Economic and Social Rights of Refugees and Asylum Seekers in Europe

by
Ryszard Cholewinski
Faculty of Law
University of Leicester
United Kingdom

prepared for:

Workshop on Refugee and Asylum Policy and Practice in Europe and North America
Oxford University, 1-3 July 1999
1. Introduction

The purpose of this paper is to outline the economic and social rights of refugees and asylum seekers in Europe, with a particular reference to their rights to health, adequate housing, social assistance, education and employment. The paper first considers to what extent these rights are protected under international refugee law and international human rights law. Of special interest is the possibility of protecting these rights in the light of broader and dynamic interpretations of certain fundamental civil and political rights, particularly those protected by the European Convention on Human Rights (ECHR). Based on surveys conducted by the Danish Refugee Council, the paper then provides an overview of the position of asylum seekers and refugees in European countries with respect to the enjoyment of the identified rights and draws some preliminary conclusions on the compliance of these countries' laws and practices with international standards.

2. Economic and social rights under international refugee law

2.1 Refugee rights

The Geneva Convention Relating to the Status of Refugees (CSR) affords refugees a broad range of rights in the country of asylum. Unfortunately, this aspect of the CSR has been given relatively little attention by refugee law scholars, who have focused their efforts on the refugee definition in Article 1 CSR and the procedures by which refugee status is determined. The rights granted include economic and social rights, such as the rights to wage-earning employment, housing, public education, public relief, and social

---


2 European Convention on Human Rights (as amended by Protocol No. 11), 4 Nov. 1950; Council of Europe ETS No. 5; entry into force 3 Sept. 1953; ratified by 40 States.

3 Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 (CSR); ratified by 133 States. The Protocol Relating to the Status of Refugees (31 Jan. 1967, 606 UNTS 267) (CSR), which extends the territorial and temporal scope of the CSR, has also been ratified by 133 States.

Social security includes 'legal provisions in respect of...[inter alia] occupational diseases, maternity, sickness... and any other contingency which, according to national laws or regulations, is covered by a social security scheme'. Refugees are to be given 'most-favoured-nation' treatment in respect of employment and treatment which is accorded to aliens generally in respect of housing and education other than elementary education. Equal treatment with nationals or 'national treatment' is to apply in respect of elementary education, public relief and social security. With the exception of the right to public education, these rights are limited to those refugees 'lawfully staying' in states parties. Goodwin-Gill argues that these provisions 'apply only to refugees lawfully resident in the contracting State, that is, those who are, as it were, enjoying asylum in the sense of residence and lasting protection'. 'Lawful residence' should therefore be distinguished from 'simple presence' or 'lawful presence':

In order to obtain the benefit of ... [these] articles ..., the refugee must show something more than mere lawful presence. Generalisations are difficult in the face of different systems of immigration control, but evidence of permanent, indefinite, unrestricted or other residence status, recognition as a refugee, issue of a travel document, 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.

Consequently, it would appear that these rights only apply to 'established' refugees, who have been granted asylum by the state party, but not to asylum seekers, despite views to the contrary. The exclusion of asylum seekers from these protections has been recognised by the English Court of Appeal in *R v. Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants and ex parte B*.

It might, however, be possible to argue that 'lawful residence' accrues to asylum seekers after they have spent a certain amount of time in a country, particularly if the time taken to arrive at a definitive decision on the claim is excessively long. If asylum seekers are permitted to work after a certain period of residence, this would also confirm

---

5 Arts. 17, 21, 22, 23 and 24 respectively.
6 Art. 24(1)(b).
8 Ibid. at 308.
11 See e.g. the view of the Immigration Law Practitioners' Association (ILPA) in representations made to the United Kingdom Government proposals in 1995 to remove welfare benefits from a large group of asylum seekers: '[T]here is a respectable body of opinion that [the provision relating to public relief and assistance] applies to those who are refugees even if they are not yet recognised as such'. ILPA, *Representations to the Social Security Advisory Committee on the Draft Regulations* (9 Nov. 1995) at 4.
to some extent that their 'status' becomes more established with time.

2.2 Non-refoulement and Article 31 CSR

The refugee rights regime in the CSR is not the only relevant package of provisions, which can be resorted to in the event of the denial of economic and social rights. It is arguable that a broad application of other provisions in the CSR can also provide some protection in this area, not only to recognised refugees but also to asylum seekers. The principle of non-refoulement, or the right not to be returned to a country of persecution, has been described as 'the undisputed cornerstone of refugee law'. It is found in Article 33(1) CSR:

No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

It is clear that this provision applies not only to those who have been recognised as refugees by the country of asylum, but also to bona fide asylum seekers. It can be argued that the denial of important economic and social rights to asylum seekers effectively amounts to an infringement of the non-refoulement principle.

Unfortunately, important courts in domestic jurisdictions have interpreted the non-refoulement principle, as delineated by Article 33 CSR, rather narrowly, an approach hardly in keeping with the profound humanitarian spirit of the CSR. In addition to the recent English Court of Appeal's decision in ex parte B, which did not devote much attention to the argument that the withdrawal of social security benefits from asylum seekers amounted to 'constructive refoulement', the scope of non-refoulement was given a very narrow construction by the U.S. Supreme Court in 1993.

These decisions, therefore, must be viewed as setbacks to efforts to establish a more

13 Hathaway & Dent, supra note 9, at 5.
14 This position has been recognised by the English Court of Appeal. See Khaboka v. Secretary of State for the Home Department [1993] Imm. AR 484 at 487 (per Nolan LJ).
15 In ex parte B, the applicants relied on the arguments of the UNHCR, submitted to the UK Social Security Advisory Committee in November 1995, that the withdrawal of benefits from asylum seekers, particularly after receipt of the first negative decision and pending the outcome of any appeal, amounted to 'constructive refoulement'. See supra note 12, at 398hj-9a (cited by Simon Brown LJ).
16 In this regard, see General Conclusion No. 81 (XLVIII) 1997 on International Protection of the Executive Committee of the High Commissioner of Refugees (EXCOM) recognising 'the fundamental importance of the principle of non-refoulement, which prohibits expulsion and return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened... (para. i)'. Emphasis added.
17 Supra note 12, at 402b (Simon Brown LJ). See also supra note 15.
18 Sale v. Haitian Centers Council, (1993) 113 S. Ct 2549. The Supreme Court ruled that the principle of non-refoulement did not apply extra-territorially to the U.S. practice of intercepting Haitian asylum seekers on the high seas and returning them to Haiti without a screening of their claims.
expansive meaning of *non-refoulement* in customary international law.

It is also arguable that measures denying economic and social rights to certain groups of asylum seekers might constitute a violation of Article 31 CSR, which obliges contracting states not to impose penalties on refugees who 'enter or are present within their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'. If persons, who have entered a country clandestinely because they have been unable to obtain travel documents, whether genuine or otherwise, are denied economic and social rights as a result, this can be considered as a form of penalty for their illegal or clandestine entry. This argument relating to Article 31 should also be viewed in the context of policies applied in Western European countries and elsewhere, such as carrier sanctions and visa requirements, which make it very difficult for asylum seekers to enter countries of asylum and which arguably contravene Article 14 of the Universal Declaration of Human Rights (UDHR) providing for the right of everyone to 'seek and enjoy in other countries asylum from persecution'. Such practices have been collectively described as amounting to negative policies of 'non-entrée' and constitute a stark contrast to the positive principle of *non-refoulement*.

### 3. Economic and social rights under international human rights law

More powerful claims can be advanced on behalf of all asylum seekers under international human rights instruments, which are more universal in character going beyond the refugee-specific rights regime in the CSR.

#### 3.1 The principle of non-discrimination

Apart from the CSR, which is exclusively concerned with non-citizens in its application to refugees and asylum seekers, the international human rights instruments embrace both citizens and non-citizens and are therefore also applicable to refugees and asylum seekers. The International Covenant on

---

19 At the time of writing, such a discriminatory policy exists in the UK where in-country claimants, some of whom may have entered the country clandestinely, are denied access to the mainstream welfare benefits regime and are subject to a far more inferior benefits system. See Cholewinski, *supra* note 1 at 464-73.


21 See Hathaway & Dent, *supra* note 9, at 13-4: 'Although they may not violate Article 33 directly, visa requirements and carrier sanctions increase the risk of *refoulement*, and effectively undermine the most fundamental purposes of the Convention'. *Ibid.* at 14 (footnotes omitted).

22 A number of arguments in this section are drawn from Ch. 2 in R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press, 1997).
Civil and Political Rights (ICCPR)\(^{23}\) and the ECHR, with few exceptions,\(^ {24}\) apply to both nationals and non-nationals. They adopt all-embracing language such as 'everyone', 'all persons', and 'no one' and also contain non-discrimination clauses requiring each state party to respect and ensure (secure) the rights recognised therein to all individuals (everyone) within its territory (jurisdiction) without distinction (discrimination) of any kind (on any ground) such as race, colour, sex, language, religion, political or other opinion, national or social origin (association with a national minority), property, birth or other status.\(^ {25}\)

Although nationality is not explicitly remunerated as a prohibited ground of discrimination in either instrument, these provisions are clearly open-ended. The applicability of the ICCPR and its non-discrimination clause to non-nationals has been declared unequivocally by the Human Rights Committee (the body responsible for monitoring the implementation of the ICCPR) in its General Comment 15/17 on the Position of Aliens under the Covenant:

> In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.

> Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike ...\(^ {26}\)

While the Committee accepts that there is no general right of non-citizens to enter a country and that matters of immigration are largely to be left to the discretion of sovereign states parties, it has emphasised that the rights in the ICCPR must be guaranteed to non-citizens once they have been permitted to

---

\(^{23}\) *International Covenant on Civil and Political Rights*, 16 Dec. 1966; 999 UNTS 171; entered into force 23 March 1976; ratified by 144 states. See also the Optional Protocol to the ICCPR providing for an individual communications procedure: 999 UNTS 171; adopted 16 Dec. 1977; entry into force 23 March 1976; ratified by 95 states, including the following Western and Central and Eastern European countries: Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, Spain, Sweden, Ukraine.

\(^{24}\) Some rights in the ICCPR are expressly limited to citizens, such as political rights in Art. 25 ICCPR. See also Art. 16 ECHR, which reads: 'Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens'. The clauses enumerated are respectively concerned with the rights to freedom of expression, peaceful assembly and association, and the right to non-discrimination.

\(^{25}\) See Art. 2(1) ICCPR and Art. 14 ECHR respectively. The terms in parenthesis are those found in Art. 14 ECHR.

\(^{26}\) General Comment 15/17 on the Position of Aliens under the Covenant (adopted 27th Sess., 1986), reproduced in UN Doc. A/41/40, Annex VI, paras. 1 and 2. The Committee is empowered to issue General Comments under Art. 40(4) of the ICCPR. These Comments are not legally binding, but nonetheless constitute authoritative interpretations of the ICCPR's provisions. See M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: N.P. Engel, 1993) at xxiv, para. 21.
enter the country concerned.27

The ICCPR also contains a substantive equality clause in Article 26, which is not restricted to the rights enumerated in the ICCPR and may therefore be applied to combat discrimination in areas outside the immediate scope of its provisions, including economic and social rights. Although there is no state obligation under the ICCPR to introduce social measures, the Committee has confirmed in a number of views that existing measures must be applied in a non-discriminatory fashion,28 a position confirmed in a subsequent General Comment.29 Non-nationals are also protected under Article 26 ICCPR in the socio-economic field. The Committee found that unjustified differences in treatment on the basis of nationality in respect of pension rights constituted an infringement of the substantive equality clause.30

The position of non-citizens under the International Covenant on Economic, Social and Cultural Rights (ICESCR)31 appears somewhat more limited. Although the ICESCR is also phrased in all-embracing language, there are differences of opinion whether the non-discrimination provision in Article 2(2) ICESCR can be of assistance to non-nationals.32 Nonetheless, the argument

27 General Comment 15/17, supra note 26, at paras. 5 and 6.
32 These differences, which I have considered in more depth elsewhere (Migrant Workers in International Human Rights Law, supra note 22, at 57-58), centre upon the lack of clear open-ended language as to the prohibited grounds of discrimination enumerated in Art. 2(2) ICESCR. The provision reads: 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Emphasis added. The Limburg Principles on the Implementation of the ICESCR (UN Doc. E/CN.4/1987/17, Annex), drafted by a group of international experts at Maastricht in June 1986, assert unequivocally that 'the grounds of discrimination mentioned in article 2(2) are not exhaustive' (Principle 36). The Limburg Principles are reproduced in (1987) 9 Human Rights Quarterly 122. Art. 2(2) should also be read in the context of an explicit restriction on the economic rights of non-citizens in the clause that follows, Art. 2(3) ICESCR: 'Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.' According to World Bank statistics, the number of developing countries far outnumber developed countries. The World Bank classifies low-income economies (US$785 or less GNP per capita in 1997) and middle-income economies (US$786-$9,655 GNP per capita) as developing countries and
is advanced in Section 3.2.1 below that non-citizens, including refugees and asylum seekers, cannot be discriminated against at will and that they should benefit from the guarantees in the ICESCR, particularly when they are deprived of the 'minimum core content' of their economic and social rights. Indeed, recent practice of the Committee on Economic, Social and Cultural Rights (the body responsible for monitoring the implementation of the ICESCR) indicates that the discriminatory treatment of non-nationals, including refugees and asylum seekers, is clearly a matter of concern under the ICESCR. For example, in its concluding observations regarding Belgium's initial report, the Committee issued the following recommendation:

In view of the non-discrimination clauses contained in article 2(2) of the Covenant, the Committee strongly urges the Government to fully ensure that persons belonging to ethnic minorities, refugees and asylum seekers are fully protected from any acts or laws which in any way result in discriminatory treatment within the housing sector.\(^{33}\)

The recognition of the principle of non-discrimination in these instruments and their potential applicability to non-nationals does not mean of course that all distinctions between citizens and aliens are prohibited. The approach of international human rights tribunals or bodies to this question is relatively well-established. Distinctions between groups under the ECHR are permissible if they are prescribed by law, pursue a legitimate aim, and are strictly proportionate to that aim.\(^{34}\) Under the ICCPR, the Human Rights Committee also recognises that differences in treatment which are based on reasonable and objective criteria will not violate the non-discrimination principle.\(^{35}\) As argued below, however, distinctions adopted by the laws of a country in the area of economic and social rights, not only those that operate between different groups of asylum seekers but also those affecting asylum seekers vis-à-vis CSR refugees, de facto refugees (for example, those with 'complementary protection' status) and nationals, are not permissible if they do not pursue a legitimate aim or cannot be said to be based on reasonable and objective criteria or if they are far too severe and disproportionate in their application.

---


\(^{34}\) See e.g. the approach taken by the European Court of Human Rights in the Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Merits), judgment of 23 July 1968, Eur. Ct. H.R., 1968, Ser. A, No. 6, (1979-80) 1 EHRR 241.

\(^{35}\) See e.g. Zwaan-de Vries, supra note 28, at para. 13. See also General Comment 18/37, supra note 29, at para. 13.
3.2 Economic and social rights

As noted in the preceding section, economic and social rights in the ICESCR are guaranteed to 'everyone', and thus, in principle, apply to both citizens and non-nationals. This section considers the extent of the safeguards available to refugees and asylum seekers, with a particular reference to the protection of their rights to health, adequate housing, social assistance, education and employment.

3.2.1 State minimum core obligations

A dynamic interpretation of the content of economic and social rights under the ICESCR confirms their application to non-nationals, particularly to vulnerable groups such as refugees and asylum seekers. An argument frequently advanced, however, is that state obligations in respect of these rights are progressive in nature and not of immediate application as in the case of civil and political rights. This is a common misconception which draws on the wording of Article 2(1) ICESCR, whereby each state party is required 'to take steps ... , to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant ... '. Although the emphasis in this obligation appears to be on the 'progressive' realisation of ICESCR rights, the Committee on Economic, Social and Cultural Rights has also asserted that the duty 'to take steps' is of immediate application. Moreover, the Committee has emphasised that each state party must satisfy the rights contained in the ICESCR at least to a basic level of enjoyment unless it can demonstrate that it simply does not have the resources to fulfill even such a minimum obligation:

[T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or

---

36 The following discussion focuses on the guarantees found in the ICESCR because of their universal application in terms of persons protected. The ICESCR is applicable in all of Europe and has been ratified by all fifteen European Union member states, as well as Norway and Switzerland, and all the countries of Eastern Europe, including Belarus, Moldova, Russia and the Ukraine. The European Social Charter (18 Oct. 1961; Council of Europe ETS No. 35; entry into force 26 Feb. 1965; ratified by 22 states as at April 1999), which is the counterpart to the ECHR in Europe and which guarantees economic, social and cultural rights, is limited in personal scope because it only applies to the nationals of Contracting parties. Moreover, it has not been ratified by most Central and East European countries, with the exception of Poland. However, passing references in this part of the paper are made to the Charter as well as to other relevant instruments, such as the CSR and the ECHR.

37 Note, however, the limitation permitted by Art. 2(3) ICESCR to developing countries in respect of the guarantee of economic rights to non-nationals. See supra note 32.

of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.\textsuperscript{39}

The phrase in Article 2(1) ICESCR 'to the maximum of its available resources' was also 'intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance'.\textsuperscript{40} 'Deliberately retrogressive measures', such as, for example, the reduction of social assistance payments to asylum seekers and refugees, or a move away from cash support to support in kind, 'would need to be fully justified by reference to the totality of the rights provided in the Covenant and in the context of the full use of the maximum available resources'.\textsuperscript{41}

Another obligation, which the Committee considers to be of immediate effect, is the non-discrimination provision in Article 2(2) ICESCR.\textsuperscript{42} As noted in Section 3.1 above, the ambit of this clause is not clear, but the practice of the Committee indicates that Article 2(2) ICESCR can operate to prohibit other kinds of discriminatory measures, such as those based on nationality. Even though the Committee is yet to clarify the application of the non-discrimination principle to non-nationals, it would seem that, at the very least, this group is entitled to the enjoyment of the minimum core content of the rights in the ICESCR.\textsuperscript{43} Distinctions based on nationality, therefore, are probably permissible, but only to the extent that they do not deny non-nationals the very means of subsistence.

Given this interpretation, it is very difficult to see how state measures completely withdrawing economic and social entitlements from refugees and asylum seekers, who have no other means of support, can ever be justified. In short, the treatment of refugees and asylum seekers in such an extreme and draconian fashion cannot be permissible under the ICESCR. To argue otherwise, as the Committee has pointed out, would render the ICESCR devoid of meaning.

\textsuperscript{39} Ibid. at para. 10.
\textsuperscript{40} Ibid. at para. 13.
\textsuperscript{42} Ibid. at para. 1.
Certain economic and social rights in the ICESCR, such as the right to an adequate standard of living, which encompasses rights to adequate food and housing (Article 11(1) ICESCR)\textsuperscript{44} and the right to social security (Article 9 ICESCR),\textsuperscript{45} have also been characterised as containing various levels of obligation, including the state obligation to 'be the provider'. This duty is particularly relevant in respect of refugees and asylum seekers:

Asylum seekers, refugees and displaced persons do not have the same opportunity as others to achieve an adequate standard of living on the basis of their own efforts. They therefore require, to a larger extent than the ordinary public, direct provisions, until conditions are established in which they can obtain their own entitlements.\textsuperscript{46}

3.2.2 Right to health

Article 12(1) ICESCR reads: 'The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. By virtue of Article 2(1) ICESCR, the full realisation of this right is to be achieved progressively, although as noted above states are required to apply a minimum core content of the right straight away, a duty that extends to non-nationals, including refugees and asylum seekers.

The Committee on Economic, Social and Cultural Rights has not defined a minimum core content of the right to health, nor has it issued a General Comment on this right elaborating its parameters.\textsuperscript{47} It is necessary, however, to view health in a broader context than the mere provision of health care or medical services since this latter aspect is only one part of the concept encompassed by a 'right to health':

The concept of a right to health emphasises the social and ethical aspects of health care and health status. A rights approach to health issues must be based on fundamental human rights principles, particularly the dignity of persons and non-discrimination.\textsuperscript{48}

\textsuperscript{44} Art. 11(1) ICESCR: 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions ... '. Scott, supra note 28, at 780-1, argues that there is an 'organic interdependence' between this right and the right to life in Art. 6(1) ICCPR in that the latter can be interpreted to include the former. This interpretation generates an 'implicit overlap' between the two provisions. See also Section 4.1 below.

\textsuperscript{45} Art. 9 ICESCR: 'The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance'.

\textsuperscript{46} A. Eide, 'The Right to an Adequate Standard of Living Including the Right to Food', in A. Eide, C. Krause & A. Rosas, (eds.), Economic, Social and Cultural Rights: A Textbook (Dordrecht: Martinus Nijhoff, 1995) 89 at 105. Clearly, therefore, those refugees and asylum seekers in Europe who have no other means of support and who do not possess the right to work (at least initially) constitute a group in need of state assistance.

\textsuperscript{47} See also Dent, supra note 10, at 80, 82 (footnotes omitted).

\textsuperscript{48} V. A. Leary, 'Justiciability and Beyond: Complaint Procedures and the Right to Health', Review of the International Commission of Jurists No. 55 (Special Issue: Economic, Social
Consequently, the continued availability of health care to asylum seekers and refugees is insufficient alone to satisfy their right to health in the absence of other concomitant measures to safeguard their human dignity. Such limited health provision would constitute an utter disregard for any notion of preventive health care, and can hardly be cost-effective. For example, a right to health care is meaningless if asylum seekers and refugees are not guaranteed a corresponding right to adequate housing. The problems experienced by hospitals when discharging patients who lack homes to be discharged to and the potential risks to recovery and health as a result of an early discharge are self-evident. Clearly, this broader understanding of the right to health is more in keeping with the health guarantee in the ICESCR.

Even if the minimum core content of the right of asylum seekers and refugees to health is protected by the country of asylum, and even if it is protected to the same extent as that of nationals, it is arguable that this is insufficient to meet the special health needs of the former group. For example, one prominent European non-governmental organisation (NGO) has adopted the position that asylum seekers should be provided with specialised treatment for physical and psychological problems related to experiences in the country of origin or arising from the hardships of flight, uprooting and exile (such as guilt and anxieties about family members, uncertainty about the future, and adaptation to a new culture). Doctors assisting asylum seekers should be trained so that symptoms of distress are not mistaken for mental illness. Any counselling of asylum seekers requires cultural sensitivity, clear reassurance of confidentiality, and a high quality of language interpretation.

Although Article 12 ICESCR generally does not identify, with the exception of children, any specific vulnerable groups in need of special health protection,
universal human rights standards aimed at securing the rights of women and children would appear to explicitly sanction the adoption of special measures in respect of the right to health.\(^{54}\)

### 3.2.3 Right to adequate housing

The right to adequate housing is thus far only one of two substantive rights to be the subject of a General Comment by the Committee on Economic, Social and Cultural Rights.\(^{55}\) The Committee asserted that this right 'is of central importance for the enjoyment of all economic, social and cultural rights'.\(^{56}\) It interpreted the right to housing in a broad sense, not merely equating it with the provision of shelter or a 'roof over one's head' but viewing it as 'the right to live somewhere in security, peace and dignity'.\(^{57}\) The right applies to everyone 'regardless of age, economic status, group or other affiliation or status and other such factors' and 'irrespective of income or access to economic resources'.\(^{58}\) Moreover, the Committee stated that disadvantaged groups 'should be ensured some degree of priority consideration in the housing sphere', and provided a list of such groups. Although this list did not expressly include asylum seekers or refugees, it was left open by the terms 'and other groups'.\(^{59}\) The Committee reiterated its views in its earlier revised guidelines on state reporting that each state party should take steps 'to ascertain the full extent of homelessness and inadequate housing within its jurisdiction' and that detailed information should be provided in state reports about 'those groups in society that are vulnerable and disadvantaged with

---

\(^{54}\) See Art. 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (18 Dec. 1979; 1249 UNTS 13; ratified by 163 States and Art. 24 of the Convention on the Rights of the Child (20 Nov. 1989; UN Doc. A/RES/44/25; ratified by 191 States), which is considered as providing 'both the most elaborate and specific incorporation of the child's right to health, and which represents significant progress in international law'. See G. Van Bueren, *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff, 1994) at 297.

\(^{55}\) General Comment No. 4 on the Right to Adequate Housing (6th Sess., 1991), UN Doc. E/1992/23. The other right is the right to adequate food, which was the subject of a General Comment adopted by the Committee at its most recent session. General Comment No. 12 on the Right to Adequate Food (Art. 11) (20th Sess., 1999), UN Doc. E/C.12/1999/5 (12 May 1999). For an analysis of the status of the right to adequate housing in international law, including moves to enshrine it in a legally binding international instrument, see S. Leckie, *Towards an International Convention on Housing Rights: Options at Habitat II* (Washington D.C.: American Society of International Law, 1994). At Habitat II, the Global Plan of Action asserted that 'States should take appropriate action in order to promote, protect and ensure the full and progressive realization of the right to adequate housing'. See *The Habitat Agenda: Goals and Principles, Commitments and Global Plan of Action*, UN Conference on Human Settlements (Habitat II), Istanbul, 3-14 June 1995, UN Doc. A/CONF.165/L.6/Add.5, Ch. 4 (Global Plan of Action: Strategies for Implementation), at para. 44.

\(^{56}\) General Comment No. 4 on the Right to Adequate Housing, *supra* note 55, para. 1.

\(^{57}\) ibid. at para. 7.

\(^{58}\) ibid. at paras. 6 and 7 respectively.

\(^{59}\) ibid. at para. 8(e). The Committee, *ibid.*, specifically identified the following vulnerable groups: the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, and people living in disaster-prone areas.
regard to housing'. Since the adoption of this General Comment, work undertaken by the UN Special Rapporteur on the Right to Adequate Housing confirms that asylum seekers and refugees should be given special attention with regard to their housing rights, and the Committee itself has recommended to states parties that vulnerable groups, including refugees and asylum seekers, should be protected from discriminatory treatment within the housing sector.

3.2.4 Right to social assistance

Social security can be understood in a broad sense as referring to both 'earned' benefits and 'need-based assistance'. The guarantee in Article 9 ICESCR is very general in nature referring merely to 'social security, including social insurance', in deference to the far more detailed provisions in International Labour Organisation (ILO) instruments. Scheinin argues that because of its close relationship with ILO classifications of social security, which exclude 'need-based basic subsistence benefits financed from general tax revenues', Article 9 'primarily focuses on social security in the narrow sense: income-based and situation-based cash benefits for workers and their families'. Any arguments advanced on behalf of asylum seekers and refugees deprived of social protection would therefore probably have to be formulated around the Article 11(1) ICESCR right to an adequate standard of

---

60 Ibid. at para. 13. In these guidelines, the Committee's list of disadvantaged and vulnerable groups included, inter alia, migrant workers and 'other especially affected groups'. See Revised guidelines regarding the form and contents of states reports to be submitted by States Parties under Articles 16 and 17 of the Covenant on Economic, Social and Cultural Rights, UN Doc. E/1991/23, cited by Eide, supra note 46, at 93. Eide, ibid. at 93-4 (footnote omitted), suggests that 'persons who are temporarily in very difficult positions, such as, inter alia, internally displaced persons and refugees' could be added to this list.

61 In his second progress report on the right to adequate housing, the Special Rapporteur produced a draft International Convention on Housing Rights, in which the non-discrimination provision specifically enumerates 'citizenship' as a prohibited ground of discrimination (Art. 2). Moreover, the Special Rapporteur, identified 'refugees' as a 'chronically ill-housed group' whose housing rights had to be 'accorded a measure of priority in both the housing laws and policies of all Governments' (Art. 4). See UN, ECOSOC, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th Session, The Right to Adequate Housing, Second Progress Report submitted by Mr. Rajindar Sachar, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1994/20 (21 June 1994) at 28-9.


64 Ibid. at 162 and D. Harris, The European Social Charter (Charlottesville, Virginia: University Press of Virginia, 1984) at 110 and n. 588, with reference to Art. 9 ICESCR and Art. 12 of the European Social Charter, which also protects the right to social security. Art. 12(4) of the Charter is concerned with equal treatment between states party nationals in respect of social security, but acceptance of this provision can be refused under the Charter's selective ratification procedure (Arts. 20(1)(b) and (c)). The principal ILO instrument is Convention No. 102 of 1952 concerning Minimum Standards of Social Security (210 UNTS 131): 28 June 1952; entry into force 27 April 1955; ratified by 40 states.

65 Scheinin, supra note 63, at 162 and n. 19.
living, which, according to Scheinin, also covers 'social assistance and other need-based forms of social benefits in cash or in kind to anyone without adequate resources'.

3.2.5 Right to education

The right of refugees and asylum seekers to education in the country of asylum should be considered in a broad light to cover the following entitlements: the right of children of refugees and asylum seekers to education at all levels of the domestic educational system and the right of adults to vocational training, including access to language instruction.

Article 13 ICESCR directs that the right to education is to be enjoyed by 'everyone'. There are no qualifications preventing non-nationals from benefiting from this right. By virtue of Article 2(1) ICESCR, the full realisation of the right to education is to be achieved progressively, although, as with the right to health, a minimum core content of the right which has to be applied straight away, has not yet been specified by the Committee on Economic, Social and Cultural Rights. Nonetheless, commentators agree that this minimum core content should include the following four features: the right to non-discriminatory access to existing public educational institutions; the right to compulsory and free primary education; the free choice of education without interference by the state or a third party; and the right to education in the language of one's choice.

The principle that a country's education should be available to all regardless of nationality is also clearly expressed in Article 3(1)(e) of the UNESCO
Convention Against Discrimination in Education,\textsuperscript{70} by which State parties undertake ‘to give foreign nationals resident within their territory the same access to education as that given to their own nationals’. It would appear, however, that this right does not encompass equality of treatment between nationals and aliens in respect of educational scholarships and grants.\textsuperscript{71}

The obligation to provide compulsory and free primary education is recognised by Article 13(2)(a) ICESCR. This obligation has been interpreted strictly by the Committee on Economic, Social and Cultural Rights, which has asserted that the charging of fees for primary education cannot be justified by the economic situation in the country concerned.\textsuperscript{72} The priority attached to the principle of compulsory and free education for all is also evident in Article 22 CSR concerning public education, which does not limit equal treatment between refugees and nationals with respect to elementary education to those refugees ‘lawfully staying’ in the territory, and is therefore also applicable to asylum seekers.

Notwithstanding that the ECHR is mainly concerned with civil and political rights, a right to education is provided for by Article 2 of the first Protocol to the ECHR,\textsuperscript{73} which, however, has a negative formulation and is therefore drawn quite narrowly when compared with other international human rights educational guarantees:

\textit{No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.}\textsuperscript{74}

This provision, when read with Article 14 ECHR (the non-discrimination clause), clearly applies on a non-discriminatory basis to both nationals

\textsuperscript{70} UNESCO Convention Against Discrimination in Education, 14 Dec. 1960; 429 UNTS 93; entry into force 22 May 1962; ratified by 87 States as at 1 Jan. 1998.

\textsuperscript{71} Art. 3(1)(c) obliges States parties to undertake ‘not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarship or other forms of assistance to pupils...’. Emphasis added. Therefore, this non-discrimination clause seems to be confined to nationals only. Given that in practice such financial assistance is normally only available at higher levels in the educational system of a country, such permissible distinctions would appear to be in conformity with Art. 13(2)(a) ICESCR, which only requires primary education to ‘be compulsory and available free to all’.


\textsuperscript{73} Protocol No. 1 to the ECHR (20 March 1952; ETS No. 9; ratified by 38 states as at April 1999).

\textsuperscript{74} Van Dijk and van Hoof write: ‘The negative formulation of the first sentence seems to emphasise that the right to freedom of education is involved here rather than the social and cultural right to education entailing a positive obligation on the part of the state.... Therefore, its primary objective is to guarantee a right of equal access to the existing educational facilities. Original emphasis. See P. van Dijk & G. J. H. van Hoof, \textit{Theory and Practice of the European Convention on Human Rights}, 3rd ed. (The Hague: Kluwer, 1998) at 644.
and non-nationals who are within the territory of a Contracting party unless there is an objective and reasonable justification for differential treatment. No children of asylum seekers and refugees present within the jurisdiction of a Council of Europe member State, which has ratified this Protocol, should therefore be denied their right to receive an education, even if their parents are in an irregular situation.\textsuperscript{75}

It is arguable, however, that the fundamental right to education must be tailored to the specific needs of refugee children in order to facilitate their integration into society and to ensure that they are not placed at an educational disadvantage to the children of nationals.\textsuperscript{76} Indeed, such an approach would appear to be sanctioned by two objectives provided for the right to education under Article 13(1) ICESCR, which are the full development of individual personality and effective participation in society:

\begin{quote}
States Parties ... agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society ...
\end{quote}

Formal equality between refugee children and the children of nationals regarding access to schooling in the country of asylum is therefore insufficient. Any educational difficulties experienced by the children of asylum seekers and refugees need to be counteracted by special measures to ensure that they are not disadvantaged with respect to their future training, employment or entry into higher education. It is important, however, that ‘special measures’ are not equated with ‘separate’ education for refugee children:

\begin{quote}
Children must be given access to the State education system at the earliest opportunity, irrespective of where they are accommodated. When joining local schools, they will require induction into the new education system and additional support to meet their particular linguistic and psycho-social needs. [There is concern] about separate educational provision for refugee children within reception centres, where this may hinder a child’s learning. Where such separate provision occurs, this should be for a limited period and for reasons other than simply organisational convenience.\textsuperscript{77}
\end{quote}

In addition to language instruction, acceptable special measures may also include preparatory and adaptation classes, assistance with homework, and

\textsuperscript{75} See also van Dijk and van Hoof, \textit{ibid.} at 654, who contend that denying to ‘foreigners who, although not legally resident ... are likely to stay [in a contracting state] for an indefinite period of time (for instance because they cannot be expelled for humanitarian reasons) ... the possibility to receive primary education has such far-reaching consequences, that the fact that they do not legally reside [in a contracting state] is not a reasonable justification for this differential treatment, which therefore is contrary to Article 2 (independently or in conjunction with Article 14)’.

\textsuperscript{76} This discussion is partly based on arguments advanced in \textit{Migrant Workers in International Human Rights Law}, supra note 22, c. 8.

\textsuperscript{77} See \textit{ECRE Position Paper on the Reception of Asylum Seekers}, supra note 53, at para. 46.
intercultural education. Another special measure, in accordance with the minimum core content of the right to education identified above, may involve the teaching to these children of their language and culture of origin. Indeed, such a measure would be in conformity with a further objective of education identified in Article 29(1)(c) of the Convention on the Rights of the Child (CRC):

[T]he development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own.78

The educational rights of adult asylum seekers and refugees principally relate to vocational training and language instruction. The rationale for guaranteeing these rights is succinctly laid out in a position paper on the reception of asylum seekers by the European Council on Refugees and Exiles (ECRE):

State policies should in no way prevent adult asylum seekers from acquiring new education and skills in the host State. All asylum seekers should be supported in these aims. ... Such a policy -- if it meets both the asylum seekers' needs and those of the host State -- will both prevent exclusion from the host society and facilitate re-integration upon return to the country of origin.

All asylum seekers should be entitled to basic training in the language of the host State, since this is an indispensable factor in living among and developing good relations with the local population.79

Therefore, the twin objectives of education identified in Article 13(1) ICESCR, namely the full development of individual personality and effective participation in society, serve to justify the above educational requirements of adult refugees and asylum seekers. The right to vocational training and language instruction is also critical to the fulfillment of the right to work (Article 6 ICESCR), discussed below, when the asylum seeker or refugee is given the opportunity to take up employment in the asylum country. Indeed, Article 6(2) ICESCR specifies that the 'steps to be taken by a State Party ... to achieve the full realisation of this right shall include [inter alia] technical and vocational guidance and training programmes'. Moreover, once asylum seekers and refugees are in employment, they are entitled under Article 7 ICESCR to 'the enjoyment of just and favourable conditions of work', which might well include access to vocational training, even though a reference to vocational training is not included in the non-exhaustive list laid out in the provision.80

78 See also the discussion in Dent, supra note 10, at 103-4.
80 With regard to refugees 'lawfully staying' in the territory of the asylum country, Art. 24(1)(a) CSR affords them equal treatment with nationals in respect of, inter alia, 'apprenticeship and training'.
3.2.6 Employment Rights

As noted in Section 2.1 above, Article 17(1) CSR does not grant refugees the right to take up employment on equal terms with nationals. Refugees lawfully staying in states parties are only afforded 'most-favoured-nation' treatment. Such treatment, however, should be very favourable in host countries belonging to the European Union where nationals from other European Union member states have equal access to employment with nationals.\(^{81}\) Under Article 17(2) CSR, any restrictive measures imposed on non-nationals for the protection of the national labour market are not to be applied to refugees who have been resident in the country for three years or whose spouse or children possess the nationality of the country of residence.

Article 6(1) ICESCR provides for a much broader right to work, which is not limited on grounds of nationality:

> The States Parties to the present Covenant recognise 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.\(^{82}\)

The Committee on Economic and Social Rights has not issued a General Comment clarifying the extent of this provision. In most countries, the rights of non-nationals to take up employment are limited and distinctions are drawn between nationals and non-nationals in order to safeguard the employment and economic welfare of the former. It is strongly arguable, however, that such discrimination is less justifiable in developed countries, particularly as only developing nations have been expressly permitted by the ICESCR to limit the economic rights of non-nationals in Article 2(3) ICESCR. Indeed, both the United Kingdom and France have considered it necessary to modify their obligations under Article 6 ICESCR by way of a reservation and declaration respectively so as to reflect the position in their domestic law and practice.\(^{83}\) Although this course of action may well indicate that discrimination between nationals and non-nationals in respect of access to employment is prohibited in developed countries under the ICESCR, it is unlikely that the Committee would support such a position given state practice.\(^{84}\) One possible

---

\(^{81}\) Art. 39 of the consolidated EC Treaty (ex Art. 48) as implemented by Council Reg. 1612/68/EEC of 15 Oct. 1968 on freedom of movement for workers within the Community, as amended, OJ Sp Ed. 1968-69, JO 1968, L 257/2. Dent, supra note 10, at 49-50, observes that the application of this provision to 'special economic and customs agreements' is supported by reservations submitted by the Benelux and Scandinavian countries stating that Art. 17(1) CSR would not apply to such regional agreements.

\(^{82}\) Emphasis added.

\(^{83}\) The UK has reserved 'the right to interpret article 6 as not precluding the imposition of restrictions, based on birth or residence qualifications, on the taking of employment in any particular region or territory for the purpose of safeguarding the employment of opportunities of workers in that region or territory', while France has made a declaration to the effect that Art. 6 ICESCR is 'not to be interpreted as derogating from provisions governing the access of aliens to employment ...'. See UN Doc. ST/LEG/SER.E/10 (1992) at 127, cited in Craven, supra note 43, at 213.

\(^{84}\) Craven, ibid. at 214.
approach is to consider restrictions on access to employment in the light of Article 4 ICESCR, which permits limitations on rights only if these limitations are determined by law, compatible with the nature of the rights in question and 'solely for the purpose of promoting the general welfare in a democratic society'. Craven argues that

although this would not prohibit discrimination as regards aliens wishing to work in the country concerned, it would mean that any restrictions imposed should be extraordinary and justified on the basis of the general welfare.\(^{85}\)

Consequently, it is difficult to see how restrictions on the access to employment of asylum seekers and refugees can ever be justified on the basis of the general welfare if these groups (particularly the former), who are protected from non-refoulement under Article 33 CSR, receive no or only extremely limited social support from the state.

4. Related civil and political rights

The denial of economic and social rights to asylum seekers and refugees, particularly their rights to health, housing and social assistance, may also, if the consequences are particularly severe, interfere with certain fundamental civil and political rights such as the right to life, the right to be free from inhuman or degrading treatment, and the right to respect for private or family life.

4.1 Right to life

Article 6(1) ICCPR reads: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. Similarly, Article 2(1) ECHR declares: 'Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'.\(^{86}\)

The fundamental nature of the right to life in international law is widely recognised, both by international human rights tribunals and by numerous academic commentators.\(^{87}\) Moreover, it has been argued that the description

\(^{85}\) *ibid.* (footnote omitted).

\(^{86}\) An exception for the death penalty is also provided for in Article 6(2) ICCPR. See however Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty (28 April 1983; ETS No. 114; entry into force 1 March 1985; ratified by 27 states as at 1 Jan. 1998) and the Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty (15 Dec. 1989; UNGA Res. 44/128; entry into force 11 July 1991; ratified by 37 states). For expressions of the right to life elsewhere, see Art. 3 of the UDHR, Art. 4 of the American Convention on Human Rights (OAS Treaty Series No. 36) and Art. 4 of the African Charter on Human and People’s Rights (OAU Doc. CAB/LEG/67/3/Rev.5).

\(^{87}\) For example, the European Court of Human Rights recently observed: ‘Article 2 ranks as one of the most fundamental provisions in the Convention ... Together, with Article 3 of the
of the right as 'inherent' in Article 6 ICCPR demonstrates that it also forms part of customary international law.\(^{88}\) The Human Rights Committee has asserted in a General Comment that the right to life is 'the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation ...'\(^{89}\) The exact normative extent of the right to life, however, is less certain. Does it go beyond a mere negative obligation upon the state to prevent arbitrary or unlawful killing? Or are states required to adopt positive measures to eliminate threats to the right to life and to ensure and realise its enjoyment, including taking economic and social measures in areas such as health, housing and employment? The Human Rights Committee has expressed its preference for a broader interpretation:

> [T]he right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.\(^{90}\)

Although the positive measures specifically enumerated concern the reduction of infant mortality and increasing life expectancy, this reasoning can just as easily be applied to requiring the adoption of positive measures in other areas.

A positive aspect to the right to life under Article 2 ECHR has also been clearly recognised by the European Court of Human Rights. In *L.C.B. v. UK*, the Court asserted:

---

88 H. A. Kabaalioglu, 'The Obligations to "Respect" and to "Ensure" the Right to Life' in *The Right To Life in International Law*, supra note 26, at 161. See also Ramcharan, *supra* note 69, at 3, who advances the argument (ibid. at 14-5) that the right to life qualifies as a peremptory norm or *jus cogens* in international law.

89 General Comment 6/16 on Art. 6 (16th Sess., 1982), reproduced in UN Doc. A/37/40, Annex V, at para. 1. Although Art. 4(1) ICCPR allows for derogation from some of the rights in the ICCPR 'in time of public emergency which threatens the life of the nation', the right to life in Art. 6 ICCPR is excluded by Art. 4(2) ICCPR. Similarly, under the ECHR, the right to life is recognised as a non-derogable right by virtue of Art. 15(2) ECHR.

90 General Comment 6/16, *ibid.* at para. 5.
The first sentence of Article 2(1) enjoins the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.91

It has been observed that this approach 'could be read very widely, so as to require a state to take positive "steps" to make adequate provision for medical care, or for food and shelter or a healthy working or living environment'.92 Although such an approach would take the ECHR further in the direction of protecting economic and social rights than the drafters originally intended, there is no reason why a dynamic interpretation of the ECHR cannot have such an impact. It would also be in keeping with the approach of the Human Rights Committee under the ICCPR.93 Moreover, this interpretation of the right to life under international human rights law is clearly more in conformity with situations that most endanger life in the world today.94 A broad and liberal understanding of the right to life, therefore, envisages the taking of positive action by States parties to the ICCPR in the economic and social spheres. It is also an approach, which constitutes a significant step in the direction of realising the principle of interdependence of civil and political rights with economic and social rights.95

91 L.C.B. v. UK, judgment of 9 June 1998, (1999) 27 EHRR 212, at para. 36. This case concerned an unsuccessful complaint that the UK had failed to take measures to warn the applicant (who had been diagnosed with leukaemia) of her father's alleged exposure to radiation during nuclear tests in 1957 and 1958. See also Osman v. UK, judgment of 28 Oct. 1998 (not reported, but available on the Court's web site at http://www.echr.coe.int/), at para. 115, concerning an unsuccessful complaint that the police authorities had failed to take adequate and appropriate steps to protect the lives of a father and his child.

92 See D. J. Harris, M. O'Boyle & C. Warbrick, Law of The European Convention on Human Rights (London: Butterworths, 1995) at 40. In Application 16593/90, Tavares v. France, decision of 12 Sept. 1991 (unpublished), the applicant argued that France was in violation of Art. 2 in respect of the death of his wife as a result of serious complications following the delivery of a child. The Commission found no violation, but recognized that the right to life involves a state obligation to take measures in order to protect life. This decision is discussed by Pellonpää, who contends that its implication 'clearly is that certain regulatory measures, aimed at protecting life, concerning the hospital system were inherent in Article 2...'. See M. Pellonpää, 'Economic, Social and Cultural Rights', in R. St. J. Macdonald, F. Matscher & H. Petzold, (eds.), The European System of the Protection of Human Rights (Dordrecht: Martinus Nijhoff, 1993) 855 at 865.

93 Harris, O'Boyle & Warbrick, supra note 92, at 41.

94 This argument has been forcefully and eloquently presented by Ramcharan, supra note 87, at 6: 'The duty of the State to assure satisfaction of the survival requirements of every person within its jurisdiction must be considered an unavoidable component of the right to life in its modern sense. Any other conclusion is unacceptable in a world in which millions of children die each year on account of hunger and disease, and in which millions of human beings have their life-span drastically reduced for the same reasons'.

95 See also the excellent thesis expounded by Scott, supra note 28, who argues, in the light of this principle, that certain rights in the ICESCR should be able to 'permeate' the ICCPR. Scott, ibid. at 875, emphasizes the importance of the right to life in realizing interdependence between these two categories of rights: '[T]he ultimate test of interdependence is the interpretation placed on the right to life in ICCPR 6(1). Does it remain a classic negative right or is there a more modern conception to appeal to? Can the Human Rights Committee foster an evolution of the concept to include the right to live with basic human dignity ... Can such rights as the right to health, the right to food, or the right to shelter be interpreted into the ICCPR?'
This broader understanding of the right to life in international law, however, may be difficult to enforce in international and national fora. For example, McGoldrick cautions that the acceptance of a more liberal concept of the right to life by the Human Rights Committee, which encroaches upon the sphere of economic and social rights, raises difficult questions as regards the applicability of the individual communications procedure under the Optional Protocol. This is because economic and social rights are still frequently understood as involving non-justiciable progressive obligations, a position no longer tenable however given that many of these rights can be the subject of legal actions in individual countries' domestic laws and in the light of recent moves to adopt an optional protocol to the ICESCR allowing for individual and group complaints.

Therefore, it can be argued with some force that measures withdrawing social protection from refugees and asylum seekers, particularly provision for health, housing and social assistance, pose a real risk to their lives and thus create the extreme circumstances constituting violations of Article 2 ECHR and Article 6 ICCPR.

4.2 Right to be free from inhuman or degrading treatment

Article 3 ECHR reads: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. As with the right to life in Article 2 ECHR, the absolute nature of this right is underscored by the fact that no derogation from it is permitted. It applies to everyone, regardless of their nationality, and irrespective of the nature of their conduct and their legal

---

96 See D. McGoldrick, The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights (Oxford; Clarendon Press, 1994) at 347, para. 8.27. To some extent, this argument is buttressed by the paucity of individual communications under the Optional Protocol addressing this aspect of the right to life. However, see Communication 67/1980, EHP v. Canada (cited by McGoldrick, ibid. at 346, para. 8.26.1, and Joseph, supra note 87, at 175) concerning complaints by the applicants alleging that their right to life was threatened by the storage of radioactive nuclear waste in the vicinity of their homes. Although the communication was declared inadmissible for non-exhaustion of domestic remedies, the Human Rights Committee, ibid. at para. 8, recognised that it raised 'serious issues with regard to the obligation of States parties to protect human life'.


98 According to Menghistu, supra note 87, at 67, the extent of the obligation upon states parties to protect economic and social rights under Art. 6 ICCPR would seem to relate only to survival requirements and not to the higher standard found in Art. 11 ICESCR (discussed in Section 3.2.2 above) requiring states parties to 'recognize the right of everyone to an adequate standard of living ...', including adequate food, clothing and housing ...'.

99 See Art. 15(2) ECHR. See however the argument in supra note 44.
status in the country concerned.\textsuperscript{100}

In \textit{East African Asians v. UK},\textsuperscript{101} the European Commission of Human Rights defined 'degrading treatment' as follows:

The term 'degrading treatment' in this context indicates that the general purpose of the provision is to prevent interferences with the dignity of man of a particularly serious nature. It follows that an action, which lowers a person in rank, position, reputation or character, can only be regarded as 'degrading treatment' in the sense of Art. 3, where it reaches a certain level of severity.\textsuperscript{102}

According to the Commission, this interpretation of 'degrading treatment' was similar to the one adopted in an earlier opinion: 'Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience'.\textsuperscript{103} The application of Article 3 in the event of the withdrawal of social protection, particularly health care, was confirmed by the European Court of Human Rights in \textit{D v. United Kingdom}. In this case, the Court concluded that the proposed deportation of an alien drug courier dying of AIDS to the Caribbean island of St. Kitts where, in the Court's opinion, the conditions of adversity awaiting him there 'further reduce his already limited life expectancy and subject him to acute mental and physical suffering',\textsuperscript{104} constituted a real risk of ill-treatment and thus infringed Article 3.

Severe discrimination may also amount to 'degrading treatment'. In \textit{East African Asians}, the Commission of Human Rights held that racially discriminatory legislation, which prevented Asians resident in Kenya and Uganda and who had retained their UK citizenship from entering the UK for the purpose of settlement, constituted, \textit{inter alia}, 'degrading treatment' within the meaning of Article 3 ECHR. The Commission attached special importance to racial discrimination suggesting that distinctions based on other grounds might not be sufficient to constitute 'degrading treatment'.\textsuperscript{105} Indeed, in

\begin{itemize}
  \item \textsuperscript{102} \textit{East African Asians}, \textit{supra} note 101, at para. 189.
  \item \textsuperscript{103} \textit{ibid.} at para. 195. See \textit{The Greek Case} (1969) 12 YBECHR 1 (admissibility), 186 (Report of 5 Nov. 1969).
  \item \textsuperscript{104} \textit{D v. UK}, judgment of 2 May 1997, (1997) 24 EHRR 423, at para. 52. In Application 23634/94, \textit{Tanko v. Finland} (1994) 77-A D & R 133, the applicant alleged that the enforcement of his expulsion to Ghana would subject him to a risk of losing his eyesight given the less adequate medical facilities for his treatment in that country. The Commission, \textit{ibid.} at 137, stated that it did 'not exclude that a lack of proper care in a case where someone is suffering from a serious illness could in certain circumstances amount to treatment contrary to Article 3', although it found that this had not been established in the application before it.
  \item \textsuperscript{105} \textit{East African Asians}, \textit{supra} note 101, at para. 207.
\end{itemize}
Abdulaziz, Cabales and Balkandali v. UK, the Court rejected the proposition that the immigration rules violated Article 3 ECHR by allegedly discriminating on the ground of nationality because 'the difference of treatment complained of did not denote any contempt or lack of respect for the personality of the applicants and that it was not designed to, and did not, humiliate or debase but was intended solely to achieve ... [legitimate immigration measures]'\(^{106}\). But this argument does not necessarily preclude discrimination based on nationality from constituting degrading treatment under certain extreme circumstances, which should include economic and social deprivation deliberately sanctioned by the state.\(^{107}\)

There seems no reason, therefore, why the core arguments in these cases cannot be applied to the very difficult situation of those refugees and asylum seekers completely denied economic and social benefits at the hands of state authorities, or severely discriminated against in relation to nationals.\(^{108}\) It is the element of severity that lowers the action to the level of 'degrading treatment' as understood in Article 3 ECHR. Moreover, as observed by the UNHCR in its submissions in respect of the restrictive United Kingdom policy on asylum seekers, the desperate situation of the affected group of asylum seekers, in needing to survive without means until a definitive decision on their claim is reached, might well drive them to 'to act against ... [their] will or conscience' by taking up illegal employment or by engaging in criminality.\(^{109}\)

The equivalent provision in the ICCPR to Article 3 ECHR is Article 7.\(^{110}\) While the views adopted by the Human Rights Committee under the Optional Protocol are of a more limited scope and appear not to be as well developed as the case law under the ECHR,\(^{111}\) the notion of 'degrading treatment' in Article 7 is certainly capable of bearing a similar meaning to that proposed

\(^{106}\) Abdulaziz, Cabales and Balkandali v. UK, judgment of 28 May 1985, Eur. Ct. H.R., 1985, Ser. A, No. 94, (1986) 7 EHRR 471 at paras. 90 and 91. See also Jacobs & White, supra note 87, at 66. However, the Court did find a violation of Art. 8 ECHR (respect for private and family life) taken together with Art. 14 ECHR (non-discrimination on the ground of sex) because the immigration rules made it more difficult for husbands to enter the UK to join their wives than for wives to join their husbands.

\(^{107}\) Indeed, Jacobs & White, ibid., recognise that the 'tenor of the judgment [in Abdulaziz, Cabales and Balkandali] is such that, if the difference of treatment did indicate contempt or lack of respect for the personality of the applicants, that may meet the level of severity necessary to constitute degrading treatment'. It has also been suggested that 'general socio-economic conditions' is one area to which the ECHR organs might explore the possibility of applying Art. 3 ECHR. See A. Cassese, 'Prohibition of Torture and Inhuman or Degrading Treatment or Punishment' in The European System of the Protection of Human Rights, supra note 92, 225 at 260.

\(^{108}\) A related argument concerns the possible infringement of Art. 3 ECHR on the ground that the adverse impact of certain measures taken in European countries is more likely to be felt by asylum seekers of a different ethnic or racial origin and thus constitute de facto or indirect racial discrimination.


\(^{110}\) Art. 7 ICCPR reads: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'. This provision replicates Art. 5 UDHR and, like Art. 3 ECHR, cannot be derogated from under any circumstances (Art. 4(2) ICCPR).

\(^{111}\) See McGoldrick, supra note 96, at 367, para. 9.12.
above. In its General Comments, the Human Rights Committee has indicated that it does not favour a narrow interpretation of Article 7 ICCPR\(^{112}\) and has also stated that 'in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise'.\(^{113}\)

### 4.3 Right to respect for private and family life

The denial of economic and social rights to refugees and asylum seekers, in particular their rights to health and adequate housing, might also constitute a violation of Article 8(1) ECHR, which grants everyone 'the right to respect for his private and family life, his home and his correspondence'.\(^{114}\) The European Commission of Human Rights has identified a close association between the right to respect for family life and the right to adequate housing. The Commission stated that, even though there is no obligation in the ECHR to provide housing, it did not ‘discount the possibility that the right to respect for family life [can] be violated in a case where the authorities impose intolerable living conditions on a person or his family’.\(^{115}\) The Court confirmed this position in Lopez Ostra v. Spain and Guerra and others v. Italy, in which the countries concerned were found to have violated Article 8 ECHR by failing to take the necessary steps to prevent severe environmental pollution which had affected the well-being of local residents, posing a risk to their health and preventing them from enjoying their homes in a way that affected adversely their private and family life.\(^{116}\)

Although the Court in Guerra accepted that the object of Article 8 ECHR was principally to protect the individual against arbitrary interference by public authorities, it reiterated its earlier case law\(^{117}\) that there may also be 'positive obligations inherent in effective respect for private and family life'.\(^{118}\) The positive aspect to the right to respect for private life has been given further substance in Niemitz v. Germany, where the Court opted for a broad approach:

> The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'. However, it would be too

---

\(^{112}\) Revised General Comment 20/44 on Article 7 (adopted 20th Session, 1992), UN Doc. A/47/40, Annex VI, at paras. 2 and 5.

\(^{113}\) See General Comment 15/17 on the Position of Aliens under the Covenant, supra note 26, at para. 5. Emphasis added.

\(^{114}\) Emphasis added.


restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.\footnote{119}

Similarly, in \textit{Beldjoudi v. France}, Judge Martens noted in a concurring opinion, agreeing with the view of the Commission, that respect for private life 'comprises also to a certain degree the right to establish and to develop relationships with other human beings, especially in the emotional field, for the development and fulfilment of one's personality'.\footnote{120} Given these arguments, it has been contended that the mere provision of assistance in kind to asylum seekers, such as the scheme currently proposed in the United Kingdom (discussed below in Section 5.1), may well violate Article 8 ECHR:

If a family, or an individual asylum seeker, is forced to live, relying entirely upon the use of governmental vouchers, their ability to develop normal social relationships within the community within which they are living will inevitably be affected. Rather than being able to integrate themselves naturally into the local population, they will be made permanently visible, and stigmatised by their inability to use the normal mechanisms for exchange or purchase, and enjoy many of the every-day prerogatives of community life.\footnote{121}

Moreover, such limited assistance is unlikely to be justified as being 'necessary in a democratic society' for the reasons listed in Article 8(2) ECHR, particularly if one of the objectives, as recognised in the UK government proposals, is to 'minimise the incentive to economic migration'.\footnote{122} It is doubted whether this end can justify 'the institution of a system that effectively marginalises a section of the population and undermines the capacity of those people to form and develop normal relations with others in the community'.\footnote{123} Similar concerns might also arguably be raised on behalf of those refugees and asylum seekers, who are required to live in a certain part of the host country, or who have no choice but to reside in designated reception centres, and thus are effectively cut off from members of their cultural, ethnic, religious, or national community.\footnote{124}

5. Overview of the position in European countries

This section looks at the situation of refugees and asylum seekers in European countries with regard to the protection of their economic and social rights. The factual data for this overview is taken from comparative studies carried out by the Danish Refugee Council (DRC) in two published reports on

the legal and social conditions for asylum seekers and refugees in both Western and Eastern and Central European countries. This section will focus on the situation in the former countries as the numbers of refugees and asylum seekers in the latter are considerably less than in this part of the continent. Moreover, the experiences of Central and Eastern European countries with refugees and asylum seekers is relatively new and some of the laws adopted have not yet been implemented, while others have only recently come into force. Nevertheless, some information will also be provided on this part of Europe. Although an in-depth analysis in this part of the paper is not possible, the objective is to examine the compatibility of the treatment of refugees and asylum seekers regarding the protection of their economic and social rights with international refugee law and with the relevant international human rights standards as interpreted in Sections 3 and 4 above. This section focuses on refugees (both CSR refugees and to a lesser extent those afforded complementary protection on humanitarian grounds) and asylum seekers, although some countries have also adopted distinct regimes relating to persons with temporary protection, which principally concern Bosnian refugees from the former Yugoslavia.

5.1 Western Europe

The Western European countries examined in the DRC’s report were the 15 European Union countries and Norway. All these countries have ratified the ECHR, the ICCPR and the ICESCR. The treatment afforded to CSR refugees in respect of the economic and social rights identified conforms to the requirements of the CSR rights regime and in most cases surpasses it to the extent that this treatment is generally on par with that afforded nationals. A significant exception concerns the situation in Italy in respect of the right to adequate housing, which is discussed below. Moreover, it is important to emphasise that provision in law does not always connote satisfactory treatment in practice. As noted in Section 3.1 above, the Committee on Economic, Social and Cultural Rights urged the Belgian Government to protect vulnerable groups, including refugees, from discriminatory treatment in the housing sector in the context of its concern at the ‘adequacy of the measures taken to actually enforce ... [the right to housing]’ inscribed in the


126 In 1998, there were over 300,000 asylum applications registered in European Union member states, with the most being lodged in Germany (98,644), the UK (58,000) and the Netherlands (45,217). There were also 41,302 asylum claims made in Switzerland. In contrast, the number of applications for asylum recorded in the Czech Republic, Hungary and Poland were 4,066, 7,398 and 3,302 respectively. Four European Union member states (Finland, Greece, Luxembourg and Portugal), however, recorded less than 3,000 claims. See Migration News Sheet, June 1999, No. 195/99-06, at 10.
recently revised Constitution of Belgium.\textsuperscript{127}

\textit{De facto} refugees, not granted CSR status but permitted to stay on humanitarian grounds, are mostly accorded the same treatment with a few exceptions. This is essentially the case in Denmark, Finland, Ireland, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, although more significant distinctions in the economic and social spheres are made between CSR refugees and \textit{de facto} refugees in Austria, Belgium, France, Germany, Greece, and Italy.\textsuperscript{128}

However, the adoption of special measures necessary to integrate the children of refugees into the education system of the country or to provide for the special health needs of refugees constitute the exception rather than the rule in Western Europe. In the majority of countries, general language tuition supported by the state is available to refugees, although only in certain countries can such tuition be described as an entitlement.\textsuperscript{129} In others, language tuition is mainly organised with the support of NGOs and intergovernmental organisations (IGOs).\textsuperscript{130} With regard to access to higher education, including the provision of grants and scholarships, most countries do not discriminate between CSR refugees and nationals provided that foreign qualifications are deemed to be compatible to national entry criteria.\textsuperscript{131} Indeed, in Denmark, refugees accepted by an education institution are not only entitled to the same grants as Danish nationals, but can also apply for additional help under the Social Assistance Act.\textsuperscript{132} As far as the availability of special adaptation or reception classes are concerned to enable refugee children to overcome cultural and linguistic difficulties in the country of asylum, these are organised in Denmark, Finland, Luxembourg, Spain, and Sweden.\textsuperscript{133} In the Netherlands and Norway, a more integrated approach is taken by placing such children in normal classes and then giving them the special attention of teachers.\textsuperscript{134} In all of these countries, with the exception of Denmark,\textsuperscript{135} no distinctions are made in this respect between the

\textsuperscript{127} Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belgium, supra note 33, at paras. 14 and 11 respectively.

\textsuperscript{128} See ECRE, Complementary/Subsidiary Forms of Protection in the EU States: An Overview (ECRE, April 1999).

\textsuperscript{129} See DRC Report on Western Europe, supra note 125, at 22 (Austria), 49 (Denmark), 66 (Finland), 84 (France), 97 (Germany), 148 (Luxembourg), 166 (Netherlands), 179 (Norway) and 223 (Sweden).

\textsuperscript{130} Ibid. at 36 (Belgium), 113 (Greece), 138 (Italy), 195 (Portugal) and 212 (Spain).

\textsuperscript{131} Ibid. at 23 (Austria), 36 (Belgium), 67 (Finland), 85 (France), 98 (Germany; except persons granted Duldung (tolerated residence)), 113 (Greece), 138 (Italy), 149 (Luxembourg), 166 (the Netherlands, except refugees granted residence permits on humanitarian grounds whose opportunities to receive state support are restricted during their first 3 years of residence in the country), 179 (Norway), 223 (Sweden), 241 (United Kingdom; persons with ELR (exceptional leave to remain) status cannot apply for university grants on the same terms as UK nationals until they have resided in the country for three years).

\textsuperscript{132} Ibid. at 50.

\textsuperscript{133} Ibid. at 50, 66 and 63, 149, 212 and 209, and 223 and 221 respectively.

\textsuperscript{134} Ibid. at 163 and 166 and 176 respectively.

\textsuperscript{135} Ibid. at 46.
children of refugees and asylum seekers. In the remaining countries, however, special adaptation classes are either not available to refugee children or only organised on an ad hoc basis by individual schools or teacher volunteers. As noted in section 3.2.5 on the right to education, an important aspect of the successful integration of children in the host society, which inculcates them with respect for their parents, is the teaching of the mother tongue and culture of their country of origin. Such instruction also has the dual purpose of preparing them for a possible return to that country at some point in the future. The availability of such instruction in Western European countries is generally lacking. In Denmark, Finland, the Netherlands, Norway and Sweden, however, bilingual children are officially entitled to mother tongue tuition provided that a certain number of children with the same language attend the school in question or are resident in the municipality, or if a qualified teacher is available. In Ireland, small-scale schemes to provide such tuition to Bosnian and Vietnamese children have been established with state support. Unofficial classes, sometimes with central or local government support, have also been organised in Luxembourg and the United Kingdom.

Special measures in the health field appear to be very rare. The DRC report only identifies measures of this kind in Denmark where under the Social Assistance Act discretionary grants can be granted towards the cost of 'essential medicines, dental treatment, physiotherapy and psychological treatment etc.' Although no specific relevant measures have been identified in Ireland, the DRC report observes that the Irish Refugee Council has undertaken discussions with statutory health agencies on 'the provision of appropriate services for victims of torture, imprisonment and warfare and for people who suffer severe psychological stress'.

In the majority of Western European countries, refugees are treated on the basis of equality with nationals as far as access to the labour market is concerned. Although a work permit is required in some of these countries, it is usually granted automatically. This is a commendable position given that Article 17 CSR only requires refugees to be given 'most-favoured nation' treatment in respect of employment. However, restrictions are retained in

---

136 See respectively, ibid. at 50 (Denmark; 12 children in municipality), 67 (Finland; 4 children in school or municipality), 166 (Netherlands; more than 8 children in one school); 176 (Norway; availability of qualified teacher); 223 (Sweden; 5 children in municipality).
137 ibid. at 126.
138 ibid. at 149 and 241 respectively.
139 ibid. at 50. Emphasis added.
140 ibid. at 124.
141 This is generally the position in Austria (ibid. at 22), Denmark (ibid. at 49; but not applicable to de facto refugees), Finland (ibid. at 86), France (ibid. at 84), Germany (ibid. at 97); Ireland (ibid. at 125-6), Italy (ibid. at 138; except high-level public administration jobs and some public positions where Italian citizenship is required), Luxembourg (ibid. at 148), Netherlands (ibid. at 165), Norway (ibid. at 179), Spain (ibid. at 212), Sweden (ibid. at 223), United Kingdom (ibid. at 241).
142 This is the position in Luxembourg and Norway. ibid. at 148 and 179 respectively.
Belgium, Greece and Portugal. Moreover, equality in law with regard to free access to the labour market does not connote equal treatment in practice, and the DRC report emphasises that in many countries unemployment among refugees is much higher than the national average.

Indeed, this concern has also been specifically raised by the Committee of Economic, Social and Cultural Rights in concluding observations issued to Denmark and Finland: 'While it notes with satisfaction the recent decrease in the percentage of the population who are unemployed, the Committee is still concerned that the level of unemployment remains high, especially among young people, immigrants and refugees'.

The position of asylum seekers in Western European countries with regard to the protection of their economic and social rights is far less satisfactory and sits very uneasily with many of the economic and social rights as well as some of the fundamental civil and political rights discussed earlier in Sections 3 and 4. Indeed, an examplar of this unsatisfactory state of affairs is reflected in the following concern expressed by the Committee on Economic, Social and Cultural Rights in its concluding observations to Germany: 'The Committee is ... concerned about the status of asylum seekers in Germany, especially with regard to the length of time taken to process their application for refugee status and with regard to their economic and health rights pending the final decision'.

The right to medical treatment is circumscribed in some countries. In most states, health care is available to asylum seekers on the same terms as nationals. In those countries where asylum seekers are mainly accommodated in special reception or asylum centres, with the exception of Norway and Spain, medical staff are usually present on site. In a number of countries, however, asylum seekers only have access to emergency and/or urgent medical care. For example, in Germany, access to medical and dental treatment during the first 12 months is restricted to 'cases of serious illness or acute pain'. In Greece, after undergoing a compulsory medical examination

---

143 Ibid. at 36, 112-3, and 194-5 respectively.
144 For example, the DRC report, ibid. at 165, points to recent research in the Netherlands, which shows that only 25% of refugees succeeded in finding employment within three years of their arrival in the country. In Sweden, statistics indicate that unemployment amongst foreign nationals is about 3 times as high as for Swedish nationals. Ibid. at 223.
147 This is the position in Ireland (DRC Report on Western Europe, supra note 125, at 124), Luxembourg (Ibid. at 147), Norway (Ibid. at 177), Spain (Ibid. 209; expenses met by the Spanish Red Cross), and the United Kingdom (Ibid. at 239).
148 Ibid. at 47 (Denmark), 63 (Finland), 81 (France), 163 (Netherlands).
149 Ibid. at 95 referring to the Nov. 1993 Law on Social Benefits for Asylum Seekers (Asylbewerberleistungsgesetz). After this initial 12-month period, access to the national
on arrival in the country, asylum seekers only have access to the health care system in emergencies.\(^{150}\) A similar position exists in Sweden and Italy, although in the latter pregnant women have free access to the national health care system during the duration of their pregnancy.\(^{151}\) Distinctions are also made between certain categories of asylum seekers, with the result that the access of some to health care appears very limited. In Austria, asylum seekers under federal care, namely those 30% of asylum seekers considered 'needy' by the authorities, are covered by the common health insurance plan. The DRC report merely notes that 'other asylum seekers may receive free basic medical treatment in private hospitals'.\(^{152}\) Similarly, in Belgium only 'needy' asylum seekers in receipt of social assistance have access to health care.\(^{153}\) In Portugal, asylum seekers processed under the accelerated procedure, which applies to cases considered 'manifestly unfounded', are not given free access to the national health service and are required to pay a consultation fee, although in practice this fee may be waived.\(^{154}\) These restrictions on the access of asylum seekers to medical treatment are a long way from the kind of holistic health care envisaged by the contemporary understanding of a right to health described in Section 3.2.2 and arguably amount to the kind of 'severe' discrimination discussed in Section 4.2, which may pose a real risk to their lives or of degrading treatment constituting a violation of Articles 2 and 3 ECHR and Articles 6 and 7 ICCPR.

In many Western European countries, where there are accommodation shortages, the provision of adequate housing for asylum seekers generally results in a number of problems with human rights implications. In half of the countries under consideration, asylum seekers are normally accommodated in special reception centres,\(^ {155}\) and concerns have been raised about the living conditions in some of these centres.\(^ {156}\) Moreover, as contended in Section 4.3 above, the confinement of asylum seekers to such centres, particularly if a legal requirement, might well constitute an interference with the private life of asylum seekers because it prevents them from developing 'normal relations' with the community at large.\(^ {157}\) In some countries, where

---

\(^{150}\) Ibid. at 110.  
^{151}\) Ibid. at 221 and 136 respectively.  
^{152}\) Ibid. at 20. Emphasis added.  
^{153}\) Ibid. at 35.  
^{154}\) Ibid. at 192-3.  
^{155}\) This is the position in Belgium (ibid. at 33), Denmark (ibid. at 46), Finland (ibid. at 62), France (ibid. at 79), Germany (ibid. at 93), Luxembourg (ibid. at 145), Netherlands (ibid. at 162); Norway (ibid. at 175); Sweden (ibid. at 220; approximately 50%).  
^{156}\) For example, the Committee on Economic, Social and Cultural rights recently expressed concern at the living conditions of asylum seekers in reception centres in the Netherlands. See Concluding Observations of the Committee on Economic, Social and Cultural Rights: Netherlands, UN Doc. E/C.12/1/Add.25 (16 June 1998) at para. 18.  
^{157}\) Residence in special asylum reception centres is compulsory in the following countries: Germany (DRC Report on Western Europe, supra note 125, at 93; at least for the first 3 months); Netherlands (ibid. at 162, after six months asylum seekers with close relatives can leave the centres); Norway (ibid. at 175, except for those asylum seekers who have relatives or friends living in the country).
asylum seekers are permitted to reside outside of designated reception centres, they cannot exercise this entitlement in practice because most financial or social assistance is tied to their continued stay in the centres or because the allowance received does not cover accommodation. In Ireland and the United Kingdom, accommodation is provided with state support in the local community. In a number of countries, however, the housing situation is particularly disturbing. In Italy, housing provision for asylum seekers as well as refugees seems very erratic and differs widely depending on the region of the country the asylum seeker or refugee is in, with the result that many are rendered homeless. Clearly, such a situation risks violation of the rights to life and degrading treatment in ECHR Articles 2 and 3 ECHR and Articles 6 and 7 ICCPR respectively. This was also the situation affecting in-country asylum seekers in the United Kingdom before the Court of Appeal interpreted the National Assistance Act 1948 as imposing a duty upon local authorities to house destitute asylum seekers. In Austria, only asylum seekers under federal care are provided with accommodation, while the remainder are forced to rely on the assistance of NGOs and charities. Similarly, in Spain, accommodation is only granted to those asylum seekers whose applications have been considered admissible and who have no other income or resources. In Greece and Portugal, while there is some state and UNHCR support for housing respectively, asylum seekers are very much dependent on NGOs for accommodation.

Given that, as discussed below, most asylum seekers present in Western European countries are not permitted to work, the extent of the social assistance available from the state is crucial to enable them to continue a dignified existence while their claims for refugee status are being determined. Most asylum seekers attached to special reception centres are provided with a basic allowance, which may vary quite widely depending on whether they are provided with meals or cook their own food or whether items essential to their well-being are provided in kind. In countries, such as Ireland and the United Kingdom, where no special reception centres have been established, asylum seekers are entitled to means-tested social benefits. In the case of the United Kingdom, however, these benefits are only available to 'port' claimants. In-country asylum seekers, as well as those who are appealing against a negative decision, can only receive benefits in kind from local

---

158 According to the DRC report, this is the position in Belgium (ibid. at 33), Denmark (ibid. at 46), and Finland (ibid. at 62).
159 Ibid. at 122 and 236 respectively.
160 Ibid. at 135 and 137.
162 DRC Report on Western Europe, supra note 125, at 18-9.
163 Ibid. at 208.
164 Ibid. at 109 and 191 respectively.
165 This is essentially the position in Denmark (ibid. at 46), Finland (ibid. at 62), France (ibid. at 80), Germany (ibid. at 94), the Netherlands (ibid. at 162), Norway (ibid. at 174), Spain (ibid. at 208) and Sweden (ibid. at 220).
166 Ibid. at 122 and 237 respectively.
authorities under the National Assistance Act 1948. The Immigration and
Asylum Bill currently passing through Parliament will deny all asylum seekers
access to the general benefits system. A separate welfare system for asylum
seekers is to be established, which will only provide benefits in kind together
with some pocket money for incidental expenses to 'destitute' asylum
seekers.\textsuperscript{167}

The new system envisaged for the United Kingdom resembles the approach
taken in some other countries where certain categories of asylum seekers are
left to fend for themselves. Depending on the extent of their own resources,
asylum seekers may not qualify for any social assistance at all. In Austria,
asylum seekers without federal care are not entitled to any social assistance
and are dependent on NGOs for support.\textsuperscript{168} In Belgium, only needy asylum
seekers may apply for social assistance and such assistance is not granted
to rejected asylum seekers in respect of whom an enforceable order to leave
the territory has been issued even if they are still appealing the negative
decision.\textsuperscript{169} In Denmark, asylum seekers with money or valuables may be
required to cover their own expenses, while in Luxembourg asylum seekers
with their own resources are not entitled to free accommodation nor other
social benefits.\textsuperscript{170} Similarly, in Italy and Spain, financial assistance is
essentially limited to needy or vulnerable asylum seekers.\textsuperscript{171} The worst
conditions exist in Greece and Portugal where no or very little social
assistance is available to asylum seekers. Coupled with haphazard
accommodation arrangements, this means that asylum seekers face a very
precarious existence. In Greece, no financial assistance is available, and
asylum seekers have to turn to NGOs and IGOs for any material support.\textsuperscript{172}
In Portugal, asylum seekers processed under the accelerated procedure,
which in 1995 constituted 96\% of applications, do not receive any financial
assistance, while those in the normal determination procedure only obtain a
basic monthly allowance for 4 months. Consequently, NGOs there also play
an important role in assisting destitute asylum seekers.\textsuperscript{173}

\textsuperscript{167} As a result of fierce political pressure from Government backbenchers, particularly
concerned at the impact of the Bill on families with children, the Home Secretary, Jack Straw
M.P., recently announced some concessions and raised the proposed cash allowance to be
payable to adults and children from £7 and £3.50 a week respectively to £10 a week for both.
See A. Travis, 'Straw moves to quell asylum bill rebellion', The Guardian, 9 June 1999, at 8
and E. MacAskill, L. Ward & H. Briggs, 'Asylum rebels mollified by Straw', The Guardian, 10

\textsuperscript{168} DRC Report on Western Europe, supra note 125, at 19.

\textsuperscript{169} \textit{Ibid.} at 34.

\textsuperscript{170} \textit{Ibid.} at 46 and 146 respectively.

\textsuperscript{171} \textit{Ibid.} at 135 and 208 respectively. In both countries, this assistance is temporally
circumscribed. The DRC report, \textit{Ibid.} at 135, observes that many asylum seekers in Italy find
it very difficult to obtain financial assistance once they have been notified of a negative first
instance decision because they are deprived of the temporary residence permit which they
require to collect the benefit. In Spain, the allowance is granted for a period of 6 months only,
although it may be extended for two further 3-month periods. \textit{Ibid.} at 208.

\textsuperscript{172} \textit{Ibid.} at 109.

\textsuperscript{173} \textit{Ibid.} at 191.
Clearly, many of the problems experienced by asylum seekers in Western European countries with regard to their enjoyment of economic and social rights would be alleviated to a certain extent if they were permitted access to the labour market of the host country. In 10 out of the 16 countries examined, asylum seekers are denied the right to work.\textsuperscript{174} However, in some countries, free access to employment is granted after a certain period of residence, while in others the right to work is subject to priorities in the labour market. In Belgium, asylum seekers in the normal determination procedure can obtain a work permit at the request of the prospective employer.\textsuperscript{175} In Finland and Germany, a work permit may be granted for a specific job to asylum seekers if they have been in the country for more than three months and if the authorities are satisfied that the job cannot be filled by a national, a European Union national or someone with a residence permit.\textsuperscript{176} In Spain, asylum seekers may apply for employment authorisations, which are in practice more readily granted for temporary agricultural work than for other forms of employment, such as clerical jobs.\textsuperscript{177} In Sweden, asylum seekers can work if their applications are likely to take more than four months, while in the United Kingdom permission to work may be granted to asylum seekers by the Home Office after a period of six months.\textsuperscript{178} The fact that asylum seekers are not permitted to work in most countries, does not of course mean that they do not work. In many countries, particularly in Greece, Italy and Portugal, where social assistance is generally lacking, asylum seekers frequently take up employment on an illegal basis.\textsuperscript{179}

While access to the labour market has traditionally been an area where distinctions between nationals and non-nationals are considered legitimate, it is arguable that the application of such distinctions to asylum seekers, who have a right under international refugee law to remain in the host country while their claims are being determined, cannot be justified by objective and reasonable criteria in the absence of concomitant measures to secure their dignified existence in that country. Moreover, the harshest situations can only constitute constructive \textit{refoulement} and are therefore in breach of the fundamental obligation in Article 33 CSR.

This section has already demonstrated that the education rights of refugee children are generally satisfied in Western European countries, although clear differences remain regarding the adoption of positive provisions to assist the successful integration of these children in the mainstream education system and in the host society at large, for example by way of

\textsuperscript{174} This is the position in Austria (\textit{ibid.} at 19), Denmark (\textit{ibid.} at 46), France (\textit{ibid.} at 80), Greece (\textit{ibid.} at 109), Ireland (\textit{ibid.} at 122), Italy (\textit{ibid.} at 136), Luxembourg (\textit{ibid.} at 146), Netherlands (\textit{ibid.} at 162), Norway (\textit{ibid.} at 176), Portugal (\textit{ibid.} at 192),

\textsuperscript{175} \textit{Ibid.} at 34. Asylum seekers in the admissibility procedure are not permitted to take up employment. \textit{Ibid.}

\textsuperscript{176} \textit{Ibid.} at 62 and 94 respectively.

\textsuperscript{177} \textit{Ibid.} at 209.

\textsuperscript{178} \textit{Ibid.} at 221 and 238 respectively. See also Cholewinski, \textit{supra} note 1, at 467 regarding the position in the UK.

\textsuperscript{179} \textit{Ibid.} at 109, 136 and 192 respectively.
special adaptation classes and mother tongue instruction. In principle, the fundamental place of education to a child’s personal and social development means that no differences should exist in the treatment of children of refugees and asylum seekers. Fortunately, this is indeed the case in all but three of the countries examined by the DRC report. In the latter countries, the right of children of asylum seekers to basic educational provision has been considerably undermined, although in two of these countries favourable changes to the law are imminent. In Denmark, the children of asylum seekers are taught in the reception centres and have no access to the normal Danish school system, although the DRC report notes that these rules are in the process of revision. In Germany, school attendance for the children of asylum seekers, though permissible in most Länder, is not compulsory, with the result that attendance in practice depends on the goodwill, interest, size and financial and human resources of the local school concerned. In Portugal, the law does not provide the children of asylum seekers with access to the school system, although the DRC report observes that the right to attend school is one of the priorities of the draft new asylum law.

As far as the education of adult asylum seekers is concerned, their access to language training supported by the state is also limited. State-financed language training is only available in Denmark, Finland, Luxembourg, the Netherlands, Norway, Spain, and Sweden where such tuition is compulsory. The DRC report provides little information on vocational training opportunities available to asylum seekers, although it notes that restrictions exist at the level of higher education particularly in relation to the payment of fees.

5.2 Central and Eastern Europe

Most Central and Eastern European countries ratified the CSR in the early 1990s. The Baltic States all accepted the CSR in 1997. All of these countries have also adopted domestic refugee laws to implement the CSR, with the exception of Bulgaria where there is a draft law currently passing

---

180 See Austria (ibid. at 18), Belgium (ibid. at 34), Finland (ibid. at 63), France (ibid. at 80), Greece (ibid. at 110), Ireland (ibid. at 123), Italy (ibid. at 137), Luxembourg (ibid. at 146), Netherlands (ibid. at 163), Norway (ibid. at 176), Spain (ibid. at 209), Sweden (ibid. at 221) and the United Kingdom (ibid. at 238).
181 ibid. at 46.
182 ibid. at 95.
183 ibid. at 192.
184 Ibid. at 47, 63, 146, 163, 176, 209 and 221 respectively.
185 See Belgium (ibid. 35-6) and Ireland (ibid. at 123).
186 The DRC Report on Central and Eastern Europe, supra note 125, assesses the situation of asylum seekers and refugees in the following Central and Eastern European countries: Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.
187 Hungary, however, ratified the CSR in 1989, although it initially implemented the geographical reservation granting asylum only to refugees from Europe (Art. 1.B.(1)(a)). This reservation was lifted in 1998. ibid. at 80.
through Parliament, and have ratified the major universal human rights instruments and the ECHR.

The health rights of asylum seekers and refugees are generally safeguarded in these countries and there are few significant differences between the treatment of asylum seekers and refugees in this respect. In most countries, as discussed below, asylum seekers are accommodated in special reception centres and basic health care for them is attached to these centres with emergency care in hospitals available at state expense. In the Czech Republic and Poland, however, asylum seekers residing outside reception centres are required to meet their own medical expenses. In the latter, they can be reimbursed by the central reception centre if the illness was life threatening or prior permission had been obtained from the centre to consult a doctor or to go to hospital. In Romania, there are no state medical services available to asylum seekers, although these services are provided by the UNHCR through the local Refugee and Advice Support Centre.

All the countries examined make provision for asylum seekers to be housed in special reception centres, although the DRC report observes that in some, such as Estonia and Latvia, these centres have not yet been established, while in others, such as Romania, the provision is extremely limited. In Latvia, asylum seekers are accommodated in a detention camp, which is part of a regular prison, although the DRC report notes that this situation was due to change by mid-December 1998 with the construction of a reception centre. Some of the reception centres set up are in fact tantamount to detention because asylum seekers are either not permitted to leave the centres or can only do so with special authorisation and usually for a limited period of time. In some countries, such as the Czech Republic and Slovakia, quarantine periods are also applied. In these countries, a two-tier system of reception centres is in place and asylum seekers are transferred to the second tier once the quarantine period has expired. A similar scheme also exists in Lithuania where those asylum seekers who have entered the country illegally are effectively detained in Foreign Registration Centres. Once they have been granted temporary territorial asylum and admitted to the asylum procedure, they are transferred to the Refugee Reception Centre,

188 Ibid. at 63 and 153 respectively.
189 Ibid. at 168.
190 Ibid. at 75, 113 and 166-7 respectively.
191 Ibid. at 111-2.
192 Ibid. at 62 (Czech Republic; for first 3-4 weeks during quarantine period; see below), 127 (Lithuania; Foreigners’ Registration Centre; see below), 205 (Slovakia; for a minimum of one month during quarantine period; see below).
193 Ibid. at 44 (Bulgaria; permission needed for leave of over 24 hours), 62 (Czech Republic), 93 (Hungary; since summer 1998 permission only granted to asylum seekers with identity documents and thus many applicants are excluded), 112 (Latvia), 152 (Poland; for a maximum of 72 hours with authorisation), 205 (Slovakia; for up to 24 hours with authorisation).
194 Ibid. at 61 (3-4 weeks) and 203 (minimum of one month) respectively.
where living conditions are also much better. As well as amounting to a possible unjustified infringement of their free movement rights, the reliance in the countries under examination on reception centres to house asylum seekers and the accompanying restrictions certainly preclude them from developing normal relations with the community at large and thus seriously risk infringing their right to privacy. These housing restrictions do not apply to recognised refugees, although not all countries provide public or subsidised housing to refugees with the result that many have to seek private rental accommodation, remain in reception centres, or rely on the help of NGOs or the UNHCR.

Most asylum seekers residing in reception centres receive a small amount of financial assistance towards their necessary expenses. In many countries, however, where asylum seekers can live outside of the centres, financial assistance is not available. Recognised refugees are treated, with few exceptions, on similar terms with nationals, although it is important to emphasise that the level of welfare assistance in some of these countries, given their economic situations, is very low and hardly sufficient to live on.

On the whole, the children of asylum seekers and refugees are treated on equal terms with nationals as far as access to schooling is concerned, but there are some significant exceptions. Discrimination between asylum seekers and refugees with regard to education appears to be prevalent in Hungary and Lithuania, where in practice the children of asylum seekers have no access to education in normal schools, although some limited instruction is provided in asylum reception centres. Moreover, in Romania the children of asylum seekers and refugees only have free access to primary schooling. They must pay for other levels of education, although access is

---

195 Ibid. at 126-7.
196 See Art. 12(1) ICCPR and Art. 2(1) of Protocol No. 4 to the ECHR (16 Sept. 1963; ETS No. 46; entry into force 2 May 1968; ratified by 30 states as at 1 Jan. 1998).
197 Additional support is available to recognised refugees in the Czech Republic (DRC Report on Central and Eastern Europe, supra note 125, at 64-5), Estonia (ibid. at 77), Lithuania (ibid. at 131-2), Slovakia (ibid. 206-7) and Slovenia (ibid. at 221-2). In Latvia, there is provision for a housing allowance, but the law in question has not yet been implemented (ibid. at 114).
198 In Bulgaria, ibid. at 44, asylum seekers in reception centres only receive board and lodging, although they can apply for a one-off allowance to meet the cost of essential items. In Latvia, ibid. at 112, no financial assistance is envisaged for those asylum seekers who will be accommodated in the new reception centre, and in Lithuania, ibid. at 128, asylum seekers housed in the Foreigners Registration Centre are only provided with shelter and food.
199 Czech Republic (ibid. at 62), Estonia (ibid. at 75), Hungary (ibid. at 94), Latvia (ibid. at 112), Slovakia (ibid. at 204), and Slovenia (ibid. at 221).
200 For example, in Romania, recognised refugees are entitled to receive specific assistance equivalent to the monthly minimum salary for a maximum period of six months. In the second half of 1998, the monthly minimum salary was about 250,000 Lei or approximately US$24. Ibid. at 169.
201 Ibid. at 94 and 129 respectively. The DRC report, ibid. at 76, also observes that the few children (three thus far) of asylum seekers in Estonia have not yet been given access to the normal school system, although this situation is set to change.
available to Romanian citizens free of charge.\textsuperscript{202}

Few of these countries have adopted positive or special measures for asylum seekers and refugees in order to assist their integration in host societies. In practice, most language tuition and integration programmes are organised and run by NGOs, sometimes with the assistance of the UNHCR. A more positive role is played by the National Bureau for Territorial Asylum and Refugees in Bulgaria, which organises free Bulgarian language courses for both asylum seekers and refugees in the reception centres. The Bureau has also established an integration centre to help refugees acquire qualifications and undergo vocational training.\textsuperscript{203} There is also evidence in three countries of additional language support for the children of asylum seekers and refugees in state schools.\textsuperscript{204}

With few exceptions, asylum seekers are not permitted to work.\textsuperscript{205} Although some work illegally, this option is not open to those confined in reception centres. In most countries in the region, recognised refugees are entitled to take up employment on the same terms as nationals. In reality, however, employment is difficult to find in the countries of Central and Eastern Europe because of language barriers and the relatively high unemployment rate, which is largely due to the transitional nature of these countries’ economies. Particularly restrictive employment conditions exist in the Czech Republic, where most recognised refugees have to apply for a work permit, which is linked to a specific job, and priority for employment is normally given to Czech citizens. The DRC report observes that this is a less favourable position than foreigners with permanent residence permits.\textsuperscript{206} These arrangements, therefore, are clearly in contravention of Article 17 CSR, which requires refugees to be given 'most-favoured nation treatment'.

\textbf{5.3 Russia, Belarus, and Ukraine}\textsuperscript{207}

The legal situation of asylum seekers and refugees with regard to the enjoyment of their economic and social rights in the Russian Federation and two former western republics of the Soviet Union, namely Belarus and the Ukraine, is relatively similar and therefore considered in this separate

\textsuperscript{202} Ibid. at 170.
\textsuperscript{203} Ibid. at 45 and 48. The integration centre gives special attention to women. Ibid. at 48.
\textsuperscript{204} Poland (Ibid. at 153 and 155), Slovakia (Ibid. at 208 and 209) and Slovenia (Ibid. at 221).
\textsuperscript{205} Some possibilities for employment exist in Bulgaria (Ibid. at 45), the Czech Republic (Ibid. at 62) and Slovenia (Ibid. at 221), although in practice such opportunities are very limited.
\textsuperscript{206} Ibid. at 65. These restrictions do not apply to refugees who have lived in the Czech Republic for three years, are married to a Czech citizen, or have a child with Czech citizenship. Ibid.
\textsuperscript{207} This section of the paper is also based on material in another paper entitled 'Economic and Social Rights of Asylum Seekers and Refugees: The Rights to Health and Education', presented at a Seminar on Legal Questions on Social Protection for Forced Migrants in the Russian Federation, Moscow, 22-24 April 1999.
section. These countries are parties to most of the major international human rights instruments discussed above, but Belarus is not a member of the Council of Europe and has not ratified the ECHR. Another significant difference is that only the Russian Federation has accepted the CSR, although both Belarus and Ukraine have passed domestic refugee laws.

5.3.1 The Russian Federation

To establish the actual position of asylum seekers and refugees in the Russian Federation with respect to the protection of their economic and social rights, a clear distinction between law and practice is required. Although the law appears promising at face value, practice indicates that these rights have often been denied, especially to those seeking asylum from outside of the Commonwealth of Independent States (CIS).

The principal law currently regulating the situation of asylum seekers and refugees in the Russian Federation is the Federal Law on Refugees, which entered into force on 3 July 1997. The asylum process under this law consists of two stages. First, the application is subject to a preliminary review, which determines whether the claim can proceed to the substantive determination procedure. There is an extensive list of grounds upon which such an application can be denied at this stage, and a number of these have been criticised by the UNHCR as violating international refugee law. If the preliminary review is successful, asylum seekers are entitled to a certificate 'on considering the claim on the merits', which, in theory, should enable them to register 'with the territorial organ of the federal executive authority responsible for internal affairs pending substantive determination of the application'.

The receipt of the certificate affords the asylum seeker and his or her family members access to a number of rights, including certain economic and social

---

208 Another former western republic of the Soviet Union is Moldova, but the migration problems faced by this country principally concern Transnistrian internally displaced persons, who were affected by a conflict in the eastern part of the country. Moldova has not acceded to the CSR and has no law providing for a refugee definition or determination procedure. DRC Report on Central and Eastern Europe, supra note 125, at 135-40.


210 Law on Refugees, Art. 4.

211 Ibid., Art. 5.

212 See A. Silvestri, Refugee Status Determination Procedures in Russia (Moscow: UNHCR, July 1998) at 2.

213 Law on Refugees, Art. 4.7, para. 5. This is the territorial branch of the Department for Visas and Registration (UVIR) under the Ministry of Internal Affairs. See DRC Report on Central and Eastern Europe, supra note 125, at 179.
entitlements, which are legally provided for to a basic level. Asylum seekers and their families are entitled to medical and medicinal assistance in accordance with the laws of the Russian Federation and the legal acts of its subjects.\textsuperscript{214} They are also entitled to other forms of economic and social assistance, such as the receipt of a cash allowance for every family member in an amount not lower than the minimum wage established by Federal law and admission to a temporary accommodation centre.\textsuperscript{215}

If the substantive refugee application is successful, a refugee card is issued, which like the certificate held by asylum seekers, should enable recognised refugees to register with the regional authorities concerned.\textsuperscript{216} Refugees are entitled to a range of rights, including economic and social rights. Generally speaking, the protection accorded to this group is greater than that granted asylum seekers. With regard to health provision, the Law on Refugees states specifically that recognised refugees are entitled to ‘medical and medicinal assistance \textit{on an equal footing with citizens of the Russian Federation} ...’.\textsuperscript{217}

The social situation of recognised refugees is on paper strengthened further by the existence of other entitlements to accommodation and social protection, including social security.\textsuperscript{218} The right to education also appears protected satisfactorily by the entitlement, on an equal footing with Russian citizens, to ‘assistance in being referred for vocational training or in getting employment’ and ‘assistance in sending children to State and municipal ... education institutions’ at all levels.\textsuperscript{219}

On their face, therefore, the provisions of the 1997 Law on Refugees seem consistent on the whole with the Russian Federation’s international obligations as far as the protection of the economic and social rights of asylum seekers and refugees is concerned. It is arguable, however, that the letter of this law is not fully compliant with such obligations. Although any person lodging an asylum application in Russia qualifies as an asylum seeker and is thus protected from \textit{refoulement} under Article 33 CSR, access to economic and social entitlements is only possible under the new refugee law once a certificate has been obtained admitting the applicant to the substantive refugee determination procedure.\textsuperscript{220} The law stipulates that a decision has to be taken within five days,\textsuperscript{221} which, though not a lengthy time-period, nonetheless means that significant hardship can be suffered by those asylum seekers who have no material possessions or financial means at their disposal. This hardship can also be exacerbated if delays are experienced in taking the initial decision. Consequently, the impact of these provisions might result in a situation of ‘constructive \textit{refoulement},’ described in Section 2.2

\textsuperscript{214} Law on Refugees, Art. 6.1(7).
\textsuperscript{215} Ibid., Arts. 6.1(3) and (4) respectively.
\textsuperscript{216} Ibid., Art. 7.7.
\textsuperscript{217} Ibid., Art. 8.1(7). Emphasis added.
\textsuperscript{218} Ibid., Arts. 8.1(4), (6) and (10) respectively.
\textsuperscript{219} Ibid., Arts. 8.1(8) and (11) respectively.
\textsuperscript{220} DRC Report on Central and Eastern Europe, \textit{supra} note 125, at 179.
\textsuperscript{221} Ibid., Art. 4.5(2).
above, where asylum seekers are forced to return to their countries of origin because they cannot access basic subsistence safeguards in the asylum country. Another flaw concerns the very limited education rights of those asylum seekers holding a certificate and awaiting a substantive determination of their claim. The only entitlement specified in the new refugee law is assistance in respect of referral for vocational training. There is no specific provision made for the children of such asylum seekers to gain access to educational institutions. Although the right to education in the Russian Constitution is granted to 'everyone', the explicit and detailed reference in the Law on Refugees to the education of the children of recognised refugees would seem to suggest that such entitlements were not envisaged for the children of asylum seekers. Such a position would appear not only to be a violation of the Constitution, but also the international human rights standards relating to education discussed in Section 3.2.5 above.

The situation of asylum seekers and refugees with regard to the enjoyment of their economic and social rights in the Russian Federation can only be truly evaluated however by examining what actually occurs in practice. There is a reluctance to consider applications from so-called 'far-abroad' asylum seekers, namely those who are fleeing persecution and violence in countries situated beyond the frontiers of the CIS. While 'near-abroad' asylum seekers have been given preferential treatment, members of the former group, many of whom come from African and Asian countries, were for a long time unable to gain access to the refugee determination procedure. This situation, however, appears to have improved since the entry into force of the new refugee law in July 1997.

The greatest practical obstacle, however, to the enjoyment of economic and social rights by asylum seekers and recognised refugees would appear to be the institution of 'propiska', which was responsible for strictly regulating freedom of movement and choice of residence in the former Soviet Union. Although 'propiska' was officially abolished in 1991 and replaced by a formal and simplified system of registration, restrictions are still in place in many Russian regions, particularly in urban and economically developed areas. This situation persists even though the Constitutional Court has ruled on a number of occasions that such restrictions are unconstitutional and in violation of Russia's international obligations. The impact of these

---


223 Law on Refugees, Art. 8.1(11).

224 This situation is reflected in the official figures provided by the Federal Migration Service (the body responsible for determining refugee status), which show that as of 1 April 1998 over 200,000 persons received refugee status in the Russian Federation, but that only 300 of these persons came from outside the former Soviet Union. Most of these were Afghans, but there was also a small number from Ethiopia, Yugoslavia, Turkey and Macedonia. See Silvestri, supra note 212, at 1, 4.

225 Ibid.

226 For a more detailed discussion, see O. Tchernishova, Freedom of Movement and the Right to Choose a Place of Residence in Russia: Rulings of the Constitutional Court.
restrictions has in practice meant that asylum seekers and refugees have been unable to gain access to economic and social entitlements because of the refusal of regional authorities to register them as being resident within their jurisdiction. Moreover, access by asylum seekers to the refugee determination procedure has also been refused to claimants who are not registered. According to the new refugee law, however, the issue of a certificate admitting the asylum seeker to the determination process must be obtained first before registration can take place. Consequently, these asylum seekers have found themselves in a 'vicious circle' or a 'catch 22' situation and can only remain in the country to pursue their claim with assistance from the UNHCR. This denial in practice by the state of basic economic and social rights is at odds with international refugee law and the human rights standards discussed earlier. It may well threaten the right to life of asylum seekers and, arguably, also reaches the level of severity necessary for a breach of the right to be free from degrading treatment. Moreover, it may well amount to effective *refoulement* in contravention of Article 33 CSR.

Even in those instances, where the new refugee law is fully applied, the provision in practice is hardly adequate and can be non-existent. The financial assistance available to those asylum seekers in possession of a certificate can be equivalent to one minimum salary under the new refugee law. Although vulnerable asylum seekers can obtain one and a half times this salary, the current monthly minimal salary in Russia of US$15 has been estimated to be only sufficient to cover basic necessities for four days. This position reflects the stark reality of the very difficult economic situation in the Russian Federation. Another problem with the practical application of the 1997 Law on Refugees relates to the provision of education. The DRC report observes that the fairly extensive entitlements afforded to recognised refugees in this respect are generally beyond their reach due to the lack of reception programmes.

5.3.2 Belarus and Ukraine

According to the DRC report, the economic and social rights of asylum seekers and refugees in Belarus and the Ukraine appear to be relatively well protected, at least on paper, in their respective refugee laws. However, the implementation of these laws has thus far been far from satisfactory. In


228 DRC Report on Central and Eastern Europe, *ibid.* at 186. However, the DRC report, *ibid.* at 190, observes that such asylum seekers can generally benefit from emergency medical care.


Belarus, asylum seekers are in a similar position to those in Russia in that they can only qualify for economic and social assistance once they have been admitted to the refugee determination procedure, which can last for up to three months in the capital Minsk.232 Once admitted, however, they are entitled to receive social and medical assistance and children have access to schools. Refugees have access to the national health system and to all educational institutions on the same terms as nationals.233 A particular problem, however, concerns accommodation. Although housing provision is stipulated in the Law on Refugees, it has not yet been put into practice and asylum seekers and refugees have to find their own accommodation.234 In the Ukraine, asylum seekers and refugees are legally entitled to receive medical care, but in practice access is restricted due to the state of the health system and the high cost of medicine and treatment.235 Similarly, refugee centres are supposed to house asylum seekers and refugees, but these have not yet been established.236 The law is less clear on access to education, but the children of asylum seekers appear to be in a more disadvantageous position than the children of recognised refugees, although in practice most of these children are able, with UNHCR intervention, to attend normal Ukrainian schools.237

Clearly, the difficult economic situation in both of these counties, similar to that in Russia, means that the rights actually enjoyed by asylum seekers and refugees are meagre in quality. For example, there is no state financial assistance available in Ukraine to asylum seekers or refugees.238 While such assistance does exist in Belarus, it amounts to a one-off allowance equivalent to one monthly wage, assessed at the paltry sum of approximately US$2.239 Asylum seekers are not permitted to work in Belarus and although they can in theory take up temporary employment in the Ukraine, in practice this is not possible because of the high level of unemployment and the lack of 'propiska'240 (see below). Even though recognised refugees in both countries are permitted to work, the same two obstacles preclude access to legal employment. As a result, many asylum seekers and refugees earn their living by way of illegal work,241 while the most vulnerable asylum seekers may qualify for UNHCR assistance.242

As alluded to above, 'propiska' still operates in these countries and, as in the

at 16 and 226.
232 Ibid. at 22.
233 Ibid. at 27 and 29.
234 Ibid. at 25 and 28.
235 Ibid. at 238 and 239.
236 Ibid. at 235 and 239.
237 Ibid. at 237 and 239.
238 Ibid. at 236 and 238.
239 Ibid. at 26 and 28.
240 Ibid. at 26 and 239 respectively.
241 Ibid. at 26, 29 and 237, 239 respectively.
242 Ibid. at 26. In the Ukraine, UNHCR cash assistance is also available to recognised refugees. Ibid. at 238.
Russian Federation, this has in practice a very negative impact on the access of asylum seekers and recognised refugees to most economic and social entitlements, particularly accommodation and employment.\footnote{Ibid. at 22-3 and 232-3.}

6. Conclusion

The protection of the economic and social rights of asylum seekers and refugees in Europe cannot be considered as a secondary goal in their flight from persecution. This paper has shown that they are entitled to many of the economic and social rights, which states are obliged to secure to nationals under relevant international human rights standards. A minimum core content of these rights should at least be guaranteed to asylum seekers and refugees in order to enable them to live in dignity while pursuing a claim for asylum or enjoying protection in the country in question. In this regard, the rights to health, adequate housing, social assistance, education and employment should be satisfied to a satisfactory level. Although the paper has focused on economic and social rights with reference to the ICESCR, it has also shown that depriving asylum seekers and refugees of social protection may constitute violations of certain fundamental civil and political rights, such as the right to life, the right to be free from inhuman or degrading treatment, and the right to respect for family and private life.

As far as European Union countries are concerned, the focus on international human rights standards is particularly important in the context of the new Title IV of the EC Treaty,\footnote{Title IV on Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons.} as amended by the Treaty of Amsterdam 1997\footnote{Treaty of Amsterdam Amending the Treaty on the European Union, the Treaties Establishing the European Communities and Certain Related Acts, signed 2 Oct. 1997. The consolidated version of the treaties can be found in European Union, Consolidated Treaties (Luxembourg: Office for Official Publications of the European Communities, 1997).} which entered into force on 1 May 1999. Whereas soft law measures in the asylum field were adopted as a result of intergovernmental cooperation under the Third Pillar and earlier arrangements, the new scheme introduced by the Amsterdam Treaty means that asylum and immigration matters will now be the subject of legally binding measures at European Union level.\footnote{Denmark, Ireland and the United Kingdom have secured 'opt-outs' as well as 'opt-ins' in respect of Title IV, which are found in three Protocols annexed to the Treaty.} Furthermore, while most of the previous measures focused on access to asylum determination procedures and the refugee definition,\footnote{See e.g. Ad Hoc Group Immigration, Resolution on manifestly unfounded applications for asylum, 30 Nov. 1992; Conclusions on Countries in which there is generally no serious risk of persecution, 30 Nov. 1992; Council Resolution on minimum guarantees for asylum procedures, 20 June 1995 (OJ 1996, C 274/13); Council Joint Position on the harmonised application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, 4 March 1996 (OJ 1996, L 63/2).} the new framework envisages the adoption of measures concerning such matters as 'minimum standards on the reception of asylum seekers in Member States'
and "minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection". It is imperative therefore that the minimum standards agreed to by European Union countries do not fall below the minimum core content of the economic and social rights identified in this paper.

248 Arts. 63(1)(b) and 63(2)(a). Whereas most measures in the asylum field are to be adopted within a period of five years, the first provision is not subject to this time limit.