TREATING LIKE ALIKE: THE PRINCIPLE OF NON-DISCRIMINATION AS A TOOL TO MANDATE THE EQUAL TREATMENT OF REFUGEES AND BENEFICIARIES OF COMPLEMENTARY PROTECTION

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[Recent years have seen academics in the field of international law demonstrate a growing interest in the subject of complementary protection, particularly in the rights that follow from complementary protection as opposed to from refugee status. While scholars have largely focused on the 'protection gap' between the rights granted to refugees and those granted to beneficiaries of complementary protection in the context of international law, they often overlook the fact that this 'gap' is most significant at a domestic level. They also overlook the potential usefulness of the principle of non-discrimination codified under art 26 of the International Covenant on Civil and Political Rights as a way to close the 'protection gap' between the two groups. This paper seeks to promote art 26 as a valuable tool for the elimination of differentiation between refugees and beneficiaries of complementary protection, thereby enhancing its role as a source of rights for highly vulnerable individuals and enriching the way we think about entitlement to protection at international law.]

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I  I NTRODUCTION

The doctrine of ‘complementary protection’ has been the subject of considerable scholarly debate over the past decade. A great deal of this discussion has focused on defining the boundaries of the doctrine at international law; that is, defining who is eligible for complementary protection. Although the doctrine has been criticised for its imprecision, it seems that there is now a general consensus that complementary protection covers persons who fall outside the scope of the protection provided under the Refugee Convention and its attendant Protocol Relating to the Status of Refugees, but who otherwise have a claim for protection based on the principle of non-refoulement at international law. In other words, the doctrine is founded on the international protection obligations owed by a state to an applicant that are complementary to the protection obligations assumed under the Refugee


2 McAdam, Complementary Protection, above n 1, 1. See also Mandal, above n 1, xi.


5 This includes both the express norm of non-refoulement under art 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (’CAT’), and the implicit norm contained within arts 6–7 of the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (’ICCPR’) and arts 6 and 37 of the Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (’CRC’). The principle of non-refoulement is discussed in further detail in Part II.
Convention. Although debates surrounding eligibility for complementary protection continue,6 there has been a shift in attention, albeit a slight one, towards defining the rights that follow from complementary protection status.7 This has coincided with a similar scholarly shift in the field of refugee studies.8 Defining the content of complementary protection status is by no means an easy task. In contrast to the Refugee Convention, which devotes considerable attention to defining the nature and the substance of the rights that flow from refugee status,9 there is no equivalent single instrument at international law for complementary protection.10

In the absence of express guidance, the question has arisen whether individuals eligible for complementary protection status should be afforded the same rights as individuals eligible for Convention refugee status. As a matter of policy, an answer in the affirmative has clear merit. As a matter of legal obligation, the issue is inherently more problematic. By its very definition, complementary protection is intended to operate outside the Refugee Convention. The fact that an individual entitled to complementary protection status falls outside the definition of a refugee provided under the Refugee Convention,11 or is otherwise expressly excluded from protection under the Convention,12 dictates that that individual

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6 See, eg, Foster, ‘Non-Refoulement on the Basis of Socio-Economic Deprivation’, above n 1.
7 See especially McAdam, Complementary Protection, above n 1, 1.
8 For the leading text, see James C Hathaway, The Rights of Refugees under International Law (Cambridge University Press, 2005). Hathaway notes that ‘[i]n contrast to the progress achieved by courts in conceiving a shared understanding of the Convention refugee definition, there has been only minimal judicial engagement with the meaning of the various rights which follow from recognition of Convention refugee status’. at 2. Hathaway attributes this ‘analytical gap’ to the ‘tradition of most developed states simply to admit refugees, formally or in practice, as long-term or permanent residents’ which ‘has led de facto to respect for most Convention rights’: at 2–3. In recent years this has changed. Hathaway goes on to state that ‘[i]n recent years … governments throughout the industrialized world have begun to question the logic of routinely assimilating refugees, and have therefore sought to limit their access to a variety of rights’: at 3 (citations omitted). A similar transgression, and corresponding need for research, can be attributed to complementary protection status. In the past, many developed states have simply afforded the recipient of complementary protection, albeit often in an ad hoc manner, the same status as refugees. This approach has recently started to shift, the primary example being the approach adopted by the Council of the European Union in Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L 304/12 (‘EU Qualification Directive’). The Directive will be considered in some detail in Parts III and V.

9 Refugee Convention arts 2–34. Those rights are then supplemented by international human rights law, in particular the ICCPR and the International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (‘ICESCR’). The EU Qualification Directive represents the first supranational instrument to detail the rights to be afforded to beneficiaries of complementary protection. Complementary protection is defined in that instrument as ‘subsidiary protection’: see, eg, EU Qualification Directive [2004] OJ L 304/12, Preamble para (24), arts 2(e)–(f).

10 Refugee Convention art 1A(2). For example, an individual who falls outside the scope of the Refugee Convention because the human rights violation does not amount to persecution, or because the persecution is not connected to one of the five relevant grounds set out under art 1A(2).

11 Ibid art 1F. I acknowledge, of course, that if an individual falls foul of art 1F of the Refugee Convention they will in fact fall outside the definition of a refugee, and hence fall within the
cannot, without more, be entitled to the rights provided under the Convention. However, an acknowledgement of distinct statuses does not necessarily prove an insurmountable hurdle to the provision of equal treatment to those two statuses. Indeed, the very notion of equality is founded on the importance of treating distinct statuses in the same manner where there is no reasonable and objective basis for differentiation; recall Aristotle’s justice formula: like cases must be treated alike, and unlike cases unalike, proportionate to the differences between them.\(^\text{13}\) Although acknowledging (without any hesitation) that an individual eligible for complementary protection status is not entitled as a refugee to the rights provided under the Refugee Convention, I will argue that an individual eligible for complementary protection status may be entitled to treatment as if he or she were a refugee by way of the principle of non-discrimination, specifically that codified in art 26 of the International Covenant on Civil and Political Rights (‘ICCPR’).\(^\text{14}\)

The principles of equality and non-discrimination\(^\text{15}\) have played a central role in the development of regional and international human rights law.\(^\text{16}\) It is therefore surprising that there has been relatively limited recourse to the specific international legal manifestations of equality and non-discrimination in commentary concerning the rights adhering to individuals eligible for complementary protection. A number of national and international bodies have adopted the language of non-discrimination to advocate equal treatment between refugees and beneficiaries of complementary protection, but all have stopped short of characterising the principle of non-discrimination as a source of extant legal obligation. Although making no attempt to define the content of complementary protection status,\(^\text{17}\) the United Nations High Commissioner for Refugees Executive Committee of the High Commissioner’s Programme (‘UNHCR

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\(^{14}\) I acknowledge, at the outset, that other instruments may operate to the same effect; in particular, in the European context, the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (‘ECHR’). As will become apparent as the paper develops, ICCPR art 26 has been selected as the focal point of this paper because of its substantive scope and geographic reach.

\(^{15}\) Equality and non-discrimination are treated as distinct, albeit interrelated, principles for the purposes of this paper. Cf the approach adopted by Anne F Bayefsky, ‘The Principle of Equality or Non-Discrimination in International Law’ (1990) 11 Human Rights Law Journal 1. See further Part IV below.

\(^{16}\) Bertrand Ramcharan suggests that ‘[e]quality and nondiscrimination constitute the dominant single theme of the [ICCPR]’: B G Ramcharan, ‘Equality and Nondiscrimination’ in Louis Henkin (ed), The International Bill of Rights: The Covenant on Civil and Political Rights (Columbia University Press, 1981) 246, 246. Lord Woolf has similarly stated that ‘[t]he right not to be discriminated against is one of the most significant requirements of the protection provided by the rule of law’: A v Secretary of State for the Home Department [2004] QB 335, 347 [?] (Lord Woolf CJ).

\(^{17}\) Notwithstanding calls for it to do so by non-governmental organisation delegations: see McAdam, ‘The Refugee Convention as a Rights Blueprint’, above n 1, 281 n 98.
Executive Committee18 has encouraged states, in granting complementary forms of protection:

to provide for the highest degree of stability and certainty by ensuring the human rights and fundamental freedoms of such persons without discrimination, taking into account the relevant international instruments and giving due regard to the best interest of the child and family unity principles …19

The House of Lords Select Committee on the European Union came close in its consideration of the EU Qualification Directive in 2002.20 More recently, with the benefit of hindsight, the European Commission, in its proposal for reform of the EU Qualification Directive, expressed a similar view:

When subsidiary protection was introduced, it was assumed that this status was of a temporary nature. As a result, the Directive allows Member States the discretion to grant them a lower level of rights in certain respects. However, practical experience acquired so far has shown that this initial assumption was not accurate. It is thus necessary to remove any limitations of the rights of beneficiaries of subsidiary protection which can no longer be considered as necessary and objectively justified.21

Academic commentators have similarly shied away from characterising the principle of non-discrimination, and specifically art 26 of the ICCPR, as a source of legal obligation in the context of complementary protection. McAdam is a noteworthy exception; she has suggested that the principle of non-discrimination under international human rights law provides support for granting refugees and beneficiaries of complementary protection identical status.22 As with the UNHCR Executive Committee, the House of Lords Select Committee and the

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18 For discussion of the weight to be afforded to Executive Committee Conclusions, see Hathaway, *The Rights of Refugees*, above n 8, 112–14.
19 UNHCR Executive Committee, *Report of the Fifty-Sixth Session of the Executive Committee of the High Commissioner’s Programme*, 56th sess, UN Doc A/AC.96/1021 (7 October 2005) para 21(n) (‘Conclusion on the Provision on International Protection Including through Complementary Forms of Protection’).
20 Select Committee on the European Union, *Defining Refugee Status and Those in Need of International Protection*, House of Lords Paper No 156, Session 2001–02 (2002) 27 [110]–[111] (‘Defining Refugee Status Report’): ‘It is difficult to see what justification there is for the Directive establishing more limited rights for persons granted subsidiary protection compared to those available to refugees… We urge the Government to push for the extension of the same rights to everybody entitled to international protection. Not only would this remove an apparently unjustified discrimination between Geneva Convention refugees and beneficiaries of subsidiary protection, it would also, as the Government itself recognises, have practical advantages. It would help limit the number of appeals by those refused refugee status but granted subsidiary protection."

The arguments above about the Convention’s architecture and its function as a form of lex specialis for persons in need of protection explain why beneficiaries of complementary protection should receive the same legal status as Convention refugees. Yet, even without this reasoning, the principle of non-discrimination in human rights law provides support for granting an identical status.
European Commission, McAdam makes no mention of art 26 of the ICCPR. However, the use of art 26 to mandate the equal treatment of refugees and beneficiaries of complementary protection is not a novel concept. Hathaway has undertaken an extensive review of the manner in which refugees and other non-citizens may, in certain circumstances, invoke art 26 to guarantee equal treatment. Although primarily concerned with equal treatment between citizens and non-citizens, and between subsets of refugees, the framework adopted by Hathaway is of clear relevance to this paper’s consideration of equality of treatment amongst distinct categories of non-citizens. Hathaway has expressly noted elsewhere the possibility of art 26 being invoked by beneficiaries of complementary protection to guarantee their equal treatment with refugees. Similar observations have also been made by other commentators.

The goal of this paper is to elaborate the manner in which art 26 of the ICCPR can be used as a tool to mandate the equal treatment of individuals eligible for complementary protection status and individuals eligible for refugee status. It will seek to do so in a manner anchored in legal principle and obligation, avoiding any temptation to subsume complementary protection within the scope of the Refugee Convention. The impetus for the argument developed in this paper derives from a number of sources. First, it is hoped that the arguments advanced in this paper might contribute to the debate currently taking place between the European Parliament, the European Commission and the member states regarding potential reform of the EU Qualification Directive. At present, the Directive sets minimum standards of protection for beneficiaries of subsidiary protection that are in a number of respects inferior to the protection afforded to individuals granted refugee status. The European Commission has recently proposed approximating the rights granted to the two categories of protection. Second, a number of jurisdictions are currently considering, or have recently implemented, a domestic system of complementary protection. It is hoped that the analysis in this paper will provide a modest contribution to any discussion of the rights to be afforded to beneficiaries of complementary protection in these

23 Hathaway, The Rights of Refugees, above n 8, 123–47.
24 Ibid.
25 Ibid 238–60.
28 I adopt here the language of Hathaway, The Rights of Refugees, above n 8, 4.
29 See above n 21 and accompanying text. The EU Qualification Directive is discussed in further detail in Part III (generally) and Part V (on the current reform efforts).
31 For example, New Zealand. See Immigration Act 2009 (NZ).
particular jurisdictions. Finally, this paper is, in part, a response to the recent work of Jane McAdam, and in particular her argument that the Refugee Convention acts as a form of lex specialis for all persons protected by the principle of non-refoulement. McAdam argues that the Refugee Convention acts as a ‘specialized blueprint for legal status, rights, and obligations, irrespective of the legal source of the protection obligation.’ 32 This paper is not concerned with McAdam’s lex specialis argument. 33 In fact, my concern is not that McAdam’s argument goes too far, but rather that it does not go far enough. McAdam is particularly concerned about the disparity between the rights provided to refugees and beneficiaries of subsidiary protection under the EU Qualification Directive. And yet, as will be noted in Part III, the key differences between the rights allocated to the two statuses are not regulated by the Refugee Convention. 34 Hence, at least in this context, the lex specialis argument is of limited utility. In contrast, art 26 has the potential to ‘drill down’ and remedy the discriminatory allocation of rights at a regional and/or domestic level, even where the rights in question are not regulated by an international instrument.

Parts II and III set the scene for the argument advanced in the paper. Part II will examine who is eligible for complementary protection. This section will provide an overview of the development of the norm of non-refoulement, focusing on the manner in which this principle has found expression in international law. Given that the focus of this paper is on the content of complementary protection status, this section is necessarily brief. Part III shifts from a consideration of qualification to a consideration of the rights that follow from an individual’s status as a refugee or as a beneficiary of complementary protection. Specifically, prior to an application of any principle of non-discrimination, this section will seek to identify the sources of these specific entitlements. Those sources are, for refugees, the Refugee Convention, supplemented by the ICCPR and the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’), and for beneficiaries of complementary protection, the ICCPR and the ICESCR. 35 Part IV of the paper introduces the principles of equality and non-discrimination. It begins by tracing the progressive development of these two core principles, and specifically the manner in which these norms have found expression in international law. It will conclude by focusing on art 26 of the ICCPR. Part V is the heart of the paper. Applying a three-stage test, it offers a detailed analysis of the manner in which art 26 of the ICCPR can provide both a targeted and a flexible tool to mandate the equal treatment of refugees and beneficiaries of complementary protection. Considerable focus is placed on whether the differential allocation of rights to these distinct statuses can be

32 McAdam, Complementary Protection, above n 1, 17.
33 For a critique, see Hathaway, ‘Leveraging Asylum’, above n 1.
34 For example, the length of residence permits and the right to family unity.
35 An analysis of the obligations deriving from customary international law and the full range of specialised human rights treaties is beyond the scope of this paper. The ICCPR and the ICESCR, regarded as the two foundational human rights treaties, have been selected in light of their scope and general application. It is necessary to stress the important role played by the specialist human rights treaties, in particular — where the claimant is a child — the CRC.
construed as ‘reasonable and objective’. Three potential bases for differentiation are examined, two of which have been invoked to elevate refugee status in a general sense, and one of which has been conjured to justify the inferior treatment of beneficiaries of complementary protection specifically. The ‘reasonable and objective’ test will be applied to two categories of beneficiaries of complementary protection to highlight the in-built flexibility of art 26, and the fact that its application can, if necessary, be confined to a subset of beneficiaries of complementary protection. The first category is individuals who do not satisfy the definition of a refugee in art 1 of the Refugee Convention, but who are otherwise protected by a state’s non-refoulement obligations. The second category is individuals that are excluded from protection under the Refugee Convention by reason of art 1F, but who are otherwise protected by a state’s non-refoulement obligations. Part V concludes with a consideration of the major practical challenges to the arguments advanced in this paper. In particular, I tentatively assess the extent to which an argument anchored in positive international law, and underpinned by well-established principles of equality and non-discrimination, might influence the behaviour of states.

II THE PRINCIPLE OF NON-REFOULEMENT UNDER INTERNATIONAL LAW

The term ‘complementary protection’ has been defined to capture those international protection obligations owed by a state to an applicant based on the principle of non-refoulement. Before turning to the manner in which this principle has found expression in international law, it is necessary to acknowledge three related points of definitional controversy. The first concerns the argument that the term ‘complementary protection’ should be defined more broadly, to include concepts such as temporary protection, protection in accordance with the expanded definitions in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and the Cartagena Declaration on Refugees, and protection for purely compassionate reasons. In this sense,

36 The Human Rights Committee (‘HRC’) has stated that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’: HRC, General Comment No 18: Non-Discrimination in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HR/COC/US/1/Rev.7 (12 May 2004) [13] (‘General Comment No 18’). The HRC has adopted a number of General Comments to clarify states’ obligations, and provide an interpretation of the provisions of the ICCPR. Although not binding, General Comments are often referred to in the jurisprudence of the HRC, and are regularly treated as persuasive authority in courts around the world.

37 Part V will illustrate, for example, why ICCPR art 26 would not preclude differentiation between refugees and beneficiaries of complementary protection who have been expressly excluded from the Refugee Convention by way of art 1F of that Convention.

38 The second category is, of course, a subcategory of the first.


complementary protection has been used to describe any protection that falls outside the Refugee Convention. Although by no means seeking to devalue the needs of individuals captured by these broader notions of protection, these humanitarian concerns are, generally speaking, not founded on international protection obligations. Any expansion of the boundaries of the doctrine of complementary protection beyond that mandated by legal obligation would necessarily shift, and in some circumstances limit, the arguments available in relation to art 26. For these reasons, the doctrine of complementary protection has been defined in this paper by reference to extant legal obligation.

Accepting, at least for the purposes of this paper, that complementary protection is concerned with international protection obligations deriving from the norms of non-refoulement, we are presented with a further set of definitional controversies. The precise scope of the principle of non-refoulement at international law is far from settled. There is, for example, debate as to the extent to which the deprivation of social and economic rights could give rise to a non-refoulement obligation. There is also an ongoing debate as to whether the non-refoulement obligation amounts to a principle of customary international law.

Given that the focus of this paper is on the content of complementary protection status, I do not intend to engage with debates concerning the outer boundaries of the principle of non-refoulement. This discussion has been, and will continue to be, the subject of a substantial body of thoughtful academic and judicial debate.

The third point of controversy relates to the specific non-refoulement obligations under the respective treaties discussed below.

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41 This will become apparent as the paper develops. For example, if complementary protection was defined to include protection for purely compassionate reasons, a state would be able to rely upon a wider range of justifications for the differential allocation of rights between refugees and beneficiaries of complementary protection.

42 The Committee on Economic, Social and Cultural Rights has not considered whether a non-refoulement obligation is inherent in the ICESCR. However, there is emerging, albeit nascent, academic commentary and jurisprudence centred on the theory of the ‘permeability of rights’; that is, the notion that rights traditionally falling within the rubric of ‘civil and political’ may have application to socioeconomic rights. This has, for example, arisen in the context of the deprivation of health and medical care (see, eg, D v United Kingdom [1997] III Eur Court HR 777; N v United Kingdom (2008) 47 EHRR 39). For a thoughtful and comprehensive discussion, see Michelle Foster, International Refugee Law and Socio-Economic Rights: Refuge from Deprivation (Cambridge University Press, 2007). There is also an argument that international humanitarian law, specifically common art 3 of the Geneva Conventions can give rise to a non-refoulement obligation: see Hathaway, The Rights of Refugees, above n 8, 369.


44 Similar to the definition of ‘complementary protection’, it is necessary to acknowledge that any wider definition of non-refoulement would shift, and in some circumstances limit, the arguments available in relation to ICCPR art 26.

45 For a comprehensive discussion, see McAdam, Complementary Protection, above n 1, 111–35.
A The CAT

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘CAT’) is the only international treaty, other than the Refugee Convention, which contains an express obligation of non-refoulement. Article 3 of the CAT provides a clear and absolute prohibition on returning an individual to a country where there are substantial grounds for believing that he or she will be subjected to torture. A number of applicants for international protection are seeking protection under the provisions of the CAT. The CAT provides an important mechanism for complementary protection in two key respects. First, art 3 is absolute and non-derogable. In contrast to the Refugee Convention, there can be no exceptions to a state’s obligation of non-refoulement under art 3 of the CAT. Second, art 22 of the CAT enables individuals to bring an individual complaint to the Committee against Torture, alleging a violation of the CAT (relevantly for present purposes, art 3). There is no such complaint mechanism available under the Refugee Convention.

B The ICCPR

Article 7 of the ICCPR provides that ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ Article 6 protects an individual’s ‘inherent right to life’, providing that ‘[n]o one shall be arbitrarily deprived of his [or her] life.’ Although neither art 6 nor art 7 specifically prescribe non-refoulement, the Human Rights Committee (‘HRC’) has stated that art 2 of the ICCPR entails an obligation not to remove a person where there are substantial grounds for believing there is a real risk of irreparable harm, such as that contemplated by arts 6 and 7. Similar to art 3 of the CAT, both arts 6 and 7 of the ICCPR are absolute and non-derogable.

48 HRC, General Comment No 31 (80): The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 80th sess, 2187° mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [12] (‘General Comment No 31’). See also HRC, General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.7 (12 May 2004) [9] (‘General Comment No 20’). Although the majority of the non-return jurisprudence before the Committee relates to communications brought under arts 6 and 7 (see, eg, HRC, Views: Communication No 900/1999, 76th sess, UN Doc CCPR/C/76/D/900/1999 (13 November 2002) (‘C v Australia’)), the Committee seems to have left open the possibility that a real risk of a violation of any ICCPR right could trigger a state’s non-refoulement obligations. This is evident from the language of General Comment No 31, UN Doc CCPR/C/21/Rev.1/Add.13, [12]. See also HRC, General Comment No 15: The Position of Aliens under the Covenant in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.7 (12 May 2004) (‘General Comment No 15’), which considers the position of aliens under the ICCPR.
Article 7 of the ICCPR is wider in scope than art 3 of the CAT. First, art 7 contains no requirement that the ill-treatment be carried out, or acquiesced in, by the state. Second, art 7 encompasses not only torture, but also ‘cruel, inhuman or degrading treatment or punishment’. The HRC has declined to provide any sharp delineation between ‘torture’ and ‘cruel, inhuman or degrading treatment or punishment’. Rather, the Committee has stated that any distinctions between the concepts encompassed by art 7 ‘depend on the nature, purpose and severity of the treatment applied’.49

Article 6 provides for the inherent protection of life, and prohibits its arbitrary deprivation. The HRC refers to the right to life in the following terms: ‘It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation … It is a right which should not be interpreted narrowly.’50 The Committee has held that states that have abolished the death penalty ‘may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.’51 It is also arguable that art 6 may encompass the risk of civilian deaths in armed conflict, on the basis that the HRC has described ‘war and other acts of mass violence’ as a major threat to the inherent protection of life.52

C The CRC

Similar to the ICCPR, art 6 of the Convention on the Rights of the Child (‘CRC’) protects the inherent right to life.53 Article 37 provides for protection against torture and other cruel, inhuman or degrading treatment or punishment. Article 37 of the CRC is wider in scope than art 7 of the ICCPR, in that it also prohibits the unlawful or arbitrary deprivation of liberty. The Committee on the Rights of the Child has interpreted arts 6 and 37 of the CRC as entailing (at the very minimum) a non-refoulement obligation.54 The Committee has also expressly referred to systems of complementary protection in General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside

It suggests that non-refoulement obligations may be triggered ‘when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise’: at [5].

49 General Comment No 20, UN Doc HRI/GEN/1/Rev.7, [4].
50 HRC, General Comment No 6: Article 6 (Right to Life) in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.7 (12 May 2004) [1] (‘General Comment No 6’).
52 General Comment No 6, UN Doc HRI/GEN/1/Rev.7, [2]. It may also be that international humanitarian law could be invoked here: see above n 42.
53 Article 6(1) of the CRC provides: ‘States Parties recognize that every child has the inherent right to life.’
Their Country of Origin (‘CRC General Comment No 6’),\(^{55}\) stating that the non-refoulement obligation is ‘by no means limited’\(^{56}\) to those obligations assumed under arts 6 and 37. There is a compelling argument that the overlaying ‘best interests’ principle contained in art 3 of the CRC may give rise to a non-refoulement obligation in certain circumstances.\(^ {57}\)

### III SOURCES OF RIGHTS FOR PERSONS ENTITLED TO INTERNATIONAL PROTECTION: IDENTIFYING THE ‘PROTECTION GAP’

Accepting that there is a category of individuals who fall outside the scope of the Refugee Convention but are otherwise entitled to international protection, it is necessary to identify the source of the rights that adhere to that category of individuals. The exercise undertaken in this paper is predicated on the existence of a gap in protection, and it is therefore imperative that this ‘protection gap’\(^ {58}\) be clearly identified and appropriately framed. It is equally important that the protection gap not be overstated.

In the first section of this Part, I identify the sources of rights available in international law to refugees and beneficiaries of complementary protection: for refugees, the Refugee Convention, supplemented by the ICCPR and the ICESCR, and for beneficiaries of complementary protection, the ICCPR and the ICESCR. Within the international context, the protection gap operates at several levels. At a primary level, there are a number of concerns specific to aliens outside their country of origin, for example, the need for travel and other identity documents, that are simply not dealt with under the ICCPR or the ICESCR. There are also more nuanced illustrations of the protection gap, deriving from the content of the respective rights, and the exceptions and limitations available to curtail those rights under the ICCPR and the ICESCR.

The second and, in my view, more significant consideration is the manner in which the ‘protection gap’ is reflected in regional and/or domestic law. This is addressed in section B of this Part. The value of considering the gap in protection in international law is ultimately premised on an assumption that the rights enshrined within the international treaties have found identical expression in domestic law and policy. It is clear that this is not borne out in reality. The EU Qualification Directive provides a case in point.\(^ {59}\)

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\(^{55}\) CRC General Comment No 6, UN Doc CRC/GC/2005/6, [77].

\(^{56}\) Ibid [27].

\(^{57}\) This argument has been persuasively mounted by McAdam, Complementary Protection, above n 1, 173–4 (citations omitted):

> Though the requirement that children’s best interests shall be a primary consideration in all actions concerning them should necessarily affect States’ application of article 1A(2) of the 1951 Refugee Convention, by imposing an additional layer of consideration in cases involving children, it may also constitute a complementary ground of protection in its own right.

\(^{58}\) McAdam, Complementary Protection, above n 1, 201.

\(^{59}\) Of course, in some respects, an analysis of the ‘protection gap’ in the EU Qualification Directive gives rise to similar issues of abstraction as a consideration of the international legal treaties. That said, it seems that a consideration of the Directive is more likely to reflect the domestic practices of states.
A The ‘Protection Gap’ in International Law

The rights of refugees are derived from two principal sources — the Refugee Convention, and the generally applicable system of international human rights law. Articles 3–34 of the Refugee Convention codify a set of substantive rights that must be guaranteed to an individual entitled to refugee status. These include free access to courts of law, access to housing, access to public education, access to the labour market and the provision of identity papers and travel documents. Two caveats must be stressed in relation to the rights regime set up under the Refugee Convention. First, the majority of the rights provided under the Refugee Convention are not guaranteed on an absolute basis, but are instead guaranteed relative to the rights enjoyed by other identified groups of individuals within the state (ie citizens, most favoured nationals of a foreign country, or non-citizens). Second, the rights themselves accrue depending on the level of attachment that the refugee has to the host state.60 It is unnecessary to explore these two caveats in further detail for the purposes of this paper.61 Rather, their exposition here is intended simply to illustrate that a ‘[s]ubtle analysis’62 is required to determine, as a matter of international law, the rights that are available to a refugee at any particular point in time, and the precise content of those rights.

The evolution of international human rights law has given rise to the development of a set of generally applicable international human rights norms. Specifically, the development of international human rights treaties ‘has filled many critical gaps in the Refugee Convention’s rights regime.’63 A consideration of the human rights of refugees must therefore go beyond a consideration of the rights codified under the Refugee Convention, and extend to a consideration of the obligations set out under this broader international human rights framework. This paper focuses on the two foundational international human rights law treaties, the ICCPR and the ICESCR. It is generally accepted that, with limited exceptions, the rights codified under these instruments apply to all persons within a state’s jurisdiction.64 This, of course, includes refugees.65 It is necessary, therefore, to ‘synthesise’ the rights guaranteed under the Refugee Convention with the rights guaranteed under the ICCPR and the ICESCR.66 In contrast to the Refugee Convention, which is necessarily limited in its application, the rights provided under the ICCPR and the ICESCR apply to all persons within a state’s

60 Hathaway, The Rights of Refugees, above n 8, 156–92.
61 An interesting point for future consideration is the extent to which the variable nature of the rights guaranteed under the Refugee Convention — both in relation to the level of attachment and the contingency of the content of the rights — could be subjected to scrutiny under art 26.
63 Hathaway, The Rights of Refugees, above n 8, 110.
64 Discussed further in Part V below.
65 General Comment No 31, UN Doc CCPR/C/21/Rev.1/Add.13, [10], referring to General Comment No 15, UN Doc HRI/GEN/1/Rev.7, states that the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.
66 This is precisely the task undertaken by Hathaway, The Rights of Refugees, above n 8.
jurisdiction. The ICCPR and the ICESCR therefore constitute the core sources of rights for beneficiaries of complementary protection.

Having identified at least the core sources of rights available to refugees and beneficiaries of complementary protection, it is necessary to identify the gap in protection that arises as a result of having different sources of rights available to the respective categories. The gap operates at three levels; the first is explicit, whereas the latter two are more nuanced. First, both the ICCPR and the ICESCR are generally framed, and do not deal with concerns specific to individuals in need of international protection. For example, neither instrument provides for the recognition of personal status, access to naturalisation, immunity from penalisation for illegal entry, or the provision of identity or travel documents. Second, where there are parallel rights in the ICCPR and the ICESCR, the content of these rights are often framed ‘on the basis of inappropriate assumptions.’ Hathaway provides the example of access to a state’s court system, pointing out that although the ICCPR provides for the right to a fair trial, it is silent on the more fundamental ‘issue of access to a court system.’ In the rubric of socioeconomic rights, Hathaway contrasts the guarantee of an adequate standard of living under the ICESCR with the more targeted guarantee of equal access to rationing systems under the Refugee Convention. Finally, there are significant exceptions and limitations built into both the ICCPR and the ICESCR. For example, in respect of the ICCPR, a state is permitted to suspend all but a few core absolute rights of non-citizens. Similarly, art 2(3) of the ICESCR allows developing countries to decide, depending on their economic situation, the extent to which they will guarantee to non-nationals the economic rights provided under the Covenant. This is accentuated by the fact that the socioeconomic rights codified under the ICESCR are generally conceived of as duties of progressive implementation.

B The ‘Protection Gap’ as a Matter of State Practice: The EU Qualification Directive

On 29 April 2004 the Council of the European Union adopted a Directive which sought to harmonise the legislation and administrative practices of member states by setting out minimum standards for the qualification and legal entitlements of refugees and beneficiaries of complementary protection (the

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67 Cf Refugee Convention art 12.
68 Cf ibid art 34.
69 Cf ibid art 31(1).
70 Cf ibid arts 27–8.
71 Hathaway, The Rights of Refugees, above n 8, 121.
72 Ibid, citing ICCPR arts 14–16 and Refugee Convention art 16.
74 ICCPR art 4. In contrast, the rights provided under the Refugee Convention are absolute.
75 ICESCR art 2(1). The Refugee Convention, in contrast, treats social and economic rights on a par with civil and political rights.
Directive adopts the term ‘subsidiary protection’).76 After setting out the criteria to be applied by member states in interpreting the provisions of the Refugee Convention, the Directive sets out the requirements that need to be satisfied to trigger a member state’s subsidiary protection obligations. According to the Preamble, those obligations are drawn ‘from international obligations under human rights instruments and practices existing in Member States.’77

The EU Qualification Directive creates a ‘protection hierarchy’78 prescribing minimum standards for the protection of refugees and for beneficiaries of subsidiary protection. While a beneficiary of subsidiary protection status under the Directive is afforded many of the same rights afforded to beneficiaries of refugee status, in some areas their entitlements are inferior. For example, the minimum duration for a residence permit for a beneficiary of subsidiary protection is one year, as compared to three years for a beneficiary of refugee status.79 There are also restrictions on access to health care,80 social welfare,81 and employment,82 as well as limitations on the issue of travel documents,83 the provision of integration facilities,84 and the right to family unification.85 The limitations on the rights of beneficiaries of subsidiary protection appear to have been motivated by political compromises, rather than by reference to regional or international legal obligations.86

Significantly, the rights afforded to refugees and to beneficiaries of subsidiary protection do not correlate to the rights provided to refugees and beneficiaries of complementary protection under international law. For example, on the issue of family unification, the differential treatment between refugees and beneficiaries of subsidiary protection under the Directive cannot be attributed to the protection gap at international law, as family unification is not provided for under the Refugee Convention. The gap in protection derives from the Directive itself, reflecting the desire of the states involved in the drafting of the Directive. At least in this context, there would seem to be limited value in closing the ‘protection gap’ at an international level. Rather, it is imperative that one drill down and consider whether the allocation of rights at a regional and/or domestic level is discriminatory. It is at this level that the inherent beauty of art 26 becomes strikingly apparent. By its very framework, art 26 is intended to facilitate an open-ended and ‘expanded breadth of protection’,87 operating outside the rubric of the ICCPR. As will be discussed in detail in Parts IV and V of this paper,

76 We are concerned here with the EU Qualification Directive as currently in force. The current reform efforts are discussed in Part V below.
78 McAdam, Complementary Protection, above n 1, 14.
80 Ibid art 29.
81 Ibid art 28.
82 Ibid art 26.
83 Ibid art 25.
84 Ibid art 33.
85 Ibid art 23.
86 See McAdam, Complementary Protection, above n 1, 90–3.
87 Hathaway, The Rights of Refugees, above n 8, 257.
art 26 is an independent and autonomous guarantee of non-discrimination.\textsuperscript{88} The text of art 26 makes clear that its application extends beyond the civil and political sphere, and extends to the proscription of any discrimination. This could include, of course, discrimination in the exercise of rights or freedoms not contained in any regional or international instrument. A state party bound by art 26 of the ICCPR must therefore abide by the duty of non-discrimination in the allocation of any legal rights.\textsuperscript{89}

IV THE PRINCIPLES OF EQUALITY AND NON-DISCRIMINATION IN INTERNATIONAL LAW

The right not to be discriminated against has been described as ‘one of the most significant requirements of the protection provided by the rule of law.’\textsuperscript{90} Given such elevation, it comes as a surprise that the principle of non-discrimination has not been put to work in the context of complementary protection. Article 26 of the ICCPR is widely regarded as the core exposition of the principle of non-discrimination in international human rights law.\textsuperscript{91} As tempting as it may be to begin one’s train of inquiry with art 26 itself, it is necessary to first consider the conceptual underpinnings of its precise legal formulation. To this end, we must first trace the development of the principles of equality and non-discrimination, which are two interrelated principles central to any understanding of art 26. Attention will then be drawn to the manner in which these principles have found expression in international human rights law generally, before focusing on art 26 specifically.

The broader discussion included in this section is intended to serve three purposes. First, it highlights the central significance of, and the value attributed to, the principles of equality and non-discrimination in social and legal discourse. Second, the broader overview is intended to assist in delineating the scope of this paper’s field of investigation. This is particularly true of the discussion on the three conceptions of equality, only one of which (‘formal equality’) is of direct relevance to the question of equal treatment between refugees and beneficiaries of complementary protection. Finally, although somewhat premature, it is anticipated that a brief exploration of some of the more progressive conceptions of equality (that is, ‘equality of result’ and ‘equality of opportunity’) may potentially strengthen any claim for non-discrimination founded on the more traditional conception of equality (that is, ‘formal equality’), which is the terrain that this paper must ultimately traverse.\textsuperscript{92}

\textsuperscript{88} Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (N P Engel, 2nd revised ed, 2005) 604, 628; Ramcharan, above n 16, 253–4.

\textsuperscript{89} Hathaway, The Rights of Refugees, above n 8, 125–6.


\textsuperscript{91} Hathaway, The Rights of Refugees, above n 8, 125.

\textsuperscript{92} There is a fourth, albeit indirect, justification for the broader discussion. This paper is concerned with equal treatment of refugees and beneficiaries of complementary protection. As noted earlier, a claim for non-discrimination in this context is grounded in the more traditional concept of formal equality. This paper is not concerned with equal treatment of beneficiaries of complementary protection and citizens. That claim would raise a number of additional issues, and would
A The Conceptual Underpinnings: The Principles of Equality and Non-Discrimination

The principles of equality and non-discrimination are inherently complex. These concepts, which have been the subject of a great deal of thoughtful and comprehensive academic literature, have generated considerable debate. It would be impossible to do justice to these concepts within the limited confines of this paper. Three points can be made by way of preliminary observation. First, the principles of equality and non-discrimination are distinct concepts. They are not, as some commentators suggest, the flip side of the same coin. The opposite (that is, the ‘flip side’) of equality is inequality. But inequality does not equate to discrimination. Equal and unequal treatment certainly function as the basis for a consideration of whether particular treatment constitutes discrimination. But something more is required before unequal treatment (or, in some circumstances, equal treatment) will amount to discrimination. Vierdag states that ‘discrimination occurs when the equality or inequality of treatment results from a “wrong” judgment as to the relevance or irrelevance of the various human attributes that are taken into account.’ He goes on to provisionally define discrimination as ‘wrongly equal, or wrongly unequal treatment.’ This definition, derived from the work of Kipp, is adopted in this paper and discussed in further detail below. Second, the principles of equality and non-discrimination are intrinsically interrelated. Although not necessarily the flip side of the same coin, they certainly derive from the same currency. As illustrated by Vierdag’s definition, any inquiry into the latter will necessarily require a consideration of the former. To this end, the two concepts are dealt with together in this section.

necessarily involve consideration of the more progressive conceptions of equality (that is, ‘equality of result’ and, in particular, ‘equality of opportunity’). By discussing those concepts here, the paper is at least alluding to the arguments that may be raised if one were to attempt to use the principle of non-discrimination as a tool to argue for this next logical step.


94 See, eg, Bayefsky, above n 15, 1; Ramcharan, above n 16, 252–3. Ramcharan considers equality and non-discrimination to be ‘affirmative and negative statements of the same principle’: at 252.

95 The author thanks Professor Christopher McCrudden for this observation.


97 Ibid 60.

98 Ibid (emphasis added).

The third and final point is to stress the fact that the principles of equality and non-discrimination are ‘not monolithic nor single-dimensional’. Although many would claim an ‘intuitive grasp of the meaning of equality’ and what it means to be discriminated against, a closer examination immediately highlights the difficulties inherent in formulating a clear definition of these concepts. This paper will outline three categories of equality articulated by Fredman: formal equality, equality of results and equality of opportunity. It will then move to a consideration of the principle of non-discrimination, and the vexed question of what is required for particular treatment (be it equal or unequal) to amount to discrimination.

The most basic formulation of equality, referred to as ‘formal equality’, is based on the Aristotelian rhetoric that justice requires that like cases be treated alike, and unlike cases unalike, proportionate to the differences between them. This formulation, also referred to as ‘equality as consistency’ or ‘equality as rationality’, appears ‘both morally irrefutable and straightforward.’ Indeed, it will be argued below that in the context of the equal treatment of refugees and beneficiaries of complementary protection, its application is just that. Although acknowledging that the notion of formal equality ‘may play a useful role in prohibiting blatant prejudice’, Fredman argues that ‘equality in its [most] formal sense … raises at least four sets of problems.’ First, it requires consideration of the ‘threshold question’ of whether or not two individuals are ‘relevantly alike.’ The second difficulty is best illustrated by reference to the writings of Anatole France: ‘to labour in the face of the majestic equality of the law, which forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.’ Formal equality, without more, does not differentiate between treating two distinct statuses equally well, or equally

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101 Fredman, Discrimination Law, above n 93, 1.
102 The author could have adopted the equally helpful categories outlined by McCrudden: ‘equality as rationality, equality as protective of prized public goods, equality as preventing status-harms, and equality as a positive duty to promote equality of opportunity’. McCrudden, ‘Equality and Non-Discrimination’, above n 93, 500. It is also important to acknowledge that, in part, Fredman appears to be shifting away from the categories of substantive equality outlined in her earlier work. See Fredman, Human Rights Transformed, above n 93, 178–9.
103 Aristotle, Nicomachean Ethics, above n 13; Aristotle, Politics, above n 13.
104 Fredman, ‘Combating Racism with Human Rights’, above n 93, 16.
106 Fredman, Discrimination Law, above n 93, 7.
108 Fredman, Discrimination Law, above n 93, 7.
109 Ibid.
invidiously. Instead, it views equal treatment as an end in itself. The third problem is ‘the need to find a comparator.’ Fredman, referring to the area of equal pay, argues that as a result of job segregation, ‘a low paid woman will frequently be unable to find a male comparator doing equivalent work.’ The final drawback is the inflexible treatment of difference. In some circumstances, a particular characteristic of an individual, or a group of individuals, may necessitate that positive measures be taken in order to achieve true equality. In other words, unequal treatment may be required to avoid discrimination.

The concept of ‘equality of results’ goes beyond the rhetoric of treating like cases alike, and instead looks to characterise the substantive result of particular treatment. Although in part a response to some of the perceived limitations of formal equality, this particular conception of equality has also proven controversial. First, this conception ‘appears to contradict the very principle of equality it purports to advance.’ For example, the provision of preferential treatment to non-citizens in order to ensure equality of results could be construed as discrimination against citizens on the grounds of their nationality. Second, this particular conception of substantive equality, with its exclusive focus on results, may overlook and fail to remedy the ‘structures that perpetuate discrimination.’ Notwithstanding these limitations, it would seem that this particular conception of substantive equality could act ‘as a valuable complement to formal equality’. While the latter can target blatant prejudice, the former can concern itself with the acknowledgement and promotion of diversity. Both, however, are problematic.

The ‘equality of opportunity’ formulation attempts to steer ‘a middle ground’ between the other two approaches. Fredman introduces the notion of ‘equality of opportunity’ by reference to the metaphor of competitors in a race. At an initial stage this may require preferential treatment for the disadvantaged

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111 Fredman refers to the oft-cited United States case where a city, required to open its whites-only swimming pools to the black population, chose instead to close down all of its swimming pools. The court held that as identical treatment had been applied there could be no breach of the guarantee of equality: Palmer v Thompson, 403 US 217 (1971).

112 Fredman, Discrimination Law, above n 93, 8.

113 Ibid 9–10.

114 Fredman gives the examples of cultural and religious differences: ibid 10.

115 Recall the definition posited by Vierdag: ‘wrongly equal, or wrongly unequal treatment’: Vierdag, above n 96, 60 (emphasis added).


117 In particular, the second problem. See above nn 110–13 and accompanying text.


119 Ibid 20.

120 Ibid 24.

121 Ibid.

122 Ibid 20.

123 Ibid. See also Lyndon B Johnson, ‘To Fulfill These Rights’ (Speech delivered at the Commencement Address at Howard University, Washington, DC, 4 June 1965) <http://www.lbjlib.utexas.edu/johnson/archives.hon/speeches.hon/650604.asp>.

group. In addition to the removal of procedural obstacles, this may require the implementation of positive measures (ie affirmative action). This third notion of equality is the least developed of the three. However, as McCrudden notes, it is the least developed because it is ‘the most recently developed. It has, however, the potential to be the most far reaching in its implications, depending on its interpretation and enforcement.’

Although inequality may function as a basis for a consideration of whether or not particular treatment amounts to discrimination, it is clear that ‘not every differential allocation is discriminatory’. There are many situations where it is entirely appropriate for a state to differentiate between particular groups. Indeed, in many circumstances the proper functioning of society depends upon such differentiation. The challenge, then, is to articulate what more is required to transform differential treatment, whether framed as formal inequality or substantive inequality, into discriminatory treatment. McCrudden frames the issue as follows: ‘Inequality may be used as one index by which the presence of discrimination is assessed, but is an act to be regarded as discriminatory simply when minority group members are disproportionately adversely affected?’ The answer is, unequivocally, no. Therefore, ‘the concern is to draw a line between invidious (discriminatory) and socially acceptable (non-discriminatory) distinctions.’ In doing so, it is necessary to breathe life into the notion of discrimination as a distinct legal principle. Vierdag stresses this point:

It follows from our objectives that we must try to develop ‘discrimination’ as a separate independent legal concept. To call all possible instances of unequal treatment … indiscriminately ‘discrimination’ would deprive that word of its very raison d’être. If in the law a separate legal term is employed, then this term should denote something separate, that is, something with specific legal consequences.

Just as it is important to afford the principle of discrimination its own legal identity, it is equally important to understand how, as a distinct concept, it interacts with the principle of equality. This can be explained as follows. The concept of formal equality, with its focus on consistent treatment, may form the basis of a claim for ‘direct discrimination’ (that is, formal inequality may amount to direct discrimination). Direct discrimination is concerned with the proscription

125 Fredman gives the example of ‘the abolition of word-of-mouth recruitment or of non-job-related selection criteria’ as obstacles for the career advancement of women or minorities: ibid 21.
126 Ibid.
127 McCrudden, ‘Equality and Non-Discrimination’, above n 93, 571.
128 Hathaway, The Rights of Refugees, above n 8, 124.
129 For example, taxation. In some circumstances, as the above discussion illustrates, differential treatment will be necessary to prevent substantive inequality.
131 Hathaway, The Rights of Refugees, above n 8, 124.
132 Vierdag, above n 96, 51. Vierdag also states that:
What we are trying to find is precisely the specific element through which we can distinguish discrimination from the countless ‘technical’, ‘reasonable’ inequalities in the law. It is obvious that neither in municipal law systems, nor in international law and practice instances of such ‘good’ unequal treatment are called discrimination …
of differential treatment (for example, where an individual has been treated less favourably because of his or her race). In contrast, the concept of equality of results, with its focus on substantive outcome, may form the basis of a claim for ‘indirect discrimination’ (that is, substantive inequality may amount to indirect discrimination). Indirect discrimination is concerned with the proscription of differential impact or result (for example, an employer’s criteria for career advancement that disadvantages a particular minority).133

As the above discussion illustrates, central to any definition of the principle of non-discrimination is the identification of the additional indicia required for formal inequality or substantive inequality to amount to discrimination. Vierdag provisionally defined discrimination as ‘wrongly equal, or wrongly unequal treatment.’134 But then, how does one identify the precise wrong that transforms inequality into discrimination? In formulating his own definition, Vierdag relies upon the definition provided by Kipp. That definition begins as follows: ‘“Discrimination can … be defined as: unequal treatment of equal objects or equal situations”’.135 What is of greater significance is Kipp’s additional proviso: ‘We can speak of discrimination … if there exists no meaningful connection between the inequality of the treatment and those aspects on which it is based.’136 The reference to ‘meaningful connection’ requires that a sufficient reason be provided in order to deviate from the prima facie requirement of equality. It requires that inequality be ‘properly justified, according to consistently applied, persuasive and acceptable criteria.’137 This additional proviso finds expression in the majority of regional and international human rights instruments that contain a non-discrimination provision. This includes art 26 of the ICCPR, which has been interpreted in a manner that allows for differentiation in treatment, ‘if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.’138

B The Principle of Non-Discrimination in International Human Rights Law

The principles of equality and non-discrimination are regarded as ‘the most frequently declared norms of international human rights law.’139 The United

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133 The concept of ‘equality of opportunity’ proves more difficult, and a full consideration of the embryonic notion of what is now commonly referred to as ‘institutional discrimination’ is beyond the scope of this paper. I acknowledge the significant weight of literature that explores the progressive development not only of the conception of equality, but also of the concept of discrimination. McCrudden, for example, has discussed the move away from ‘an essentially negative (“thou shalt not discriminate”) to an essentially positive (“thou shalt promote equality”) legal approach’: McCrudden, Anti-Discrimination Law, above n 93, xv. McCrudden notes that much of the literature on anti-discrimination law since 1990 has focused on the need for anti-discrimination law to be seen as taking on this positive role. McCrudden has labelled this ‘institutional discrimination’: McCrudden, ‘Institutional Discrimination’, above n 93, 345.

134 Vierdag, above n 96, 60 (emphasis added).
136 Vierdag, above n 96, 54 (emphasis in original), citing Kipp, above n 99, 140–1.
138 General Comment No 18, UN Doc HRI/GEN/1/Rev.7, [13].
139 Bayefsky, above n 15, 1.
Nations was established in the aftermath of the Second World War, with the ‘perversions of Nazism’\textsuperscript{140} and the death of 6 million Jews at the forefront of the collective mind of the international community. In these circumstances, it is of little surprise that the repudiation of discrimination is expressly dealt with in the Charter of the United Nations. The Charter’s preamble promotes ‘the equal rights of men and women’.\textsuperscript{141} Article 1(3) commits the United Nations to ‘achieving international co-operation in ... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’. The Universal Declaration of Human Rights\textsuperscript{142} adds flesh to this concept.\textsuperscript{143} The first United Nations international human rights convention, the Convention on the Prevention and Punishment of the Crime of Genocide,\textsuperscript{144} was similarly tied to the post-war experience, attempting to combat genocide as the ‘ultimate expression’\textsuperscript{145} of racial discrimination. At a regional level, the Convention for the Protection of Human Rights and Fundamental Freedoms (‘ECHR’), adopted in 1950, also contains an express prohibition against discrimination.\textsuperscript{146} These instruments, inextricably influenced by their historical context, were considered revolutionary not simply because they protected human rights, but also because they sought to do so in a manner which ‘embraced all human beings equally’.\textsuperscript{147} As Nowak states, it is clear that the United Nations has ‘since its very beginnings placed the battle against discrimination at the forefront of its human rights activities.’\textsuperscript{148} The centrality of the concept of non-discrimination in each of these instruments, which ‘imbued and inspired’\textsuperscript{149} similar protection in every other major international human rights instrument, underscores the central significance of, and the value attributed to, this principle, and the fact that ‘human inclusiveness is a characteristic of the international human rights approach.’\textsuperscript{150}


\textsuperscript{141} Charter of the United Nations Preamble para 2.

\textsuperscript{142} Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) (‘UDHR’).

\textsuperscript{143} Article 1 of the UDHR provides: ‘All human beings are born free and equal in dignity and rights.’ Article 2 provides that every individual is ‘entitled to all the rights and freedoms set forth in [the UDHR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ Article 7 further provides: ‘All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.’


\textsuperscript{145} Boyle and Baldaccini, above n 140, 139.

\textsuperscript{146} ECHR art 14.

\textsuperscript{147} Boyle and Baldaccini, above n 140, 138.

\textsuperscript{148} Nowak, UN Covenant on Civil and Political Rights (2nd revised ed), above n 88, 599 (citations omitted).

\textsuperscript{149} Ibid 598.

\textsuperscript{150} Boyle and Baldaccini, above n 140, 138 (citations omitted).
The principle of non-discrimination was firmly entrenched within the *ICCPR* and the *ICESCR*. Nowak has remarked that the 'principle of equality and the prohibition of discrimination runs like a red thread throughout the [*ICCPR*].'151 Both the *ICCPR* and the *ICESCR* contain a common art 3, which mandates that states parties shall undertake to ensure the equal right of men and women to the enjoyment of all of the rights set forth in the respective Covenants. These principles are also manifested in common provisions that provide that, apart from a number of limited exceptions,152 all of the rights enumerated in the *Covenant* apply without discrimination.153 The forbidden grounds mirror those contained in art 2 of the *Universal Declaration of Human Rights* (*UDHR*).154 These provisions are essentially parasitic, in that the provisions protect only those rights and freedoms expressly enumerated within the Covenants. However, the *ICCPR* also contains a free-standing non-discrimination provision, which extends considerably further than either arts 2(1) or 2(2). Article 26 provides:

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

This provision is considered at some length in subsequent sections of this paper. Although the *ICESCR* does not contain an equivalent provision, the scope of art 26 of the *ICCPR* makes clear that its application extends beyond the civil and political sphere to the proscription of any discrimination. The commitment to the principle of non-discrimination, as clearly illustrated through the protections afforded under the *UDHR*, the *ICCPR* and the *ICESCR*, has led to the adoption of international instruments dealing with specific forms of discrimination.155

**C Article 26 of the ICCPR**

If the principle of non-discrimination is to be regarded as a dominant theme, or the ‘red thread’156 underpinning the *ICCPR* regime, then art 26 is without doubt

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151 Nowak, *UN Covenant on Civil and Political Rights* (2nd revised ed), above n 88, 600 (citations omitted). Ramcharan similarly states that '[e]quality and nondiscrimination constitute the dominant single theme of the [*ICCPR*]': Ramcharan, above n 16, 246. In addition to arts 2(1), 3 and 26 of the *ICCPR*, see also art 20(2).

152 In the *ICCPR*, art 13 applies only to aliens, art 24 only to children, art 25 only to citizens, and art 27 only to members of minorities.

153 *ICCPR* art 2(1); *ICESCR* art 2(2).

154 *UDHR* art 2. ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’


156 Nowak, *UN Covenant on Civil and Political Rights* (2nd revised ed), above n 88, 600.
the appointed figurehead. Hathaway has described the provision as ‘an extraordinarily robust guarantee of non-discrimination’ that includes, in particular, ‘an affirmative duty to prohibit discrimination and effectively to protect all persons from discrimination.’ It is necessary then to unpack the precise scope and implications of the non-discrimination principle that finds manifestation in the provision; to examine, for example, precisely which conceptions of equality and non-discrimination art 26 captures. As the above discussion illustrates, neither the principle of equality nor the principle of non-discrimination is ‘self-defining’ or ‘beyond the need for interpretation.’ Nonetheless, the ICCPR neither defines the term ‘discrimination’ nor gives any indication as to what constitutes discrimination. Given the potential breadth of its application, it is not surprising that the precise meaning and scope of art 26 remain controversial. In the absence of a definition, it is necessary to turn to the ordinary meaning of the provision, ‘in [its] context and in the light of its object and purpose.’ This includes the purpose and intent of the draftsmen as reflected in the travaux préparatoires. Further assistance can be taken from the interpretative guidance and jurisprudence of the HRC.

This interpretative exercise has already been undertaken by a number of commentators, most notably Nowak, Ramcharan, and Joseph, Schultz and Castan. Rather than traverse this well-documented path, this section will focus in on four specific features of art 26 that are particularly salient to the issues raised in this paper. First, art 26 is a free-standing autonomous provision. Second, it guarantees both ‘equality before the law’ and ‘equal protection of the law’. Third, it is not confined to particular grounds of discrimination. Finally, it is not absolute, allowing for differentiation if there is a ‘reasonable and objective’ justification for such differentiation. These four features will be used to distil a test of general application, to be adopted in Part V as a framework to assess the extent to which art 26 requires the equal treatment of refugees and beneficiaries of complementary protection.

It is well-established that art 26 provides an independent and autonomous guarantee of non-discrimination. The implications of this are best illustrated

157 Hathaway, The Rights of Refugees, above n 8, 126.
158 Ibid (citations omitted).
159 Ramcharan, above n 16, 246.
160 Cf CERD art 1(1); CEDAW art 1(1).
162 See especially General Comment No 18, UN Doc HRI/GEN/1/Rev.7.
163 Nowak, UN Covenant on Civil and Political Rights (2nd revised ed), above n 88, 597–634.
164 Ramcharan, above n 16, 246–69.
166 Nowak, UN Covenant on Civil and Political Rights (2nd revised ed), above n 88, 604, 628; Ramcharan, above n 16, 253–4.
by contrasting art 26 with the ‘accessory … prohibition[s] of discrimination’ contained in art 2 of the UDHR, art 2(1) of the ICCPR, art 2(2) of the ICESCR and art 14 of the ECHR, each of which proscribes discrimination only in the exercise of the rights and freedoms contained within the respective instruments. Each of these provisions is limited in the sense that it can only afford protection where discrimination has occurred in conjunction with an enumerated right. In this sense, they offer derivative protection, falling short of the more comprehensive non-discrimination protection guaranteed by art 26. The text of art 26 makes clear that its application extends beyond the civil and political sphere, and extends to the proscription of any discrimination. This could include discrimination in the exercise of the rights or freedoms enumerated within the ICCPR or the ICESCR, discrimination in the exercise of rights or freedoms enumerated within another regional or international instrument (including the Refugee Convention), or, of course, discrimination in the exercise of rights or freedoms not contained in any regional or international instrument. The HRC has confirmed this interpretation. The decision in Broeks v The Netherlands is supported by General Comment No 18, which expressly distinguishes arts 2(1) and 26: ‘While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations.’

The second observation relates to the particular conceptions of equality and discrimination captured by art 26. It seems largely settled that art 26 contains two branches. The first branch, framed as ‘equality before the law’, derives from the concept of formal equality, and may give rise to a claim for direct discrimination. This branch may be used to form the basis of a claim where a court or...
administrative decision-maker fails to apply existing laws without discrimination. This branch is therefore directed to the enforcement of existing laws, rather than the enactment of legislation. During the drafting process, several delegates argued that this formal guarantee of non-discrimination was insufficient. It would not, for example, prevent a state from legislating to allow ‘separate but equal facilities such as housing, schools and restaurants for different groups.’ The Polish delegate referred expressly to the apartheid era, and noted a concern that the provision, as initially drafted, may not proscribe the discriminatory laws that characterised that era. A second branch was therefore introduced, drawing from the text of art 7 of the UDHR, which allowed a claim for ‘equal protection of the law.’ This obligation is directed to the legislature. According to Nowak, this obligation contains

both negative and positive aspects. On the one hand, the legislature must refrain from any discrimination when enacting laws; however, it must also prohibit discrimination by enacting special laws and afford effective protection against discrimination.

The second branch contains elements of formal equality (and may therefore form the basis of a claim of direct discrimination), and substantive equality (and may therefore form the basis of a claim of indirect discrimination). The precise scope of the latter, and in particular whether it also captures the concept of equality of opportunity, has been the subject of considerable academic debate, a review of which is beyond the limited scope of this paper. For present purposes, it is sufficient to understand that art 26 extends beyond a guarantee of non-discrimination in the enforcement of legislation, and extends to a guarantee of non-discrimination in the enactment of legislation. In this sense, art 26 ‘is a principle above the law’, and can be relied upon to challenge the legitimacy of the law itself.

Article 26 prohibits discrimination on ‘any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ The inclusion of a list of expressly prohibited grounds can be a cause for confusion, particularly given that the language of the provision — with its reference to ‘any ground’ and ‘other status’ — suggests that its protection is not limited to particular grounds. In light of this, one would certainly be justified in characterising the list of grounds as largely redundant.

This position was put forward by the representative of the Philippines, quoted in Hathaway, The Rights of Refugees, above n 8, 126 (citations omitted).

Nowak, UN Covenant on Civil and Political Rights (2nd revised ed), above n 88, 603–4.

Ibid 607.

For a good overview, see Bayefsky, above n 15, 24–33. See also Joseph, Schultz and Castan, above n 165, 728–9.


This is of central importance to what this paper is trying to achieve.

ICCPR art 26 (emphasis added).
That is, it seems clear that a distinction in treatment may give rise to a violation of art 26 where the ground upon which that distinction is made is not contained within art 26, just as a distinction in treatment may not necessarily amount to a violation even where the ground is expressly listed. However, on closer analysis, the list of grounds may play a role in the assessment of whether differentiation in treatment is reasonable and objective. In this context, one might view art 26 as creating a hierarchy of grounds. Although the HRC has not said so expressly, this hierarchy could potentially be used to explain the level of scrutiny that a court will apply, and ultimately the degree of deference that a court will afford to a state party’s justification for the differential treatment: the higher in the hierarchy the ground, the more difficult it will be for a state to establish a meaningful connection.

The first ‘tier’ in the hierarchy would consist of the 11 grounds expressly listed within art 26. Differential treatment on any of the listed grounds is seen to ‘harbour an increased risk of a violation of the prohibition of discrimination’ and, it has been argued, should therefore be subjected to greater judicial scrutiny. The second ‘tier’ in the hierarchy would capture those groups linked by their common ‘status’ as falling within the final listed ground, ‘any other status’. It is difficult to discern a clear consensus in the HRC jurisprudence as to the meaning of ‘any other status’, other than the requirement that it only capture a distinct ‘group’, as opposed to an individual. Other than this, the HRC has preferred to decide the issue on a case-by-case basis.

183 Joseph, Schultz and Castan, above n 165, 693.

184 Joseph, Schultz and Castan, develop this argument:

It is arguable that the issue of ‘grounds’ should be considered as an aspect relating to the permissibility of the reasonableness of the impugned distinction. The definition of ‘discrimination’ in General Comment 18 lends support to this idea with its reference to ‘any ground’. If so, the ‘grounds’ issue may become completely subsumed by the issue of reasonableness: an unreasonable distinction may give rise to a violation of Article 26 regardless of the grounds upon which that distinction is made. ‘Grounds’ remain important to the extent that they help establish or disprove reasonableness.


185 Putting to the side, for the moment, the final ground — ‘any other status’.

186 Nowak has referred to these grounds as based on ‘especially reprehended personal criteria’:

Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (N P Engel, 1993) 474 (emphasis in original).

187 This argument is, in some ways, similar to the ‘suspect classifications’ approach adopted in the United States jurisprudence: see, eg, the discussion by O’Connor J in Lawrence v Texas, 539 US 558, 579–80 (2003). For an interesting illustration, see Fredman’s discussion of the European Court of Human Rights’ decision in Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 94 Eur Court HR (ser A). Fredman, Discrimination Law, above n 93, 117.

Article 26 of the ICCPR does not establish an unconditional guarantee of equality. As emphasised throughout this paper, there are many situations where it is necessary and appropriate for a state to differentiate between different groups of citizens (or, potentially, non-citizens). It follows that not every instance of differential treatment, whether framed as formal inequality or substantive inequality, will amount to discrimination under art 26. Something more is required to transform that differentiation into discrimination. The challenge is to clearly articulate what these additional requirements are; to facilitate the delineation of the fictitious line between ‘invidious discrimination and appropriate differentiation.’ Kipp refers to the requirement of a ‘meaningful connection’ between the inequality and the ground upon which it is based. McCrudden distills a requirement that inequality be ‘properly justified, according to consistently applied, persuasive and acceptable criteria.’ This standard has manifested itself in various admonitions in domestic, regional and international treaties. Article 26 does not contain an express limitation provision. Rather, that limitation is to be implied by the reference to discrimination itself. This choice of the term ‘discrimination’ as opposed to ‘distinction’ was the subject of extensive discussion during the drafting of art 26. The difference between the two terms was described by the Italian delegate as follows:

A question of substance, and not merely of drafting, was involved … there were cases in which the law was justified in making distinctions between individuals or groups, but the purpose of the article was to prohibit discrimination, in the sense of unfavourable and odious distinctions which lacked any objective or reasonable basis.

No doubt influenced by the drafting history, the HRC has interpreted art 26 as containing the following proviso:

the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

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189 Joseph, Schultz and Castan, above n 165, 691.
190 Reference to substantive inequality is a reference to substantive inequality of result.
192 Kipp, above n 99, 140–1, translated and quoted in Vierdag, above n 96, 54.
194 Quoted in Nowak, UN Covenant on Civil and Political Rights (2nd revised ed), above n 88, 629 n 155.
195 General Comment No 18, UN Doc HRI/GEN/1/Rev.7, [13].
This statement also finds manifestation in the jurisprudence of the HRC. If a state is able to show that the differential treatment is based on ‘reasonable and objective’ criteria, and that it has been instituted to serve a legitimate aim, then the treatment will not be considered discriminatory, and art 26 will not be ‘triggered’. The use of the word ‘trigger’ is significant. The ‘reasonable and objective’ standard, articulated in General Comment No 18 and reflected in the jurisprudence of the Committee, should not be viewed as creating an exception to the prohibition on discrimination. Rather, the standard is built into the concept of discrimination itself.

The HRC has resolved the ‘reasonable and objective’ standard on a case-by-case basis, and it is difficult to discern a uniform approach in its jurisprudence. It is impossible, for example, to provide any clear guidance on what ‘ends’ will be considered legitimate, or the precise relationship required between the ‘means’ and the ‘ends’ for a differentiation to be considered ‘reasonable and objective’. The test is therefore potentially very subjective, with one commentator referring to the potential ‘elasticity’ of the standard to be applied. A review of the Committee’s jurisprudence suggests that the focus of the Committee in cases concerning an alleged violation of art 26 has been on the identification of differential treatment, followed by a consideration of whether or not that treatment is based on reasonable and objective criteria; that is, whether or not it is possible to identify circumstances that justify the differentiation in treatment. The issue of proportionality (that is, whether the differential treatment is appropriately tailored) seems to be a secondary inquiry that will only arise in certain circumstances. Given the subjective nature of the ‘reasonable and objective’ standard, it is impossible to accurately predict the outcome of its application in any given circumstance. It may be possible to anticipate, at least to some degree, the level of scrutiny likely to be applied by the HRC, by reference to the particular ground under consideration. As noted above, there are various indications that the Committee will tailor the ‘stringency of [its] evaluations’ depending upon the particular ground of differentiation. It is difficult to comment further on the ‘reasonable and objective’ standard without the aid of a concrete example. The application of the test will be addressed in some detail in Part V.


197 Any other conceptualisation fails to take into account the fact that discrimination and equality are distinct concepts.

198 Fredman, Discrimination Law, above n 93, 116.


200 Bayefsky, above n 15, 18.

201 See above n 184.
V Article 26 as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection

In this section we turn to an examination of the extent to which art 26 can provide a tool to mandate the equal treatment of refugees and beneficiaries of complementary protection. To date, there has not been a complaint brought before the HRC that raises the validity of the differential allocation of rights to refugees and beneficiaries of complementary protection. Indeed, there is very limited jurisprudence concerning the differential allocation of rights to categories of non-citizens generally.\(^{202}\) In these circumstances, it is important to acknowledge the tentative nature of the discussion that follows. Hathaway, discussing the use of art 26 as between citizens and refugees, has described the state of the law in that context as follows:

The present moment can thus be most accurately described as one of legal uncertainty on this point: until and unless the jurisprudence of the Human Rights Committee assesses the propriety of categorical differentiation based on citizenship across a broader range of issues, it will be difficult to know which forms of exclusion are likely to be found valid, and which are in breach of Art 26.\(^{203}\)

This caveat applies with equal, if not greater, force to the subject matter of this paper. Just as Hathaway opened the door for the invocation of art 26 in the context of refugees as against citizens, it is hoped that this paper will promote the use of art 26 as a tool to remedy the differential allocation of rights to refugees and beneficiaries of complementary protection.

The discussion that follows is framed around three broad questions, drawn from the discussion in Part IV:

1. Has there been differential treatment between individuals in similar circumstances? In other words, is there an inequality basis for a discrimination claim?
2. Is the unequal treatment based on a ground captured by art 26?
3. Is the unequal treatment based on ‘reasonable and objective’ criteria?

Before examining each of these questions, it is necessary to attend to two preliminary matters. The first is to establish the entitlement of a beneficiary of complementary protection to invoke art 26’s duty of non-discrimination. The second is to provide a set of hypothetical facts to assist in developing the argument put forward in this section.

Hathaway describes the ICCPR as a ‘critical source of rights for refugees’.\(^{204}\) This proposition applies equally to other categories of non-citizens, including beneficiaries of complementary protection. The language threaded throughout

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\(^{202}\) There are a small number of cases concerning the privileging of nations based on bilateral treaties or international obligations of reciprocity: see HRC, Decisions: Communication No 658/1995, 60\(^{th}\) sess, UN Doc CCPR/C/60/D/658/1995 (14 August 1997) (‘van Oord v The Netherlands’); Karakurt v Austria, UN Doc CCPR/C/74/D/965/2000.

\(^{203}\) Hathaway, The Rights of Refugees, above n 8, 133.

\(^{204}\) Ibid 121.
the ICCPR speaks of protection being extended to ‘everyone’, 205 ‘all individuals’ 206 or ‘all persons’. 207 Article 2(1) requires contracting states to ensure the rights in the Covenant ‘to all individuals within its territory and subject to its jurisdiction … without distinction of any kind’. 208 This includes access to the protection afforded by art 26. The HRC has confirmed that, as a general rule, 209 ‘each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.’ 210 Aliens must, therefore, ‘receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant’. 211 This position is strengthened by the views of the HRC contained in General Comment No 31. 212

The following hypothetical will be used as a tool to examine the argument developed in this section. It is preferable to rely on a fictitious set of facts to avoid any distraction that may derive from the specific domestic legal regime in a country of origin, or the political and social context of a country of destination. The hypothetical facts are as follows:

Country X has been the subject of civil unrest and political instability for many years. The existence of a consistent pattern of gross, flagrant and mass violations of human rights by the government of Country X is widely reported, and has been internationally condemned. These reports demonstrate the widespread practice of torture and other cruel, inhuman and degrading treatment perpetrated by police and security forces under the control of the government. In many instances, the human rights violations are indiscriminate in their reach.

The members of Family A and Family B are nationals of Country X. 213

Family A is politically active. The mother and father of Family A are members of the main opposition political party, and regularly attend demonstrations condemning the current government and the human rights violations perpetrated by it. The opposition party has been classified by the government as a ‘terrorist threat’, and the government has specifically targeted members of the party. Family A has been the subject of a number of attacks as a result of its affiliation with the opposition party.

Family B is not politically active. Notwithstanding this, the family has been the subject of several attacks as a result of the region of Country X where Family B resides (a region where the opposition party is particularly active). Members of the security forces have beaten the father and the eldest son of Family B on three separate occasions.

Family A and Family B flee to Country Y. 214 The members of Family A are granted ‘refugee’ status. The members of Family B are granted ‘subsidiary protection’ status.

205 See, eg, ICCPR arts 9, 12.
206 See, eg, ibid art 2.
207 See, eg, ibid art 26.
208 Ibid art 2(1) (emphasis added).
209 There are a number of very limited exceptions. Only citizens are granted the right to vote, to run for office and/or to enter the public service: ibid art 25.
210 General Comment No 15, UN Doc HRI/GEN/1/Rev.7, [2].
211 Ibid.
212 General Comment No 31, UN Doc CCPR/C/21/Rev.1/Add.13, [10].
213 Both families comprise a husband and wife, and two children under the age of 10.
We turn now to a consideration of the three questions set out above.

A Has There Been Differential Treatment between Individuals in Similar Circumstances?

It is first necessary to identify an inequality in treatment that can function as the basis of a discrimination claim under art 26. We are concerned here with equality in its most formal sense. The concept of ‘formal equality’ is concerned with proscribing the most blatant forms of prejudice. It is necessary to address two questions to establish an instance of formal inequality. First, it is necessary to show that there are two individuals or groups in similar circumstances. Some commentators refer to this to as a requirement to find appropriate comparators. If it is established that the individuals or groups are similarly placed, it is then necessary to show that there has been differential treatment between the two comparators.

The starting point must be an acknowledgement that we are dealing with two distinct statuses of individuals. As noted in the introduction, complementary protection is, by its very definition, intended to operate outside the scope of the Refugee Convention. We must then turn to consider whether or not these distinct statuses — ‘refugees’ and ‘beneficiaries of complementary protection’ — can properly be regarded as ‘comparators’. A refugee is an individual who satisfies the definition of a refugee under art 1A(2) of the Refugee Convention, and is not excluded by application of art 1F of that Convention. Article 1A(2) defines a ‘refugee’ as a person who

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Article 1 of the Refugee Convention sets out a number of exclusion clauses. Articles 1D and 1E apply to individuals who are already in receipt of protection from the United Nations, or from another institution. In contrast, art 1F provides for the mandatory exclusion of individuals who are considered undeserving of protection.
The membership of the proposed comparator, classified for the purposes of this paper as ‘beneficiaries of complementary protection’, consists of individuals who do not satisfy the definition of a refugee under art 1A(2), but who are otherwise protected by a state’s non-refoulement obligations outside the Refugee Convention. For example, this includes an individual who falls outside the scope of the Refugee Convention because the human rights violation does not amount to persecution, or because the persecution is not connected to one of the five relevant grounds set out in art 1A(2). It is necessary here to also note an important subset of individuals falling within the broader category of beneficiaries of complementary protection: those individuals who are excluded from protection under the Refugee Convention by reason of art 1F, but who are otherwise protected by a state’s non-refoulement obligations outside the Refugee Convention.

Before addressing the question of whether we have two comparators sufficient to found a claim under art 26, it is prudent to briefly deal with art 33(2) of the Refugee Convention. The relationship between arts 1F and 33(2) often gives rise to considerable confusion, reflected more starkly in the practices of receiving states. Article 33(2) provides an exception to the duty of non-refoulement provided under the Refugee Convention. In contrast to art 1F, which is premised on the notion that the individuals that it captures are undeserving of protection, art 33(2) is concerned with the security interests of the receiving state. However, art 33(2) is not an exclusion provision. The refugee loses the protection of non-refoulement under the Refugee Convention, but the individual will not lose his or her refugee status. The distinction is most clearly explained by the Supreme Court of Canada in Pushpanathan v Minister of Citizenship and Immigration.

The effect of the distinction is that the rights afforded to the beneficiary of refugee status (other than the right of protection against refoulement) cannot be withdrawn. Hence, if art 33(2) is applied to a refugee who is otherwise precluded from removal by a state’s broader duties of non-refoulement (ie under art 3 of the CAT), then that individual retains the remainder of his or her rights under the Refugee Convention. A failure to afford those rights to the refugee will amount to a violation of the Refugee Convention. It is therefore unnecessary to consider directly the position of individuals who enliven art 33(2) of the Refugee Convention within the context of the principle of non-discrimination.

219 See generally Hathaway and Harvey, above n 218.
220 [1998] 1 SCR 982, 1024 [58] (Bastarache J for L’Heureux-Dubé, Gonthier, McLachlin and Bastarache JJ): The purpose of Article 1 is to define who is a refugee. Article 1F then establishes categories of persons who are specifically excluded from that definition. The purpose of Article 33 of the Convention, by contrast, is not to define who is and who is not a refugee, but rather to allow for the refoulement of a bona fide refugee to his or her native country where he or she poses a danger to the security of the country of refuge, or to the safety of the community. … Thus, the general purpose of Article 1F is not the protection of the society of refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33 of the Convention. Rather, it is to exclude ab initio those who are not bona fide refugees at the time of their claim for refugee status.

221 This is not to say that the differential allocation of rights between ‘refugees’ and ‘refugees who have enlivened art 33(2) of the Refugee Convention’ would not amount to a violation of art 26 of
We return now to the question of whether ‘refugees’ and ‘beneficiaries of complementary protection’ can be considered appropriate comparators. The question here is a threshold one: should individuals falling under the umbrella classification of ‘beneficiaries of complementary protection’ be considered to be in a similar position to refugees? This preliminary question should be answered in the affirmative. A claim for status as a ‘refugee’ or as a ‘beneficiary of complementary protection’ is premised upon a unique and shared condition: international movement to avoid the risk or furtherance of serious human rights violations. Although the particular source of protection, or the nature of the violation, can be distinguished as between refugees and beneficiaries of complementary protection, it is submitted that these distinctions are relevant to the issue of justification rather than this preliminary inquiry. The objection will likely be raised that individuals falling within the subcategory set out above — individuals excluded from protection under the Refugee Convention by way of art 1F — are by definition not in a similar position to refugees. There is clear force to this objection; however, it is submitted that these distinctions are, once again, best considered within the context of the issue of justification rather than in this preliminary inquiry.

The second inquiry is a relatively simple one: has there been differential treatment between refugees and beneficiaries of complementary protection? Here we are concerned with the differential allocation of rights to refugees and beneficiaries of complementary protection and specifically the ‘protection gap’ identified in Part III of this paper. As stressed in Part III, although the ‘protection gap’ has been identified at an international level, it does not necessarily find its parallel at a domestic level. The answer to this question will therefore vary depending on the particular domestic context under consideration, and the extent to which the ‘protection gap’ has been entrenched within that domestic legal framework. In

the ICCPR. Consider, for example, Hathaway’s discussion of the use of non-discrimination to remedy differential treatment between different categories of refugees: Hathaway, *The Rights of Refugees*, above n 8, 123–47. A consideration of these issues is beyond the scope of this paper; however, it is suggested that the same framework of analysis would apply.

In the context of a debate concerning why refugees should be distinguished from other migrants, including other forced migrants, Hathaway concedes this point:

Why are refugees appropriately distinguished from other migrants, including other forced migrants? Refugee status is a categorical designation that reflects a unique ethical and consequential legal entitlement to make claims on the international community. This is not to suggest that the refugee’s circumstances are completely unique. To the contrary, refugee status is in part premised on a non-unique predicament: movement to avoid the risk of serious human rights abuse.

James C Hathaway, ‘Forced Migration Studies: Could We Agree Just to “Date”?’ (2007) 20 *Journal of Refugee Studies* 349, 352 (citations omitted). This is consistent with Hathaway’s argument that the International Bill of Rights (comprising the UDHR, the ICCPR and the ICESCR) provides a persuasive guide to the interpretation of ‘being persecuted’: James C Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 106. This approach has been accepted and adopted in the United Kingdom, Canada and New Zealand. For a comprehensive explanation and critique of Hathaway’s model, see Foster, *International Refugee Law*, above n 42, 113–55.

And, indeed, for particular categories of beneficiaries of complementary protection, depending upon the particular source of the non-refoulement protection (see art 6 or art 7 of the ICCPR, as compared to art 3 of the CAT).
the hypothetical outlined above, Country Y has implemented domestically the minimum standards provided under the EU Qualification Directive. In accordance with the Directive, the members of Family A have been afforded refugee status, and the members of Family B have been afforded ‘subsidiary protection’ status. In this example, it is clear that there has been differential treatment (specifically, the differential allocation of rights) between individuals in similar circumstances.

B Is the Unequal Treatment Based on a Ground Captured by Article 26?

A beneficiary of complementary protection might be discriminated against on the basis of their race, colour, religion or national origin. They may also be discriminated against on the basis of their status as a ‘beneficiary of complementary protection’. We are concerned with the latter. We consider here whether status as a ‘beneficiary of complementary protection’ is likely to fall within the concept of ‘any other status’ in art 26 of the ICCPR (the second level in the hierarchy discussed earlier). This precise question has not yet come before the HRC, and it is difficult to discern a clear consensus in the Committee’s jurisprudence as to the meaning of ‘any other status’. Notwithstanding the lack of express guidance, there appears to be support for the proposition that status as a ‘beneficiary of complementary protection’ falls within the concept of ‘any other status’.

First, the ‘beneficiary of complementary protection’ label captures a distinct group of individuals who share a common status, namely individuals entitled to international protection under the doctrine of complementary protection. This satisfies the requirement stipulated in Vos v The Netherlands.224 Second, the HRC has repeatedly affirmed the principle that distinctions based upon nationality or citizenship fall within the notion of ‘other status’ in art 26.225 It seems reasonable to assume that this principle would apply between different categories of non-citizens.226 This is consistent with the approach adopted by the HRC in its Concluding Observations.227 These considerations, particularly when taken

224 Vos v The Netherlands, UN Doc CCPR/C/35/D/218/1986, [1]. See above n 188 and accompanying text.
225 See especially General Comment No 15, UN Doc HRI/GEN/1/Rev.7, [1]–[2]; General Comment No 37, UN Doc CCPR/C/21/Rev.1/Add.13. A number of decisions of the Committee also lend support to the proposition that nationality falls within the notion of ‘other status’: see, eg, HRC, Decision: Communication No 196/1985, 35th sess, UN Doc CCPR/C/35/D/196/1985 (6 April 1989) [9.4]–[9.5] (‘Gueye v France’). This case was brought by 743 Senegalese nationals who had served in the French army and were being denied their military pensions on the basis of their nationality. The Committee considered that ‘[t]here has been a differentiation by reference to nationality acquired upon independence. In the Committee’s opinion, this falls within the reference to “other status” in the second sentence of article 26’: at [9.4]. See also Karakurt v Austria, UN Doc CCPR/C/74/D/965/2000.
226 See Clark and Niessen, above n 27, 251.
together, support an argument that the status of ‘beneficiaries of complementary protection’ should be considered to fall within the ambit of ‘any other status’.

C Is the Unequal Treatment Based on ‘Reasonable and Objective’ Criteria?

The final question to address is whether or not the differential allocation of rights to refugees and beneficiaries of complementary protection is ‘reasonable and objective’. That is, is it possible to identify differences in circumstances between the two statuses justifying the differential allocation of rights between refugees and beneficiaries of complementary protection? This final step is decisive to the ultimate issue of whether or not there has been discrimination sufficient to trigger art 26. If the differential treatment is found to satisfy the ‘reasonable and objective’ test, it will not be considered discriminatory. The extent to which the Committee is likely to consider differential treatment between categories of non-citizens to be reasonable and objective is unclear.

As noted earlier, there has not been a complaint brought before the Committee that considers the validity of the differential allocation of rights to refugees and beneficiaries of complementary protection. The limited jurisprudence is compounded by the sparcity of the Committee’s reasoning when the question does arise. A consideration of the manner in which the Committee has dealt with the differential treatment of non-citizens based on state relations highlights the subjective nature of the test, and the difficulty inherent in attempting to ‘predict future applications of the test’. In the case of van Oord v The Netherlands, the Committee adopted the view that separately negotiated bilateral treaties based on reciprocity could be called upon to justify a finding that preferential treatment to one category of non-citizen over another was reasonable and objective, and therefore not discriminatory within the meaning of art 26. This result must be contrasted with the Committee’s view in Karakurt v Austria.

The author in Karakurt v Austria possessed Turkish citizenship and held an open-ended residence permit in Austria that provided the author with a right to work. The author was elected to the work-council for his place of employment, which was responsible for promoting staff interests and supervising compliance with work conditions. It was subsequently determined that the author was excluded from standing for the work-council on the basis of the applicable labour law, which limited the entitlement to stand for election to Austrian nationals or members of the European Economic Area (‘EEA’). The author

228 General Comment No 18, UN Doc HRI/GEN/1/Rev.7, [13].
230 Joseph, Schultz and Castan, above n 165, 700.
232 This decision provides a clear example of the sparse reasoning of the Committee in its consideration of whether differentiation is reasonable and objective. The issue is dealt with in two sentences: ibid [8.3]. It is also unclear whether or not the decision is founded on the fact that the justification was reasonable and objective, or solely on the fact that the categories of non-citizens were not appropriate comparators (that is, the first question considered above).
complained to the Committee, alleging a violation of art 26. The state party argued, inter alia, that the Committee was precluded from considering the Communication by reason of Austria’s reservation to the ICCPR. This reservation — which ultimately explains the different position adopted by the majority and the minority in this case — provided: ‘Article 26 is understood to mean that it does not exclude different treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of the [CERD].’ The Committee accepted this argument, and considered itself precluded from examining the Communication insofar as it concerned the differentiation in treatment between Austrian nationals and the author. However, this did not tie the Committee’s hands with respect to the claim concerning the differentiation in treatment between the author and other non-citizens who were EEA nationals. It was therefore necessary to consider whether there was a reasonable and objective ground justifying the differential treatment, on the basis of citizenship, between EEA nationals and the author as another category of non-citizen. That is, whether there were ‘reasonable and objective grounds justifying exclusion of the author from a close and natural incident of employment in the State party otherwise available to EEA nationals’. The state party’s submission on this issue was summarised as follows:

The State party argues that the privilege accorded EEA nationals is the result of an international law obligation entered into by the State party on the basis of reciprocity, and pursues the legitimate aim of abolishing differences in treatment of workers within European Community/EEA Member States. The State party refers to the jurisprudence of the Committee [van Oord v The Netherlands] for the proposition that a privileged position of members of certain states created by an agreement of international law is permissible from the perspective of article 26. The Committee observed that creating distinguishable categories of privileged persons on the basis of reciprocity operated on a reasonable and objective basis.

The Committee stressed that the decision in van Oord v The Netherlands did not lay down a general rule, and that

it is necessary to judge every case on its own facts. With regard to the case at hand, the Committee has to take into account the function of a member of a work council, ie, to promote staff interests and to supervise compliance with work conditions … In view of this, it is not reasonable to base a distinction be-

234 Ibid [2].
235 Ibid [8.4].
236 Ibid [5.5].
237 Ibid [8.4]. The Committee held:
Although the Committee had found in one case [van Oord v The Netherlands] that an international agreement that confers preferential treatment to nationals of a State party to that agreement might constitute an objective and reasonable ground for differentiation, no general rule can be drawn therefrom to the effect that such an agreement in itself constitutes a sufficient ground with regard to the requirements of article 26 of the Covenant.
between aliens concerning their capacity to stand for election for a work council solely on their different nationality.238

In these circumstances, the Committee found a violation of art 26. Two members of the Committee239 took the view that the Committee did, in fact, have competence to consider whether the differential treatment between the author and Austrian citizens amounted to a violation of art 26. This was based on a view that distinctions based on citizenship fell under the notion of ‘other status’ in art 26, and were therefore not captured by the state party’s reservation.240 Adopting this view, Rodley and Scheinin went on to conclude that the distinction between the author and Austrian citizens241 did not have a reasonable or objective foundation, and thereby triggered art 26.242

The decision in Karakurt v Austria is significant for a number of reasons. In addition to explicitly affirming that distinctions based on citizenship fall under the notion of ‘other status’, the decision demonstrates a willingness on the part of the Committee to treat differentiation between different categories of non-citizens as discriminatory.243 The decision also provides a clear example of the framework adopted by the Committee in considering an alleged violation of art 26. Although, for these reasons, the decision provides a useful starting point, it certainly does not resolve the specific issue raised by this paper. In the absence of jurisprudence addressing that issue, the most sensible approach seems to be to identify the potential bases which a state may invoke to justify the differential allocation of rights between refugees and beneficiaries of complementary protection, and to critically examine these bases to pre-empt the likelihood that they will be considered reasonable and objective criteria justifying the differential allocation of rights. In a practical sense, this examination amounts to something of a pre-emptive attack.

This analysis can helpfully be separated into two distinct stages. The first stage involves a consideration of the potential bases that could be invoked to justify the differential allocation of rights between refugees and beneficiaries of complementary protection. The second stage comprises a consideration of any additional bases that could be invoked to justify the differential allocation of rights between refugees and the subset of beneficiaries of complementary protection that consists of individuals excluded from the Refugee Convention by reason of art 1F. This structure is designed to highlight the in-built flexibility of

238 Ibid.
239 Sir Nigel Rodley and Mr Martin Scheinin.
240 Because the distinction did not fall within the scope of art 1 of the CERD, Karakurt v Austria, UN Doc CCPR/C/74/D/965/2000, 9.
241 In addition to the distinction between the author and EEA nationals.
242 Further support for the proposition that nationality cannot be a valid ground for differential treatment between citizens and non-citizens can be taken from the earlier decision of the Committee in Gueye v France, UN Doc CCPR/C/35/D/196/1985. See above n 225 and accompanying text.
243 As noted above, the Individual Opinion went even further, demonstrating a willingness to treat differentiation between citizens and non-citizens as discriminatory. It seems at least arguable that the majority would have gone this far if it had not considered itself precluded by the state party’s reservation from examining the issue.
art 26, and the fact that its application can, if necessary, be confined to a subset of beneficiaries of complementary protection.

1 Differential Allocation of Rights to Refugees and Beneficiaries of Complementary Protection

Accepting the earlier proposition that refugees and beneficiaries of complementary protection are appropriate comparators, it is necessary to examine the potential bases upon which a state may attempt to justify differential treatment between the two. Three bases are considered within this context: first, the nature of the risk; second, the protective competence of the international community; and third, the more temporary needs of beneficiaries of complementary protection. The first two bases have been invoked to elevate refugee status in a general sense. The final basis has been invoked specifically to justify inferior treatment of beneficiaries of complementary protection.

In a recent article challenging the soundness of the shift away from ‘refugee studies’ to ‘forced migration studies’, Hathaway identifies two features of a refugee’s circumstances that distinguish him or her from other forced migrants. The first relates to the nature of the risk faced by the refugee, and the fact that an individual is only a refugee if they are able to show that the risk that prompted flight from their country of origin accrued because of ‘fundamental disfranchisement within the home state community.’ Hathaway acknowledges that ‘refugee status is in part premised on a non-unique predicament’, namely ‘movement to avoid the risk of serious human rights abuse.’ This is perhaps illustrated most clearly in the manner in which ‘being persecuted’ has been defined for the purposes of art 1A(2) of the Refugee Convention. Hathaway goes on to argue that there is something sufficiently unique about the nature of the risk that a refugee faces. Prefacing the argument with a recognition of the plight of any individual facing human rights abuse, Hathaway states:

refugee status is a recognition of the special imperative to respond to the needs of persons in flight from risk prompted by discrimination — the prohibition of which is the most central human rights commitment of the international community. Simply put, refugees are persons who are seriously at risk because of who they are or what they believe. Refugees are therefore doubly deserving: not only is the risk they have fled profoundly serious, but their exposure to such risk is based on characteristics which are either unchangeable (like race or na-

244 I acknowledge that this proposition may not be acceptable to everyone, particularly regarding individuals excluded from the Refugee Convention by way of art 1F. See above nn 222–3 and accompanying text.


246 Ibid 352 (citations omitted).

247 Ibid (citations omitted).

248 Recall Hathaway’s model, which is premised on the proposition that the International Bill of Rights (comprising the UDHR, the ICCPR and the ICESCR) provides a persuasive guide to the interpretation of ‘being persecuted’. See above n 222.
Hathaway argues that this fundamental social disenfranchisement, which gives rise to a risk of harm and ultimately prompts flight from a country of origin, makes an individual entitled to refugee status ‘uniquely’ or ‘doubly deserving’.251

The second distinguishing feature relates to what Hathaway describes as the ‘unconditional protective competence of the international community.’252 Refugee status is predicated on the requirement that an individual be outside his or her country of origin. By its very definition, refugee status is not just about an individual who has been the subject of fundamental social disenfranchisement; it also requires the individual to have fled from his or her country.253 Thus refugee status is as much a reflection of need as it is a recognition of international competence and capacity. Hathaway astutely points out that “ethicality is not only a function of the “ought” but equally of the “can”.”254 The refugee regime was founded on the concept of international protection; international protection as a concept rather than an activity. This concept also lies at the core of the mandate of the United Nations High Commissioner for Refugees (‘UNHCR’), notwithstanding its clearly expansionist agenda.255

Hathaway raises the specificities of a refugee’s circumstances to mount a persuasive argument that ‘the uniqueness of the refugees’ circumstances should not be lost by incorporating them into the forced migrant paradigm’.257 Of particular relevance to this paper, Hathaway states:

My goal here is not to propose a definitive way forward, but simply to engender what I trust will prove a thoughtful debate about how best to evolve as a scholarly community. I believe passionately that scholars must not sacrifice the specificity of refugeehood on the altar of a misguided effort to pursue formal equality with other migrants, or fail to recognize the real loss of personal and

250 Ibid 353.
251 Ibid 352–3, 358.
253 In order to satisfy art 1A(2) an individual must be ‘outside the country of his nationality’ or, in circumstances where the individual does not have a nationality, be ‘outside the country of his former habitual residence’. The centrality of alienage is also made clear by an examination of the rights that flow from refugee status.
256 This is particularly evident in relation to the UNHCR’s evolving role in relation to internally displaced persons. This shift is not without controversy: see ibid, 104–10.
communal autonomy that follows from an over-emphasis on the phenomenon of forced migration and the perceived imperative to find solutions to it.258 Hathaway’s goal is a general one: to prevent the wholesale collapse of refugee studies into the broader discipline of forced migration studies. Hathaway is not suggesting that the pursuit of formal equality between refugees and other categories of non-citizens is unsound in every instance. But such efforts must be targeted and discriminate in their reach. This is precisely the mantra that has been adopted in this paper. It is submitted that art 26 provides a sufficiently targeted mechanism both to assess the distinguishing features of refugee status, and to consider the circumstances in which those features may justify the differential allocation of rights. In circumstances where the distinguishing features are not considered sufficient to justify differential treatment for the purposes of art 26, the specificity of refugee status is respected, with the requirement of formal equality operating outside the scope of the Refugee Convention.

A third basis has been put forward to justify the differential allocation of rights to refugees and beneficiaries of complementary protection. It has been suggested that the inferior treatment of the latter is justified on the basis that the needs of beneficiaries of complementary protection are more ‘temporary in nature’.259 Two points can be made with respect to this argument. First, it misconceives the nature of the refugee regime, which is premised on the notion of interim protection. This point can be illustrated by framing the argument positively. So framed, the argument would be that refugees are entitled to differential treatment because the needs of refugees are less temporary. This subverts the underlying premise of the refugee system. Any link between refugee status and permanent re-settlement was expressly rejected during the drafting of the Refugee Convention.260 Article 1C(5) makes it resoundingly clear that refugee status applies only so long as there is a well-founded fear of being persecuted. This point has been repeatedly emphasised by commentators.261 Second, there is no evidence to suggest that the needs of beneficiaries of complementary protection are more temporary in nature than those of refugees. Hence this argument, even if one were to accept its conceptual premise, lacks any empirical foundation.262

258 Ibid 365.
Let us then examine the two distinguishing features identified by Hathaway in the context of the differential allocation of rights to refugees and beneficiaries of complementary protection. The second feature (the unconditional protective competence of the international community) can be dealt with briefly. Beneficiaries of complementary protection and refugees share the common feature of international alienage. In crossing an international border, beneficiaries of complementary protection have thrown themselves into the ‘protective ambit of the international community’. In contrast, for example, to internally displaced persons, a beneficiary of complementary protection is therefore a person who can be guaranteed the protection of the international community. The focal point for any differentiation in treatment must therefore be whether a beneficiary of complementary protection is someone who is less deserving — that is, not ‘uniquely’ or ‘doubly deserving’ — of international protection. We turn now to consider that question.

It is necessary to begin with a clear acknowledgement that the underlying risk faced by a refugee is distinctive. As noted earlier, an individual is a refugee only if they are able to show that the risk that prompted their flight accrued because of fundamental social disfranchisement within their country of origin. It was also earlier noted that there may be examples of other non-citizens who have fled in similar if not identical circumstances:

It might be countered, though, that this ‘doubly deserving’ argument could also be made by at least a subset of forced migrants. While not all forced migrants are at risk because of discrimination, some clearly are. But the point of difference is that all refugees are the subjects of fundamental social disenfranchisement. In order to satisfy the definition of a refugee in art 1A(2) of the Refugee Convention, a person must show that they are seriously at risk of being persecuted by reason of their race, religion, nationality, membership of a particular social group or political opinion. That is, they must show that they are being discriminated against on the basis of ‘who they are or what they believe.’ All individuals entitled to refugee status share this common condition. Although only a subset of beneficiaries of complementary protection will be victims of discrimination, all beneficiaries of complementary protection do in fact share a common condition, in that they must be seeking to avoid the risk or

264 Ibid 352–3. The requirement of alienage, central to the definition of refugee in art 1A(2) of the Refugee Convention, lies at the heart of the differentiation between refugees and internally displaced persons. In particular, this requirement is central to the differentiation between refugees and the subset of internally displaced persons who have fled as a result of fundamental social disfranchisement or to avoid the risk or furtherance of a human rights violation. As Hathaway notes, ‘the special ethical responsibility towards refugees follows not just from the gravity of their predicament, but also from the fact that it is always possible to address their plight in ways that, sadly, we still cannot for those who remain inside their own country’: Hathaway, ‘Why Refugee Law Still Matters’, above n 252, 98 (emphasis added) (citations omitted).
265 See above n 246 and accompanying text.
267 Ibid 352.
furtherance of a serious human rights violation in order to enliven a state’s non-refoulement obligation. Is the fact that one group is at risk of fundamental social disenfranchisement, and the other is at risk of the perpetuation or furtherance of a serious human rights violation, a sufficient basis to justify preferential treatment for the former? Is the preferential treatment based on reasonable and objective criteria? When framed in this manner, it is difficult to see how the question could be answered in the affirmative. This would certainly explain the view taken by the European Commission in a recent Communication to the European Parliament. A working document accompanying the Communication noted:

Beneficiaries of subsidiary protection form an increasing percentage of the persons protected in the EU, but they enjoy fewer rights than the Convention refugees. Given the fact that in practical terms the situation of the two groups is comparable, their level of rights should also be (close to) equivalent. A clear example is the lack of provisions in EU law on family reunification for subsidiary protection beneficiaries. A higher level of rights for these persons is necessary if the EU wants to avoid creating a subclass of protected persons. This position is also supported by the UNHCR, which has noted that the rights and entitlements that flow from international protection should be based on the needs of the applicant for international protection, rather than on the grounds upon which international protection was granted. This position is also supported by a number of academic commentators. Let us return to the plight of Family A and Family B. Given the above discussion, and assuming that the facts remain as set out in the hypothetical, is it possible to reach the conclusion that the difference in treatment between Family A and Family B is based on reasonable and objective criteria? Is the difference in

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268 The use of the preface ‘serious’ reflects the fact that the human rights violation must give rise to the obligation of non-refoulement.

269 The same cannot be said of internally displaced persons. An internally displaced person may or may not be vulnerable or at risk.


273 Mandal, above n 1, xiii, has argued:

Indeed, non-Convention and Convention refugees have similar, if not identical, needs. They are both without the support of their national government or authorities, generally in a poor financial/material position, often psychologically and physically scarred by the events that have forced them to flee their homes and fearful for their future.

See generally McAdam, Complementary Protection, above n 1.
underlying risk sufficient to justify the availability of family reunification 274 for Family A, but not Family B? 275 Is the difference sufficient to justify a more limited access to employment for the members of Family B? 276 Is the difference sufficient to justify a more limited access to social welfare for the members of Family B? 277 These are precisely the questions — targeted both at the specific comparators, and at the specific rights in issue — that must be addressed in considering the application of art 26.

2 Differential Allocation of Rights to Refugees and Beneficiaries of Complementary Protection Expressly Excluded from the Refugee Convention

The above discussion has sought to illustrate that there is no reasonable and objective justification for a differentiation in the allocation of rights between refugees and beneficiaries of complementary protection, as a general category. This, it is submitted, provides a principled prima facie position. However, it is immediately necessary to invoke a caveat. We earlier identified a subset of beneficiaries of complementary protection: individuals who are expressly excluded from the Refugee Convention by operation of art 1F. There are additional bases upon which a state may seek to justify the inferior allocation of rights to this particular subcategory. It is imperative that one recognises that these additional bases only apply to this particular subcategory. A blanket justification cannot be applied to the entire category of beneficiaries of complementary protection on the back of these arguments. If one were to accept that these additional arguments provide a reasonable and objective justification for differential treatment, art 26 is sufficiently flexible to allow this particular subset of beneficiaries of complementary protection to be ‘defined out’ and considered separately.

Article 1F provides that the Refugee Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Individuals who satisfy one or more of these enumerated standards are considered ‘inherently unworthy’ 278 and are subject to exclusion without full consideration of the substantive merits of their refugee claim under the Refugee Convention. Article 1F is therefore a peremptory procedure, ‘directed to the historically

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274 Assume here that one of the children was left in Country X, and later sought to be reunited with the remainder of the family.
277 Ibid art 28.
278 Hathaway and Harvey, above n 218, 259.
grounded purpose of excluding *fundamentally unworthy* persons from refugee status'. Its impetus can be traced back to art 14(2) of the *UDHR*, which provides that the right of asylum ‘may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.’ Although art 1F mandates that an individual captured by the provision cannot be granted refugee status, the *Refugee Convention* does not specify the manner in which an individual should be treated if a state invokes its sovereignty to otherwise admit that individual. This point was articulated by the French representative during the drafting of the *Refugee Convention*:

> it must be made quite clear that the object was not to specify in the *Convention* what treatment each country must mete out to individuals who had placed themselves beyond the pale, but only to state whether a country was entitled, in granting refugee status to such individuals, to do so on the responsibility of the High Commissioner and of the United Nations.280

Equally, the *Refugee Convention* does not specify the manner in which an individual excluded by art 1F should be treated if — by reason of the broader remit of the non-refoulement obligation — a state cannot remove an individual.281

It is clear that the broader duties of non-refoulement, the majority of which allow for no exceptions, are of considerable benefit to individuals who are expressly excluded from *Convention* refugee status.282 It seems unlikely that this benefit would have been foreseen at the time the *Refugee Convention* was drafted. Article 1F of the *Refugee Convention* divides individuals seeking international protection into two categories: those who are ‘deserving’ of protection, and those who are ‘undeserving’. Those who are found undeserving are not entitled to *Convention* refugee status. As one commentator has noted, ‘refugee law is limited to asylum-seekers and refugees seeking protection with “clean hands”.’283 The question that remains unanswered is whether the fact that an individual does not have clean hands — or, to return to the French representative’s comments, the fact that an individual is ‘beyond the pale’ — is sufficient to justify the differential allocation of rights as between a refugee and a beneficiary of complementary protection who falls within the remit of art 1F.

279 Ibid 261 (emphasis added).
280 Hathaway and Harvey, above n 218, 263, quoting United Nations Economic and Social Council, *Summary Record of the 166th Meeting Held at the Palais des Nations, Geneva, 11th sess, 166th mtg, UN Doc E/AC.7/SR.166* (22 August 1950) [4].
281 There are, of course, other reasons that an individual excluded by art 1F might be non-removable: see McAdam, *Complementary Protection*, above n 1, 228–42.
282 By way of illustration, if the requirements of art 3 of the *CAT* are satisfied, the return of the claimant is absolutely prohibited. Hence, in Committee against Torture, *Views: Communication No 39/1996, 18th sess, UN Doc CAT/C/18/D/39/1996* (28 April 1997) (‘Tapia Paez v Sweden’), the Committee against Torture held that Sweden was required to provide protection to a Shining Path guerrilla notwithstanding the fact that that individual was expressly excluded from refugee status.
It is impossible here to address the broad spectrum of circumstances in which this question could arise. An answer will ultimately depend on a number of factors, including the precise circumstances of the activity that gave rise to exclusion under art 1F, the actions taken by the receiving state upon notification of the alleged activity, and the particular rights in question. Ultimately, the question can only be answered on a case-by-case basis, hopefully assisted by the framework provided in this paper. The point here is that there may be additional indicia that give rise to reasonable and objective bases for differentiation between refugees and the subset of beneficiaries of complementary protection who have been expressly excluded from protection under the Refugee Convention.

D Limitations and Challenges

It is necessary to consider the major practical challenges to the arguments advanced in this paper and, notwithstanding these challenges, the likelihood that an argument grounded in international law might influence the behaviour of states. Of course, any general analysis of the influence of international law on domestic decision-making is well beyond the scope of this paper. The discussion is necessarily confined to a consideration of three limitations specific to the enforcement of art 26 of the ICCPR. I then consider the role that the art 26 framework might — notwithstanding these limitations — play in influencing the way in which decision-makers at a regional and/or domestic level engage with the issues raised in this paper.

The first limitation relates to the ‘reasonable and objective’ standard. As illustrated above, the Committee generally offers sparse reasoning in its Views as to whether or not different treatment is reasonable and objective. This reflects the degree of deference generally afforded to the state party by the HRC when considering whether particular instances of differential treatment can be justified. This general deference to ‘state perceptions of reasonableness’ may be compounded when dealing with categories of non-citizens. Hathaway characterises this deferential practice of the HRC as the ‘major challenge’ to the application of art 26 of the ICCPR. In the absence of any definitive guidance on the manner in which the HRC may decide a particular case concerning the differential allocation of rights to refugees and beneficiaries of complementary protection, and in circumstances where the Committee has traditionally been

284 It may be, for example, that the individual is prosecuted for the alleged crime within the receiving state. The subsequent treatment, and the justifications for that treatment, would vary depending on whether that individual was found innocent or guilty. If the individual were found guilty, any justification might also vary after the individual had served out his or her sentence. See generally McAdam, Complementary Protection, above n 1, 228–42.

285 See above n 232.

286 Hathaway, The Rights of Refugees, above n 8, 141.

287 See especially ibid 130–3. Although this discussion is concerned with refugees as compared to citizens, it is likely that similar issues may arise, albeit to a lesser extent, when dealing with the differential allocation of rights amongst categories of non-citizens.

288 Ibid 251.
deferential to any justification provided by a state, it seems unlikely that a threat of recourse to the HRC will provide any substantial deterrent to a state party. The second limitation is a practical one. Access to the complaint mechanism provided by the HRC requires the host state to be a signatory to the ICCPR and the Optional Protocol to the International Covenant on Civil and Political Rights. Further, it can take up to four years for the Committee to reach a View on any given complaint. The third limitation relates to enforcement. Even where a state has ratified the Optional Protocol, a decision of the HRC is not binding and the outcome will ultimately depend on the will of the state party concerned.

Of course, the existence of a weak enforcement mechanism in no way obviates a state’s obligations to comply with international law in good faith. In Part IV, I traced the development of the principles of equality and non-discrimination, and outlined how these principles have found expression in a large number of widely ratified regional and international instruments. In addition to illustrating the value attributed to the principles of equality and non-discrimination in social and legal discourse, this discussion was intended to demonstrate the manner in which these values have been translated into express legal obligations. Specifically, art 26 anchors the principle of non-discrimination within a structured legal framework. To borrow a phrase from a related context, the provision promotes a ‘culture of justification’, where those seeking to defend differential treatment will need to provide an objective and reasonable justification for the differentiation. Article 26’s core, and in my view its most significant function, is in generating the questions — targeted both at specific comparators, and at specific rights in issue — that must be answered where a state is considering differentiation of treatment. Article 26 requires a decision-maker to critically examine the rationale behind any differentiation in treatment between refugees and beneficiaries of complementary protection. Although Hathaway is no doubt justified in articulating his concern that the HRC has generally been deferential to state perceptions of reasonableness, implicit in this concern is an assumption that a state will be able to cogently articulate an objective and reasonable basis for differentiation. This paper has attempted to illustrate that the requirement to so articulate may prove an insurmountable hurdle in the context of refugees and

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290 I reflect here on my own experiences in the preparation and submission of two Communications to the HRC (in 2007 and 2008 respectively). At the time of writing, the Committee has not yet reached a View on either complaint.
292 Although more limited in scope and geographic reach, art 14 of the ECHR plays a similar role.
beneficiaries of complementary protection. This is evident in the current debates concerning the reform of the EU Qualification Directive.

The benefit of an analysis grounded in art 26 is illustrated by reference to the current reform efforts regarding the EU Qualification Directive. On 21 October 2009 the European Commission presented a proposal to the European Parliament for revising the current Directive. One of the key recommendations is the approximation of the rights that attach to refugee status and subsidiary protection status. As noted earlier, the Explanatory Memorandum to the EU Qualification Directive justified the inferior treatment of beneficiaries of subsidiary protection on the basis that their needs were more ‘temporary in nature’. In the Explanatory Memorandum to the proposed amendments, we see the Commission challenge the veracity of this initial basis for differentiation:

When subsidiary protection was introduced, it was assumed that this status was of a temporary nature. As a result, the Directive allows Member States the discretion to grant them a lower level of rights in certain respects. However, practical experience acquired so far has shown that this initial assumption was not accurate. It is thus necessary to remove any limitations of the rights of beneficiaries of subsidiary protection which can no longer be considered as necessary and objectively justified.

The argument being advanced by the Commission would no doubt be strengthened if framed by reference to the member states’ international legal obligations, specifically those under art 26. Although the Commission does refer to the need to ‘ensure full respect of the principle of non-discrimination’, referring briefly to the jurisprudence of the European Court of Human Rights, and the CRC, it makes no attempt to add substantive flesh to this otherwise bare assertion. It is hoped that the framework provided in this paper will assist in precisely that exercise.

VI Conclusion

The title of the paper draws on the Aristotelian rhetoric that justice requires that like cases be treated alike, and unlike cases unalike. The rhetoric finds legal manifestation in art 26 of the ICCPR. This paper has attempted to illustrate the manner in which art 26 can be used as a robust, targeted and inherently flexible tool to remedy a discriminatory allocation of legal rights. Three qualities are particularly noteworthy. First, art 26 is a free-standing right, intended to facilitate an expanded field of operation beyond the scope of the ICCPR, and indeed beyond the rubric of international human rights law generally. This is particularly important where the ‘protection gap’ at a domestic level extends beyond the ‘protection gap’ entrenched at the international level. The EU Qualification Directive...
Directive provided a case in point, illustrating that the ‘protection gap’ in international law can be augmented at the regional or domestic level where a state provides rights to refugees beyond those mandated by international law. Second, the application of art 26 can necessarily be confined by use of the ‘reasonable and objective’ standard. Article 26 does not establish an unconditional guarantee of equality. It follows that not every instance of differential treatment, whether framed as formal inequality or substantive inequality, will trigger art 26. The ‘reasonable and objective’ test provides an in-built flexibility that can limit the application of art 26 to beneficiaries of complementary protection, or even, as the above discussion illustrates, a particular subcategory of beneficiaries of complementary protection. Finally, the application of art 26 respects the distinctive nature of refugee status, avoiding any temptation to subsume complementary protection within the scope of the Refugee Convention. Indeed, the application of art 26 is predicated on the existence of two distinct statuses of individuals.

The thesis advanced in this paper is to a degree circumscribed by the difficulties inherent in the enforcement of international law, and specifically the ICCPR. However, these limitations do not speak to the role that the argument might play in influencing the content of regional and/or domestic systems of complementary protection. In this respect, it is hoped that the argument advanced in this paper — anchored in positive international law, and underpinned by principles of equality and non-discrimination — has the potential to contribute to debate in countries that have an established domestic complementary protection regime, or are in the process of implementing (Australia) or reforming (the European Union) the same.