 'Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers', Feb. 1999, Geneva, Guideline 6.

<sup>153</sup> *A v. Australia*, above n.31, paras. 9.3 and 9.4 respectively.

<sup>154</sup> *C v. Australia*, HRC Communication No. 900/1999.

<sup>155</sup> *Ibid.*, para. 8.2.

<sup>156</sup> See, e.g., Arts. 2(2), 3(1), 5, 9, 12(2), 16, 20(1), 22, 25, and 37.

<sup>157</sup> Amnesty International Press Release, 'Australia: Ten years of detention for asylum-seekers — time for change', 12 June 2002.

## 4. The right to work

### 4.1 The refugee context

'[I]t has become clear that a significant proportion of the world's refugees [and asylum-seekers] is destined to remain in their countries of asylum for long periods of time, due to the protracted nature of the conflicts which have forced them to leave their homeland. It has become equally clear that confining refugees to camps for years on end, deprived of the right to freedom of movement and without access to educational and income-generating opportunities, has many negative consequences.'<sup>158</sup> A reluctance to allow refugees and asylum-seekers to participate in the labour market is commonplace in developing countries, largely born of 'concern about the negative economic ... impact of large-scale refugee populations in countries which are struggling to meet the needs of their own citizens'.<sup>159</sup> Very few industrialised countries allow asylum-seekers to work and there are still some restrictions on the right to work for recognised refugees, including in Europe.<sup>160</sup>

The right to work is particularly important to refugees and asylum-seekers as a means of survival and as a contribution to their sense of dignity and self-worth. It provides them with an opportunity to participate in and contribute to their host community, while improving language and other skills. Economic independence reduces reliance on social assistance and avoids the creation of an under-class of persons dependent on welfare. UNHCR's Handbook on Reception and Integration of Resettled Refugees refers to the restoration of 'social and economic independence' as among its principal integration objectives.<sup>161</sup> EXCOM in 1988 '[r]ecognised that the enhancement of basic economic and social rights, including gainful employment, is essential to the achievement of self-sufficiency and family security for refugees and is vital to the process ... of realizing durable solutions to refugee problems'.<sup>162</sup> Whatever the ultimate durable solution for individual refugees and asylum-seekers, access to the employment market facilitates all three of the identified solutions, whereas languishing in camps, detention centres or in society indeterminately in a state of economic dependence can only adversely affect their future resettlement, local integration and/or return prospects.

<sup>158</sup> UNHCR, 'Local Integration', above n.91, para. 21.

<sup>159</sup> UNHCR, 'Local Integration', above n.91, para. 18.

<sup>160</sup> See, e.g., H. Lambert, 'Seeking Asylum: Comparative Law and Practice in Selected European Countries', (Martinus Nijhoff Publishers, Dordrecht, 1995), at 170–174. This position may be affected by the EU Directive on the recognition of professional qualifications, EU doc. 13781/2/04 Rev. 2, 21 Dec. 2004, although it only applies to non-nationals from Member States of the EU.

<sup>161</sup> UNHCR, 'Refugee Resettlement: An International Handbook to Guide Reception and Integration', Oct. 2002, at Chapter 1.3. See, also, Chapter 2.9 on Building Bridges to Economic Self-Sufficiency: Employment and Training.

<sup>162</sup> EXCOM Conclusion No. 50(XXXIX) of 1988, para. (j).

## 4.2 The right to work under the 1951 Convention

Among the economic rights protected under the 1951 Convention, Part III regulates gainful employment: Article 17 refers to wage-earning employment, Article 18 to self-employment, and Article 19 to recognition of professional diplomas. This article is concerned with Articles 17 and 18.

Refugees are not afforded the right to work on equal terms with nationals under the 1951 Convention. At best, Article 17(3) calls on States to give 'sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals'. Otherwise, '[r]efugees [lawfully staying in the territory] are given the equivalent of a "most-favoured-nation" treatment'.<sup>163</sup> The same standard is applied in Article 18, except in so far as a refugee need only be 'lawfully in' the territory of the State party. Moreover, any restrictive measures imposed on non-nationals for the protection of the national labour market must not be applied to refugees who (a) were already exempt from them at the date of entry into force of the Convention for the Contracting State concerned or (b) who have completed three years' residence or (c) whose spouse or child possess the nationality of the country of residence.<sup>164</sup> Where the right to work is granted, refugees lawfully staying shall be accorded the same treatment as is accorded to nationals in respect of general conditions of employment.<sup>165</sup>

It has been suggested that not all rights are applicable upon the granting of status, but rather depend on 'lawful presence', 'lawful residence' or 'habitual residence'.<sup>166</sup> The 1951 Convention is inconsistent in its drafting of Articles 3 to 34 in this respect. In order to engage in wage-earning employment on a most-favoured-nation basis, refugees must be 'lawfully staying' in the territory of a State party, while to engage in self-employment activities they must only be 'lawfully in' the territory of the State party (that is, 'lawfully present'). A literal interpretation of these articles might highlight these semantic discrepancies, however, the object and purpose of the 1951 Convention would suggest that, at a minimum, the full spectrum of rights should be made available to refugees upon recognition. Whether this amounts to temporary or permanent asylum is irrelevant. Thus, it is arguable that any individual granted refugee status is 'lawfully present' as well as 'lawfully staying' in the territory of a State party. The text is insufficiently clear in both the French and English versions to draw a contrary conclusion. It is also not readily apparent why certain rights require higher levels of legal status or longer periods of

<sup>163</sup> R. Cholewinski, 'Economic and social rights of refugees and asylum seekers in Europe', (2000) 14 *Georgetown Immig. L.J.* 709, at 711.

<sup>164</sup> Art. 17(2). A refugee cannot invoke the benefit of this provision if he or she has abandoned his or her spouse (Art. 17(2)(b)).

<sup>165</sup> Art. 24(1)(a), 1951 Convention.

<sup>166</sup> E.g., G. Goodwin-Gill, *The Refugee in International Law*, above n.44. See, Part 2 above.

stay than others. Without interpretative guidance included within the text of the 1951 Convention, the meaning of such terms is at best open to speculation.

In respect of asylum-seekers, it has been argued by Hathaway that it cannot be reasonably concluded that refugees who submit to a refugee status determination procedure are not 'lawfully present'.<sup>167</sup> Moreover, it has been asserted that the absence of a duty to verify refugee status 'would allow States to indefinitely deny refugees their Convention rights simply by refusing to verify their status'.<sup>168</sup> Grahl-Madsen finds that 'lawful stay' to be equivalent to 'lawful presence' that extends for a period of three months or longer.<sup>169</sup> Of course, this is an arbitrary and artificial time frame and has no support in the wording of the 1951 Convention. Hathaway finds that 'lawfully staying' is not related to a legal status at all, but rather to the *de facto* circumstances of the refugee.<sup>170</sup> Goodwin-Gill, in contrast, finds that refugees lawfully staying 'must show something more than mere lawful presence', such as 'permanent, indefinite or unrestricted or other residence status, recognition as a refugee, issue of a travel document, [or] grant of re-entry visa'.<sup>171</sup> The latter explanation is the most restrictive and would in most cases exclude asylum-seekers. As can be seen, there is no clear understanding of the so-called qualifications upon rights contained in Articles 17 and 18, or other 1951 Convention rights. What is clear though is that States parties have benefited from these drafting discrepancies in refusing to grant the full range of rights to recognised refugees and correspondingly to deny such opportunities to asylum-seekers.

In addition to Articles 17 and 18, refugees and asylum-seekers may benefit from other 1951 Convention provisions in order to reinforce their social and economic rights. It is arguable that denying refugees and/or asylum-seekers basic social and economic rights could constitute constructive *refoulement*. Not only might the lack of social and economic rights in a particular destination country threaten to deter individuals from seeking asylum from persecution there, but it may act as a push factor in which refugees and/or asylum-seekers, out of pure economic necessity, are forced to return to a country in which their life or freedom could be threatened. The same arguments could validly be put in respect of a denial of the right to family life. Article 33 is broadly conceived in prohibiting the expulsion or return of a refugee 'in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened ...' (emphasis

<sup>167</sup> J.C. Hathaway, *The Rights of Refugees under International Law*, at Chapter 3.1.2 (not yet published), referred to in J.A. Dent, 'Research Paper on the Social and Economic Rights of Non-Nationals in Europe' (commissioned by the European Council on Refugees and Exiles), Nov. 1998, at 18.

<sup>168</sup> J.A. Dent, *ibid.*, at 17.

<sup>169</sup> A. Grahl-Madsen, *The Status of Refugees in International Law*, vol. II (A.W. Sijthoff-Leyden, 1972), at 374.

<sup>170</sup> J.C. Hathaway, above n.167, at Chapter 3.1.3.

<sup>171</sup> G. Goodwin-Gill, *The Refugee in International Law*, above n.44, at 309.

added). EXCOM has resolved that States must observe '[i]n all cases the fundamental principle of *non-refoulement*, including — non-rejection at the frontier . . . scrupulously'.<sup>172</sup> It is open to argue, therefore, that 'in any manner whatsoever' could include indirect forms of *refoulement* in which treatment in the country of refuge is so pitiable that it leaves refugees and asylum-seekers vulnerable to move to another country or to return home.<sup>173</sup>

Article 31 of the 1951 Convention may similarly be used in support of economic rights. It requires that 'Contracting States shall . . . not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . , enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.' As stated in Part 2 above, it is well accepted that this provision applies to asylum-seekers as well as to refugees. While the term 'penalties' within the meaning of Article 31 has been most commonly interpreted in terms of 'prosecution, fine and imprisonment', it is possible that the term has a broader meaning.<sup>174</sup> The Article has at its base the concept of non-penalisation for illegal entry or presence. The Conference of Plenipotentiaries to the 1951 Convention clearly intended that refugees not be penalised through recourse to criminal prosecution for their illegal entry or presence, recognising that refugees 'may have good cause for leaving any first country of refuge'.<sup>175</sup> They may have also intended to protect refugees from the denial of certain benefits or rights on account of their illegal entry or presence. Subsequent conclusions of EXCOM have confirmed just this intention, in stating that asylum-seekers should 'not be penalised or exposed to *any unfavourable treatment* solely on the ground that their presence in the country is considered unlawful' (emphasis added).<sup>176</sup> In the event that Article 31 is applicable, any measures taken to penalise refugees by reason of their illegal entry or presence, such as the denial of family rights or the right to

<sup>172</sup> EXCOM Conclusion No. 22 (XXXII) of 1981, Part IIA, Para. 2.

<sup>173</sup> Cholewinski, however, points out a number of restrictive domestic decisions that have so far refused to recognise that denial of basic social and economic rights amounts to 'constructive *refoulement*', in R. Cholewinski, 'Economic and social rights of refugees and asylum seekers in Europe', above n.163, at 712–713.

<sup>174</sup> See, UNHCR, 'Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees — Revised', Global Consultations on International Protection, Geneva Roundtable, 8–9 Nov. 2001, para. 10(h), and G. Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection', above n.151, at 189.

<sup>175</sup> G. Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection', above n.151, at 191–192, referring to statements by the Danish representative and the United Kingdom representative, from the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records: UN doc. A/CONF.2/SR.13, 15; UN doc. A/CONF.2/SR. 35, 18.

<sup>176</sup> Executive Committee Conclusion: Protection of Asylum-Seekers in Situations of Large-Scale Influx, No.22 (XXXII) (1981), Para. B.2.(a).

work, need to be justified in the interests of national security or on the basis of public order, as well as being proportionate to their intended purpose.<sup>177</sup> The requirement to implement their obligations in good faith further requires that States justify their actions on the basis of at least one of the above grounds.<sup>178</sup>

### 4.3 The right to work under the ICESCR

Before delving into what the right to work under the ICESCR constitutes, it is first necessary to determine whether it applies to non-nationals. Given the particular nature of economic rights, a separate analysis of this question is required here in addition to the general principles outlined in Part 2 above. Article 6 of the ICESCR provides that, ‘Everyone has the right to work, which includes the right of everyone to the opportunity to gain his [or her] living by work which he [or she] freely chooses or accepts . . .’. This was first recognised in Article 23 of the UDHR and later legally entrenched in Article 6. There is no specific mention of the right to self-employment in the ICESCR, as in the 1951 Convention, although it is taken to be included within the broad wording of Article 6. In addition, Article 7 of the ICESCR refers to standards of treatment in employment. It is well-established that these standards apply to non-nationals on an equal footing as nationals, although given the particular vulnerability of refugees and asylum-seekers such standards are not always fully observed.<sup>179</sup> The 1951 Convention, as shown above, also provides for equal employment standards for refugees as those enjoyed by nationals.

‘A plain reading of [Article 6] would certainly indicate that alien workers are entitled to significant protection in any state in which they choose to work.’<sup>180</sup> Article 2(2) of the ICESCR reinforces its non-discriminatory basis and Article 26 of the ICCPR extends non-discrimination protection to socioeconomic rights of non-nationals.<sup>181</sup> By and large, ‘more powerful

<sup>177</sup> A. Edwards, ‘Tampering with Refugee Protection: The Case of Australia’, above n.53, at 200.

<sup>178</sup> Art. 26, VCLT.

<sup>179</sup> On employment standards, see the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (UNGA Res. 45/158, 18 Dec. 1990; entered into force 1 July 2003) and 1949 ILO Revised Migration for Employment (C97) and the 1975 ILO Migrant Workers (Supplementary Provisions) Convention (C143). Although the 1990 Convention expressly excludes refugees and stateless persons from its scope (per Art. 3(d)), it is not clear whether this includes asylum-seekers. This leads to the absurdity that persons claiming asylum are defined as ‘migrant workers’ if they are permitted to work in the country, but lose their ‘migrant worker’ status under the [Convention] once they are granted refugee status. Thus, depending on the regime in place, working asylum-seekers and their families may, in the future, benefit from a broader range of rights than those granted to refugees under Article 17 of the 1951 Convention. See, R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (1997), at 153.

<sup>180</sup> A.A. Stevens, ‘Comment: Give me your tired, your poor, your destitute laborers ready to be exploited: The failure of international human rights law to protect the rights of illegal aliens in American jurisprudence’, (Spring 2000) 14 *Emory Int’l Law Rev.* 405, at 410.

<sup>181</sup> Above n.82.



claims can be advanced on behalf of asylum-seekers under international human rights law<sup>182</sup> than under IRL. The Committee on Economic, Social and Cultural Rights has noted that reception standards of asylum-seekers may be contrary to their right to an adequate standard of living in Article 11(1).<sup>183</sup> It further commented on Venezuela's failure to issue personal documentation to refugees and asylum-seekers and its negative impact on their ability to exercise rights to work, health, and education. In general, therefore, Article 6 applies to non-nationals, although it is subject to a number of limiting factors.

First, Article 2(3) of the ICESCR specifically allows developing countries to limit the economic rights of non-nationals. It is not, however, an unlimited discretion. Notably, Article 2(3) states that '[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals'. It is itself limited by the words 'human rights and the national economy'. While ambiguously worded, its purpose was to end the domination of certain economic groups of non-nationals during colonial times. For this reason, it ought to be interpreted narrowly.<sup>184</sup> It is open to read Article 2(3) as meaning that where a distinction is made between a citizen and an alien in respect of a basic economic right and such a distinction would have the effect of undermining their other basic rights and their human dignity, such a denial of that right would not be legitimate. For example, restrictions imposed as a pretext for racial discrimination would not be acceptable, nor would a prohibition on the right to work for refugees and asylum-seekers where no social welfare assistance is provided in lieu thereof so as to threaten their very existence. It may be generally justifiable to prohibit tourists from engaging in employment, but not refugees and asylum-seekers, as the latter are frequently in situations of vulnerability and may require additional care on the part of the host State. Similarly, where a restriction is not justified by the interests of the national economy, it is likewise in breach of the Covenant. By way of illustration, 'it can perhaps be argued that economic constraints may justify limiting some entitlements (such as welfare or health care) to citizens, but limiting employment-related benefits would not be supportable under this

<sup>182</sup> R. Cholewinski, 'Economic and social rights of refugees and asylum seekers in Europe', above n.163, at 713.

<sup>183</sup> ICESCR Committee, Report on the 25<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup> sessions (23 Apr. 11 May 2001, 13–30 Aug. 2001, 12–30 Nov. 2001), ECOSOC Official Records, Supp. No. 2, UN doc. E/2002/22, E/C.12/2001/17.

<sup>184</sup> See, Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN doc. E/CN.4/1987/17, Annex, para. 43.

<sup>185</sup> J. Fredriksson, 'Bridging the Gap between rights and responsibilities: Policy changes affecting refugees and immigrants in the United States since 1996', (Spring 2002) 14 *Georgetown Immig. L.J.* 757, at 778.

rationale'.<sup>185</sup> According to Fredriksson, 'It is unreasonable to deny both the right to work and the right to access social security: this policy threatens to deter bona fide asylees with a well-founded fear of persecution from seeking protection . . .'.<sup>186</sup> It may also lead a host State into breach of its other human rights obligations, such as Articles 6 and 7 of the ICCPR. Many developing countries have taken advantage of Article 2(3) in order to deny rights to refugees and asylum-seekers on their territory. In some cases it is legitimate, while in others it is born of local politics and pandering to anti-refugee sentiment. In order to determine the degree to which IHRL is supplementary to IRL, it thus requires an analysis of the particular circumstances in the country of asylum and the effect of such a denial on the individual.

In light of the explicit, albeit limited, exception for developing States, it can be implied that no distinctions can thus be drawn between nationals and non-nationals in developed States, although some commentators have argued that this position might be a difficult to maintain given the general practice of States. Craven, however, has argued that 'In so far as the United Kingdom and France considered it necessary to rely upon reservations to modify their obligations under the Covenant, it might be assumed that the Covenant otherwise prohibits discrimination against aliens with respect to employment'.<sup>187</sup>

The second potentially limiting factor affecting the applicability of Article 6 of the ICESCR is the concept of progressive realisation that underlies much of the ICESCR. According to Article 2(1) of the ICESCR, socioeconomic rights are to be implemented according 'to the maximum of [a State's] available resources'.<sup>188</sup> This has acted as a further practical barrier - to the full realisation of the right to work for nationals and non-nationals alike in many countries. '[W]hile non-nationals are clearly beneficiaries of ICESCR rights, the exact treatment owed to them by States Parties is not well defined'.<sup>189</sup> According to the ICESCR Committee, 'the fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. . . . It thus imposes an obligation to move as expeditiously and effectively as possible towards [the goal of the full realisation of the rights in question]'.<sup>190</sup> Importantly, the Committee has highlighted that among the obligations which are of immediate effect is the 'undertaking to guarantee that relevant rights will be exercised without

<sup>186</sup> J. Fredriksson, *ibid.*, at 778.

<sup>187</sup> M.C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, (Clarendon Press, Oxford, 1998), at 214.

<sup>188</sup> Art. 2(1), ICESCR.

<sup>189</sup> J.A. Dent, above n.167, at 45.

<sup>190</sup> ICESCR Committee General Comment No. 3, 5<sup>th</sup> sess., 1990, 14 Dec. 1990, para. 9. See, also, Limburg Principles, above n.184, para. 21.

discrimination'.<sup>191</sup> The Committee has further noted that progressive realisation is tempered by the insertion of a duty 'to take steps' which is of immediate effect.<sup>192</sup> In addition, the obligation of progressive achievement exists independently of an increase in resources; it requires effective use of resources available.<sup>193</sup>

Third, Article 4 allows any form of limitation to ICESCR rights as is determined by law 'in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare of a democratic society'.<sup>194</sup> As with Article 2(3), Article 4 has been carefully drafted. It is not sufficiently broad as to allow complete scope to deny economic rights to non-nationals without justification. Any restrictions need to be 'solely' for the purpose of promoting the general welfare of a democratic society. In so far as the denial of employment opportunities to refugees and asylum-seekers is concerned, in many cases it could be arguable that giving access to the labour market would itself promote the general welfare of society, enhance understanding and build confidence toward such groups, and generally contribute to their sense of self-worth and dignity. In support of this, the ICESCR Committee has emphasised that Article 4 'is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State'.<sup>195</sup>

Overall, it can be successfully argued that the 'right to work' in principle applies to nationals and non-nationals alike by virtue of a literal interpretation of Article 6 and the non-discrimination basis of IHRL generally. It is though subject to a number of limiting factors that need to be restrictively interpreted and applied in light of the particular circumstances in the country of asylum. In any event, the absence of residence requirements, as in the 1951 Convention, means that IHRL is wider in its scope of application, applying to refugees and asylum-seekers alike. The 1951 Convention, however, remains important in its assurance of employment opportunities for some categories of recognised refugees.

Having outlined above that the right to work applies to non-nationals, albeit subject to some limitations, the next issue is to determine what the 'right to work' entails. The ICESCR Committee has stated that 'a minimum core obligation to ensure the satisfaction or, at the very least, minimum essential levels of each of the rights is incumbent upon every State party'.<sup>196</sup> Unfortunately, however, the Committee is yet to issue a

<sup>191</sup> ICESCR Committee General Comment No. 3, *ibid.*, para. 1. See, also, Limburg Principles, above n.184, para. 22.

<sup>192</sup> ICESCR Committee General Comment No. 3, above n.190, para. 2.

<sup>193</sup> Limburg Principles, above n. 184, para. 23.

<sup>194</sup> Art. 4, ICESCR.

<sup>195</sup> ICESCR Committee General Comment No. 13, 21<sup>st</sup> sess., 1999, UN doc. E/C.12/1999/10 (1999), para. 42.

<sup>196</sup> ICESCR Committee General Comment No. 3, above n.190, para. 10.

specific General Comment on the right to work in order to identify its 'minimum core content'. At the time of drafting Article 6, there was much debate between socialist and market economy States as to the precise obligations imposed on States. At a minimum, it is agreed that the 'right to work', via the inclusion of the wording 'opportunity to earn a living', can be interpreted as 'implying that the State should restrain itself from preventing persons from working'.<sup>197</sup> (emphasis added) That is, there should be access to the labour market. However, it does not necessarily extend to a guarantee of employment.<sup>198</sup> For refugees and asylum-seekers, the first battle is often access to the labour market, which would be covered by any minimum requirements of Article 6.

What is not reflected, however, in this legal analysis is the factual situation of the continuing reluctance of States to recognise the equal rights of refugees, asylum-seekers and other aliens to economic rights. It is thus more a question of implementation than legal protection. Part of this reluctance can be traced to the division of UDHR rights into two separate instruments.<sup>199</sup> Despite the fact that the UN has consistently referred to the 'universal, indivisible and interdependent and interrelated' nature of all human rights,<sup>200</sup> States continue to give unequal weight to economic rights. General respect for economic rights, whether for nationals or non-nationals, is the starting point for their equal application to refugees and asylum-seekers.

## 5. Conclusion

There is no doubt that the 1951 Convention retains its 'central place in the international refugee protection regime', as acknowledged by States parties in the Declaration in December 2001.<sup>201</sup> Yet it is similarly clear that the 1951 Convention does not cover the many rights nor deal with the range of issues facing forcibly displaced persons today. IRL suffers from the fact that it is seen as a 'compromise between the state imperative of migration control and humanitarian concerns'.<sup>202</sup> Its lack of a complaints

<sup>197</sup> M.C.R. Craven, above n.187, at 197.

<sup>198</sup> M.C.R. Craven, above n.187, at 204.

<sup>199</sup> For a discussion on the nature of human rights, see, *inter alia*, J. Donnelly, *Universal Human Rights in Theory and Practice*, (Cornell University Press, Ithaca and London, 1989); J. Häusermann, 'The Realisation and Implementation of Economic, Social and Cultural Rights', in R. Beppard and D.M. Hill (eds.), *Economic, Social and Cultural Rights: Progress and Achievement* (Macmillan, 1992) 47; B.G. Ramcharan, 'The Concept of Human Rights in Contemporary International Law', (1983) *Canadian Hum. Rts YB* 267; T.C. van Boven, 'Distinguishing Criteria of Human Rights', in K. Vasak (ed.), *The International Dimensions of Human Rights*, (vol. 1) (Greenwood Press, Connecticut, 1982) 43; and K. Vasak, 'Pour une troisième génération des droits de l'homme' in *Etudes et Essais sur le droit international humanitaire et sur les principes de la Croix-Rouge* (1984) 837.

<sup>200</sup> UNGA Res. 36/133, 14 Dec. 1981, Preambular para. 6. See, also, the Vienna Declaration and Programme of Action, above n.24.

<sup>201</sup> Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol, above n.14.

<sup>202</sup> C.J. Harvey, 'Refugees, Rights, and Human Security' (2001) 19(4) *Refugee* 94, at 96.

procedure and the failure of the UNHCR to activate its supervisory role<sup>203</sup> in new and dynamic ways, such as through state reporting requirements, have, in addition, meant that the supervision of the rights of individual refugees under IRL has fallen behind the momentum of IHRL. Given that it is highly unlikely in the present political climate that States parties would agree to any revision of the 1951 Convention in order to broaden its protective scope, IHRL is an effective device available to strengthen and to enhance existing standards.

With more frequent recourse being made to human rights redress mechanisms by refugees and asylum-seekers themselves, the writer finds that it is no longer possible to assert that refugee policy is 'at least one part State interest and at most one part compassion'.<sup>204</sup> While States continue to assert their sovereignty in relation to admitting aliens to their territory, their corresponding accession to varying international instruments binds them to certain standards in relation to the enjoyment of asylum. A plethora of standards of treatment are prescribed by both IRL, albeit subject to qualifications on status, and IHRL. The latter, although imperfect in its formulation and subject to varying interpretations and exceptions, bolsters the rights of refugees and asylum-seekers under international law and on some occasions goes beyond the protection offered by refugee law. As this article has shown, the right to family life is a clear example of the protections afforded to refugees under the 1951 Convention being inadequate. Similarly, the right to work is restricted under the 1951 Convention to the imprecise sub-categories of 'refugees lawfully staying' or 'lawfully in' the territory of a State party and subject to 'most-favoured-nation' treatment. Although the IHRL regime suffers from its own limitations in respect of economic rights, it is open to argue that the right to work in the ICESCR applies to refugees and asylum-seekers by virtue of its non-discriminatory provisions and upon a literal interpretation of Article 6. Permissible restrictions are not as broad as asserted by some States. The establishment of a complaints mechanism for the ICESCR should, in the future, finally clarify some of the continuing debates on the applicability of economic rights to non-nationals.<sup>205</sup>

<sup>203</sup> The UNHCR has supervisory responsibility over the 1951 Convention by virtue of Article 35 of that Convention, and the 1950 Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res. 428(V), 14 Dec. 1950.

<sup>204</sup> A. Shacknove, 'From Asylum to Containment', 5 *IJRL* 516, at 517, (1993).

<sup>205</sup> Human Rights Commission resol. 2003/18, Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights, UN doc. E/CN.4/2003/L.11/Add.3, paras. 12 and 13. See, also, Sub-Commission on Human Rights Resolution 2002/14, 14 Aug. 2002 urging the Commission to consider the utility of an optional protocol, report of the independent expert on the question of an optional protocol (UN doc. E/CN.4/2002/57), and Economic and Social Council decision 2002/254, 25 July 2002.

In the face of eroding standards of treatment for refugees and asylum-seekers, IHRL serves to reinforce refugee protection and to define and give meaning to the ‘right to enjoy asylum’ component of Article 14 of the UDHR. In the event of an inconsistency between the two bodies of law, the higher standard must prevail, not only because this is required by treaty interpretation but also because of the underlying rationale behind both IRL and IHRL to recognise ‘the inherent dignity and . . . the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world’.<sup>206</sup>

<sup>206</sup> Preambular para. 1, UDHR.