

# **Towards recognizing the right to work for asylum seekers?**

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## List of abbreviations

CAT	Committee Against Torture
CEAS	Common European Asylum System
CESCR	Committee on Economic, Social and Cultural Rights
CSR	Convention relating to the Status of Refugees
EC	European Community
ECSR	European Committee of Social Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	Court of Justice of the European Communities
ECtHR	European Court of Human Rights
EEA	European Economic Area
ESC	European Social Charter
ESCOR	Economic and Social Council Official Records
EU	European Union
GCSE	General Certificate of Secondary Education
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice

ICJ Rep.	International Court of Justice Reports
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their families
ILO	International Labour Organization
ILC	International Law Commission
RSD	Refugee Status Determination
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UN GAOR	United Nations General Assembly Official Records
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
USCRI	United States Committee for Refugees and Immigrants

Note: Denne masteroppgaven innholder enkelte elementer av et mindre arbeid innlevert ved Universitet i Cape Town (UCT) våren 2009.

# 1 Introduction

## 1.1 Background

Over the years, it has become increasingly clear that asylum-seekers may be forced to remain in the host State for a considerable length of time pending a decision on their asylum application. Due to a combination of unpredictable migratory flows, poor funding and negligent planning, many countries grapple with substantial backlogs, which in turn causes severe delays in the processing of claims.<sup>1</sup>

During this waiting period, sometimes for several years, asylum-seekers are often barred from engaging in work. Industrialized States in Europe and Northern America generally grant recognized refugees permission to work, but impose restrictions on asylum-seekers.<sup>2</sup> In most developing States, restrictions on work are regularly maintained against asylum-seekers as well as recognized refugees.<sup>3</sup>

Developing countries are generally disinclined towards granting refugees and asylum-seekers access to their labour markets due to the concern that an influx of refugees would have a negative economic impact on the ability of the country to meet the needs of its own citizens.<sup>4</sup> These concerns have been acknowledged by United Nations High Commissioner for Refugees (UNHCR).<sup>5</sup> For example, the xenophobic violence outbreaks in townships of South Africa in 2008 was triggered by tensions between the local communities and migrants where the latter were accused of causing high crime rates and ‘stealing local jobs’ by accepting lower wages.<sup>6</sup> Such incidences serve as a particularly bleak reminder that in times of great social unrest, foreigners are convenient scapegoats.

For the same reason, asylum-seekers’ access to employment is a vexed question in developed countries as well. Indeed, the aim to protect the national labour market and its nexus to immigration in particular, is a major preoccupation of most governments worldwide.

In Europe, the authorization of employment for asylum-seekers is currently a hotly debated topic. It is one of the most controversial elements in a legislative proposal on reception standards

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<sup>1</sup> In the UK, the backlog was reported to have doubled over a year to 8.700 cases by mid-2008. See: [http://news.bbc.co.uk/2/hi/uk\\_news/7846140.stm](http://news.bbc.co.uk/2/hi/uk_news/7846140.stm) [sited 29 May 2010].

<sup>2</sup> For detailed account, see Chapter 4.2.

<sup>3</sup> Ibid.

<sup>4</sup> UNHCR, ‘Local Integration’, Global Consultations on International Protection, 4<sup>th</sup> Meeting, UN Doc. EC/GC/02/6, 25 April 2002, para.18.

<sup>5</sup> UNHCR, ‘Implementation of the 1951 Convention and the 1967 protocol relating to the Status of Refugees’, UN Doc. EC/SCP/54, July 7 1989, para.11.

<sup>6</sup> Integrated Regional Information Networks (IRIN), ‘*South Africa: Should I stay or should I go?*’, 22 May 2008, available at: <http://www.unhcr.org/refworld/docid/4836929a1b.html> [accessed 24 May 2010].

for asylum-seekers within the EU framework. The present situation of recession and mounting unemployment across Europe puts foreigners in an exposed position. Tension is exacerbated by the rise of far-right political parties that play on xenophobic sentiments within the local population. For fear of being perceived as a 'soft touch', mainstream political parties have internalized the language of the far-right. Thus, they are portraying asylum-seekers as 'bogus refugees' or 'illegal immigrants' whose motivations are rendered suspect.

From the perspective of European policymakers, there is another reason why the issue of employment for asylum-seekers gives rise to such controversy. The denial of access to employment for asylum-seekers is perceived as a measure to deter future applications. Politicians regularly describe restrictions as necessary in order to prevent *economic migrants* from abusing the asylum system in order to secure employment in Europe. This must be understood in light of a general policy of deterrence which aims to deflect future applicants from arriving at a State's borders. This logic manifests itself in an unofficial competition as to which State offers the *least* attractive living conditions for asylum-seekers.

For many years human rights advocates have questioned State policies which render the provision of social support the default solution pending a verification of refugee status. Notwithstanding the fact that not all asylum-seekers are able to work, it has been argued that denying those willing and able is detrimental to both the individual and the State. Moreover, in accordance with the prevailing paradigm of deterrence, the support asylum-seekers receive are often provided at minimum subsistence levels, to avoid perceived 'asylum-shopping' for favourable welfare packages. For those capable and eager to work, the provision of social support may thus be perceived as nothing more than enforced idleness.

Consider the case of Aisha, an Ethiopian woman who lodged an application for asylum in the UK on the grounds of ethnic persecution.<sup>7</sup> Her initial claim and the subsequent appeals were denied. Presently she is awaiting a decision on a fresh claim. However, after more than 5 years in the country she is still not allowed to engage in any form of paid work. In Ethiopia, she qualified as a teacher and taught English and social studies in primary schools for 8 years. She comments:

To be banned from work is very difficult in any society and is a mental torture, in my position. I dislike living on fixed support when I have a lot to contribute and want to earn a wage. I feel I am losing my talents and skills in which I was an expert. I am living on a £41 a week for everything that includes all my food, clothing, travel costs which is very limiting and at times feels less than human. As a mature professional, an independent person, this is emotionally and physically hard.<sup>8</sup>

## ***1.2 The approach of this paper***

The Convention relating to the Status of Refugees (CSR) was adopted in 1951.<sup>9</sup> Despite its age, it is still widely regarded as the 'centre of the international legal framework for the protection of

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<sup>7</sup> See: [http://www.refugeecouncil.org.uk/campaigning/letthemwork/real\\_stories/aisha.htm](http://www.refugeecouncil.org.uk/campaigning/letthemwork/real_stories/aisha.htm) [Sited 1 June 2010].

<sup>8</sup> Ibid.

<sup>9</sup> Adopted in Geneva, July 28, 1951, (entry into force April 22, 1954), 189 UNTS 137.

refugees’.<sup>10</sup> However, the CSR suffers from a number of shortcomings. The CSR was originally conceived to address the situation for European refugees in the aftermath of World War II. At that time, the drafters did not predict the emergence of asylum systems of such a comprehensive scale and scope as that of present time. This is evident from the fact that the Convention does not provide for procedural rules of status determination, but leaves this at the discretion of the State Parties. In fact, although the term ‘refugee’ often covers asylum-seekers, the treaty text contains no reference to the notion of asylum-seeker.

While it is arguable that *recognized refugees* are entitled to access employment by virtue of the CSR, the question of whether this right also inheres in asylum-seekers has been given limited attention:

*This paper discusses whether asylum-seekers may rely on norms of international law in order to gain access to employment.*

The account has primarily been made on the basis of international refugee law and international human rights law. While the CSR remains relevant to asylum-seekers, it is increasingly recognized that international human rights law may provide a supplementary basis for entitlements. Thus, in addition to the CSR, this paper provides broad coverage of provisions in the United Nations International Covenant of Economic, Social and Cultural Rights (ICESCR)<sup>11</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>12</sup> Thus, the interface between international human rights law and refugee law is explored.

There are many other work-related international and regional treaty instruments. Most notably, the standards of the International Labour Organization (ILO) are considered advanced in this area, in particular C97 and C143.<sup>13</sup> However these standards only apply to non-nationals ‘regularly admitted as a migrant for employment’.<sup>14</sup> Another instrument, the 1990 International Convention on the Protection of all the Rights of All Migrant Workers and Members of Their Families (ICRMW), only applies to ‘[m]igrant workers who have been granted permission to engage in remunerated activity’.<sup>15</sup> As these instruments are not relevant to the thesis question, they are excluded from the scope of this paper.

Although the paper is concerned with international law, Chapter 7 of this paper devotes attention to relevant legal instruments in the European region. By choosing this approach, it is neither intended to downplay the global scale of the problem nor the importance of other regional

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<sup>10</sup> Report of the UN High Commissioner for Refugees, Addendum, UN GAOR, 48th session, Supp No.12A, para.19(c) UN Doc. A/48/12/Add.1(1993).

<sup>11</sup> Adopted 16 December 1966, (entry into force 3 January, 1997), GA Res. 2200A(XXI) 993 UNTS 3.

<sup>12</sup> Adopted 16 December 1966, (entry into force 23 March, 1976), GA Res 2200A(XXI). 999 UNTS 171.

<sup>13</sup> ILO Convention concerning Migration for Employment (C97), entry into force 22 January 1952; ILO Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, entry into force 9 December 1978.

<sup>14</sup> See C97 Article 11 and C143 Article 11.

<sup>15</sup> Adopted 18 December 1990 (entry into force 1 July 2003) GA Res. 45/158, 30 ILM 152(1991)., see Article 2.

instruments elsewhere in the world.<sup>16</sup> Rather, in light of the present climate of moral panic over asylum policies in the Europe this should be read as a response to the European policymakers' specific preoccupations. Furthermore, the longstanding history of human rights treaty adjudication in this region suggests that Europe may be an important laboratory for further standard-setting.<sup>17</sup>

The fundamental value of the right to work was first recognized in Article 23 of the Universal Declaration of Human Rights (UDHR) and later legally entrenched in Article 6 of the ICESCR.<sup>18</sup> The right to work is essential as a means of survival but also as an important component of human dignity. Indeed, work has been described as 'an essential part of the human condition' and comprise of an economic as well as a social dimension.<sup>19</sup> This paper seeks to promote the understanding of work as an element integral to the dignity of the individual.<sup>20</sup> Hence work is not seen as a 'commensurable activity that can be substituted for by income support, but as an activity that is good in itself'.<sup>21</sup>

For asylum-seekers, employment is an important means of facilitating social and economic inclusion in the host community. Importantly, work also affects the level of enjoyment of other human rights.<sup>22</sup> This paper also points out the nexus between work and the three identified durable solutions for refugees - voluntary repatriation, local integration and resettlement.<sup>23</sup> States often claim that permitting asylum-seekers to work may reduce the possibility of an early return in the event of dismissed applications.<sup>24</sup> Yet it has also been acknowledged that labour access may actually facilitate reintegration into the country of origin by making it possible to return home with a measure of financial independence or some acquired work skills.<sup>25</sup> Moreover, allowing asylum-seekers access the labour market is mutually beneficial because it reduces reliance on social support. For the State, the effect is decreased spending of taxpayers' money on direct income support. In respect of the asylum-seekers, access may prevent the creation of receiver dependent subcultures. The Executive Committee (EXCOM) of the United Nations High Commissioner for Refugees have emphasized the importance of access to gainful employment in facilitating durable solutions for refugees.<sup>26</sup> Indeed, support for the notion of the

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<sup>16</sup> See e.g. the American Convention of Human Rights, adopted 22 November 1969 (entry into force 18 July 1978), 1144 UNTS 123; Convention governing the Specific Aspects of Refugee Problems in Africa, adopted September 10, 1969 (entry into force June 20), 1974 (OAU Convention), 10011 UNTS 14691.

<sup>17</sup> Cholewinski (2004), p.1.

<sup>18</sup> Adopted December 10, 1948, G.A. res. 217A (III), UN Doc. A/810 at 71.

<sup>19</sup> Lester (2005), p.334.

<sup>20</sup> Craven (1995), p.194.

<sup>21</sup> Mundlak (2007), p.364.

<sup>22</sup> See e.g., the right to family life (ICCPR Art.32 and ICESCR Art.10); the right to an adequate standard of living (ICESCR Art.11) and the right to life (ICCPR Art.6).

<sup>23</sup> The three durable solutions are identified in : UN High Commissioner for Refugees, *Framework for Durable Solutions for Refugees and Persons of Concern*, 16 September 2003, EC/53/SC/INF.3, p.4, paras 14-18. available at: <http://www.unhcr.org/refworld/docid/4ae9ac93d.html> [accessed 15 May 2010].

<sup>24</sup> UNHCR, *Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, UN Doc. EC/GC/01/17, Sept.4, 2001, p.3.

<sup>25</sup> Ibid.

<sup>26</sup> EXCOM Conclusion No.50 (XXXIX) of 1988, para.(j).

right to work as integral to protection may be found in the CSR itself, which contains provisions on employment.<sup>27</sup>

The economic dimension of asylum-seekers plight is often either over-emphasized or downplayed. As noted above, the economic dimensions of flight is used by governments to undermine the credibility of asylum-seekers. Consequently, human rights advocates often attempt to downplay the socio-economic factors in favour of increased focus on the civil and political matters relating to persecution.<sup>28</sup> However, it should be acknowledged that people may leave their countries for a combination of reasons. Indeed, as will be shown in this paper, the mere existence of economic motives does not in *itself* deprive a person from refugee status. Instead, it is submitted that denying asylum-seekers access to employment ‘undermines protection rather than discrediting the right to it’.<sup>29</sup>

Furthermore, this paper addresses the various justifications States offer for not authorizing access to their labour markets to asylum-seekers. It will be shown that it is by no means self-evident that foreigners ‘steal local jobs’.<sup>30</sup> Moreover, the effect of the deterrent policies of industrialized States and their reliance on social support is addressed.

The paper is structured as follows: Chapter 2 explains the terms most relevant to this paper, while Chapter 3 provides an analysis of how the human rights law treaty regimes operate within the greater corpus of international law. In Chapter 4 the social-economic setting in which these treaties operate is described. Chapter 5 and 6 is the core of the paper. Chapter 5 delineates the provisions of the CSR, and Chapter 6 deals with the relevant norms of international human rights law. As indicated, Chapter 7 looks at instruments within the European region. Chapter 8 concludes the discussion.

## 2 Terminology

In colloquial speech, *the right to work* and the *right to access employment* are often applied interchangeably. However, for the purposes of international law, these terms does not convey the same meaning. This chapter provides an explanatory account of the link between work, the right to work and the right to access employment, as well a clarification of the distinction between a refugee and an asylum-seeker.

The notion of work may be defined as the engaging in physical or mental activities for the purposes of generating income, including barter exchange and non-monetized work.<sup>31</sup> While recognizing remunerative work as an essential element of work, this definition also serves to underscore the social dimension of work.

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<sup>27</sup> Lester (2005),p.347.

<sup>28</sup> Ibid.,p.333.

<sup>29</sup> Ibid., p.334.

<sup>30</sup> See article: ‘Migration is good for everybody’ <http://news.bbc.co.uk/2/hi/europe/4117300.stm> [Sited 25 May 2010].

<sup>31</sup> Lester (2005), p.337.

Conceptually, the notion of a right to work has been described as ‘a complex normative aggregate, and not a single legal concept’.<sup>32</sup> As a result, there are divergent views as to its precise content and implications. Drzewicki, for example, tentatively submits that the right to work may be divided into seven separate dimensions: freedom from slavery; freedom from forced and compulsory labour; freedom to work; the right to free employment services; the right to employment; the right to protection of employment and protection of unemployment.<sup>33</sup> Others, like Mundlak, has explored alternative constructs of work, e.g. whether the concept might be seen as a right to be exploited or even a *duty* to work.<sup>34</sup>

In the aftermath of 1945, the inclusion of a right to work within the international human rights framework was a highly disputed point on the negotiation agenda. Disputes erupted along the Cold War ideological lines, but also among Western States; between international employers’ and labour organisations; and along North-South governmental lines.<sup>35</sup> A main point of contention was some Socialist States’ proposals of a duty to ‘guarantee’ or ‘ensure’ the right to work.<sup>36</sup> From a Western perspective the concern was that such a guarantee would bind States to a centralized system of government and require that all labour be under the direct control of the State.<sup>37</sup>

Against this backdrop, the International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted in 1966. The ICESCR contains the most important elaboration of the right to work in international human rights law.<sup>38</sup> Its Article 6 ‘recognize[s] the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’. This definition may be seen as a compromise between the divergent ideologies and does not refer to any notion of a duty to guarantee, i.e. *provide* work. It is comprised of a cluster of different positive and negative rights, broadly said to include the right to access employment, free choice of employment and protection against arbitrary dismissal.<sup>39</sup> The right to work must be distinguished from the rights *at work*, which concerns the right to just and favourable conditions of work. The content of Article 6 is scrutinized in the substantive part of this paper.

The terms asylum-seekers and refugees are often confused. Article 1A(2) of the CSR states that the term ‘refugee’ shall apply to a person who ‘...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...’.

An asylum-seeker usually refers to a person who is present in a foreign State territory *claiming* to satisfy the refugee status criteria enumerated in the CSR.<sup>40</sup> The term is of recent origin and was

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<sup>32</sup> Drzewicki (2001), p.227.

<sup>33</sup> Ibid, p.241.

<sup>34</sup> Mundlak (2007), p.345.

<sup>35</sup> Siegel (2002), p.23.

<sup>36</sup> Craven (1995), p.195.

<sup>37</sup> Ibid.

<sup>38</sup> See n.10.

<sup>39</sup> Craven (1995), p.205.

<sup>40</sup> Sometimes the claim may be protection on other grounds, such as protection under the ECHR Article 3.

not referred to in the provisions of the CSR. It appears to have been introduced in the late 1970s in the Conclusions of the Executive Committee of the High Commissioner's programme (ExCom) and in 1981 in Resolutions in the UN General Assembly.<sup>41</sup>

However, as evident from the abovementioned refugee definition, the circumstances justifying refugee status will necessarily have occurred prior to the status determination. Thus, 'recognition of his refugee status does not (...) make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee'.<sup>42</sup> In other words, asylum-seekers may be refugees even if not formally recognized as such. Indeed, it is widely recognized that asylum-seekers may benefit from certain rights extended to 'refugees' in the CSR.<sup>43</sup>

For the purposes of this paper, an *asylum-seeker* is an individual undergoing refugee status determination, who's status has not been finally determined. However, when pertinent the phrase *refugee* will be applied as a collective term for both recognized refugees and asylum-seekers. In doing so, this writer wishes to emphasize the declaratory aspect of the refugee status described above. Refugees formally determined as such will be referred to as *recognized refugees*.

## 3 Methodology

### 3.1 Distinctive features of human rights law

The Vienna Convention on the law of Treaties (VCLT) is the main framework for the interpretation of international treaties.<sup>44</sup> Although VCLT only entered into force in 1980 it is widely regarded as reflective of customary international law.<sup>45</sup> Some authors have questioned the application of the VCLT to human rights treaties, focusing on its 'special' status.<sup>46</sup> This question is part of a wider debate on the relationship between the human rights 'regimes' and the perceived structure of public international law.<sup>47</sup> As such, the question is beyond the scope of this paper. Nevertheless, this paper argues that the VCLT norms of interpretation are sufficiently flexible to permit consideration of a treaty's particular characteristics.

Article 31 of the VCLT is the starting point for the interpretation of the treaties discussed in this paper. Its first paragraph prescribes the main rule of interpretation: A treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in

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<sup>41</sup> House of Lords, House of Commons, 'The Treatment of Asylum Seekers', 10<sup>th</sup> Report of Session 2006-2007.Ev. 146.

<sup>42</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 (hereinafter UNCHR Handbook), para.28. See also R(Hoxha)v. Secretary of State for the Home Department[2002].EWCA Civ. 1403 (Eng.CA, Oct.14,2002).

<sup>43</sup> See Chapter 5.

<sup>44</sup> Adopted May 23, 1969, (entry into force January 27 1980), 1155 UNTS 331 (VCLT).

<sup>45</sup> The International Court of Justice (ICJ) has on numerous occasions recognized the VCLT as embodying customary norms of international law, *inter alia*: *Maritime Delimitation and Territorial Questions* (Qatar v. Bahrain), ICJ Rep. 1995, p. 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 Rep. 1971, p.47; *Territorial Dispute* (Libyan Arab Jamahiriya v. Chad),1994 ICJ Rep 6, p. 21.

<sup>46</sup> Craven (2000) p.491.

<sup>47</sup> Craven (2000), p. 513-517.

their context and in the light of its object and purpose'. The following paragraphs define the context of the treaty and other elements that have to be taken into account, such as *subsequent practice*.<sup>48</sup>

However, even if VCLT expresses customary international law, it does not necessarily mean that the rules of interpretation can be applied equally to all types of treaties. In the case of lawmaking treaties it is recognized that 'the character of the treaty may affect the question whether the application of a particular [interpretive] principle, maxim or method is suitable in a particular case'.<sup>49</sup> The main rule of interpretation referred to above, largely reflects this view. The carefully drafted provision neatly combines the three traditional approaches to treaty interpretation without implying a rigid hierarchy between them.<sup>50</sup> While the 'ordinary meaning of the terms' clearly is the point of departure, the drafters' did intentionally refrain from formulating any such rule.<sup>51</sup> Thus, Article 31 of the VCLT does not reflect an attempt to assess the relative weight of the different sources to be taken into account in the interpretation but rather to describe the process itself.<sup>52</sup>

The refugee and human rights treaties are multilateral of nature. Unlike more traditional treaties concluded on a bilateral basis, these treaties are widely recognized and ratified by the vast majority of States worldwide.<sup>53</sup> In addition, the fundamental object and purpose of human rights treaties is the protection of the rights of individuals, even if other values such as the State security to some extent are protected through derogation and limitation clauses.<sup>54</sup> Furthermore, unlike other treaties in international law, human rights treaties are not concluded to attain a reciprocal exchange of rights for the mutual benefit of the parties to a convention.<sup>55</sup>

Based on the particular characteristics of human rights treaties described above, a nuanced approach to VCLT- treaty interpretation must be employed.

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<sup>48</sup> VCLT Articles 31(2) and (3).

<sup>49</sup> Remarks of Sir Humphrey Waldock, Chief Rapporteur of the International Law Commission for the Draft Articles on the Law of Treaties, [1964] 2 Yearbook of the International Law Commission 55. Cited in Hathaway (2005), p.72.

<sup>50</sup> Three different schools of thought are commonly said to reflect the subjective ('intentions of the parties') approach; the objective ('textual') approach and the teleological ('objects and purpose') approach. In VCLT Art.31(1) 'ordinary meaning' is attributed to the textual approach; 'context' to the parties intention and 'in light of its object and purpose' to the teleological approach. See Sinclair (1986), p.114-119.

<sup>51</sup> The Commission recognized that treaty interpretation is not an exact science, concluding that '[a]ny attempt to codify the conditions of the application of those principles of interpretation whose appropriateness in any given case depends on the particular context and on a subjective appreciation of varying circumstances would clearly be inadvisable'. The International Law Commissions commentaries to its own proposals (adopted virtually without change by the Conference and are now reflected in Art.31 and 32 of VCLT) Yearbook of the International Law Commission (1966-II), p. 218.

<sup>52</sup> Toufayan (2005), p.10.

<sup>53</sup> As of 5.Nov 2009 the ICESCR was ratified by 160 States, the ICCPR was ratified by 165 States, the ICERD by 173, the CSR/Protocol by 144 States. United Nations Treaty Database, <http://treaties.un.org/Pages/ParticipationStatus.aspx> [Sited 13 November 2009].

<sup>54</sup> Mechlem (2009), p.912.

<sup>55</sup> See e.g. The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75), Advisory Opinion OC-2/82 of 24 September 1982, Inter-American Court of Human Rights (1982), Series A, No.2, para.30.

### ***3.2 The interface between refugee law and human rights law***

Conceptually, international refugee law and international human rights law are often treated as related, but separate areas of public international law. Indeed, human rights law is general in nature, while beneficiaries of international refugee law must satisfy the narrow requirements of the refugee status definition. Nevertheless, the refugee protection regime has its origins in general principles of human rights.<sup>56</sup> The fact that ‘the right to seek and enjoy asylum’ is incorporated in the Universal Declaration of Human Rights (Hereinafter UDHR) is clear testimony that international refugee law is considered part of international human rights law.<sup>57</sup> Furthermore, the Preamble to the CSR refers explicitly to the 1945 UN Charter, the UDHR and ‘the principle that human beings shall enjoy fundamental rights and freedoms without discrimination’.<sup>58</sup>

While the CSR incorporates a selection of essential rights for refugees, they are often not as comprehensive as comparable rights enumerated in the UN Human Rights Covenants, most notably the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Furthermore, as will be elaborated below, the protection offered by the CSR is impaired by gradations of treatment and a sliding scale of standards.<sup>59</sup> For asylum-seekers this problem is manifest as many of the rights in the CSR only accrue to recognized refugees.

In contrast, the UN Covenants on human rights are more inclusive and applies to ‘everyone’ or ‘all persons’. The rights enumerated in these Covenants are applicable to ‘all individuals within [a State’s] territory and subject to its jurisdiction’.<sup>60</sup> This has been confirmed on numerous occasions by the UN treaty bodies.<sup>61</sup>

Approximately 95 percent of the State parties to the CSR or its protocol have also signed or ratified both of the human rights Covenants.<sup>62</sup> Even more significant, about 86 percent of the world’s refugees stay in States which have signed or ratified the two UN Covenants. This exceeds the 68 percent who stays in States that are signatory to the CSR or its Protocol.<sup>63</sup> Thus, rights applicable to asylum-seekers will most often consist of a combination of principles drawn from both international refugee law and international human rights law. The protection offered by international human rights law may prove particularly important with respect to States which are *not* signatories to the CSR and/or its 1967 Protocol. An important example is Pakistan, which is not a State party to the CSR but ratified the ICESCR in April 2008.<sup>64</sup> Being the host of the largest refugee population in the world, this ratification may have a major impact on the legal position for this group.

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<sup>56</sup> Feller (2001), p.582.

<sup>57</sup> UDHR, Article 14.

<sup>58</sup> CSR Preamble.

<sup>59</sup> See Chapter 5.

<sup>60</sup> See e.g. ICCPR Art.2(1).

<sup>61</sup> See e.g. Human Rights Committee General Comment 15/17 on the position of aliens in the Covenant, paras.1 and 2; Committee of Economic, Social and Cultural Rights General Comment No.20.

<sup>62</sup> Hathaway (2005), p.9.

<sup>63</sup> Ibid.

<sup>64</sup> This is also the case in Syria, which is the second largest refugee host state.

Moreover, treaties must be interpreted in a way that ensures its effectiveness. This entails a duty to interpret treaties as *living instruments* able to function in a social and legal environment in constant change. The ICJ has declared that ‘an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation’.<sup>65</sup> The principle is widely recognized as essential to all treaty interpretation, and expressly affirmed in relation to human rights treaties.<sup>66</sup> Indeed, such a principle may also be derived from VCLT Article 31(3) (c), which requires that account be taken of ‘any relevant rules of international law applicable in the relation between the parties’.

Thus, in practice the rights of asylum-seekers may be extrapolated from the interface of the two regimes in question. Indeed, the view that international human rights law may ‘support, reinforce and supplement refugee law’ has gained general acceptance.<sup>67</sup> The UN treaty bodies do not differentiate between refugees, asylum-seekers or other individuals claiming violations of their human rights by a State party. In fact, refugees and asylum-seekers are increasingly resorting to the UN complaint mechanisms in the absence of a comparable instrument under the CSR and/or its 1967 Protocol.<sup>68</sup>

### **3.3 A conflict of standards?**

In the event of a conflict of standards between the two bodies of law, the question is which standard will prevail. Due to the speciality of international refugee law one might argue that the CSR standard should take precedence.<sup>69</sup> However, Article 5 of the CSR provides that ‘[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention’.

The wording is ambiguous because it appears to be written in past tense.<sup>70</sup> However, the main intention of the Conference of Plenipotentiaries was to ‘assure refugees the widest possible exercise of [their] fundamental rights and freedoms’.<sup>71</sup> Thus, a purposive interpretation suggests

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<sup>65</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia,[1971] ICJ Rep 6., para.53.

<sup>66</sup> Gabcikovo-Nagymaros Project (Hungary/Slovakia),[1997] ICJ Rep 7, p.114-155: ‘Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application’.

<sup>67</sup> Mason (1997), p. 40.

<sup>68</sup> See 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 Muzonzoro Paku Kisoki v. Sweden*, CAT Communication No. 41/1996. Cited in Edwards (2005) p.299.

<sup>69</sup> The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation in international law. It suggests that if two or more norms deal with the same subject matter, priority should be given to the more specific norm. See Report of the International Law Commission: fifty-eighth session (1 May-9 June and 3 July-11 August 2006) general Assembly Official Records Sixty-first session Supplement No.10(A/61/10),p.408.

<sup>70</sup> See the term ‘granted’.

<sup>71</sup> CSR Preamble.

that the provision must apply equally to rights granted after ratification of the CSR.<sup>72</sup> Indeed, this interpretation is confirmed in the *travaux préparatoires*.<sup>73</sup>

Thus, more generous obligations under a subsequent human rights treaty may supplement, enhance or even supersede the obligations under the CSR. The VCLT provide support from this interpretation through Article 30 (2).<sup>74</sup> Conversely, whenever CSR affords a higher standard it remains valid as an exception to the subsequently ratified UN treaties, unless otherwise provided for in that treaty.<sup>75</sup> Considering that the objective of the refugee and human rights treaties is to enhance the fundamental rights and freedoms of individuals this interpretation is the most appropriate.<sup>76</sup>

### **3.4 State parties and ‘subsequent practice’**

Article 31(3) (b) of VCLT provides that treaties are to be interpreted in light of ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’. The terms ‘subsequent practice’ refer mainly to the State parties’ legislative, administrative and judicial practices.<sup>77</sup> Thus, State practice may constitute an authoritative interpretative guidance to a treaty text. However, the value of State practice will depend on whether the question relates to bilateral or multilateral treaties. As regards the latter, and the human rights treaties in particular, there are compelling reasons for a narrow interpretation of Article 31(3) (b).<sup>78</sup>

The first objection for attributing decisive value to State practice is based in the wording of Article 31(3) (b). The provision requires that the relevant practice ‘establishes the agreement of the parties regarding its interpretation’. The wording implies that the practice must be uniform. Scholars have emphasized that the value and significance of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent.<sup>79</sup> The International Court of Justice has on several occasions endorsed a strict interpretation of Art. 31(3) (b) when considering multilateral treaties.<sup>80</sup> Another basic objection is that no obligation arises for a third party through a treaty without its consent.<sup>81</sup> However, it is not necessary to show that all parties

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<sup>72</sup> VCLT Art. 31(1).

<sup>73</sup> Weis (1995), p. 44.

<sup>74</sup> VCLT Art. 30(2): ‘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 the other treaty prevail’. Alternatively sub-sections 30(3) and (4) may lead to the same result.

<sup>75</sup> The ICCPR and the ICESCR both contain an Article 5(2) which provides that ‘[n]o restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.’

<sup>76</sup> See e.g. *Wemhoff v. Germany*, June 27, 1968 (ECHR) 1 EHRR 55 (1968), para. 23.

<sup>77</sup> Sinclair (1986), p. 136-138.

<sup>78</sup> Hathaway (2005), p. 68.

<sup>79</sup> Sinclair (1986), p. 137.

<sup>80</sup> See e.g.; *Certain Expenses of the United Nations*, [1962] ICJ Rep 151, p. 191 (Separate Opinion of Judge Spender); *Asylum Case* (Columbia/Peru), [1950] ICJ Rep 266; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), [1971] ICJ Rep 16, p. 31.

<sup>81</sup> VCLT Art. 34-35.

have engaged in the practice, only that they have acquiesced in it, expressly or tacitly.<sup>82</sup> In any case, for multilateral treaties it is only concordant subsequent practice accepted by all parties that may be admitted to evidence in relation to Art.31(3) (b). Thus, when considering the number of ratifications to human rights treaties, the threshold for modification of the treaty through State practice is high.

Furthermore, it has been argued that the purposive nature of legally relevant practice requires that the practice in question must have been motivated by a sense of legal obligation.<sup>83</sup> This liberal interpretation of Art.31(3)(b) may be supported by the wording itself and the general duty to interpret and perform the treaty in good faith.<sup>84</sup> This view has achieved recognition, albeit limited, in the case law of the ICJ.<sup>85</sup> In many countries, refugee and human rights law discussions take place in a highly charged populist climate where considerations of expediency and self-interested conduct is increasingly common. Therefore, in the present context this argument is particularly appropriate.

Most significantly, human rights treaties are characterized by their non-reciprocal nature.<sup>86</sup> The treaties are designed to protect every individual against actions of State parties and do not depend on the existence of any reciprocal agreement. This important feature of human rights law must be reflected in the treaty interpretation. A total deference to the prevailing State practice in determining the scope of obligations could, in effect, threaten the very existence of obligations.<sup>87</sup> Therefore, the principles of treaty interpretation must be accommodated to the characteristics of human rights treaties. For example, traditional interpretive principles stating that the interpretation which gives rise to a minimum of obligations for the parties should be applied, cannot be maintained in the case of human rights treaties. Rather, as recognized by the European Court of Human Rights, in such cases it is necessary ‘to seek the interpretation that is most appropriate in order to realise the aim and achieve the objective of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the parties.’<sup>88</sup> This purposive way of interpreting a treaty’s terms, sometimes referred to as the teleological approach, is applied in this paper.

Based on the above it may be concluded that the threshold for State practice to meet the requirements of Article 31(3) (b) in relation to human rights treaties is particularly high. However, relevant practice may nevertheless be considered as a supplementary means of interpretation under Article 32 of the VCLT.<sup>89</sup>

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<sup>82</sup> Harris (1983), p.599-600.

<sup>83</sup> Hathaway (2005), p.70.

<sup>84</sup> VCLT Arts 26 and 31.

<sup>85</sup> See *Certain Expenses of the United Nations*, [1962] ICJ Rep 151, p. 201 (Separate Opinion of Judge Fitzmaurice). According to Judge Fitzmaurice, evidence of state practice provides useful guidance in the interpretation of a treaty where: ‘it is possible and reasonable to infer from the behaviour of the parties that they have regarded the interpretation they have given the instrument in question as the legally correct one, and have tacitly recognized that, in consequence, certain behaviour was incumbent upon them’.

<sup>86</sup> A notable exception is the CSR which can be said to build upon a reciprocity philosophy, see Article 7(1).

<sup>87</sup> Hathaway (2005), p.71.

<sup>88</sup> *Wemhoff v. Germany*, June 27, 1968, 1 EHRR 55 (ECHR), para.8.

<sup>89</sup> The supplementary means of interpretation enumerated in VCLT Art.32 is not exhaustive.

### 3.5 Treaty monitoring bodies as generators of ‘subsequent practice’

The human rights treaty bodies were created in order to ensure an independent monitoring process and to build specialized knowledge among a group of experts independent of the State Parties.<sup>90</sup> Currently there are eight human rights treaty bodies that monitor the implementation of the core international human rights treaties.<sup>91</sup> Of particular relevance in this paper are the Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (CESCR).<sup>92</sup> This paper features an analysis of these treaty bodies’ output in relation to the right to work.

Through the treaty provisions authorizing their interpretative functions, the treaty monitoring bodies must be regarded as the main interpreters of the UN treaty provisions.<sup>93</sup> The HRC and the CESCR examine State reports and address violations by issuing Concluding Observations. Another important publication is the General Comment, which contains interpretations of the respective Covenant provisions. In addition, both Committees have been given competence to examine individual allegations of violations by the establishing of individual complaint procedures.<sup>94</sup>

Although the Committees’ interpretations of the treaty provisions are not legally binding, it nevertheless constitutes a *de facto* authoritative interpretation of the treaty provisions. In fact, scholars have convincingly argued that the treaty bodies through their output have become the principal generators of ‘subsequent practice’ within the meaning of Article 31(3) (b) of the VCLT.<sup>95</sup> Given the difficulties in establishing a uniform interpretation through State practice, the treaty bodies function as a ‘clearing centre’ for divergent interpretations.<sup>96</sup> By virtue of their independent, expert capacities these Committees are best suited to establish the common agreement of States as to the interpretation of the Covenants.<sup>97</sup> On the other hand, this does not mean that the State Parties’ positions are rendered unimportant. Rather, because only states may assume obligations under international law, it is the state parties’ *reactions* to the treaty bodies’ output which is the constitutive factor in establishing relevant ‘subsequent practice’.<sup>98</sup> General Comments and Recommendations issued by the treaty monitoring bodies are distributed to all State parties following their adoption, generally as part of an annual report of the committee concerned to the UN General Assembly or the Economic and Social Council.<sup>99</sup> States have the opportunity to communicate their views at that stage, as well as in their reports to the treaty

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<sup>90</sup> Mechlem (2009), p.919.

<sup>91</sup> See <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> [accessed at 15 Dec. 09]

<sup>92</sup> The supervisory bodies to the ICCPR and ICESCR respectively.

<sup>93</sup> The establishment of HRC is authorized in the ICCPR part IV. The CESCR was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the ICESCR.

<sup>94</sup> The HRC derives its competence from the First Optional Protocol to the ICCPR. Recently, the CESCR was authorized to consider individual complaints through the adoption of an Optional Protocol (GA Resolution/A/RES/63/117).

<sup>95</sup> See e.g. Craven (1995), p.91-92 and Mechlem (2009), p.920.

<sup>96</sup> Meron (1986), p.10.

<sup>97</sup> Craven (1995), p.4.

<sup>98</sup> See e.g. Meron (1986), p.10 and Craven(1995), p.91-92.

<sup>99</sup> International Law Association, ‘Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies, Berlin 2004 [hereinafter *ILA Final Report*] para.23, p.6.

bodies and in discussions during the consideration of the reports. State parties may be said to have accepted the interpretation of the Committees if it fails to express its view on one of those stages.<sup>100</sup>

In practice, States rarely express their own interpretation of rights in the Covenants.<sup>101</sup> They normally base their reports on the interpretations provided by the treaty bodies in General Comments, the reporting guidelines, and the questions provided to them.<sup>102</sup> As of 2005, in more than two hundred State reporting procedures before the CESCR, only a small number of States contended that General Comments were not legally binding and thereby indirectly questioned the legal authority of the CESCR's work.<sup>103</sup> As regards the HRC, a few formal objections have been voiced and thus amount to arguments against the establishment of relevant subsequent practice within the meaning of Article 31(3) (b) in those areas.<sup>104</sup> Treaty body output, in particular that of the HRC, has become a relevant interpretive source for numerous national courts in the interpretation of constitutional and statutory guarantees of human rights as well as other domestic law norms.<sup>105</sup> The same is the case for international tribunals.<sup>106</sup> Thus, the treaty bodies' interpretation and the concurrent States Parties reactions to it may jointly generate 'subsequent practice' in the sense of Art.31(3) (b) of VCLT. Moreover, treaty body findings may alternatively be taken into account as a 'supplementary means of interpretation' within the meaning of Article 32 of the VCLT.<sup>107</sup>

In international refugee law, there is no treaty monitoring body with the competence to provide authoritative interpretations and monitor compliance. Thus, only State Parties and the ICJ<sup>108</sup> have binding authority to interpret the CSR. However, the output of the UNHCR, by virtue of its mandate and the State Parties' obligation to co-operate in the exercise of its functions, may hold authoritative value. The most prominent example is the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, which will be consulted where appropriate. The persuasive value of the Handbook has been acknowledged by State Parties to the Convention.<sup>109</sup> Another relevant source is the Conclusions of the Executive Committee of the High Commissioner's Programme (EXCOM). This committee was established in 1958 by the UN General Assembly as an advisory organ to the UNHCR.<sup>110</sup> While these sources are not legally binding they may influence State practice and constitute indications of States' *opinio juris*.<sup>111</sup>

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<sup>100</sup> Craven (1995), p.91-92.

<sup>101</sup> Mechlem (2009), p.920.

<sup>102</sup> Supra n.98. *ILA Final Report*, pp. 631–57 (reporting the use of General Comments in national courts).

<sup>103</sup> For examples, see Langford(2006),p.445-446.

<sup>104</sup> See e.g. U.S. Comments on the Concluding Observations of the Human Rights Committee, Addendum, U.N. Doc. CCPR/C/USA/CO/3/Rev.1/Add.1 (Feb. 12, 2008).

<sup>105</sup> Supra n.98, *ILA Final report*, para.175.

<sup>106</sup> Ibid.

<sup>107</sup> See e.g., the Osaka High Court, which has concluded that General Comments and other output of the committees may be considered as 'supplementary means of interpretation', Osaka High Court, Judgment of 28 October 1994, 1513 HANREI JIHO 71, 87, 38 JAPANESE ANN. INT'L L. 118 (1995).

<sup>108</sup> See CSR Article 38 and Article IV of the Additional Protocol, which authorizes inter-state settlement of disputes before the ICJ. To date however, no such case has been referred.

<sup>109</sup> Boeles, Pieter [et al] (2009), p.258.

<sup>110</sup> ESC Res.672, UN Doc. E/3123, 30 April 1958. UNGA res.1166, UN doc. A/3805, 26.November 1957, para.5.

<sup>111</sup> Hathaway (2005),p.54.

### 3.6 On preparatory works

The respective treaties' preparatory works, often referred to as the *travaux préparatoires* will be frequently consulted throughout this legal analysis. Article 32 of the VCLT seemingly relegates the preparatory works of a treaty to a mere supplementary source of interpretation. Furthermore, the *travaux préparatoires* may only be consulted to 'confirm' the interpretation based on Article 31 or if the ordinary interpretation renders the meaning 'ambiguous or obscure' or the result 'manifestly absurd or unreasonable'.<sup>112</sup> As a result of this apparently restrictive wording, reluctance to rely on the *travaux* has been noted.<sup>113</sup>

Yet, when interpreting a treaty in light of its object and purpose as prescribed by Article 31 the historical intentions of the drafters clearly is relevant. While the view of the *travaux* as merely a supplementary means of interpretation is formally maintained, in practice the use of the *travaux* is more important than its formal position suggests. A prominent jurist has noted that use of the *travaux* is often concealed behind statements that it is only consulted to 'confirm an interpretation which is supposed to have been derived from the bare words of the text'.<sup>114</sup> Additionally, because the meaning of a disputed legal text is frequently 'ambiguous or obscure' even after an ordinary Article 31 interpretation, recourse to the *travaux* is often justified on that basis. Indeed, in its practice the International Court of Justice has relied on the *travaux* to fill in textual lacunae and to address interpretive issues of first impression.<sup>115</sup> Thus the maintenance of a rigid position towards interpretations informed by the *travaux* is hard to justify in contemporary international law. This point is particularly valid for treaties such as the CSR, which do not have a treaty monitoring body competent to authoritatively interpret terms in the treaty text. Importantly however, an interpretation 'in light of [a treaty's] object and purpose' entails not only that account is taken of the drafters' historical intentions, but also that the analysis ensures the treaty's effective operation in a contemporary legal and social setting.

## 4. Socio-economic context

### 4.1 Introduction

An analysis of law cannot take place in a void, detached from social and economic realities. In fact, the need to consider how a treaty operates within the present day setting is part and parcel of the teleological approach to treaty interpretation described in the previous section. In the next section, an overview of State practice as regards asylum-seekers' access to the labour market is provided. Furthermore, sections 4.3 – 4.7 addresses one specific concern of Western States through the lens of the Social Sciences. As will be shown, these perspectives are highly relevant

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<sup>112</sup> VCLT Article 32.

<sup>113</sup> Hathaway (2005), p.56.

<sup>114</sup> *South West Africa Case (Ethiopia v. South Africa; Liberia v. South Africa) 2<sup>nd</sup> Phase* [1966] ICJ Rep 6, p.352 (Dissenting opinion of Judge Jessup).

<sup>115</sup> See e.g. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, [1951] ICJ Rep 15.; *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), Jurisdiction, [1984] ICJ Rep 392, p. 406. Cited in Hathaway (2005), p.57-58.

to the legal analysis because it has a bearing on whether States may legally justify restrictions on access to employment.

## 4.2 State of play

In developed countries recognized refugees are mostly permitted to access the labour market. However, these States generally maintain restrictions on asylum-seekers undergoing refugee status determination. Although the nature of the restrictions may vary, a common feature is the imposition of a time-limit during which the claimant is barred from the labour market. Such measures range from a bar on access to employment throughout the whole status determination process<sup>116</sup>, to barring for shorter periods<sup>117</sup>. In fact, four out of five top receiving countries in the developed world in 2008, France<sup>118</sup>, Italy<sup>119</sup>, UK<sup>120</sup> and the United States<sup>121</sup>, maintain restrictions on asylum-seekers right to access the labour market. The notable exception is Canada, where asylum-seekers may apply for work permits after lodging an asylum application and upon completion of a medical exam.<sup>122</sup>

Other types of restrictions typically include limitations to what kind of work asylum-seekers may apply for<sup>123</sup>, the amount of time they are allowed to work<sup>124</sup>, the favouring of nationals from certain countries<sup>125</sup> or various types of national labour market considerations<sup>126</sup>.

In Europe, improvements for the employment opportunities of asylum-seekers were made in 2003, when the so-called 'Reception Directive' was approved.<sup>127</sup> This directive grants access to the labour market to asylum seekers who have not received a first instance decision within one year from the time of application.<sup>128</sup> Examples of best practices are *e.g.* Belgium, where asylum-seekers have access to employment once their application has been admitted to the substantive

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<sup>116</sup> 'Comparative Overview of the Implementation of the directive 2003/9 OF 27 January 2003 Laying down minimum Standards for the Reception of Asylum Seekers in the EU Member States', Odysseus Academic Network synthesis report 2007, p.70: Lithuania does not allow asylum-seekers to work, even when the procedure last for more than a year.

<sup>117</sup> Ibid., p.69: *e.g.* Austria and Finland(3 months); Portugal(less than one month); Luxembourg(9 months); Sweden(4 months)and Spain(6 months).

<sup>118</sup> Ibid. France applies the maximum authorized period of one year within the EU.

<sup>119</sup> Ibid. A six month time bar is introduced by Italy.

<sup>120</sup> Ibid. The UK have introduced a one year time-bar in compliance with their EU asylum policy obligations.

<sup>121</sup> See U.S. Committee for Refugees and Immigrants(USCRI), 'World Refugee Survey 2009': The United States impose a bar-period of 180 days from the lodging of an asylum application. Available at: <http://www.refugees.org> [Sited [Sited 31 May 2010].

<sup>122</sup> Ibid.: Although CIC officers may impose, vary, or cancel conditions on work permits, including the type of employment, the employer, location, and hours worked.

<sup>123</sup> Supra n.116. Odysseus Report p.71: While not legally subject to any restrictions in Cyprus, asylum-seekers can only work in the agricultural sector in practice.

<sup>124</sup> Ibid.: In the Netherlands, asylum-seekers are allowed to work for 12 weeks in a year.

<sup>125</sup> Supra n.121. Germany allowed asylum seekers granted 'tolerated stay' to work only in limited and exceptional circumstances and, even when they found jobs, they were subject to checks by the Department of Labour as to whether any unemployed German or EU nationals could take the jobs instead.

<sup>126</sup> Ibid.: In Denmark asylum-seekers may not work unless they have both a residence and a work permit. An asylum seeker with a work contract or work permit for a job covered by the so-called Positive List, i.e. a list of professions and fields currently experiencing a shortage of qualified professionals, may apply for a residence permit on those grounds

<sup>127</sup> Council Directive 2003/9/EC of 27 January 2003 *laying down minimum standards for the reception of asylum seekers*.

<sup>128</sup> Ibid., Article 11.

stage of the determination procedure.<sup>129</sup> Moreover, Portugal, Spain and Greece allow asylum-seekers to work but not as an automatic entitlement – individual authorization is required.<sup>130</sup>

In Norway, the Immigration Act § 96 states that asylum-seekers *may* be given a work permit until a final decision is made in the case. However, this is subject to conditions that the asylum-interview has taken place; that there is *no doubt* about the person's identity and the asylum-seeker must not be in line for a forced return.<sup>131</sup> Thus, the Norwegian regulations does not set a time limit for when a request for a work permit must be considered. Despite this, a report indicate that in practice a formal access to the labour market is normally given well within the one year time limit set in the EU directive.<sup>132</sup>

In developing countries, access to the labour market is generally very restrictive for asylum-seekers. Even recognized refugees are often prevented from working legally. Considering that the vast majority of refugees are situated in a developing country, this is clearly a cause for concern.<sup>133</sup>

Pakistan hosts the biggest number of refugees worldwide at approximately 1.8 million, mostly Afghan nationals. While many Afghan refugees have been permitted to work, non-Afghan refugees are mostly deemed to be illegal immigrants and denied access to employment. However, authorities have tolerated refugees working in the informal economy because of the significant economic contribution. In Syria, another major receiving country, work permits are rarely granted to non-Palestinian refugees, thus relegating them to the informal sector where no legal protection is available. Iran restricts work permits to particular sectors and imposes administrative costs of 700,000 Rials (approximately \$75). Few refugees reportedly apply because employers do not wish to hire employees formally and incur insurance and tax costs. Refugees and asylum-seekers are faced with similar barriers in other important refugee destinations such as Tanzania<sup>134</sup>, Kenya<sup>135</sup>, Nepal<sup>136</sup>, Malaysia<sup>137</sup> and Thailand<sup>138</sup>.

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<sup>129</sup> UNHCR, 'Reception Standards for Asylum Seekers In the European Union', Geneva July 2000, p.29.

<sup>130</sup> Ibid.

<sup>131</sup> Secondary legislation regulates in more detail, see *Utlendingsforskriften* §§17-24 - 17-27.

<sup>132</sup> Brekke and Vevstad (2007), p.77.

<sup>133</sup> See UN Department of Economic and Social Affairs, Population Division International Migration 2009 [http://www.un.org/esa/population/publications/2009Migration\\_Chart/ittmig\\_wallchart09.pdf](http://www.un.org/esa/population/publications/2009Migration_Chart/ittmig_wallchart09.pdf) [Accessed 20 May].

<sup>134</sup> Supra n.121 (USCRI World Report 2009), the Refugees Act forbade refugees from working without permits and provided for fines up to \$180 and three years in prison for violations, and the 1999 National Employment Promotion Services Act (Employment Service Act) forbade foreigners from working and authorized fines of up to 1 million shillings (\$901) and three years' imprisonment for violations. The procedure for the issuance of work permits was unclear, and there were no reports of refugees receiving them.

<sup>135</sup> Ibid; Refugees recognized by UNHCR were not eligible for work permits and it was unlawful for them to engage in economic activity.

<sup>136</sup> Ibid; the 1992 Labour Act heavily restricted the employment of foreigners, without exception for refugees. If no Nepali was available for a skilled post after national advertising, managers could apply to the Labour Department for permission to hire foreigners. After investigation, the Labour Department could grant two year permits but for no more than five years in total.

<sup>137</sup> Ibid; Malaysia allowed Filipino Muslims in Sabah and Acehnese refugees to work, but not other groups.

<sup>138</sup> Ibid; Refugees and asylum seekers could not work legally but as many as 40 percent of those in the camps sought illegal employment outside of the camps.

However, in some jurisdictions the situation for asylum-seekers has improved. In South Africa the courts have recognized a right for asylum-seekers to access employment.<sup>139</sup> Unfortunately, the three month duration of asylum-seekers' documentation coupled with severely delayed processing of renewals still severely restricts their legal employment options.<sup>140</sup> Consequently, the majority still work in the informal sector.<sup>141</sup> Recently, changes to the Immigration Control Act in South Korea have provided asylum-seekers with the possibility of applying for a work permit.<sup>142</sup> Moreover, the West African member States of ECOWAS allow refugees and asylum-seekers from all Member States to access the labour market.<sup>143</sup>

### ***4.3 The Politics of Deterrence***

The United Nation estimates that 214 million people will live outside their country of origin in 2010.<sup>144</sup> People migrate for many reasons: they meet and marry across borders, move to find better social and economic opportunities, flee from natural disasters, civil war, famines or persecution or for a combination of these reasons. Particularly, the standard of living varies enormously depending on which region of the world one is situated. The power of attraction created by the developed world's economic wealth and political stability is a fundamental driver of migration. According to a World Bank study published in 2002, the wealthiest 50 million people in Europe and North America have the equivalent income as 2.7 billion people in developing countries.<sup>145</sup> Indeed, the stock of international migrants is concentrated in relatively few countries. The UN Department of Economic and Social Affairs cites that sixty per cent of the world's international migrants reside in more developed regions.<sup>146</sup>

Out of the migrant stock estimate of 214 million, approximately 15 million is estimated to be refugees.<sup>147</sup> According to UNHCR at the end of 2008 827 000 asylum-seekers had cases pending for refugee status recognition.<sup>148</sup> When compared with the general migratory flows described above, the situation of refugees is the reverse: At the end of 2008 approximately 13 million refugees out of the total estimate of 15 million were situated in less developed regions of the

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<sup>139</sup> The Minister of Home Affairs v. Watchenuka, 28 November 2003, 1 All SA 21(SA Supreme Court of Appeal).

<sup>140</sup> Supra n.121.

<sup>141</sup> Ibid.

<sup>142</sup> Concluding Observations, Committee on Economic, Social and Cultural Rights Forty-third session Geneva, 2-20 November 2009. E/C.12/KOR/CO/3 20 November 2009.

<sup>143</sup> Lester (2005), p.355.

<sup>144</sup> Supra n.133.

<sup>145</sup> Milanovic (2002), p.88.

<sup>146</sup> Supra, n.133. Most of the world's migrants live in Europe (70 million in 2010), followed by Asia (61 million) and Northern America (50 million). With 43 million migrants expected in 2010, the United States of America hosts the largest number of international migrants, followed by the Russian Federation (12 million), Germany (11 million) and Saudi Arabia and Canada with 7 million each.

<sup>147</sup> Supra, n.133.

<sup>148</sup> UNHCR 'Global trends 2008: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons', 16 June 2009.

world.<sup>149</sup> In 2008 industrialized countries recorded 383 000 asylum applications over the course of the year.<sup>150</sup>

Despite low numbers of asylum-seekers in relative terms, developed countries are introducing increasingly restrictive policies informed by so-called deterrence logic. This term refers to a range of policy measures aimed at decreasing the amount of ‘bogus’ asylum applications by making the conditions of entry and stay more burdensome or less desirable for prospective applicants. The deterrent measures typically include measures restricting access to the territory through border controls and immigration policy, lower recognition rates through narrow interpretation of the refugee definition and measures limiting socio-economic benefits while undergoing refugee status determination. This paper is occupied with the latter of these three deterrent measures, specifically restrictions on the right to access employment.

The CSR has been ratified by 144 States and is the most frequently applied international treaty in the world.<sup>151</sup> Since 2000, it has governed approximately 500 000 asylum decisions each year.<sup>152</sup> Thus, the refugee status is widely respected – at least on a rhetorical level. However, it is important to realize that the debate on asylum is highly driven by the politics of perception. Policy changes as numbers of asylum-seekers increase, regardless of whether or not the causes for the increase are within government control. Increased numbers of applicants puts pressure on governments to react. Politicians of the opposition frequently accuse the governing party of a misconceived or naïve stance towards the perceived flow of asylum-seekers. Governments imposing deterrent measures often claim that these measures are necessary to safeguard the rights of *bona fide* refugees or alternatively, to prevent the country from being ‘swamped by illegal immigrants’. Another frequently cited term is ‘economic migrant’, a euphemism for individuals who can lay no legal claim to remain in the territory by virtue of the CSR.

There are several problems with the logic of deterrence. As a first point, to what degree a government has the ability to control its own borders might be questioned. Governments spend vast resources on border control each year, yet there are undoubtedly large populations staying in countries in contravention with the applicable immigration rules.<sup>153</sup> The precise numbers of unauthorized migrants are notoriously difficult to calculate. The International Labour Organization estimates that there are 20 to 30 million unauthorized migrants worldwide, comprising around 10 to 15 per cent of the world's immigrant stock.<sup>154</sup> However, these

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<sup>149</sup> Supra, n.133.

<sup>150</sup> UNHCR Asylum Levels and Trends in Industrialized Countries 2008, 24 March 2009. Based on information from the 44 countries who currently provide monthly asylum statistics to UNHCR.

<sup>151</sup> Dauvergne (2008), p.35.

<sup>152</sup> UNHCR Statistical Yearbook 2007, p.48.

<sup>153</sup> See e.g. Cornelius (2005), who looks at how a substantial increase of spending on the US-Mexico border security did not lead to a decrease of immigration from Mexico.

<sup>154</sup> International Labour Conference, 92nd Session, 2004, ‘International Labour Organization's Towards a Fair Deal for Migrant Workers in the Global Economy’, p.11. [accessed Nov 25 2009] available at: [http://www.ilo.org/global/Themes/Labour\\_migration/lang--en/docName--KD00096/index.htm](http://www.ilo.org/global/Themes/Labour_migration/lang--en/docName--KD00096/index.htm)

unauthorized migrants are not a homogenous group: this category also include visa overstayer's from Western countries.

Second, measures aimed at limiting 'bogus' asylum-seekers is detrimental to genuine refugees because these measures apply without distinction to all applicants. Furthermore, one should keep in mind that the ambit of the refugee definition enumerated in the CSR is limited and that States employ divergent and sometimes very strict interpretations.<sup>155</sup> For example, in Greece 0.06 % of cases decided at first instance were afforded protection in 2008.<sup>156</sup> The resulting low recognition rates foster the public perception of large-scale abuse of allegedly generous asylum provisions by 'bogus' asylum-seekers. By comparison, in the five countries which, along with Greece, received the largest number of applicants in Europe in 2008, the average protection rate at first instance was 36.2%.<sup>157</sup>

Furthermore, people often leave their countries of origin for a combination of reasons. Refugees fleeing persecution may have auxiliary motives of creating better economic opportunities in the new country. This does not deprive them of their refugee status.<sup>158</sup> The UNHCR recognizes this and states that '[t]his mixture of motives is one factor creating a perception of widespread abuse of asylum systems, which is often manipulated by politicians and the media'.<sup>159</sup>

When considering whether asylum-seekers should be allowed to work or not, the mixture of motives is really the crux of the matter. Indeed, as a judge in the English Court of Appeal put it: 'Part of the purpose of immigration policy is to exclude economic migrants: the removal of the restriction upon the right to work merely because someone has claimed asylum would jeopardize that policy.'<sup>160</sup>

Thus, the policy of restricting access to employment for asylum-seekers is directed to deter economic migrants from lodging abusive applications in order to get access to the labour market. Apart from the problems mentioned above, an essential question that ought to occupy policy-makers is whether this measure actually works as a deterrent in practice.

#### **4.4 Social science perspective**

Several methods have been utilized to identify the effects of policy and other variables of asylum flows. Qualitative studies based on interviews with asylum-seekers find that their choice of destination is largely determined by the existent refugee stock, while asylum policies and labour

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<sup>155</sup> A Joint Position Paper of the Council of the European Union states that 'reference to a civil war or internal or generalized conflict and the dangers which it entails is not in itself sufficient to warrant the grant of refugee status. Fear of persecution must in all cases (...) be individual in nature', Council of the European Union 1996, para.6.

<sup>156</sup> Observations on Greece as a country of asylum, Office of the United Nations High Commissioner for Refugees (UNHCR) December 2009, p.18.

<sup>157</sup> Ibid, (i.e. France, the U.K., Italy, Sweden and Germany).

<sup>158</sup> See e.g. *Guillermo Lautaro Díaz Fuentes* (1974), 9 IADC 323; *Abeba Teklehaimanot v. Immigration Appeal Board* Federal Court of Appeal Decision A-730-79, September 8, 1980.

<sup>159</sup> UNHCR Global Report 2001, p.155 [accessed Nov 25 2009 at] [www.reliefweb.int/library/documents/ch07.pdf](http://www.reliefweb.int/library/documents/ch07.pdf)

<sup>160</sup> *Secretary of State for the Home Department v. Jammeh*, [1999] Imm AR 1 (Eng.CA, July 6, 1991, p.14.

market conditions are of secondary importance.<sup>161</sup> Although Böcker and Hattinga do find indications that some policy measures may have an effect, particularly measures restricting access to the territory. Measures restricting access to employment is found ‘sometimes’ to affect the influx from ‘specific countries of origin’.<sup>162</sup> Overall however, the ‘effects of both pre-entry and ‘deterrence’ measures should not be overrated’. In many cases the effects of these measures is not reflected in the statistics.<sup>163</sup> Where there is a marked effect, moreover, it often proves to be transitory.<sup>164</sup> However, it has been noted that one must take into account the possibility that asylum-seekers might try to underplay the relative importance of such determinants that might compromise their asylum application or residence status.<sup>165</sup> Nevertheless, these results constitute relevant indicators concerning the determinants of asylum-seekers.

Furthermore, quantitative studies have investigated migration applying a so-called push-pull model. This model suggests that there are push factors in countries of origin that cause people to leave their country, and pull factors that attract migrants to a host State.<sup>166</sup> The theory has also been applied in the area of forced migration. However, this approach has its limitations when transferred to this field.<sup>167</sup> As a first point, statistics on asylum are often unreliable due to differing methods of gathering information. Thus, a cautious approach is warranted.

Furthermore, in the area of forced migration, pull-factors are generally not assumed to be the driving forces behind persons fleeing their country of origin.<sup>168</sup> Moreover, the determinant push-factors are assumed to be limited to fear of persecution as enumerated in Article 1A (2) of the CSR.<sup>169</sup> Thus, in principal asylum-seekers must be kept apart from economic migrants. Nevertheless, asylum-seekers may have auxiliary economic motivations or other reasons more associated with the conditions in the host State.<sup>170</sup> Econometric studies applying this model could therefore prove feasible in the investigation of forced migration as well.<sup>171</sup> Of course, it ought to be acknowledged that the possibilities asylum-seekers have for making a real and informed choice of destination often are restricted. This may be due to blocked travel-routes, economic constraints or the availability of routes for trafficking and information.

On the other hand, even in situations of forced migration some measure of choice as to the country of destination may be assumed. Here it seems reasonable to differentiate between the majority of the world refugee stock situated in a neighbouring developing country and the smaller share that manages to reach industrialized countries. Whereas in the former case, the

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<sup>161</sup> See e.g. Böcker and Havinga (1998); Robinson, Vaughan and Jeremy Segrott (2002).

<sup>162</sup> Böcker and Havinga (1998), p. 263.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid.

<sup>165</sup> Thielemann(2003), p.10.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> As pointed out in Chapter 1, it is not necessarily problematic that asylum-seekers have fled their country for a combination of reasons.

<sup>171</sup> Thielemann (2003), p.10-11.

choice of destination is assumed to be restricted, an element of choice may be inferred for the latter group. The available econometric data referred below suggests that host country conditions do matter. At the same time studies confirm that push-factors such as human rights abuse, dissident political violence, civil/ethnic warfare and State failure are strong determinants. Neumayer finds autocracy to be the substantively most important determinant of asylum migration to Western Europe.<sup>172</sup> This puts accusations of wide-spread ‘asylum-shopping’ into great doubt.

#### ***4.5 The effect of deterrent policies***

Thielemann found in his study of 20 OECD countries for 1985-1999 that the aggregate deterrence measures do have a significant negative effect on the number of applications.<sup>173</sup> He concludes that restricting asylum-seekers right to work has a considerable negative effect.<sup>174</sup> However, the individual deterrence measures are not by far as significant as the legacies of migrant networks, general employment opportunities and asylum-seekers’ general perceptions of the ‘liberalness’ of the host country.<sup>175</sup> These are structural factors that are largely beyond the reach of policy, at least in the short to medium term.<sup>176</sup> Moreover, and worth noting for policy-makers, are findings that the deterrent effect of the measures appears to be short-term.<sup>177</sup> Thus, the effect of the States’ attempts to introduce more restrictive asylum policies relative to other potential host States is limited to a first mover advantage.<sup>178</sup> Thielemann highlights the rapid spread of so-called safe third country provisions across Europe in the 1990s as a well-known example of cross-country policy transfer.<sup>179</sup> Thus, once States start copying the measures from their neighbours the structural pull-factors will again become a determinant.

Similarly, Neumayer finds evidence that destination countries can influence the migration-patterns of asylum-seekers with restrictive policy measures.<sup>180</sup> However the only policy variable used is the overall recognition rate for the destination. Moreover, consistent with Thielemann’s findings, Neumayer concludes that existing communities of past asylum-seekers are substantively most important as pull-factor.<sup>181</sup>

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<sup>172</sup> Neumayer (2005), p.389-409.

<sup>173</sup> Thielemann (2003), p. 27-28. He analyses five types of deterrent measures: The prohibition to work; the average recognition rate; safe third country provisions; restrictions on the freedom of movement and non-cash benefit payments.

<sup>174</sup> Ibid. If disaggregated only the prohibition to work and the average recognition rate has significant effect on the number of applications.

<sup>175</sup> Ibid, p.32. In referring to ‘employment opportunities’ as a structural factor, he clearly does not refer to the denial of access to employment as a deterrence measure, but in terms of a general availability of work.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid, p.28: Thielemann explains that when the ‘deterrence index is lagged by more than a year, it ceases to have any significance’.

<sup>178</sup> Ibid, p.33.

<sup>179</sup> Ibid.

<sup>180</sup> Neumayer (2004).p.176.

<sup>181</sup> Ibid.

Timothy Hatton's study from 2008 provides estimates of deterrent policy effects for the period 1997-2006.<sup>182</sup> He finds evidence suggesting asylum policies have reduced the volume of asylum applications, even to a larger degree than earlier studies have found.<sup>183</sup> However, the policies that deter applications are those related to territory access and recognition rate.<sup>184</sup> Policies that reduce the socioeconomic conditions of asylum-seekers are found to have negligible deterrent effect.<sup>185</sup> The latter part of the conclusion suggests, in Hatton's words 'that the need to find a balance between punitive policies on living conditions and more positive refugee integration measures is less of a dilemma than is sometimes believed'.<sup>186</sup>

However, an important factor is left unaccounted for in the studies referred above. Due to the increasingly stringent immigration controls in developed countries, the human trafficking organizations have emerged as major stakeholders in the area of refugee migration.<sup>187</sup> The International Labour Organization (ILO) estimated in 2005 that total illicit profits generated annually by trafficked forced labourers are around US\$ 32 Billion.<sup>188</sup> Oxfam estimated in 2005 that 90% of asylum claimants enter Europe clandestinely.<sup>189</sup> The majority will have used the services of traffickers or human smugglers who organize the trip.<sup>190</sup> Thus, there is a need to consider the effects of deterrent asylum policies in light of the economic market considerations made by traffickers/smugglers.

In a quantitative study from 2008, Jenny Monheim investigated the effects of deterrent asylum policies on the number and group composition of asylum seekers, allowing for consideration of the potential distortive effect of traffickers/smugglers.<sup>191</sup> As already implied, the facilitation of migration is costly.<sup>192</sup> Monheim points out that government policy measures may have unintended effects because the trafficker/smuggler often has an interest to bind the migrants to a debt-contract.<sup>193</sup> When paying down a debt contract, the refugee cannot report to the authorities but stay unauthorized until debt service is finalized and they are released from the control of the traffickers/smugglers. Therefore, from the viewpoint of traffickers/smugglers, applying for asylum is a way to renege on the incurred debt because the host State then provides protection against the intermediary's pressure.

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<sup>182</sup> Hatton (2008), 'The study is based on data from nineteen destination countries and forty source countries.

<sup>183</sup> Ibid., p.27.

<sup>184</sup> Ibid., p.28.

<sup>185</sup> Ibid.; This is based on an aggregate selection of restrictive asylum policies from the following areas; detention; deportation; employment; access to benefits; and family reunification. See the study's appendix p.33.

<sup>186</sup> Ibid.

<sup>187</sup> Monheim (2008), p.7.

<sup>188</sup> International Labour Office, 'A Global Alliance Against Forced Labour: Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work' 265, p. 55 (2005).

<sup>189</sup> Monheim (2008), p.7.

<sup>190</sup> Ibid.: The German authorities estimate that approximately 50% of asylum seekers were trafficked in 1997. In the Netherlands, figures reach 60-70%.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid., p.9: A refugee fleeing Iraq for the EU in 2002 had to pay between 3.000 and 40.000 Euros.

<sup>193</sup> Ibid: Debt contracts are the usual way to finance migration and imply a repayment of debt in the country of destination by work for the intermediary in sweatshops and/or forced labour or prostitution.

Moldheim finds that only the policies of restrictive access control lead to a reduction of the inflow of refugees.<sup>194</sup> Stricter acceptance and benefits policies are found to have a counterproductive effect.<sup>195</sup> Such measures make it less attractive for asylum-seekers to default on their debt contract, which has the effect that traffickers can charge a lower price to facilitate migration.<sup>196</sup> This, in turn, makes it possible for more refugees to migrate. However, these findings do not translate directly into the same effects for asylum applications. The effects of all types of asylum policies on asylum applications are found to be *a priori* uncertain due to contradictory influences. Moldheim concludes that policy makers cannot influence whether their policies will increase or decrease the numbers of asylum applications. In addition she finds that the effects of government policies 'will depend on exogenous factors like the distribution of profiles and wealth' in the refugee population.

## 4.6 Discussion

The econometric studies referred above seem to support the States' assertion that *some* restrictive asylum policies have a negative effect on the number of asylum applications. However, the evidence of the effect of limiting the right to *access employment* is unconvincing. The only survey that does contain some measure of support concludes that the effect is only short-term. The differences in methodology or the time-period investigated may explain the divergent findings.<sup>197</sup> Given this it is interesting to note the convergence in confirming that economic conditions in the destination country do matter.

Thus, it may appear surprising that Hatton's study concludes that measures restricting those conditions have little effect as a deterrent. Yet this is consistent with findings that asylum-seekers often lack detailed knowledge about the reception conditions in the destination country.<sup>198</sup> While a general picture of the level of economic prosperity is easily accessible to asylum-seekers through friends, relatives and the mass-media, detailed information on the substance of labour market conditions are not as readily available.

There is reason to believe that organizers of trafficking routes provide the asylum-seekers with information. However, it might be assumed that information provided by traffickers generally concerns the facilitation of access to the territory rather than the reception conditions of the country. Indeed, as the traffickers may require refugees to pay their debt through sweatshop

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<sup>194</sup> Ibid., p.17

<sup>195</sup> Ibid.

<sup>196</sup> Ibid., The point is that these policies render unauthorized stay more attractive relative to claiming asylum.

<sup>197</sup> Thielemann's study is based on a dataset from 20 OECD countries for 1985-1999, while Hatton's study is based on information from nineteen destination countries and forty source countries from 1997-2006. Furthermore, Thielemann does not allow for differences in source country composition of asylum application because he did not disaggregate by country of origin.

<sup>198</sup> Böcker and Havinga (1998); Robinson and Segrott (2002).

labour they have no interest in providing details about reception conditions for asylum-seekers.<sup>199</sup> The principal objective of trafficking is income maximization, not humanitarian aid.

#### **4.7 Conclusion – socioeconomic perspectives**

Overall, the empirical evidence does not support the States' assertion that the restriction of the right to work has a deterrent effect on the number of asylum applications. The migratory flows of refugees are complex, and many of the factors that attract refugees to the western countries are structural in character, i.e. largely beyond the reach of policy makers. In addition, there is the distortive effect of human traffickers and smugglers.

Furthermore, the denial of the right to work may lead to a bigger informal market sector. Individuals might choose to either not report to the authorities at all, or to apply for asylum but seek employment in the informal sector when faced with restrictions. This will in turn lead to less transparency and the risk of exploitation of workers.

The alleged aim of the deterrent measures are to deter 'bogus' asylum claimants. But how does one distinguish these from the *bona fide* refugees? Evidently, measures as the one in question are poorly suited to attain such aims, as they are applied indiscriminately.

A limited number of migrants with primarily economic motives are undoubtedly trying the asylum route in order to obtain permission to stay and work in countries they migrated to. However, as the CSR was never intended to be a migration control tool, it cannot be framed as the root cause of this problem.<sup>200</sup> Rather, 'pure' economic migrants may take the asylum route because it has often constituted almost the only opportunity for migrants to legally stay in a Western country. Few legal channels exist for labour immigration to developed countries, as most States shut their borders in the 1970s. Thus, the issue of economic migration cannot be solved through a strict interpretation of the CSR, but through a comprehensive, multilateral approach to management of migratory flows. Considering the demographic situation in present-day Europe, policy makers may actually not have a choice.<sup>201</sup>

Moreover, it is often overlooked that many asylum-seekers possess high levels of skills and work-experience that could be put to use in the host country. In a sample of asylum-seekers to the United Kingdom from 2004, 90 per cent had education levels ranging from equivalent of GCSEs to a PhD, while 57 per cent had a degree and/or a postgraduate qualification.<sup>202</sup> The vast majority of the sample (86 per cent) had worked in their country of origin before arriving in the UK.<sup>203</sup> However, more than 75 per cent of the claimants did not have permission to work, despite

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<sup>199</sup> Moldheim (2008), p. 9-10.

<sup>200</sup> Feller (2006), p.525.

<sup>201</sup> See *BBC News*, 27 March 2006. 'The EU's baby blues' available at: <http://news.bbc.co.uk/2/hi/europe/4768644.stm>. [Sited 31 May 2010].

<sup>202</sup> The Refugee Council. 'The Forbidden Workforce: Asylum seekers, the employment concession and access to the labour market', p.5. March 2005.

<sup>203</sup> Ibid.

willingness to do so.<sup>204</sup> Some trade unions have acknowledged this unused potential: the British Medical Association has pointed out that the National Health Service could benefit from the skills and experience of refugee doctors, including asylum-seekers.<sup>205</sup>

## 5 International Refugee Law

### 5.1 The 1951 Refugee Convention

The CSR and its 1967 Protocol provides refugees with important rights in the country of asylum. However, not all refugees are entitled to enjoy the same rights. The CSR provisions are rather elaborately structured, and imply a hierarchy of right-holders.

While some core rights are conferred upon all refugees, enjoyment of the full spectrum of rights is contingent upon the degree of attachment to the asylum State. At the core level, the rights accruing to ‘refugees’ without qualification are widely held to include all *prima facie* refugees, such as asylum seekers.<sup>206</sup> However, many important rights are subject to further qualifications based on legal notions such as ‘lawful stay’ or ‘lawful presence’. These rights are accorded on an incremental basis, and imply a consideration of the nature and duration of the applicant’s stay in the asylum State.<sup>207</sup> Indeed, turning to the relevant provisions on the right to work, they are only accorded if specified attachment criteria are satisfied. The duration of stay in the host State is a main focus for considerations of attachment level. Such a focus may be detrimental to the position of asylum seekers, due to their relatively shorter stays in the host State.<sup>208</sup>

Furthermore, refugees who satisfy the attachment requirements are not automatically entitled to equal treatment with citizens of the host State. At a minimum, the CSR provides for treatment at least as favourable as that ‘accorded to aliens generally’.<sup>209</sup> Yet, apart from the exemptions on reciprocity, this standard rarely provides substantial benefits to refugees.<sup>210</sup> The CSR therefore provides for a contingent right standard system, coined ‘most-favoured nation’ treatment. Under this standard, the prescribed treatment varies according to the relevant treatment afforded a citizen from the most-favoured State. The highest standard afforded refugees are treatment ‘at least as favourable as that accorded to [the host State’s] nationals’.<sup>211</sup> Moreover, some rights, like the right to be protected from *refoulement* contain no such contingency and are to be afforded every refugee without qualification.

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<sup>204</sup> Ibid., p.6.

<sup>205</sup> See [http://www.bma.org.uk/international/refugee\\_doctors/index.jsp](http://www.bma.org.uk/international/refugee_doctors/index.jsp) [Accessed 20 May 2010].

<sup>206</sup> See e.g. CSR Art. 3, 13 or 33. This understanding is consistent with the ordinary meaning given to the term, the intention of the drafters derived from the *travaux* and the declaratory nature of the refugee definition, *supra* n.3.

<sup>207</sup> Hathaway (2005), p.155

<sup>208</sup> This is not always the case: Refugees originating from conflict-stricken countries may gain swift recognition, while asylum seekers from less common refugee-producing countries might have to wait for years.

<sup>209</sup> CSR Art.7(1).

<sup>210</sup> Widespread state practice imposes limitations on the rights of aliens.

<sup>211</sup> See e.g. CSR Art.4 and 14.

The next four subsections provide a thorough analysis of the provisions of the CSR related to employment. In order to achieve the desired level of detail the analysis under each right is broken further down into a tripartite structure; separately dealing with the content of the relevant right, the required attachment criteria and the standard of treatment.<sup>212</sup> The last subchapter under Chapter 5 deals briefly with the possible application of Articles 31 and 33 of the CSR.

## **5.2 Article 18 - Self-employment**

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

### **5.2.1 Self-employment**

Article 18 provides for the right to 'engage on [one's] own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.' The wording implies the earning of one's livelihood directly from personal economic activity. Clearly, one cannot seek employment by virtue of this provision. Furthermore the provision provides for the right of establishment, i.e. the right to incorporate an enterprise.<sup>213</sup> The *travaux préparatoires* are mostly silent on the interpretation of this provision. Consequently, an investigation of the ambit of the provision gathers little from the *travaux*.<sup>214</sup> Based on a contextual interpretation of the provision and in the light of its object and purpose, the subtypes of work mentioned in the text should be read as examples, not meant as a limitation on the possible self-employment to engage in.

Overall, considering that in most developing States a larger percentage of the working population are self-employed, this article may prove beneficial for refugees and asylum-seekers in those countries.<sup>215</sup>

### **5.2.2 Lawful presence**

In order to be entitled to engage in self-employment a refugee must be 'lawfully in' the territory. Thus, a mere physical presence in the territory does not satisfy the required level of attachment to the host country. The physical presence must be lawful, thereby implying an 'officially sanctioned' presence.<sup>216</sup> In the *travaux préparatoires* it is referred to as 'a very wide term

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<sup>212</sup> The applied structure is based on Hathaway's (2005) tripartite analysis of refugee rights.

<sup>213</sup> Hathaway (2005), p.724.

<sup>214</sup> Weis (1995), p.149-152.

<sup>215</sup> See Squire C., 'Employment Policy in Developing Countries' (1981), 58-65.

<sup>216</sup> Hathaway (2005), p.154.

applicable to any refugee, whatever his origin or situation'.<sup>217</sup> The internal structure of the CSR and the language used in qualifying the various rights further strengthens this argument. Indeed, the *travaux* confirm the drafters' intention of allowing *prima facie* refugees admitted to a refugee status determination to rely on Article 18.<sup>218</sup> In a case before the Federal Court of Australia this interpretation was endorsed: In *Rajendran v. Minister for Immigration and Multicultural Affairs* a Sri Lankan applicant whose refugee case had yet to be determined was nonetheless considered 'lawfully in' Australia by virtue of his provisional admission under domestic regulations for purposes of pursuing his claim.<sup>219</sup>

The question has been raised, however, whether the term 'lawfully' refers to domestic or international law. In the UK for example, the domestic laws deem that a temporary admission for purposes of pursuing an asylum claim does not result in lawful presence. British jurisprudence has interpreted 'lawfully' with deference to a national conception of lawful presence.<sup>220</sup>

In *Kaya v. Haringey Borough Council* the English Court of Appeal concluded that a Kurdish couple was not considered lawfully present while awaiting a refugee status determination, consequently they were denied public housing.<sup>221</sup> The Court focused on the lack of an internationally settled meaning of the term 'lawfully', claiming that the Contracting States by inserting this phrase into the text intended to 'reserve to themselves the right to determine conditions of entry, at least in cases not covered by the Refugee Convention'.<sup>222</sup>

While acknowledging the constraints flowing from the Refugee Convention, the Court nevertheless chose an interpretation in conflict with the object and purposes of the CSR. By ratifying the Refugee Convention, States have accepted limitations to their sovereign right to decide conditions of entry and stay for aliens in its territory. If lawfulness only referred to compliance with domestic laws, each State would be able to reduce its obligations unilaterally, subjecting it to the changing tides of politics. Such an approach is contrary to a State's duty to perform its treaty obligations in good faith.<sup>223</sup> Clearly, '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.<sup>224</sup> Indeed, this view finds support in the House of Lords judgement *Adan*:<sup>225</sup>

[A]s in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning...without taking colour from distinctive features of the legal system of any individual contracting State. In principle therefore there can only be one true interpretation of a treaty...

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<sup>217</sup> Weis(1995), p.371.

<sup>218</sup> Presence is lawful in the case of 'a person(...)not yet in the possession of a residence permit but who had applied for it and had the receipt for that application. Only those persons who had not applied, or whose applications had been refused, were in an irregular position.'(Statement of Mr.Rain of France, UN Doc. E/AC.32/SR.15, Jan.27, 1950, p. 20).

<sup>219</sup> *Rajendran v. Minister for Immigration and Multicultural Affairs*, 4 September 1998, 166ALR 619 (Aus. FFC).

<sup>220</sup> Said to originate from the decision *R v. Secretary of State for the Home Department, ex parte Bugdaycay*, 19 February 1987, AC 514 (UK HL). Cited in Hathaway (2005), p.175.

<sup>221</sup> *Kaya v. Haringey Borough Council*, 1 May 2001, EWCA Civ. 677 (Eng. CA).

<sup>222</sup> Ibid, para.31.

<sup>223</sup> VCLT Art.26.

<sup>224</sup> VCLT Art.27.

<sup>225</sup> *R v. Secretary of State for the Home Department, ex parte Adan and Aitseguer*, 19 December 2000, 2 WLR 143 (UK HL) Cited in Hathaway (2005), p.2.

However, as the Court correctly pointed out in *Kaya*, there is no uniform international standard that establishes the precise meaning of lawful presence.<sup>226</sup> In that light, deference to a national interpretation is a logical starting point. Nonetheless, when considering State compliance with the provisions of CSR the term must be interpreted in light of its objects and purposes in a way that ensures the effectiveness of the treaty. It is important to keep in mind that CSR is a multilateral treaty designed to protect the rights of a vulnerable group deprived of the protection of their home State. It cannot reasonably be argued that states have a margin of appreciation that enables them to unilaterally adjust the scope of its obligations.

Therefore, insofar as a refugee ‘present[s] himself without delay to the authorities and show[s] good cause for their illegal entry or presence’ as prescribed by Article 31 of the CSR, his/her presence is lawful within the meaning of Article 18. Importantly, the obligation to present ‘without delay’ does not translate into a duty to claim refugee status immediately upon arrival. On the contrary, the drafters considered that only situations of ‘prolonged illegal presence’ were clearly excluded.<sup>227</sup> The assessment must be made with regard to the special situation of refugees, recognizing factors that can affect a decision to present a claim such as language barriers, mistrust of officials or traumatizing experiences.<sup>228</sup>

Thus, an asylum seeker who is admitted to a status determination procedure in compliance with CSR article 31 must be considered ‘lawfully in’ the host country. However, in many developing countries there is no formalized status determination procedure in place to assess asylum claims. The CSR does not require states to operate with a formal system to determine refugee status. In these cases a refugee risks being held hostage to a decision not to consider the asylum application. Hathaway, focusing on the declaratory status of refugees, argues with persuasive force that the State then must be taken to have acquiesced in the asylum seekers’ claim to be a refugee.<sup>229</sup> Consequently, the rights must be immediately granted to them.<sup>230</sup>

In sum, international refugee law arguably provides a right for asylum seekers to engage in self-employment.

### 5.2.3 The standard of treatment

Refugees lawfully in the territory are entitled to ‘*treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances*’.

The provision confers *at least* equal rights to the standard of entitlements commonly enjoyed by aliens. The legal basis for the general right to self-employment for aliens can be domestic laws

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<sup>226</sup> The UN Human Rights Committee has interpreted the term: ‘The question whether an alien is ‘lawfully’ within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, *provided they are in compliance with the State’s international obligations*’[emphasis added]. HRC GC No.27, UN Doc. HRI/GEN/1/Rev.7, May.12, 2004, para.4.

<sup>227</sup> Statements of Mr. Herment of Belgium, UN Doc. E/AC.32/SR.40, Aug.22, 1950, at 4-6. Cited in Hathaway (2005), p.391.

<sup>228</sup> Hathaway (2005), p.179.

<sup>229</sup> Ibid., p.184-185.

<sup>230</sup> Ibid.

and practices, bilateral or multilateral agreements, or de facto enjoyment – in any case the right automatically accrue to refugees as well.<sup>231</sup> The wording ‘aliens generally’ indicates that preferable treatment accorded to citizens of selected partner countries will not be extended to refugees. Thus, treatment prescribed in inter-state free trade agreements or economic unions were not intended to inhere in refugees.<sup>232</sup> For example, the EEA agreement permitting citizens from Norway, Iceland and Liechtenstein to work within the EC member states area cannot be relied upon by refugees.<sup>233</sup> However, if such preferential treatment *in fact* applies in a generalized manner, refugees are entitled to equal treatment.<sup>234</sup>

Importantly, the ‘aliens generally’ standard only represents the minimum threshold for the rights of refugees.<sup>235</sup> The provision also entitles refugees to treatment ‘as favourable as possible’. The discussions in the *travaux* imply that this addition was a result of a conscious effort among the delegates to encourage the promotion of refugee rights.<sup>236</sup> This creates an obligation ‘to give consideration to the non-application to refugees of limits generally applied to other aliens’.<sup>237</sup> The provision should be interpreted broadly, in conjunction with the states’ duty to ‘as far as possible facilitate the assimilation and naturalisation of refugees’.<sup>238</sup>

The terms ‘in the same circumstances’ implies that refugees generally have to satisfy the same general requirements as other aliens. An exception is provided for in the existence of ‘requirements which by their nature a refugee is incapable of fulfilling’.<sup>239</sup> This entails a duty to acknowledge the specific predicament of refugees and consider whether it should result in exemptions to the general requirements. Often formal requirements demand certifications, identity papers or other official documentation in order to be entitled to a certain right. However, because of the severing of ties with the home state such documentation could prove impossible to obtain for the refugee. For example, the inability to provide officially certified identity papers should not automatically prevent a refugee’s right to engage in self-employment. Another pertinent example is the practice of some states of applying excessive fees on work permits, making it impossible for refugees to access employment.<sup>240</sup>

Thus, asylum-seekers are at a minimum entitled to equal treatment as aliens generally as regards the right to self-employment. The potential advantages are however tempered by the fact that most States, including in the developing regions, routinely imposes general restrictions on aliens.

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<sup>231</sup> Ibid., p.727.

<sup>232</sup> “The article is not intended to relate to rights specifically conferred by bilateral treaty and which are not intended to be enjoyed by aliens generally’. Comments of the Committee on the Draft Convention,” UN Doc. E/AC.32/L.32/Add.1, 10 February 1950, pp.2-3.

<sup>233</sup> See EEA agreement Article 28.

<sup>234</sup> Hathaway (2005), p.199.

<sup>235</sup> Weis (1995), p.57: “The provision entails that the minimum standards of treatment of aliens under international law apply also to refugees.”

<sup>236</sup> Ibid.

<sup>237</sup> Hathaway (2005), p.200.

<sup>238</sup> CSR Article 34.

<sup>239</sup> CSR Article 6.

<sup>240</sup> According to a 2008 report from the U.S. Committee for Refugees and Immigrants (USCRI), refugees and asylum seekers have to invest \$25,000 in Zambia in order to be eligible for a self-employment permit. Available at: <http://www.refugees.org> [Sited 31 May 2010].

## 5.3 Article 17 - Wage-earning employment

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

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

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

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

### 5.3.1 Wage-earning employment

Article 17 provides for the right to ‘engage in wage-earning employment’. The term implies employed activities in exchange of remuneration. The term was broadly conceived, meant to cover all paid employment.<sup>241</sup> Grahl-Madsen suggests that it ‘...comprises employment as factory workers, farmhands, office workers, salesmen, domestics and any other kind of work the remuneration for which is in the form of a salary as opposed to fees or profits. It seems reasonable to include waiters, salesmen and others who are remunerated to a greater or smaller extent in the form of tips, commissions or percentages; the crucial point is apparently whether they may be said to have an employer and are not free agents.’<sup>242</sup> The liberal professions such as doctors and solicitors are excluded but not persons assisting members of such professions.<sup>243</sup>

Moreover, the right to *engage* in wage-earning employment include, apart from the right to *perform work*, the right to look for, and to accept job offers extended to them.<sup>244</sup> Of course, the article does not establish a right to free choice of a preferred type of employment. Evidently, one has to consider what type of limitations that exists naturally in the employment market.<sup>245</sup>

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<sup>241</sup> Weis (1995), pp.147-148.

<sup>242</sup> Grahl-Madsen (1963, re-published 1997), p.70.

<sup>243</sup> Weis (1995), p.148.

<sup>244</sup> Hathaway (2005), p.748.

<sup>245</sup> Ibid.

### 5.3.2 Lawfully staying

In order to be entitled to the rights set out in Article 17 the refugee has to be considered ‘lawfully staying’ in the state’s territory. The wording implies a settling down for a length of time in compliance with the national immigration policy. Unlike Article 18, the article contains the additional term *staying*. By comparison, other provisions of the CSR condition entitlements on notions of ‘lawfully in’ or ‘habitual residence’.<sup>246</sup> Despite the subtle shift of words it appears that it was intended to imply a rather substantive change in conditions. Indeed, the discussions in the *ad hoc committee* indicate that the drafters intended to create an intermediate attachment level between legal presence and habitual residence.<sup>247</sup>

Furthermore, due to problems devising an English term with equivalent connotations, the terms ‘lawfully staying’ are to be interpreted as an approximation of the French notion of ‘résidant régulièrement’.<sup>248</sup> This is important because the word ‘résidant’ in French also encompasses a temporary resident, and therefore ‘very wide in meaning’.<sup>249</sup> Thus, while very short periods of stay are excluded, it is clear that no demands for permanent resident status or domicile can be put forward under this provision. Hathaway derives from the *travaux* that the refugee’s de facto circumstances should be the focal point of the deliberation.<sup>250</sup>

While it is arguable that Article 17 rights inhere in recognized refugees, the question is whether asylum-seekers are entitled to Article 17 benefits. The answer, however, is not straightforward.

Scholars have taken various approaches to the scope of legal stay. Grahl-Madsen focuses on the *de facto* circumstances arguing that lawful stay may be implied if an individual is allowed to remain in a territory for a period that exceeds the period of a general visitor’s visa, whether or not he is in possession of a residence permit.<sup>251</sup> Goodwin-Gill and McAdam are more restrictive, suggesting that ‘evidence of permanent, indefinite, unrestricted or other residence status, recognition as a refugee, issue of a travel document, or grant of a re-entry visa, will raise a strong presumption that the refugee should be considered as lawfully staying in the territory of a contracting state.’<sup>252</sup> Perhaps most in line with the *travaux préparatoires*, Hathaway argues that legal stay is characterized by an ‘officially sanctioned, ongoing presence’ within a state party territory.<sup>253</sup>

The UNHCR suggests that ‘...where a person enters a country illegally, but is allowed to stay because of personal circumstances sufficiently precarious to bring into play the *non-refoulement* obligation, it would be consistent with the intent of the framers of the 1951 Convention to regard that person as lawfully staying for the purposes of the Convention.’<sup>254</sup>

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<sup>246</sup> See CSR Article 18 and 14 respectively.

<sup>247</sup> Weis(1995), p.371-72.

<sup>248</sup> VCLT Art.33(1).

<sup>249</sup> Weis (1995), p.372 (but presumably not as wide as legal presence, earlier referred to as having ‘very broad meaning’).

<sup>250</sup> Hathaway (2005), p.187.

<sup>251</sup> Grahl-Madsen (1966), pp. 354-354.

<sup>252</sup> Goodwin-Gill and McAdam (2007), p.526.

<sup>253</sup> Hathaway (2005), p.730.

<sup>254</sup> UN High Commissioner for Refugees, "Lawfully Staying" - A Note on Interpretation, 3 May 1988, available at: <http://www.unhcr.org/refworld/docid/42ad93304.html> [accessed 6 October 2009], para.21.

Turning to State practice regarding the interpretation of legal stay, there are significant disparities among the state parties.<sup>255</sup> Even within the European Union's system for harmonization of asylum policy, the practices of member states vary greatly.<sup>256</sup> Most of the member states allow asylum-seekers to work, but under a variety of restrictive conditions.<sup>257</sup> In many developing states neither refugees nor asylum-seekers have access the labour market.<sup>258</sup> Another widespread practice, prevalent in both developed and developing states, is to favour asylum-seekers from selected states in their access to employment while generally limiting access to asylum-seekers belonging to other nationalities.<sup>259</sup> This may constitute a breach of the prohibition on discrimination between refugees in Article 3 of the CRSR.<sup>260</sup>

A problem when investigating State practice is that governments or other generators of practice usually does not make explicit reference to how the State interprets a particular ratified treaty. The normal approach is that the state *assumes* or *considers* that the practice in question is compliant with its international human rights obligations. An exception is the English Court of Appeal which has denied asylum seekers the right to undertake wage-earning employment with explicit reference to an interpretation of the CSR.<sup>261</sup> Another difficulty is that such practice might not be the result of a good faith interpretation, but rather an attempt to dilute the asylum instrument.

Overall, no concordant state practice can be found that 'establishes the agreement of the parties regarding its interpretation'.<sup>262</sup> What is certain is that 'lawful stay' must be regarded as something more than 'lawful presence' and less than 'habitual residence'. However, it is open to argue that 'lawful stay' accrues to asylum-seekers after a certain amount of time in the host state territory, especially if the determination procedure is excessively prolonged.<sup>263</sup>

The CSR was ratified in 1951 and does not require states formally to adjudicate refugee status or provide refugees with any form of immigration status.<sup>264</sup> In fact, most less developed countries do not assess refugee claims in a formal status determination procedure.<sup>265</sup> Given this, it is clear that satisfaction of the requirements must depend on the *de facto* circumstances, not whether or not formal status has been confirmed. Thus, in the absence of a refugee verification procedure, the claimant must be treated as a *bona fide* refugee from the very outset of presence in the

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<sup>255</sup> Ibid.,p.9: The UNHCR concludes that: 'The term 'lawfully staying' has no generally recognized interpretation although it describes a presence integral to the enjoyment of fundamental rights'.

<sup>256</sup> See Chapter 4.2.

<sup>257</sup> Ibid.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid.

<sup>260</sup> CSR Article 3 provides that '[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.'

<sup>261</sup> *R v. Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants and ex parte B (R v. Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants and ex parte B*, 1996 4 All ER 385. Simon Brown LJ stated at 401h: '[N]o obligation arises under Art.24 of the 1951 Convention [national treatment regarding social security] until asylum seekers are recognized as refugees'.

<sup>262</sup> VCLT Art. 31(3) (b).

<sup>263</sup> Cholewinski (2004), p.3.

<sup>264</sup> Hathaway (2005),p.180-181.

<sup>265</sup> Ibid.

territory. Asylum-seekers in many developed countries are facing a similar problem where the procedure is hampered by excessive backlogs. Consequently, claimants may have to wait for several years to have their application finally determined. Where a delay in the processing of an application cannot be attributed to the claimant, valid legal arguments could be put forward to support the view that asylum-seekers at some point acquire the attachment level of ‘legal stay’

The lack of procedural provisions in the CSR indicates that the drafters did not predict the emergence of status determination procedures of such a comprehensive scale. Somewhat ironic, the CSR was originally a response to the prevailing situation in Europe in the aftermath of the WW2 and its scope did only encompass refugees originating from within the European area. Nevertheless, the CSR is a ‘living instrument’ which must be interpreted in light of present day conditions.<sup>266</sup> At the same time one must have due regard to the historical intentions of the drafters.<sup>267</sup> Indeed, ‘while [the Convention’s] meaning does not change over time, its application will’.<sup>268</sup>

The principal intention of the Conference of Plenipotentiaries was to assure refugees the ‘widest possible exercise of their fundamental rights and freedoms’.<sup>269</sup> In this regard it is important to keep in mind that asylum-seekers may very well be refugees even if they are not recognized.<sup>270</sup> In cases where backlogs have created excessive delays, the prolonged denial of access to employment does not appear reconcilable with the intention of the drafters.

Thus, both the intention of the drafters and the present day conditions support the argument that asylum-seekers at some point may satisfy the requirements of ‘legal stay’. However, the support for such an understanding of legal stay is still limited. Unfortunately the CSR lacks a mechanism to adequately scrutinize compliance or provide authoritative interpretations on the stipulated rights. While Article 35(2) of the CSR could have provided the basis for a periodic reporting system, no steps have yet been taken by the UNHCR to subject implementation of the CSR to a formal process of interstate enquiry.<sup>271</sup> Thus, there no forum in which states are required to engage in discussions of their compliance with CSR – let alone for individual petitions.<sup>272</sup> Due to the inadequate monitoring opportunities of the UNHCR, human rights groups have advocated the use of the UN monitoring body mechanisms in order to address the human rights of refugees.<sup>273</sup>

### 5.3.3 The standard of treatment

Refugees lawfully staying in a state territory are entitled to ‘the most favourable treatment accorded to nationals of a foreign country in the same circumstances as regards the right to engage in wage-earning employment’.

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<sup>266</sup> See Chapter 3.

<sup>267</sup> VCLT Art.31.

<sup>268</sup> *Sepet and Bulbul v. Secretary of State for the Home Department*, 20 March 2003, UKHL 15 (UK HL), Lord Bingham.

<sup>269</sup> CSR Preamble.

<sup>270</sup> *Supra* n.42, UNHCR Handbook, para.28.

<sup>271</sup> Dent (1998), pp.21-22.

<sup>272</sup> *Ibid.*

<sup>273</sup> See e.g. Amnesty International, ‘The UN and refugees’ human rights: A manual on how UN human rights mechanisms can protect the rights of refugees (1997).

The terms indicate that refugees may rely on preferential treatment accorded to any category of aliens by treaty or by practice. As opposed to the treatment owed to refugees in Article 18, benefits granted under bilateral or multilateral treaties alike, are included. The *travaux préparatoires* support this view.<sup>274</sup> It appears that the states' reason for accepting the higher contingent standard was the fact that refugees were denied the reliance on their Governments to negotiate exceptions for them.<sup>275</sup> Thus, the terms were broadly conceived: economic or customs unions as well as other special co-operation agreements fall under the scope of the provision. This is confirmed by the fact that the Scandinavian and Benelux states found it necessary to enter reservations to this provision. Evidently, the reason was a wish to reserve the exceptional standard to the citizens of regional partner states.<sup>276</sup> At present, only eight states maintain blanket reservations to Article 17.<sup>277</sup> In addition the Scandinavian and the Benelux countries keep their reservations regarding most-favoured nation treatment.<sup>278</sup>

As a result, the EU member states that did not enter reservations are obliged to allow refugees the right to engage in wage-earning employment on the same conditions as citizens from EU member states. Indeed, the European Union so-called 'Qualification Directive' expressly recognizes the right of refugees to 'engage in employed or self-employed activities...immediately [albeit] after the refugee status has been granted'.<sup>279</sup> However, this directive only covers recognized refugees.

Furthermore, refugees may benefit from the exemptions enumerated in Article 17(2). This paragraph exempts refugees from 'restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market' if the refugee has:

- (a) 'completed three years' residence in the country'
- (b) 'a spouse possessing the nationality of the country of residence'
- (c) 'one or more children possessing the nationality of the country of residence'.<sup>280</sup>

Importantly, by inserting the terms '[i]n any case' at the beginning of Article 17(2), it is implied that the exceptions listed above apply to all refugees irrespective of residence requirements, such as asylum seekers.<sup>281</sup>

<sup>274</sup> Weis(1995), pp.129-130 derives from the *travaux*: 'Most favourable treatment means the best treatment which is accorded to nationals of another country by treaty or usage. It also includes rights granted under bilateral or multilateral treaties on the basis of special provisions or the 'most-favoured-nation' clause.'

<sup>275</sup> See statement of Mr.Rain of France, 26 January 1950, UN Doc. E/AC.32/SR.13, p. 2.

<sup>276</sup> See for example the Belgian reservation: 'In all cases where the Convention grants to refugees the most favourable treatment accorded to nationals of a foreign country, this provision shall not be interpreted by the Belgian Government as necessarily involving the régime accorded to nationals of countries with which Belgium has concluded regional customs, economic or political agreements.' Available at:

[http://treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg\\_no=V~2&chapter=5&Temp=mtdsg2&lang=en](http://treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en) [Sited 6 November 2009].

<sup>277</sup> Ibid. i.e. Austria, Botswana, Burundi, Ethiopia, Iran, Latvia, Papua New Guinea, Sierra Leone.

<sup>278</sup> Ibid.

<sup>279</sup> EU Qualification Directive, Art.26(1).

<sup>280</sup> CSR Art.17(2). Of less contemporary importance is the exemption on the ground that the refugee 'was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned'.

<sup>281</sup> CSR Article 17(2).

The word ‘residence’ in paragraph 2(a) is not qualified and does not therefore refer to any legal notion, but rather implies a *de facto* residence.<sup>282</sup> Therefore, residence refers to physical presence irrespective of whether or not the presence was authorized.<sup>283</sup> Arguably time spent in the host state since the lodging of an asylum application must be counted towards satisfaction of the three year threshold<sup>284</sup>. Evidence of periods of unauthorized stay before the lodging of such application should also be counted in.<sup>285</sup>

Under paragraph 2(b) a refugee who is married to a citizen of the host country is entitled to immediate exemption from labour market restrictions. However, the second sentence introduces an exception where the refugee ‘has abandoned [his/her] spouse’. From the discussions in the travaux préparatoires it may be derived that this refers to formal abandonment, hence physical cohabitation is not required.<sup>286</sup> Indeed, Grahl-Madsen argues that even if legally separated, the refugee may rely on Article 17(2)(b). This exemption may be beneficial to asylum seekers as it entails immediate exemption. However, pure marriages of convenience are clearly excluded.<sup>287</sup>

Alternative (c) gave rise to debate from some of the state parties during the drafting of the Convention. The U.K. was a particularly vocal opponent. This is because a refugee’s child born in U.K. territory automatically would acquire citizenship. It was claimed that this would result in efforts to exploit the system by timing the arrival in the U.K to coincide with the child-birth, hence securing access to the labour market.<sup>288</sup> In the end, the majority view prevailed and it was decided to keep clause (c) in its present shape. As a result, the U.K. opted out of sub-paragraph (c) by virtue of a specific reservation.<sup>289</sup>

Furthermore, by simply stating ‘children’ the provision does not distinguish between children born in or out of wedlock. Despite some views to the contrary, that was the view endorsed by the drafters.<sup>290</sup>

Another important point is that exemption from restrictive measures does not apply for purposes other than the ‘protection of the national labour market’. Consequently, measures imposed for the purposes of national security, *e.g.* restrictions on employment in sensitive industries, are not prohibited. Moreover, it may be inferred from the text that the prohibition aims both at measures restricting aliens’ involvement and measures restricting employers’ ability to hire aliens.<sup>291</sup>

The provision does not, however, indicate that refugees must be granted national treatment in relation to labour-market restrictions.<sup>292</sup> General conditions of entry or stay imposed on aliens

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<sup>282</sup> Weis (1995), p.148.

<sup>283</sup> Ibid.

<sup>284</sup> Hathaway (2005), p.756.

<sup>285</sup> Weis (1995), p.148.

<sup>286</sup> Hathaway (2005), p.758.

<sup>287</sup> Weis (1995), p.148.

<sup>288</sup> Hathaway (2005), p.759.

<sup>289</sup> Supra n.276.

<sup>290</sup> The President of the Conference stated that Art. 17(2)(c) ‘covered illegitimate as well as legitimate children’. Cited in Hathaway (2005), p.760.

<sup>291</sup> See also Dent (1998), p.50.

<sup>292</sup> Weis (1995), p.148.

are not excluded.<sup>293</sup> For example, a general requirement to obtain a work permit is not waived, but has to be accorded *ex officio* if any of the conditions enumerated in the second paragraph are satisfied.<sup>294</sup>

Weis, apparently inferring from the text's wording 'restrictive measures *imposed*', assumes that the paragraph does not include the imposition of restrictions in the future.<sup>295</sup> This writer disagrees with such a narrow understanding of the scope of this provision. A treaty's terms must be interpreted in context and in light of the treaty's object and purpose.<sup>296</sup> The purpose of these exemptions was to favour those refugees who enjoyed a special link with the host state without satisfying the requirement of lawful stay.<sup>297</sup> With this in mind, and acknowledging the constant change of immigration and asylum policies, Weis' assumption simply cannot be maintained. If such an understanding is applied, all restrictions introduced during the almost sixty years after ratification would be excluded from the provision. This would effectively deprive the provision of any meaningful protection. Thus, although ambiguously framed, it cannot reasonably be inferred from the terms that they only refer to restrictions already in place at the time of ratification.

The third paragraph of Article 17 provides that the 'Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals'. From the text it is clear that no duty of result can be invoked.<sup>298</sup> However, the paragraph entails a duty of 'sympathetic consideration'. Thus the State Parties must consider efforts to improve the labour market access of refugees in light of the overarching duty to 'as far as possible facilitate the assimilation and naturalization of refugees'.<sup>299</sup>

## **5.4 Article 19 - Liberal profession**

***1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.***

***2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.***

What constitutes a 'liberal profession' is not defined anywhere in the Convention. There is no clear established meaning of the term. Medical doctors and lawyers were explicitly mentioned by the drafters as examples but the precise scope of the terms was not further

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<sup>293</sup> Ibid.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid. [emphasis added].

<sup>296</sup> VCLT Art.31.

<sup>297</sup> Dent (1998), p.50.

<sup>298</sup> See also Hathaway (2005), p.762.

<sup>299</sup> CSR Article 34.

elaborated.<sup>300</sup> According to Weis the terms include ‘...lawyers, doctors, dentists, veterinarians, engineers and architects working on their own account. It may also include pharmacists, artists and accountants.’<sup>301</sup> Grahl-Madsen and Robinson present similar lists, although Robinson warned that ‘[t]here is no clear-cut distinction between certain liberal professions (for instance, pharmacists, engineers) and either self-employment (owner of an engineering firm or a pharmacy) or wage-earner (non-self-employed engineer, pharmacist, and chemist).’<sup>302</sup> Indeed, with a view to the minimalist approach taken in Article 19, there are valid reasons for a strict interpretation of ‘liberal profession’.

This article requires the same incremental level of attachment as Article 17, namely ‘lawfully staying’. Moreover, like in Article 18, the provision only prescribes treatment ‘not less favourable than that accorded to aliens generally in the same circumstances’. In practical terms this standard is of little help to refugees because there is usually no general right for aliens to access the professions. Thus, in effect, the *least* favourable parts of Article 17 and 18 are combined in one provision.

Perhaps most severely still, even assuming that a refugee satisfies the above criteria, the recognition of the diplomas still remains at the discretion of ‘competent authorities’ of the state. Thus, professional associations authorized by the state may themselves refuse to recognize certifications obtained outside the host country or impose other requirements effectively barring the access to the profession. The greatest problem faced by refugees is recognition of their qualifications, yet under Article 19 such recognition remains at the discretion of the state.

## 5.5 Other legal grounds

Furthermore, a growing body of scholars argues that denying asylum seekers basic social and economic rights may constitute an infringement of the principle of non-*refoulement*.<sup>303</sup> The argument is that the prohibition on States to ‘expel or return a refugee in *any matter whatsoever*’ to a country of persecution also includes more indirect forms of *refoulement*.<sup>304</sup> This dynamic interpretation is based on the broad wording of the prohibition and its status as the ‘undisputed cornerstone of refugee law’.<sup>305</sup> Arguably, if asylum-seekers are denied both public assistance and access to employment, forcing them to leave the territory, this could effectively amount to an infringement of the *non-refoulement* principle.

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<sup>300</sup> See statements of Mr. Cha of China, 26 January 1950, UN Doc. E/AC.32/SR.13, p. 17; Mr. Cuvelier of Belgium, (ibid), p.18; and Mr.Larsen of Denmark, 23 August 1950, UN Doc. E/AC.32/SR.41, p.18.

<sup>301</sup> Weis(1995), p.158.

<sup>302</sup> Hathaway (2005), p.800.

<sup>303</sup> Cholewinski (2004), p.3.

<sup>304</sup> [emphasis added]

<sup>305</sup> Cholewinski (2004), p.3.

In an English Court of Appeal decision from 1993 it was claimed that the withdrawal of all public assistance for asylum seekers amounted to ‘constructive *refoulement*’.<sup>306</sup> While the Court regarded the Regulations in force as ‘so uncompromisingly draconian in effect’ that they were held *ultra vires*, it did not explicitly accept the notion of constructive *refoulement*. However the Court found that the ‘Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma: the need either to abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution.’

Moreover, in a High Court ruling concerning whether local authorities under the national legislation had a duty to provide food and shelter to asylum-seekers who would otherwise be left destitute, the Court found it ‘impossible to believe that Parliament intended that an asylum-seeker, who was lawfully here and who could not lawfully be removed from the country, should be left destitute, starving and at the risk of grave illness and even death because he could find no one to provide him with the bare necessities of life’. Judge Collins concluded that if this was the intention of the Government, ‘it would almost certainly put itself in breach of(...)the Geneva Convention.....’<sup>307</sup> While a limited recognition of the notion of constructive *refoulement* may be implied from these court cases, its status as a matter of international refugee law is still contested.<sup>308</sup> In the European context, jurisprudence from the European Court of Human Rights (ECtHR) may offer stronger protection from enforced destitution.<sup>309</sup>

The question has also been raised whether the denial of socio-economic rights such as the right to work could constitute a violation of Article 31 CSR. This provision prohibits the imposition of ‘penalties’ on refugees who enter or are present within their territory without authorization, if certain requirements are met. It could be argued that if an asylum seeker entering a territory without authorization is denied socio-economic rights as a direct result, this could constitute imposition of a *penalty*. A conclusion from EXCOM has stated that asylum seekers ‘should not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful’.<sup>310</sup> To date however, this interpretation has gained little momentum.

As already indicated, the CSR contrast unfavourably with other international human rights conventions in that it does not provide for a mechanism to examine compliance with the stipulated rights. Thus, the following chapter undertakes to perform an investigation of a selection of provisions in international human rights law relevant to asylum-seekers.

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<sup>306</sup> *R. v. Secretary of State for Social Security, ex parte Joint Council for the welfare of immigrants and ex parte B*[1996] 4 All ER 385 (EN CA).

<sup>307</sup> *R v. Westminster City Council ex parte M* (1997) 1 CCLR 85.

<sup>308</sup> See the narrow understanding of the scope of *non-refoulement* in *Sale v. Haitian Centers Council*, 21 June 1993, 509 US 155, p.162.

<sup>309</sup> See Chapter 7.1.

<sup>310</sup> UNHCR Executive Committee Conclusion: Protection of Asylum-Seekers in Situations of large-Scale Influx, No.22(XXXII)(1981),Para.B.2.(a).

# 6 International Human Rights law

## 6.1 Overview

In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR). Drafted as a common standard of achievement for all peoples the Declaration spelt out basic civil, political, economic, social and cultural rights that should inhere in all human beings. While the general view is that the UDHR is not in itself legally binding, it is widely accepted as expressing fundamental norms of human rights that states should adhere to. In fact, some scholars argue that the declaration or selected elements of it are reflective of international customary law.<sup>311</sup> The UDHR, together with the International Covenant on Civil and Political Rights (ICCPR); its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (ICESCR), form the so-called International Bill of Human Rights.

The International Human Rights protection regime rests mainly upon the aforementioned two legally binding UN Covenants and the output of its treaty supervisory bodies.<sup>312</sup> In addition, seven treaties address aspects of human rights for vulnerable groups or address particular topics.<sup>313</sup>

While the entitlement to CSR rights only accrue to refugees upon satisfaction of a system of rather complex attachment requirements, the language of the human rights provisions are more inclusive. The rights provided for in the Covenants are generally granted to ‘everyone’, ‘all persons’ or ‘all peoples.’<sup>314</sup> The wording and the very notion that underpins human rights implies that they apply to everyone, thus including refugees and asylum-seekers.<sup>315</sup>

There are a few exceptions, *e.g.* ICESCR Article 2(3), which allows developing countries to ‘determine to what extent they would guarantee the economic rights’ to non-nationals, although within strict limitations. Furthermore, the enjoyment of the political rights enumerated in ICCPR Article 25 is only conferred upon citizens. While the common view is that the political rights contained in Article 25 should not inhere in aliens, there are divergent views as to what entails from ICESCR Article 2(3).<sup>316</sup> However, generally the ICESCR applies to non-nationals. The issues are subsequently discussed in detail.

Another important quality of international human rights law is the widely accepted notion that its various treaty systems to a considerable extent contain overlaps, frequently expressed in terms of

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<sup>311</sup> Simma and Alston (1988-1989), pp.84-88.

<sup>312</sup> Supra n.10-11.

<sup>313</sup> See *e.g.* the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>314</sup> See *e.g.* ICESCR Article 1, 6, 7 and 9 and ICCPR 6, 7 and 9.

<sup>315</sup> VCLT Art.31.

<sup>316</sup> See chapter 6.2.2 (ii).

*the interrelated, interdependent and indivisible character of human rights.*<sup>317</sup> Historically, focus has often been directed towards a perceived division between civil and political rights on the one hand, and economic, social and cultural rights on the other. Both in law and in fact however, there is considerable interdependence as well as instances of direct overlap between the ICCPR and the ICESCR. Accordingly, a holistic approach is appropriate when considering the nature and scope of States obligations under international human rights law.<sup>318</sup>

The subsequent sections provides an analysis of the relevant ICESCR provisions concerning the question of access to employment. In addition, the potential application of the free-standing equality provision in the ICCPR Article 26 is investigated.

## **6.2 The ICESCR Article 6**

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

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

### **6.2.1 Content of the right to work**

Recalling from Chapter 1 that, by virtue of the terms ‘recognize’, Article 6 does not require the States Parties to *guarantee* the right to work. Such an interpretation entails a duty on States to provide work for all individuals able and willing to do so.<sup>319</sup> In a market economy where the amount of jobs made available is conditional upon the needs of society, such a guarantee is unsustainable.<sup>320</sup> Thus, while the main objective was to achieve full employment, it was generally considered by the drafters that this could only be achieved by way of progressive realization.<sup>321</sup> The content of this notion is addressed below under States obligations.

The reference to ‘work which [s]he freely chooses or accepts’, implies not being forced to engage in employment. Moreover, the provision contains no distinctions as to forms of work, thus indicating that the right encompasses both self-employed and wage-paid employment.<sup>322</sup>

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<sup>317</sup> See e.g. the Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993 UN General Assembly A/CONF.157/23, para.5.

<sup>318</sup> Rehman (2003), p.7.

<sup>319</sup> Craven (1995), p.204.

<sup>320</sup> Ibid.

<sup>321</sup> Ibid., pp.195-196.

<sup>322</sup> The only limitation is that employment must be ‘productive’. See Article 6(2). See also CESCR GC No.18, para.6.

Indeed, the terms ‘chooses or accepts’ may be taken to imply self-employment and wage-employment respectively.<sup>323</sup>

In this paper, the key terms are ‘opportunity to gain [his/her] living by work’. A literal interpretation clearly suggests that this entails the right to access employment.<sup>324</sup> Furthermore, it may be taken to imply that remuneration should be consistent with an adequate standard of living as prescribed by Article 11 of the ICESCR.<sup>325</sup> However, it would be a gross misconception to conclude that Article 6 is merely a means of satisfying an adequate standard of living. On the contrary, the crucial element of Article 6 is its emphasis on *gaining* one’s living. In the moral connotations of the term ‘gain’, the social component of work is underscored: if you earn money, you are justly compensated for something you do for the benefit of others.<sup>326</sup> Work according to a social rationale thus has to do with one’s relationship and participation in society, and includes the reciprocal acceptance and gratification between individual and society.<sup>327</sup> Thus, the opportunity to gain one’s living by work is seen as having intrinsic value. Indeed, the focus on the inherent value of work permeated the drafting process and has been acknowledged by the CESCR as well.<sup>328</sup> The right to access employment, which is the right relevant in this paper, may be broken down into physical and equal access to employment and a right to seek, obtain and impart information on the means of gaining access to employment.<sup>329</sup>

## 6.2.2 The States Parties obligations

Article 6(2) denotes various steps to be taken in order to achieve full realization of the right to work in the 1<sup>st</sup> paragraph. As these measures are mostly concerned with policies to progressively achieve full employment they are not directly relevant to this paper. However, the term ‘include’ implies that the second paragraph of Article 6 was not intended to provide an exhaustive list of prescribed measures.<sup>330</sup>

In the ICESCR, the States Parties general obligations in relation to each particular right are stated in Article 2 of the Covenant’s part II. This separation of rights and duties is merely for conceptual and practical purposes, but serves to underscore that a right not by necessity carries with it a corollary duty for the State to act. For example there is a limit to how far the State are obligated to protect an individual right from interference by third parties.

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<sup>323</sup> VCLT Article 31.

<sup>324</sup> Ibid. See also Craven (1995), p. 204-217 and CESCR GC No.18, para.6.

<sup>325</sup> Craven (1995), p.205.

<sup>326</sup> International Human Rights Internship Program (IHRIP) and the Asian Forum for Human Rights and Development (Forum-Asia). ‘Circle of Rights: Economic, Social and Cultural Rights Activism: A Training Resource’. University of Minnesota Human Rights Resources Center (2000), module 10. Available at: <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/toc.htm> [Sited 31 may 2010].

<sup>327</sup> Ibid.

<sup>328</sup> See discussions of the *travaux* in Craven (1995), pp.195-203; CESCR GC No.18, para.1.

<sup>329</sup> CESCR GC No. 18, para.12.b.

<sup>330</sup> CESCR GC No.18, para.6 and Craven (1995), p.200.

During the drafting process questions arose as to the relationship between Article 6(2) and Article 2(1).<sup>331</sup> Some delegates inquired to what extent Article 6(2) modified the general Article 2(1).<sup>332</sup> However, it was agreed that Article 6(2) was not intended to limit Article 2 but rather to outline and elaborate on those conditions which were required for the full realization of the right to work.<sup>333</sup> Thus, in order to determine the precise nature of the States obligations in relation to Article 6, it must be interpreted in light of the Article 2.

The content of the State duty of progressive realization as expressed in Article 2(1) is examined below. The examination features an investigation of the authoritative output of the CESCR, as well as the General Limitations clause of Article 4. The next section discusses the duty of non-discrimination required by Article 2(2) of ICESCR, as well as the related Article 2(3).

## **(ii) ICESCR Article 2(1) – Progressive realization**

The principal obligation of State parties under the Covenant is ‘to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’<sup>334</sup>

The wording implies that while the ultimate objective is to achieve ‘full realization’ of the Covenant rights, the required steps taken shall aim at achieving this over time, not necessarily immediately.<sup>335</sup> Moreover, as opposed to the comparable provision in the ICCPR, the requirement to ‘take steps’ is conditioned on the availability of resources. These factors have led to claims that the obligations in the ICESCR, due to its ‘progressive nature’, are not justiciable.<sup>336</sup>

However, although the ICESCR provides for progressive realization and acknowledges the constraints due to limited available resources, it also imposes on States obligations that are of immediate application. The Committee has affirmed this in General Comment No.3.<sup>337</sup>

The Committee asserts that the duty ‘to take steps’ towards full realization of the right are of immediate effect. These steps should be ‘deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant’.<sup>338</sup>

The Committee further elaborates that:

[T]he fact that realization 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 is

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<sup>331</sup> Craven (1995), p.203.

<sup>332</sup> Ibid., p.200.

<sup>333</sup> Ibid., p.203.

<sup>334</sup> ICESCR Art 2(1).

<sup>335</sup> VCLT Art.31.

<sup>336</sup> See overview in Langford (2008), p.29.

<sup>337</sup> CESCR GC No.3, para.1.

<sup>338</sup> Ibid., para.2.

on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.<sup>339</sup>

The provisions of the ICESCR may be interpreted according to a tripartite typology where the rights are seen as entailing state obligations to *respect*, *protect* and *fulfil*.<sup>340</sup> The *obligation to respect* implies a State duty to refrain from indirect or direct interference in the enjoyment of a right.<sup>341</sup> The *obligation to protect* requires the State to take measures to prevent third parties from interference with the rights of the individual.<sup>342</sup> The *obligation to fulfil* requires the State to take the necessary measures to ensure the satisfaction of the needs of the individual that cannot be secured by the personal efforts of that individual.<sup>343</sup> This tripartite typology constitutes a useful tool in clarifying the nature and scope of State obligations and will be utilised in the present analysis.<sup>344</sup>

The duty to *respect* the right to work is the element of the greatest concern to asylum-seekers. State-imposed restrictions on access to the labour market for asylum-seekers is widespread in both developed and developing countries. In light of this practice, it is interesting to note that France and the UK have considered it necessary to enter reservations interpreting Article 6 as not preventing them from imposing restrictions on aliens' access to employment.<sup>345</sup>

One of the central elements of the *right* to work is arguably the right to access the labour market.<sup>346</sup> A corresponding state obligation to respect this right requires the States to *refrain* from interfering with this right. Moreover, the duty to respect could also impose obligations of a more 'positive' nature where a State party already has instituted restrictions on access to the labour market. In those instances, a duty to rectify those administrative or legislative requirements in breach of Article 6 is clearly implied.

Indeed, the guarantee to everyone of free access to the labour market without government interference is seen by some scholars as part of the core of the right to work.<sup>347</sup> As opposed to the obligations to *protect* and *fulfil*, the obligations to respect are normally cost-free because they require the State to abstain from action. Considering the limited amount of resources associated with implementation it can be viewed as a short step to assign the respect-bound obligations to the category of minimum core obligation.<sup>348</sup> In fact, the CESCR has for a long time maintained

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<sup>339</sup> Ibid., para.9.

<sup>340</sup> This method of analysis is adopted by the Committee in its General Comments. See also Eide ...et al (2001), pp.23-24.

<sup>341</sup> See e.g. CESCR GC No.18, para.22.

<sup>342</sup> See e.g. CESCR GC No.18, para.22.

<sup>343</sup> Craven (1995), p.109.

<sup>344</sup> For criticism of the tripartite typology, see Waldron (1993), p.25, and Koch (2005), p.81 ff.

<sup>345</sup> [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en) [Sited 2 June 2009].

<sup>346</sup> See chapter 6.2.1.

<sup>347</sup> Kallström(1992), p.357.

<sup>348</sup> Chapman (2002), p.11.

the view that States are under an obligation to ‘...ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’ provided for in the Covenant.<sup>349</sup>

The Committee arrived at this conclusion by virtue of a purposive interpretation of the nature of State obligations under the ICESCR. The Committee argued that if the Covenant were to be read in such a way as not to establish such a threshold, ‘it would be largely deprived of its *raison d’être*.’<sup>350</sup> As noted, the expert authority of the Committee’s interpretations, in combination with the State Parties’ general practice of not voicing objections during the stages of consultation processes, may constitute subsequent practice within the meaning of Article 31(3) (b) of VCLT.<sup>351</sup> Additional support for this interpretation may be found in certain provisions in the ICESCR, which expressly recognizes an obligation to realize a minimum core.<sup>352</sup>

An appropriate question is whether States parties are able to attribute their failure to discharge minimum essential levels of a Covenant right to the lack of resources. Originally, the Committee stated that the minimum core obligation has to be interpreted in light of resource constraints in the particular country.<sup>353</sup> Furthermore, the Committee emphasized that ‘even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.’<sup>354</sup> The effect of a failure to provide with minimum essential levels of a covenant right is to establish a *prima facie* violation that shifts the burden of proof to the State party.<sup>355</sup>

However, the Committee has shown a lack of consistency in its approach, in some instances referring to the minimum core obligation as ‘non-derogable’.<sup>356</sup> Given that Article 2(1) speaks of a duty to take steps ‘to the maximum of its available resources’, such an approach has been rightly criticised.<sup>357</sup> In any case, in its most recent General Comments the Committee has reverted to its original position.<sup>358</sup> Thus, when failing to meet the minimum essential levels of a particular Covenant right the State party must refute the presumption that violation has taken place.

Another question is whether these standards are international or State-specific.<sup>359</sup> On the one hand, the universal nature of the Covenant rights suggests that an international standard should be established.<sup>360</sup> On the other hand, the viability of establishing benchmarks from which to base assessments of compliance in developed and developing countries alike is questionable. In fact, while subsequent General Comments provide with a degree of specificity, attempts to quantify is generally not made.<sup>361</sup> Instead, it appears that the Committee prefers to leave this to the specific

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<sup>349</sup> CESCR GC No.3. para.10.

<sup>350</sup> Ibid.

<sup>351</sup> See Chapter 3.5.

<sup>352</sup> See e.g. Article 13, which requires the immediate realisation of the free primary education for all as part of the right to education. See Langford (2009), p.14.

<sup>353</sup> CESCR GC No.3., para.10.

<sup>354</sup> Ibid., para.11.

<sup>355</sup> Ibid., para.10.

<sup>356</sup> CESCR GC No.14., para.47.

<sup>357</sup> Langford (2008), p.493.

<sup>358</sup> Ibid.

<sup>359</sup> Craven (1995), p.141.

<sup>360</sup> Ibid.

<sup>361</sup> Langford (2008), p.494.

context, which can be gauged from its Concluding Observations.<sup>362</sup> Langford observes that the Committee often focuses on the existence of a national minimum level, which is examined for reasonableness and how it applies in the country.<sup>363</sup> Overall, given the complexity of establishing such standards it is plausible that the minimum core obligation must be understood in context of the general level of development in the State party. Indeed, this can generally be seen in many of the Committee's Concluding Observations.<sup>364</sup>

In its General Comment on Article 6 the CESCR supported the notion that 'State parties are under the obligation to respect the right to work, by *inter alia*, (...)refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups....'.<sup>365</sup> In fact, the Committee found that the duty 'to ensure the right of access to employment, especially *for disadvantaged and marginalized individuals and groups* permitting them to live a life in dignity', constituted a core obligation.<sup>366</sup>

The Committee does not expressly define who is protected by the terms 'disadvantaged and marginalized', although members of minorities and migrant workers are mentioned as examples.<sup>367</sup> While there is no explicit reference to asylum-seekers, this group may form a part of the designated categories. Moreover, a person without the protection of their country of origin is *per se* a marginalized individual. Additionally, as described in this paper, these groups are often marginalized in their country of asylum.

Since the adoption of the General Comment, the Committee has urged a State party to 'revise its refugee law in order to grant asylum seekers the right to work'.<sup>368</sup> In subsequent Concluding Observations on the U.K., the Committee expressed that it was 'concerned about the length of waiting time of asylum-seekers before taking up employment until their asylum applications are processed'.<sup>369</sup> In this regard, it 'encourages the State party to ensure that asylum-seekers are not restricted in their access to the labour market while their claims for asylum are being processed'.<sup>370</sup> It is worth noting that the U.K. in its follow-up reports to the Committee, no reference was made to that specific recommendation.<sup>371</sup> In the review of the Australian State report the Committee 'notes with concern that, despite the State party's economic prosperity, 12 per cent of the Australian population lives in poverty, and poverty rates remain very high among disadvantaged and marginalized individuals and groups *such as* indigenous peoples, *asylum*

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<sup>362</sup> Ibid.

<sup>363</sup> Ibid.

<sup>364</sup> Ibid.,p.495.

<sup>365</sup> CESCR GC No.18, para.23.

<sup>366</sup> Ibid., para.31.a.

<sup>367</sup> Ibid., para.23.

<sup>368</sup> Report on the Thirty-sixth and Thirty-seventh Sessions Economic and Social Council Official Records, 2007 Sup. No. 2, E/2007/22 E/C.12/2006/1, para.448.

<sup>369</sup> CESCR, Consideration of Reports submitted by States Parties under Articles 16 and 17 of the Covenant E/C.12/GBR/CO/5, 42<sup>nd</sup> session, Geneva, 4-22 May 2009, para.27.

<sup>370</sup> Ibid.

<sup>371</sup> Comments by the United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories on the concluding observations, E/C.12/GBR/CO/5, CESCR, E/C.12/GBR/CO/5/Add.1 (2009).

*seekers, migrants and persons with disabilities*'.<sup>372</sup> Thus, a literal interpretation of the States obligations under Article 6, as well as the Committee's output, clearly suggests that asylum-seekers are entitled to access employment in the host state.

In light of the duty to 'take steps...to the maximum of [the State's] available resources', certain limitations are permitted under Article 2(1). The Committee has started to develop criteria in accordance with which it evaluates 'retrogressive measures' States may or may not take when facing resource constraints.<sup>373</sup> However, the duty to abstain from the restrictions on access to employment is a respect-based duty, which is not dependent on the 'available resources' of the States as defined in Article 2(1). It is hard to see how resource constraints could ever justify restrictions in access to the labour market. Besides, the CESCR has indicated that there is 'a strong presumption that retrogressive measures taken in relation to the right to work are not permissible'.<sup>374</sup>

However, in light of the general State practice of withholding access to the labour market for aliens, the question is whether such practices may be justified by virtue of Article 4 of the ICESCR.

Article 4 permits limitations to the rights enumerated in the Covenant as 'determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.

The Committee has devoted limited attention to this provision and States parties rarely refer to it in their reports on the implementation of the Covenant rights.<sup>375</sup> Thus, it is appropriate to rely on the *travaux préparatoires* as the most informative source.<sup>376</sup> Firstly, the requirement that the limitations imposed are 'solely' for 'promoting the general welfare' implies a high threshold. Furthermore, from the *travaux* it is clear that Article 4 was not intended to apply to limitations imposed by the State for reasons of resource constraints.<sup>377</sup> Another important point is that because Article 4 only permits limitations to 'rights', limitations on the duty of non-discrimination enumerated in Article 2(2) are excluded from its scope.<sup>378</sup>

Müller finds that 'general welfare' primarily refers to the economic and social well-being of individuals and the community, and that it excludes notions of 'public order' or 'national security'.<sup>379</sup> Moreover, despite its broad general legal usage, the term is to be interpreted narrowly in the context of Article 4.<sup>380</sup> The latter interpretation is endorsed by the CESCR.<sup>381</sup>

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<sup>372</sup> CESCR, Consideration of Reports submitted by States Parties under Articles 16 and 17 of the Covenant, E/C.12/AUS/CO/4, 42<sup>nd</sup> session, Geneva, 4-22 May 2009, para.18. [emphasis added].

<sup>373</sup> See e.g.; CESCR GC No.14, paras 32 and 48; GC No. 13, para.45.

<sup>374</sup> CESCR GC No.18, para.34.

<sup>375</sup> Alston and Quinn (1987), pp.193-194.

<sup>376</sup> Ibid.

<sup>377</sup> Ibid.

<sup>378</sup> VCLT Article 31.

<sup>379</sup> Müller (2009)), p.573.

<sup>380</sup> Alston and Quinn (1987), p.202.

<sup>381</sup> CESCR GC.13, para.42.

The requirement that the limitations are ‘compatible with the nature of this right’ further narrows the scope of permissible limitations. Müller infers from statements made by the Committee that minimum core obligations under each right may be seen as expressing the ‘nature of this right’. According to this interpretation, the minimum core obligations should not be limited under Article 4.<sup>382</sup> Another important implication of the terms is that it shifts the burden of proof over to the State limiting the right.<sup>383</sup> Lastly, a test of proportionality is implied.<sup>384</sup> Thus, the limitation would have to be proportional only to the legitimate aim that may be pursued under Article 4, which is the promotion of the ‘general welfare’.<sup>385</sup> Overall, the restrictions above suggest that the situation justifying limitations must be extraordinary.

What then, do we make of States’ claim that withholding access to employment for asylum-seekers is justified in order to protect local employment? In light of the strict requirements of Article 4, the strength of this argument is doubtful. As a first point, it should be acknowledged that it is ‘by no means axiomatic that aliens are prejudicial to the economy of a State’.<sup>386</sup> In fact, in a report issued by the International Organization of Migration (IOM) it is found that rather than taking jobs from local workers, migrants tend to fill vacant positions at the poles of the labour market – working both in low-skilled, high-risk jobs and highly skilled, well-paid employment.<sup>387</sup> Very little evidence is found to indicate that migrants in Western countries are substituting the local workforce.<sup>388</sup> Neither is there much evidence that migrant drive down wages.<sup>389</sup> More directly related to the situation of asylum-seekers, the CESCR appears to take the position that the limitation of rights of vulnerable groups because of the implementation of economic policies are not justified.<sup>390</sup>

One commentator has suggested that ‘developed countries might experience a situation, for example during a period of unemployment and recession, where general public opinion would be so hostile to allowing a great number of refugees access to their country and the local labour market that the article 4 could be invoked in order not to endanger the general welfare’.<sup>391</sup> Klerk, on the other hand, contends that ‘a declining economy is no justification for burdening only socially disadvantaged groups’.<sup>392</sup> Indeed, limitations that disproportionately affect particular vulnerable groups can never be seen as ‘promoting the general welfare’.<sup>393</sup>

An additional argument may be that an acceptable subsistence level is provided through the provision of social support, and that this represents the most lenient means to achieve the protection of its local labour force. However, as indicated above, the right to work contained in

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<sup>382</sup> Müller (2009), p.579.

<sup>383</sup> Alston and Quinn (1987), p.201.

<sup>384</sup> See e.g. CESCR GC No.14, para.29 and GC 7, para.15.

<sup>385</sup> Müller (2009), p.583.

<sup>386</sup> See Konate E/C.12/1987/SR.7, para.2.

<sup>387</sup> IOM World Migration Report 2005, pp.167-169. Available at:

[http://ftp.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published\\_docs/books/wmr\\_sec02.pdf](http://ftp.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/wmr_sec02.pdf) [Sited 31 May 2010].

<sup>388</sup> Ibid.

<sup>389</sup> Ibid.

<sup>390</sup> CESCR Concluding Observations on Egypt, 23 May 2000, E/C.12/1/Add.44, para.10.

<sup>391</sup> Kjaerum(1994), p.454.

<sup>392</sup> Klerk (1987), p.264.

<sup>393</sup> Müller (2009), p.574.

Article 6 of the ICESCR was conceived not merely as a guarantee to sustain one's living through work, but as a social value in itself. Thus, a justification based on compliance with the duty to provide an adequate standard of living would deprive Article 6 of its most essential element. The right to an adequate standard of living is protected in Article 11 of the ICESCR. It is submitted that one cannot reasonably justify limitation of a right by virtue of compliance with another. Furthermore, given that the deterrent effects of barring access to employment for asylum-seekers cannot be credibly established, the arguments against the application of Article 4 is even more compelling.<sup>394</sup> In light of the consequences for asylum-seekers of not getting the opportunity to engage in work, in particular its long-term harmful effects on the facilitation of durable solutions, it appears that the State justifying restrictions are faced with a heavy burden of proof.

In summary, a literal interpretation of Article 6 requires that the State parties clearly have an obligation to refrain from barring access to employment for asylum-seekers. The Committee's formulation of core obligations and their thus far consistent approach in subsequent state reviews, serves as enhancement of its legal basis. The next section investigates the State duty of non-discrimination.

## **(ii) ICESCR Article 2(2) – Non-discrimination**

When interpreted in conjunction with Article 6, Article 2(2) requires equal access to employment.

Apart from the obligation to 'take steps', the Committee has stated that the "'undertaking to guarantee" that relevant rights "will be exercised without discrimination ..."' is of immediate effect.<sup>395</sup>

Article 2(2) prohibits 'discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. It does not explicitly prohibit discrimination based on nationality. Scholars have questioned the scope of this provision, especially its applicability to non-nationals.<sup>396</sup> However, the terms 'national origin or 'other status' must reasonably be interpreted to include nationality.<sup>397</sup> The practice of the CESCR clearly indicates that discriminatory treatment of non-nationals is within the ambit of the ICESCR. For example, the Committee has 'recommended' to Belgium that it 'fully ensure that persons belonging to ethnic minorities, refugees and asylum seekers are fully protected from any acts or law which in any way result in discriminatory treatment in the housing sector...'.<sup>398</sup> Interestingly, during the drafting process Belgium found it necessary to enter a reservation interpreting the article 'as not necessarily implying an obligation on States automatically to

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<sup>394</sup> See Chapters 4.6-4.7.

<sup>395</sup> CESCR GC No.3, para 1. Affirmed in GC No.20, para.7.

<sup>396</sup> Cholewinski (2004), p.6. It does not, like the equivalent provision in the ICCPR specify that the personal scope is '...ensure[d] to all individuals within its territory and subject to its jurisdiction'(ICCPR Art.2(1)) Further, the provision lacks open ended language as to the prohibited grounds of discrimination. The words "as to" is more limited than "such as" in the ICCPR.

<sup>397</sup> VCLT Art.31.

<sup>398</sup> Dent (1998), p.5.

guarantee to foreigners the same rights as to their nationals'.<sup>399</sup> In its General Comment on Article 2(2) the Committee explicitly confirmed that '[t]he Covenant rights apply to everyone including non-nationals, such as refugees [and] asylum-seekers...'.<sup>400</sup>

Thus, States may not discriminate against non-nationals. However, the principle of non-discrimination is not defined in the article nor elsewhere in the ICESCR. Despite the lack of a consensus among scholars as to the understanding of the twin issue of discrimination and equality<sup>401</sup>, the UN human rights monitoring bodies have established similar definitions.<sup>402</sup> The CESCR has adopted a definition similar to that of the HRC. It concludes that 'discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.'<sup>403</sup>

However, the CESCR does not view all forms of differential treatment as discriminatory. The Committee states that differential treatment based on prohibited grounds is discriminatory unless the justification for differentiation is 'reasonable and objective'.<sup>404</sup> This includes a requirement that there is a 'clear and reasonable relationship of proportionality between the aim sought to be realised and the measures or omissions and their effects.' In addition, the Committee calls for an integrated assessment as to whether the requirements in article 4 of the Covenant are fulfilled.<sup>405</sup> It should be noted that by merging the requirements of Article 4 with the 'reasonable and objective' test the Committee has caused a measure of uncertainty. Although not explicitly referring to Article 4 of the ICESCR it is essentially the same requirements. In the first place, as seen above, Article 2(2) is excluded from the scope of Article 4. Furthermore, it raises fundamental questions as to the substantial differences between the two tests. So far, this is not clarified by the CESCR and national courts have shunned the problems.

Given that the non-discrimination guarantee in ICESCR Article 2(2) applies to everyone, including non-citizens, it would appear evident that asylum-seekers are entitled to equal access to employment on par with citizens. Yet, commentators have noted a cautious approach of the CESCR in relation to the question of equal treatment of aliens.<sup>406</sup>

However, in order to arrive at a definitive conclusion the provision must be interpreted in light of Article 2(3) of the ICESCR. There are divergent views as to the legal import of Article 2(3). This provision is formulated as an exception to Article 2(2), providing 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'.

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<sup>399</sup> [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en) [Sited 2 June 2009].

<sup>400</sup> CESCR GC No.20, para.30.

<sup>401</sup> Vierdag (1973), p.50.

<sup>402</sup> See e.g HRC GC No.18, para.7; ICERD Article 1(1) and CEDAW Article 1.

<sup>403</sup> CESCR GC No.20, para.7.

<sup>404</sup> Ibid., para.13.

<sup>405</sup> Ibid.

<sup>406</sup> Hathaway (2005), pp.123-147.

As a first point, the notion of ‘developing countries’ is not defined in the Covenant. Thus, although guidance may be sought from categorizations by international institutions or agencies, the scope of this exception is hard to precisely establish.<sup>407</sup> Furthermore, the permissible limitations concern ‘economic rights’. Indeed, this implies that developing countries ‘with due regard to human rights and their national economy’ are entitled to discriminate against aliens in their equal access to employment. The reference to the ‘national economy’ implies that the exception may only be invoked when it is justified on the grounds of the economy of the state as a whole.<sup>408</sup> This suggests that the situation must be extraordinary. Moreover, the purpose of the provision was to end the economic dominance of aliens in former colonies after their independence.<sup>409</sup> Thus, a restrictive interpretation is clearly warranted.

Furthermore, even when the exception may be invoked, aliens may not be deprived of all their economic rights – it is only the *extent* of such enjoyment that could be limited by the developing States.<sup>410</sup> One scholar asserts that ‘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 rationale’.<sup>411</sup> Overall, this exception may only to a very limited extent be used by developing states to limit economic rights of aliens.

However, the provision has also been interpreted as implicitly prohibiting limitations imposed upon equality of access to employment in the case of *developed* countries.<sup>412</sup> The reservations by the UK and France, in effect excluding aliens from Article 6 protection, may be interpreted as supporting the notion that the Covenant ‘otherwise prohibits discrimination against aliens with respect to employment’.<sup>413</sup>

On the other hand, restrictions on the employment opportunities of aliens, such as through work permits, remains pervasive. Craven noted that the disinclination of the Committee to be unequivocal in its defence of the equal treatment of aliens would seem to be a result of the force of State practice.<sup>414</sup> The withholding of rights to aliens present on state territory has longstanding traditions. For example it was pointed out by the United States Supreme Court over a century ago in *Nishimura Ekiu v The United States*<sup>415</sup> that ‘[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to *admit them only in such cases and upon such conditions as it may see fit to prescribe*’.<sup>416</sup>

Statements such as these have led commentators to contend that Article 2(3) simply confer on developing states a right that the developed states already enjoys through systems of stringent

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<sup>407</sup> Dankwa (1987) pp. 230-249.

<sup>408</sup> Ibid., p.242.

<sup>409</sup> See e.g. 17 UN GAOR Annex (Agenda item 43) para.68, UN Doc A/5365 (1962).

<sup>410</sup> Dankwa (1987), p.245.

<sup>411</sup> Fredriksson (2002), p.778.

<sup>412</sup> Applying the maxim *expressio unius est exclusio alterius* [when one or more things of a class are expressly mentioned others of the same class are excluded].

<sup>413</sup> Craven (1995), p.214.

<sup>414</sup> Craven (1995), p.173.

<sup>415</sup> [emphasis added] decided 18 January 1892, 142 US 651.

<sup>416</sup> Ibid, p.659 (emphasis added).

residential requirements for aliens.<sup>417</sup> Indeed, the drafters of the ICESCR were clear that the non-discrimination clause should not prohibit every distinction of treatment between nationals and aliens, particularly concerning the right to take up employment.<sup>418</sup>

However, while no general legal entitlement of entry into a territory may be established under international law, certain aspects of the maxim is no longer reconcilable with the contemporary framework of international refugee and human rights law. Although a right of entry for refugees is still contested, it is arguable that once present in the territory certain rights accrue immediately or on an incremental basis from the CSR provisions.<sup>419</sup> Moreover, regardless of status, human rights entitlements accrue as a function of presence on a State Party's territory. Thus, the logic of limiting asylum-seekers' access to employment by making sweeping statements citing the historical limitations imposed on 'aliens' as a group are severely flawed.<sup>420</sup>

The CESCR has adopted an approach to non-discrimination similar to the one that has evolved under HRC jurisprudence, concentrating on whether differential treatment may be justified based on reasonable and objective criteria.<sup>421</sup> However, the individual complaint mechanism recently established under the optional protocol of the ICESCR is not yet operational. So far then, the CESCR are not to the same extent as the HRC capable of entering into detailed discussions of specific situations. Presently, it is difficult to ascertain to *what extent* the CESCR will regard restrictions on access to employment for asylum-seekers as discriminatory. The recommendation directed at the United Kingdom in relation to the duty to respect may indicate that the Committee considers shorter bar-periods, *e.g.* for the duration of a fair and efficient manifestly ill-founded procedure, as implicitly reasonable.<sup>422</sup> Whether or not the Committee will regard a particular measure as unreasonable will depend on individual factors such as time spent in the country and other conditions of stay. Craven has correctly pointed out that 'the process of reviewing State reports does not give rise to similar opportunities for the specification of the norms in the treaty concerned'.<sup>423</sup> However, claims that restriction on asylum-seekers' access to employment may alternatively be heard by the HRC. In any case, as the CESCR and the HRC apply the same 'reasonable and objective' standard to assess compliance, that discussion is moved a chapter forward to avoid unnecessary overlaps.

## **6.3 The ICCPR Article 26 - Equality**

### **6.3.1 Normative content and scope**

The scope of the ICCPR is universal; it is applicable to both nationals and non-nationals.<sup>424</sup> Moreover, the HRC has explicitly extended the protection to include refugees and asylum-

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<sup>417</sup> Dankwa (1987), p.247.

<sup>418</sup> Craven (1995), p.174.

<sup>419</sup> See Chapter 5.

<sup>420</sup> Elaborated in detail in chapter

<sup>421</sup> CESCR GC No.20, para.13.

<sup>422</sup> Supra n.370.

<sup>423</sup> Craven (1995), p.34.

<sup>424</sup> HRC GC No. 15/17, paras 1 and 2.

seekers.<sup>425</sup> The so-called equality clause of Article 26 is of potentially great importance to asylum-seekers. The provision reads:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

While the non-discrimination clause in Article 2(1) of the ICCPR only protects rights recognized in the Covenant, the wording of this article does not imply such limitations.<sup>426</sup> Both the wording and the *travaux préparatoires* suggest that this interpretation is accurate. Indeed, the jurisprudence of the HRC confirms that the scope of protection extends to rights not covered by the ICCPR, including socio-economic rights. This was first established by the HRC in the cases of *Broeks* and *Zwaan-de Vries*<sup>427</sup>. The Committee confirmed that the Article 26 had a free-standing character and that it could be applied to discrimination in the field of social and economic rights.<sup>428</sup> In both cases the Committee found a violation of Article 26. This position has later been entrenched in General Comment 18, where the Committee affirmed that the article ‘...does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact *in any field* regulated and protected by public authorities.’<sup>429</sup>

Furthermore, the prohibition on discrimination is comprised of two different components, namely ‘equality before the law’ and the ‘equal protection of the law’. The first component requires that there shall be no discrimination in the enforcement of existing laws.<sup>430</sup> The latter part has been interpreted as requiring that ‘the legislature must refrain from any discrimination when enacting laws...[and] is also obligated to prohibit discrimination by enacting special laws and to afford effective protection against discrimination’.<sup>431</sup> The second sentence of the article is connected to the first by including the terms ‘[i]n this respect’. This means that the requirement that the ‘law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground’ applies both in respect of equality before the law and the equal protection of the law.<sup>432</sup>

The enumerated grounds of discrimination recognized in Article 26 must be regarded as non-exhaustive examples as the category of ‘other status’ is wide enough to accommodate additional grounds for discrimination. The Committee has declared admissible complaints of discrimination on grounds of *e.g.* marital status, nationality, citizenship, age and the difference between

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<sup>425</sup> HRC GC No.31, para.10.

<sup>426</sup> VCLT Article 31.

<sup>427</sup> *F.H.Zwaan-de Vries v. Netherlands* (182/1984) and *S.W.M.Broeks v. Netherlands* (172/1984). These cases involved a Dutch Unemployment Benefit Act according to which a married woman was not entitled to unemployment benefits unless she could prove she was the ‘breadwinner’ of the family, while neither unmarried women nor unmarried or married men had to fulfil the same requirements.

<sup>428</sup> *Broeks*, para.12.4.

<sup>429</sup> HRC GC No.18(27), para.12[emphasis added].

<sup>430</sup> Hathaway (2005), p.126.

<sup>431</sup> Nowak(2005), p.607.

<sup>432</sup> VCLT Article 31.

employed and unemployed persons.<sup>433</sup> The case of *Gueye et al. v France* involved French legislation which afforded lower pensions to retired Senegalese soldiers of the French army than to French nationals in an otherwise equal position. Here the Committee established that non-citizens enjoy protection from discrimination in social security agreements.<sup>434</sup>

As in the case of ICESCR Article 2(2), no definition of discrimination is provided for in Article 26. The HRC has declared that discrimination

should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>435</sup>

### 6.3.2 The 'reasonable and objective' test

Despite paying lip service to the abovementioned definition, the HRC has in its practice established that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.<sup>436</sup> Although the Committee in its Communications rarely makes reference to the latter requirement, it is often implicit in its reasoning.<sup>437</sup> For example, distinctions made on the basis of the particular requirements of a job do not usually amount to discrimination.<sup>438</sup> The formula has been repeatedly applied in communications before the Committee.

At present, there is no communication before the HRC that have considered specifically whether restrictions of asylum-seekers' access to employment violates Article 26. However, considering that the Committee explicitly has stated that the provisions in the ICCPR apply to asylum-seekers<sup>439</sup> and the fact that the right to work is recognized within the ambit of Article 26<sup>440</sup>, it appears that such a claim would be admissible. Thus, at least before the individual complaint system under the auspices of CESCR is operational, Article 26 may prove valuable in promoting the socio-economic rights of asylum-seekers.

From the facts disclosed in this paper it is clear that the prevalence of differential treatment in the field of employment is widespread. States may differentiate between citizens and aliens, recognized refugees and asylum-seekers, nationals or refugees from different countries; or nationals originating from within a member area of a political or economic union and nationals

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<sup>433</sup> Choudhury (2003), p.7.

<sup>434</sup> Communication No.196/1985, Views of 3 April 1989.

<sup>435</sup> HRC GC No.18, para.7.

<sup>436</sup> Ibid., para.13; *S.W.M.Broeks v. Netherlands* (172/1984) and *F.H.Zwaan-de Vries v. Netherlands* (182/1984).

<sup>437</sup> Choudhury (2003), p.19.

<sup>438</sup> Dent (1998), p.45.

<sup>439</sup> HRC GC No.31, para.10.

<sup>440</sup> *John K.Love, William L.Bone, William J.Craig, and Peter B.Ivanoff v. Australia* (Communication No.983/2001).

originating from outside such an area.<sup>441</sup> Thus, a prevalence of differential treatment is established. The next question is whether restrictions on access to employment may be justified based on ‘reasonable and objective’ criteria.

This test implies that the measure in question meet a test of proportionality.<sup>442</sup> The content of a proportionality test may be described in three steps: consideration should be given to whether restriction of the right is appropriately designed to achieve its objective; whether it limits the right to the minimum extent necessary; and whether the benefit of the limitation outweighs the harm occasioned by infringement of the right.<sup>443</sup>

In considering whether restrictions in the access to employment for asylum-seekers may be justified based on ‘reasonable and objective’ criteria lies certain methodical difficulties that first needs to be addressed. The presumption underlying a claim of discrimination is that individuals in the same situation should be treated equally.<sup>444</sup> Differential treatment between individuals in analogous situations requires justification.<sup>445</sup> A person claiming discrimination usually contends that she/he has been treated differently from others who, though in a similar position, enjoys more preferable treatment.<sup>446</sup> Sometimes a contrary position is taken, the person claims that she/he is entitled to differential treatment specifically because she/he is *not* in the same position as the comparator and that equal treatment is discriminatory.<sup>447</sup> Craven acknowledges this and asserts that ‘equality demands that those who are equal be treated in an equal manner, and that those who are different should be treated differently’.<sup>448</sup> Indeed, the HRC has endorsed the use of affirmative action to offset unbalanced conditions in some instances.<sup>449</sup> It should also be noted that the HRC in some of its recent jurisprudence related to property restitution, appears to hold arbitrariness as a form of discrimination, even in the absence of a comparator.<sup>450</sup> Be that as it may, the present discussion will be based on comparators as they are instructive in order to closely examine States arguments.

Thus, a key issue is who the ‘others’ are to whom the author is comparing himself.<sup>451</sup> In this paper an attempt to identify appropriate bases for comparison is made. In addition there are other variables which may influence the consideration of an individual complaint before the Committee. First, the length of time spent in the host country without the right to access employment certainly matter. Evidently there is a difference between being denied access to the labour market for a brief period of a few weeks and denying it throughout the whole

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<sup>441</sup> See Chapter 4.2.

<sup>442</sup> See e.g. *Gillot et al. v. France* (Communication No.932/2000), paras 13.16-13.17; *Jacobs v. Belgium* (Communication No.934/2000), para.9.5.

<sup>443</sup> *R v. Oakes*, 28 February 1986, 1 SCR 103 (Can. SC).

<sup>444</sup> Choudhury (2003), p.10.

<sup>445</sup> *Ibid.*

<sup>446</sup> *Ibid.*

<sup>447</sup> *Ibid.*

<sup>448</sup> Craven (1995), p.155.

<sup>449</sup> HRC GC No.18, para.11.

<sup>450</sup> For example, in the case of *Pezoldova* the HRC established a violation of Article 26 on grounds of the arbitrariness in which the Czech authorities had denied access to documents through which the author sought to argue her restitution claim, thus obstructing her access to an effective remedy. See *Alzbeta Pezoldova v. The Czech Republic* (Communication No.757/1997), Views of 25 October 2002.

<sup>451</sup> Choudhury (2003), p.10.

determination process regardless of length. Second, and related, whether the individual during that period of time receives adequate social security. Indeed examples may be found in national jurisprudence that withholding both social support and at the same time barring access to the labour market is not accepted.<sup>452</sup> A third factor is other general conditions of stay, such as housing conditions or the degree of free movement.

However it must be emphasized that due to the complexity of the issues at hand, it is beyond the scope of this paper to adequately scrutinize discrimination in relation to the full spectrum of potential situations that might arise for asylum-seeking claimants denied access to employment. Rather, the following is an attempt to establish useful vantage points from which to address the issue. Yet, conclusions on the general topic may be established.

(i) *Differential treatment in the access to the labour market based on citizenship or refugee status recognition*

One possible way to consider the discrimination issue is to compare the treatment of citizens and aliens, the latter being a category in which asylum-seekers may be placed. Commentators, citing in particular the widespread state practice of restrictions on aliens in employment, have expressed doubt as to whether a duty to access employment for aliens exists.<sup>453</sup> These commentators are correct in noting the prevalence of restrictions on employment of aliens. The notion that foreign workers may be required to obtain work authorizations is widely accepted.<sup>454</sup> Indeed the ILO has generally been cautious in its approach to distinctions between nationals and non-nationals.<sup>455</sup> While it is clear that the drafters to some extent accepted that states were permitted latitude to allocate certain rights differentially on the basis of citizenship<sup>456</sup>, discrimination of non-citizens were not generally permitted<sup>457</sup>. The simplistic accounts made by some commentators indicate a wariness to engage in a more nuanced discussion, in particular in terms of the distinctive characteristics of the sub-categories that make up the category of ‘aliens’.

An initial question is what constitutes an alien in international law.<sup>458</sup> According to the UN General Assembly the term alien applies ‘to any individual who is not a national of the State in which he or she is present.’<sup>459</sup> Accordingly, this encompasses subcategories of a rather diverse character such as; tourists, migrant workers, refugees and asylum-seekers, documented and undocumented migrant and stateless individuals. Evidently the general conditions of stay in a State territory for these groups are rather different as well. For example, the notion that tourists should be allowed to access employment is meaningless, because the nature and purpose of stay speaks against it. Furthermore, a migrant worker as defined by the UN is ‘a person who is to be

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<sup>452</sup> See e.g. *The Minister of Home Affairs v. Wathcenuka*, 28 November 2003, 1 All SA 21 SA SCA (2004).

<sup>453</sup> Craven (1995), p.214.

<sup>454</sup> Craven (1995), p.213.

<sup>455</sup> Ibid.

<sup>456</sup> UN Docs. E/CN.4/SR.122, p.5-7; E/CN.4/SR.173, paras. 46,67, and 76; E/CN.4/SR.327, p.7. Cited in Hathaway (2005), p.131.

<sup>457</sup> An Indonesian proposal to limit the scope of protection of Article 26 to ‘citizens’ rather than ‘all persons’ was not adopted (UN Doc. A/C.3/SR.1102, at para.48) Cited in Hathaway (2005), p.131.

<sup>458</sup> Despite their somewhat different connotations, it seems that the terms ‘non-citizens’ and ‘aliens’ are interchangeable.

<sup>459</sup> The UN General Assembly adopted the Declaration on the Human Rights of Individuals Who are not Nationals in the Country in which They live. See UNGA Res.40/144, adopted Dec.13, 1985. Article 1.

engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national'.<sup>460</sup> It is to be noted that the term 'to be engaged' refers to potential migrant workers who *hold a work contract*.<sup>461</sup> Thus, the right of access to employment for migrant workers depend on the state's immigration policy rather than a treaty-based obligation. Documented or undocumented aliens have no right to remain on a foreign State's territory unless immigration regulations allow them to: hence there is no reason to speak of a right to access employment either. Asylum-seekers, on the other hand, find themselves in a situation quite different both in actual and legal terms from the categories described above.

Recalling that the CSR constitutes the only limitation in international law of the states sovereign right to decide aliens' conditions of entry and stay on its territory, it becomes clear that asylum-seekers are not in a comparable situation to the groups described above.<sup>462</sup> The distinguishing factor is that asylum-seekers are *prima facie* fleeing from a well-founded fear of persecution on one of the grounds enumerated in Article 1A (2) of the CSR. As a consequence, they are seeking protection for an indeterminate period in another State's territory. The other categories cannot present a treaty-based claim to enter and reside in a foreign state territory. One might also express it as the predicament of *involuntary* alienage, as opposed to the situation for aliens generally. Acknowledging that no watertight division exists between the different categories, other groups like tourists, visitors or migrant workers have presumably *chosen* migration.<sup>463</sup> In fact, it may be derived from the practice of HRC that the question whether a distinction is reasonable 'may be affected by the extent to which the author has a choice in membership of the group against which distinctions is made'.<sup>464</sup>

State parties have a legal obligation to assess a refugee claim – or if no assessment procedure is available – to provide refugee benefits forthwith.<sup>465</sup> The refugee status determination procedures are reportedly often excessively prolonged due to heavy backlogs in the systems, sudden influxes or resource constraints.<sup>466</sup> As States throughout such a process often deny asylum-seekers the opportunity to engage in employment, they may spend years in enforced idleness. Thus, their situation suggests that affirmative action may be justified. A purposive understanding of the non-discrimination principle requires that asylum-seekers particular predicament must be taken into account.

Many developed countries typically argue that employment restrictions on asylum-seekers are necessary in order to deter abusive asylum-applications. While the aim of curbing abusive asylum applications may be legitimate, the actual deterrent effect of this particular measure cannot be credibly established. On the contrary, the available evidence suggests that the effect is

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<sup>460</sup> United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 2(1).

<sup>461</sup> Cholewinski (1997), p.150.

<sup>462</sup> See Chapter 6.2.2 (ii).

<sup>463</sup> Other groups of forced migrants, lacking of formal treaty protection when fleeing situations such as famine, generalized violence, climate changes or other natural disasters have to depend on the goodwill and sympathy of states in order to be afforded protection.

<sup>464</sup> Chodhury (2003), p.21.

<sup>465</sup> See chapter 5.3.2.

<sup>466</sup> See e.g. Greece, which reported a backlog of 6,145 unprocessed first instance claims as of 31 July 2009. On appeal, the backlog of unprocessed cases stood at 42,700. (Observations on Greece as a country of asylum Office of the United Nations High Commissioner for Refugees (UNHCR), December 2009,p.17).

negligible and short-term at best and at worst even counterproductive. The fact that these restrictions do not appear to achieve its intended objectives constitute a solid argument against the introduction or maintenance of such measures.<sup>467</sup>

A more traditional argument is that restrictions are reasonable when the aim is to protect the national labour market. Perhaps there are situations where this may be considered reasonable, such as extreme situations of sudden, large influxes coupled with extraordinary levels of unemployment. However as shown above, very little evidence suggest that migrants 'steal local jobs', as they often fill positions shunned by the local population.<sup>468</sup>

Alternatively, States may contend that the appropriate question is whether the recognition of refugee status itself may be a reasonable and objective justification for differential treatment between *recognized refugees and asylum-seekers*. Given that the practice of the HRC often has revealed a disinclination to probe more deeply into the States' assertions of reasonableness it is open to question whether the HRC might succumb to this point of view. However, the proportionality test requires the HRC to measure the proportionality between the aims sought to be realised and the consequences of the measures. This will by necessity involve a discussion of the abovementioned aspects such as length of time, availability of social security or limitations imposed on the freedom of movement.

Restrictions on asylum-seekers are often justified on grounds of the temporary nature of their status.<sup>469</sup> In countries where the refugee status determination procedures are adequately balanced between fairness and efficiency the distinction might be regarded as reasonable. However, for numerous reasons already elaborated, very few states are able to accomplish such a balance. As regards the provision of social security, it has been pointed out why this is an inadequate justification for withholding access to the labour market.<sup>470</sup> Furthermore, recalling the declaratory nature of refugee status, barring all asylum-seekers from access to the labour market does not only harm so-called 'bogus' asylum-seekers, but genuine refugees as well. As stated by the HRC in *Gueye et al. v. France*, 'the possibility of some abuse of pension rights cannot be invoked to justify unequal treatment'.<sup>471</sup> Considering that overall status recognition rates worldwide are at approximately 38 percent, the argument that a blanket prohibition is not a proportional measure has considerable persuasive weight.<sup>472</sup> Evidently, the longer an asylum-seeker has to wait before gaining access to the labour market, the less proportionate it is. Another argument is that regardless of the outcome of the determination process, access to the labour market may actually help to enhance the prospect of a durable solution for the asylum-seekers.<sup>473</sup>

In summary, a good faith interpretation of Article 26 requires that asylum-seekers are entitled to access employment. As argued, this holds true irrespective of whether the comparator is a citizen or a recognized refugee. In light of the inadequate justifications offered by States; the realities on the ground in terms of delays as well as the consequences for the individual asylum-seeker, the

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<sup>467</sup> See also chapter 6.2.2 (i).

<sup>468</sup> Ibid.

<sup>469</sup> Da Lomba (2004), p.229.

<sup>470</sup> See chapter 6.2.2. (i).

<sup>471</sup> Communication No.196/1985, Views of 3 April 1989.

<sup>472</sup> UNHCR Statistical yearbook 2007, p.51.

<sup>473</sup> See Chapter 1.

barring of asylum-seekers from the labour market do not satisfy the ‘reasonable and objective’ test.

Yet, the extent to which the HRC will examine whether differential treatment is reasonable and objective may vary. In the past, the Committee has been known to defer to State’s assertions on reasonableness instead of engaging in analysis of both the logic and extent of the differential treatment.<sup>474</sup> In particular, the HRC has too often shown an inclination to accept differential treatment between citizens and aliens as presumptively reasonable.<sup>475</sup> In other cases HRC has focused on the unique predicament of refugees as involuntary migrants, thereby indicating a reluctance to find limitations to be reasonable when individuals are unable to comply by virtue of having been forced to seek refugee status abroad.<sup>476</sup> It is submitted that the HRC would be advised to apply a substantive understanding of Article 26 which takes into account the particular characteristics of asylum-seekers’ status.

(ii) *Differential treatment in the access to the labour market between aliens of different nationalities.*

Another basis for an allegation of discriminatory treatment might be that nationals from other States receive more favourable treatment than nationals from the claimant’s country of origin. Thus, the question is whether or not differential treatment in the access to employment between aliens of different nationalities may be based on reasonable and objective criteria. This removes the discussion from the dichotomy of citizens and aliens.

In general, distinctions are increasingly being made between different categories of non-citizens. Distinctions are typically made between neighbouring countries’ nationals and nationals of more distant countries. The *de facto* distinctions made between Afghan refugees and refugees of other nationalities in Pakistan is symptomatic.<sup>477</sup> Another example is Saudi-Arabia’s recognition of Iraqis displaced in the Gulf War as refugees while refugees from other countries were left within its borders without status, even summarily deporting Somalis.<sup>478</sup> The United States is reportedly dealing much more severely with refugees from Haiti than those from Cuba.<sup>479</sup> It has been noted that this phenomenon is a common practice of supranational political or economic unions, such as the EU and the North American Free Trade Agreement (NAFTA).<sup>480</sup> The Committee on the Elimination of Racial Discrimination (CERD) has observed that this raises questions from the perspective of the ICERD, notwithstanding Article 1(2) of that Convention.<sup>481</sup> It is worth noting that CERD in its Concluding Observations has made several comments about distinctions between non-nationals. In an examination of Italy in 1995, the CERD expressed concern that ‘legislation concerning political asylum for non-European Union citizens may be more restrictive

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<sup>474</sup> Hathaway (2005), p.130.

<sup>475</sup> Ibid.

<sup>476</sup> Ibid.,p.146.

<sup>477</sup> See Chapter 4.2.

<sup>478</sup> Hathaway (2005), p.239.

<sup>479</sup> Ibid.

<sup>480</sup> Weissbrodt (1999), para.77.

<sup>481</sup> ICERD Article 1(2) cf. Article 1(3): The ICERD does not apply to distinctions between citizens and non-citizens, but does not permit distinctions between different categories of non-citizens.

in matters relating to the status and employment of the people concerned than the ordinary Italian legislation in those areas'.<sup>482</sup>

States may claim that differential treatment between asylum-seekers from different countries is reasonable because it receives a disproportionate amount of 'bogus' applications from some states. However, such an argument is essentially the same deterrent argument as described above. While this argument may hold some truth in limited instances, it is submitted that the statistical existence of abuse cannot justify the denial of access for everyone of that nationality. Indeed, this has been recognized by the HRC.<sup>483</sup> Problems of abuse are more appropriately addressed through fair and efficient procedures and general migration policies.

In the jurisprudence of the HRC some cases are instructive of the view the Committee might adopt on the issue of differential treatment between different groups of non-nationals. The case of *van Oord* concerned differences in bilateral social security agreements concluded by the Netherlands with other countries.<sup>484</sup> In this case, the Committee indicated that bilateral treaties based on reciprocity between states may justify certain differences in pension entitlements. Yet in the later case of *Karakurt* the Committee concluded that notwithstanding the case of *van Oord* 'no general rule can be drawn there from to the effect that such an agreement in itself constitutes a sufficient ground with regard to the requirements of article 26 of the Covenant.'<sup>485</sup> Thus, the HRC has signalled that it will not necessarily accept the States assertions of reasonableness and that the States might have to prepare for a more thorough scrutiny in the future.

While the prevalence of differential treatment between asylum-seekers from different countries is noted, it does not follow that such practices is in compliance with international law. In fact, perhaps to an even greater extent than distinctions made between citizens and aliens, such practices cannot generally be justified by reference to Article 26.

Although the problems of deference to States assertions of 'reasonableness' reported in the practice of HRC are valid also with regard to differential treatment between asylum-seekers of different nationalities, the HRC might react stronger to this types of differentiations. After all, justifications based on deterrence of abusive asylum applications and protection of the national labour market has even less merit in such instances. Thus it might be concluded that Article 26 has substantial value as a complementary prohibition of discrimination between classes of asylum-seekers or non-nationals in the allocation of a rights.<sup>486</sup>

### 6.3.3 Article 4 ICCPR

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<sup>482</sup> Concluding observations of the Committee on the Elimination of All Forms of Racial Discrimination: Italy, 22/09/95, UN Doc. A/50/18, para.83 (1995).

<sup>483</sup> See text accompanying n.472.

<sup>484</sup> *Jacob and Jantina Hendrika van Oord v. The Netherlands* (Communication No 658/1995), Views adopted 14 August 1997.

<sup>485</sup> *Mümtaz Karakurt v. Austria* (Communication No.965/2000), Views adopted 4 April 2002.

<sup>486</sup> Hathaway (2005), p.260.

State parties may attempt to justify discriminatory measures with reference to the derogation clause in article 4(1) of the ICCPR. This article provides that

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

In requiring the existence and official proclamation of a ‘public emergency which threatens the life of the nation’ it may be implied that an extraordinary situation must have occurred.<sup>487</sup> The Committee seems to imply that situations of armed conflicts, natural catastrophes, violent mass demonstrations or major industrial accidents might constitute a public emergency.<sup>488</sup> Indeed, civil wars or other situations of widespread, violent internal unrest are by far the reasons most often cited for declaring a state of emergency.<sup>489</sup> The wording ‘to the extent strictly required by the exigencies of the situation’ indicates that derogatory measures may only be taken according to a strict proportionality test.<sup>490</sup>

Furthermore article 4(1) prohibits the application of measures that are ‘inconsistent with [the derogating State’s] other obligations under international law’.<sup>491</sup> The HRC has held that ‘it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties’.<sup>492</sup> Yet, by virtue of the explicit reference in the provision to other international law obligations the HRC has asserted its authority ‘to take a State party’s other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant’.<sup>493</sup> Thus, by virtue of this provision the provisions of the ICESCR, in particular Article 4 and the provisions of the CSR may be considered by the HRC.<sup>494</sup>

In case of overlapping treaties within different ‘regimes’, both treaties should be implemented as far as possible with the view of mutual accommodation and in accordance with a principle of harmonization.<sup>495</sup> Thus, the HRC may appropriately apply the reasoning of the CESCR.<sup>496</sup> This holistic approach is appropriate in light of the *indivisible, interdependent, and interrelated*

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<sup>487</sup> VCLT Art.31.

<sup>488</sup> Ibid. Paras 3 and 5.

<sup>489</sup> Nowak, p.90.

<sup>490</sup> See also HRC General Comment No. 29 UN doc. CCPR/C/21/Rev. 1, Add. 11, 31 August 2001 (adopted 24 July 2001), 9 IHRR 303 (2002). para 4.

<sup>491</sup> See generally ICCPR article 5.

<sup>492</sup> HRC General Comment No.29, para 10.

<sup>493</sup> UN Doc. CCPR/C/21/Rev. 1, Add.11, 31 August 2001 (adopted 24 July 2001), 9 IHRR 303(2002), para 10.

<sup>494</sup> See e.g. Joseph...[et al] (2004), p.828; Nowak (2005), p.99, mentions specifically the 1951 Geneva Refugee Convention.

<sup>495</sup> International Law Commission, Fragmentation Of International Law: Difficulties Arising From The Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, 58<sup>th</sup> session 2 May 2006 Geneva, 1 May-9 June and 3 July-11 August 2006, A/CN.4/L.682/Add.1.

See also VCLT Art. 31(3)(c) which requires the interpreter to consider other treaty-based rules applicable in the relations between the parties in order to arrive at a consistent meaning.

<sup>496</sup> See also ICCPR Article 44.

character of human rights law treaties. Unfortunately the HRC has an odd habit of not referring to the decisions of any other adjudicatory body.<sup>497</sup> Given noted concern about the growing fragmentation of international law this is not an ideal practice.<sup>498</sup> For the sake of legal clarity and the facilitation of a transnational judicial dialogue on the interpretation of international human rights law, the HRC would be advised to draw on the work of other treaty bodies given this opportunity to do so.<sup>499</sup>

Additionally, the derogatory measures may not involve discrimination on the enumerated grounds. Thus the indication that the threshold is set particularly high for a State party to be able to justify derogations by way of this provision are strengthened. On the other hand, it does not say that discriminatory treatment cannot be justified; it is referred to discrimination that are 'solely' based on the enumerated grounds.

Despite this latter point an ordinary reading of this article clearly implies a highly restrictive reading. Arguably in some situations of public emergency it may be justifiable to derogate from certain rights in order to ensure general public safety. For example in situations of tense, armed conflict it may be justifiable to curtail the right of *e.g.* freedom of movement in form of a general curfew. However, because severe human rights abuses are known to occur during public emergencies it is appropriate that derogations are strictly monitored.<sup>500</sup> Indeed, the HRC confirms that measures of derogation must be of 'an exceptional and temporary nature', designed to combat a serious public emergency.<sup>501</sup> A comparison with Article 4 of the ICESCR strengthens this impression: Indeed, derogation measures are legally distinct from limitations and the threshold of justification is even higher.<sup>502</sup>

The task in the present context is to consider whether it is permissible to derogate from article 26 as regards access to employment for groups of aliens such as asylum-seekers. For instance, the future prospects of Southern European countries experiencing a worsened downward spiral of economic depression and unemployment coupled with increasingly large influxes of immigrants is not entirely unlikely. However, scholars have submitted that 'economic difficulties *per se* cannot justify derogation measures'.<sup>503</sup> Indeed, public emergencies are extraordinary situations, whereas economic underdevelopment is a commonplace phenomenon in many States. This writer fails to see how restrictions on access to employment for asylum-seekers could ever be 'strictly required by the exigencies of the situation'. After all, the threshold is arguably stricter than Article 4 of the ICESCR. Overall, given the strict requirements of this provision it cannot be used as justification of measures of the type in question.

## 7. European legal instruments

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<sup>497</sup> Scheinin and Langford (2009), p.112.

<sup>498</sup> Ibid.

<sup>499</sup> Ibid.

<sup>500</sup> In *Landinelli Silva v. Uruguay*, the HRC declared that Uruguay was not able to evade its obligations under the Covenant simply by proclaiming the existence of a public emergency. Communication No. 34/1978, para.8.3.

<sup>501</sup> HRC GC No. 29, para.2.

<sup>502</sup> Müller (2009), p.564.

<sup>503</sup> See 'Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR'(1985), 7 HRQ 1, Article 41.

In light of the controversies over asylum policies in the European region, it is appropriate to devote attention to its most important legal regimes. As indicated, it is also a constructive approach as these regimes take part in an informal transnational judicial dialogue that may exert influence on the future content of international human rights law. This chapter addresses three important legal regimes in the European region. The first section provides an overview of the relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as well as relevant jurisprudence by the European Court of Human Rights (ECtHR). Subsequently a section is devoted to the European Social Charter (ESC) and the output of the European Committee of Social Rights (ECSR). The chapter is concluded with a discussion of relevant developments within the European Union legislative framework.

## ***7.1 European Convention for the Protection of Human Rights and Fundamental Freedoms***

### **7.1.1 Main provisions**

The personal scope of The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) encompasses ‘everyone within the[ir] jurisdiction’ of a State party.<sup>504</sup> Thus, aliens such as asylum-seekers benefit from its protection.<sup>505</sup> Moreover, while the Convention is primarily concerned with civil and political rights, the European Court of Human Rights (ECtHR) has long ago established that a water-tight division towards the socio-economic sphere of rights cannot be maintained.<sup>506</sup> Although the Convention does not contain core socio-economic rights, the ECtHR has developed a jurisprudence of addressing socio-economic rights by virtue of purposive interpretation of the ECHR provisions.<sup>507</sup> Thus, as long as the claims are made within the Convention’s *ratione materiae*, auxiliary questions concerning socio-economic rights may be decided upon. As opposed to the UN treaty bodies, the ECtHR renders binding judgments with the formal approval of the Committee of Ministers, the highest political body of the Council of Europe.<sup>508</sup>

Neither the Convention nor any of its protocols provide for a right to work, any complaint made solely on that basis would be inadmissible.<sup>509</sup> However, a growing body of case-law indicates a nascent recognition of the concept of human dignity as an essential aspect of the rights enumerated in the ECHR. For example, the jurisprudence of the Court indicates that when individuals within its jurisdiction are left in conditions of complete destitution the State may incur responsibility under the ECHR. In several cases the Court has considered that such cases have the potential of provoking violations of the right to life in Article 2; the prohibition of

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<sup>504</sup> 213 UNTS 221, adopted 4 November 1950.

<sup>505</sup> See e.g. *Cruz Varas v. Sweden*, Application No.15576/89, ECHR, 20 March 1991, para.70.

<sup>506</sup> See *Airey v. Ireland* (1979) 2 EHRR 305, para.26.

<sup>507</sup> See e.g. *Buckleley v. United Kingdom*, 25 September 1996, Application no.20348/92, ECHR 39 (1996). (Housing); *D v. The United Kingdom*, 2 May 1997, Application no. 30240/96, 24 EHRR 423 (1997) (Health Care); *Gaugusuz v. Austria* (1996), 16 September 1996, Application no. 17371/90, 23 EHRR 364 (1997) (Social Security).

<sup>508</sup> Article 46 ECHR.

<sup>509</sup> See e.g. *Neigel v. France*, 17 March 1997, Application No.18725/91.

degrading treatment in Article 3; or with the principle of respect for bodily integrity as an aspect of private life protected under Article 8.<sup>510</sup> While the most known cases concerns deportation to face destitution, the Court has implied that these articles may be violated in cases concerning the socio-economic conditions on the territory as well.<sup>511</sup> In *O'Rourke v. The United Kingdom*, the Court declared that the applicant had failed the test of admissibility because it found that he had brought his homelessness upon himself.<sup>512</sup> Yet the Court did not exclude the possibility that his Convention rights could have been engaged if his predicament had been attributable to the State. Furthermore, in a separate opinion in *H.R.L v. France* it was considered that the refusal to accord the means of subsistence to a person whose expulsion has been ruled to be in violation of the Convention raised issues under Article 8 of the ECHR. These views may also be applied to asylum-seekers who cannot be deported while their application to remain in the country is being determined.<sup>513</sup>

Moreover, a plethora of decisions from the English Courts have addressed the question of destitution as a result of States imposed denial of all socio-economic benefits.<sup>514</sup> The English High Court in *R(Q and others) v. Secretary of State Home Department* addressed the issue of destitute asylum-seekers who were simultaneously denied access to employment and social support, including accommodation. The Court considered that the withdrawal of support from people who lacked the means of obtaining adequate accommodation or meeting their essential living needs could violate the ECHR Article 3.<sup>515</sup> Thus, it may be persuasively argued that the concurrent denial of both the access to a social support scheme and the right to seek employment, which in effect leaves the asylum-seeker destitute, may violate Article 3 and/or Article 8. While these cases appear to require the concurrent denial of both social support and access to work in order to violate Article 3 or 8 of the ECHR, they may be taken to imply a growing recognition that the concept of human dignity permeates the ECHR and is of essential importance to the interpretation of State obligations.

However in the recent case of *Tekle* the English High Court decided that employment restrictions imposed on asylum-seekers and the lack of cash benefits for an extended period of time without a definite end date for the authorities to determine the claim may violate the right to respect for private life in Article 8 of the ECHR.<sup>516</sup> In the *Tekle* case an Eritrean national applied for asylum in the UK in November 2001 but his application was denied and his appeal dismissed in May 2002. In April 2004 a fresh claim was made on the basis of new circumstances. Faced with excessive backlogs in the asylum system the authorities initiated prioritisation of certain cases perceived as more urgent than others. As a result of this practice the claimant had spent four and a half years before his fresh claim was assessed. During this period of waiting, he was not allowed to undertake any form of employment in the UK. Tekle did not claim to be destitute, but was allowed a challenge of the refusal to grant permission to work.

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<sup>510</sup> See O'Cinneide (2008).

<sup>511</sup> See e.g. the landmark case of *D. v. The United Kingdom* (1997) 24 EHRR 423. Also *Van Volsen v. Belgium*, Application No.14641/89 ECHR.

<sup>512</sup> Application No. 39022/97, Decision of 26 June 2001.

<sup>513</sup> Mole (2007), p.110.

<sup>514</sup> See e.g. *R (Q and others) v. Secretary of State Home Department*, 19 February 2003, EWHC 195 Admin [2003]; *United Kingdom House of Lords case of Limbuela and Others*, 3 November 2005, UKHL 66 [2005].

<sup>515</sup> *Ibid.*, para.67.

<sup>516</sup> *David Tekle v. Secretary of State for the Home Department*, 11 December 2008, EWHC 3064 Admin [2008].

The claimant submitted, *inter alia*, that the ability to undertake remunerative employment was an aspect of the right to respect for his private life within the meaning of ECHR Article 8(1) of which he was entitled to have respected in the UK. As a result of the excessive delays in having his claim assessed and the State measures barring him from taking up employment, his solicitor argued that Article 8 had been violated. The Court found that while there is no right to a decision within any given period of time and no right to permission to work merely because of delays, ‘undue delay that is the responsibility of the Home Office’s inefficiency both increases the right to respect to private life that is carried on of necessity during the period of delay, and can be said to diminish the strength of immigration control factors that would otherwise support refusal of permission to work.’<sup>517</sup>

The Court went on to declare that the ability to take employment, self employment or establishing a business was an aspect of private life, elaborating that the ‘ability to develop social relations with others in the context of employment, as well as the ability to develop an ordinary life when one is in possession of the means of living to permit travel and other means of communication with other human beings is thus an aspect of private life.’<sup>518</sup>

The Court concluded that the continued refusal to grant access to employment and access to cash benefits after such an excessive waiting period was a violation of the right to respect for private life within the meaning of ECHR Article 8. However, the Court did not establish at what point the prohibition on employment would become unjustifiable, although it implied that a denial for more than two years would make it ‘*less acceptable*’.<sup>519</sup> The immigration authorities appealed the High Court’s decision. The Court of Appeal dismissed the appeal because the claimant was now eligible to apply for permission to work under the EU Reception Directive as a result of another Court decision.<sup>520</sup> For this reason the judge did not discuss the arguments pertaining to Article 8 on the basis that it was not good to waste the Court of Appeal’s time. However, he emphasized that in doing so he had expressed no view one way the other as to the *ratio* in the High Court judgment. Thus, the High Court decision still stands and even if not strictly binding it serves as persuasive precedent for future cases.

Of particular interest in this judgment is the explicit link that is drawn between the access to *means of living*, i.e. ready money, and the right to respect for private life in Article 8. In drawing this nexus, the Court implied that there is a limit to how long in-kind support schemes can be maintained as the only form of support. Moreover, in emphasizing the ‘ability to develop social relations with others in the context of employment’ the Court understands the notion of work as not merely a source of remuneration but as a value in itself justified according to a social rationale.<sup>521</sup> Another point of interest is the High Court’s inclusion of the right to self-employment and the establishing of a business within the sphere of the right to private life, especially considering that under Rule 360 of the UK Immigration Rules these rights were currently not provided for. This judgment represents an important recognition of a connection

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<sup>517</sup> Ibid, para.34.

<sup>518</sup> Ibid, para.36.

<sup>519</sup> Ibid, para.40 vii).

<sup>520</sup> See Chapter 7.3.

<sup>521</sup> Ibid, para.36, where the Court quotes Lord Bingham in *Huang v SSHD*: ‘human beings are social animals. They depend on others’.

between employment and human dignity. Considering the widespread problem of backlogs in many western countries, the judgment may prove to have great import.

### **7.1.2 ECHR Protocol 12**

The prohibition of discrimination in Article 14 of the ECHR only applies to the rights enumerated in the Convention. However, the States which have ratified Protocol 12 now afford a scope of protection which extends beyond the enjoyment of the rights contained in the ECHR.

Protocol 12 provides that '[t]he enjoyment of any rights set forth in law shall be secured without discrimination on any ground' as well as the prohibition of discrimination by 'any public authority on any ground'. The wording 'any right set forth in law' mainly refers to national law, but in EU member states it will also apply to the relevant EU legislation. The new protection afforded is thus similar to that of Article 26 of the ICCPR.<sup>522</sup> Moreover, the Court has through its case law on Article 14 established a consistent approach resembling that of the HRC Committee. In fact, the reasonable and objective test may be said to have its origins in the jurisprudence of the ECtHR.<sup>523</sup> While the respective tests are fairly equal, the substantial difference is that the decisions of the ECtHR are legally binding and that its competencies include the award of damages.

Thus, where national law or other regional instruments provide for a right to access employment, the protocol may be a constructive avenue for addressing claims of violation of the non-discrimination principle. As of April 2010, the protocol has entered into force in 17 of the Member states in the Council of Europe.<sup>524</sup> Regrettably, the major refugee recipient states have not yet agreed to sign. Case-law relating to the application of the non-discrimination principle beyond the rights protected by the main articles are still scarce.

## **7.2 The European Social Charter**

The European Social Charter is an instrument of the Council of Europe in the field of economic and social rights. The original version of the Charter was adopted in 1961.<sup>525</sup> An extensive recast of the Charter was undertaken in 1996, when many of its provisions were altered and several new rights added in a new treaty, the Revised Social Charter (ESC).<sup>526</sup> The European Committee of Social Rights (ECSR), an independent expert body, performs an important function in both the reporting and the collective complaint procedures of the Charter.<sup>527</sup> The Committee of Ministers

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<sup>522</sup> See Explanatory note annexed to the Protocol.

<sup>523</sup> *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Appl. Nos. 9214/80, 9473/81, 9474/81, para.72.

<sup>524</sup> Available at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=&CL=ENG> [Sited 31 May 2010].

<sup>525</sup> CETS No.: 035, entry into force 26/2/1965.

<sup>526</sup> CETS No.: 163, entry into force 1/7/1999.

<sup>527</sup> Khaliq and Churchill (2008), p.21.

of the Council of Europe is the only body with competence to transmit recommendations to the States parties of the Charter.<sup>528</sup> However, in its capacity as an expert body, the ECSR is recognized as the only body competent to provide authoritative interpretations of the Charter.<sup>529</sup> The views of the ECSR are gleaned from its conclusions on individual National Reports and findings on collective complaints.

A significant aspect of the ESC is that the rights enumerated are generally construed as not subject to progressive realization, i.e. they give rise to duties of immediate effect. Yet the ESC does share the commonalities of most economic and social rights treaties in that a number of its rights are formulated in rather vague terms. Conversely, many of its provisions, particularly those concerned with employment rights, are framed in sufficiently defined terms to be justiciable.

Article 18 of the Revised Charter directly addresses the ‘*right to engage in a gainful occupation in the territory of other Parties*’. Contracting states are required, *inter alia*, to apply existing regulations in a spirit of liberality, to simplify such regulations and to liberalise regulations governing the employment of foreign workers. The wording implies a duty of progressive realization. Nevertheless, perhaps to an even greater extent than Article 2(1) of the ICESCR all the four subparagraphs imply a duty to take concrete steps.<sup>530</sup> Note that consistent with the declaratory part 1 of the ESC, article 18 is ‘subject to restrictions *based on cogent economic or social reasons*’. In addition, Part VI Article E provides that the right contained in the Charter shall be secured without discrimination of any ground.

As a general rule, the rights enumerated in the Charter apply only to the nationals of the State concerned and to the nationals of other States parties lawfully residing or working regularly in that State.<sup>531</sup> However, paragraph 2 of the Appendix explicitly binds Contracting States to

grant to refugees as defined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 and in the Protocol of 31 January 1967, and lawfully staying in its territory, treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Party under the said convention and under any other existing international instruments applicable to those refugees.

While this provision has received limited attention from commentators, it would appear to provide a legal basis for the protection of asylum-seekers rights in Europe. However, an initial question is whether this protection encompasses refugees from a state which is *not* a member of the Council of Europe.<sup>532</sup> This is not explicitly enunciated in the text, thus raising a question as to the precise relationship to the main rule in paragraph 1 requiring a nationality from one of the member states. Yet by explicitly including the Protocol of 1967, which in effect removed the geographical limitation to the original 1951 Refugee Convention, it appears that the protection may not be limited to refugees that are nationals of Council of Europe Member States.<sup>533</sup>

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<sup>528</sup> Ibid.

<sup>529</sup> Ibid.

<sup>530</sup> See *Autism-Europe v. France*, Complaint No.13/2002, Decision on the Merits, para.53.

<sup>531</sup> See Appendix; Scope of the Revised European Social Charter in terms of persons protected, para.1.

<sup>532</sup> See e.g. Dent (1998), p.37 who takes this position.

<sup>533</sup> VCLT Art.31.

Recalling the declaratory nature of refugee status, asylum-seekers may very well be refugees despite not yet being recognized as such. Guidance might be sought in the complaint case of *FIDH v. France*, in which the Committee held that ‘legislation or practice which denies entitlement to medical assistance to foreign nationals, even if they are here illegally, is contrary to the Charter.’<sup>534</sup> Although it must be emphasized that asylum-seekers are *not* illegal migrants, the case may serve as an additional indication that certain groups, by virtue of their vulnerable status are entitled to enjoy the rights in the ECSR.

The question is whether the term ‘lawfully staying’ in the text corresponds to the meaning of this notion in the Refugee Convention. If this is the case, asylum-seekers would be able to enjoy the protection of the ESC to the extent that their presence on the territory has acquired the characteristics of officially tolerated, ongoing presence in the territory.<sup>535</sup> Neither the appendix itself nor the preparatory works shed further light on the terms used. However, the authoritative practice of the ECSR provides strong support for the notion that refugees recognized as such by virtue of the CSR benefit from the provisions in the Charter, irrespective of their nationality.

In Conclusions on a National Report from Sweden relating to Article 18, the ECSR noted the preparation of a new bill to reform immigration rules and the formalities of ‘foreigner’s engaging in gainful occupation in Sweden.’<sup>536</sup> Furthermore, it explicitly focused on the opportunities of asylum-seekers to apply for a work permit.<sup>537</sup> In asking to be informed of the progress of the bill, the ECSR indicated that it considers protection of asylum-seekers to be within the ambit of the ESC.<sup>538</sup> The Committee concluded that the situation in Sweden was in conformity with the obligation in Article 18 (1). As this paragraph only prescribes the duty ‘to apply existing regulations in a spirit of liberality’, the exact treatment owed to asylum-seekers as regards Article 18 in general remains unclear. However, in another conclusion regarding Greece, the Committee found that ‘in the absence of measures to relax the procedures for issuing work permits to nationals of States not members of the European Union or Parties to the [EEA-agreement], (...) the Greek situation is not in compliance with Article 18 para. 2.’<sup>539</sup> Overall, in light of the explicit reference to the socio-economic conditions of asylum-seekers in 57 Committee Conclusions on National Reports between 1988 and 2008, it is trite that asylum-seekers are within the *ratione personae* of ESC. Thus, despite receiving little attention, the ESC may prove an effective avenue for the advocacy of asylum-seekers right to access employment.

## ***7.3 Developments in the EU***

### **7.3.1 The Reception directive**

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<sup>534</sup> International Federation of Human Rights Leagues (FIDH) v. France, Decision on the Merits, Complaint No. 14/2003.

<sup>535</sup> For detail, see Chapter 5.3.2.

<sup>536</sup> ECSR Conclusions 2008, 24 October 2008, Volume 2, Report Number 7.

<sup>537</sup> *Ibid.*

<sup>538</sup> *Ibid.*

<sup>539</sup> ECSR Conclusions, 31 December 2001, Volume 1, Report Number 11.

At a Council summit in Tampere in 1999 a five-year program of EU legislation on asylum matters was agreed with a view to establish a Common European Asylum System (CEAS).<sup>540</sup> This was a reaction to the growing recognition amongst the Member States that widely divergent asylum practices had detrimental effects to both states and individuals. Harmonization of policies was considered necessary in order to address the problems associated with migration for asylum-seekers, such as secondary movements within the EU-area and efficient border control while at the same time ensuring a dignified standard of living for asylum-seekers. Article 63(1) (b) of TEC conferred on the Council the competence to adopt ‘minimum standards on the reception of asylum seekers in member States’.<sup>541</sup> The provision explicitly stated that the measures must be in accordance with the 1951 Refugee Convention, its 1967 Protocol and ‘*other relevant treaties*’.<sup>542</sup> As a result of these developments, EU’s Member states have ceded limited control over their immigration policies to the Community institutions. However, the United Kingdom, Ireland and Denmark opted out of the asylum-related instruments.<sup>543</sup> Thus, they are not bound by the Community measures adopted in this area, although an opportunity for opt-in is provided for in the protocols.

In 2003, the ‘Reception conditions directive’ was adopted by the Council.<sup>544</sup> It binds the Member States to guarantee a set of minimum standards for the reception of asylum seekers, including provisions to access employment. A directive is binding as to the result to be achieved, but confers a margin of appreciation on the Member States as to the means and form of implementation.<sup>545</sup> The preamble also states that ‘Member States have the power to introduce or maintain more favourable conditions’.<sup>546</sup>

The question of access to the labour market for asylum-seekers gave rise to intense debates amongst Member States and caused a delay in the adoption of the directive.<sup>547</sup> The vast majority wished to maintain some level of restriction on asylum-seekers’ access to employment to protect their national labour markets.<sup>548</sup> The majority position is reflected in Article 11(1) which states that ‘Member States shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not have access to the labour market’.

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<sup>540</sup> European Community, Tampere European Council, Presidency Conclusions, 15 and 16 October 1999, reported in IJRL, Vol.11, No.4 1999, pages 738-752.

<sup>541</sup> Treaty establishing the European Community (Amsterdam consolidated version), 10 November 1997, Official Journal C 340.

<sup>542</sup> [emphasis added]

<sup>543</sup> See Protocol No.21 on the Position of the United Kingdom and Ireland and Protocol No.22 on the position of Denmark.

<sup>544</sup> See Council Directive 2003/9/EC of January 2003 *laying down minimum standards for the reception of asylum seekers*.

<sup>545</sup> Treaty of the Functioning of the European Union Article 288 [ex TEC Article 249]. Official Journal of the European Union C 83 of 30 March 2010.

<sup>546</sup> Preamble, recital (15)

<sup>547</sup> Groenendijk (2005), p.151: Negotiations lasted from July 2001 until November 2002. The UK opted in, Ireland did not.

<sup>548</sup> Only Sweden was in favour of a clear right to work for asylum-seekers and a bar period shorter than six months.

However, Article 11(2) provides that ‘if a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant’. This provision is significant because it explicitly imposes a time-limit on the barring of asylum-seekers from access to the labour market. Yet the legal import of this provision is significantly undermined by a number of qualifications.

First of all, the right may only arise if it relates to a *decision at first instance*. Thus, if a first instance decision is reached after, say, eleven months, no obligation to authorize access arises from this provision, even in the event of excessive delays in an appeal-case.<sup>549</sup> On the other hand, paragraph 3 provides that access will not be withdrawn owing to pending appeal proceedings, provided that such appeal has suspensive effect.

Second, the requirement that the delay may not be attributable to the applicant is ambiguous and affords considerable latitude to the Member States’ authorities. Furthermore, even if these two requirements are satisfied, the Member States still retains authority to ‘decide the conditions for granting access to the labour market’. While the provision permits the imposition of national regulations on access, such conditions may not fully exclude access to employment. Some type of access must be granted, even if the Member States may decide the kind of work asylum-seekers may apply for, the amount of time per month or year they are allowed to work or the skills required.<sup>550</sup>

Overall, the present text is a diluted version of the Commission’s original proposal, which proposed that ‘Member States shall authorize access to the labour market’ within six months from application.<sup>551</sup> Moreover, as opposed to the original proposal, family members are excluded from the scope of this provision.<sup>552</sup> In addition, the Member States subsequently negotiated the insertion of a fourth paragraph, which permitted them to prioritize EU citizens, and nationals of EEA-States, as well as legally resident third-country nationals.

These provisions raise several questions from the perspective of international refugee and human rights law. Despite affirmations that the directive is based on a ‘*full and inclusive application*’<sup>553</sup> of the Refugee Convention, it is not in compliance with Article 18 of the CSR on the right to engage in self-employment for refugees lawfully present.<sup>554</sup> In fact, the directive does not operate with a distinction between self-employed and wage-earning employment. Moreover, the directive does not comply with the duty to allow more immediate access to spouses of nationals

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<sup>549</sup> But see *ZO(Somalia) and MM(Burma and the Secretary of State for the Home Department)*, 20 May 2009, EWCA Civ. 442. The English Court of Appeal found that a fresh claim for asylum is covered by the Reception Directive. The decision has been challenged by the authorities through a petition lodged to the new Supreme Court.

<sup>550</sup> Commission’s Explanatory Memorandum p.13-14.

<sup>551</sup> COM (2001)181 of 3 April 2001, Official Journal of the European Union 2001 213E/286.

<sup>552</sup> Groenendijk (2005), p.153.

<sup>553</sup> Supra n.545., recital (2).

<sup>554</sup> See Chapter 5.2.2.

and parents of minors possessing the nationality of the host country as required by CSR Article 17(2)(b)-(c).<sup>555</sup> Furthermore, to the extent that asylum-seekers are entitled to benefit from the provisions of Article 17(2) the prioritization of EU citizens, nationals from the EEA and legally resident third-country nationals constitutes a breach of the Refugee Convention. The fourth paragraph is also highly questionable in light of the prohibition of discrimination in international human rights law, in particular the ICESCR Article 2(2) and ICCPR Article 26.<sup>556</sup> Finally, while the directive recognizes a limited right for asylum-seekers to work it is not compliant with the duty to respect the right to work as required by ICESCR Article 6.<sup>557</sup>

Commentators have expressed doubt as to whether this directive will contribute to the harmonization of national practices in this field.<sup>558</sup> In fact, because the directive only prescribes minimum standards, concern have even been expressed that the directive will actually lead to a deterioration of standards for asylum-seekers.

An expert report prepared for the European Commission in 2006 found that all Member States but Lithuania had implemented regulations on access to employment in compliance with Article 11.<sup>559</sup> While the high level of compliance was partly due to the latitude conferred in relation to labour market conditions, the report concluded that the impact of the directive had been underestimated by commentators.<sup>560</sup> Overall, the directive was found to have had a positive effect on asylum-seekers' access to employment in more than a third of the Member States concerned.<sup>561</sup> Furthermore, the predictions that the directive would result in a lowering of standards in Member States that maintained more favourable conditions had not been fulfilled.<sup>562</sup> Thus, the results so far indicate an incremental improvement of conditions for asylum seekers in accessing the labour market.

Despite its rather narrowly defined scope, the Article 11 of the 'Reception conditions directive' constitutes an important acknowledgment that asylum-seekers in some circumstances are entitled to access employment within the EU-area. The opinion of this writer is that the significance of Article 11 extends beyond what the text appears to say at first glance. In particular, there is the possibility for elaboration of the norms through the jurisprudence of the European Court of Justice. Furthermore, with the accession of the EU to the European Convention of Human Rights, issues relating to the interpretation of that convention will come under the ambit of the ECtHR.

### 7.3.2 Future?

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<sup>555</sup> See Chapter 5.3.3.

<sup>556</sup> See Chapters 6.2.2 (ii) and 6.3.

<sup>557</sup> See Chapters 5.3 and 5.6.

<sup>558</sup> Groenendijk (2005), p.153.

<sup>559</sup> See Academic Network for Legal Studies on Immigration and Asylum in Europe, '*Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States*', October 2006. See also the Commission Evaluation Report, COM(2007) 745 Final.

<sup>560</sup> Ibid, pp.72-73.

<sup>561</sup> Ibid.

<sup>562</sup> Ibid.

After the Lisbon Treaty entered into force in December 2009, Community acts adopted in the area of immigration and asylum policy have been governed by Article 78 of the Treaty of the Functioning of the European Union (TFEU).<sup>563</sup> Its first paragraph reiterates the former TEC commitment to the 1951 Refugee Convention and its 1967 Protocol, as well as ‘*other relevant treaties*’. Interestingly Article 78(2) (f) does not, like former TEC Article 63(1) (b), refer to the establishment of *minimum* standards. In referring simply to ‘standards concerning the conditions for the reception of applicants for asylum’ it appears that there has taken place an enlargement of EU competences in this field.

Furthermore, due to a change brought about in 2005, the co-decision procedure are presently the normal legislative procedure in the field of asylum.<sup>564</sup> The co-decision procedure entails that both the Council and the European Parliament must consent to the adoption of new legislation.<sup>565</sup> Voting in the Council will hereafter be done by qualified majority and the European Parliament has a right of veto.<sup>566</sup> This has the potential of substantially enhancing the decision-making process in the Council, as single Member States are no longer able block decisions.

The European Commission presented a recast proposal of the Reception directive in December 2008.<sup>567</sup> The proposal is an attempt to address the deficiencies in the original directive, in particular the wide margin of discretion conferred on the Member States. Its stated main objective is ‘to ensure higher standards of treatment for asylum seekers with regard to reception conditions that would guarantee a dignified standard of living, in line with international law.’

The proposal aims, *inter alia*, to improve the facilitation of access to employment. First, Article 15 proposes that ‘Member States shall ensure that applicants have access to the labour market no later than 6 months following the date when the application for international protection was lodged’. This time-period was considered appropriate in light of the current State practices. Notably, the proposal removes the link between access to employment and the various stages of the asylum procedure, thus making the six month period absolute.<sup>568</sup>

Second, while the competence of Member States to impose certain labour market conditions are retained, the proposal stipulates that these conditions may not *unduly restrict* access to employment for asylum seekers. Moreover, the paragraph allowing the prioritization of EU citizens, EEA nationals and legally resident third-country nationals is removed in the present proposal. The recast proposal was transmitted to the Council and European Parliament in December 2008.

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<sup>563</sup> Official Journal of the European Union C 83 of 30 March 2010 [formerly the Treaty establishing the European Community].

<sup>564</sup> Council Decision 2004/927/EC, since 1 December 2009 governed by TFEU Article 294.

<sup>565</sup> TFEU Article 294.

<sup>566</sup> *Ibid.*

<sup>567</sup> COM(2008) 815 final 2008/0244 (COD) Brussels, 3 December 2008.

<sup>568</sup> cf. the reference in the current provision that grants access only if a ‘decision of first instance’ has not been taken within one year from the lodging of the application.

At the time of writing the recast proposal was going through the stages of the co-decision procedure. Considering the present state of economic downturn and rising unemployment in many Member States, it is likely that the negotiations within the Council will be clouded with controversy yet again.

## 8. Conclusions

After having investigated the interface between international refugee law and international human rights law, a rather clear picture presents itself:

While the CSR arguably protects the right to access employment for *recognized refugees*, the relevant provisions does not adequately address the predicament of asylum-seekers. As shown, the complex residence requirements of the CSR have aided opportunistic State parties in minimizing their obligations under the Convention. The problem is further compounded by the lack of an individual complaint procedure and the failure of the UNHCR to perform its supervisory function in a dynamic way, e.g. through the imposing of state reporting requirements.<sup>569</sup>

By virtue of CSR Article 18, asylum-seekers are entitled to engage in self-employed activities. Yet, the importance of this provision is tempered by the fact it only affords treatment ‘not less favourable than that accorded to aliens generally’. While this provision may be important in less developed states where the formal barriers to entrepreneurship are few, it is of little value in Western states where aliens generally are not entitled to access any form of employment. Thus, there is reason to question the substantive value of this guarantee to asylum-seekers in developed countries. Furthermore, the so-called liberal professions are afforded tantamount to no protection whatsoever by Article 19.

On the other hand, by virtue of Article 17(2), asylum seekers who marry a national or have a child possessing that nationality are entitled to *immediate* exemption from restrictive measures for the protection of the labour market. However, as regards access to wage-earning employment in general, the divergent interpretation of ‘lawfully staying’ in Article 17 is noted. In line with the approach of this paper and in order to give modern content to this notion it is appropriate to seek guidance in general human rights law.

Although the international human rights law regimes suffer from its own limitations, it arguably affords a stronger basis in terms of access to employment for asylum-seekers. First and foremost, a literal interpretation of ICESCR Article 6 clearly entails a duty to respect the right to access employment. The CESCR’s inclusion of access to employment within the concept of minimum core obligations further amplifies this argument. In addition, when read in conjunction with Article 6, the non-discrimination principle of ICESCR Article 2(2) serves to enhance the legal basis. Importantly, the principle of non-discrimination also permits affirmative action in favour of asylum-seekers. The latter conclusion centres upon the fact that asylum-seekers cannot be put in the general category of aliens. As argued, until the complaints mechanism under the

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<sup>569</sup> Lester (2005), p.329.

ICESCR is fully operative, a constructive avenue may be the filing of a petition to the HRC under ICCPR Article 26.

While limitations may be justified in *extreme* situations of mass influxes coupled with excessive unemployment, the States have a heavy burden of proof in justifying such measures. In the same vein, while ICESCR Article 2(3) affords developing states a level of discretion in guaranteeing economic rights to aliens, the threshold is high. Importantly, this article may not be taken to dilute rights under the CSR.<sup>570</sup> On the other hand, in light of ICESCR Article 2(2) it is appropriate to read down the scope for distinguishing between nationals and non-nationals which is implied in articles 18 and 19 of the CSR.<sup>571</sup>

Overall, the common State justifications for withholding access to the labour market are not convincing. The argument of protection of local employment has been shown to be of limited merit. Furthermore, this paper has pointed out the perils of deference to State justifications based on deterrent policy, as no evidence has been presented in support of its continued operation. The paper has also shown why the provision of social security, despite its essential importance in many instances, cannot be accepted as a legally valid justification for withholding access to the labour market. In light of the social and economic consequences for asylum-seekers of not being able to work in the host country, limitations are particularly difficult to justify.

Thus the scope for permissible limitations is much more limited than claimed by some states. Therefore, it may be seen as a problem of implementation rather than legal protection. As has been argued in this paper, international human rights law does not defer to state practice which is not uniform. Although the recognition of a right to access employment for asylum-seekers does not seem to be reflected in general State practice, a growing awareness may be seen in many States that the socio-economic conditions of long-term asylum-seekers must be addressed. For example, the developments of legal standards within the EU may be seen in that light. Furthermore, based on the jurisprudence presented in this paper, it appears that the reception conditions of asylum-seekers are increasingly addressed through the elaboration of concepts like freedom from destitution and human dignity.

While it is clear that asylum-seekers may not be denied access to the labour market for any substantial period in compliance with international law, there is the question of whether a reasonably short time-bar may be implied. Although the available evidence does not support claims of deterrent effects in this area, such minor limitations may reconcile the concern to allow asylum-seekers dignified conditions and State's preoccupations of controlling their labour markets. The European Commission recast proposal of authorizing access to the labour market for asylum-seekers within six months after application could provide a useful yardstick in that regard. Indeed, the UNHCR endorsed this realist approach in written submissions.<sup>572</sup> It has also been proposed that it might be viable to distinguish between newly arrived asylum-seekers and

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<sup>570</sup> Edwards (2005), p.351.

<sup>571</sup> Lester (2005), p. 355.

<sup>572</sup> 'UNHCR Comments on the European Commission's Proposal for a recast of the Directive laying down minimum standards for the reception of asylum-seekers (COM (2008)815 final of 3 December 2008', 13 March 2009, available at: <http://www.unhcr.org/refworld/docid/49ba8a192.html> [accessed 23 May 2010], p.9.

claimants who are given temporary leave to remain because their claim has been declared admissible.<sup>573</sup>

In any case, for this writer's part, it is submitted that the States would be best advised to rid themselves of the deterrent policy mindset, as it is doing more harm than good. States must accept the statistical existence of abuse. Moreover, asylum-seekers are not 'illegal' immigrants. On the contrary, until a status as refugee has been verified or denied, their stay in the host State are legal by virtue of the CSR. The right to access employment should accrue as a result of their authorized ongoing presence in the country. As acknowledged by the UNHCR one must keep in mind that '[e]very refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined'.

Furthermore, moving beyond the confines of this paper, it ought to be acknowledged that formal permission to engage in work cannot suffice to solve the problem of asylum-seekers' access to employment. Apart from formal restriction imposed by States, asylum-seekers attempting to engage in work face a number of other difficulties. For example, their uncertain status may deter potential employers.<sup>574</sup> The latter may also be discouraged by administrative complications and delays in obtaining the required documentation.<sup>575</sup> Moreover, language barriers, lack of qualifications or problems in establishing equivalence between foreign and national qualifications may prevent asylum-seekers from taking up employment.<sup>576</sup> In addition the enforcement of detention in many countries may effectively preclude any such aspiration. Thus, the authorization of asylum-seekers to work should also entail vocational training, alleviation of administrative requirements and targeted employment program strategies aimed at facilitating work opportunities for those willing and able to work. In the long run, this is in everyone's interest. Being able to participate as productive members of society have fundamental importance for the individual's sense of self-worth and dignity. Work is not just a means in order to sustain one's living, it is a means to *earn* it.

As Nugent JA stated in the case of *Watchenuka*, 'Human dignity has no nationality'.<sup>577</sup>

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<sup>573</sup> See Belgian delegate's proposal in the 2<sup>nd</sup> *Colloquy on the European Convention on Human Rights and the protection of refugees, asylum-seekers and displaced persons*, p.100.

<sup>574</sup> Da Lomba (2004), p.229.

<sup>575</sup> Ibid.

<sup>576</sup> Ibid.

<sup>577</sup> *Supra* n.139.

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