



**UNHCR**

**United Nations High Commissioner for Refugees**  
Haut Commissariat des Nations Unies pour les réfugiés

**LEGAL AND PROTECTION POLICY  
RESEARCH SERIES**

**Rights of Refugees in the Context of Integration:  
Legal Standards and Recommendations**

**Rosa da Costa**

**External Consultant**

**DIVISION OF INTERNATIONAL PROTECTION  
SERVICES**

**POLAS/2006/02  
June 2006**

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## Abbreviations

ACHR	American Convention on Human Rights.
ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
CEDAW	International Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CTDs	Convention Travel Documents
DAR	Development assistance for refugees
DLI	Development through local integration
EAC	Eastern African Community
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECRE	European Council on Refugees and Exiles
EFA	Education for all
EMW	European Convention on the Legal Status of Migrant Workers
ESC	European Social Charter
EU	European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGAD	Inter-Governmental Authority on Development

ILO	International Labour Organization
NGO	Non-governmental organization
OAU	Organization of African Unity
OHCHR	Office of the High Commissioner for Human Rights
PPI	Counselling Centre for Integration (Czech NGO)
PTSD	Post-traumatic stress disorder
4Rs	Repatriation, reintegration, reconciliation and reconstruction
RSD	Refugee status determination
SADC	Southern African Development Community

## **PART I: INTRODUCTION: DEFINITIONS AND SCOPE OF THIS REFERENCE GUIDE**

### **A. Definition of Local Integration**

Commonly referred to as one of the three durable solutions available to refugees, local integration is based on the assumption that refugees will remain in their country of asylum permanently and find a solution to their plight in that State. It is a legal, economic and socio-cultural process and is related to, but also to be distinguished from, self-reliance, as well as local settlement.<sup>1</sup>

“Local integration in the refugee context is the end product of a multi-faceted and on-going process, of which self-reliance is but one part. Integration requires a preparedness on the part of the refugees to adapt to the host society, without having to forego their own cultural identity. From the host society, it requires communities that are welcoming and responsive to refugees, and public institutions that are able to meet the needs of a diverse population. As a process leading to a durable solution for refugees in the country of asylum, local integration has three inter-related and quite specific dimensions.”<sup>2</sup>

This reference guide focuses on the legal process and framework, which is in many ways a pre-requisite for the realization of the other dimensions of successful integration. It may be described as follows:

“First, [local integration] is a **legal process**, whereby refugees are granted a progressively wider range of rights and entitlements by the host State that are broadly commensurate with those enjoyed by its citizens. These include freedom of movement, access to education and the labour market, access to public relief and assistance, including health facilities, the possibility of acquiring and disposing of property, and the capacity to travel with valid travel and identity documents. Realization of family unity is another important aspect of local integration.”<sup>3</sup>

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<sup>1</sup> Local integration is to be distinguished from the idea of self-reliance and local settlement. The term “**self-reliance**” is defined in the UNHCR *Handbook for Self-Reliance*, August 2005, as follows: “Self-reliance is the social and economic ability of an individual, a household or a community to meet essential needs (including food, water, shelter, personal safety, health and education) in a sustainable manner and with dignity. Self-reliance, as programme approach, refers to developing and strengthening livelihoods of persons of concern, and reducing their vulnerability and long-term reliance on humanitarian/external assistance.” Self-reliance does not presuppose that refugees will find a durable solution in the country of asylum, but should be viewed (in the context of local integration as a durable solution) as part of a continuum, progressively leading to local integration. The relationship between the concepts of local integration and local settlement is even more ambiguous, since the terms are unfortunately sometimes used interchangeably by commentators. “**Local settlement**”, is situated somewhere between self-reliance and local integration, and is a practice most commonly found in large scale mass influx situations where host countries recognize refugees on a *prima facie* basis, sometimes providing them land where they can establish new settlements and engage in farming or other economic activities. While in some instances, refugees might be allowed to remain and become progressively integrated in the host country, in other cases, local settlement is a temporary phase during which refugees are allowed to become self-reliant until they can voluntary repatriate. UNHCR, *Local Integration*, Global Consultations on International Protection, EC/GC/02/6, 25 April 2002, paras. 14-17.

<sup>2</sup> UNHCR, *Local Integration* (see above at footnote 1), para. 5.

<sup>3</sup> *Ibid.*, para. 6.



It is a process which should lead to permanent residence rights and ultimately, the acquisition of citizenship.

Beyond securing legal rights, the **economic and socio-cultural dimensions** of life in the country of asylum are also integral to successful integration. As such, the recommended standards set out in this reference guide will reflect the importance for refugees of attaining a growing degree of self-reliance, being able to pursue sustainable livelihoods and contributing to the economic life of the host country. Similarly, it will stress the social and cultural process of integration: understood as an interactive process involving both a process of acclimatization by refugees and accommodation by nationals and local communities, and based on the principles of non-discrimination and non-exploitation. As seen in the chapter on political rights, social and cultural integration also includes some political dimensions. In order to properly reflect this two-way and multi-dimensional process of acclimatization, the more appropriate term “integration” will be used in this reference guide, instead of “assimilation”.<sup>4</sup>

## **B. Scope: Relevant to Recognized Refugees and to the Integration Rights and Standards in the 1951 Convention (as Complemented by Human Rights Law)**

The guidelines in this reference guide are concerned primarily with the integration rights and standards contained in the 1951 Convention relating to the Status of Refugees (hereinafter 1951 Convention),<sup>5</sup> and as applicable to **recognized refugees**. The relevance and impact of international and regional human rights instruments to refugee rights cannot be over stressed however, and indeed, are now considered part and parcel of refugee law and rights. Given the complementary nature of human rights law, this reference guide therefore provides as well references to key human rights standards relative to each of the specific rights addressed. Moreover, while certainly not comprehensive, significant efforts have nonetheless been made to highlight in particular, key regional human rights standards and realities, as well as standards for the protection of gender, racial and children’s rights. Research for this study was undertaken during 2005. A more detailed exposition of these issues can be found in James C. Hathaway’s *the Rights of Refugees under International Law*, published by Cambridge University Press towards the end of that year.

As mentioned above, the scope of this reference guide is limited to the integration rights of **recognized refugees**, such that the rights and standards applicable to asylum-seekers or persons under alternative protection regimes are not covered.<sup>6</sup> It is important to highlight

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<sup>4</sup> Indeed, although article 34 of the 1951 Convention and UNHCR’s Statute make reference to “assimilation”, commentators on this provision agree that the Ad Hoc Committee responsible for drafting the 1951 Convention intended the term “assimilation” to be understood “in the sense of integration into the economic, social and cultural life of the country” and not as forced assimilation or coercion. Similarly, the international community has always rejected the notion that refugees should be expected to abandon their own culture and way of life, so as to become indistinguishable from nationals of the host community. This interpretation of the term “assimilation” is thus attributed to both the original drafters of the 1951 Convention, as well as to contemporary opinion. See Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation*, 1953, re-published by UNHCR, Geneva, 1997, p. 142, and UNHCR, *Local Integration* (see above at footnote 1), p. 2, footnote 3.

<sup>5</sup> Convention relating to the Status of Refugees, UNTS No. 2545, adopted July 28, 1951 (entered into force April 22, 1954), and Protocol relating to the Status of Refugees, UNTS No. 8791, adopted January 31, 1967 (entered into force October 4, 1967).

<sup>6</sup> While it was considered necessary to restrict the content of this reference guide to a status (i.e. refugee status) accompanied by common and clearly defined integration rights, some of the recommended standards and rights may nonetheless be applicable to asylum-seekers and persons with an alternative status. More

however, that the legal standards, rights and recommendations in this reference guide are not only applicable to refugees recognized under the 1951 Convention itself, but are also largely applicable to refugees recognized under regional refugee instruments (or their applicable refugee definitions), and most notably, the OAU Convention governing the specific aspects of refugee problems in Africa<sup>7</sup>, and the Cartagena Declaration on Refugees.<sup>8</sup> Indeed, while both of these regional instruments extend the definition of a refugee beyond that contained in the 1951 Convention, they do *not* provide a new set of specific rights and standards but refer instead to those established in the 1951 Convention; these instruments therefore complement each other. For example, the OAU Convention provides in article VIII (2) that it “shall be the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees.” The Cartagena Declaration for its part, provides in article III (8) that the countries of the region are to “establish a minimum standard of treatment for refugees, on the basis of the provisions of the 1951 Convention and 1967 Protocol and of the American Convention on Human Rights, taking into consideration the conclusions of the UNHCR Executive Committee, particularly No. 22 on the Protection of Asylum-seekers in Situations of Large Scale Influx.” To this extent, the 1951 Convention rights and minimum standards of treatment remain the central point of reference for integration rights in this reference guide (and are complemented by international and regional human rights standards), even where refugees are recognized under another of the refugee instruments mentioned above.

### **C. Purpose of the Reference Guide**

This reference guide is intended to provide actors in the refugee field with guidance on the relevant legal frameworks and recommended standards pertaining to the local integration of recognized refugees (hereinafter, “refugees”). In particular, the guidelines it contains may be used to inform the drafting of and commentaries to relevant domestic legislation or reforms (including integration frameworks), and guide advocacy, training and capacity-building activities in this field undertaken by UNHCR, national counterparts or other concerned actors. The guide may be used as a practical reference or learning tool in order to build individual and institutional capacities in the field of integration; the aim being to encourage and empower protection, as well as programme staff, to strengthen integration-related efforts and activities and to secure the best conditions (including legal and administrative frameworks) possible for the integration of recognized refugees. To this end, it should be complemented by other important documents, including most notably the UNHCR’s *Handbook for Self-Reliance*, August 2005.

### **D. Context and General Considerations**

In the past, the three durable solutions of voluntary repatriation, resettlement and local integration took on a hierarchy, with voluntary repatriation taking clear priority over the others.<sup>9</sup> While many refugees are eager to return to their country as soon as it is feasible,

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specifically, these persons will also benefit from the core or basic rights protected by both international human rights and refugee law, many of which are provided in this reference guide. See also UNHCR, *Reception Standards for Asylum-seekers in the European Union*, July 2000, in particular, Part I: UNHCR’s Recommendations as Regards Harmonization of Reception Standards for Asylum-seekers in the European Union.

<sup>7</sup> OAU Convention governing the specific aspects of refugee problems in Africa, adopted 10 September 1969 (entered into force 20 June 1974).

<sup>8</sup> Cartagena Declaration on Refugees of 19-22 November 1984.

<sup>9</sup> UNHCR, *Local Integration* (see above at footnote 1), para. 18-19.

voluntary repatriation has also been favoured by host States, who for various reasons<sup>10</sup> have become reluctant both to admit large numbers of asylum-seekers and refugees and to take action that might imply their long-term or permanent presence. Despite this past emphasis on voluntary repatriation however, the three durable solutions are in fact complementary in nature.<sup>11</sup> A comprehensive durable solutions approach must be able to address as well the situation of those refugees who are unable to return to their country of origin or for whom local integration is otherwise the preferred of the three solutions.

Indeed, integration has received renewed attention within the context of the UNHCR **Agenda for Protection** (which resulted from the Global Consultations on International Protection)<sup>12</sup> and the Framework for Durable Solutions for Refugees and Persons of Concern.<sup>13</sup> The **Agenda for Protection** seeks to address, amongst others, the issues of more equitable burden sharing,<sup>14</sup> and the search for durable solutions. As strategies for achieving these, it promotes the idea of empowering refugees to meet their protection needs, as well as anchoring refugee issues within national, regional and multilateral development agendas (Goal 3, Objectives 4 and 5). It also emphasizes the place of local integration in a comprehensive strategy for durable solutions, as well as the achievement of self-reliance for refugees (Goal 5, Objective 4 and 7).

To facilitate the realization of these durable solutions and to build on the different initiatives undertaken, UNHCR launched in 2003 the operational **Framework for Durable Solutions**. This framework contains three components, namely, Development Assistance for Refugees (DAR) in countries of asylum, Development through Local Integration (DLI), and Repatriation, Reintegration, Reconciliation and Reconstruction (4Rs). Central to all three approaches is, again, the focus on self-reliance, as well as the promotion of broad-based partnerships between governments, humanitarian and aid agencies (multi- or bilateral) with the aim of ensuring more effective responses to mass refugee movements.

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<sup>10</sup> *Ibid.*, para. 18. Amongst the reasons mentioned are the following: concern about the negative economic and environmental impact of large scale refugee populations in countries struggling to meet the needs of their citizens; the reluctance of host States to accommodate large numbers of refugees, especially given the perception that the international community is not sufficiently committed to burden-sharing; the belief that exiled populations may represent a threat to the host State's national security; popular antagonism to the presence of refugees; and an increasingly restrictive climate, associated with the fear that States are losing their ability to control population movements across international borders.

<sup>11</sup> Regarding the complementary nature of the three durable solutions and the need for a comprehensive durable solutions strategy, see the following: *ibid.*, paras. 20 and 26; Global Consultations, 'Strengthening and Expanding Resettlement Today: Dilemmas, Challenges and Opportunities', EC/GC/02/7, 25 April 2002, paras. 6-7; Executive Committee of the High Commissioner's Programme, Forty-third Session, Report of the Fourth Meeting in the Third Track (22-24 May 2002), A/AC. 96/961, 27 June 2002, para. 23. The last two documents are available in: UNHCR, Protection Policy in the Making: Third Track of the Global Consultations, *Refugee Survey Quarterly*, Vol. 22, No. 2/3 2003, Oxford University Press.

<sup>12</sup> UNHCR, *Agenda for Protection*, UNHCR, Geneva, Third edition, October 2003. The Agenda for Protection is a practical programme of action adopted by States and UNHCR in 2002 to improve refugee protection globally. The agenda resulted from the Global Consultations on International Protection initiated by UNHCR in late 2000 and bringing together governments, intergovernmental and non-governmental organizations over an eighteen month period to explore means of reinvigorating the existing refugee protection regime whilst ensuring flexibility in addressing new problems.

<sup>13</sup> UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern*, EC/53/SC/INF.3, 16 September 2003.

<sup>14</sup> The High Commissioner's Convention Plus initiative, which also resulted from the Global Consultations, addresses the issue of burden sharing as well. This initiative seeks to provide a forum for developing agreements, which amongst other objectives, would improve burden-sharing by targeting additional development assistance to countries hosting large refugee populations, and addressing particular protracted refugee situations through multilateral agreements.

Of particular relevance to us, in the context of this reference guide, is the Framework's strategy of DLI.<sup>15</sup> DLI includes soliciting additional development funds with the aim of attaining the local integration of refugees, while also contributing to improvement of the quality of life for host communities.<sup>16</sup> The approach is based on the understanding that the host country's preparedness to allow full refugee integration, including social, economic and legal integration, will be matched with additional assistance by the donor community. It is particularly relevant to protracted refugee situations as a means of improving burden sharing for asylum countries on the one hand, and attaining self-reliance and sustainable livelihoods for refugees on the other.

The legal standards and recommendations in this guide are intended to support the above policy and implementation tools. In particular, they aim to contribute to the strengthening of the *legal and administrative* conditions for the integration of refugees in the contexts of both developed and developing countries, although some of the recommendations may not always be equally relevant to both situations.

Integration standards as stipulated in the 1951 Convention and supported in international human rights instruments are no longer to be considered relevant only in the European context but are increasingly revealing their importance in other regions, as well as in protracted refugee situations. Indeed, the connection between some of these rights and the success of self-reliance and local settlement initiatives is more and more manifest. Moreover, there is a growing recognition that the process of identifying durable solutions, even for protracted refugee case loads, must go beyond those initiatives which fall short of full fledged local integration. In some situations, voluntary repatriation and resettlement may not be viable options for certain groups amongst the refugee population, such that local integration with its accompanying rights must be part of a comprehensive durable solutions strategy. In addition, in Europe, but also in other regions including the Americas and Africa, international and regional human rights instruments, supported by their various supervisory and enforcement mechanisms, are redefining certain concepts of protection and are establishing new standards with regard to rights to basic needs (i.e. including water, food, sanitation, housing and health care) and other rights central to the successful integration of refugees. Some of these developments thus appear to render the refugee

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<sup>15</sup> DLI is an option rather than an obligation for States. As such, the commitment to local integration by host governments (including local authorities) is essential to this strategy, as is the commitment on the part of the donor community to provide additional funding. From an **operational perspective**, it is the host government which leads the process; a process which includes working with the World Bank, the UN Country Team (UNCT), as well as bilateral and multilateral donors, in order to achieve an integrated programming strategy and to develop a joint implementation strategy which builds on existing structures and mechanisms. It also includes: mobilising resources for DLI; bringing refugees on the development agenda by ensuring that the DLI programme is developed within the existing development framework; and developing legal and institutional frameworks which foster local integration (such as through productive activities and the protection of relevant civil, social and economic rights, including rights related to land, employment, access to services, freedom of movement, identity documents, and access to the judicial system). While the host government is to lead this entire process, UNHCR (and other partners and actors) should also support it, including by assisting with the development and implementation of an integrated and joint strategy, resource mobilisation for the DLI programme, and developing legal and institutional frameworks that foster local integration. The operational and general recommendations provided in this reference guide take into account the above strategies and processes, while the legal framework and the rights-based standards it sets out are intended to contribute to the development of legal and institutional frameworks that foster local integration.

<sup>16</sup> UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern* (see above at footnote 13), p. 24.

rights addressed in this reference guide of growing relevance to a number of situations and regions.

## PART II: APPLICABLE INTERNATIONAL LEGAL FRAMEWORK

### A. International and Regional Human Rights Instruments (and Others of Relevance)

States are responsible for respecting and ensuring the human rights of everyone on their territory and subject to their jurisdiction.<sup>17</sup> International and regional human rights instruments are therefore relevant to both defining and protecting the integration standards for recognized refugees. In its General Comment No. 15 for example, the Human Rights Committee (HRC) reaffirmed this by stressing that the enjoyment of Covenant rights (i.e. ICCPR) is not limited to citizens of States Parties but must be available to all individuals regardless of nationality or statelessness; thereby including asylum-seekers and refugees, for example.<sup>18</sup> This was also reiterated by UNHCR's Executive Committee (ExCom) in its Conclusion No. 82, where reference is made to the "obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments."<sup>19</sup>

While the 1951 Convention continues to be the most commonly relied upon and most specific international instrument regarding the rights of refugees and, more specifically, the integration rights of recognized refugees,<sup>20</sup> international human rights law offers an increasingly important complement to the Convention. For example, international human rights law provides a minimum core content of human rights which applies to everyone regardless of their legal status or any other pre-requisite. Furthermore, with the evolution of human rights law, the 1951 Convention standards have in some cases been complemented or even superseded by more generous provisions in subsequent international and regional instruments. When this is the case, States are obliged to accord refugees the benefit of the highest standard or most generous provision from amongst the

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<sup>17</sup> In this respect, the Human Rights Committee (HRC) has recently established in General Comment No. 31 (on Article 2 of the Covenant: The Nature of the General Obligation Imposed on States Parties to the Covenant: ICCPR/C/74/CRP. 4/Rev.6, para. 10), that the scope of the ICCPR is not strictly limited to territory. According to the HRC, the obligation in article 2 to respect and ensure the Covenant rights to all persons who may be within State territory or subject to their jurisdiction "means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power and effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), 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. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation." [Emphasis added]. In this connection, article 1 of the ECHR as well, refers to the concept of jurisdiction, for example, rather than territory.

<sup>18</sup> The Human Rights Committee General Comment No. 15: The position of aliens under the Covenant: 11/04/86. U.N. Doc. HRI/GEN/1/Rev.1 (1994). See paragraph 1 in particular, which states: "In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness."

<sup>19</sup> ExCom Conclusion No. 82 (XLVII) of 1997, on Safeguarding Asylum, para. (vi).

<sup>20</sup> Indeed, although it has been most frequently cited and used in the context of the refugee status determination procedure, the 1951 Convention is largely about the integration rights of refugees.

international instruments they have ratified.<sup>21</sup> Some of these international and regional human rights instruments also have the added advantage of addressing specific issues and rights not elaborated upon in the 1951 Convention and making available international enforcement or supervisory mechanisms.<sup>22</sup> In these various ways, human rights instruments often play a significant role both in further **defining** and **protecting** (i.e. enforcing) refugee integration rights.

Moreover, in some instances, the values and the legal norms advanced by sub-regional organizations are more progressive (than regional ones) and have gained increasing importance for the promotion of human rights, and to this extent can also support refugee rights. Most notably in Africa, the Economic Community of West African States (ECOWAS) for example, in addition to the objective of regional integration and the free

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<sup>21</sup> In fact, the national Constitutions of some States (such as those in Central Europe) incorporate international treaties which have been ratified by their Parliaments into national law, and further provide that in the event of any inconsistencies between these international instruments and domestic legislation, the former is to take precedence. By contrast, in other States where there is no such Constitutional provision, implementation of international human rights obligations may be impeded by the fact that while ratified, the obligations of these international instruments may not have been incorporated into national law.

<sup>22</sup> UN human rights instruments, including the Covenant on Civil and Political Rights (ICCPR) and the Covenant on Social, Economic and Cultural Rights (ICESCR), as well as many other UN instruments offer **quasi-judicial petitioning** systems which provide enforcement mechanisms absent from the 1951 Convention. For example, articles 40 and 41 of the ICCPR establish the country reporting system and the petitioning or communications system, respectively.

This is also the case with some **regional** instruments. For example, in the **European** context, the European Convention on Human Rights (ECHR) offers the important advantage of an enforcement mechanism in the form of the European Court of Human Rights, whose decisions are binding upon Member States. This enforcement mechanism is made all the more relevant since the ECHR contains provisions which have in certain cases already proven effective in protecting rights which are closely related to integration, such as the right of aliens to the protection of family unity, the right to social security and public relief benefits, and of course, the right not to be subjected to torture (in the context of the principle of *non-refoulement*). The European Social Charter, which is the counterpart to the ECHR, also specifically provides, in an appendix, that the rights of recognized refugees under the 1951 Convention are to be included in this Charter, thereby enabling refugees to use the supervisory and complaints mechanisms of the Charter to enforce their rights under the 1951 Convention. In this regard, the 1995 Additional Protocol to the European Social Charter which provides for a system of collective complaints, is a particularly important improvement to the supervisory system since NGOs with consultative status can report Charter violations directly to the Committee of Independent Experts in the form of a complaint. See also da Costa, Rosa, "Integration Rights and Practices with Regard to Recognized Refugees in Central European Countries", *European Series*, Vol. 5, No. 1, July 2000, UNHCR, Geneva, pp. xi and xii.

In the **Americas**, the Inter-American Commission and Court have also used the different supervisory mechanisms at their disposal (e.g. the individual complaints procedure, precautionary measures and provisional measures, on-site visits, annual and country reports) to protect a variety of rights in refugee-related cases, including the right to seek and be granted asylum, the prohibition of *refoulement*, the right to due legal process, and more directly pertinent to integration, the right to protection of the family and the right to a nationality.

In **Africa**, the African Charter on Human and Peoples' Rights (ACHPR) has the ACHPR Commission as a quasi-judicial supervisory body, and as of January 2004 also the African Court on Human and Peoples' Rights as an enforcement mechanism. The jurisdiction of this new court extends to States which have signed up to the Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights. The Court has the mandate to complement the protective mandate of the African Commission on Human and Peoples' Rights, and its jurisdiction is to extend to all cases and disputes submitted to it concerning the interpretation and application of the ACHPR, and any other relevant human rights instrument ratified by the States that are party to the Protocol. Those which may submit cases to the Court include: State Parties; the ACHPR Commission; African Intergovernmental organisations; as well as individuals and NGOs with observer status with the Commission, as long as the State concerned has made a declaration (either at the time of ratification of the Protocol or any time thereafter) accepting the competence of the Court to receive complaints from these parties.

movement of persons, goods and services, also includes fundamental principles for the protection of human rights and indeed specifically affirms and incorporates the African Charter on Human and Peoples' Rights (ACHPR).<sup>23</sup> The Inter-Governmental Authority on Development (IGAD), another sub-regional organisation for regional cooperation in the political, economic, development, trade, and peace and security sectors, also acknowledges the importance of the promotion and protection of human rights in accordance with the African Charter in article 6A(f) of that agreement.<sup>24</sup> The Southern African Development Community (SADC) is of relevance as well, to the extent that one of the chief principles the community and Member States must abide by is human rights, democracy and the rule of law.<sup>25</sup>

Finally, within the Commonwealth of Nations, agreements such as the Singapore Declaration of Commonwealth Principles of 1971, the Harare Declaration of 1991 and the 1988 Bangalore Principles, can be important instruments to support and protect the human rights of refugees, even if indirectly.<sup>26</sup> The Bangalore Principles for example, reiterate in paragraphs 2 and 3 the importance of international human rights instruments as well as the impressive body of jurisprudence (both national and international) interpreting them, for guidance (to judges and lawyers) in cases concerning fundamental human rights and freedoms. The Bangalore Principles further point out that even in legal systems (such as those based on common law) where international conventions are not directly enforceable in national courts unless their provisions have been incorporated into domestic law, there is a "growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or

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<sup>23</sup> Treaty of the Economic Community of West African States (ECOWAS) of 1993. See the Preamble to the Treaty as well as articles 4 and 56 for example, which refer to the promotion and protection of human and peoples' rights in accordance with the ACHPR. Also relevant is the Protocol on Democracy and Good Governance, adopted in Dakar on 21 December 2001, and more specifically article 1(h) which states:

[...] "The rights set out in the African Charter on Human and Peoples' Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States, each individual or organisation shall be free to have recourse to the common or civil courts, a court of special jurisprudence, or any other national institution established within the framework of an international instrument on human rights, to ensure the protection of his/her rights. In the absence of a court of special jurisdiction, the present Supplementary Protocol shall be regarded as giving the necessary powers to common or civil law judicial bodies."

ECOWAS includes the following Member States: Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo.

<sup>24</sup> The Inter-Governmental Authority on Development (IGAD) includes the following Member States: Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan, and Uganda.

<sup>25</sup> See the amended Consolidated Text of the Treaty of the Southern African Development Community (SADC) of August 1992, article 4 (c). Amongst the objectives of the SADC listed in article 5 (1) and (2) are *inter alia*: the promotion of sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation (including by eliminating obstacles to the free movement of capital, labour and goods and services); supporting the socially disadvantaged through regional integration; the promotion of common political values, systems and other shared values transmitted *via* institutions which are democratic, legitimate and effective; and the defence and maintenance of democracy, peace, security and stability. SADC Member States are the following: Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

<sup>26</sup> Singapore Declaration of Commonwealth Principles, issued at the Heads of Government Meeting in Singapore, 22 January 1971; Harare Commonwealth Declaration, adopted in Zimbabwe, 20 October 1991; and the Bangalore Principles, adopted in Bangalore, India, 26 February 1988. It should also be noted with regard to the principles in such documents, that a consistent pattern of a Member State violating these principles may result in pressure on the offending State and lead to a suspension or withdrawal of membership, such as was the case in Pakistan, Fiji, Apartheid South Africa and Zimbabwe. For the full texts and more information on these documents, please refer to: <http://www.thecommonwealth.org>.



common law – is uncertain or incomplete.”<sup>27</sup> Moreover, they stress that even in such cases where national law is to prevail in the event of inconsistencies between international obligations and domestic legislation, the courts should draw this inconsistency to the attention of the appropriate authorities.<sup>28</sup>

Documents which have been adopted by the Assembly of Heads of States and Governments of the AU (formerly OAU), can be relevant as well to the protection of human rights in that region as they reflect a common understanding on a particular issue. For example, in the Declaration on the Problem of Subversion of 1965,<sup>29</sup> States undertook not to tolerate any subversion originating in their countries against another Member State, but also explicitly undertake in the same document to “observe strictly the principles of international law with regard to all political refugees who are nationals of any Member States of the Organization of African Unity [...]”<sup>30</sup>

Thus, while it is not possible in this reference guide to further explore the content of these types of agreements, it is important to recognize that such sub-regional instruments and institutions are also relevant and may become increasingly important for the promotion and protection of human rights and refugee rights more specifically (even if indirectly), including for certain crucial integration rights (e.g. residency, employment, political rights) to the extent that refugees are from a Member State and residing in a host State that is also a Member. To the extent possible, refugee organizations in countries that are part of such types of sub-regional communities should seek to include refugee rights, issues and interests in the agenda of such agreements and institutions.

As mentioned above, the standards recommended in this reference guide will nonetheless continue to primarily draw on and reflect the standards contained in the 1951 Convention, as well as those in international and regional human rights instruments. Where pertinent, sources of “soft law” such as ExCom Conclusions, recommendations of authoritative bodies such as the Council of Europe, and opinions of implementing bodies will also be taken into account, as well as certain standards based on best practices.

## **B. International Refugee Law**

The benefits and rights provided under the 1951 Convention have different levels of applicability depending on the nature of the refugee’s sojourn or residence in the host country.<sup>31</sup> While the most fundamental rights (as well as certain others) are extended to all

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<sup>27</sup> See Bangalore Principles, para. 4.

<sup>28</sup> Paragraph 8 of the Bangalore Principles provides:

“However, where national law is clear and inconsistent with the international obligations of the State concerned in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation, which is undertaken by a country.”

<sup>29</sup> Declaration on the Problem of Subversion, AHG/Res. 27(II) 1965, adopted at the 2<sup>nd</sup> Session of the OAU, in Accra, Ghana, 21-26 October 1965.

<sup>30</sup> *Ibid.*, paras. 1 and 6, respectively.

<sup>31</sup> Indeed, the 1951 Convention does not say “that its provisions only apply to formally recognised refugees. In fact, the [Convention] applies in parts before a formal recognition of refugee status... The 1951 Convention therefore remains an important point of departure for considering certain standards of treatment for the reception of asylum-seekers, not least because asylum-seekers may turn out to be refugees.” See, UNHCR’s *Reception Standards for Asylum-Seekers in the EU*, July 2000, p. 5.

refugees, other rights of varying degrees of generosity are contingent on the nature of the refugees' stay in the country concerned.<sup>32</sup> Indeed, the 1951 Convention does not explicitly mention the terms "asylum-seekers" or "recognized refugees" (instead the general term "refugee" is used), but rather, links rights to the type of stay held by the refugee, namely: simple presence "within" the country (even illegal);<sup>33</sup> "lawful" presence;<sup>34</sup> and "lawful stay".<sup>35</sup>

The last term "lawfully staying" is based on a translation of the French term "résidant régulièrement", and implies more than mere presence; it may be described as a "permitted, regularized stay of some duration".<sup>36</sup> Indeed, while there is no definitive definition of this term, it is reasonable to conclude that "stay", while not necessarily implying a durable residence, does clearly mean more than a transit stop, and "embraces both permanent and temporary residence, but not the situation of refugees in transit or temporarily visiting a country for special reasons and for a specific period."<sup>37</sup> The "lawful" part of the expression, is normally to be assessed against national laws and regulations.<sup>38</sup> The drafting history thus reveals that a distinction was intended between the basic rights accorded to all refugees (including asylum-seekers) and other rights and benefits accorded to those accepted as legal residents (persons with lawful stay).

Formally recognized refugees (based on individual or group recognition as *prima facie* refugees) whose status in the country has been permitted and regularized by the granting State and who reside (i.e. have temporary or permanent residence) in the country of asylum, would therefore be considered to have "lawful stay" in their host country, and consequently, the right to the maximum and full range of rights and benefits accorded by the 1951 Convention.

According to the 1951 Convention, a refugee "lawfully staying" in the territory is to be granted the same treatment as nationals with regard to public relief, social security and primary education, and at least (at minimum) the same treatment as that accorded to aliens generally in the same circumstances<sup>39</sup> with regard to the right to self-employment, liberal

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<sup>32</sup> The most fundamental rights (articles 3 and 33) and some others such as articles 7(1), 8, and 13 are extended to all refugees. Other basic rights are applicable to any refugee present "within" the country (e.g. articles 2, 4, 20, 22, 27), even if illegally (see article 31), and yet others are applicable to refugees "lawfully staying" ("résidant régulièrement") in the territory of the country concerned (e.g. articles 15, 17, 19, 21, 23, 24 and 28; see also articles 14, 16 (2) and 25).

<sup>33</sup> Simple presence is expressed in the 1951 Convention by such terms as "within" (art. 4) or "in"[the] territory.

<sup>34</sup> "Lawful presence", which is expressed for example as "lawfully in the country", was understood by the Ad Hoc Committee to refer to refugees who were either lawfully admitted or whose illegal entry was legalised. However the term no longer applies to refugees who have overstayed the period for which they were authorised to stay or have violated another condition of their admission or stay, according to Robinson (see above at footnote 4), p. 93.

<sup>35</sup> *Ibid.*; As noted by Robinson, while there are some articles in the Convention such as 14 and 16(2) that employ the term "habitual residence", this expression is intended to have the same meaning as "lawful stay". They are both translations of the term "résidant régulièrement" and the difference in the English wording does not imply any change in meaning.

<sup>36</sup> UNHCR, 'Lawfully Staying: a Note on Interpretation', Geneva, 3 May 1988, p. 3.

<sup>37</sup> *Ibid.*, p. 5.

<sup>38</sup> *Ibid.*, p. 9.

<sup>39</sup> According to article 6 of the 1951 Convention, the term "in the same circumstances" implies that "any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee

professions, housing and post elementary education. As relates to wage-earning employment, States are to give “sympathetic consideration” to granting refugees the same rights as nationals, but at minimum they must be accorded the most favourable treatment granted to nationals of a foreign country in the same circumstances.<sup>40</sup>

Also of significance in the 1951 Convention is the position that, beyond the minimum standards indicated in the specific provisions, States should accord to refugees lawfully in their territory “treatment as favourable as possible”; a recommendation which is reiterated in many key provisions<sup>41</sup> in the Convention and which should be taken into consideration, particularly when the minimum standard for a particular right is less than that accorded to nationals. This recommendation is also consistent with the general legal standard of treatment recommended in this reference guide in the section below.

### C. General Legal Standard Recommended in this Reference Guide

There are compelling practical as well as legal reasons for affording recognized refugees a special status in international law and more specifically in international human rights and refugee law. As a foreigner without the protection of a State or an effective citizenship, a refugee requires certain safeguards, integration measures and rights which are not necessary with regard to nationals or other foreigners. Recognized refugees, by virtue of being unable to return to their country of origin, are fully dependent on their host country for both protection (against *refoulement*), as well as a durable solution to their plight in the form of a secure legal status and rights which will make possible their successful integration – the completion of which is their naturalization and acquisition of an effective citizenship. This situation sets them clearly apart from other aliens who, failing integration, can always return to their country of origin.

In relation to subjects or rights falling under the 1951 Convention<sup>42</sup> it is thus generally recommended that recognized refugees be afforded the **most favourable treatment possible**, and more specifically, wherever possible they should be accorded the same treatment as nationals or permanent residents.<sup>43</sup> This entails applying the recommendation explicitly incorporated into most specific provisions in the 1951 Convention urging States to grant the “most favourable treatment possible”, rather than opting for the minimum standard indicated (which is usually the “same treatment as applied to aliens generally”).

This would also be consistent with the rationale in the Convention whereby it accords rights of varying degrees of generosity depending on the nature of the refugee’s stay or sojourn in the host country. Recognized refugees, with regard to whom the host country

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must be fulfilled by him with the exception of requirements which by their nature a refugee is incapable of fulfilling.”

<sup>40</sup> Article 17(1) and (3) of the 1951 Convention.

<sup>41</sup> For instance, this recommendation is made in articles 13 (property), 18 (self-employment), 19 (liberal professions), 21 (housing) and 22(2) (education beyond elementary education).

<sup>42</sup> Under the 1951 Convention, refugees benefit from two broad categories of rights: the rights granted to them as inhabitants of the country (e.g. the right to education, work, welfare, to practice their religion), and the rights specific to refugees, such as those relating to personal status, identification papers and travel documents, and expulsion for example. It is with regard to the former, that it is recommended that recognized refugees be afforded the most favourable treatment possible.

<sup>43</sup> Unless of course, a specific provision in the 1951 Convention makes it possible to grant refugees rights greater than those accorded to nationals, such as is the case in article 4 on religion.

has recognized the need for protection, and who have as a consequence both a lawful and durable stay in the country, should therefore be granted the most favourable treatment of all. Such treatment should facilitate their complete and speedy integration into the host State – an objective which the minimum standards of treatment may not be capable of achieving as effectively.

Similarly, and also on the basis of their special status, recognized refugees should be afforded a special place with regard to international and regional **human rights** instruments. More specifically, recognized refugees should not be subject to the special restrictions which are in practice often placed on **aliens** in relation to certain provisions in human rights instruments, and particularly those relating to socio-economic rights. While aliens, including refugees, already benefit from the strong protection afforded by the International Covenant on Civil and Political Rights (ICCPR) and its non-discrimination provision with regard to civil and political rights,<sup>44</sup> the standards of treatment relative to social and economic rights have not been as clearly and unequivocally defined in relation to aliens.

Moreover, unlike the ICCPR where rights are subject to immediate and full realization by the State Party, the rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>45</sup> are subject to **progressive** realization, such that neither nationals nor non-nationals can necessarily expect to benefit fully from these rights. Certainly, non-nationals (as well as nationals, of course) are to benefit from the minimum or core content of the ICESCR rights,<sup>46</sup> but the exact treatment owed to them is not as certain, especially in relation to economic rights (notably the right to work) on which article 2(3) specifically provides for the possibility of differing treatment with regard to non-nationals.<sup>47</sup> The

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<sup>44</sup> International Covenant on Civil and Political Rights, adopted by UNGA Resolution 2200 A (XXI) of 16 December 1966 (entered into force 23 March 1976). See also, **General Comments Nos. 15, No. 18** and, most recently, **No. 31** of the Human Rights Committee (HRC) relating to articles 26 (guarantee of legal protection against discrimination) and 2 (State obligations towards all individuals in their territory and subject to their jurisdiction) respectively.

<sup>45</sup> International Covenant on Economic, Social and Cultural Rights, adopted by UNGA Resolution 2200 A (XXI) of 16 December 1966 (entered into force 3 January 1976).

<sup>46</sup> See Committee on Economic, Social and Cultural Rights, **General Comment 3**, “The nature of States parties’ obligations”, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III p. 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 p. 14 (2003). In this General Comment, the Committee states in para. 10, that:

“[any] State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.”

<sup>47</sup> **Article 2(3)** of the ICESCR provides that: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.” **Article 4**, a general limitation clause of the ICESCR, may also be relevant as it has been interpreted by some commentators in relation to the right to work of non-nationals.

**It states that:**

“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

See in this respect, a brief review of the differing interpretations on article 4 of the ICESCR in: Dent, J.A., *Research Paper on the Social and Economic Rights of Non-Nationals in Europe*, prepared for the European Council on Refugees and Exiles (ECRE), November 1998, p. 11 (especially footnotes 41 and 42), where he refers to the work of Craven and Kjaerum. These commentators argue two opposite positions and interpretations of article 4, namely: that restrictions on the right to work of aliens, while not prohibited under article 4, would have to be extraordinary and justified on the basis of the general welfare (Craven); and on the

position advocated in this reference guide however, is that States, in particular developing States, to which a certain latitude appears to be accorded by the international community to differentiate in favour of their nationals (or to make reservations in relation to aliens) with regard to certain social and economic rights (e.g. the right to access to employment), should *not* apply this against recognized refugees. They should instead accord them the most generous treatment possible (and preferably, equal treatment with nationals) in order to facilitate their integration and in recognition of their special status as persons in exile, who unlike other aliens, left their country involuntarily and can no longer seek the protection of that country.

Rights granted apart from those of the 1951 Convention are also important, as the Convention does not deal with all the rights which an inhabitant would normally enjoy, such as freedom of assembly, freedom of speech,<sup>48</sup> the acquisition of licenses, etc. This neither means that refugees are automatically prohibited from exercising these rights, nor that they have the same rights as nationals. In such cases, international human rights standards are applicable. In this respect, it is also recommended that to the extent possible no special reservations limiting these rights for aliens be applied in the case of recognized refugees: the rights granted refugees should be congruent with an open and full integration policy.

This interpretation is further endorsed by the State's responsibility in article 34 to facilitate integration and naturalization. Moreover, the 1951 Convention specifically provides in article 5 that nothing in the Convention "shall be deemed to impair any rights and benefits granted by Contracting States to refugees apart from this Convention." The purpose of this article was to make it clear that the adoption of the Convention should "not impair any greater rights which refugees may enjoy prior to or apart from this Convention."<sup>49</sup> This includes any broader rights that all or certain groups of refugees may enjoy under domestic law or international treaties for instance. It also means that the 1951 Convention should not be a barrier to Contracting States granting refugees broader rights in the future.<sup>50</sup>

It is in the framework of these legal considerations and the practical challenges faced by refugees in their endeavour to forge a new life in their host country that the general recommendation to afford refugees the most favourable treatment possible, and more specifically, the same standard of treatment as nationals or permanent residents, is proposed, including with respect to social and economic rights. The recommendations

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other hand, that even developed countries might invoke article 4 if during a period of recession or unemployment for instance, general public opinion is so hostile to allowing refugees access to the local labour market that it would endanger the general welfare (Kjaerum). Yet another commentator, Klerk, argues that discriminatory practices could never be compatible with the nature of these rights and could never be said to promote the general welfare since it is achieved at the expense of one section of society. See also, Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6, 2003, p. 85. In this General Comment, the Committee states that the purpose of article 4 "is primarily to protect the rights of individuals rather than to permit the imposition of limitations by States."

<sup>48</sup> With regard to the **political** rights of refugees, such as freedom of expression, freedom of assembly, voting rights etc., see: Mandal, Ruma, "Political Rights of Refugees", *Legal and Protection Policy Research Series*, PPLA/2003/04, UNHCR, Department of International Protection, Geneva, November 2003. See also chapter 13 below.

<sup>49</sup> Robinson (see above at footnote 4), p. 66, quoting the Ad Hoc Committee (reference E/1850, para. 19).

<sup>50</sup> *Ibid.*, p. 67.

specific to each right in this reference guide also provide further reasons for granting recognized refugees a regime of rights (i.e. set of rights) which seeks to facilitate their complete and successful integration into their host society, especially in areas where refugees may require special measures. Indeed, as is demonstrated in many instances, a variety of problems at the legal, administrative or implementation level are often alleviated or avoided altogether by granting refugees a mainstream and durable status, and ensuring that domestic laws provide for a generous regime of rights for refugees.

**PART III: SPECIFIC RIGHTS:  
LEGAL STANDARDS AND RECOMMENDATIONS**

## CHAPTER 1: THE RIGHT TO INTEGRATION ASSISTANCE

### MAIN INTERNATIONAL STANDARDS

#### **1951 Convention relating to the Status of Refugees**

##### **Article 34**

##### *Naturalization*

*The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.*

#### **Statute of the Office of the United Nations High Commissioner for Refugees**

*2. Calls upon Governments to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his Office, especially by: [...]*

*(e) Promoting the assimilation of refugees, especially by facilitating their naturalization;*

### **A. International Standards**

#### *1. 1951 Convention*

##### □ *The Meaning of the Terms “Assimilation” and “Integration”*

The term “assimilation” used in article 34 of the 1951 Convention is to be understood in the sense of integration into the economic, social and cultural life of the country and not as denoting any notion of forced assimilation or coercion.<sup>51</sup> Commentators on this provision agree that the Ad Hoc Committee responsible for drafting the Convention intended the term “assimilation” to be understood in this sense. Similarly, the international community has always rejected the notion that refugees should be expected to abandon their own culture and way of life, so as to become indistinguishable from nationals of the host community.<sup>52</sup> In this reference guide the term “integration” will therefore be used instead of “assimilation”.

The term integration (“assimilation”) has also been interpreted as referring to the process of laying the foundations for the refugee to become familiar with the customs, language and way of life of the country of asylum, so that without any feeling of coercion, he/she may more readily be integrated into the different aspects of life in the country of refuge. This may be accomplished through such means as, *inter alia*, language and vocational courses, lectures on national institutions and culture, and by creating opportunities for stimulating contacts between refugees and the host population.

As such, any definition of “integration”, as well as integration frameworks or programmes should reflect an approach which promotes acceptance and respect for the refugee’s way of life and culture, while also providing assistance for their functional and cultural adaptation into the host society.

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<sup>51</sup> See, Part I: Section A of this reference guide.

<sup>52</sup> UNHCR, *Local Integration* (see above at footnote 1), p. 2, footnote 3. This interpretation of the term “assimilation” is thus attributed to both the original drafters of the 1951 Convention, as well as to contemporary opinion. See also Robinson (see above at footnote 4), p. 142.



□ *Placing Article 34 in Context and Understanding the Inter-Relationship between Integration and Naturalization*

Article 34 contains two distinct obligations, one general and one specific. Contracting States are to (as far as possible) facilitate integration and naturalization<sup>53</sup> in general, and more specifically, to make every effort to expedite naturalization proceedings and reduce charges or costs of such proceedings.

As argued elsewhere in this reference guide, the special situation and vulnerability of refugees makes it especially important that all possible measures be taken to facilitate their integration and accord them maximum rights in this respect. Unlike other aliens, they do not have a country of origin they can return to and therefore count on their host country to grant them not only protection against *refoulement* but also a durable solution in the form of integration into that society. Moreover, refugees often lack support networks, the language skills and the resources to start their new life in the host country completely on their own, thus requiring special assistance to establish themselves at the beginning. For these same reasons, they may experience particular difficulties as well in gaining permanent residency, acquiring the requisite financial means to reunite with their family members still in the country of origin, or becoming eligible for naturalization. Article 34 should therefore be understood in this context, where their special situation impresses upon Contracting States the need to accord refugees rights and measures beyond those normally granted to other aliens and to assimilate their rights as much as possible to those of permanent residents or citizens.

To the extent that integration can also be viewed as a stage which precedes naturalization, measures to facilitate integration will have an important secondary or additional benefit, namely of facilitating an eventual process of naturalization. This link between integration and naturalization is especially important in the case of refugees, who unlike other aliens, lack an effective nationality (they may be considered ‘a *de facto* stateless refugee’); a situation which is “abnormal and should not be regarded as permanent”.<sup>54</sup> Thus, while integration assistance to newly recognized refugees is an independent obligation from any eventual naturalization process, from a legal and sociological perspective efforts to facilitate naturalization for refugees does demonstrate a willingness on the part of the State to accept and **complete** a refugee’s integration process. This aspect of naturalization in article 34 is further elaborated in chapter 14 below.

## 2. *Other Authoritative References on Integration, Including Regional Instruments*

In addition to the provision in the 1951 Convention, UNHCR’s Statute and the Annex thereto also contain provisions stipulating as one of the tasks of this Office the protection of refugees by assisting both governments and private organizations in the process of integration of recognized refugees within national communities.<sup>55</sup> In particular, the UNHCR Statute calls upon governments to promote the integration of refugees, especially by facilitating their naturalization.<sup>56</sup>

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<sup>53</sup> Grahl-Madsen, Atle, *Commentary on the Refugee Convention 1951, Articles 2-11, 13-37*, 1963, re-published by UNHCR, Division of International Protection, Geneva, 1997, p. 247, see (3).

<sup>54</sup> *Ibid.*, p. 245.

<sup>55</sup> Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428 (V) of 14 December 1950, and Annex, (see Chapter II, 8 (c)).

<sup>56</sup> *Ibid.*, para. 2 (e).

Several ExCom Conclusions<sup>57</sup> also provide guidance and recommendations on local integration as one of the durable solutions. ExCom Conclusion No. 50 for example, notes the “close nexus between international refugee protection and durable solutions”, and calls upon the High Commissioner to continue efforts to provide international protection through voluntary repatriation, local integration and resettlement.<sup>58</sup> Another ExCom Conclusion, No. 58, further makes the connection between irregular movements of refugees who have already found protection in a country, and “the absence of educational and employment possibilities [as well as] the non-availability of long-term durable solutions”,<sup>59</sup> including local integration. More recently, ExCom Conclusion No. 95 also mentioned the crucial importance of achieving durable solutions for refugees and urged the continuation of efforts to work proactively on local integration (and resettlement opportunities) where appropriate and feasible, in addition to voluntary repatriation.<sup>60</sup>

Thus, while a number of ExCom Conclusions highlight voluntary repatriation as the preferred solution when feasible, many of the above-mentioned Conclusions stress that in fact all three durable solutions, including local integration, “remain viable and important responses to refugee situations”;<sup>61</sup> and that “a combination of solutions, taking into account the specific circumstances of each refugee situation, can help achieve lasting solutions.”<sup>62</sup>

At the regional level, the European Council Directive on Minimum Standards<sup>63</sup> which is binding on Member States of the European Union, may be the regional instrument which contains the most direct and explicit reference to the concept of “a right to integration assistance” for refugees. It provides in article 33:

1. In order to facilitate the integration of refugees into society, Member States shall make provision for integration programmes which they consider to be appropriate or create pre-conditions which guarantee access to such programmes.
2. Where it is considered appropriate by Member States, beneficiaries of subsidiary protection status shall be granted access to integration programmes.

While this provision could have been made more complete with a reference to measures which would facilitate permanent residence or/and naturalization procedures and requirements, it is hoped that such measures will be taken independently by individual Member States. Indeed, paragraphs 3, 6 and 8 of the Preamble to the European Council Directive on Minimum Standards, as well as article 3, refer not only to the 1951 Convention as the “cornerstone” of the international legal regime for the protection of refugees (thus endorsing its article 34),<sup>64</sup> but also to the objective of this Directive as *inter*

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<sup>57</sup> ExCom Conclusions Nos. 29, 50, 58, 79, 81, 85, 87, 89, 95, 99 and 101.

<sup>58</sup> ExCom Conclusion No. 50 (XXXIX) – 1988, para. (e).

<sup>59</sup> ExCom Conclusion No. 58(XL) – 1989, para. (b).

<sup>60</sup> ExCom Conclusion No. 95 (LIV) – 2003, para. (i).

<sup>61</sup> ExCom Conclusions No. 85 (XLIX), (1998) para. (gg); and No. 87(L) (1999), para. (r).

<sup>62</sup> ExCom Conclusion No. 87 (L) (1999), para. (r).

<sup>63</sup> European 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 protection granted, published in the Official Journal of the European Union No. L 304 of 30 September 2004 (entered into force 10 October 2004).

<sup>64</sup> Article 20(1) of the European Council Directive on Minimum Standards also reaffirms the authority and binding nature of the 1951 Convention by stating that: “This Chapter [i.e. Chapter VII: Content of International Protection] shall be without prejudice to the rights laid down in the Geneva Convention.”

*alia*, ensuring a *minimum* level of benefits and standards – such that Member States have the power to introduce more favourable provisions. Recommendations for such provisions on residency status and naturalization are provided in chapter 2 on Residency Status and chapter 14 on Naturalization below.

Importantly, the European Council Directive on Minimum Standards also includes a specific provision (article 20(3)) imposing an obligation on Member States to “take into account the specific situation of vulnerable persons”, including *inter alia*, minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence. An individual evaluation of the person’s situation is necessary before they can be deemed to have special needs (article 20(4)).

In the Americas and Africa, the minimum standards of treatment provided in the 1951 Convention (e.g. article 34), including in relation to integration, are also endorsed in both the Cartagena Declaration and in the OAU Convention,<sup>65</sup> as already mentioned in Part II above. However, the Cartagena Declaration includes more explicit references to assisting refugees with the integration process. For example, the issue of enhancing integration, including through projects aiming at the self-sufficiency and integration of refugees in their host society, are mentioned in article III (6) and (11).

## **B. Recommendations**

While it is not possible within the parameters of this reference guide to provide exhaustive recommendations suitable to all regional contexts, the general recommendations below are intended to highlight some of the measures and standards which can contribute to a positive and effective framework (or policy) on local integration. For the sake of being comprehensive and highlighting their particular importance, some of the recommendations provided in this chapter may, on occasion, be repetitive of broad principles and measures suggested in other chapters on specific rights. The recommendations below have been drawn from a variety of sources, including NGO and UNHCR sources.<sup>66</sup>

### *1. The Importance of Reception Conditions for Eventual Integration*

From a sociological perspective, the process of integration effectively begins at the time refugees arrive in the host country. Adequate and humane standards for reception and stay of asylum-seekers as well as persons under alternative protection regimes have been found to affect and improve significantly the process of eventual integration, and where relevant, even return and resettlement.<sup>67</sup> It is therefore in the interest of States to adopt measures and

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<sup>65</sup> See article III(8) of the Cartagena Declaration, and para. 9 of the Preamble to the OAU Convention.

<sup>66</sup> Sources for these recommendations include, *inter alia*: UNHCR, NGO and independent studies; papers on integration and related topics (such as community development); analysis of relevant reports; and principles elaborated in the UNHCR *Agenda for Protection* (see above at footnote 12), Global Consultation papers, and UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern* (see above at footnote 13). Some of the recommendations also draw on a previous study by da Costa (see above at footnote 22).

<sup>67</sup> The conclusion that humane reception standards increase the chances of successful integration for refugees was supported in the context of the European Union for example, in a notable 2004 study on integration by the European Refugee Fund. In this study, it was found that “the Europe-wide drive for deterrence and the

accord asylum-seekers and other persons of concern the rights necessary to their basic dignity and welfare, since amongst other things, this is likely to improve the chances of a successful integration for those asylum-seekers who will eventually be granted refugee status. These reception measures and rights should be in keeping with international refugee and human rights law and include, *inter alia*, the right to adequate means of subsistence, access to education and medical care, as well as basic civil and social rights. Special measures must also be put in place to cover the specific needs and rights of children, women and older persons of concern. Further details regarding reception standards are available in a variety of sources, including those mentioned below.<sup>68</sup>

## 2. *Ratification and Use of Refugee and Human Rights Instruments to Support Refugee Integration Rights*

In addition to ratifying the 1951 Convention, States are urged to lift reservations made at the time of accession and to incorporate, as necessary, the fundamental principles of the 1951 Convention into domestic legislation.<sup>69</sup> In the context of this reference guide, States are also urged to lift reservations<sup>70</sup> on rights essential to the integration process (e.g. access to employment, public relief) and to ensure that the relevant secondary legislation and administrative structures are in place to guarantee effective implementation of integration rights. The provisions in the 1951 Convention alone, however, do not address all the rights and measures that may be necessary for integration, and should therefore be complemented

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increasing restriction placed on asylum-seekers accessing welfare benefits militate against their successful settlement and integration in the long term.” Furthermore, the study argues that:

“there is an increasing tendency by EUMSs [European Union Member States] to differentiate between refugee/asylum-seekers and other non-forced migrant groups. For the former category there is more restrictive engagement with the instruments of settlement and integration whilst awaiting refugee determination. Indeed, our evidence suggests that attempts to mainstream refugee integration into the wider framework and policies for the integration of immigrants are breaking down against the back cloth of deterrence and restrictionism adopted by EUMs towards asylum-seekers. These trends are tending both to ghettoise asylum-seekers and refugees rather than managing diversity and to erode fundamental principles of protection which are a necessary prelude to integration.”

See Summary Report of the findings of the *Survey on Policy and Practice Related to Refugee Integration*, commissioned by the European Refugee Fund Community Actions 2001/2, at the Oxford Brookes University website: <http://www.brookes.ac.uk/schools/planning/dates/RefInt/index.htm> (see specifically the ‘Summary’ section, paragraph 5, page one; and for the last citation see the section ‘Comparative Issues’ of that website).

**Further support** for this recommendation may also be found in: UNHCR, *Reception Standards in EU* (in particular, UNHCR’s recommendations at p. 3); Crisp, ‘No solutions in sight: the problem of protracted refugee situations in Africa’, in *New Issues in Refugee Research*, Working Paper no. 75, January 2003 (in particular, pp. 24-29); UNHCR, *Local Integration* (see above at footnote 1), para. 21; UNHCR, Global Consultations, ‘Recommendations on the Refugee Perspective’, developed at a meeting with refugees in September 2001 (Institut de Développement Social, Rouen), p. 6; da Costa (see above at footnote 22), pp. 360-362.

<sup>68</sup> UNHCR, *Reception Standards for Asylum-seekers in the European Union*, July 2000.

<sup>69</sup> For example, the OAU Convention, in point 10 of the Preamble, calls upon Member States of the Organisation who have not already do so to accede to the 1951 Convention (and 1967 Protocol), and meanwhile to apply its provisions to refugees in Africa. Similarly, the Cartagena Declaration in articles II (a) (c), and III (1) (2) encourages the undertaking of constitutional procedures for accession to the 1951 Convention (and 1967 Protocol) without reservations, the establishment of the internal machinery including the adoption of national laws and regulations for its implementation, and the lifting of existing reservations. The UNHCR Agenda for Protection also reiterates the need for all of the above in Goal 1, Objective 1.

<sup>70</sup> This refers to reservations under article 42 (1) of the 1951 Convention which provides that at the time of signature, ratification or accession, any State may make reservations to articles in the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive. As seen above however, even regional instruments suggest the lifting of these reservations, see article III (2) of the Cartagena Declaration.

by other instruments. As such, States are further encouraged to ratify and to work towards the effective implementation of regional refugee instruments, as well as international and regional **human rights** instruments, and to use these as the framework for further **defining** and **protecting** the integration rights of refugees.<sup>71</sup> An explicit statement to this effect is contained in the Cartagena Declaration for example, where the role of the Inter-American Commission on Human Rights with regard to the protection of the rights of refugees is recognized, and Member States are urged to establish minimum standards for the treatment of refugees not only on the basis of the 1951 Convention but also the American Convention on Human Rights, which they are encouraged to apply in dealing with refugees.<sup>72</sup>

### 3. *Making Local Integration an Effective and Viable Durable Solution: Adopting Policies, Standards, and a Regime of Rights (and Residency) Which are Conducive to Integration*

#### □ *Regime of Rights Favourable to Integration*

Article 34 of the 1951 Convention provides that States are to facilitate integration. UNHCR's Statute also calls upon Governments to cooperate with UNHCR by, *inter alia*, promoting the assimilation (i.e. integration) of refugees.<sup>73</sup> As described elsewhere in this reference guide, this is most effectively accomplished by adopting a regime of rights which generally accords refugees the same rights as permanent residents or nationals, thus contributing to their speedy and increased self-reliance, and overall social protection and cultural integration – a goal which is in the interests of both refugees and the host society. In addition, some special measures particular to the situation of refugees may also be necessary, as will integration programmes and activities such as language and orientation courses, for instance.

#### □ *Durable Legal Status and Facilitating Naturalization*

Similarly, granting recognized refugees a secure and durable residency status upon recognition (either automatically, or within a relatively short time, and with conditions facilitated for refugees), such as permanent residence, and facilitating conditions for their naturalization will contribute immeasurably to a positive integration process and the formation of durable ties, not least because it will facilitate access and implementation of rights, and end the uncertain situation of refugees who would otherwise lack an effective citizenship.

#### □ *Linking Effective Protection With Durable Solutions: A Strategy for Reducing Irregular or Secondary Movements.*

In addition to benefiting refugees and States by increasing the chances of successful integration and avoiding conditions leading to social marginalization, offering refugees a durable legal status and other favourable conditions for local integration (e.g. speedy and

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<sup>71</sup> This recommendation is consistent with the Statute of the Office of the UNHCR, which provides in article 2(a), and paragraph 8(a) of the Annex to this Statute, that the conclusion and ratification of international conventions for the protection refugees should be promoted by UNHCR, as should the supervision of their application and the proposal of amendments.

<sup>72</sup> See the following articles: I (para. 5); III (8) and (10) of the Cartagena Declaration.

<sup>73</sup> See article 2 (e) of the Statute of the Office of the UNHCR. See also paragraph 8 (c ) of the Annex to this Statute, which provides that UNHCR is to provide for the protection of refugees by, *inter alia*, assisting “governmental and private efforts to promote [...] assimilation [i.e. integration] within new national communities.”

comprehensive family reunification) is an important strategy to reduce irregular or secondary movements globally.<sup>74</sup>

The absence of conditions which are conducive to integration (including socio-economic conditions), may result in a *de facto* lack of effective protection for refugees in countries of first asylum (such as when they cannot ensure their survival needs), or in a reluctance on the part of refugee populations to commit to integration in the host country. With regard to the latter, refugees may refuse to acquire a more durable legal status in the host country (such as acquisition of permanent residence or naturalization) for fear of losing their chances at resettlement or the benefits granted to those holding refugee status. Such is the case in a number of African countries, for instance.<sup>75</sup> Lack of sufficient conditions, rights, or a durable status to secure the local integration of refugees are thus some of the reasons leading to irregular and secondary movements.

□ *Ensuring the Protection of Refugee Rights Within Broader Migration Movements*

States should ensure that immigration control measures and policies are tempered by adequate protection and human rights safeguards which **differentiate** in an appropriate manner between refugees, on the one hand, and persons **not** in need of international protection, on the other. Of special concern are policies relating to such issues as access to employment, public relief (social assistance) and family reunification – such policies may be negatively affected by priorities related to immigration control<sup>76</sup> which typically favour deterrence (for refugees and illegal aliens alike) by reducing integration rights or imposing administrative obstacles or delays in the implementation of certain key rights.

4. *Adopting a Definition of Integration and an Integration Framework*

Incorporating a definition of integration as well as an integration framework in domestic legislation or policy allows all actors in host countries to have a common reference point and goal (i.e. “roadmap”). While such a definition will be a living text, evolving alongside related policies and other changes, it encourages States to formulate and work towards a national vision (including on issues of national identity) and develop a common strategy for accommodating and managing a diverse and dynamic population – including its many benefits. It would be desirable that the major stakeholders in society and in this type of process, (such as, *inter alia*, relevant NGOs, ethnic, immigrant, refugee and local communities, as well as federal, regional and local levels of government) contribute to such a definition and engage in a process of consultations. A definition of integration should be in keeping with international human rights principles, and promote values of mutual respect for differences, as well as respect for the host society’s social customs and

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<sup>74</sup> The reduction of irregular or secondary movements is contained in objective 4 of Goal 2 (Protecting refugees within broader migration movements) of the UNHCR Agenda for Protection. Reference should also be made to ExCom Conclusion No. 58 (XL) of 1989 on the Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner From a Country in Which They had Already Found Protection.

<sup>75</sup> Resettlement programmes should therefore always be part of a wider protection and durable solutions strategy – a strategy which harmonizes UNHCR’s responses to different refugee needs, so as to avoid that resettlement activities jeopardize incentives or programmes related to self-reliance, or the acquisition of a durable status in the first asylum country. In addition, the resettlement criterion (or grounds) of ‘lack of integration prospects’ must be applied in a consistent manner and through the application of established and objective indicators.

<sup>76</sup> See UNHCR’s Agenda for Protection, Goal 2 (Protecting refugees within broader migration movements), Objective 1, which concerns the need for improved identification of and proper response to the needs of asylum-seekers and refugees, including access to protection within the broader context of migration management.

laws. It should recognize that local integration is a social, economic and political process of acclimatization, and aim to ensure that refugees can live amongst the host population without discrimination or exploitation and contribute actively to the life of the country and community.

□ *Recognizing State Responsibility to Facilitate Integration, and Adopting an Integration Framework*

States that have not already done so are urged to adopt a legally binding provision in their legislation recognizing their responsibility to facilitate the integration of refugees, thus incorporating into domestic law the principle in article 34 of the 1951 Convention. Such a provision should be accompanied by an integration framework, containing a definition of integration (as specified above) and detailing concrete measures or a *modus operandi* for implementation of integration policies and activities (see below).

To the extent possible, this statement of responsibility should be binding on all levels of government (federal, regional and local levels) and draw clear lines of responsibility for the relevant government actors and institutions at the different levels. In addition to providing a legal basis and national framework upon which to build or improve refugee integration programmes and practices, such a provision also imposes on local offices and municipalities dealing with refugees on a regular basis a legal obligation to facilitate their integration into local communities. Given the extent to which government services and authorities may be decentralized in many countries, it is important that the moral obligation be also a legal obligation to assist refugees in their integration process. Ensuring that relevant laws and administrative procedures are refugee-friendly (i.e. that they do not leave refugees in a grey area, or pose unintended obstacles to accessing the relevant rights or services etc.) is also important to ensure proper implementation of these laws and refugee rights.

5. *Promoting Venues and Opportunities for Exchange of Information and Best Practices on Integration*

Increased opportunities for compilation and exchange (this would include documentation and dissemination) of information related to integration practices, frameworks and innovative programmes, should be promoted between governments and relevant organizations, particularly at the regional, sub-regional and local levels.<sup>77</sup> In addition to making information about integration practices more available (including best practices and lessons learnt), opportunities for dissemination and exchange on this issue would stimulate increased expertise on integration, highlight new strategies, and provide comparative reference points which, amongst other things, can facilitate the harmonization of regional (or sub-regional) integration standards, should this be deemed desirable.

As regards best practices and innovative integration strategies, the following are only a few examples of practices on which further information should be shared:

- frameworks proposing creative divisions of responsibility between different levels of government (and their institutions and agencies);

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<sup>77</sup> As mentioned in Part I of this reference guide, the increasing importance of regional communities such as the European Union, and the various sub-regional communities in the Africa region, may also render harmonization of laws and standards, and exchange of information, including on practices affecting refugees, all the more necessary.

- innovative approaches such as those linking integration with development initiatives (especially those benefiting refugees and local residents simultaneously);
- self-reliance and land policies for rural refugees; and
- successful programmes providing individualized refugee assistance and counselling, and which typically increase self-reliance and facilitate access to rights and resources in the host country (such as some housing assistance programmes and programmes which involve the development of an individual or family “plan of action”).

#### 6. *Fostering a Positive and Respectful Attitude Toward Refugees*

Enhanced awareness and respect for refugees should be fostered, including by encouraging political leaders to uphold the basic values underpinning the 1951 Convention and 1967 Protocol, and making better use of or distributing more broadly public awareness materials<sup>78</sup> aimed at engaging and sensitizing civil society to the situation of refugees.

States should also develop public awareness programmes, with the participation of refugees, which focus on the positive social and cultural contributions that refugees can make and which promote principles of pluralism and cultural diversity, as well as common values and bridge-building. At the institutional level, it is important to provide training to civil servants on human rights and refugee affairs, and to create direct channels of communication between politicians (e.g. members of parliament), political institutions and refugees; the latter should provide refugees with an opportunity for input on issues or decisions impacting on refugee integration,<sup>79</sup> as well as a role during subsequent monitoring, consultation or evaluation activities.

#### 7. *Measures to Combat and Monitor Racism, Racial Discrimination and Xenophobia*

Measures to combat racism, racial discrimination and xenophobia directed against aliens generally or refugees in particular, are necessary given the long-term negative effects that this increasing global phenomena has on the local integration of refugees and the overall health of communities and societies.<sup>80</sup> As detailed in the recommendation below, partnerships with other actors and partners, including refugees themselves, are essential to an effective strategy to combat racism and xenophobia.

While refugees are responsible for abiding by the laws of the host society and should make efforts to learn about and respect its culture and social norms, host governments and relevant institutions should also promote the principles of mutual respect, cultural diversity and tolerance for differences, and support opportunities for cultural exchange and education.<sup>81</sup>

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<sup>78</sup> Including materials developed by UNHCR, and other educational materials such as information pamphlets, teachers’ guides etc., developed by other relevant actors in the refugee field.

<sup>79</sup> See UNHCR, Global Consultations, ‘Recommendations on the Refugee Perspective’, p. 5.

<sup>80</sup> In the Agenda for Protection, enhanced respect for refugees (Objective no. 8) is seen as instrumental to strengthening implementation of the 1951 Convention and 1967 Protocol (see Goal 1).

<sup>81</sup> See, UNHCR, Global Consultations, ‘Recommendations on the Refugee Perspective’, p. 5.



## 8. *Promoting the Development of Refugee Community Structures and Networks*

In keeping with the UNHCR community development approach,<sup>82</sup> States, UNHCR and other partners are encouraged to empower refugee communities to help meet their own protection and integration needs, including by mobilizing and promoting the development of refugee community-based systems, networks, and organizations which provide assistance to refugees from the reception to the integration phase.<sup>83</sup> Essential to the promotion of such networks is the need in some countries to: improve the general legal status of NGOs and related institutions (e.g. non-profit associations, cultural or assistance centres); create a clear legal framework for their operations; and ensure refugees are guaranteed effective enjoyment of the civil and political rights<sup>84</sup> enabling them to establish or participate in these activities and institutions.

Investing in structures providing community support and representation to the various refugee groups in the host country can have many benefits. For example, it may facilitate pro-active strategies on the part of the populations of concern, increase employment opportunities and provide an important source of psychological, social and material support to newly recognized refugees. Such structures are essential to the initial transition and adaptation phase of integration and to the well-being of these communities in the long run, since they play an invaluable role as informal networks for the purposes of work and a myriad of essential community services. Where relevant, such organizations should be provided with organizational, fundraising and other training or assistance (e.g. additional resources or training on community services) in order to establish or improve their services.

## 9. *Strengthening Partnerships With Civil Society*

Beyond the working relationships between UNHCR and key government counterparts, partnerships with NGOs, other actors in civil society, as well as refugee women, men and children, are also necessary to strengthen protection<sup>85</sup> and assistance, combat xenophobia, and raise awareness and mutual understanding between refugees and their host society. Indeed, in addition to refugee-specific NGOs, other actors in civil society can also prove important partners by extending their mandate or services to include refugees, for example. In this fashion, human rights NGOs, national ombudsman institutions, national human

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<sup>82</sup> This approach aims at strengthening refugee initiative and partnership, including by: involving refugees (including women, men, children, the elderly, minorities etc.) in the planning of services, so as to ensure their ownership of all phases of programme implementation; reinforcing dignity and self-esteem; achieving a higher degree of self-reliance and increasing cost effectiveness and sustainability of programmes. It is an approach that is to be applied from the early stages of operations until and including the durable solutions phase. In the UNHCR Agenda for Protection, a key recommendation is that UNHCR disseminate widely and promote better understanding of its community development strategy, and train staff, government officials and partners in its proper application (Goal 3, Objective 4). See also, UNHCR, 'Reinforcing a Community Development Approach', EC/51/SC/CRP. 6 (15 February 2001).

<sup>83</sup> See UNHCR, *Agenda for Protection* (see above at footnote 12), Goal 3, Objective 4, at 60.

<sup>84</sup> These rights may include for example, the right of association, assembly and freedom of expression. See chapter 13 on Selected Political Rights in this reference guide.

<sup>85</sup> See UNHCR *Agenda for Protection* (see above at footnote 12), Goal 3, Objective 3, which states "UNHCR to continue to strengthen partnerships for protection and awareness-raising, not only with host and donor governments (including national and regional legislatures), but also NGOs, other actors of civil society, as well as refugee men, women and children."

rights commissions,<sup>86</sup> legal aid centres such as university legal clinics, and Bar associations<sup>87</sup> could include as part of their organizational mandate and activities, advocacy, legal counselling and representation, and even monitoring on the rights of refugees.<sup>88</sup> Similarly, refugees could benefit from the diverse services of other organizations such as: crisis and assistance centres; groups providing employment, training or housing assistance to the under-privileged; business, artistic or cultural associations; literacy programmes; and centres or institutions providing targeted assistance to women and children in need.

In some countries, recognized refugees might, as legal residents, automatically benefit from the assistance of some of these organizations or institutions. However, in other host societies, barriers to accessing these services could include: particular eligibility conditions or other requirements which they cannot meet; lack of translation services; and lack of familiarity or expertise with different ethnic groups, or refugee groups more specifically. As such, once key partners and target areas are identified as priorities for the refugee population in the host country, relevant refugee actors (e.g. UNHCR, refugee government agencies, refugee-specific NGOs, or refugee community structures) could initiate dialogue, negotiate a working partnership and provide training and other assistance to relevant organizations in order to enable them to effectively extend their services to refugees. In addition to the services which these organizations may be able to provide refugees, this type of “outreach” strategy has the added benefit of familiarizing refugees with mainstream organizations and services, and increasing their contact with the local population. Moreover, increasing awareness of refugee issues among some of the types of organizations and institutions mentioned above, has a doubly positive impact, since they often have the capacity in turn, to reach and raise awareness among the general population.

#### *10. Promoting Specialized NGOs in the Field of Integration*

Where relevant (i.e. depending on the situation, needs, number of refugees and programme structures in each country), the creation of more specialized organizations (governmental or and non-governmental) with a mandate to focus exclusively on the integration of recognized refugees, should be promoted.<sup>89</sup> Best practices in this field<sup>90</sup> have demonstrated that the more focused approach of such specialized organizations could: improve the implementation of relevant programmes; help identify and respond to specific integration problems; facilitate and monitor the integration process; improve the quality of counselling services, as well as fund-raising and advocacy efforts on behalf of recognized refugees.

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<sup>86</sup> For example, in Africa, and more specifically in countries such as Uganda, South Africa, Zambia, Kenya and Ghana, National Human Rights Commissions are becoming very active and may eventually play a significant role in the protection of refugee rights in Africa.

<sup>87</sup> For example, such legal clinics have long been established in western Europe and North America, and have more recently also developed in eastern and central Europe. See also chapter 10 on Right of Access to Courts and Related Judicial Guarantees, in this reference guide.

<sup>88</sup> By virtue of their refugee status, lack of support structures, language skills and familiarity with the host country, recognized refugees may be vulnerable to some special problems. In order to provide effective services to refugees, the above-mentioned NGOs or legal assistance centres, should be offered basic training on the rights, and special legal needs and concerns of refugees. See also chapter 10 in this reference guide.

<sup>89</sup> The decision on whether such institutions or NGOs should be promoted will depend on the particular situation, needs, available funding and programme structures in each country, as well as whether a government integration programme already exists.

<sup>90</sup> PPI an NGO providing integration counselling to recognized refugees in the Czech Republic (Prague), is one such positive example, and is described in detail by da Costa (see above at footnote 22) (see in particular chapter I on ‘assimilation’, and chapter III on housing).

11. *Increased Role of Local Actors in the Integration Process (Including Municipalities and Local NGOs)*

An increased role by municipalities and local NGOs in the integration process has also proven an effective strategy, as local communities are more likely to accept and meet the needs of refugees when they are given a role in the process and understand they are stakeholders in helping refugees to become self-sustaining.

12. *Promotion of Self-Reliance, Empowerment, and Participation of Refugees in Relevant Programmes*

From the outset, assistance programmes for refugees should include strategies to promote their participation as well as their self-reliance and empowerment.<sup>91</sup> Depending on the context, such strategies could include *inter alia*, relief-substitution programmes, or expanded possibilities for education, vocational training, and agricultural and other income-generating programmes. Such programmes should tap the resourcefulness and potential of refugees, including the potential of women in particular, and should benefit men and women equitably.<sup>92</sup> Host and donor States, UNHCR, other humanitarian/development actors and domestic partners should also ensure that refugees (including refugee women and adolescents) and host communities themselves participate in the design and development of self-reliance programmes.<sup>93</sup> Increased efforts to further develop integrated approaches that can simultaneously strengthen the absorption capacity and situation of refugee-hosting areas are also necessary.<sup>94</sup>

13. *Gender and Age-Sensitive Measures: Tailoring Integration Assistance to Special Needs and Potential*

Ensuring the successful integration of certain groups from amongst the refugee population may require a special effort to encourage their participation in programmes, or to tailor programmes to their particular needs or potential. Such groups could include refugee women, children and adolescents, unskilled young men, and persons with special vulnerabilities due to age or disability. A gender and age-sensitive community-development approach to local integration should therefore be promoted, and as possible and appropriate, the needs of both the refugee and the local population should be taken into account.<sup>95</sup>

□ *Gender*

In order to better tailor programmes to women refugees,<sup>96</sup> these programmes, strategies and policies should include, as appropriate, a **gender analysis** of relevant populations and take into consideration, *inter alia*: the special needs and strengths of refugee women; prevailing gender roles within the family structure and specific refugee communities

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<sup>91</sup> See UNHCR, *Agenda for Protection* (see above at footnote 12), Goal 5, Objective 7.

<sup>92</sup> *Ibid.* See also provisions related to development programmes and the rights of rural women in CEDAW, for example.

<sup>93</sup> UNHCR, *Agenda for Protection* (see above at footnote 12), Goal 5, Objective 7.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, Goal 5, Objective 4.

<sup>96</sup> A gender mainstreaming approach should be adopted which analyzes the different advantages and skills, as well as the obstacles and special needs of women and men in relation to the different integration rights, as well as assistance programmes and policies.

(including the obstacles these may pose to the implementing of certain programmes); and generally promote measures and strategies which encourage and facilitate the local integration and general welfare of refugee women and girls. Amongst other things, such measures could have some of the following aims:

- facilitate their effective **access** to integration-related services and programmes;<sup>97</sup>
- provide **individualized** employment and self-reliance assistance for women unfamiliar with the job market;
- increase refugee women's **knowledge** of their rights and the administrative and social service (assistance) structures in the host country;
- increase their **contacts** with the host population as well as their opportunities; and
- adopt measures to increase their **participation**, representation and decision-making in all areas of refugee life and local involvement in their new host country.

It is worth noting that the gender mainstreaming approach suggested above also includes a comparative analysis in relation to refugee men. A **gender** analysis must by definition include both women and men, girls and boys. Indeed, certain categories of male refugees, such as young unskilled male refugees, or single (i.e. unmarried) male refugees, may also be in need of particular focus as their integration (and acceptance) may prove especially difficult in certain settings. The focus on women in this section, however, simply reflects the fact that women have traditionally been less visible (given their traditional household duties) and had less access to mainstream society and services, thereby making it necessary to highlight their particular needs and interests. In addition, assistance targeting women tends to have important benefits for families and communities as a whole.

□ *Age-Sensitive Approach*

Refugees with special needs or vulnerabilities, including due to age or disability, should be provided with special support, including follow-up, as necessary. Other groups may also require particular attention in order to secure or maximize their integration and life opportunities. For example, the local integration of refugee children and adolescents should be promoted and supported, including, as appropriate, by: encouraging their participation in processes and decisions affecting them as well as in different areas of refugee life; informing them of their rights and giving them access to other knowledge enabling them to make informed decisions in key areas of their lives; securing the equal and free access of boys and girls to primary and secondary education, including by providing additional necessary assistance, incentives or other measures as appropriate,

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<sup>97</sup> For example, language courses could be provided at times which are compatible with their household duties, or alternatively, language programmes could include volunteer or affordable child care services.

such as supporting their attendance at pre-school,<sup>98</sup> and providing school materials, uniforms or food.<sup>99</sup>

#### 14. *Promoting Integrated Strategies: For Development, Local Integration and Burden-Sharing*

Strategies for the local integration of refugees should, ideally, not be undertaken in isolation, but rather be based on an *integrated* approach which favours:

- inclusion and mutual benefits to refugees as well as host populations; and
- coordination between relevant State, humanitarian, refugee, and development actors in an effort to improve burden sharing and anchor refugee issues and assistance within broader development agendas or existing programmes.

Indeed, there has been an increased emphasis recently on implementing a community development approach within the framework of broader development programmes and in coordination with a range of relevant actors. The Agenda for Protection in particular, has as one of its objectives to “anchor” refugee issues within national, regional and multilateral development agendas. Establishing refugee interests and integration plans within this broader framework has many advantages, and can be accomplished through different strategies of varying complexity. For example, at its most basic level, this strategy can simply mean working more closely with State authorities and development actors (including UNDP, UNHCR and the rest of a UN country team, as well as relevant NGOs) to promote, where feasible, the inclusion or **extension to refugees of relevant benefits** related to broader country or regional development programmes. However, the Agenda for Protection recommends other strategies as well,<sup>100</sup> namely that:

- States consider allocating [specific] development funds to programmes “simultaneously benefiting refugees and the local population in host countries”;
- States also consider including refugee-hosting areas in their national development plans (in this context, UNHCR would encourage multilateral and bilateral development partners to extend tangible support for such initiatives); and
- that UNHCR together with States explore new funding strategies within the private sector.

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<sup>98</sup> Day care for children, or early pre-school programmes are encouraged, as they not only facilitate the acquisition of the local language before children reach first grade, but parents, and women in particular, are then more free to engage in activities and contacts which strengthen their integration process, such as participating in language courses, seeking outside employment, or enrolling in vocational or educational courses.

<sup>99</sup> See UNHCR, *Agenda for Protection* (see above at footnote 12), Goal 6, Objective 2 which stresses certain measures to improve the framework for the protection of refugee children, including for example: their participation in decision-making; the promotion of age-sensitive approaches at every stage of programme development, implementation, monitoring and evaluation; the ratification of relevant international conventions on the rights of the child; informing refugee children of their rights; and stressing the importance of primary and secondary education for refugees.

<sup>100</sup> *Ibid.*, Goal 3, Objective 5.

In keeping with UNHCR's community development approach to local integration and the principles contained in the Agenda for Protection, the needs of both the refugee and the local population should be taken into account to the extent possible, and as appropriate.<sup>101</sup> Thus, it might be preferable in certain situations to support an existing programme for nationals in which refugees participate and benefit, rather than to allocate funds to an independent programme targeting refugees exclusively. For example, a housing programme to provide accommodation for refugees could be based on the restoration of old housing and contributions to the local infrastructure (e.g. roads, water pipes), such that the needs of both the local community and the refugee population are met. Where special programmes are necessary however, such as to address specific needs or a gap, these programmes should ideally be temporary, or alternatively (if appropriate), be inclusive of the local population in some way.

Another particular strategy which has been proposed and which draws on the above recommendations in the Agenda for Protection, consists in an approach entitled "Development Through Local Integration" (DLI).<sup>102</sup> DLI is a strategy whereby development funds are directed specifically at refugee populated areas, where these funds then benefit both refugees and the local population. The aim of such a strategy is to help diminish the burden on the local community, contribute to local development and broaden the prospects for refugee integration. This approach is fundamentally different from those previously mentioned, in that refugees are not simply feeding into or benefiting from pre-existing development programmes on an *ad hoc* basis; rather it is the focus on refugee populated areas that is driving these particular development projects. This strategy would thus turn refugees from burdens and simple beneficiaries into agents of development. Practically speaking, DLI requires soliciting additional development assistance with the (chief) aim of attaining the local integration of refugees.

DLI is particularly relevant to protracted refugee situations, as a means of improved burden sharing for asylum countries which consider the local integration of refugees (or certain groups of refugees) a viable option, and choose to provide opportunities for this durable solution. DLI is an option rather than an obligation for States, and as such the attitude and commitment to local integration by the host government and related central and local authorities is essential to this strategy, as is the commitment on the part of the donor community to provide additional funding. From a programming perspective, DLI envisions broad-based partnerships between government, humanitarian and both multi- and bilateral development agencies, with the aim of achieving a better quality of life and self-reliance for refugees as well as improvements in the quality of life for host communities.<sup>103</sup>

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<sup>101</sup> *Ibid.*, Goal 5 (Redoubling the Search for Durable Solutions), Objective 4.

<sup>102</sup> DLI was proposed in the 'Framework for Durable Solutions for Refugees and Persons of Concern', issued by UNHCR, May 2003 (see above at footnote 13). The Framework for Durable Solutions is a policy and implementation framework proposing particular strategies (i.e. DAR, DLI and the 4Rs) for achieving key goals of the Agenda for Protection, namely: sharing burdens and responsibilities more equitably and building capacities to receive and protect refugees; and, redoubling the search for durable solutions (which correlate to Goals 3 and 5 respectively). DLI in particular, highlights the adoption of bilateral and multilateral agreements to increase, facilitate and improve the opportunities for local integration as a durable solution. For more details on the *Framework for Durable Solutions*, please refer to the document itself (see above at footnote 13), as well as UNHCR, *Planning and Implementing of DAR Programmes* (January 2005).

<sup>103</sup> UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern* (see above at footnote 13), p. 24.

As emphasized in the Agenda for Protection, realising local integration through a strategy of **partnerships** with donor and host States, UNHCR, as well as humanitarian and development actors, and developing together with them **integrated approaches** has important benefits. Some of the more important of these include: burden sharing; providing the resources which make possible self-reliance; sustaining the viability of local communities affected by the presence of refugees; and strengthening the absorption capacity of refugee-hosting areas.<sup>104</sup> Thus, while particular funding and partnership strategies, as well as the arrangements between refugee and the host communities may differ significantly depending on the profile, needs and other specifics of each situation, the community development approach elaborated above will generally provide sound working principles.

#### 15. *Administrative and Implementation Gaps*

Even where legislative frameworks are in place, administrative and implementation gaps frequently pose serious obstacles to refugees wishing to access or exercise their integration rights. At times, these implementation gaps may be due to domestic difficulties in setting up the administrative or procedural structures necessary to give effect to new refugee legislation, or they may be due to a lack of training on refugee specific situations and legal reforms (especially in the civil service sector). At other times, problems related to implementation reflect larger social problems, such as those related to societies in transition, or a general lack of funds for government/administrative infrastructures. For example, as regards the latter, a society with little resources to allocate to health facilities or public relief (i.e. social assistance for the destitute) benefits, will often only accord assistance to the most needy amongst the eligible applicants, and in this way, may also discriminate against refugees, as they are perceived as foreigners who therefore generally have more means or alternative solutions.

As is further explained in the relevant sections in this reference guide however, some of the more troublesome difficulties in accessing or implementing refugee rights are related to fundamentals such as the residency (legal) status attributed to refugees, the deliverance or terms of their identity cards, the ability to demonstrate a place of residence (address of domicile), and issues relating to freedom of movement. According refugees a residency status or legal stay which is insecure, administratively burdensome and obscure to civil servants for example, will often not only impede their access to many rights and state benefits, but will also reduce their employment opportunities, as employers will see their stay in the country as temporary. The same is also true with respect to identity cards with short validity periods. Strategies to compile, analyze and address gaps in the implementation of rights are therefore very often as necessary as the establishment of legal frameworks and provisions. While certain problems of access to rights may require training of relevant government offices and civil servants on refugee issues, or in other cases simple awareness raising, other strategies may have to include raising key issues of residency status, housing or ID cards as mentioned above, or finding creative solutions

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<sup>104</sup> UNHCR, *Agenda for Protection* (see above at footnote 12), Goal 5, Objectives 4 and 7. Objective 4 in particular, provides that:

“local integration [should have] its proper place as part of a comprehensive strategy for durable solutions” and that this may be achieved *inter alia*, by: “States, working in partnership with international and regional development actors, to contribute to the realization of local integration through burden-sharing, which ensures that the necessary resources are available to underpin self-reliance and local integration, in a manner that sustains the viability of local communities affected by their presence.”

such as contributing to local infrastructure and services in return for providing assistance to refugees (vocational training, health care), which require more concerted lobbying for reforms and undertaking special arrangements with host governments and institutions.



## CHAPTER 2: LEGAL RESIDENCY STATUS AND RELATED REGIME OF RIGHTS

### A. International Standards

#### 1. *Minimum Guarantees and General Effect of Residency Status on Integration*

The type of legal residency status to be granted to recognized refugees does not benefit from an explicit provision in the 1951 Convention or any other international instrument (no corresponding Box of “Main International Standards” is therefore provided in this chapter). Regional refugee instruments are equally silent on this issue, with the notable exception of the European Council Directive on Minimum Standards which provides that as soon as refugee status has been granted, refugees and their family members are to be issued a residence permit which must be valid for at least three years and be renewable (unless compelling reasons of national security or public order require otherwise).<sup>105</sup>

Residency status is nonetheless a critical factor in the integration process affecting the regime of rights applicable to refugees, as well as their prospects for establishing a definitive and permanent home and assuming their role as full and equal members of society. Indeed, when assessing whether the residency status granted to recognized refugees is consistent with the standards of treatment contained in the 1951 Convention, it is important to ensure that the minimum guarantees protected by these are satisfied but also to assess the general effect of the residency status on naturalization and general integration. Seen from this perspective, granting recognized refugees a durable residency status may be interpreted as a concrete measure facilitating integration, thus fulfilling State obligations in this regard under article 34 of the Convention.

#### 2. *Durable Residency Status Generally Provides Basis of Broader Regime of Rights*

While refugee status and the related rights under the 1951 Convention do indeed provide refugees with a number of important rights, including certain rights and safeguards which are not necessary with regard to other foreigners with functioning nationalities, it is important that recognized refugees also be granted the broader status and rights allowing them to function as full members of their new community and to integrate locally. At the domestic level, it is their legal residency status that normally constitutes the basis of their more general rights and legal standing in their host country, such that granting refugees a durable residency status (such as permanent residence) and the related regime of rights, is perhaps the single most important and effective measure a State may take to facilitate their local integration. This is so for many reasons, some of which are detailed below.

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<sup>105</sup> Article 24 of the European Council Directive on Minimum Standards. See also references to residence permits in paragraph 30 of the Preamble to the Directive, which provides that Member States may stipulate that benefits relating to access to employment, social welfare, health care, and access to integration facilities may require the prior issue of a residence permit. Article 2(j) also defines the term “residence permit” as “any permit or authorisation issued by the authorities of a Member State, in the form provided for under that State’s legislation, allowing a third country national or stateless person to reside on its territory”.

### 3. *Rights Often Primarily Associated with Residency Rather Than Citizenship*

In a large number of countries, rights are primarily associated with a person's residency status rather than citizenship. Attributing a durable residency status therefore ensures that refugees are automatically granted and mainstreamed into the broad regime of rights associated with that status. One advantage of this is that, since the 1951 Convention does not deal with all the rights necessary to local integration, it is an efficient way to address and fill such gaps. Moreover, the more generous regime of rights associated with a durable residency status (such a permanent residency) are generally equivalent to the rights of citizens, and therefore offer refugees the best conditions for a successful integration.

### 4. *Durable Residency Status Facilitates Implementation of Refugee Rights*

A durable residency status, such as permanent residence also has the important advantage of significantly facilitating the implementation of refugee rights. For instance, while civil servants are generally experienced in applying the regime of rights related to permanent residence, they are often less informed and more reluctant to apply regimes associated with a less known, temporary or special status. A more common residency status is bound to cause less confusion and require less training at the level of implementation for government institutions, refugee-assisting NGOs, as well as in the private sector, such as with employers and landlords. Recognized refugees would therefore only require particular attention or treatment in those areas where they are granted special protection or rights by virtue of their refugee status.

In some countries, proof of a durable residency status<sup>106</sup> (which is frequently provided in the form of an identity/residency card), is also often necessary in order to implement specific rights, rendering it administratively difficult or impossible to access even core rights if one's residency status is not sufficiently durable or if it is considered of an 'exceptional' or 'temporary' nature.

Furthermore, in addition to bureaucratic simplification, a streamlined and durable residency status has a beneficial psychological impact on refugee integration, by reducing the stigma often associated with refugee status and providing refugees a sense of long-term security, which encourages the establishment of durable ties in the host country.

### 5. *Acquiring a Durable Legal Status and Eligibility to Apply for Naturalization*

As importantly, the type of residency status granted to refugees upon recognition is relevant with respect to both their ability to acquire a secure and durable legal status in their country of asylum, and their eligibility to apply for naturalization. Amongst other factors, due to their special socio-economic vulnerabilities, refugees are frequently unable to meet the stringent requirements associated with the normal procedure for acquisition of permanent residence<sup>107</sup> in many countries. Such requirements may include but are not limited to: proof of secure or permanent accommodation; sufficient and secure financial means (to support themselves as well as dependant family members); durable family or

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<sup>106</sup> Further details on proof of legal residency and related problems are provided in chapter 9 on Identity Papers and Convention Travel Documents in this reference guide.

<sup>107</sup> 'Permanent residence' is also referred to in some countries as 'permission to settle', 'domicile', and other similar terms, but generally is equivalent to whatever residence status is necessary as a precondition to apply for citizenship.

economic ties; and a certain duration of legal stay in the country, for which the time spent in the RSD procedure or under an alternative refugee status may not count.<sup>108</sup> In relation to these requirements, refugees may lack the support and family networks necessary to satisfy such conditions for example, or may confront language and other barriers which will unduly prolong the time necessary to establish economic ties or prove financial means. Moreover, unlike other foreigners who may have to meet the same requirements, refugees do not benefit from another functioning nationality. Finally, without the required years of permanent residency, a common pre-requisite for naturalization, refugees will also remain ineligible for naturalization.

## **B. Recommendations**

### *1. A Secure and Durable Residency Status*

In addition to their refugee status, refugees should be granted a secure and durable form of legal residency status,<sup>109</sup> such as permanent residence, automatically upon recognition. For all the reasons mentioned above, granting refugees permanent residence is one of the most effective measures States can adopt to facilitate integration. Such a status not only offers refugees a form of legal residency which, due to its long-term security and psychological impact, is conducive to integration, but it also affords them the broader regime of rights attributed to this status (corresponding to essentially the same as those granted to nationals), including the right to family reunification, and significantly facilitates the implementation of refugee rights by linking them to a common and better known form of legal residence.

### *2. Residency Status Should be Compatible With Residency Requirement for Naturalization*

The legal residency status granted refugees upon recognition should, for the purposes of integration, be *compatible* with the form of residency ultimately required for naturalization. This means that if refugees are not automatically granted permanent residence (which as mentioned above is normally required to be eligible for naturalization) they should at minimum be granted a status which will allow them to apply for permanent residence before applying for naturalization. Recommendations on this are provided in chapter 14 below.

### *3. No Automatic Expiration Period or Withdrawal of Refugee Status Should be Prescribed*

States should not provide for an automatic expiration period of refugee status, as it leads to a situation of insecurity with regard to their stay and continued protection in the host country.<sup>110</sup> Relatedly, refugee status and/or some related rights should not be withdrawn

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<sup>108</sup> Indeed this is an important way in which domestic legislation often discriminates against refugees *vis-à-vis* other aliens, since the time that they have lived legally in the host country under another status is often not counted towards the period of residence required to apply for permanent residence.

<sup>109</sup> UNHCR, *Agenda for Protection*, Goal 5 (on durable solutions), Objective 4: “States [...] examine where, when and how to promote the grant of a secure legal status and residence rights, which could include the opportunity to become naturalized citizens of the country of asylum, for refugees who have already attained a considerable degree of socio-economic integration.”

<sup>110</sup> The term ‘automatic expiration period of refugee status’ mentioned above, refers to what in fact is an automatic ‘cessation’ clause, as per the terminology used in the 1951 Convention. Even in the context of

when a refugee acquires a different status, such as permanent residence, as certain refugee-specific rights (e.g. the right to a Convention Travel Document (CTD) and *non-refoulement*) may continue to be relevant. However, such refugee-specific rights and protection are no longer necessary once the refugee is naturalized.

#### 4. *Refugees Should Not be Specifically Excluded from Acquiring Long-Term Residency Status*

Even where a short-term status (e.g. three years) is automatically granted to newly recognized refugees, laws relating to long-term residency should *not specifically exclude* refugees or render them ineligible to apply for the latter. At minimum, recognized refugees with short-term status should have at least the same rights as other foreigners to apply for long-term residency, and ideally they should be accorded more favourable provisions given their lack of an effective nationality and the additional obstacles they often face. Long-term residency laws should not discriminate against refugees by making them ineligible to apply or by granting them less rights than other foreigners in similar circumstances. For example, if within a regional community, such as the European Union, foreigners with long-term residency status are granted the right to move and take up residence in another Member State, refugees with long-term residency should also be granted these same rights.

#### 5. *Minimum Requirements of Other Legal Statuses*

Where the residency status granted to refugees upon recognition is inferior to permanent residence, efforts should be made to ensure the following:

- the residency status is not for an unduly ‘temporary’ or short term (should not be inferior to five years);<sup>111</sup>
- it is automatically renewable unless another more beneficial status is acquired;
- the status is compatible with the type of residency required for permanent residence and/or naturalization, and allows refugees to undertake family reunification procedures (or a special allowance to this effect is made for refugees);

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*prima facie* refugees, UNHCR policy is that cessation clauses (article 1C(5) and (6) of the 1951 Convention) should not be subject to an automatic application (even if applied on a group basis), but given its serious implications, should be a decision formally announced, such as in the form of a Ministerial Decree, for example. Such a decision should also ideally be made in consultation with UNHCR and the refugees concerned, and in deciding whether cessation is justified, the same sources of objective evidence used to determine whether the group as a whole was at risk of persecution should be harnessed to assess whether that danger has lapsed. The burden rests on the country of asylum to prove that application of the ceased circumstances cessation clauses in respect of the refugee population in question is appropriate. For cessation to be justified, the change in conditions in the country of origin must be both fundamental and durable. Further guidance on the application of the cessation clauses may be found in UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees*, 2003.

<sup>111</sup> For example, the simple right to ‘remain in the country’ which is granted upon recognition and which is accompanied by an identity/residency card which is extendable every 6 months or one year, implies not only a lack of security with regard to the refugee’s continuity of residence in that country, but for the same reason will render housing, employment and many other aspects of ordinary life very difficult for refugees. It is therefore not conducive to integration, which States have an obligation to facilitate under article 34 of the 1951 Convention. Also see further details below on some of the problems associated with a short-term residency status as well as identity/residency cards with short validity periods.

- at minimum, the rights correlating to that residence status meet the minimum standards of treatment in the 1951 Convention and other relevant international and regional human rights instruments;
- preferably, in addition to this residence status, refugees are also granted a default regime of rights, which provides for a set of rights broadly equivalent to those granted to nationals or permanent residents. A ‘default regime of rights’ is often provided for in a general provision in a country’s refugee law, and grants refugees rights which generally go beyond those of the 1951 Convention or those tied to their residency status. As such, in the absence of a more specific provision in relevant laws, this regime becomes their ‘default’ standard of treatment. Different formulations have been used to express this default regime, such as, “refugees are to have the status of citizens”, “are to be considered as citizens” or alternatively, “are to have the rights of citizens”.<sup>112</sup> This is generally followed by a qualification to the effect that special provisions may provide otherwise.
- where necessary, certain requirements for the acquisition of permanent residence<sup>113</sup> which refugees have difficulty meeting are facilitated for them, and processing fees are reduced or waived; and
- the period of time the refugee resided in the country during the refugee status determination process or under an alternative protection regime, is counted towards the acquisition of permanent residence and/or naturalization. Ideally, refugees should therefore be eligible to apply for naturalization after five years of their total period of residence in the host country.

#### 6. *Monitoring the Issuance of Residency/Identity Cards*<sup>114</sup>

In countries where residency/identity cards constitute proof of one’s residency status and are required in order to access basic rights, it is important that the issuance of these cards be monitored and that recognized refugees be assisted (by NGOs or governments), as necessary, in promptly acquiring these cards upon recognition. This may entail providing refugees with special assistance in order to ensure that they are able to satisfy the

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<sup>112</sup> In addition to granting refugees a more generous regime of rights than that related to their residency status or the 1951 Convention, a general provision adopting this type of ‘default regime of rights’ also acts as an important point of reference when the law is otherwise silent or unclear on specific rights and issues or when State practice is discriminatory towards refugees or aliens generally. Furthermore, it can inform the *interpretation* of certain legal provisions and their implementation, as well as future government action. Adopting this type of generous default regime of rights is thus consistent with the obligation of best efforts required by article 34 of the 1951 Convention whereby Contracting States are requested to facilitate the integration of recognized refugees. Countries such as Bulgaria, Hungary and Slovakia for example, have adopted such default regimes, while the Czech Republic, grants refugees the regime of rights associated with permanent residence (which are broadly the same as those granted citizens). More detailed information on ‘default regime of rights’ is provided by da Costa (see above at footnote 22), pp. 5-7.

<sup>113</sup> Or naturalization, in the event one can apply directly for naturalization based one’s current residence status.

<sup>114</sup> In some countries, identity papers and residency cards are provided as distinct documents each having a different purpose, while in other countries they are combined into a single document and used both to prove one’s legal residency status and access relevant rights and services, as well as simply to prove one’s identity (which is the required purpose of ‘identity papers’ as defined in the 1951 Convention). For a more complete discussion of the possible differences between these two documents, see chapter 9 in this reference guide.

conditions for their issuance. One of these conditions might be proof of a domicile or permanent address, a requirement which may be subject to difficulties depending on the housing situation or “propiska” requirements in certain parts of the world.<sup>115</sup> For example, shortage of affordable housing may result in informal accommodation arrangements which refugees cannot document, or the refusal by some landlords to provide them with an official lease or other necessary papers if this is to their advantage. Further relevant details are provided in chapters 4 and 9 below.

#### 7. *Long-Term Validity Periods on Residency Cards (and/or Associated Identity Cards)*

Administrative requirements, and particularly those regarding the *renewal* of a refugee’s legal residency status (where permanent residency is not automatically granted upon recognition) and the associated residency/identity card, should be facilitated as much as possible. An effective way to do this is by granting long-term validity periods on residency/identity cards. This would not only be likely to alleviate the problems associated with the bureaucratic requirements for renewals, such as proving a formal place of domicile, but it would also allow refugees the possibility of securing long-term employment contracts, since these cannot in principle exceed the period of their legal residency in the country. Indeed, it is conceivable that a number of other areas of refugee life are similarly adversely affected due to relatively short-term permissions (e.g. six months or one year) of stay in the host country. For the purposes of integration, it is therefore recommended that a refugee’s residency/identity card be issued with a validity period of five or more years, but no less than two years (even where a short-term residency is granted) since this often renders access to certain integration rights, such as employment, difficult. See also chapter 9 below.

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<sup>115</sup> Immediately upon recognition, assistance should be provided to refugees in securing either temporary or permanent accommodation, the address of which they can provide as a registered place of domicile. Moreover, for refugees living in private accommodation who are unable to obtain proof of an official lease/contract from their landlord, consideration should be given to offering refugees a default place of registered residence (such as with a government refugee office or a government refugee camp or integration centre). Similarly, attention should be paid to ensuring that the refugee is able to provide a registered place of residence each time he must *renew* his residency/identity papers.

## **CHAPTER 3: EMPLOYMENT: WAGE EARNING EMPLOYMENT, SELF-EMPLOYMENT, LIBERAL PROFESSIONS**

### **MAIN INTERNATIONAL STANDARDS**

#### **1951 Convention relating to the Status of Refugees**

##### **Article 17**

##### ***Wage-earning employment***

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

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

*(a) He has completed three years residence in the country,*

*(b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefits of this provision if he has abandoned his spouse,*

*(c) He has one or more children possessing the nationality of the country of residence.*

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

##### **Article 18**

##### ***Self-employment***

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

##### **Article 19**

##### ***Liberal professions***

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

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

#### **International Covenant on Economic, Social and Cultural Rights**

##### **Article 6**

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

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

#### **Universal Declaration of Human Rights**

##### **Article 23**

*1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.*

*2. Everyone, without any discrimination, has the right to equal pay for equal work.*

*3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented if necessary, by other means of social protection.*

*Everyone has the right to form and to join trade unions for the protection of his interests.*

## **Convention on the Elimination of All Forms of Discrimination against Women**

### **Article 11**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same **employment opportunities** [...]
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced **vocational training** and recurrent training;
- (d) The right to **equal remuneration**, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- (e) The right to social security [...]
- (f) The right to protection of **health and to safety** in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of **marriage or maternity** and to ensure their effective right to work, States Parties shall take appropriate measures:

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
- (c) To encourage the provision of the necessary supporting **social services** to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
- (d) To provide **special protection** to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

(Emphasis added)

### **Article 14**

1. States shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of this Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: [...]

(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, *inter alia*, the benefit of all community and extension services, in order to increase their **technical proficiency**;

(e) To organize self-help **groups** and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment; [...]

(Emphasis added)

## **International Convention on the Elimination of All Forms of Racial Discrimination**

### **Article 5**

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

[...]

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

**NOTE:** See also the international standards in introduction to chapter 7 of this reference guide.



## A. International Standards

### 1. Wage-Earning Employment

#### □ 1951 Convention

The 1951 Convention contains three provisions relating to the right to work, and more specifically, with regard to the right to wage-earning employment, self-employment and liberal professions.<sup>116</sup>

With regard to wage-earning employment, article 17 (paragraph 3) of the Convention requires that beyond the minimum standards stipulated in that provision, Contracting States are to give sympathetic consideration to granting all refugees equal treatment with nationals. The term “sympathetic consideration” used in this paragraph is analogous to the term “favourable consideration”, which though of a discretionary nature, nonetheless implies an obligation on States Parties to address this request and provide reasons in case of refusal.<sup>117</sup> It is this standard of equal treatment with nationals which is also recommended in this reference guide.

At minimum however, States Parties have the obligation to grant refugees lawfully staying in the country of asylum, the “most favourable treatment” accorded to other aliens in the same circumstances. This mandatory provision to accord refugees the most *favourable*, rather than simply the same treatment accorded to other aliens generally (the standard applied to self-employment and liberal professions) is justified by the fact that refugees cannot rely on their governments to obtain exceptions or favourable conditions for them by means of a Convention.<sup>118</sup> Thus, they are to benefit from the best treatment granted to nationals of any other country, whether by treaty or by practice.<sup>119</sup> This includes the preferential treatment granted to aliens by virtue of arrangements the host country negotiated with favoured States.<sup>120</sup> Any restrictions imposed on refugees will have to meet this test. For example, in the European context, this is very significant, since Member States of the European Union should in principle grant recognized refugees the same treatment as nationals of other EU States.<sup>121</sup>

In relation to taxes imposed on wages and revenues from employment or business activities for example, article 29 on fiscal charges in the 1951 Convention also ensures that the State does not impose on refugees “any duties, charges or taxes of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.”

The term “in the same circumstances” refers to the fact that a refugee must fulfil any requirements, such as length and conditions of residence, which another individual who is not a refugee would have to fulfil in order to enjoy this right.<sup>122</sup> Naturally, an exception

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<sup>116</sup> Articles 7, 18 and 19 of the 1951 Convention.

<sup>117</sup> Robinson (see above at footnote 4), p. 83.

<sup>118</sup> *Ibid.*

<sup>119</sup> It should be noted that article 17 does not deal with conditions of work, which are covered in article 24 on labour legislation and social security in the 1951 Convention.

<sup>120</sup> Dent (see above at footnote 47), p. 49.

<sup>121</sup> *Ibid.*

<sup>122</sup> See article 6 of the 1951 Convention.

must be made with regard to those requirements which, by their nature, a refugee is incapable of fulfilling.

Paragraph 2 of article 17 provides for a more favourable treatment for refugees who have a special tie to the receiving country, including refugees who have completed three years of residence in the host country,<sup>123</sup> are married to a national (unless they have abandoned their spouse)<sup>124</sup> or have a child who is a national.<sup>125</sup> Such persons are exempt from the restrictive measures which are often imposed on aliens in order to protect the national labour market (such as first demonstrating that there is no national to do the job). This is so even in the case of developing countries.<sup>126</sup> However, if a restriction is not related to the protection of the national labour force, then it is not affected by this provision. In other words, refugees cannot benefit from the more generous access to wage-earning employment provided under article 17(2), if for example, civil service jobs are reserved for nationals for reasons of national security rather than protection of the labour force.

A definition of “wage-earning” employment is not provided in the 1951 Convention, but it should be taken in its broadest sense, so as to include all forms of legal employment which cannot be categorized as either self-employment or a liberal profession.<sup>127</sup>

#### □ *Other International and Regional Instruments*

The Universal Declaration of Human Rights, as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) also include the right of everyone,

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<sup>123</sup> In the context of this paragraph, it is suggested that the term “residence” be interpreted as liberally as possible, so that it may include physical presence in the country regardless of whether the person was there as a refugee or in another capacity, and even regardless of whether the presence was lawful. It should also be interpreted so that the period of residence is not deemed interrupted by relatively short periods of travel abroad. See, Grahl-Madsen (see above at footnote 53), p. 72. In the case of recognized refugees, therefore, the entire duration of their actual stay should be counted towards this three year “residency period” so that they may be exempt at the earliest possible opportunity from any restrictions normally imposed on aliens (in the event their rights upon recognition have not already provided for this automatically).

<sup>124</sup> The exception stipulated in subsection 2(b) of article 17 should be interpreted liberally, so that a refugee who is married to a national of the host country may benefit from it even if they live apart, or, under certain circumstances, even if they are separated. However, once they are divorced or the refugee has abandoned his or her spouse, the refugee may no longer enjoy this privilege. In case of legal or factual separation, it has been suggested that in order to invoke the provision, the refugee must show that there is still a certain community of interests between them, such as would be the case for example, if the refugee continues to support his or her spouse. See Grahl-Madsen (see above at footnote 53), pp. 72-73.

<sup>125</sup> With regard to subsection 2(c) of article 17, the delegates of the Ad Hoc Committee felt that such an exception was appropriate because it was in the national interest that the refugee-parent be able to work in order to support his family. The provision applies regardless of whether the child was born in or out of wedlock. See Grahl-Madsen (see above at footnote 53), p. 73. Nonetheless, it appears that in order to benefit from the exceptions under subsections 2(b) and 2(c), the refugee may in certain situations have to show a genuine tie with his spouse or child. These exceptions cannot simply be invoked regardless of circumstances, and the failure of a refugee-parent to demonstrate any interest in or support for his child, for example, will be taken into consideration. Grahl-Madsen makes the argument however, that one would best serve the purpose of article 17 if it is interpreted in such a way that a refugee who once enjoyed the benefits of these should continue to do so, with the exception of a person who has abandoned his/her spouse. See Grahl-Madsen, p. 74.

<sup>126</sup> In other words, while article 2(3) of the ICESCR may accord developing countries a certain latitude in the extent to which they guarantee economic rights to aliens and allow them to differentiate in favour of their nationals, refugees falling under the ambit of article 17 (2) of the 1951 Convention (i.e. who have resided in the country for over three years etc.) should not be subject to any restrictions imposed on aliens to protect the national labour force.

<sup>127</sup> See Grahl-Madsen (see above at footnote 53), p. 70.

without distinction, to work (i.e. the opportunity to gain a living) and to free choice of employment.<sup>128</sup> This right is further protected by a non-discrimination provision in both instruments, which encompasses, amongst other grounds, race, national or social origin, birth or other status.<sup>129</sup> In addition, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) offer special protection against discrimination in employment (and related rights) to women and against discrimination on racial grounds.<sup>130</sup> Thus, in principle, based on their general provisions on employment these human rights instruments guarantee *all persons* the right to work and grant refugees a higher standard of treatment than the 1951 Convention.

In practice though, governments frequently restrict free access to the labour market in the case of non-nationals, and appear to have implicitly been given considerable latitude to differentiate in favour of their citizens in this regard. In the context of developing countries, such restrictions are generally based on a special dispensation (i.e. article 2(3) of the ICESCR) allowing them to impose restrictions on the economic rights of non-nationals in order to protect their national economy.<sup>131</sup> However, other countries have also applied such restrictions, arguably basing them on article 4 of the ICESCR,<sup>132</sup> which requires that restrictions with regard to the rights in the Covenant be entrenched in law, and be solely for the purpose of promoting the general welfare in a democratic society.<sup>133</sup>

As noted in Part II above (Applicable International Legal Framework, section on General Legal Standards), it is both recommended, as well as consistent with international law that refugees be exempted from such restrictions on aliens, particularly in view of their special status and vulnerability. Unlike other aliens, refugees do not have the benefit of the legal or social protection of another State or of seeking an alternative residence elsewhere. To the extent that they are to find a durable solution to their plight in their country of asylum, recognized refugees should therefore be accorded the rights necessary to ensure their livelihood and broader integration into the society; the right to work is a critical aspect of this process. Refugees should thus be afforded full protection in relation to the right to work contained in international human rights instruments, and not be subject to possible restrictions imposed on other aliens. As suggested in the 1951 Convention, States should strive to accord refugees treatment as favourable as possible (such as, treatment on the same terms as permanent residents or nationals) with regard to all types of employment.

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<sup>128</sup> See, article 23 of the Universal Declaration of Human Rights, G.A. Res. 217 A(III), of 10 December 1948; and article 6 of the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 A(XXI), of 16 December 1966.

<sup>129</sup> Article 2 (2) of the ICESCR, and article 2 of the Universal Declaration.

<sup>130</sup> See articles 11 and 14 of the International Convention on All Forms of Discrimination against Women, G.A. Res. 34/180 of 18 December 1979; and article 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination, G. A. Res. 2106A (XX) of 21 December 1965.

<sup>131</sup> Article 2(3) of the ICESCR reads as follows: “Developing countries, with due regard to human rights and the national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

<sup>132</sup> Article 4 of the ICESCR reads as follows: “The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights, and solely for the purpose of promoting the general welfare in a democratic society.”

<sup>133</sup> For further details on this provisions, see Part II (section on recommended general legal standards) in this reference guide.

Other international and regional instruments such as ILO Conventions,<sup>134</sup> the European Social Charter,<sup>135</sup> the European Convention on the Legal Status of Migrant Workers (EMW)<sup>136</sup> and a variety of other regional human rights and refugee instruments, also contain provisions which may under certain circumstance be applicable to refugees and accord them a higher standard of treatment with regard to working rights than the minimum requirements in the 1951 Convention.

With regard to **regional instruments**, in the European context provisions specifically pertaining to the right to work are contained in the European Social Charter and the EMW. These grant non-nationals equal work and employment conditions as nationals,<sup>137</sup> and impose an obligation on States Parties to improve opportunities for work for nationals as well as foreign workers.<sup>138</sup> However, these two instruments are generally only applicable to nationals of Contracting States, and as very few refugees are likely to come from these States, the relevance of these instruments to them is likely to be very marginal. The European Social Charter does nonetheless, have a special significance for refugee rights, since by virtue of an Appendix, the rights of recognized refugees contained in the 1951 Convention (including their rights with regard to employment) are explicitly incorporated in the Charter, thereby enabling refugees to use the Charter's supervisory and complaint mechanism to enforce their rights under the 1951 Convention.<sup>139</sup>

At the level of the European Union more specifically, article 26(1) of the European Council Directive on Minimum Standards provides that recognized refugees have the right to "engage in employed or self-employed activities subject to rules generally applicable to the professional and to the public service, immediately after the refugee status is granted". It would appear that beyond wage-earning and self-employment, the scope of this provision extends also to liberal professions in the sense of article 19 of the 1951 Convention. Moreover, according to 26(2) of this same Directive, activities such as employment-related education opportunities for adults, as well as vocational training and practical workplace experience are to be offered to recognized refugees on the same conditions as nationals.

However, European Union Law, which amongst other things, establishes the principles of free movement of labour and the abolition of any discrimination based on nationality between workers of Member States, is not applicable to refugees. While the principle of free movement applies to nationals of EU Member States, it does not apply in an unqualified way to non-EU nationals. The EU in 2003 adopted a Directive on Long-Term Residence of third country nationals, which allows for non-EU citizens, under certain

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<sup>134</sup> The International Labour Organization (hereinafter ILO) Conventions relating to employment and migration, such as the 1949 and 1975 Conventions, which apply to refugees who fit the definition of a migrant worker (even if their primary objective is protection), establish the principle of equal treatment with nationals with respect to employment and working conditions, after a certain period of work and residence in that country. The 1949 Convention for Migration, in article 11, defines a 'migrant worker' as a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment.

<sup>135</sup> European Social Charter, ETS No. 35, of 18 October 1961 (entered into force 26 February 1965).

<sup>136</sup> European Convention on the Legal Status of Migrant Workers, ETS No. 93, of 24 November 1977 (entered into force 1 May 1983).

<sup>137</sup> See articles 2, 3 and 19 of the European Social Charter, and article 16(1) of the EMW. It should be noted that article 1(1) of the EMW defines 'migrant worker' as "a national of a Contracting Party who has been authorized by another contracting Party to reside in its territory in order to take up paid employment."

<sup>138</sup> Article 1 and 18 of the European Social Charter.

<sup>139</sup> See Dent (see above at footnote 47), pp. 56, 59 and 61.

conditions, to reside and work in the State other than that which initially granted them residence. However, refugees and those benefiting from subsidiary protection are, at the time of publication, explicitly excluded from the scope of this rule. The EU is discussing the possibility of a similar directive to cover those people in need of international protection in the future. Meanwhile, refugees in one Member State within the European Union do not benefit as of yet from the principle of free movement of labour within the European Union, and do not have the right to take up employment in another Member State.

In the Americas, the American Convention on Human Rights (ACHR)<sup>140</sup> includes an article 26 protecting economic, social and cultural rights. This provision has been interpreted by the Inter-American Commission on Human Rights as protecting specific rights, including the right to health, but the Commission has not as of yet dealt with a case relating to employment. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights – the San Salvador Protocol – specifically recognizes the right to work in article 6,<sup>141</sup> and includes in article 3 a general prohibition of discrimination. However, while the Protocol establishes an individual complaints procedure, this mechanism is limited to the right to education and to trade union rights, and does not as such, cover the right to work.

In the African context, several instruments are of interest. The Southern Africa Development Community (SADC) Social Charter of Fundamental Social Rights<sup>142</sup> for example,<sup>143</sup> has the following objectives of *inter alia*, gender equity, equal treatment and opportunities of men and women, and in particular with regard to employment, it addresses issues of remuneration, working conditions, social protection, education, vocational training and career development. The Charter also specifically establishes a priority list of ILO Conventions for States to consider which include Conventions on the abolition of forced labour (Nos. 29 and 105), freedom of association and collective bargaining (Nos. 100 and 111), the minimum age of entry to employment (No. 138) and other relevant instruments. The SADC Social Charter thus provides an important basis for advocating for the ratification of ILO Conventions which are especially relevant to the integration of refugees. The SADC Social Charter does not have an enforcement mechanism as such. However, the courts in the region have the practice of taking judicial notice of the international agreements that States have signed in the process of adjudication.

Refugee women also benefit from the provisions in CEDAW, which accord all women special protection against discrimination in the area of employment and working conditions, and particularly in order to prevent discrimination on grounds of marital status

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<sup>140</sup> American Convention on Human Rights of 22 November 1969 (entered into force 18 July 1978).

<sup>141</sup> See also the right to just, equitable and satisfactory conditions of work in article 7 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador, of 17 November 1988 (entered into force 16 November 1999).

<sup>142</sup> The Southern Africa Development Community (SADC) Social Charter of Fundamental Social Rights, August 2003.

<sup>143</sup> Other sub-regional instruments, such those applicable to the Eastern Africa Community (EAC), and the Economic Community for West African States (ECOWAS) for example, can also be of relevance to the integration and rights of refugees, given their broad social and economic objectives, and the establishment of regional courts with jurisdiction over the relevant treaties and human rights conventions. For further details on some of these African sub regional (community) instruments, please refer to Part II in this reference guide (in particular the section on International and Regional Human Rights Instruments).

or maternity.<sup>144</sup> Also, particularly relevant to rural refugee contexts and developing countries, article 14 recognizes the significant role rural women play in the economic survival of their families, and obliges States to take all appropriate measures to eliminate discrimination against women in rural areas. Member States thus have the obligation to ensure the rights of rural women to *inter alia*: participate and benefit from rural development; organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment; have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes; and to enjoy adequate living conditions, in relation to housing, sanitation, electricity, water supply, transport and communications. This provision could therefore, be used to support the inclusion of rural refugee women in broader development projects, as well as in programmes in the context of Development Assistance for Refugees (DAR) or DLI frameworks (i.e. Development through Local Integration) – both of which seek to close the gap between emergency relief and longer-term development, and advocate a strategy of promoting self-reliance and local integration of refugees while also improving the quality of life for host communities through development assistance.<sup>145</sup>

Finally, while the topic of working conditions is more appropriately addressed in chapter 7 below, it should be noted that numerous instruments, some of which have already been mentioned above, also provide for negative rights regarding work, such as the right *not* to work under abusive conditions, and the prohibitions of servitude, recruitment into forced labour, and the right to non-discrimination with regard to employment.

## 2. *Self-Employment*

### □ *1951 Convention*

Article 18 of the 1951 Convention provides that with regard to self-employment, States must at minimum grant refugees lawfully present in the country the same treatment as is accorded “aliens generally in the same circumstances”.<sup>146</sup> This is a less generous minimum standard than in the case of wage-earning employment.<sup>147</sup>

However, beyond the legal obligation to ensure the minimum standard of treatment stipulated in article 18, this provision also recommends that States Parties accord refugees “treatment as favourable as possible”. This implies a positive effort on the part of the State to facilitate self-employment and lift restrictions for refugees in particular. This is in line with the legal argument and recommendations already made in Part II (section C) above, in which it is argued that international human rights instruments (such as the ICESCR) should be interpreted such as to grant refugees the full protection and rights in these instruments, and exempt them from the restrictions often imposed on aliens, especially with regard to core rights to integration, such as the right to work. Refugees should thus be accorded the same rights with regard to self-employment as generally granted to nationals or permanent residents in the host country.

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<sup>144</sup> Article 11(1) of CEDAW.

<sup>145</sup> UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern* (see above at footnote 13), p. 24. See also Part II (Section C) above.

<sup>146</sup> The definition of this expression is available in article 6 of the 1951 Convention, and in Part II (section C) of this reference guide.

<sup>147</sup> With regard to wage-earning employment, the 1951 Convention provides that refugees are to be granted at minimum, the “most favourable treatment granted to foreigners”.

The enumeration of the areas of self-employment contained in article 18 of the 1951 Convention must be interpreted in the widest possible sense.<sup>148</sup>

For a discussion of other relevant international and regional instruments, please see the section above on wage-earning employment, as it is also largely applicable to self-employment.

### 3. *Liberal Professions*

#### □ *1951 Convention*

The minimum standard of treatment accorded to refugees under article 19 of the Convention is that granted to “aliens generally in the same circumstances”, with the additional condition that a diploma may be required and must, in that case, be recognized by the receiving State. Beyond this, there is also an obligation on States to consider granting refugees treatment as favourable as possible. States thus have an obligation to make a positive effort to minimize the restrictions imposed on refugees wishing to practice their profession or open their own business, even when such restrictions are normally placed on other aliens. In this sense, refugees may be accorded greater rights and facility in exercising their liberal professions than other aliens. With regard to their general right to employment and the exercise of their profession in international human rights instruments, the discussion of these in the section on wage-earning employment above, is also largely applicable, as is the general recommendation that to the extent possible, restrictions imposed on other aliens should be waived in the case of refugees.

Although the term “liberal profession” has not been specifically defined, it is usually understood as referring to lawyers, physicians, architects, dentists, pharmacists, engineers, veterinarians, artists, and probably other professions such as accountants, interpreters, scientists etc. While “profession” denotes the possession of certain qualifications, such as a diploma or license for example, the term “liberal” suggests that this professional works on his own rather than as a salaried employee or State agent.<sup>149</sup>

In practice, it may sometimes be difficult to make the distinction between some liberal professions and self-employment or even wage-earners, and this categorization will ultimately depend on the nature of the profession and activity, as well as the decision of the authorities. On a practical level however, it may not be of much significance whether a person is classified as a professional or as self-employed, especially if these two categories are granted the same standard of treatment – as is the case of the 1951 Convention which prescribes the same minimum standard of treatment for both. By contrast, given the more liberal treatment offered to wage-earners in the 1951 Convention, the distinction between this category and that of a professional could gain considerable importance.<sup>150</sup>

The term “diploma” should not be given a narrow interpretation, but should be understood to mean any degree, examination, admission, authorization, or completion of a course which is required for the exercise of a profession.<sup>151</sup> If the diploma is obtained outside the

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<sup>148</sup> Grahl-Madsen (see above at footnote 53), p. 76.

<sup>149</sup> *Ibid.*, p. 78.

<sup>150</sup> Robinson (see above at footnote 4), pp. 99-100.

<sup>151</sup> Grahl-Madsen (see above at footnote 53), p. 77-78.

receiving country, then the diploma is to be considered as recognized if the relevant authorities have either made a general ruling about diplomas from specific universities, or a special ruling recognizing the equivalency of a particular diploma for the exercise of that liberal profession in their country.<sup>152</sup> With respect to the issue of equivalencies of diplomas and certifications please also refer to chapter 5 below.

## **B. Recommendations**

### *1. Context and Considerations*

In addition to being a legal process, local integration is also clearly an *economic process*. It is a process whereby “refugees become progressively less reliant on State aid or humanitarian assistance, attaining a growing degree of self-reliance<sup>153</sup> and becoming able to pursue a sustainable livelihood, thus contributing to the economic life of the host country.”<sup>154</sup> Access to work opportunities is an essential element of human dignity as well as the ability to achieve economic self-sufficiency, one of the cornerstones of the successful integration of recognized refugees in their host country. A policy which promotes self-reliance and reduces the need for prolonged dependence on the country of asylum or international assistance by making available work opportunities, is a policy which is mutually beneficial to refugees and host States regardless of what the durable solution may ultimately be.<sup>155</sup>

Moreover, beyond the purely financial aspects, employment plays a key role in furthering the *social* integration process of refugees by improving their language skills, encouraging the formation of friendships and professional contacts with the host population, and generally helping them gain acceptance by their local communities.

Yet, recognized refugees face important obstacles in entering domestic labour markets, including: legal and administrative difficulties; language barriers; socio-cultural differences (often significant in the field of employment); the difficulty of securing housing compatible with employment opportunities; and domestic economies suffering from high unemployment rates.

Indeed, it is important to recognize that even where States have lifted legal and administrative barriers, simply ensuring legal access to the job market is often not enough. In many parts of the world obtaining a job is not only difficult in itself, but is not even a guarantee of self-sufficiency. This is often even more true in the case of refugees as (in their new host society) they frequently lack the wider social and family networks which in many parts of the world are instrumental in helping the general population meet the critical every day needs of their families, as well as ensuring survival during periods of crisis. One can easily see this in relation to housing for example, where in some countries younger generations must rely on housing (rented at controlled prices or owned) that has been in the

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<sup>152</sup> *Ibid.*, p. 78.

<sup>153</sup> As mentioned in Part I of this reference guide, “self-reliance” refers to the social and economic ability of an individual, household or community to meet their essential needs in a sustainable manner and with dignity. Essential needs include food, water, shelter, personal safety, health and education. See, UNHCR *Handbook for Self-Reliance*, August 2005.

<sup>154</sup> See description of the “economic process” of integration in paper: UNHCR, *Local Integration* (see above at footnote 1), p. 2, para. 7.

<sup>155</sup> *Ibid.*, para. 9.



family for generations or where three generations typically live in the same household; they would be unable to afford housing otherwise. A similar situation exists with regard to household goods, furniture, food and even emergency savings, such that family and social networks are able to inherit, share, borrow, or pull together resources for their individual and collective benefit. When one member of the family loses their employment, or the members individually do not earn enough to ensure their needs, the family and other community networks step in to pull together their resources.

This is the gap between the right to work and self-reliance. By virtue of their situation, refugees may require further measures for bridging this gap; measures directed at creating an enabling environment, improving conditions for their self-reliance, or providing other additional assistance. The recommendations below relate to legal and administrative employment issues, as well as this broader perspective which holds self-reliance as an important goal.

2. *Standard of Treatment: According Recognized Refugees the Same Rights as Permanent Residents or Nationals With Regard to Wage-Earning, Self-Employment, and Liberal Professions*

In general, and for the reasons previously noted in this chapter, refugees should be accorded a special dispensation from the restrictions on employment often imposed on aliens, and granted in principle, the same rights as regards wage-earning, self-employment and liberal professions as permanent residents or nationals. Given the special status of refugees (i.e. lack of effective citizenship, State protection, and the corresponding rights in another country) and the obstacles which they frequently already face with regard to employment, an open working policy for recognized refugees would ensure they are secured the most favourable legal conditions – thus allowing them to take advantage of all possible employment opportunities and work towards achieving a tangible degree of socio-economic self-reliance and integration as soon as possible.

3. *Lifting Specific Legal and Administrative Barriers*

□ *Legal Barriers*

In addition to the standard of treatment recommended above, certain specific legal or administrative barriers to the employment of recognized refugees may also need to be lifted. These typically include legislative and regulatory restrictions such as the requirement of a work permit and other onerous bureaucratic procedures, as well as provisions granting priority to nationals over aliens (including refugees) in the allocation of employment opportunities (by requiring proof that no national is available to take on the job). Removing such requirements by, for example, granting refugees the automatic right to take up employment upon recognition on the same terms as nationals (or permanent residents) and without requiring a work permit, would allow refugees free and immediate access to the labour market and to State employment assistance programmes. This would avoid the problems and delays often associated with the issuance of permits, the advertising of posts (for nationals), and ensure that refugees are able to receive the assistance of employment bureaus as soon as possible. Moreover, in addition to greater access to the job market, less bureaucratic requirements and restrictions would also benefit refugees by increasing their job mobility as well as their chances of achieving job security – two important assets in weak economies or those suffering from high unemployment rates.

□ *Other Indirect Barriers*

Other more indirect barriers may also limit access to employment for refugees. These may include: certain conditions rendering refugees ineligible to participate in State re-qualification and vocational courses;<sup>156</sup> the issuance of residency/identity cards (which are necessary in order to take up legal employment) with relatively short-term validity periods, which place refugees at a disadvantage in the labour market and are an obstacle to job security; and the requirement of national citizenship or special permission for public service positions and professions which do not concern national security or the public order, and could thus potentially be waived in the case of recognized refugees.

4. *Importance of Securing Residency/Identity Cards, Including Long Validity Periods*

Difficulties in securing residency/identity cards, which are often due to the inability to provide a formal address of domicile in the host country, may pose a serious problem for refugees, who cannot take on legal employment without these cards. Moreover, when such cards prescribe a relatively short validity period such as six months or one year, this is also likely to place refugees at a disadvantage, both in obtaining employment in the first place (since employers will perceive their stay in the country as precarious) and in terms of long-term job security. Comprehensive solutions to this problem, also discussed in chapters 2 and 9 in this reference guide, may include housing programmes for refugees, residency/identity cards with longer validity periods, and the acceptance of a *de facto* address of domicile rather than a formal lease and authorization from the landlord.

5. *Strategies for Dealing with a Lack of Documentary Proof of Educational and Professional Qualifications or National Equivalencies*

While article 19 on liberal professions specifically mentions the recognition of diplomas by the host State, other types of employment and professions may also require proof of a relevant diploma. For refugees holding educational or professional qualifications, being unable to prove this with the requisite documents, or to acquire national recognition of their degree or training, can be a particularly disempowering experience, in addition to the employment opportunities that are lost. The following are recommendations for addressing some of these problems:

□ *Lack of Requisite Documents*

When documents ascertaining the person's education or profession are not available at all (or their originals, when required), detailed information about the person's educational and/or professional background and experience should be gathered, for example in the form of a *curriculum vitae*. All alternative documentation which is available, such as photocopies, student identity cards or documents from professional associations, as well as reference letters from previous employers etc. should also be compiled so as to be able to provide as much evidence as possible to academic institutions or prospective employers. Where the refugee feels comfortable contacting educational or professional institutions, former employers or family members in his country of origin (or other countries where he

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<sup>156</sup> Such barriers could include, *inter alia*: requirements as to proof of previous relevant diplomas or certificates, which refugees may not have brought with them from their country of origin, or for which they may not get "recognition" in the country of asylum; proof of a certain level of education such as high school leaving certificate; or a certain minimum period of previous employment in the country of asylum – which newly recognized refugees would not be able to fulfil.

may have studied or worked) in order to request documentary evidence, financial or logistical assistance should also be provided for this purpose, if needed. However, such contact with the refugee's country of origin must never be expected or required.

□ *Obtaining Equivalencies of Academic Degrees and Training*

Procedures for recognition should be simple, transparent and effective, and carried out in accordance with international conventions and standards. They should lead to a statement of recognition that is authoritative and accepted by employers and education providers.<sup>157</sup>

Translation of these documents, when they are available, should be provided and assistance should be offered to refugees in the process of gaining national recognition or equivalency for degrees either by the State whenever possible, or by other organizations. Gaining recognition for degrees or training acquired abroad can require a certain resourcefulness and persistence, as well as solid knowledge of equivalent degrees in other countries. The Danish Refugee Council has published several handbooks on the system of education of various countries, as well as on the assessment and recognition of refugee qualifications in the European Union, which may be particularly helpful and are provided in the footnote below.<sup>158</sup>

It is worth noting that different universities or colleges within the same host country might have different standards for recognizing equivalencies of degrees or training. It may therefore be worthwhile to get a statement from a few different universities. Universities and colleges where there is a high immigrant enrolment might be more experienced with this process and with foreign degrees. Moreover, recognition of equivalencies by a university may in certain cases be relevant even when it is only formally valid in that specific institution; such as when a refugee wishes to obtain a second or complementary degree from that university, or to provide some evidence of competencies to prospective employers.

Where there is an existing immigrant/ethnic community from the same country of origin as the refugee in the host country, it may also be worthwhile to contact individual professionals<sup>159</sup> in the event that they may have personal experience or knowledge on obtaining such equivalencies or addressing related issues.

Where, in order to have the right to practice their profession in the host State, further requirements such as examinations or supplementary training or schooling are necessary to fulfil national criteria, assistance should be granted to refugees undertaking these. Such assistance could include, helping them obtain recognition of their original degrees, secure the best tuition rates (or dispensations) possible by intervening on their behalf with Universities and the Ministry of Education for example, as well as helping them secure financial assistance (including where available, from the State) in the form of student loans, scholarships or bursaries.

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<sup>157</sup> ECRE, *Good Practice Guide to the Integration of Refugees in Central and Eastern Europe*, September 2001 (see, "General signposts to good practice", p. 49).

<sup>158</sup> *Assessment and Recognition of Refugees' Qualifications in the European Community*, December 1998; *The System of Education in Iraq*, 1999; *The System of Education in former Yugoslavia*, 1999; *The System of Education in Somalia*, 1999; *The System of Education in Iran*, 1999.

<sup>159</sup> Immigrant/ethnic community associations or business directories may provide contact information for these professionals.

□ *Where Documents or Academic/Professional Equivalencies (Including the Right to Practice) Are Not Possible*

Where documents, academic or professional equivalencies are not possible or are not sufficient to enable the refugee to practice his or her profession in the host country (i.e. where the person's degree, training or experience is ascertained but does not entitle them to practice in the host State, e.g. lawyers, teachers etc.), counselling staff could assist the refugee to identify and obtain alternative types of employment in the same or a similar field.

For example, for certain jobs, employers may be inclined to accept a detailed *curriculum vitae*, without requiring documentary proof of academic degrees, or may be able to offer the person a similar job at a lower grade if they cannot provide formal proof of a degree.

At times proof of the academic degree is available, but only a partial equivalency is obtained or the professional does not have the right to practice in the host State (province or district). In these situations, alternative employment is often also possible and counselling should be provided in this regard.<sup>160</sup> Refugees could be assisted in taking up training (perhaps even in an expedited fashion) for related professions in the same field but which are less onerous in terms of time invested than their original profession. For example, completing requirements to become a doctor, lawyer, or certified accountant may not be possible for refugees who cannot afford to return to school for several years, but related professions or jobs may be more easily attained.

6. *Waiving Conditions That Are Unduly Burdensome or Cannot Be Met By Refugees*

In some instances, granting recognized refugees equal employment opportunities with nationals may mean that certain requirements which are imposed on nationals should be waived in the case of refugees (especially newly recognized refugees), such as when refugees, by virtue of their special situation or status, cannot fulfil particular conditions. Such is the case when there is a minimum period of work required in the host country in order to benefit from State vocational courses, or when the prerequisite for participation in these is proof of a previous degree, conditions which refugees can often not meet.

7. *Offering Language Courses, and Ensuring Functional Literacy*

Language is undoubtedly one of the greatest barriers to the employment potential of refugees, together with the economic situation in the country of asylum.

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<sup>160</sup> For example, refugees who were lawyers in their country of origin, may be able to conduct legal research or negotiations for law firms, provide legal counsel to a private company, work in the area of administrative law (labour tribunals, ethical committees in professional associations, etc), international law, or otherwise use their legal training in capacities which do not require formal professional equivalencies, an actual law degree, or do not entail formally representing clients in legal procedures. Teachers, for instance, may also be able to take up positions in administrative or other functions in educational institutions, school boards, government or NGO educational programmes or agencies, or a private school, even if they cannot teach in a classroom setting in a public school. Accountants might be able to work as programme or administrative assistants with private companies providing advice, or with international organizations or NGOs that welcome diversity and which, given the nature of the job, do not necessarily require the same permits to practice or certificates of equivalency.

□ *Language Courses at Different Levels Should Be Offered at the Earliest Opportunity*  
Ideally, partially or fully subsidized language courses should be offered to refugees at the earliest possible opportunity,<sup>161</sup> and enable them to achieve a degree of command of the local language sufficient for their every day needs, as well as their employment needs, which can vary significantly depending on the person's educational and professional level or background. Ideally, a language programme should offer at least one beginner, intermediary and advanced level course. In certain situations, it may also be necessary to provide targeted, specialized or supplementary language courses or tutoring.

□ *Adapting Language Courses to Employment and Family Needs*  
For detailed recommendations on languages courses, including on how they can be adapted to employment and family situations or needs, please refer to the recommendations in chapter 5 below, which must be read as a complement to this section.

#### 8. *Housing Compatible with Employment Opportunities*

Housing and employment hold a central place in the functional integration of refugees, both separately and together: the close relationship between affordable housing and employment opportunities being a key factor in creating conditions for a sustainable livelihood and the integration of refugees. Recommendations and strategies for addressing both issues in an integrated and effective fashion are provided in chapter 4 below, and are an important complement to the recommendations in this chapter.

#### 9. *Accent on Promoting Individual Refugee Initiatives and Participation*

A high level of refugee participation has been shown to aid considerably in ensuring that refugees receive appropriate and the desired type of employment assistance.<sup>162</sup> Programmes which support or promote individual refugee initiatives, participatory methods and strategies as well as participation in mainstream vocational, retraining or employment programmes are thus recommended. One such example, is the drawing-up of a detailed plan of action with individual refugees and families, which includes self-reliance and employment issues. Other strategies provided in this chapter may also be helpful in promoting refugee participation and initiatives.

#### 10. *Promoting More Mainstream Educational, Vocational and Re-qualification Training Opportunities for Refugees*

Where feasible and available, refugees with a sufficient command of the language should be assisted in attending State vocational and re-qualification courses instead of special UNHCR and NGO sponsored training courses specifically for refugees. This strategy, which should be promoted with relevant government institutions and refugees themselves,

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<sup>161</sup> The most opportune time to begin language courses is during the asylum procedure, or during the stay under an alternative protection regime, as this procedure can last up to several years in some cases, during which refugees, who are often not permitted to work, generally have more availability and are highly motivated.

<sup>162</sup> This was shown for example, in a 1998 survey by PPI, a Czech NGO specializing in the integration of recognized refugees, which found that only 11% of respondents reported being helped by various organizations, including NGOs, in finding employment. Moreover, this perception was present even when assistance had clearly been provided, indicating that the assistance given had not been what the refugee had wished for, or that the recipient had not participated sufficiently in the process. For more information, see da Costa (see above at footnote 22), p. 88.

is considered by some as a more effective and integrated approach to vocational training, not least because it has the significant advantage of providing refugees with a training certificate from a recognized institution rather than an unknown NGO programme.<sup>163</sup>

Refugees should thus be accorded the same or similar treatment with nationals with regard to employment-related educational opportunities, vocational training and practical workplace experience. As mentioned above, however, participation in such courses may be subject to certain administrative or regulatory requirements which may be impossible or difficult for refugees to satisfy. These may include requirements regarding *inter alia*: proof of former training; job experience; academic degrees; a required period of residence or time worked in the host country; or a certain duration of unemployment. In such instances government authorities should consider and refugee-assisting organizations advocate, granting refugees special dispensations in the form of waivers, suitable compromises, or alternative proof of certain requirements, in order to allow them to participate in the course and ensure that they will be able to obtain a certificate upon completion of the training. In particular, relevant legislative or administrative provisions should exempt refugees from requirements relating to a minimum period of residence, previous employment or unemployment, so that they are eligible to enrol in these programmes as soon as possible.

Where State courses are not available, not free of charge, or when they are too time intensive to allow the person to work at the same time, financial assistance should be considered in order to enable them to pursue their training. Ideally, refugees should provide some participation whether financial or otherwise.<sup>164</sup> UNHCR and refugee-assisting NGOs could also lobby relevant government or private institutions for special agreements to reduce or waive the fees for refugees in need. The same may be done with regard to re-qualification programmes at universities, colleges or other such educational institutions.

While developing too many pre-existing refugee-specific training programmes is not encouraged, in certain circumstances special vocational and re-qualification programmes for refugees may be a better, a complementary, or even perhaps the only alternative to mainstream programmes. This may be the case where no effective access to State programmes can be provided to refugees, where there is still an important language barrier or where there are simply no viable domestic programmes. In such situations, NGO-run programmes may offer a more cost-effective alternative to private institutions. Better

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<sup>163</sup> Moreover, in certain countries there is some evidence that the courses offered in the past to refugees through UNHCR and its implementing NGOs, have never been thoroughly assessed, or have not been deemed to be sufficiently successful. Even where national programmes may be under-funded and inadequate to the needs of the workforce, promoting refugee participation in these mainstream courses offered by the State may still be a strategy worth pursuing for some of the following reasons: it provides national governments with the opportunity to implement their responsibilities and grant access to refugees; refugees have the opportunity to interact more fully and make contacts with society at large rather than being isolated in refugee-specific programmes; and funds which would have gone to refugee-specific trainings can now be redirected to other purposes related to employment, such as employer incentives or job placement assistance upon completion of the course.

<sup>164</sup> A financial contribution could be a percentage of the total cost based on the refugee's financial capacity, whereas other forms of participation could include demonstrating a level of commitment and seriousness by researching appropriate institutions and programmes (including state programmes), presenting the costs and the contact details of the relevant educational institutions, providing a justification of which institution is preferable, putting together a *curriculum vitae*, and action plan for job searches upon completion of the course, including a list of potential employers and employment options. A standard *curriculum vitae* form with the relevant categories should be provided to refugees who have no prior experience in drafting these.

strategies for securing more regular attendance, linking vocational training to the needs of the labour market and refugee interests, and also linking training more closely with specific job opportunities should continue to be elaborated. A special effort should be made to provide vocational training and re-qualification programmes to refugee women.

#### 11. *Other Employment Assistance Programmes: Small Business and Employer Incentive Programmes*

Programmes to support refugees with small start-up businesses by providing grants, loans or technical assistance (i.e. advice) often have the benefit of a multiplier effect since refugees may hire other refugees or family members, and these businesses usually help support the entire family. Given that these types of programmes have not always proven successful in the past, however, it is important that such programmes draw on relevant lessons learnt and good practices in order to increase their chances of success and the quality of their implementation. For example, amongst other things, successful small-business or micro-credit programmes often adopt criteria for identifying eligible and capable refugees, help them with the development of a sound business plan, and provide financial as well as continued logistical support to help them set up and run the business.<sup>165</sup> An appropriate business and economic environment in the host country has been found to be critical in the success of small businesses, while some types of businesses have been found to be particularly prone to failure.<sup>166</sup>

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<sup>165</sup> For further details on the experience in some regions of such business grants, as well as sharing of good practices, lessons learnt and specific recommendations in this domain, see with regard to western and central **Europe**: ECRE, *Good Practice Guide*, *ibid.*; and da Costa (see above at footnote 22). In the context of the **Americas**, the “cajas comunales” are perhaps one of the best known good practices. A programme created by and for Guatemalan refugees in Southern Mexico, the “cajas” consist of revolving micro-credit funds managed directly by refugee associations (which provide credit to their members). In Mexico, technical assistance was provided by an NGO made up of refugees who were provided with specialised training in micro-credit and project management. The “cajas” often also include members of the local Mexican population. This model is now being replicated in other countries in the region, including Panama where micro-credit is provided for projects involving the production and sale of raw sugar, and Ecuador where it is provided for such activities as carpentry shops, and small scale vegetable production by refugee women. Other areas which have lent themselves to small business-ventures by refugee women in particular in that region include seamstressing, hairdressing, beauty care, handicrafts, and street vending (e.g. Ecuador).

<sup>166</sup> A variety of such business programmes have been undertaken in many countries, and despite carefully drafted guidelines and conditions they have not always been successful. The following are some suggestions which have emerged from the valuable experience already acquired with regard to such programmes by NGOs and UNHCR in some countries:

- a *curriculum vitae* or detailed account of the person’s educational and work background should be provided, as well as a realistic business proposal, complete with costs and expected returns, though the forms for this should be in a simple, easy format;
- the loan or grant provided should not meet all the business costs but should also require an investment on the part of the refugee, which should nonetheless take his individual financial capacity into consideration;
- each financial installment of the grant or the loan should, in principal, be conditional on the satisfactory completion of previous objectives or conditions. And financial assistance should, to the extent possible, be disbursed in the form of direct payments to suppliers, landlords, and for purchase of equipment, the details of which should be provided by the refugee, thereby indicating that he/she has done research and is committed to the business venture.

In addition, organizations providing financial assistance for these business projects should keep track of the types of business proposals which have in the past proven unsuccessful or problematic. While differing from country to country, problematic businesses in the past have included outdoor market activities and money exchange services. The relatively small amounts of financial assistance which are generally granted mean that only small business ventures, of which market activities are an example, are possible. As such, solutions which render such businesses more viable may be preferable to excluding them altogether from grant

Employer incentive programmes whereby incentives are offered to prospective employers for training and eventually hiring refugees are also of potential interest. In such schemes, refugees should be encouraged as much as possible to take the initiative by approaching potential employers of interest and then requesting assistance from relevant NGOs or other organizations in order to negotiate a possible agreement if there is mutual interest on the part of both parties.

## 12. *Facilitating Informal Networks*

In identifying and securing jobs, informal networks of friends, acquaintances, as well as family and community members are often vastly more effective than institutional procedures and contacts.<sup>167</sup> Hence, efforts should be made to support the development of such networks. This may be achieved in a number of ways, including promoting opportunities for contact amongst refugees, immigrant communities and the host population, and supporting the establishment of refugee and immigrant/ethnic organizations and community structures (including community social and assistance centres).

## 13. *Promoting Preventive Measures to Discourage Participation in the Informal Economy*

Situations or conditions which may encourage refugees to participate in the informal work sector typically include, *inter alia*:

- insufficient or complete lack of State financial (i.e. public relief or social welfare) assistance during the RSD procedure (during which asylum-seekers are also generally prohibited from working – see below);
- legal prohibition to work during the period of time they are under a different status (e.g. under an alternative protection regime) in the host country and/or during the time they are awaiting their refugee status. As mentioned above, insufficient or lack of State assistance during this period, as well as the urgency of sending money back to their dependants in the country of origin may thus force them into informal employment networks which may persist after recognition;

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programmes. For refugees who have come from rural areas and have experience in farming, consideration should be given to offering grants in this sector.

In an effort to help professionalize some of these business activities, the establishment of a business club where members could meet once a month to receive counselling on such practical matters as business management and relevant legal issues, as well as a business courses *per se*, have also been suggested.

Perhaps most important of all, however, UNHCR and other organizations interested in starting such a programme should first conduct an evaluation of the domestic conditions for the small business sector (including with regard to taxes, laws and reporting requirements) in order to assess the chances of success. Screening prospective candidates by providing counselling regarding their expectations and the needs of the current labour and consumer market would also be beneficial. For further information on this topic, see *inter alia*, da Costa (see above at footnote 22) (chapter on employment section in Country Profiles, notably those of Hungary, Romania and Bulgaria).

<sup>167</sup> This has also been confirmed in relevant surveys, such as one done by a Czech NGO (PPI) specialising in integration, which reported that two thirds of the respondents had reported finding employment on their own or with the help of friends, rather than through the assistance of organizations (11%) and labour offices (3%). *Survey: 'Refugees in the Czech Republic: Research Questionnaire Report'* (otherwise known as 'PPI Study'), by PPI, Prague, Czech Republic, December 1998.



- insufficient language skills, local contacts, and social integration to compete successfully in the domestic labour market (especially during the initial adaptation period);
- eagerness by some employers to hire refugees off the books in order to avoid paying their share of contributions and enjoy cheap labour; and
- the low level of net wages remaining after taxes/contributions.

Refugees who worked in the informal labour force before they were granted refugee status may also be more inclined to continue working in that sector once they are recognized. Some of the recommendations in this reference guide already address, directly or indirectly, some of these issues, particularly with regard to language and inadequate assistance during the RSD procedure. In addition to these, counselling and assistance should be provided to refugees regarding the legal, social and financial consequences (in terms of their eligibility for certain types of State assistance, such as health care) of working in the informal labour market, and alternative modes of employment, some of which carry lower rates of taxation than wage-earning employment.

#### *14. Assistance and Support to Governments Undertaking Integration-Related Responsibilities, Including on the Issue of Employment*

In the context of the integration responsibilities of States, efforts should be made to provide forums, programmes and opportunities to increase the level of knowledge and capacity of States to provide employment assistance to refugees. Among other programmes, venues should be provided for relevant organizations to share their findings, assessments and needs analyses with regard to their experiences. Twinning projects,<sup>168</sup> training, exchanges, and assistance with the establishment of such programmes, should be offered to State authorities, who may in some instances have little or no experience in the realm of integration, and employment strategies for refugees. Partnerships between UNHCR (or relevant NGOs) and State authorities in implementing integration programmes, and more specifically employment-related assistance, is another way to transmit experience and maximize resources. NGOs for example, often have better networks and a stronger rapport with refugees, which may make them a good implementing partner for governments with regard to such programmes.

#### *15. Special Assistance and Focal Points: For Women Refugees and Employment*

Because many refugee women may have been the primary caregivers in the family and have little or no work experience outside the home, they may have special needs with regard to employment assistance. It is therefore advisable that employment assistance programmes include a more tailored assistance strategy for them. This may include more specialized counselling, increased funding, and a more individualized and targeted job-placement assistance strategy. In view of these needs, some organizations working in this area have assigned a focal point specifically tasked with assisting refugee women in the field of employment. Amongst other things, the focal point can undertake a gender and

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<sup>168</sup> Under such projects one State volunteers to provide civil servants working in a relevant field to another State with less developed structures, in order to assist the building up of domestic expertise in specific areas of interest.

needs analysis, and ensure that strategies and specific measures address and reduce obstacles for women wishing to take up employment or engage in programmes to improve their employment prospects, such as apprenticeships, vocational training or language courses. Addressing obstacles to the employment of refugee women could also mean, for example, taking their family duties into consideration by offering language or vocational courses during children's school hours or providing day care services. Women may also need assistance with such basics as drafting a *curriculum vitae*, or undertaking a job search as such.

Employment assistance programmes for refugee women should aim as well to identify and develop income-generating opportunities which stem from the particular interests and skills demonstrated by the women themselves. They may include assistance in formulating business proposals. Some areas of interest amongst non-professional women which have lent themselves to small business ventures (income-generating projects) and other independent low risk/cost work opportunities in the past, have included *inter alia*: seamstressing, hairdressing, handicrafts, beauty-care, soap-making, pressing of edible oil, rearing of livestock, retailing of second-hand clothing and small-scale catering.

Where relevant, development projects targeting local women and which have the direct or indirect effect of increasing job or self-reliance opportunities for them in the community, should also, to the extent possible, be open to the participation of refugee women in the area.

16. *Encouraging Relevant Organizations to Extend Their Mandate and Activities to Help Protect Refugee Employment Rights, Including Against Discrimination*

Relevant actors (both governmental and non-governmental) in the field of labour, human rights or refugees, should be lobbied and provided the skills to monitor, report, protect and defend the rights of refugees with regard to employment, including against discrimination in employment. More specifically, such organizations should be encouraged to include the rights of refugees as part of their broader organizational mandate and activities. Active public information campaigns and interventions on behalf of individual refugees may also sometimes be necessary in order to correct misperceptions or misinformation with regard to refugee rights, or an employer's misgivings with regard to the legal stay or right to work of a refugee, especially in cases where administrative papers such as work permits, or residency/identity cards with short term validity may lead to confusion.

Refugees who have been victims of discrimination in employment should be granted the same assistance, legal and otherwise, as that accorded to nationals. Refugee-assisting organizations should therefore sensitize human rights groups and institutions to the problems and rights of refugees in the host country. A similar process should be undertaken with relevant ministries, particularly the ministries in charge of employment and social affairs, as well as government employment offices, so that their personnel also understand the rights and special needs of refugees.

## **CHAPTER 4: HOUSING RIGHTS**

### **MAIN INTERNATIONAL STANDARDS**

#### **1951 Convention Relating to the Status of Refugees**

##### **Article 21**

##### ***Housing***

*As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.*

#### **International Covenant on Economic, Social and Cultural Rights**

##### **Article 11**

*1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*

#### **Universal Declaration of Human Rights**

##### **Article 25**

*(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*

#### **Convention on the Elimination of All Forms of Discrimination against Women**

##### **Article 14**

*2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:*

*[...]*

*(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.*

#### **Convention on the Rights of the Child**

##### **Article 27**

*1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.*

*[...]*

*3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.*

#### **International Convention on the Elimination of All Forms of Racial Discrimination**

##### **Article 5**

*In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:[...]*

*(e) Economic, social and cultural rights, in particular:*

*[...]*

*(iii) The right to housing; [...]*

## A. International Standards

### 1. 1951 Convention

Article 21 on housing in the 1951 Convention is intended to deal with the question of rent control and assignment of apartments and premises, as well as participation in home financing schemes.<sup>169</sup> The obligation to respect the standard of treatment in that provision is imposed on the State, including all relevant public authorities, such as municipalities. Therefore, if housing is subject to regulations and the control of administrative authorities, these must ensure that the relevant laws or regulations accord refugees the most favourable treatment possible, which should never fall below that granted to aliens generally.<sup>170</sup> This provision thus imposes a standard which goes beyond the negative duty not to discriminate against refugees.<sup>171</sup>

### 2. Other International and Regional Instruments

Both the Universal Declaration on Human Rights and the ICESCR include provisions relating to the right of everyone, without discrimination, to an adequate standard of living, including the specific right to adequate housing.<sup>172</sup> It appears that the Covenant's monitoring Committee and the HRC may perhaps permit States a certain amount of discretion to differentiate in favour of their own nationals (*vis-à-vis* aliens), unless such differentiations are unreasonable.<sup>173</sup> However, as argued earlier in this reference guide such differentiation and restrictions, including with regard to the right to housing, should not be applied in the case of refugees (even in developing States) who should instead be granted treatment as favourable as possible (i.e. as nationals or permanent residents) given their special status.<sup>174</sup>

In its General Comment No. 4 the monitoring Committee of the ICESCR stressed that this right to housing, which is of central importance and is derived from the right to an adequate standard of living contained in the Covenant, should not be interpreted in a narrow or restrictive sense.<sup>175</sup> More specifically, it should not be understood simply as a commodity or as the shelter provided by merely having a roof over one's head, but rather as the right to live somewhere in security, peace and dignity.<sup>176</sup> According to the Committee, this is appropriate because: (1) the right to housing is "integrally linked to other human rights and to the fundamental principles upon which the Covenant is

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<sup>169</sup> Article 29 in the 1951 Convention is also of note, as it ensures that States do not impose upon refugees duties, charges or taxes of any description (thus also in relation to housing) that are other or higher than those imposed on nationals in similar situations.

<sup>170</sup> According to one interpretation of article 21, if housing functions entirely on the basis of private enterprise, the State does not have any obligation to pass laws specifically ensuring suitable housing for refugees.

<sup>171</sup> Grahl-Madsen (see above at footnote 53), p. 84.

<sup>172</sup> Articles 2 and 25(1) of the Universal Declaration of Human Rights, and articles 2(2) and 11(1) of the ICESCR.

<sup>173</sup> Dent (see above at footnote 47), p. 108.

<sup>174</sup> See Part II above.

<sup>175</sup> Committee on Economic, Social and Cultural Rights, General Comment 4, 'The right to adequate housing', (Sixth session, 1991), U.N. Doc. E/1992/23, annex III, p. 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

<sup>176</sup> *Ibid.*, para. 7.

premised” (e.g. the inherent dignity of the human person); and (2) the reference to housing in article 11 must be read as referring not just to housing but to **adequate** housing.<sup>177</sup>

Despite the relevance of social, economic and other variables, the Committee nonetheless goes on to identify certain aspects of this right which **must** be taken into account in order to determine “adequacy”, including: legal security of tenure;<sup>178</sup> availability of services, materials, facilities and infrastructure; affordability; habitability;<sup>179</sup> accessibility;<sup>180</sup> location (allowing access to e.g. employment options, health-care services, schools etc.); and cultural adequacy. Moreover, the right to adequate housing, concludes the Committee, cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments. It is linked to the concept of human dignity and the principle of non-discrimination, as well as being related to the other rights such as, *inter alia*, the right not to be subjected to arbitrary or unlawful interference with one’s privacy, family, home or correspondence.<sup>181</sup> Furthermore, despite the reference to “himself and his family” in article 11 of the Covenant, the Committee stresses that the concept of the “family” must be interpreted in a wide sense – the right to adequate housing applies to *everyone*, including individuals, female-headed households or other such groups, and regardless of age, economic status, group or other affiliation or status and other such factors (in accordance with article 2 (2) relating to the right not to be subject to any form of discrimination).<sup>182</sup>

The ICESCR Committee has focused as well on other specific aspects of the right to housing in other General Comments, including *inter alia*: the rights of tenants; the need to construct low-income housing; the lack of domestic remedies for housing rights violations; protection against evictions; and protection from discrimination.<sup>183</sup>

International law also provides for the particular rights of women and children in relation to adequate housing. Similarly to article 11 of the ICESCR seen above, CEDAW (which extends to all women including recognized refugees) grants rural women the right to

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<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*, para. 8. With respect to tenure, the ICESCR Committee explains that :

“Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups”.

<sup>179</sup> *Ibid.* The Committee comments in this paragraph that: “Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well.”

<sup>180</sup> *Ibid.* The Committee explains that:

“Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such **disadvantaged groups** as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups”.

<sup>181</sup> *Ibid.*, para. 9.

<sup>182</sup> *Ibid.*, para. 6.

<sup>183</sup> See, for example, the ICESCR Committee’s General Comment No. 7 on evictions.

adequate housing in the wider context of the right to adequate living conditions, such as sanitation, electricity, and water supply (article 14). The CRC for its part, requires in article 27 that the State provide adequate housing to children in need of material assistance. Article 5(e)(iii) of CERD further complements the various international instruments mentioned above by prohibiting racial discrimination in all its forms, including in relation to housing.

In certain circumstances, the ILO Convention concerning Migration for Employment (No. 97) of 1949, as well as other ILO Conventions and Recommendations<sup>184</sup> may also be applicable to refugees. The former Convention contains a more generous standard than the minimum requirement in the 1951 Convention,<sup>185</sup> granting legal migrant workers (which may include refugees who beyond seeking protection also fit the definition of a migrant worker) treatment equal to that of nationals with regard to accommodation. This does not however, include equal treatment in access to home ownership and public financing schemes that may exist to facilitate it.<sup>186</sup> This provision is to be implemented without discrimination as to nationality, race, religion or sex, and like article 21 of the 1951 Convention, is applicable to the extent that housing is subject to the control of administrative authorities or is regulated by law.<sup>187</sup>

At the **regional** level, both the Commission and the European Court of Human Rights have considered the issue of housing in several cases,<sup>188</sup> and while they have declared that States do not have a legal duty to provide housing to their citizens,<sup>189</sup> they have nonetheless held that public authorities are required to ensure that they do not impose intolerable living conditions on a person.<sup>190</sup> In certain cases, the European Social Charter may also be relevant to refugees, including in enforcing their housing rights.<sup>191</sup> As noted above, through an Appendix, the Charter incorporates the standards contained in the 1951 Convention as well as other international instrument applicable to refugees, and further states that Contracting States are to generally accord refugees treatment as favourable as possible.<sup>192</sup> In case of need, refugees in this region can therefore use the supervisory and complaint mechanisms of the Charter to enforce their rights under the 1951 Convention.

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<sup>184</sup> See, for example, ILO Recommendation No. 115 on Workers' Housing.

<sup>185</sup> Article 6 of the ILO Convention concerning Migration for Employment, No. 97, 1949 (entered into force January 22, 1952).

<sup>186</sup> Dent (see above at footnote 47), p. 112.

<sup>187</sup> Grahl-Madsen (see above at footnote 53), p. 83.

<sup>188</sup> See Dent (see above at footnote 47), p. 114, footnote 439, referring to: *Gillow v. UK*, Series A, No. 109, March 16, 1987; *Buckley v. UK*, Series A, 1271/96; and *Akhdivar and others v. Turkey*, Series A, 1192/96). It should be noted that no specific right to housing is provided in the ECHR however.

<sup>189</sup> *Ibid.*, footnote 441.

<sup>190</sup> *Ibid.*, referring to a citation of Application 7367/76 by Scott Leckie, "The Justiciability of Housing Rights", in Coomans and Van Hoof (eds.).

<sup>191</sup> Besides the rights incorporated through the Appendix, the main body of the Charter also contains article 13 on the right to social assistance, which although it is not explicitly mentioned may be assumed to include housing, and article 19(4)(c) requiring equal treatment with respect to accommodation between citizens and migrant workers who are nationals of States Parties. However, as noted previously in this reference guide, the rights in the body of the Charter itself only extend to refugees who are nationals of a Contracting State and are lawfully resident or working in that State. Since such cases are rare, these provisions are not likely to be relevant to most refugees. A similar situation exists with regard to the European Convention on the Legal Status of Migrant Workers, which in principle also only applies to nationals of Contracting States, which recognized refugees are not likely to be.

<sup>192</sup> Para. 2 of the Appendix 'Scope of the Social Charter in terms of persons protected', to the European Social Charter.

Moreover, article 1 in Protocol No.1 to the ECHR provides for the right of every person to the peaceful enjoyment of his possessions as well as other guarantees regarding possessions, which also have applicability to housing rights. Further details in this regard are provided in chapter 11 below. Article 8 of the ECHR as well as the relevant jurisprudence on this provision are also noteworthy in that they offer guarantees against undue interference in one's private and family life, *home* and correspondence.

Within the European Union, the European Council Directive on Minimum Standards provides in article 31 that Member States are to provide refugees "access to accommodation under equivalent conditions as other third country nationals legally resident in their territories". No specific standards with regard to the housing are provided in that Directive, however.

In the context of the Americas and Africa, neither the San Salvador Protocol nor the African Charter on Human and Peoples' Rights include a specific right to housing.

## **B. Recommendations**

### *1. The Necessity to Take Into Account the Broader Context and Importance of Housing*

Beyond the obvious need to secure basic conditions of shelter, housing programmes and policies must also consider and be capable of answering many related needs of refugees. These various needs may include: employment opportunities; the need to provide a place of residence or domicile in order to secure residency/identity papers (often necessary to access certain rights); the need for *affordable* housing so that they can achieve a sustainable and adequate standard of living; and the need for an environment conducive to socio-cultural adaptation and integration.

While housing problems and the consequences of these may be fundamentally different in different regions of the world, the lack of affordable housing compatible with employment possibilities or self-reliance, is undoubtedly a severe and pressing problem for recognized refugees in many regions. It sometimes impacts on their very capacity for self-sufficiency, such that even when employed, the high cost of housing relative to their wages means that refugees may be unable to secure a livelihood.

In other parts of the world, congestion in large urban areas or policies of compulsory participation by local communities in housing and integration programmes (for refugees), may result in programmes which have the effect of attracting or even forcing refugees into rural areas or small towns. Yet other housing programmes and policies (or the absence thereof) may have the effect of ghettoizing or marginalizing refugees by forcing them for example, to live on a long-term basis in housing which was only intended as temporary.

Beyond the strictly legal aspects of refugee housing rights, the housing situation also has broader implications for the integration prospects of refugees. While it is not possible in this reference guide to provide recommendations for the entire range of housing situations and related challenges which refugees must confront, the recommendations below highlight some of the main issues and possible strategies for addressing housing problems.

2. *Standard of Treatment: Granting Recognized Refugees the Standard of Treatment Accorded to Nationals, and Supplementary Programmes as Necessary*

Given the difficulties related to housing in many parts of the world, and in keeping with the recommendations in the 1951 Convention as well as their rights under international human rights instruments, refugees should be granted the same standard of treatment with regard to housing as is accorded to nationals (or permanent residents). In particular, they should be granted the same rights to rent control, assignment of apartments, participation in home financing schemes, tenant's rights, and protection from discrimination. Additional housing programmes and related assistance to refugees may also be necessary in many contexts – some of the recommendations below take account of such situations.

3. *Integrating Affordable Housing and Employment Programmes*

Housing and employment hold a central place in the functional integration of refugees, both separately and together: the close relationship between affordable housing and employment opportunities being a key factor in creating conditions for a sustainable livelihood and the integration of refugees.

Assistance programmes in the areas of housing and employment should be integrated (or at least informing each other) and to the extent possible, suitable to the individual refugee's particular social and professional/employment profile. Relevant organizations, donors and State agencies should therefore promote housing programmes for refugees which:

- consider employment possibilities and strategies; and
- have the capacity and flexibility to take account of the particular compatibility between the type of job opportunities available in a particular area and the individual or group profile of the refugees concerned (including their rural or urban backgrounds, skills and professional situation).

It may even be argued that these two conditions should be prerequisites or preconditions to providing any support to housing programmes, whether financial or otherwise.

4. *Incentives to Reside in Low Cost Areas or the Countryside*

Incentives to recognized refugees to reside in low cost areas such as the countryside should ideally only be offered if reasonable employment prospects exist, sound strategies have been elaborated in this regard, and the refugees' profile, skills or background are compatible with such strategies (such as with refugees from a rural background).

5. *Respecting the Right to Freedom of Residence and Movement*

Chapter 12 below on freedom of residence and movement should be read as a complement to the recommendations on housing in this chapter. Indeed, the right to freedom of residence and movement are recognized and protected in both international refugee and human rights law, and must be respected as well in relation to housing issues. Certain sanctions for example, which are imposed on refugees who refuse to accept a particular housing offer or who decline to participate in a particular housing programme, must therefore be analyzed in relation to human rights standards, including with respect to the



right to non-discrimination. Further recommendations in this respect are also provided below.

#### 6. *Housing Programmes to Consider Integration and Personal Needs*

Housing programmes should not function in isolation from other integration objectives or fail to take into account compelling personal needs, such as the need to live in an environment compatible with work or educational opportunities, near extended family members, or where health care facilities are available for refugees who require special care. In view of the special difficulties often faced by refugees, efforts should be made to develop housing programmes which offer some individual attention and flexibility, rather than simply offering incentives or automatically penalizing refugees for not accepting a particular housing offer or declining to take up residence in a particular community. Programmes which lack the capacity to be flexible may, *inter alia*: force refugees into inappropriate living situations; render them more vulnerable to stigmatization or marginalization, (e.g. by forcing them to live in hostile environments or areas where they could not hope to find any work); encourage the development of a dependency syndrome and increase isolation; and increase the chances of chronic poverty (and dependency) which could have otherwise been avoided or alleviated, including by living close to members of their extended family or ethnic communities, for example.

#### 7. *Sanctions in Case of Refusals to Accept a Specific Housing Offer or Declining to Settle in a Particular Community*

Punitive measures for not accepting a specific housing offer or an offer to settle into a particular community, and which involve significant or total withdrawal of social assistance (i.e. welfare or public relief) or other rights or benefits essential to ensure a person's basic needs and/or status in the host society should not be imposed. A balance should be struck between maintaining the efficient administration of such programmes on the one hand, and ensuring that these programmes are flexible and responsive to individual (or group, in certain circumstances) needs and compelling circumstances, on the other.<sup>193</sup> In addition, any punitive measures or sanctions imposed on refugees refusing to accept housing offers or to live in a specified community must pass the test of non-discrimination, including in relation to the right to freedom of residence and movement. Ensuring that such sanctions and housing programmes are not implemented in a discriminatory fashion is all the more necessary, as in many cases, such sanctions (and, the resulting "restrictions") are **not** imposed on other aliens, but remain specific to refugee policies or programmes (for example, in relation to housing, freedom of residence and movement, and general integration strategies). More details on this topic are also provided in chapter 12 below.

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<sup>193</sup> While it is important for housing programmes (or municipal integration programmes which include housing) to be able to impose certain rules with regard to the acceptance of housing offers, especially in a tight housing market, a reasonable degree of flexibility and responsiveness to individual needs or situations is still necessary. Housing programmes should therefore include a reasonable degree of flexibility, which takes into consideration compelling personal, professional and other circumstances, supports refugees to seek an alternative solution to the extent possible (for example, exchanging housing with another refugee) or provides them with an alternative housing possibility, and does not impose penalties for refusing to live in a designated municipality or particular housing which was offered by the state. In particular, punitive measures involving the total or partial withdrawal of rights, key benefits or social assistance /welfare assistance which are necessary to the refugee's livelihood and welfare should not be applied.

8. *Cities with Acute Shortage of Affordable Housing: Need for Sustainable Strategies for Refugees and Exchange of Good Practices*

In order to help interested organizations and national governments identify housing solutions for refugees, especially in centres or areas with acute housing shortages, a situation analysis as well as a survey or study on what strategies might be most appropriate to secure affordable housing might be the most effective way to proceed.<sup>194</sup> The costs, relative merits, success, sustainability and appropriateness of different types of housing assistance programmes to the situation at hand could be assessed by such a study. For example, one might compare some of the following: programmes offering financial assistance (towards housing) as opposed to those working on the basis of actual offers of affordable accommodation; programmes offering financial incentives and assistance to encourage refugees to move out of the capital and other congested areas and into areas with cheaper housing options; and voluntary as opposed to compulsory programmes of participation by local municipalities in housing and integration programmes for refugees.<sup>195</sup> Constraints such as the limited financial capacity of the governments involved, the general employment situation in the country (or region), and the potential marginalizing effect of some of the more traditional affordable housing programmes, should be factored in. Such a study could then serve as a basis to inform the design of new affordable housing programmes for both refugees and other vulnerable or marginalized groups in the country or region.<sup>196</sup> Naturally, if studies on securing affordable housing for vulnerable groups have already been conducted in the host country (region or city), these should be used to inform refugee housing programmes as well.

Increased opportunities for exchange of information, compilation of best regional practices, and sharing of experiences and lessons learnt in this field would also be beneficial.

9. *Temporary Accommodation Immediately Upon Recognition*

In some countries, asylum-seekers and other persons of concern are provided State accommodation in government reception centres. Once they are granted refugee status however, they must secure their own housing. Yet permanent housing may not be immediately available to newly recognized refugees. For example, there could be significant waiting periods in order to access existing housing programmes (including those specific to refugees), or acute housing shortages could mean that affordable private accommodation is simply unavailable. In such situations, it is important that governments plan for an interim solution and ensure that adequate temporary accommodation is

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<sup>194</sup> Such a study could include a situation analysis, make projections of future developments in this sector and research the most up-to-date approaches to the issue of affordable housing for vulnerable or marginalized groups, particularly in the context of community revitalization or housing rehabilitation projects which have already been attempted.

<sup>195</sup> The Czech (voluntary) housing programme, as well as some Scandinavian integration and housing models (including some where participation by municipalities is compulsory) for example, could be assessed for their transferability to other countries, and particularly to States in the central and eastern European region. For further details on the Czech housing programme in particular, see da Costa (see above at footnote 22) (see chapter on housing).

<sup>196</sup> As capitals and big cities become increasingly congested due to large national migratory movements in search of employment from rural areas to urban centres, both housing and community revitalization programmes will command more government attention in the future. As such, the research, findings and pilot projects emerging from projects intended to identify and secure suitable housing solutions for refugees, could also benefit government efforts to identify housing solutions for other groups.

available. In addition to ensuring that refugees have adequate accommodation and shelter during this period, a domicile address is also critical to the implementation of other rights. As such, an interim housing programme is especially recommended in countries where proof of a fixed address is necessary to obtain residence/identity cards, in order to secure refugees the right to live in a particular city, and even access core social and economic rights.<sup>197</sup>

This accommodation should be for a period sufficiently long to enable the refugee to identify and secure permanent housing. This period will vary depending on the housing situation in each country but an extendable minimum period of six months is recommended, during which any rent charged should be either State-regulated, or commensurate with social benefits or entry-level wages.

Ideally, housing during this transition phase should not be in isolated areas (if it is, there should at least be easy and affordable transportation to nearby urban areas) so as to allow refugees to seek permanent housing and employment possibilities. Where feasible, it would be preferable to offer recognized refugees accommodation *outside* reception centres or camps for asylum-seekers, and in an environment that would promote a more independent life style at the same time as providing integration support services, such as counselling and language courses.<sup>198</sup>

*10. Where Permanent Housing Assistance Programmes are Provided (State or NGO) – These Should Strive to Promote the Following:*

- Affordable housing compatible with employment possibilities: promoting or requiring an integrated strategy on both issues. Donors and governments should require that proposals for housing schemes or assistance projects automatically include an employment analysis and/or strategy in order to ensure a proper evaluation of the viability of the proposal for long-term integration. State integration frameworks as well as related policies and programmes should also be based on an integrated approach to these two issues. Implementation of housing and employment assistance programmes may often require coordination, or a holistic approach, given the impact each has on the other.<sup>199</sup> In addition, reference should be made to chapter 3 on Employment in this paper, and in particular to the recommendations on promoting housing compatible with employment opportunities.

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<sup>197</sup> This is the case for example, in central and eastern Europe, a region where proof of a domicile address and residency/identity cards (which cannot be issued without the former), are required in order to access and exercise many of the basic rights granted refugees. For further details, please see da Costa (see above at footnote 22) (chapter on Identity Cards and Convention Travel Documents).

<sup>198</sup> In countries with limited resources and which do not yet have adequate accommodation facilities for asylum-seekers or newly recognized refugees, a housing programme which simultaneously answers the needs of both groups might be necessary. In this case, an active permanent housing assistance programme for these newly recognized refugees should also be provided and their temporary accommodation at such a facility should not exceed six to twelve months, during which time they should be encouraged to live independently and pay a nominal rent.

<sup>199</sup> Where feasible for example, refugee-assisting NGOs can be given a dual employment and housing assistance mandate in order to ensure a coordinated approach. Such is the case with the Czech NGO, PPI, an NGO exclusively dealing with the integration of recognised refugees in the Czech Republic and who in addition to the wide array of services, including employment assistance, which they provide, also administer the government housing scheme for refugees. For further details on this, see da Costa (see above at footnote 22).

- Durable housing solutions for refugees offering guaranteed affordable housing for a minimum of five years, but preferably longer.
- Flexibility and capacity to consider individual needs or special circumstances. Housing programmes should have the capacity for a reasonable degree of flexibility and responsiveness to the needs or special circumstances of individual refugees. For example, there should be a possibility of exchanging apartments between refugee beneficiaries, and in exceptional cases, requesting a change of housing when this is required due to a pressing need, such as a growing family. See also chapter 3 above, especially the discussion on securing affordable housing compatible with employment.
- Avoiding marginalization and the ghettoizing effect of certain housing strategies, sites or projects which impose a heavy concentration of refugees in one place (e.g. area, neighbourhood or building). Other sensibilities may sometimes also have to be taken in to account, including ensuring that ethnic rival groups, or groups on opposite sides of a bitter war are not housed side by side (especially when such events may be relatively recent or especially traumatic).
- Programmes which, to the extent possible, contribute to local community development, increase the absorption capacity of the community and garnish local support rather than resentment, should be promoted. For example, such programmes could include renovation projects which create or improve housing rather than take housing away from local residents, or programmes such as that developed in the Czech Republic which include contributions towards the infrastructure of participating municipalities, and awareness-raising of refugee issues among local officials. In many situations, such programmes are much preferable to providing direct financial assistance to refugees or developing refugee-specific housing sites which risk segregation and marginalization.
- The collaboration of key actors including, State refugee agencies, local communities, UNHCR, local NGOs and the refugees themselves, in the development and implementation of refugee housing programmes, and even in the identification and selection of particular sites and buildings. Amongst other things, all of these actors should be involved in determining the suitability of housing programmes for the medium and long-term integration prospects of refugees, in addition to satisfying immediate needs. In addition to socio-economic indicators, attitudes of local populations to foreigners and refugees should be taken into consideration.

## 11. *Settlement Grants and Assistance With Household Furnishings*

### □ *Settlement or Rental Grants*

Settlement grants, provided by either national governments or refugee-assisting NGOs, can perform an important function in securing housing for refugees. Such grants are intended to enable refugees, who generally do not have sufficient savings or family support networks to make this important transition, to affect the move from a refugee camp (or reception centres) to their own accommodation and a self-sufficient lifestyle. Moreover, in many countries, large deposits (representing three or more months' rent in advance) are habitually required by landlords in the private housing sector, especially in the case of foreigners. Frequently, settlement grants are the only source of extra assistance which enable refugees to overcome such initial obstacles and establish a home for themselves.

□ *Furnishings*

Furniture and other household goods, which constitute considerable expenditures for refugees, are ideal items for in-kind donations. Such a programme could solicit in-kind donations from embassy and international agency offices (as well as their international staff who are subject to rotations), large companies, furniture manufacturers and retailers, department stores, and private persons. Where such a programme or donation campaigns are not feasible, relevant NGOs or municipalities hosting refugees could undertake activities to assist refugees in this regard, agreements could be undertaken with second-hand furniture providers, or charity groups (such as the Salvation Army) which aim to provide such items to poor local families, or settlement grants could include a certain amount for the specific purpose of purchasing furnishings.

12. *Awareness-Raising of Housing and Tenant Rights, Including for Refugee Women*

Orientation programmes, rights awareness campaigns, refugee-related literature, legal counselling services and housing assistance programmes, should include information on housing (and tenant) rights and regulations in the host country. In particular, these activities should target refugee women so that they may be better informed on such matters as: tenancy rights and obligations; available housing options and programmes; the implications of personally signing or not signing housing agreements (as opposed to their husbands or fathers doing so); their housing rights in the event of a separation or divorce; emergency housing and shelters; and NGOs, State agencies or other organizations able to provide assistance with housing issues (including legal assistance, if necessary).

13. *Address of Domicile or Permanent Residence*

Recommendations on issues related to a formal address of domicile or residence are provided in chapters 2 and 9, respectively on Residency Rights, and on Identity Papers and Convention Travel Documents.

## **CHAPTER 5:**

### **EDUCATION: PRIMARY, SECONDARY, HIGHER EDUCATION AND LANGUAGE AND VOCATIONAL TRAINING**

#### **MAIN INTERNATIONAL STANDARDS**

##### **1951 Convention relating to the Status of Refugees**

###### **Article 22**

###### **Public Education**

1. *The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.*
2. *The Contracting States shall accord to refugees treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.*

##### **Universal Declaration of Human Rights**

###### **Article 26**

1. *Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.*
2. *Education shall be directed at the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nationals, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. Parents have a prior right to choose the kind of education that shall be given to their children.*

##### **International Covenant on Economic, Social and Cultural Rights**

###### **Article 13**

1. *The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*
2. *The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:*
  - (a) *Primary education shall be compulsory and available free to all;*
  - (b) *Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;*
  - (c) *Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;*
  - (d) *Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;*
  - (e) *The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.*

##### **Convention on the Rights of the Child**

###### **Article 28**

1. *States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:*
  - (a) *Make primary education compulsory and available free to all;*
  - (b) *Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;*
  - (c) *Make higher education accessible to all on the basis of capacity by every appropriate means;*
  - (d) *Make educational and vocational information and guidance available and accessible to all children;*

(e) Take measures to encourage regular attendance at schools and the reduction of drop/out rates;  
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.  
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.  
[NOTE: **Articles 2, 29 and 30** are also relevant.]

## **Convention on the Elimination of All Forms of Discrimination against Women**

### **Article 10**

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas [...]
- b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises [...]
- c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by [...]
- d) The same opportunity to benefit from scholarships and other study grants;
- e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes [...]
- f) The reduction of female students' drop-out rates and the organisation of programmes for girls and women who have left school prematurely;
- g) The same opportunities to participate actively in sports and physical education ;
- h) Access to specific educational information to help ensure the health and well-being of families, including information and advice on family planning.

### **Article 14**

[...]

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: [...]

(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase technical proficiency. [...]

## **International Convention on the Elimination of All Forms of Racial Discrimination**

### **Article 5**

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...]

- (e) Economic, social and cultural rights, in particular:[...]
- (v) The right to education and training; [...]

## **UNESCO Convention against Discrimination in Education**

### **Article 1**

1. For the purposes of this Convention, the term "discrimination" includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:

- (a) Of depriving any person or group of persons of access to education of any type or at any level;
- (b) Of limiting any person or group of persons to education of an inferior standard;
- (c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or
- (d) Of inflicting on any person or group of persons conditions which are compatible with the dignity of man.

2. For the purposes of this Convention, the term "education" refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.

## A. International Standards

### 1. 1951 Convention

As regards education, international and regional human rights instruments have come to offer refugees standards of treatment and rights which are both wider and more generous than those provided in the 1951 Convention. Nonetheless, article 22 in the Convention contains some noteworthy aspects. This provision relates only to education provided by public authorities which is funded or subsidized by public funds, at the exclusion of private schools.<sup>200</sup> Significantly, it makes no requirement regarding lawful residence and simply applies to refugees (including asylum-seekers) without any further conditions. It seeks to ensure a basic elementary education to all children by granting refugees equal treatment with nationals: a right which was reaffirmed in ExCom Conclusion No. 47 which calls upon States to ensure that all refugee children benefit from primary education of a satisfactory quality, that respects their cultural identity and is oriented towards an understanding of the country of asylum.<sup>201</sup>

Article 22 also provides that States are to accord refugees<sup>202</sup> as favourable treatment as possible with regard to education beyond the elementary level (which includes general higher education as well as vocational training),<sup>203</sup> and at minimum must grant them at least the same treatment as other foreigners in the same circumstances.

The distinction between “elementary” and “higher” education is dependent on the definitions applied by each Contracting State,<sup>204</sup> and are unclear concepts in international terms. In some countries elementary school represents four years of schooling while in others it may be five to eight years. Secondary education may vary in a similar fashion, as in some countries it may begin in grade (or class) 6, 7, 8, or 9 and continue to grades 10, 11, 12 or 13. For programming purposes, within UNHCR **primary** education has been standardized as covering at least grades 1 to 8.<sup>205</sup>

The mention of recognition of foreign certificates, diplomas and degrees in article 22 is solely intended for the purpose of admission to advanced studies which require a prior

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<sup>200</sup> Robinson (see above at footnote 4), p. 103.

<sup>201</sup> ExCom Conclusion No. 47 (XXXVIII) of 1987 on Refugee Children, para. (o).

<sup>202</sup> This provision must of course, be interpreted as applying to the children of refugees, as much as to recognized refugees themselves. The principal whereby the rights which are granted to refugees are also to be extended to members of their families is endorsed in Recommendation B of the Final Act of 28 July 1951, which notes that the official commentaries of the Ad Hoc Committee on Statelessness and Related Problems support this interpretation. Naturally, if the child has by virtue of a different status of his own, more rights than his parent, he will benefit from the more favourable treatment. It should be noted that for the purposes of this reference guide the expressions “refugee children” and “children of refugees” are used interchangeably, and include both categories of children.

<sup>203</sup> Grahl-Madsen (see above at footnote 53), p. 87.

<sup>204</sup> Robinson (see above at footnote 4), p. 103.

<sup>205</sup> UNHCR, *Education Field Guidelines*, Geneva, February 2003, p. 21 (para. 3.1.1): “UNHCR will give priority to these grades [1 to 8] in terms of rapid establishment of EFA, and in terms of needed resources. This should be the case even where some of these grades are termed ‘middle’ or ‘lower secondary’ education in countries concerned, as UNHCR cannot support five years of first level schooling in one country and eight years in another, based on different usage of terms.”



diploma, certificate or degree.<sup>206</sup> With regard to the remission of fees or charges, this article should be read together with the more favourable provision in article 29, which in many cases will prevail over article 22,<sup>207</sup> and has the effect of granting refugees the same treatment as nationals with regard to duties, charges or taxes of any type which are levied by the State.

## 2. *Other International and Regional Instruments*

As mentioned above, in the field of education, refugees and indeed non-nationals in general, are granted considerably more generous and better-defined education rights in international and regional human rights instruments than in the 1951 Convention; rights which States must honour as they are bound to apply the most generous applicable standard.

Moreover, many of these human rights instruments have the added advantage of being subject to supervisory and enforcement mechanisms, such as the Committee on Economic, Social and Cultural Rights (also referred to as the monitoring Committee) with regard to rights under the ICESCR, the European Court of Human Rights in the case of rights under the ECHR, and the Inter-American Commission and Court in relation to rights under the American Convention on Human Rights and the San Salvador Protocol.<sup>208</sup> This is particularly noteworthy in relation to the right to education given the binding nature of the decisions of many of these supervisory and enforcement mechanisms, and the existence of a significant body of case law in this area.

The right to education is also considered to be one of the more justiciable rights in the ICESCR, portions of which the monitoring Committee considers capable of immediate application by judicial and other organs in many legal systems.<sup>209</sup> It is unlikely as well that either the Committee of the ICESCR or the HRC<sup>210</sup> would allow States much latitude to differentiate in favour of their nationals, given that the right to education has generally not been denied to non-nationals.<sup>211</sup> Moreover, as argued elsewhere in this reference guide, legal differentiations in favour of nationals with regard to certain rights (which may in certain conditions be permissible under international human rights instruments) should not be applied with regard to refugees, who by virtue of their special status and integration needs should be accorded their full rights under these instruments on the same level as nationals (or permanent residents). A minimum core content of the right to education has

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<sup>206</sup> Grahl-Madsen (see above at footnote 53), p. 87.

<sup>207</sup> *Ibid.*

<sup>208</sup> The San Salvador Protocol in particular, provides in article 19 (6) that cases of violations (by actions directly attributable to a State Party) of articles 8(a) and 13 (i.e. the right to education) can give rise to the individual complaints procedure under which individuals may lodge complaints before the Inter-American Commission. Subject to the terms of the Protocol and the Rules of Procedure of the Inter-American Commission, the Commission may also refer cases alleging violation of the right to education, for instance, to the Inter-American Court.

<sup>209</sup> Dent (see above at footnote 47), p. 95. In its General Comment No. 3, the Committee on Economic, Social and Cultural Rights suggested that articles 13(2)(a), 13(3) and 13(4) in particular would be capable of immediate application in many legal systems.

<sup>210</sup> The Human Rights Committee (HRC), which is the supervisory body of the ICCPR, is relevant in this instance given that article 26 of the ICCPR guaranteeing all persons equality before the law as well legal protection against discrimination, may stand on its own and as such, protect refugees against discrimination in access to education for instance. See, General Comment No. 18 of the Human Rights Committee for further details on the freestanding nature of article 26 of the ICCPR.

<sup>211</sup> Dent (see above at footnote 47), p. 93.

been defined by commentators on article 13 of the ICESCR as including the following: the right to non-discriminatory access to existing public educational institutions; to free and compulsory primary education; to free choice of education without interference by the State or a third person; and the right to be educated in the language of one's choice at institutions outside the official system of public education.<sup>212</sup>

Provisions contained in various other international instruments such as ILO Conventions,<sup>213</sup> CEDAW, CERD and the UNESCO Convention against Discrimination in Education may also provide certain guarantees in relation to the education of foreigners, and refugees more specifically. In particular, CEDAW seeks to eliminate discrimination against women and ensure that they receive equal treatment with men in all fields, including education. Articles 10 as well as 14(2) (d) on the rights of rural women with respect to education, literacy and training are especially noteworthy, and potentially of particular relevance to refugee women and the girl-child in refugee camp or rural situations. CERD for its part, guarantees in article 5(e)(v) the right to freedom from racial discrimination, including specifically in the field of education and training. Further details on relevant international and regional human rights instruments are provided below.

#### □ *Primary Education*

While the 1951 Convention grants refugees national treatment (whatever that may be) with regard to primary education, the ICESCR, CRC, and the Universal Declaration further specify that this substantive right to primary education is to be **free and compulsory** for all, without discrimination.<sup>214</sup> As mentioned above, these standards have even been deemed part of the minimum core content of the right to education in the ICESCR. In particular, the monitoring Committee of the ICESCR has interpreted this obligation strictly, stating that the charging of fees for primary education is contrary to this provision and cannot be deemed justifiable even for economic reasons.<sup>215</sup> This Covenant further encourages extending and intensifying “fundamental” education as much as possible to persons who have not completed the entire period of their primary education.<sup>216</sup> The UNESCO Convention against Discrimination in Education also forbids any form of discrimination which impairs equality of treatment in education, with regard to, *inter alia*, access to and quality of education of any type or level, and reiterates the principles relating to free and compulsory primary education.<sup>217</sup>

At the level of regional human rights instruments, provisions such as article 17 of the African Charter on Human and Peoples' Rights,<sup>218</sup> article 13 of the San Salvador Protocol,

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<sup>212</sup> *Ibid.*, p. 95, referring primarily to the definition of the minimum core content of the right to education as elaborated by Coomans: Clarifying the Core Elements of the Right to Education, in *The Right to Complain about Economic, Social and Cultural Rights*.

<sup>213</sup> Article 12(f) of the ILO Convention No. 143 provides, for example, that States are to take steps to assist efforts of migrant workers to preserve their national and ethnic identity as well as their cultural ties with their country of origin, including the possibility of children to be given some knowledge of their mother tongue. Although refugees' primary objective in moving to their host country is protection, they may still fit the definition of a migrant worker. Dent (see above at footnote 47), pp. 99-100.

<sup>214</sup> Articles 2 and 26 of the Universal Declaration; articles 2(2) and 13 of the ICESCR; and articles 28 and 29 of the CRC.

<sup>215</sup> Dent (see above at footnote 47), p. 94, drawing on Coomans' reference to U.N. Doc. E/C.12/1988/SR.19, para. 10, and U.N. Doc. E/C.12/1988/SR.17, paras. 27, 28, 40, 41, contained in his book, *The Right to Complain about Economic, Social and Cultural Rights*.

<sup>216</sup> Article 13(2)(d) of the ICESCR.

<sup>217</sup> Articles 1 and 4 of the UNESCO Convention against Discrimination in Education.

<sup>218</sup> Article 17 (1) provides “Every individual shall have the right to education.”

and article 2 of Protocol No. 1 to the ECHR also protect the right to education. In the European context, the latter provision specifically reaffirms the principle of non-discrimination in relation to access to existing educational institutions, stating (in article 2) that “no person shall be denied the right to education.” Within the European Union, article 27(1) of the European Council Directive on Minimum Standards provides that “Member States shall grant full access to the educational system to all minors granted refugee or subsidiary protection status, under the same conditions as nationals.”

In the Africa region, in addition to the Charter provisions, the Southern Africa Development Community (SADC) Protocol on Education and Training<sup>219</sup> for example, is also of note. It provides for seven areas of cooperation including educational and training policies, as well as basic, intermediary and higher education, and seeks to promote a regionally integrated and harmonized educational system especially with regard to issues pertaining to access, equity, and quality of education. In addition, article 5 (3) provides that where necessary and appropriate (but without prejudice to the normal admission requirements), Member States are to give special support to “socially disadvantaged groups” in admission to basic education in order to balance access to education.

In the Americas, it is also relevant to note that the Inter-American Commission on Human Rights has interpreted article 26 (on progressive development) of the American Convention on Human Rights as capable of protecting *specific* rights, including specific economic, social and cultural rights (such as the right to education or health, for example) contained in the San Salvador Protocol. Thus, in addition to article 13 on education in the San Salvador Protocol which was mentioned above, the American Convention on Human Rights may also be called upon to support this right.<sup>220</sup>

□ *The Right to Respect of Religious, Cultural, Moral and Philosophical Convictions in Education*

Another important component of the right to education included (explicitly or implicitly) in many of the international and regional human rights instruments mentioned above relates to the obligation of States Parties to respect the religious, cultural, moral and philosophical convictions of the child and/or his parents.<sup>221</sup> Article 4 on freedom of religion in the 1951 Convention also provides that States are to grant refugees treatment **at least** as favourable as that granted to nationals, including freedom as regards the religious education of their children. This is further confirmed in UNHCR ExCom Conclusion No. 47, which recommends that the education of refugees respect their cultural identity. In the ICESCR, this right is formulated as an obligation upon States to respect the liberty of parents to choose schools for their children, other than those established by the public authorities

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<sup>219</sup> Southern Africa Development Community (SADC) Protocol on Education and Training, September 1997, (entered into force July 2000).

<sup>220</sup> In the case of *Jorge Odir Miranda Cortez et al*, Report No. 29/01, Case 12.249, El Salvador, March 7, 2001, the Inter-American Commission concluded that it was competent to examine the merits of this case and that the petition was admissible pursuant to articles 46 and 47 of the American Convention on Human Rights. Thus, while it was not competent to determine violations of the relevant article 10 of the San Salvador Protocol in that case, it determined that it could take into account the provisions related to the right to health in its analysis of the merits of the case pursuant to articles 26 and 29 of the American Convention on Human Rights. In the same manner, the specific right to education contained in the San Salvador Protocol could therefore also be indirectly protected *via* the enforcement mechanisms of the American Convention on Human Rights, and its article 26, which specifically mentions educational standards.

<sup>221</sup> See in particular: articles 28 and 29(b),(c) of the CRC; article 13(3) of the ICESCR; article 5(2) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief; article 2 of Protocol 1 of the ECHR; and article 12(4) of the American Convention on Human Rights.

(although they should conform to the minimum standards set out by the State), and to ensure the religious and moral education of their children in conformity with their own convictions.<sup>222</sup> Similarly, article 29(1)(c) of the CRC provides that the education of the child shall be directed to the “development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.” The latter provision is particularly relevant to refugees, and implies a right to education about their own indigenous culture as well as knowledge of their country of asylum.

The analogous provision in article 2 of Protocol 1 to the ECHR, which focuses on the obligation of the State to respect parental religious and philosophical convictions in relation to their child’s education, has been interpreted by the European Commission as well as the Court.<sup>223</sup> In particular, in the *Danish Sex Education* case, the Court interpreted this provision as requiring the State to respect parental convictions by prohibiting any form of indoctrination. Commentators have elaborated on this, stating that this provision also requires that in State schools positive measures be taken to respect this right, such as granting exemptions to students for certain subjects.<sup>224</sup>

#### □ *Secondary and Higher Education*

With regard to secondary education as well, the ICESCR and the CRC offer more specific guarantees to non-nationals than the minimum standard provided in the 1951 Convention,<sup>225</sup> by requiring that in working towards the progressive realization of this right, States make secondary education generally available and accessible to every child by all appropriate means, including the introduction of *free* education. For the purposes of these two instruments, secondary education includes general, as well as technical and vocational education at that level.

Higher education is also to be accessible to all on the basis of capacity, by every appropriate means, including the progressive introduction of free education (mentioned in the ICESCR).<sup>226</sup>

Unlike the right to primary education, the provisions pertaining to secondary and higher education in these two human rights instruments contain elements of progressive realization. This will generally mean that State obligations are more flexible, especially with regard to certain requirements such as the progressive introduction of *free* secondary and higher education.

However, by contrast, other requirements such as that of non-discrimination contained in both provisions (with regard to access to education generally, and secondary education in

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<sup>222</sup> Article 13(3) of the ICESCR.

<sup>223</sup> For instance, the European Commission of Human Rights stated that the right to the establishment of private educational institutions can be a right inferred from article 2 of the Second Protocol, though it did not find that States have an obligation to finance such schools; see Dent (see above at footnote 47), p. 105. Following the same line of reasoning, the Court found that the provision does not include the right to State-funded education in the language of one’s choice (Dent, p. 105, referring to the Belgium Linguistic Case).

<sup>224</sup> *Ibid.*, p. 105 (Dent referring to Coomans).

<sup>225</sup> The minimum standard of treatment with regard to education other than primary education in the 1951 Convention is “treatment not less favourable than that accorded to aliens generally in the same circumstances”.

<sup>226</sup> Article 28(1)(b) and (c) of the CRC; and article 13(2)(b) and (c) of the ICESCR.

particular), is likely to be subject to *immediate* realization. This interpretation is supported by the fact that the right to education has not typically been denied to non-nationals, and it is unlikely that the Committee on Economic, Social and Culture Rights or the HRC would permit States much latitude to differentiate in favour of their nationals. The UNESCO Convention against Discrimination in Education also forbids any form of discrimination which impairs equality of treatment in education with regard to, *inter alia*, access and quality of education of any type or level. It upholds as well the principles contained in the CRC and the ICESCR, to the effect that secondary education be generally available and accessible to all, and higher education also equally accessible based on merit.<sup>227</sup>

Thus, higher education benefits from the same guarantees with respect to access as secondary education – they are both based on the principle of non-discrimination. The important distinction however, is that equal access to higher education is further qualified in that it is based on capacity or merit. Other potentially relevant provisions relating to higher education in other international instruments include for example, article 6(1)(a)(i) in the ILO 1949 Convention concerning Migration for Employment (No. 97) which grants migrant workers national treatment in apprenticeship and vocational training,<sup>228</sup> and article 10(a) in CEDAW which strives to guarantee women equal access (as men) to higher education such as professional and higher technical education.

With respect to the right to secondary and higher education in **regional** human rights instruments, reference should be made to the discussion on these instruments in the section on primary education above, as in most instances the same provisions are applicable. With regard to the European Union, the European Council Directive on Minimum Standards deals explicitly in its article 27(2) with the right to education for **adults**, stating that: “Member States shall allow adults granted refugee or subsidiary protection status access to the general education system, further training or retraining, under the same conditions as third country nationals legally resident.” Paragraph 3 of the same provision addresses as well the issue of recognition of foreign diplomas, and grants persons with refugee status the same standard of treatment as nationals in the “context of existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications.” For more details on the issue of standards and recognition procedures for foreign degrees, please refer to chapter 3 above.

## **B. Recommendations**

### *1. The Relevance of Education for Protection and Integration*

In addition to being a human right, education can play a critical *protection* role (especially for children and adolescents), help meet the psychological needs of refugee children who have been caught up in crisis situations involving conflict and displacement, and promote self-reliance as well as social and economic development, including of local areas.<sup>229</sup>

The UNHCR Agenda for Protection and the subsequent action plan approved by the Executive Committee in October 2002, specifically underline the importance of education

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<sup>227</sup> Articles 1 and 4 of the UNESCO Convention against Discrimination in Education.

<sup>228</sup> This ILO Convention may also be applicable to refugees, if in addition to being refugees, they also fit the definition of a migrant worker in that Convention. For more information, see Part II (C) above in this reference guide.

<sup>229</sup> UNHCR, *Education Field Guidelines*, 2003, pp. 3, 4.

as a tool for protection. The UNHCR *Education Field Guidelines* (2003) also constitute an important complement to this chapter, providing further recommendations on specific issues, as well as UNHCR's policy on the various levels and types of education. The latter expresses a commitment to "Ensure the provision of basic education, for refugees and other persons of concern, to ensure their protection and security and to enhance the possibility of durable solutions."<sup>230</sup>

The UNHCR *Education Field Guidelines* state the following six goals of Education for All (EFA):<sup>231</sup>

- Free access to primary education;
- Equitable access to appropriate learning for youth and adults;
- Adult literacy;
- Gender equity;
- Equality in education.

Other general UNHCR commitments, which should also be taken into consideration in relation to educational programmes and policies, include the key principles of refugee participation, local capacity building, gender equity and addressing the specific needs of groups at risk.<sup>232</sup>

## 2. *Primary Education*

### □ *Standard of Treatment: Access to Free and Compulsory Primary Education on the Same Terms as Nationals*

As required by international refugee and human rights instruments, refugee children should have access to free and compulsory primary education on the same terms as nationals. Relevant legislation should therefore stipulate not only that refugee children are to be granted this standard of treatment, but should also specify that this substantive right to primary education is to be *free* and *compulsory* for all.

### □ *Earliest Possible Resumption of School*

The education of refugee children should be started or resumed by every possible means at the earliest opportunity regardless of their legal status in the host country. It should therefore be granted to all asylum-seekers and other persons of concern, as well as recognized refugees. For children, access to education is essential to overcoming the emotional upheaval caused by their dislocation and provides both the structure and skills necessary for their future. Schooling opportunities which are missed may negatively affect a child's educational experience and success for years to come (or even permanently), as well as their chances of a successful integration into their new society.<sup>233</sup>

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<sup>230</sup> *Ibid.*, p. v. (point 2).

<sup>231</sup> *Ibid.*, (point 1).

<sup>232</sup> *Ibid.*, p. v.

<sup>233</sup> This is particularly so if children lose too many years of school due to the language barrier, are subject to equivalencies which place them in lower grades, and must deal with an unsettled status or family situation. Given such difficulties, refugee children may already be older than the average child in the same grade; for this reason they must start schooling in the host country at the earliest possible opportunity.

□ *Short Primary Education Renders Access to Secondary School More Imperative*

Where primary education is of a short duration (e.g. four years), it is even more imperative that refugee children be provided access to secondary school on the same terms as nationals.

□ *Mainstreaming Rather Than Segregating Refugee Children*

As far as possible, education of refugee children should take place within the mainstream educational sector. Refugee children should not be collectively or individually segregated or placed in special classes or schools (i.e. classes or schools for children with learning disabilities or special needs) as a coping strategy for the fact that they may still face language barriers and cultural adaptation. Particular attention should therefore be paid to cases of refugee children who are recommended for placement in special classes or schools in order to ensure that this decision has been taken for the appropriate reasons. Where a child or a group of children are identified as requiring special or additional assistance (such as with the local language or cultural adaptation), to the extent possible this assistance should be designed so as to run parallel to and supplement the mainstream educational programme, rather than replacing it. For example, to the extent possible, language studies should not replace ordinary school attendance at an appropriate level (to the child's age and development).

□ *Respect for Religious, Cultural, Moral and Philosophical Convictions in Educational Settings*

In keeping with international human rights standards, educational institutions are to operate based on the principle of respect for the religious, cultural, moral and philosophical convictions of the children and their parents.

□ *Monitoring Registration and Attendance, Particularly of Girls*

In certain situations, it may be especially important to regularly monitor the registration and attendance of refugee children in school (which may require the cooperation of school authorities and teachers) and to identify and address any reasons why children, and particularly girls, may not be attending school e.g. lack of resources to purchase school uniforms, lunch, books and other supplies, social mores regarding girls, lack of affordable transportation, 'necessity' of older girls to work outside or inside the home (e.g. such as to baby sit younger siblings or perform household chores). Further details and recommendations on promoting girls' education and gender equity are provided in the *UNHCR Education Field Guidelines*, and include, *inter alia*:

- gender sensitivity training for the community in order to raise awareness of gender issues in relation to school and to develop possible solutions;
- employing female staff;
- actively encouraging schooling for adolescent mothers;
- helping girls combine school and household duties; and
- ensuring that cultural sensitivities regarding school facilities and arrangements (especially in conservative societies, in relation to girls) are taken into account by

working with the community to find ways to meet their concerns so as to ensure girls' attendance in schools.<sup>234</sup>

□ *Community and Parental Participation in Educational Programmes and Activities*

Active community and parental participation in educational programmes, relevant educational committees and the child's schooling is vital to ensuring attendance, the child's performance, and in certain situations, even the success of the educational programme itself (such as when schools are established and run on a community or volunteer basis, during emergencies, and in certain refugee camp situations). An effort should be made to ensure that refugee parents meet their child's teacher and school authorities early in the year; where there are a significant number of refugee children attending a particular school, the refugee parents may also benefit from meeting with the school authorities and teachers as a group in order to discuss the particular situation, needs or concerns of the parents.

□ *Awareness-Raising for Teachers and School Authorities Regarding the Special Situation or Needs of Refugee Children*

Where appropriate, awareness-raising activities may also need to be provided to teachers and school authorities regarding the particular situation, issues and needs relating to refugee children and their parents. This is also an opportunity for teachers to ask questions and become engaged. The refugee community and individual parents should be involved in such activities and take a lead role in organizing them.

□ *Development of Educational Facilities by Local or Refugee Community*

In some host countries, refugees may live in areas where schools are simply not available or are not safely accessible (e.g. due to distance, lack of transportation, physical insecurity). In such cases, the assistance of government (and especially local) authorities, as well the international, NGO, refugee and local indigenous communities, will be critical to the establishment of educational facilities or to rendering these facilities accessible to refugees. This must be done at the earliest possible opportunity. In situations where educational facilities and programmes must be established, the skills of the local and of the refugee community should be harnessed, and where appropriate and possible, be encouraged and trained to participate in the running of the school (for example, as teachers, school managers etc.). It is important that such programmes and schools include female teachers and classroom assistants. In certain situations, older children may also be encouraged to provide instruction to younger ones, but this must not be done at the detriment of the older child's own educational needs. The development of educational facilities should ideally be done in conjunction with the local community and where feasible and appropriate, the schools should be open to local children as well. In the interim, informal education should be provided through refugee-run classes and community-based activities.<sup>235</sup>

□ *Special Attention to the Educational Needs of Vulnerable or At-Risk Groups*

Particular attention should be paid to the educational needs of vulnerable and at-risk children, such as, *inter alia*: girls generally; adolescents; unaccompanied children; mentally or physically disabled children; children in foster-care (including those being cared for by the extended family, friends, or elderly relatives); teenage mothers; former

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<sup>234</sup> UNHCR, *Education Field Guidelines*, 2003, pp. 5-6.

<sup>235</sup> *Ibid.*, p. v. (point 3) and p. 4 (point 1.2.1).



child soldiers and other children affected by conflict – including girls who may have been used for slave labour or as sexual slaves by parties to a conflict.<sup>236</sup>

□ *Using Educational Facilities as a Protection or Integration Tool*

As mentioned above, the UNHCR Agenda for Protection and the UNHCR *Education Field Guidelines* both underline the importance of education as a tool for protection, particularly for children and adolescents. In addition to the protection value inherent in education itself, educational *facilities* could also be used as a protection tool, or as a tool of cultural adaptation (integration) for the whole family. Schools can represent a means of identifying children at risk, or with special needs, or be used as a venue for raising awareness of safety issues such as mine awareness and SGBV. They can even provide ideal opportunities for promoting positive contacts and better understanding between refugee communities and the local population, as well as between individual families.<sup>237</sup>

□ *Availability of Pre-School Facilities*

Where feasible, refugee children should be enrolled in pre-school or kindergarten at the earliest possible opportunity, as this will promote their early integration and acquisition of the local language, thus avoiding future problems upon entry into grade school. In addition, structured activities of various kinds provide young children the opportunity to relieve psychological tensions (e.g. related to their displacement, or tension within the household which often accompanies the difficult period of initial adaptation and settling into the host country) and assist in child development.<sup>238</sup> Where pre-school is not free of charge, efforts should be made to render it accessible to as many refugee children as possible by for example, advocating for the granting of subsidies (by governments or municipalities), soliciting relevant educational institutions to grant a certain number of places to refugee children, or developing other programmes to facilitate access. In refugee camp settings or in rural areas, refugee communities may even be able to establish and run a collective pre-school facility. In addition to the benefits to the individual child, being able to enrol young children in pre-school also means that parents, especially women, can have free time to learn the local language, search for work or take up a job. As importantly, it can also mean that older girl-siblings who might otherwise be expected to mind younger siblings can go to school or engage in other productive activities.

□ *Assessing Educational Levels Fairly*

Assessment of educational levels should consider (all) language competencies in order to get a full and accurate picture of the linguistic and cognitive abilities of the child.

□ *Education Support Programmes, Including Financial, Language Assistance and Extra-Curricular Activities*

Educational support activities for school children, particularly during the first years in their host country, can play an important part in ensuring scholastic success and integration into their new social environment. Specifically, language classes and after-school tutoring opportunities should be provided. While some activities are most appropriately provided

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<sup>236</sup> On this topic, see also the complementary recommendations in *ibid.*, section 3.1.2 (second to last point), and section 1.4 ('Support for the Education of Vulnerable Groups').

<sup>237</sup> *Ibid.*, p. 3: "Education is an essential and effective tool of protection of children and adolescents. Measures to promote universal primary education will help identify children who are being exploited as labourers or servants, who are subject to physical and sexual abuse, who are disabled or who need medical help. The process of education helps children to learn about the way society functions, their duties and rights" [...].

<sup>238</sup> *Ibid.*, p. 23.

by teachers in a formal educational context, much of this support can also be offered by volunteers.<sup>239</sup> Wherever possible, refugee children (especially those that already started grade school in their country of origin) should be provided with special assistance to learn the language of instruction. In addressing obstacles related to language, strategies should minimize any potential for marginalization or segregation of refugee children, and to the extent possible, should not unduly impact on the child's grade or their attendance of mainstream classes and schools.<sup>240</sup> Financial assistance, whether it be for the purposes of purchasing school materials, transportation or other school-related costs, is also likely to be necessary for children of newly recognized refugees given the often limited employment opportunities of their parents prior to mastering the host language. Concerted efforts and programmes to encourage children to take part in extra-curricular and recreational activities, particularly in the first few years in the host country, will also provide refugee children with opportunities to establish a closer rapport with local children, and the community and culture of their host country, while increasing self-confidence. Furthermore, these activities are easily undertaken by volunteers and attractive to non-traditional donors, such as corporations or civic associations.

□ *Modalities of Support for Primary Schools*

UNHCR's *Education Field Guidelines* also provide that primary education may be further assisted through, *inter alia*:

- support (through an implementing partner) for school construction and teacher incentives;
- in case of budgetary constraints, ensuring that building maintenance (of educational facilities) does not take precedence over teachers;
- assistance with application procedures for admission into local/national schools;
- assistance to local schools accommodating a substantial number of refugee students;
- material assistance for needy refugees in local schools; and
- accelerated learning programmes for adolescents.<sup>241</sup>

3. *Secondary Education*

□ *Standard of Treatment: The Right to Secondary Education on the Same Terms as Nationals*

Host countries should provide refugee children the legal right (i.e. recognized by law) to access secondary education on the same terms as nationals. Where secondary education is not readily accessible or is not free of charge, efforts must be made to provide fee waivers to refugees in need, or to otherwise assist them in gaining access to secondary school.

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<sup>239</sup> For example, 'Big Brother' or 'Big Sister' programmes can provide educational support services, as can literacy and educational voluntary networks.

<sup>240</sup> For example, language programmes could be provided during the summer months when children are off from school, or parallel to school attendance, to avoid losing years. In Bulgaria for example, the opportunity to attend a summer camp is offered to both Bulgarian and refugee children, and focuses on improving the language skills of the latter.

<sup>241</sup> UNHCR, *Education Field Guidelines*, 2003, p. 21.

Where secondary educational programmes or facilities are not otherwise available and are developed for refugee communities, to the extent possible these should also be open to host populations.

□ *Providing Access to Secondary Education at the Earliest Opportunity*

In keeping with international standards relating to education, host countries should ensure that refugee children are provided access to secondary school (on the same terms as nationals) at the earliest possible opportunity upon entry into the country (and including during the determination of their asylum request), as this will promote the chances of a successful and rapid integration into the host community.

□ *Recommendations of a General Character Also Applicable to Secondary Education.*

The recommendations of a general character which have been provided in the section on Primary Education above, are equally applicable to secondary education, and should be read in conjunction with these recommendations.

□ *Complementary Recommendations in UNHCR Education Guidelines*

Guidelines specifically addressing access to secondary education are also provided in the *UNHCR Education Field Guidelines*, section 4.1 (p. 27).

□ *Providing Adults the Opportunity to Complete Secondary Education and Vocational Training*

Wherever feasible, efforts should be made to provide adults the opportunity to complete their formal secondary education, as well as to undertake vocational training. Detailed recommendations on vocational training are provided in chapter 3 above.

#### 4. *University and Other Forms of Higher Education*

□ *Standard Of Treatment: Access to Higher Education on the Same Terms as Nationals*

Access to the normally available educational facilities, especially in the context of sophisticated economies and labour markets, can be regarded as including university level studies. Host countries are thus strongly encouraged to grant recognized refugees the legal right to access higher education on the same terms as nationals.

□ *Awareness Raising and Individual Interventions*

Even in countries which formally grant refugees equal rights with nationals with regard to higher education, it may still be necessary to inform relevant institutions on the rights of refugees, so that they do not treat them as other aliens and impose higher tuition rates or extra fees. Governments, and particularly the Ministry of Education, can take a proactive role in this regard by issuing information letters and internal instructions. These institutions should also be approached regarding mechanisms to facilitate refugee enrolment.

□ *Support for University, Re-Qualification and Vocational Studies, as well as Equivalencies*

Recommendations regarding equivalencies, as well as financial and other types of support to be provided in the context of university, professional re-qualification and vocational studies are provided above in chapter 3 (Employment). Funding programmes and scholarships for post-secondary studies may in many cases be the only way that refugees can afford to complete their education. Such programmes should be supported by international organizations, refugee-assisting NGOs and governments, and educational

authorities should be lobbied to provide tuition waivers and scholarships to refugees. Special attention should be paid to assisting refugees who have the additional responsibility of supporting a family, and whose studies are pursued in the context of professional re-qualification and certification programmes, specific employment opportunities, or in order to complete studies already begun abroad.

□ *UNHCR Guidelines on Access to Tertiary Education*

These are available in the UNHCR *Education Field Guidelines* (sections 4.2. and 5.1.2).

## 5. *Vocational Training*

Recommendations relative to vocational training are provided in chapter 3 above. Guidelines on this issue are also available in the UNHCR, *Education Field Guidelines* (section 5.2).

## 6. *Language Training and Literacy Courses*

As described in chapter 3 on Employment, language often constitutes one of the greatest barriers to employment. At the same time, language courses must be made accessible and adapted to the refugee's employment and family needs/ situation if they are to be effective and enjoy sustained attendance and participation. Amongst other things, the recommendations below aim to provide suggestions on designing and adapting language courses/programmes (and literacy courses, for example) so that they also take account of the exigencies of everyday life, including work, family, and financial aspects. Some of these recommendations may therefore, also be applicable to other programmes such as vocational or literacy programmes.

□ *Language Courses at Different Levels Should be Offered at the Earliest Opportunity*

Ideally, partially or fully subsidized language courses should be offered to refugees at the earliest possible opportunity,<sup>242</sup> and provide them the possibility to achieve a degree of command of the local language sufficient for their every day needs, as well as their employment needs (which can vary significantly depending on the person's educational and professional level or background). Ideally, a language programme should offer at least one beginner, intermediary and advanced level course. In certain situations, it may also be necessary to provide targeted, specialized or supplementary language courses or tutoring.

□ *Courses Provided by Ethnic/Immigrant Community Centres or Relevant NGOs*

Where infrastructures permit, ethnic or immigrant community organizations and relevant NGOs (dealing with that ethnic group, or with refugees specifically) could be funded to implement language training programmes or allow such courses to be provided on their premises. This arrangement is likely to increase attendance given the "outreach" capacity of such organizations and familiarity with these centres. Such centres could also provide extra tutoring or more targeted courses to meet group or individual needs through their volunteer networks.

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<sup>242</sup> The most opportune time to begin language courses is during the asylum procedure, or during a stay under an alternative protection regime, as this procedure can last up to several years, during which refugees, who are often not permitted to work, generally have more availability and are highly motivated.

□ *Incentives Rather Than Sanctions Should be Granted for Attendance or Completion of Courses*

Where language programmes are required or run by the State, incentives should be provided for attending and completing language courses,<sup>243</sup> rather than punitive measures for failing to attend or complete them. Punitive measures which involve significant or total withdrawal of social assistance, welfare, or other rights or benefits essential to ensure a person's basic needs and legal status in the host society should not be imposed.

□ *Dual Learning Agenda*

Wherever possible, language courses should be designed with a dual agenda of linguistic training and the acquisition of additional knowledge or new skills relevant to the integration process. For example, exercises, homework or discussion topics during courses could relate to skills necessary to conduct a job-search,<sup>244</sup> or to the culture, geography, history or legal rights (e.g. housing, employment and human rights) of the host country. To the extent possible, language courses should also draw on the socio-economic and professional profile of those attending, as well as their sex, age and interests in order to ensure that the topics, vocabulary, speed etc., are appropriate to the students, thereby increasing their interest and commitment to the course. For advanced level courses, and when feasible, consideration should be given to linking more closely vocational and language training, or the acquisition of relevant vocabulary for professionals (broadly related to the social sciences, such as politics, law, economy, sociology, administrative issues, etc.).

□ *Intensive Courses*

Intensive language courses during the day are more likely to be successful than evening courses, as the latter tend to have a high drop out rate. Intensive day-time courses (for a period of six months, for example) should be encouraged. Such programmes will only be feasible however, if they are flexible enough to take into consideration both the financial needs and time constraints of participants during the period of the training. In particular, the loss of wages during that period should be taken into account. Therefore, a schedule allowing refugees to work part-time, and an offer of additional financial assistance during that period might represent a more attractive and realistic strategy. Periods of unemployment or under-employment are also times when intensive language programmes could be usefully undertaken.

□ *Support to Families and Women*

Whenever feasible, day care or a children's play centre (with access to toys and books for example, possibly with part-time supervision of a volunteer supervisor) should be organized at the same location as the language courses. Indeed, it could be built into the design of the language programme itself. Other special needs of women refugees, such as family schedules and cultural considerations, should also be taken into consideration when designing such programmes. This may include offering classes during children's school hours or at other convenient times, or offering women-only classes – which women may

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<sup>243</sup> Such incentives could include: providing attendees certificate attesting to the completion of the course; a built-in component to the programme which provides job placement assistance at the end of the course; financial assistance to ensure for the daily needs of the refugee and their family during intensive languages course which do not permit full time work; counting the period of attendance at language courses as time worked, such that any credits, social security benefits or future rights which would have been granted to a person working are also accorded for the time spent in the course.

<sup>244</sup> Such as, inter personal, social, presentation and interviewing skills, or learning to draft a *curriculum vitae*.

find more congenial. The acquisition of the host country language by refugee women tends to be an important factor in the social, cultural, and even the economic integration of the entire refugee family. Incentives or creative strategies to increase and sustain the attendance of women in language course should therefore be encouraged.

□ *Using Volunteer and Student Networks*

Students studying related topics such as education, languages, or translation /interpretation could be enlisted to provide language courses to refugees in exchange for credits, as practical internships, or as part of a recognized community work programme. In addition to students, members of the ethnic community, relevant church groups, or retired persons (such as retired teachers, and other professionals) could provide supplementary language courses, or individual tutoring at home. A similar corps of volunteers could also provide literacy courses or tutoring (see below).

□ *Government Participation and Coordination*

The participation of the Ministry of Education, and the Ministry of Labour and Social Affairs could also be enlisted, as they may have additional resources and programmes to offer. For example, in the case of the latter, they may be able to include language courses as part of the State re-qualification and vocational training programmes.

□ *Literacy Courses and Tutoring*

Functional literacy may be just as much a barrier to employment as lack of language skills, and should be addressed whenever possible. Where they exist, literacy services and groups, as well as general volunteer networks such as those mentioned above (in relation to language training), may also be enlisted to provide literacy courses or tutoring to refugees. In this connection, opportunities provided to adult nationals for the completion of primary or high school level studies, should also be accessible free of charge to adult refugees. The importance of securing fundamental education for persons who have not received or completed primary education is explicitly recognized in article 13(2)(d) of the ICESCR.

□ *Evaluating Language Programmes and Overcoming Problems of Attendance*

Evaluations, surveys or other follow-up measures which seek to assess the success and suitability of language courses, including possible hindrances to attendance or a lack of interest, are highly recommended.

## CHAPTER 6: PUBLIC RELIEF AND HEALTH CARE

### MAIN INTERNATIONAL STANDARDS

#### **1951 Convention relating to the Status of Refugees**

##### **Article 23, Public Relief**

*The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.*

#### **International Covenant on Economic, Social and Cultural Rights**

##### **Article 11**

*1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*

#### **International Covenant on Civil and Political Rights**

##### **Article 6**

*1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

#### **Convention on the Rights of the Child**

##### **Article 24**

*1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services [...]*

##### **Article 27**

*1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. [...]*

*3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.*

[NOTE: the following provisions may also be of relevance: **articles 23** (disabled children), **25** (periodic review of treatment of child), **22** (refugee children) and **26** (social security).]

#### **Convention on the Elimination of All Forms of Discrimination against Women**

##### **Article 12**

*1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.*

*2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.*

[NOTE: **Articles 11(1)(e)**, **13(a)** and **14 (2) (b)**, **(c)** and **(h)** may, in certain circumstances, also be relevant with regard to women's rights to health care, social security programmes or public relief.]

#### **International Convention on the Elimination of All Forms of Racial Discrimination**

##### **Article 5**

*In compliance with the fundamental obligations laid down in article 2 of the Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...]*

(e) *Economic, social and cultural rights, in particular: [...]*  
(iv) *The right to public health, medical care, social security and social services;*

## A. International Standards

### 1. 1951 Convention

As a mandatory provision, article 23 of the 1951 Convention seeks to ensure that refugees lawfully staying in the host country are entitled to benefit from the national social assistance and welfare schemes enjoyed by nationals, even if they do not meet any of the conditions of local residence or affiliation which may be required of nationals.<sup>245</sup> The article must be given a broad interpretation, and includes, *inter alia*, relief and assistance to persons in need due to illness, age, physical or mental impairment, or other circumstances, as well as medical care.<sup>246</sup> Thus, refugees without sufficient resources are equally entitled to social and medical assistance on the same conditions as nationals.<sup>247</sup> As the Convention does not contain a definition of public relief and assistance,<sup>248</sup> the level of assistance that refugees, and indeed all beneficiaries, receive will depend on the situation of each Contracting State.

In some States, unemployment benefits are provided from the national social security scheme, while in others they are dispensed from the public relief scheme. While some argue that unemployment benefits fall more directly under article 24 on social security, it is generally assumed that article 23 covers the situation of unemployment as part of its relief mandate in those cases where unemployment benefits are not covered by insurance.<sup>249</sup> Moreover, the Convention precludes any possible difficulty in delimiting between public relief and social security by providing for the same treatment (equal to that of nationals) in both cases, subject to the limitations contained in article 24(1)(b)(i) and (ii).<sup>250</sup>

Given the high standard of treatment granted to refugees with regard to public relief and social security in the 1951 Convention, this should remain the basic instrument of reference in these fields. However, as we see below, other international and regional human rights instruments also provide for these rights, and continue to be relevant to the extent that they apply even to countries that have not ratified the 1951 Convention, and in some cases benefit from enforcement mechanisms not available under the 1951 Convention. Moreover, these human rights instruments can be used to protect, support and further define these rights, both in general as well as in relation to particular groups, such as refugee women or children (CEDAW and the CRC for example).

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<sup>245</sup> Robinson (see above at footnote 4), p. 104, referring to the Ad Hoc Committee's understanding of this provision as expressed during its drafting process.

<sup>246</sup> This wide interpretation is confirmed by the discussions of the Ad Hoc Committee responsible for drafting the 1951 Convention. See Grahl-Madsen (see above at footnote 53), p. 89.

<sup>247</sup> *Ibid.*, p. 89. This broad interpretation of the provision is confirmed by the discussions of the Ad Hoc Committee responsible for drafting the 1951 Convention. It should also be noted that the channels of distribution for these benefits may differ for refugees, so long as they receive the same benefits as nationals.

<sup>248</sup> For the purposes of this reference guide, the expressions "public relief", "social assistance" and "social welfare" for example, are used interchangeably and correspond to the meaning of "public relief" as contained in the 1951 Convention.

<sup>249</sup> Robinson (see above at footnote 4), p. 105, footnote 191.

<sup>250</sup> *Ibid.*, p. 105.



## 2. *Other International Human Rights Instruments*

Article 25 of the Universal Declaration provides that everyone has the right to a standard of living adequate for health and well-being, including basic medical care and social services, in the event of unemployment, sickness, disability, widowhood, old age, or other circumstances causing a loss of livelihood. Similarly, the ICESCR obliges States to provide assistance to persons who are unable to be self-sufficient, and stipulates the right of everyone to an adequate standard of living, mentioning adequate food, clothing and housing in particular.<sup>251</sup> No definition for measuring what constitutes an “adequate standard of living” is provided, and standards will of course differ between host States depending on their available resources, but the State concerned must show that they have delivered basic assistance to the best of its abilities.

More specifically with regard to health, article 12 of this Covenant recognizes the right of everyone to the highest attainable standard of physical and mental health, which includes medical service and attention. The right to life contained in article 6 of the ICCPR has also been interpreted by the HRC as imposing an obligation on States to take positive measures, such as to eliminate malnutrition and reduce infant mortality.<sup>252</sup>

In addition to the fact that the scope of the above human rights instruments extends to everyone and is not limited to nationals, these instruments also include a non-discrimination provision.<sup>253</sup> Given this non-discrimination principle and the minimum core rights of the ICESCR, any differential treatment of non-nationals is only acceptable if it is based on reasonable grounds and is not endangering the health of that person.<sup>254</sup> While these are important guarantees, with regard to refugees the 1951 Convention continues to provide the highest and most definitive standard of treatment (i.e. the same as granted nationals) – a standard which Contracting States are deemed to apply and which does not allow for any differentiation between refugees and nationals.

Other relevant international instruments also include CEDAW and the CRC. CEDAW, which applies to women without any distinctions and therefore benefits refugee women, grants them both substantive rights and the right against discrimination in the area of social assistance, adequate living conditions, and equality in access to health facilities.<sup>255</sup> The CRC, which applies to all children without distinction, requires that the State ensure (to the extent possible) the child’s survival and development, and in a separate provision provides for the right of the child to an adequate standard of living, including the mental, spiritual, moral and social aspects of his or her development.<sup>256</sup> While, according to article 27, parents have the primary responsibility for the child’s development, States Parties are to take appropriate measures to assist parents in this task and in case of need, are required to provide material assistance, especially with respect to such basic needs as housing, food and clothing. The child’s right to health is elaborated in article 24 of the same Convention, which due to its broad approach to health and specific requirements is considered to be a

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<sup>251</sup> Article 11 of the ICESCR.

<sup>252</sup> Dent (see above at footnote 47), p. 82.

<sup>253</sup> The relevant provisions in these instruments are generally to the effect that the rights in these instruments are to be exercised without discrimination or distinction of any kind, including as to national or social origin, or any other status. See, article 2 of the Universal Declaration; article 2(2) of the ICESCR; and article 2(1) of the ICCPR.

<sup>254</sup> Dent (see above at footnote 47), pp. 63 and 80.

<sup>255</sup> Articles 12-14 of CEDAW.

<sup>256</sup> Articles 6(2) and 27 of the CRC.

particularly progressive provision in international law, and surpasses the protection provided in the ICESCR.<sup>257</sup> Particularly noteworthy is its guarantee of access to **health care** services for the treatment of illness and for rehabilitation, its emphasis on the development of primary health care, information and preventive health services, the combat of disease and malnutrition, and measures to abolish traditional practices which are prejudicial to the health of children, such as female genital mutilation.

### 3. *Regional Instruments*

Rights relative to public relief and health care are further protected in regional human rights instruments. In the Americas, the American Declaration on the Rights and Duties of Man<sup>258</sup> and the San Salvador Protocol provide for such rights. More specifically, article XI of the American Declaration states:

“Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community services.”

The San Salvador Protocol also provides in article 10 for the right to health, understood to mean “the enjoyment of the highest level of physical, mental and social well-being”. Among the measures required of States Parties by this provision is the obligation to ensure the “satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.”<sup>259</sup> The Protocol also contains specific obligations in relation to older persons and disabled persons (articles 17 and 18 respectively), as well as an important provision on the right to food (article 12).<sup>260</sup>

In terms of African human rights instruments, while the African Charter (or ACHPR) does not contain a specific right to public relief, other rights in the Charter such as articles 2, 4, 5, and 18 which guarantee such rights as the right to life, human dignity, and special protection for the aged and disabled are of relevance. Article 16 provides for the right to health.

In the European context, these rights are protected in the ECHR,<sup>261</sup> the European Social Charter,<sup>262</sup> and the European Convention on Social and Medical Assistance.<sup>263</sup> In

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<sup>257</sup> Dent (see above at footnote 47), p. 87.

<sup>258</sup> American Declaration of the Rights and Duties of Man, adopted by Final Act of the Ninth International Conference of American States, Bogota, 1948.

<sup>259</sup> Article 10(2)(f) of the San Salvador Protocol.

<sup>260</sup> Article 12 of the San Salvador Protocol provides as follows:

“Right to Food

1. Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.
2. In order to promote the exercise of this right and eradicate malnutrition, the States Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies.”

<sup>261</sup> Refugees also benefit from the guarantees provided under the ECHR, as this Convention is applicable to everyone within the jurisdiction of States Parties. While the ECHR and its Protocols do not contain any provisions directly related to public relief as such, other provisions in these instruments have resulted in certain precedents which impact on these rights. One such precedent is a ruling by the Court of Human Rights, whose decisions are binding, to the effect that the right to a fair trial in the ECHR applies to social security and even social assistance rights, if these are protected as statutory rights at the domestic level, thus providing a safeguard against possible discrimination and arbitrariness in the allocation of such benefits. See Dent (see above at footnote 47), pp. 73-74.

particular, the latter provides for equality of treatment between nationals of a host country and nationals of other Contracting Parties on the condition that they are lawfully present and without sufficient resources. Refugees recognized under the 1951 Convention benefit from this protection by virtue of a Protocol to this Convention.<sup>264</sup> Hence, recognized refugees who are resident in a Contracting State are entitled to receive national treatment with respect to social assistance in any other Contracting State.

Within the European Union, the European Council Directive on Minimum Standards provides in articles 28 and 29 respectively that refugees have the right to “the necessary social assistance as provided to nationals”, and to “access to health care under the same eligibility conditions as nationals of that Member State”.<sup>265</sup> The Directive also specifically provides in article 29(3) for the right of refugees with “special needs” to “adequate health care” under the same eligibility conditions as nationals. As listed in that provision, persons with special needs include for example: pregnant women; disabled persons; persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence; or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict.<sup>266</sup>

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<sup>262</sup> The rights granted under the European Social Charter, including article 13 which grants the right to social and medical assistance on a reciprocal basis, are only of marginal relevance to refugees as they only extend to those refugees who are *nationals* of a Contracting State, which very few are likely to be. Indeed, as mentioned in other sections of this reference guide, the main relevance of the Charter for refugees lies in the fact that its Appendix entitled ‘Scope of the Social Charter in terms of Persons Protected’ imposes on Contracting States the obligation to grant refugees the same standards of treatment as required by the 1951 Convention. As a consequence, this Appendix, which incorporates into the Charter all the economic, social and cultural rights of refugees contained in the 1951 Convention, allows refugees to take advantage of the Charter’s supervisory mechanisms in order to enforce these rights.

<sup>263</sup> This Convention grants nationals of other Contracting Parties who are in need and who are lawfully present in the country the right to social and medical assistance on the same terms as their own nationals. It extends these rights to recognized refugees by virtue of article 2 of its Protocol. Dent (see above at footnote 47), pp. 40 and 77.

<sup>264</sup> Article 2 of the Protocol to the European Assistance Convention reads: “The provisions of Section 1 of the Assistance Convention shall apply to refugees under the same conditions as they apply to the nationals of the Contracting Parties thereto.”

<sup>265</sup> It should be noted that the qualifying terms “necessary” with regard to social assistance in article 28(1), as well as the mention of ‘eligibility conditions’ in relation to access to health care in article 29(1) of the European Council Directive on Minimum Standards are **not** contained in article 23 of the 1951 Convention – which simply states that “refugees lawfully staying in the territory [are to be accorded] the same treatment with respect to public relief and assistance as accorded [...] nationals.” It is hoped therefore, that in the application and interpretation of the above provisions in the European Council Directive on Minimum Standards, Member States remain consistent with the broader and unqualified (except for lawful stay) standard of treatment granted to refugees under the 1951 Convention. In particular, Member States should ensure that the eligibility conditions relating to access to health care are not by their nature impossible to meet or unduly burdensome on refugees – which could mean that they would not have immediate and full access to health care as in the case of nationals. For example, this might be the case if health care systems (even for nationals) impose a minimum period of previous employment or residence, or previous contributions to the health care scheme. Such preconditions would be unfair to refugees as they might not have been in the country sufficient time to fulfil them.

<sup>266</sup> Article 29(3) of the European Council Directive on Minimum Standards.

## **B. Recommendations**

### *1. Public Relief*

#### □ *Challenges in Securing a Basic Standard of Life*

Even when refugees are indeed granted the same rights as nationals with regard to public relief and assistance, they face particular difficulties in meeting their basic needs, when they are dependant on the State. For example, even when the right to public relief is secured in law, accessing or implementing these rights has proven difficult in some countries. Levels of assistance provided are often insufficient, particularly if they are not supplemented by the assistance inherent in traditional support networks such as an extended family. In other cases, certain requirements or sanctions imposed on refugees can mean that their assistance is subject to cancellation or reductions. The following are some recommendations relating to public relief in general, as well as suggestions on how to assist refugees in achieving a basic standard of living, in light of these challenges. The applicability of some of these recommendations (with the exception of the first six) will of course depend on the specific situation in each country of asylum.

#### □ *Standard of Treatment*

Refugees should be granted public relief and assistance on the same terms as nationals including with regard to amounts and duration of the assistance. The exception to this might be certain conditions which, by their nature, refugees may not be able to fulfil or would be unduly burdensome on them, such as an eligibility requirement of a minimum period of residence in the host country (see details below).

#### □ *Conditions and Eligibility Requirements for Accessing Public Assistance*

No further conditions or requirements **specific** to refugees (e.g. being forced to live in a designated area or housing arrangement) should be imposed with regard to eligibility for, or access to, public assistance. Discriminatory provisions which target refugees (directly or indirectly) and result in diminished rights or benefits to them, such as a time limit on State financial assistance (specific to refugees), should not be adopted.

Where the legislation provides for certain requirements or conditions for nationals and/or other aliens which, by their nature, cannot reasonably be met by refugees, and which have the effect of blocking, delaying or reducing their access to assistance (such as a minimum period of previous residency, minimum years of previous work, etc), a waiver for such conditions should be stipulated in the relevant legislation.

Moreover, in countries where eligibility for and access to benefits under the national social assistance scheme are subject to considerations such as subjective reasons and the personal responsibility of the applicant for his situation, refugees should be granted an initial period of reprieve from such conditions (i.e. a sufficient period for adapting to the host country, learning the language and securing employment, for example).

When special waivers or considerations such as those suggested above apply, special measures (e.g. internal information notices or instructions, awareness-raising activities, training) should be taken to ensure that local social assistance offices are aware of the rights of refugees and are able to implement them effectively.

□ *Sanctions Affecting or Related to Assistance*

Failure to comply with administrative or other requirements (e.g. living in a designated municipality or housing arrangement, to study the local language, or to comply with certain other residency requirements) should not be sanctioned by denying or reducing public relief amounts and assistance to a level below the minimum threshold of an adequate standard of living. Any sanctions related to a reduction of assistance should be of a general character and not specific to refugees or refugee situations; and no sanctions (or reductions) related to basic assistance and relief should be imposed without according the refugee a reasonable opportunity to justify his or her actions, and without providing a written and motivated decision which takes the refugee's overall situation and needs into account.<sup>267</sup> An appeal process to such decisions should also be provided. A refugee should always be given the opportunity to return to an authorized place of residence where assistance is available. Further details on this topic are also provided in chapter 4 above (Housing), and in chapter 12 (Freedom of Residence and Movement).

□ *Ensuring Access to Assistance by Women and Children*

Administrative practices as well as allocation or distribution methods should ensure that women and children, and not just male heads of household, have access to the assistance available, including family benefits.<sup>268</sup>

□ *Promoting Self-Reliance*

Strategies and programmes which promote self-reliance and provide opportunities for getting out of dependency cycles, such as the elaboration of a personal or family action plan (which could involve paid employment, educational, vocational or language training, housing or other initiatives) are highly recommended, and should be undertaken as soon as feasible. Ideally, such programmes should take the entire family situation into account (including the situation of dependant spouses, children and other close family members such as elderly parents – even if they are still in the country of origin) with a view to empowering them by capitalizing on all their resources and skills, as well as offering them *new* skills and opportunities.

□ *Evaluation and Sharing of Good Practices: Related to Financial Assistance Programmes and Strategies to Increase Self-Reliance and Integration*

Opportunities for exchange of experiences and successful practices in this field should be promoted, particularly at regional levels, or between countries with similar socio-economic conditions and/or refugee populations. Increased *analysis* of results and experiences to date with different financial assistance programmes, and strategies for decreasing dependence on State assistance, (such as self-reliance initiatives, programmes providing supplementary assistance based on employment and integration efforts etc.) should also be conducted. Conclusions and lessons learnt from these types of exercises could be shared with relevant domestic actors in these fields (e.g. NGOs, relevant government departments and agencies, refugee groups), international organizations, and other interested countries, including at the regional and sub-regional levels.

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<sup>267</sup> For example, the wish to live in proximity to other family members, close friends or ethnic community services may also affect the refugees' ability to achieve increased self-sufficiency, given the important role played by these support networks in times of need.

<sup>268</sup> See article 13 (a) of CEDAW, which provides for equal rights of men and women with regard to family benefits.

□ *Where National Assistance Levels are Insufficient*

In host countries unable to provide integration conditions and public assistance levels sufficient to ensure a basic standard of living (especially for refugees, who often do not have traditional support networks to rely on), all efforts must be made to secure arrangements with the international and NGO communities to provide supplementary assistance sufficient to permit refugees to remain in the host State in dignified conditions and be afforded effective protection. In addition to this assistance, programmes to increase the self-reliance of refugees, as well as activities and practices which promote their ability to meet their own needs, should also be promoted.

□ *Supplementary Rather Than Alternative Regimes of Financial Assistance*

Where there are refugee-specific financial assistance programmes (whether supported by the international community or the host State), these should ideally be in the form of a *supplementary* programme, i.e. a financial assistance programme which supplements national public relief benefits, but does not substitute for the national system nor provide a completely alternative regime. In other words, it is best if refugees are part of the mainstream national public relief system, even if a supplementary programme also exists.

This approach offers several advantages. For example, it allows both social welfare bureaus and refugees to gain experience and establish a practice with regard to the exercise of social welfare rights, before refugee-specific assistance is exhausted. This will decrease the chances, for example, of delays and difficulties in gaining access to national public assistance later on. Otherwise the transition from refugee-specific assistance / integration programmes (which can include in-kind assistance for example) to mainstream social welfare schemes can be difficult. When such difficulties and delays arise, refugees may effectively be left without any State assistance during this transition period, a problem which may be avoided with the above strategy of mainstreaming refugees into the national social assistance system as soon as possible.

Moreover, a supplementary financial assistance programme whereby refugees still participate in the mainstream public relief scheme, allows them to know the exact amounts of the national social welfare benefits, such that they are able to better prepare for the end of such supplementary assistance. This advantage is lost with substitute programmes, since refugees may be less able to appreciate just how low or difficult access to national social assistance schemes may be.

Both governmental and non-governmental programmes of supplementary financial assistance (in addition to mainstream public relief) could also request that refugees show proof of registration with the relevant social welfare and employment bureaus (including the results). This will permit easy monitoring of access to these rights and the early identification of obstacles to it, so that these problems could be negotiated or resolved before supplementary assistance runs out entirely.

A minimum period of one year of supplementary financial assistance is recommended, although the need and duration of the assistance depends largely of course on conditions in the country of asylum.

□ *Indirect Forms of Assistance to Compensate for Low Levels of State Public Relief Benefits*

In countries where levels of assistance under national social assistance programmes are low or insufficient, this situation may be ameliorated by helping refugees secure affordable housing that is compatible with employment opportunities. More specifically, housing costs should be compatible with social welfare benefits, and ideally also offer reasonable opportunities for employment, so that the period during which refugees will have to rely on social benefits will be kept to a minimum, and the likelihood of a downward spiral towards marginalization and poverty is avoided. Further details on affordable housing compatible with employment opportunities are provided in chapter 3 (Employment) above.

□ *Offering Continuation of Supplementary Assistance For Recognized Refugees Who Have Secured Employment*

In certain situations, and particularly in countries where low or medium-level wages alone are frequently insufficient to meet basic needs, and the public relief scheme is unreliable or inadequate, consideration should be given to temporarily continuing supplementary forms of assistance (where such assistance exists) to refugees *even after* they have found legal employment. This would act as an incentive to become more financially self-sufficient and gain work experience, but would also of course supplement wages, which in the case of refugees are generally lower than the average national wage. In some cases, wages may even be less advantageous than the financial and / or in-kind benefits provided through State or other assistance – hence the need for incentives. Naturally, the decision on whether to continue granting any financial assistance must take into account the person's actual revenues and wage earnings, as well as expenses. This supplemental employment assistance should be made conditional on obtaining *legal* employment, which can include self-employment.

□ *One-Time Settlement Assistance by Host Governments*

Where this is financially feasible, host governments should be encouraged to offer one-time settlement assistance within the framework of their refugee-specific integration/or financial assistance programmes, in order to help newly recognized refugees with the initial costs of purchasing essential furniture and household items, and other expenses related to setting up a new home. In-kind settlement assistance in the form of donated furniture for example, could also supplement the government one-time grant.

□ *Encouraging Refugees to Obtain a More Durable Legal Status*

In certain situations, such as in developing countries or countries with limited resources, refugees may be provided more assistance (either by the State, international community or NGOs) while they have refugee status, than upon gaining a more durable residency status in the host country. Often this assistance is essential to meeting their most basic needs of life, and refugees fear they will lose this assistance if they acquire a different and more durable legal status in the country. In such situations, creative solutions and incentives should be identified (such as a transition period where assistance is prolonged and concerted efforts are made to increase self-reliance) in order to avoid prolonged dependency and encourage refugees to opt for a more durable legal status in the host State at the earliest opportunity. Artificial or short-term solutions however, should be avoided as they are likely to simply result in irregular movements in the future.

## 2. Health Care

### □ *Standard of Treatment: Access and Same Level of Care as Nationals*

Refugees should be granted access to health services on the same terms (except where such conditions cannot reasonable be met by refugees) and of the same standard as that available to nationals of the host State. In order to secure actual access however, it may be necessary to undertake advocacy and informational activities, as well to follow-up and monitor the situation with relevant ministries, local health providers and related public institutions.

### □ *Cultural Awareness and Sensitivity*

Healthcare providers, particularly those involved in the initial or in regular contacts with refugees, should be sensitized to the cultural background of different refugee communities in the host country. In particular, they should be knowledgeable about traditional practices, potential obstacles to providing effective healthcare (e.g. refusal by some women to see male doctors), and strategies to address these. Whenever possible female refugees should be asked if they prefer to see a female doctor. Reproductive health services and family planning should be given particular attention, and broached with sensitivity. See also recommendation below related to refugees with special needs.

### □ *Initial Examinations to Establish Needs, Including Urgent Needs Related to Trauma, SGBV and Torture*

Initial medical examinations should take place as soon as possible after arrival (or recognition, where this was not previously done) in order to identify priority cases and to evaluate the health needs of individuals and of the refugee community as a whole. Qualified female staff should form part of the medical screening team. Professionals should be alerted to the possibility of certain types of conditions (psychological and physical) amongst particular refugee populations or groups (depending on the history of the conflict and the refugee group), when it is known that torture and SGBV were used against a particular minority or as a widespread war tactic during a conflict. Health professionals dealing with refugees should therefore also be aware of, and ideally be specifically trained to identify persons suffering from trauma. Once identified, these patients should be urgently referred to specialized medical and psychological services, including services for victims of torture and severe trauma including sexual or gender-based violence.<sup>269</sup>

It is important that an efficient assistance or referral service also be in place to address particularly serious or *emergency* cases discovered during initial medical examinations of this type (such as patients with suicidal or other destructive tendencies, persons suffering from memory loss, disorientation, or other conditions which put them or others at risk). This emergency referral and support (follow-up) system should ensure that refugees identified with urgent problems can be provided with prompt professional evaluation and specialized assistance – and their cases followed-up and coordinated on an emergency basis with other relevant assistance sectors, such as financial assistance services.

### □ *Ensuring Care for Refugees With Special Needs*

Relevant domestic legislation should explicitly provide for the right of refugees with special needs, whether it be due to pregnancy, trauma (such as that related to PTSD,

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<sup>269</sup> See also UNHCR's *Sexual and Gender Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Responses*, Geneva, May 2003.



SGBV, or torture), or to a disability, to benefit from adequate and specialized health care on the same level as nationals.

□ *Principle of Confidentiality*

Medical examinations, consultations, test results, psychological counselling, and all other medical or health-related information, should be subject to strict confidentiality requirements, including with regard to other family members.

□ *Newly Recognized Refugees, Medical Schemes in Transition, and Special Provisional Assistance*

Special attention must be paid to the situation of newly recognized refugees *vis-à-vis* their access to medical care, particularly in countries where medical insurance schemes and the health sector is in a process of reform (e.g. from entirely public to private care and insurance schemes tied to employment), or where complex and multiple schemes are in place which require language skills and a good understanding of the medical and bureaucratic systems. Although nationals may also experience difficulties in such situations and may even be financially unable to contribute to (State and employment-related) new medical insurance schemes, newly recognized refugees are especially affected since they typically have additional language barriers, less knowledge of the bureaucracies involved and cannot rely on past employment (a minimum duration is sometimes set in order to be eligible for medical coverage) or previous contributions to an insurance fund.

Moreover, in countries where reforms in the health sector have already had or are likely to have a negative impact on recognized refugees, the relevant government authorities, NGOs and UNHCR are encouraged to identify and negotiate solutions specifically taking into consideration the situation and special needs of recognized refugees. In particular, national governments are urged to adopt legal provisions, as well as practical measures ensuring medical coverage for newly recognized refugees (and their close family members) who would otherwise not be eligible for it; this coverage should be either until they obtain medical coverage through employment or for a length of time which is deemed reasonable for learning the language and securing employment. Vulnerable refugees and those with special needs, persons who are unable to work (due to old age or disability for example), and single-parent families for example, should also be granted special medical coverage.

□ *Alternative Arrangements to Deal With Gaps Created by Legislative Reforms and Deteriorating Medical Services*

Failing the adoption of adequate measures or legislation to address problems related to reforms or deteriorating medical infrastructures, *ad hoc* and/or temporary creative arrangements (including with specific medical institutions or practitioners) are encouraged as a way to provide medical coverage to recognized refugees who would otherwise not be able to receive free medical care.<sup>270</sup>

□ *Providing Information on Eligibility Rules and Reforms in the Health Care System*

As part of their orientation sessions into their new host society, newly recognized refugees, and especially refugee families and women, should receive general information and counselling on the rules relating to the national health care system. This should include for example, the consequences of working in the informal labour market on health care coverage. Such information sessions and accompanying written materials (which should be

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<sup>270</sup> Examples of such types of arrangements are provided in da Costa (see above at footnote 22) (see chapter on public relief and health care).

in a language understood by refugees) are also necessary in the context of reforms which may be taking place in this field, especially if such reforms render the conditions for eligibility more restrictive. Moreover, these informational activities are all the more necessary as newly recognized refugees generally have little or no previous knowledge of the national medical system, since as asylum-seekers they may have been automatically granted full medical coverage or special assistance **outside** the national health care system.

## CHAPTER 7: SOCIAL SECURITY AND LABOUR LEGISLATION

### MAIN INTERNATIONAL STANDARDS

#### **1951 Convention relating to the Status of Refugees**

##### **Article 24**

##### ***Labour Legislation and Social Security***

*1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:*

*(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;*

*(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national law or regulations, is covered by a social security scheme), subject to the following limitations:*

*(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;*

*(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.*

*2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.*

*3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.*

*4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.*

#### **International Covenant on Economic, Social and Cultural Rights**

##### **Article 7**

*The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:*

*(a) Remuneration [...]*

*(b) Safe and healthy work conditions;*

*(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;*

*(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.*

*[...]*

##### **Article 9**

*The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.*

##### **Article 10**

*The States Parties to the present Covenant recognize that:*

*[...]*

*2. Special protection should be accorded to **mothers** during a reasonable period before and after childbirth. During such period, working mothers should be accorded paid leave or leave with adequate social security benefits.*

3. *Special measures of protection and assistance should be taken on behalf of all **children** and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.*

(Emphasis added)

### **Convention on the Elimination of All Forms of Discrimination against Women**

#### **Article 11**

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: [...]*

(e) *The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;*

(f) *The right to protection of health and to safety in working conditions, including the safeguarding of the functions of reproduction. [...]*

(NOTE: See also: **article 11(2)** regarding appropriate measures to ensure women are not discriminated against on grounds of pregnancy or maternity; **article 13(a)** relating to the right to family benefits; and **article 14(2)(c)** which ensures that women living in rural areas are able “to benefit directly from social security programmes”.)

### **Convention on the Rights of the Child**

#### **Article 26**

1. *States Parties shall recognise for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law.*

2. *The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or in behalf of the child. (NOTE: See also rights under ICESCR above).*

[...]

#### **Article 32**

1. *States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.*

2. *States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:*

(a) *Provide for a minimum age or minimum ages for admission to employment;*

(b) *Provide for appropriate regulation of the hours and conditions of employment;*

(c) *Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.*

### **International Convention on the Elimination of All Forms of Racial Discrimination**

#### **Article 5**

*In compliance with the fundamental obligations laid down in article 2 of the Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...]*

(e) *Economic, social and cultural rights, in particular:*

(i) *The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; [...]*

(iv) *The right to public health, medical care, social security and social services; [...]*

## A. International Standards

### 1. 1951 Convention

#### □ *General Standard of Treatment – Same Terms as Nationals*

Article 24 of the 1951 Convention deals with official employment regulations and social security, and requires that refugees receive equal treatment with nationals. The employment regulations in this provision refer, not to the right to employment as such, but rather to the basic labour rights of legally employed workers. Likewise, “social security” in this article does not refer to a purely needs-based social assistance granted to destitute persons (which is addressed in article 23 on public relief, as seen in the previous chapter), but rather to State benefits such as unemployment, old-age or disability benefits which are covered by social security systems, many of which (though not all) are based on contribution schemes rather than being drawn from public funds raised *via* tax revenues.

These terms and concepts, and particularly the distinction between public relief<sup>271</sup> and social security benefits, can be problematic since these expressions are often used interchangeably in every day language and have different meanings in different countries. Moreover, national assistance schemes are not necessarily based on the same neatly drawn categories of benefits described in the 1951 Convention. It is therefore, helpful if refugees are granted the same standard of treatment (i.e. the same treatment as nationals) for the purposes both of social security and of public relief. Categorizing the benefit is thus less critical, as the standard of treatment is the same in both cases.

In addition to satisfying the demands of equity, part of the rationale for the high standard of treatment granted refugees in article 24 was that of protecting the interests of national wage-earners, since aliens who are generally treated as nationals with respect to remuneration, other working conditions and social security, are not likely to represent serious competition to the local labour force.<sup>272</sup>

#### □ *Exceptions in Article 24*

Article 24(1)(b) provides for two situations in which the State may deal with refugees under special schemes. The first exception ((b)(i)) refers to the situation where the refugee comes under a bilateral or multilateral international arrangement that grants him the benefit of rights he acquired (or rights in the process of acquisition) in another country. In this case, the present country of residence does not have an obligation to maintain rights which he acquired elsewhere.<sup>273</sup> The second exception ((b)(ii)), is in reference to the portion of social security benefits which stem entirely from public funds and the allowances which are granted instead of pensions (i.e. when the person has not yet earned his pension under domestic rules). In the case of these categories of benefits, Contracting States may choose not to apply at all, or only apply in part, the usual regulations to refugees. Thus, while States may apply this provision in such a way that refugees will receive less benefits than

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<sup>271</sup> Public relief is often also referred to as “social assistance”, “welfare”, or “welfare assistance” in this reference guide.

<sup>272</sup> Grahl-Madsen (see above at footnote 53), p. 91.

<sup>273</sup> See discussion of subsection 24(1)(b)(i) of the 1951 Convention in: Grahl-Madsen (see above at footnote 53), p. 94; and Robinson (see above at footnote 4), p. 107. Note also that according to one interpretation of this subsection, where no such international arrangements apply, refugees should benefit from the general rule according them the right to the same treatment as nationals. According to Grahl-Madsen, however, such cases would normally come under the scope of subparagraph (b)(ii), which contains the second exception to the rule prescribing equal treatment with nationals.

nationals, it may not be interpreted to mean that States may on this basis refuse to grant all such benefits completely.<sup>274</sup>

The second paragraph of article 24 provides for another exception which is in fact favourable to refugees, by granting surviving dependants compensation for the death of a refugee which has resulted from employment injury or occupational disease, even if they reside outside the country concerned. They also have the right to have these benefits transferred to them in their place of residence. Paragraphs 3 and 4 of this same provision relate to rights acquired in the first country of asylum, and the extent to which these may be enjoyed in the second country of asylum.<sup>275</sup>

## 2. *International and Regional Human Rights Instruments*

Other **international instruments** granting non-nationals and refugees the right to social security include: the 1962 ILO Convention on Equality of Treatment of Nationals and Non-Nationals in Social Security,<sup>276</sup> which stipulates in article 10 that the Convention is to apply to refugees as well as stateless persons without any condition of reciprocity,<sup>277</sup> and the ILO Conventions on the rights of migrant workers, to the extent that refugees may also meet the definition of a migrant worker in those Conventions.<sup>278</sup>

International human rights instruments also provide for certain guarantees in relation to social security and working conditions. The Universal Declaration provides for the right of everyone to social security, public relief, just and favourable working conditions and the right to form or join a trade union.<sup>279</sup> The ICESCR contains similar provisions relating to the right to just and favourable working conditions and the right of everyone to social

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<sup>274</sup> *Ibid.*, p. 96.

<sup>275</sup> Paragraph 3 is in reference to the rights acquired in the Contracting State in which the refugee was first granted asylum, and which he would now like to enjoy in another Contracting State. According to this provision, the refugee is to benefit from the same treatment as a national of the country of his first asylum. The next paragraph deals with rights accumulated in a first country of asylum which is a non-Contracting State, and recommends to the second country of asylum, which is a Contracting State, to treat the refugee as if he were a national of the first country of asylum. With reference to Robinson (see above at footnote 4), pp. 107-108.

<sup>276</sup> ILO Convention concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, No. 118, 1962, entry into force 25 April 1964.

<sup>277</sup> This Convention provides equal treatment of nationals and non national workers, though non-contributory schemes are subject to residence requirements. See Dent (see above at footnote 47), p. 69. Moreover, to the extent that this Convention applies and offers more favourable provisions for refugees, it will take precedence over article 24 of the 1951 Convention. Grahl-Madsen (see above at footnote 53), p. 91.

<sup>278</sup> These include the ILO Conventions C97 and C143 (entitled respectively as: 1949 Convention concerning Migration for Employment, and the 1975 Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers). C143 expands on C97 by requiring that beyond national treatment for migrant workers, Contracting States must also pursue a national policy which promotes and guarantees equality of opportunity and treatment with regard to social security, trade unions and employment. Dent (see above at footnote 47), p. 27. Moreover, whereas the 1949 Convention defines social security narrowly as referring to contributory schemes, the latter requires that migrant workers benefit from equal treatment with nationals, even with regard to non-contributory types of social security. Both Conventions define a migrant worker as a person who migrates from one country to another with a view to being employed otherwise than on his own account, and includes any person regularly admitted as a migrant for employment. Dent (see above at footnote 47), p. 69. Refugees meeting this definition can therefore also benefit from the provisions in these Conventions.

<sup>279</sup> Articles 22 to 25 of the Universal Declaration.

security, including social insurance.<sup>280</sup> Moreover, in article 10(2), women are guaranteed the right to special protection during a reasonable period before and after childbirth, and working mothers specifically are granted the right to paid maternity leave or leave with adequate social security benefits. As compared to the right to public relief benefits (i.e. social assistance based on need), the right to social security is well entrenched for non-nationals in international human rights instruments, so that limited latitude is likely to be granted to Contracting States with regard to differentiations between nationals and non-nationals.<sup>281</sup>

Persons requiring additional protection and rights (including against discrimination), especially women and children, are also afforded particular attention with regard to social security in international instruments such as ILO conventions, the CRC and CEDAW. Article 26 of the CRC for instance, requires States Parties to recognize and to take measures to achieve the full realization of the child's right to social security, in accordance with their national law, though unfortunately no minimum standards for such benefits are offered. Article 11(1)(e) of CEDAW requires States to ensure that women enjoy the same right to (employment-related) social security as men, especially with respect to benefits connected to retirement, unemployment, sickness, invalidity, old-age, and other circumstances rendering them incapable of working, as well as paid leave. Article 13 of the same Convention further endeavours to ensure women equal rights to social security which are not dependant on employment, including access to family benefits, and other types of financial assistance such as in the form of bank loans. Under CEDAW, *rural* women receive particular attention and protection against discrimination in relation to social security programmes available through the State. Amongst other things, article 14(2)(c) stipulates that the State has the obligation to ensure that rural women "benefit directly from social security programmes", though these are not defined. This provision seeks to ensure nonetheless, that social security for rural women is at least equal to that available to men, and sufficient to ensure adequate living conditions.<sup>282</sup> For its part, CERD includes in article 5 protection from racial discrimination in relation to economic, social and cultural rights, and more specifically with regard to the right to favourable conditions of work and to social security.

At the **regional level**, articles XIV and XVI of the American Declaration recognize the right to work and remuneration, the right to social security, and to special protection and care for two specific vulnerable groups, namely children and pregnant or nursing mothers. The right to leisure is provided for in article XV. The American Convention on Human Rights provides only for related rights such the right to freedom from slavery, including involuntary servitude and compulsory or forced labour, in article 6. However, the legal obligations under the American Convention are expanded under the San Salvador Protocol, which guarantees the right to work, to just, equitable and satisfactory working conditions and the right to organize trade unions.<sup>283</sup> Article 9 of this Protocol also provides explicitly for the right to social security, which includes: protection from old age and disability; benefits for dependants in case of death of the beneficiary, as well as the right to medical

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<sup>280</sup> Articles 7 and 9 of the ICESCR. Article 9 in particular, refers specifically to insurance supported schemes towards which working persons have made contributions (including unemployment, sickness, old age, invalidity and maternity benefits, as well as medical care) and not public relief schemes for those in need.

<sup>281</sup> Dent (see above at footnote 47), p. 63.

<sup>282</sup> *Ibid.*, pp. 70 and 71.

<sup>283</sup> Articles 6 to 8 of the San Salvador Protocol. Article 8(a) in particular, envisages the right to form trade unions, a right which under article 19(6) could give rise to the application of the individual complaint system of the American Convention on Human Rights.

care; an allowance or retirement benefit in the event of work accidents or occupational disease; and paid maternity leave for women who are employed.

In Africa, the African Charter (ACHPR) does not provide for a specific right to social security, but other provisions such as article 8 (4) on the rights of aged and disabled persons may be of relevance. Moreover, with regard to labour rights and working conditions, article 16 relating to the right to health, article 5 on the right to freedom from exploitation and slavery, and article 15 on the right to work under “equitable and satisfactory condition”, including equal pay for equal work, are also noteworthy. Within the Southern Africa region, article 10 of the SADC Social Charter guaranteeing workers in the region the right to adequate social protection (including social security benefits, regardless of status and type of employment) is of particular note, as is article 3 which refers to the universality and indivisibility of basic human rights proclaimed in such instruments as the Universal Declaration, the ACHPR and other relevant international instruments.

In the European context, the European Convention on Social Security,<sup>284</sup> which provides for multilateral coordination of social security legislation is of potential relevance, as is the European Social Charter<sup>285</sup> and some of the case law related to the ECHR.<sup>286</sup> Within the European Union, the European Council Directive on Minimum Standards provides in article 26(5) that the “law which is in force in the Member State applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply.” Paragraph 2 of the same article also stipulates that adult refugees are to be offered employment-related educational opportunities, such as vocational training and practical workplace experience under “equivalent conditions as nationals.” Thus, these provisions appear to grant refugees the

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<sup>284</sup> The European Convention on Social Security affirms the principle of equality between nationals of States Parties. This Convention is potentially of relevance as it extends in article 4(1)(a), its coverage to refugees recognized under the 1951 Convention (as well as to their families and survivors ) who have been subject to the relevant legislation and reside in the territory of a Contracting Party. The Convention governs the following areas of social security: unemployment benefits, sickness, invalidity and maternity benefits, old-age and survivor’s benefits, death grants, and family benefits. Moreover, it applies to all general social security schemes, and to special schemes, whether they are contributory or non-contributory. Since this Convention **extends its protection to refugees** who are resident in a Contracting State, these persons are therefore entitled to receive the same standard of treatment as nationals with respect to social security in any other Contracting State (article 2 (1) (2)). European Convention on Social Security, ETS No. 78, December 14, 1972 (entered into force March 1, 1977). See in particular, the Preamble and articles 2 and 4.

<sup>285</sup> As discussed in previous sections in this reference guide, the right to social security stipulated in article 12 of the European Social Charter as well as the other rights in the body of this Charter, while applicable in certain situations are generally considered of marginal relevance to refugees since they must be nationals of a Contracting State, which is unlikely. The real relevance of the Charter lies in the fact that, by virtue of an Appendix, the rights of refugees granted under the 1951 Convention are incorporated into the Charter, thus imposing these obligations also on the States Parties to the Charter, and granting refugees a potential venue for their enforcement *via* the Charter’s supervisory machinery.

<sup>286</sup> The ECHR and its Protocols do not contain any provisions directly related to social security as such, but have nonetheless led to precedents that affect these rights. The relevant precedents include, *Gaygusuz v. Austria*, confirming the rights of non-nationals to non-discrimination (article 14) in relation to the right to peaceful enjoyment of possessions (article 1 of Protocol No. 1 to the ECHR), including social security benefits. The ruling by the Court of Human Rights to the effect that the right to a fair trial in the ECHR applies to social security and even social assistance rights (if these are protected as statutory rights at the domestic level, thus providing a safeguard against possible discrimination and arbitrariness in the allocation of such benefits) is also important. In this regard see, *Schuler-Zraggen v. Switzerland*, judgement of 26 February 1993, Publications of the European Court of Human Rights, Series A, No. 257-E, para. 46, and the discussion of this case in Dent (see above at footnote 47), pp, 35-36 and 73-74.



same standard of treatment as nationals with regard to access to social security, rights related to work conditions and work-related educational opportunities.

## **B. Recommendations**

### *1. Social Security*

#### □ *Standard Of Treatment: Granting Refugees Standard of Treatment Accorded to Nationals, and Applying Waivers Regarding Contributions*

With respect to social security and labour legislation, refugees should be afforded the same standard of treatment as nationals. In some situations however, this may include granting them certain basic social security benefits (essential to secure a basic standard of living, such as old-age benefits and family benefits) despite the fact that they may not have had the opportunity to contribute to the relevant schemes (due *inter alia* to their short period of residence in the country of asylum). In this regard, it should be taken into consideration that in many instances refugees will be in an unfortunate and unfair situation since they generally cannot claim (due notably to security concerns) and will perhaps never receive the social security benefits towards which they contributed in their country of origin. See recommendations below on efforts to increase access to these benefits.

#### □ *Continued Need for Monitoring, Facilitation, and Proactive Measures to Ensure Effective Access*

Access to State social security benefits by recognized refugees must, in certain circumstance, be monitored and facilitated by refugee-assisting organizations. Host governments should also be encouraged to take proactive measures to ensure effective access to these benefits, particularly in countries where there is very limited or no known State practice in relation to refugees in this field.

#### □ *Providing Information on Conditions and Rules Related to Social Security Benefits, Such as Unemployment and Pension Benefits*

Recognized refugees should be informed about regulations, general conditions and eligibility criteria for social security benefits, especially unemployment and pension benefits (as well as health and invalidity benefits when these are included in social security schemes) in the country of asylum as soon as possible after (or even before) being granted refugee status. This information could be provided, for example, during orientation sessions and other activities designed to introduce refugees to their host society, as well as during activities or programmes related to employment assistance. It is important that women refugees also be ensured easy access to this information.

#### □ *Need for Increased Expertise and Guidelines on Accessing Benefits Acquired in the Refugee's Country of Origin or Former Habitual Residence*

The complex and sensitive issue of how to access relevant benefits and rights acquired in the refugee's country of origin, remains an area in which there is both little knowledge and practical experience. There is therefore a need to increase expertise and develop guidelines on procedures and the general treatment of such cases so as to more effectively assist recognized refugees in accessing these rights, especially invalidity or retirement pensions. In particular, such instructions or guidelines should advise on the issue of confidentiality *vis-à-vis* authorities in the country of origin, as well as areas of cooperation and responsibility in this field between host governments, UNHCR and other interested actors.

## 2. *Labour Legislation*

### □ *Need for Awareness-Raising and Information on Advantages of Legal Employment and Labour Rights*

Awareness-raising and basic information with regard to domestic labour rights and regulations should be provided to newly recognized refugees in the context of orientation sessions, employment assistance, or other appropriate opportunities. In particular, the short and long-term benefits of legal employment (e.g. medical coverage, unemployment insurance, increased job security, pension contributions) and an explanation of basic labour rights in the host country, such as the national minimum wage, maximum working hours, and work safety rules, should be provided. Special protection offered to certain groups of persons, including pregnant women, should also be highlighted. Information pamphlets on the same topics should be provided for reference and translated into the relevant languages. Such informational activities should include strategies to ensure that they reach and benefit women refugees as well as young persons.

## CHAPTER 8: FAMILY UNITY AND REUNIFICATION

### MAIN INTERNATIONAL STANDARDS

#### **Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons** (Appendix to the 1951 Convention)

*Part IV. The Conference adopted unanimously the following recommendations:*

[...]

#### **B.. (Principle of Family Unity)**

*The Conference,*

*Considering that the unity of family, the natural and fundamental group unit in society, is an essential right of the refugees, and that such unity is constantly threatened, and*

*Noting, with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems (E/161, p. 40), the rights granted to a refugee are extended to members of his family.*

*Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:*

*(1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,*

*(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.*

#### **International Covenant on Civil and Political Rights**

##### **Article 17**

*1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

#### **Convention on the Elimination of All Forms of Discrimination against Women**

##### **Article 16**

*1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: [...]*

*(c) The same rights and responsibilities during marriage and at its dissolution;*

*(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; [...]*

#### **Convention on the Rights of the Child**

##### **Article 9**

*1. States Parties shall ensure that a child shall not be separated from his or her parents against their will [...]*

##### **Article 10**

*1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.*

#### **ExCom Conclusion No. 24 (XXXII), 1981 on Family Reunification**

*The Executive Committee,*

*Adopted the following conclusions on the reunification of separated refugee families.*

*1. In application of the principle of the unity of the family and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated refugee families.*

*2. For this purpose it is desirable that countries of asylum and countries of origin support the efforts of the High Commissioner to ensure that reunification of separated refugee families takes place with the least possible delay. [...]*

*5. It is hoped that countries of asylum will apply liberal criteria in identifying those members who can be admitted with a view to promoting a comprehensive reunification of the family.*

6. When deciding on family reunification, the absence of documentary proof of the formal validity of a marriage or of the filiation of children should not per se be considered as an impediment.[...]
8. In order to promote the rapid integration of refugee families in the country of settlement, joining close family members should in principle be granted the same legal status and facilities as the head of the family who has been formally recognized as a refugee.
9. In appropriate cases family reunification should be facilitated by special measures of assistance to the head of the family so that economic and housing difficulties in the country of asylum do not unduly delay the granting of permission for the entry of the family members.

**UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status**

**Chapter VI**

***The Principle of Family Unity***

[...]

186. The principle of the unity of the family does not only operate where all family members become refugees at the same time. It applies equally to cases where a family unit has been temporarily disrupted through the flight of one or more of its members.

**A. International Standards**

*1. Family Unity: Essential to the Protection, Support and Integration of Refugees*

The right to family unity stems from the universal recognition of the family as the fundamental group unit of society, which is entitled to protection and assistance. It is a right which is of particular importance to refugees whose dislocation often involves the separation of families, and for whom family unity is a key means of protection for individual family members. Maintaining and facilitating family unity helps to ensure the physical care, protection, emotional well-being and economic support of individual refugees. By enhancing refugee self-sufficiency and lowering long-term social and economic costs, family unity benefits the host country as well. The right to family life, which is entrenched in universal and regional human rights instruments as well as humanitarian law, is thus a key component for the successful integration of refugees in their new society. In practical terms, the importance of this right for refugees lies chiefly in its capacity to protect the unity of the family already in the country of asylum, and to enable family reunification in the case of families who are still separated.

*2. 1951 Convention and Other Refugee-Specific Instruments*

The 1951 Convention does not contain a specific provision providing for the right to family unity or reunification. However, this fundamental right is clearly an integral part of the broad object and purpose of this Convention and its 1967 Protocol, and is expressly affirmed in the Recommendation on the Principle of Family Unity contained in the Final Act of the Conference of Plenipotentiaries, as well as in ExCom Conclusions Nos. 1, 9, 24, 84, 85 and 88. In particular, the latter recognizes the unity of the family as an essential right of refugees, and notes that the rights granted to refugees are extended to members of their family. It further recommends that Governments take the necessary measures for the protection of the refugee's family, including by maintaining family unity (particularly where the head of the family has fulfilled conditions for admission to the host country) and protecting minors who are refugees.

ExCom Conclusion No. 24 also makes several important recommendations to Contracting States in relation to family reunification, including the following:

- that they exercise flexibility with respect to requirements of documentary proof of the formal validity of marriage or the filiation of children;
- make every effort to trace the parents or other relatives of unaccompanied minors before and after their resettlement;
- grant close family members joining the recognized refugee the same legal status and facilities; and
- provide special measures of assistance, when appropriate, to the head of the family in order to prevent that economic and housing problems impede or delay permission for the family members to join the refugee in the country of asylum.<sup>287</sup>

It makes further recommendations regarding:

- the granting of exit visas by the country of origin;
- and the application of liberal criteria in defining the family members who may be admitted into the country of asylum, so as to promote a comprehensive family reunification.

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, an interpretative text and practical guide to the 1951 Convention, provides further doctrinal support on this matter. It reaffirms, *inter alia*, that the principle of family unity applies as much when family members become refugees at the same time, as when the family unit has been temporarily disrupted, and that other dependants who are living with the refugee (such as aged parents) should normally also be considered in addition to the minimum definition of the family (i.e. spouse and minor children).<sup>288</sup>

### 3. *International and Regional Human Rights Instruments: The Right to Family Life*

In addition to the above sources, the right to family life and to family reunification is contained in international and regional human rights instruments, which can both directly and indirectly support refugee rights in this area.<sup>289</sup> These instruments provide a range of related protections in relation to this right, including the right to marry and found a family,<sup>290</sup> the right of the family unit to protection and assistance, as well as to protection against unlawful and arbitrary interference in family life.<sup>291</sup> In addition, specialized instruments provide specific guarantees to such groups as women and children. The CRC includes particular guarantees with regard to the best interests of the child and the child's right to family life, as well as in relation to applications for the purpose of family reunification with his or her parents – specifying that these are to be dealt with in a positive, humane and expeditious manner.<sup>292</sup> Rights of women which are important (directly or indirectly) to issues of family life and family unity are protected in CEDAW and include, *inter alia*, the rights of women to non-discrimination in the area of marriage

<sup>287</sup> ExCom Conclusion No. 24 (XXXII) of 1981, on *Family Reunification*.

<sup>288</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status: under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UNHCR, Geneva, reedited January 1992, chapter VI, para. 186.

<sup>289</sup> For example: the Universal Declaration; the ICCPR; the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages; and the Additional Protocol 1 of 1977 to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 1949, article 74.

<sup>290</sup> See, *inter alia*, article 16 of the Universal Declaration, and article 23 of the ICCPR.

<sup>291</sup> See, for example, article 17(1) of the ICCPR; article 8 of the ECHR; article 11 of the American Convention on Human Rights; and article V of the American Declaration.

<sup>292</sup> Of particular relevance is article 10, as well as articles 8, 9 and 22 of the CRC.

and family life (including rights during marriage and at its dissolution), as well as in relation to their children.

In many instances, the relevant provisions in these instruments have also been **interpreted** in a manner which is especially relevant to or supports refugee rights in this field. For example, in its General Comment on article 23 of the ICCPR, the Human Rights Committee stated that “[t]he right to found a family implies, in principle, the possibility to procreate and live together...[T]he possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in co-operation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.”<sup>293</sup>

At the **regional level**, rights which are relevant to family life or unity are contained in a variety of instruments as well. In the Americas, the American Convention on Human Rights, the American Declaration and the San Salvador Protocol contain provisions relating to the right to marry and found a family, and providing particular protection to the family unit.<sup>294</sup> In the Africa region, related rights are provided in article 18 of the African Charter (ACHPR), and articles XXIII and XXV of the African Charter on the Rights and Welfare of the Child (1990). Within Europe, article 8 of the ECHR which provides that “[e]veryone has the respect and family life, his home and his correspondence” and contains guarantees against unlawful interference in this right, is of particular relevance.<sup>295</sup>

In the European Union, the European Council Directive 2004/83/EC on Minimum Standards provides in article 23 that Member States are to “ensure that family unity can be maintained”, and that family members of recognized refugees who do not individually qualify for refugee status, are entitled to claim the benefits (articles 24-34) provided in that Directive.<sup>296</sup> The term “family members” is defined in that Directive in article 2(h) as including the spouse (or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens) and unmarried dependent minor children. Article 23(5) leaves it to the discretion of Member States to decide whether this article also applies to other “close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent [on the refugee] at that time.” Provisions for family reunification are also contained in the Council Directive 2003/86/EC which provides for the right of recognized refugees to apply to the host State for permission to allow members of their nuclear family (i.e. spouse and minor children) into the Member State. Anyone falling outside this definition of a nuclear family remains at the discretion of the Member State. As per article 5 of that Directive, applications for family reunification should include all documentary proof to the existence

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<sup>293</sup> Human Rights Committee, General Comment No. 19 of 1990 (on Article 23), para. 5.

<sup>294</sup> See for examples: articles 11 and 17 of the American Convention on Human Rights; articles V and VI of the American Declaration; and article 15 of the San Salvador Protocol.

<sup>295</sup> Article 8(2) provides: “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

<sup>296</sup> More specifically article 23(2) of the Directive provides that they are entitled to the “benefits referred to in articles 24-34, in accordance with national procedures and as far as it is compatible with the personal legal status of the family member.” However, paragraphs 3 and 4 also stipulate exceptions to this right to family unity and benefits, namely, in the case of exclusion and where for reasons of national security or public order, the State refuses, reduces or withdraws the benefits referred to in paragraph 2 of that article.

of the family. However article 11 qualifies this requirement in the case of refugees, such that if a refugee is unable to provide official documentation of the family relationship the Member State can take into account other evidence, which is to be assessed according to national law.

## **B. Specific Issues**

The following sections of this chapter draw in large parts on the draft UNHCR Guidelines on International Protection on the Right to Family Unity and Family Life.

### *1. State Responsibility: To Preserve Family Unity and Facilitate Family Reunification*

The protection of family unity requires that States refrain from action that could result in family separation, as well as positive measures to maintain the unity of the family, including reuniting separated family members under certain circumstances.<sup>297</sup> Refusal to allow family reunification may be considered as an interference with the right to family life or to family unity, especially where the family has no realistic possibilities for enjoying that right elsewhere.<sup>298</sup> Equally, deportation or expulsion could constitute an interference with the right to family unity unless justified in accordance with international standards.

Supported by paragraph 184 of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, host States have an obligation to extend the rights of the Convention to the refugee's family members.

The object and purpose of the 1951 Convention imply that its rights are in principle extended to the family members of refugees. In some jurisdictions, this is referred to as derivative status. Thus, family members of a refugee should be allowed to remain with him or her, in the same country and to enjoy the same rights and opportunities as the principal refugee.<sup>299</sup>

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<sup>297</sup> See for example, Human Rights Committee, General Comment No. 19 of 1990 (on Article 23 of the ICCPR).

<sup>298</sup> See for example: General Comment 16/32 (on Privacy), para. 5, and Communication 35/1978 *Aumeeruddy-Cziffra v. Mauritius*, para. 9.2(b) as discussed in Plender, "The European Convention and Other Protection Instruments", in: da Costa, Rosa (ed.), *The European Convention on Human Rights and Other international Protection Mechanisms: Selected texts from the Seminar, 20-22 November, 1996*, Prague, 1997, p. 40 (published with the support of UNHCR and the European Council's Phare Democracy Programme). In the European context, article 8 of the ECHR which provides for the right to respect for one's private and family life, has been the subject of rulings of the European Court of Human Rights which are of relevance to refugees. For example, the *Golder* and *Airey* cases are of particular relevance since the court established the principle that the ECHR does not merely guarantee rights in theory, but rather the effective enjoyment of rights. As such, in certain circumstances, the State has a positive duty to take measures to render the exercise of these rights effective, as well as the negative duty of non-interference in the exercise of these rights. This interpretation can be especially useful if applied to stop a deportation or expulsion of a refugee which might also potentially violate the right to family unity for instance. The *Abdulaziz* case of 1985, also at the European Court, is of relevance as well, and both cases are discussed in Mucha, *Article 8 of the European Convention on Human Rights: The Right to Private and Family Life*, and in da Costa (ed.) (see above), pp. 47-48 and 51.

<sup>299</sup> See further the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, para. 184. A separate interview for refugee status (with due respect to principles of confidentiality) should also be accorded to each family member, in light of increased awareness of gender-related persecution and child specific forms of harm.

However, in many instances refugee families are separated during flight, such that family unity can then only be ensured through family reunification. In cases where there is no reasonable possibility for family reunification in the country of origin or elsewhere, it is then incumbent upon the receiving State to adopt measures to facilitate family reunification.

## 2. *The Definition of the Family*

As recommended in ExCom Conclusion No. 24, a practical rather than a formalistic definition of the family should be applied in order to protect family life, support the well-being of refugees and their successful integration in the host country. The very minimum standard definition of the family includes members of the nuclear family, i.e. spouse and dependent children. Beyond this however, the concept of **dependency**, which relates to a relationship or bond (financial or emotional) that exists between family members, is normally applied to factually identify family members. The bond is normally one that is “strong, continuous, and of a reasonable duration”, and dependency need not be complete but can be “mutual or partial dependence”, as exists between spouses for example. Other family members could therefore include: non-minor children; dependent parents; foster children; other dependent relatives such as aunts uncles or cousins; or individuals unrelated by blood but who are dependent on the family in a similar manner to the other categories mentioned above.<sup>300</sup>

The dependency relationship may have arisen in the country of origin or stem from circumstances in the host country, such as a subsequent marriage, caring for elderly relatives or the formation of new households due to the death of parents or siblings, for example. In keeping with the concept of dependency as well as UNHCR policy, it is also important that the definition of “**spouse**” not be restricted only to persons in legal unions, but include those engaged to be married, persons who have entered into a customary marriage, couples who have formed a household, and spouses in polygamous marriages valid in the country of origin.<sup>301</sup>

## C. **Recommendations**

### 1. *General Principles for Addressing Family Reunification*

Requests for family reunification should generally be dealt with in a “positive, humane and expeditious manner”, and in cases involving minors, particular attention should be paid to the best interests of the child. Expedited procedures should also be adopted for cases involving separated and unaccompanied children, as well as for family members who may be particularly at risk due to conflict or other reasons. Care should be taken to include all appropriate family members in the case from the very beginning.

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<sup>300</sup> See for example the UNHCR Procedural Standards for Refugee Status Determination under UNHCR’s Mandate, Department of International Protection, UNHCR Geneva 2005, section 5.1.2.

<sup>301</sup> *Ibid.*



2. *Specific Legal Provision on Family Reunification and Status/Rights of Family Members*

The right to family **reunification** (rather than simply the right to family unity), for refugee families that have been separated, should be specifically provided for in the relevant legislation of host countries. Such a provision should stipulate when this right becomes effective (when the refugee may apply for reunification), the procedures involved, and other applicable requirements, waivers or conditions for assistance, as necessary. An explicit provision of this type is preferable to one which relies only on a general provision on family unity, since reunification of family members implies further obligations<sup>302</sup> than simply extending refugee status to close family members already present in the host country. The right to family reunification should clearly stipulate the right for close members to enter and settle in the country of asylum on the same or similar terms (i.e. legal status and rights) as persons with refugee status.

3. *Right to Family Reunification Granted Upon Recognition, and Not Subject to Different Status*

The right to family reunification should be granted and become effective (i.e. the refugee has the right to apply for reunification) immediately upon recognition and should not be dependent on other conditions or on obtaining a further status, such as permanent residence. In particular, conditions which are normally applied to family sponsorships, such as proof of financial means, processing fees etc., and which refugees cannot be reasonably be expected to meet at all or in the short-term, should be either automatically waived, or special measures should be provided to help the refugee meet these demands. Similarly, requiring that a refugee obtain another legal status puts undue hardship on the family given the difficulty in meeting conditions necessary to acquire such a status (e.g. permanent residence) as well as the delays involved in processing both the change in legal status and the application for family reunification.

4. *Practical and Comprehensive Definition of the Family*

For the purposes of family unity and reunification, and in keeping with international recommendations, relevant domestic legislation should include a flexible and more comprehensive definition of the family which extends beyond the spouse and dependent children. This is especially recommended where a relationship of dependency (which can be partial or mutual), in the form of a financial or emotional bond, exists between other family members. Other family members could include: non-minor children; dependent parents; foster children; other dependent relatives such as aunts uncles or cousins; or individuals unrelated by blood but who are dependent on the family in a similar manner to these other categories.

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<sup>302</sup> Further obligations may include, *inter alia*: the adoption of appropriate measures both domestically and in cooperation with other States to ensure that reunification is possible; that it is dealt with in an expeditious manner; and that waivers are provided for financial or other requirements normally related to family sponsorships which refugees cannot reasonably be expected to meet or that are too burdensome on the refugee or his/her family.

5. *Definition of Spouse and Children*

The definition of “spouse” should not be restricted in law or in practice, only to persons in legal unions, but should include *inter alia*, persons who have entered into a customary marriage, couples who have formed a household (situation of cohabitation), persons engaged to be married, and spouses in a polygamous marriage valid in the country of origin. Similarly, no distinctions should be made between children born in and outside of marriage.

6. *Documentary Evidence of Relationships and Filiation*

Requirements of documentary evidence of relationships (such as proof of the formal validity of marriage or the filiation of children), for the purpose of family unity and reunification should be realistic and appropriate to the situation of the refugee as well as conditions in the country of origin. A flexible approach and alternative means of demonstrating the relationship (and dependency in the case of family members outside the nuclear family) should be available.

7. *Calculating the Applicable Age of Children*

To avoid that delay in adjudication prejudice family reunification, the applicable age of the children should be determined at the date the sponsoring family member obtains status, rather than the date of approval of the reunification application.

8. *Providing Special Measures of Assistance to Facilitate Reunification*

The right of recognized refugees to family reunification should, to the extent of the possibilities of each country, be accompanied by special measures of assistance when appropriate, in order to prevent that economic, housing or other such problems impede or delay family reunification in the country of asylum. Such assistance may be in form of financial assistance, such as to cover travel costs, or the provision of adequate and affordable housing to accommodate the expected family members.

9. *Requirements Regarding Proof of Identity and Security Checks*

Requirements regarding proof of identity and security checks for family members awaiting reunification, should take into account such factors as: conditions in the country of origin; the refugee’s circumstances as well as that of his or her family; safety concerns with respect to family members in the country of origin (*vis-à-vis* contacting their government for information or documents); and should not impose undue delays or blocks to family reunification. For example, decision makers could be required to balance the seriousness and merit of the security concerns with the delays and harm being experienced by the family, and alternative means of proving the identity of those concerned (such as through sworn affidavits and testimonies of persons who know them) as well as alleviating security concerns should be offered.

10. *Requirements to be Waived in Case of Family Reunification of Refugees*

Application fees and costs associated with medical tests (including examinations or other such related medical requirements) for example, as well as other general requirements such

as proof of income or employment should be waived in the case of refugees, particularly with respect to applications for reunification with nuclear and/or other dependent family members.

*11. Streamlined, Standardized and Coordinated Procedures for Family Reunification*

The adoption of more streamlined and standardized procedures (including assistance) for family reunification is still necessary in many countries, where implementation of family reunification still occurs on an *ad hoc* rather than systematized basis. The lack of standardized procedures may lead to a lack of coordination, arbitrary decisions, unreliable assistance and delays or mistakes caused by lack of information and protocols. Such a protocol or legislative provision should set out the various steps to be undertaken at each stage of the procedure, the communication and coordination to take place among the relevant persons, institutions and government agencies, and clear lines of responsibility for each of the different actors involved in the process including *inter alia*: the Ministry responsible for refugees; diplomatic missions or consular bodies abroad; and other bodies involved in such issues, such as the Aliens Police. A family reunification procedure should strive to offer a speedy resolution to such applications, since long processing delays continue to be a problem in many countries.

*12. Obtaining Exit Visas for the Purposes of Family Reunification*

Countries of origin should provide an exit visa (where such visas are required by law) for the purposes of family reunification. Countries of asylum should facilitate this process when necessary and with the authorization of the refugee, while ensuring that the safety of family members is not compromised. This may sometimes present a delicate problem that must be broached with extreme care and discretion, as well as the full participation and consent of the refugee.

*13. Securing a Travel Document*

In cases where it is impossible to secure any other type of travel document to enable family members to travel to the host country, ICRC documents are usually issued and accepted by the concerned governments. On a very exceptional basis, other interim and *ad hoc* arrangements may also be possible with the assistance of the UNHCR office in the asylum country, for example.

*14. If Repatriation is Envisaged*

Even where conditions are conducive to repatriation in the short or medium term, family reunion should still take place as soon as the group is recognized on a *prima facie* basis for example. Priority should be given to the reunification of the nuclear family, i.e. spouses and dependent children.

*15. Securing and Maintaining Family Unity*

The following are some specific recommendations relating to securing and maintaining family unity.

□ *Principle of Family Unity and Derivative Rights Entrenched in Law*

States should adopt a provision in their domestic legislation which specifically grants family members refugee status or an alternative durable status (including the accompanying rights and benefits) based on the principle of family unity, rather than on general humanitarian grounds, which are of a more discretionary nature.

□ *Alternative Status for Family Members in Certain Cases*

Family members of recognized refugees may not necessarily require international protection, or indeed wish to hold this status. States are therefore encouraged to facilitate the acquisition of an alternative and durable status, such as permanent residence, for refugees<sup>303</sup> as well as their family members.

□ *Maintaining Family Unity in the Host State*

Countries with requirements or assistance schemes which impose on individual refugees an obligation to live in designated municipalities or regions (e.g. as part of a burden-sharing scheme among municipalities), or which provide housing assistance and designated accommodation, should ensure that every effort is made to enable refugees to remain with or in close proximity to their family already in the country. This may include their extended family, such as independent children, siblings, uncles and aunts, cousins, parents, grandparents, etc., and for which a relationship of dependency does *not* need to be established.

□ *Family Unity When a Refugee Marries a National*

The principle of family unity should also be ensured to refugees who marry a national of the country of asylum or a person under a different legal status, such as permanent residency, but who is not a refugee. A problem may occur in these situations if inflexible conditions are imposed on refugees regarding, for example, where they should reside or be housed (e.g. a specific, pre-selected municipality, a camp-like situation or a transition centre). The refugee should be allowed in conjunction with his or her family to decide where they should live together.

□ *When a Refugee Marries a Non-National*

Certain States may impose on persons marrying foreigners (living outside the host State) that they live in that spouse's State. In other words, persons living in their territory would not have the right to bring their foreign spouses to live with them in that country. If they elect to live together, the couple would have to adopt another country of residence, such as the country of the foreign spouse, or another country in which both could obtain the right to reside. In the case of refugees, host States with such laws, should provide an automatic waiver and allow refugees marrying a foreigner to bring them to the host State. This is especially critical in cases where a refugee should wish to marry someone from their country of origin, to which they cannot return. It is equally critical in cases where the refugee does not have reasonable prospects of being able to reside and gain an effective citizenship in a third country.

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<sup>303</sup> See also chapter 2 (Residency Status) above, which explains why refugee status should not necessarily be withdrawn, even if a more durable status is accorded.

## CHAPTER 9: IDENTITY PAPERS AND CONVENTION TRAVEL DOCUMENTS

### MAIN INTERNATIONAL STANDARDS

#### **1951 Convention relating to the Status of Refugees**

##### **Article 27**

##### ***Identity Papers***

*The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.*

##### **Article 28**

##### ***Travel Documents***

*1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.*

*2. Travel documents issued to refugees under previous international agreements by Parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.*

[NOTE: See also, Schedule to the Convention relating to the Status of Refugees of 1951 which details essential requirements for Convention Travel Documents.]

#### **ExCom Conclusion No. 13 (XXIX), 1978**

##### ***Travel Documents for Refugees***

*The Executive Committee, [...]*

*(b) Urged all States parties to the 1951 Convention and/or the 1967 Protocol to issue to all refugees, lawfully staying in their territory and who wish to travel, travel documents as provided for in the 1951 Convention (article 28, schedule and annex);*

*(c) Recommended that such Convention Travel Documents should have a wide validity, both geographically and in time, and should contain — as provided for in paragraph 13 or the schedule — a return clause with the same period of validity, in the absence of very special circumstances, as that of the travel document itself;*

*(d) Recommended that in order to avoid unnecessary hardship a refugee requesting an extension of validity or renewal of his Convention Travel Document should not be required to return to the issuing country for that purpose and should be enabled to secure such extension of validity or renewal of the Convention Travel Document, also for periods beyond six months, by or through the diplomatic or consular representatives of the issuing State; [...]*

*(f) Expressed the hope that bilateral and multilateral arrangements, concluded with a view to facilitating travel by their nationals, e.g. as regard the simplification of visa formalities or the abolition of visa fees, be extended by Contracting States also to refugees lawfully residing in their respective territory;*

#### **ExCom Conclusion No. 49 (XXXVIII), 1987**

##### ***Travel documents for Refugees***

*The Executive Committee, [...]*

*[Recalls its Conclusion No. 13 and article 28 of the 1951 Convention and]*

*(d) Urged all States parties to the 1951 U.N. Convention and / or the 1967 Protocol which have not yet done so to take appropriate legislative or administrative measures to implement effectively the provisions of these instruments concerning the issue of Convention Travel Documents (article 28, Schedule, Annex), including the giving of clear instructions to national authorities competent to issue, renew and extend travel documents and grant visas to holders of Convention Travel Documents.*

*(e) Urged all States not parties to the 1951 U.N. Convention and / or 1967 Protocol which have not yet done so to take appropriate legislative or administrative measures to ensure that refugees are issued with appropriate travel documents under conditions as similar as possible to those attaching to the Convention Travel Documents.*

**ExCom Conclusion No. 91 (LII), 2001**

**Registration of Refugees and Asylum-Seekers**

*The Executive Committee, [...]*

*(g) Requests States, which have not yet done so, to take all necessary measures to register and document refugees and asylum-seekers on their territory as quickly as possible upon their arrival, bearing in mind the resources available, and where appropriate to seek the support and cooperation of UNHCR;*

**Section I: Identity Papers**

**A. International Standards**

*1. 1951 Convention*

Article 27 is intended to provide a refugee, no matter what their legal status in the country, at least a provisional document stating their identity; thereby enabling him or her to conform to any laws and regulations that may require inhabitants of a country to carry such papers, or to prove their identity in certain circumstances.<sup>304</sup> The issuance of such an identity paper does not obligate the State to keep the refugee within its borders, and does not confer any rights on the bearer.

The obligation to issue the identification papers described in article 27 is imperative where the refugee does not possess a valid travel document. A “valid travel document” includes not only the Convention Travel Document provided for in the 1951 Convention,<sup>305</sup> but also a foreigner’s passport (if it contains the required visa), another valid travel document issued by the authorities of the State in which the refugee is present or another foreign State, or a travel document issued to a refugee under previous international agreements by parties to the 1951 Convention.<sup>306</sup> A refugee is deemed *not* to possess a valid travel document in the following cases: if no such document has been issued to him; if it has expired; if it is not valid either because it has expired or is not considered valid in the territory concerned (usually due to the absence of a required stamp or visa); or in the event that it has been temporarily surrendered in order to have it extended to obtain a visa.<sup>307</sup>

It is noteworthy that article 27 of the 1951 Convention does not require that these identity papers<sup>308</sup> assume any particular form or serve any purpose other than simply establishing the identity of the refugee.<sup>309</sup> Indeed, the degree of obligation imposed on the State by article 27 depends largely on whether or not there is a general practice of issuing identity papers in that country, and as mentioned already whether the refugee has a valid travel document. Thus, in countries not having a practice of identification papers, a driving license, immigrant’s record of landing or even a postal identity card may suffice, rendering a separate identification card unnecessary.<sup>310</sup> In other countries, including many countries in Europe, where there is a long-standing practice and sometimes an obligation under law

<sup>304</sup> Grahl-Madsen (see above at footnote 53), pp. 114-115. The obligation to provide refugees with identification documents is also reiterated in a number of UNHCR ExCom Conclusions, (see box in introduction to this chapter).

<sup>305</sup> Articles 11 and 28 of the 1951 Convention, and para. 6, of the Schedule to the 1951 Convention.

<sup>306</sup> Grahl-Madsen (see above at footnote 53), p. 116.

<sup>307</sup> *Ibid.*, pp. 115-116.

<sup>308</sup> For the purposes of this chapter, the expressions identity “card”, “papers” or “documents” are used interchangeably.

<sup>309</sup> Robinson (see above at footnote 4), p. 114.

<sup>310</sup> Grahl-Madsen (see above at footnote 53), p. 114.

to carry an identification card, identification papers have an official character and must generally conform to specific regulations. In a number of African countries, possession and carrying of identification documents is also a legal requirement and failure to do so constitutes a misdemeanour punishable by a fine, or if one cannot pay the fine, may lead to a short period of incarceration (e.g. 10 days). In such cases, the duty of States to provide documents which meet this obligation is absolute.

Finally, in certain countries such as many central and eastern European States, identification cards are particularly important as they also serve as residence permits and proof of domicile, and are essential in order to access many rights and services. These residency/identification cards are more formal and serve a wider purpose than the basic identification papers required by the 1951 Convention, which as mentioned above, do not confer any right of residence or legal entitlements. Recognized refugees who are generally granted residency and other rights upon recognition, will often simply be provided with the same type of identity and/or residency cards which nationals are also required to carry, even if the card does note some differences or restrictions. There is of course no longer any need in such cases for an additional identity card as prescribed under article 27 of the 1951 Convention – once they are recognized. Refugees may thus have an identity card conforming to the 1951 Convention before they are recognized, and another type of residency/identity card once they receive refugee status.

However, when as described above, these residency or identity cards are necessary to prove residency (or domicile), to access basic rights, or where the failure to carry these cards is punishable by law, it becomes all the more important to issue these in a timely and accurate manner. Problems related to the content and issuance of such cards can have important consequences for refugees. Some of the recommendations below describe and attempt to address such problems, as does chapter 2 above (Legal Residency Status and Related Regime of Rights) – which should be read as a complement to this section. Issues related to the basic identity papers required by the 1951 Convention and to the more sophisticated residency/ identity card required by some States are both discussed in this chapter. It is nonetheless important not to confuse these two types of documents, or indeed other documents such as those attesting to civil status (marriage or birth certificates, for example).

## **B. Recommendations**

In addition to the recommendations below, further recommendations related to different aspects of identity and residency cards are also provided in chapters 2 (Legal Residency Status), 3 (Employment), and 4 (Housing).

### *1. Standard of Treatment: Prompt Issuance of Identity Papers Consistent With National Standards and Requirements*

States should ensure that refugees without a valid travel document are promptly issued with identity papers which are in conformity with relevant standards or requirements in the host State, so that a refugee may prove his or her identity at any moment from the time of entry into the territory of the host State, no matter what their legal status. If a different identity/residency card is issued upon recognition of refugee status (and replaces the former identity card), such papers will also be issued without delay.

States must also exercise diligence in issuing identity papers promptly following changes rendering invalid the travel documents that may have been previously held by a refugee (such as the expiration of the travel document itself or a required visa or stamp), or if the refugee has surrendered his or her travel document at the request of authorities or in order to extend a visa, for example.

## 2. *Emergency Issuance of Provisional Identity Papers*

While standard identity papers may exist, less formal or provisional identity papers simply attesting to the refugee's identity should be issued without delay in the event that administrative processing of standard papers will take longer, or in case of an emergency.

## 3. *Individual Identity Papers for Women and Adolescents*

Particular attention must be paid to ensuring that women and older children (e.g. adolescents, who are already likely to be asked for their papers, i.e. above 15 years of age) hold their own, independent identity papers, and are not simply listed on the papers of another family member.

## 4. *Recommendations in the Context of States With a National Tradition of Identity Cards*

The additional recommendations below are intended to reflect the particular situation of **recognized** refugees, and are especially relevant to countries in which these cards are based on a long-standing national practice, required by law, and used for a wide array of official purposes (which include not only the identification of their holder but also as proof of residency status, domicile address, and in order to access important rights and benefits in the host State).

### □ *Prompt Issuance on an Individual Basis*

States which require and have a long-standing practice of issuing identity cards, have a particular responsibility to provide such cards to refugees as quickly as possible upon recognition of refugee status. Such cards must be issued on an individual basis to female and male refugees so as to improve their security, effective access to essential services and rights, freedom of movement and general integration into mainstream society.<sup>311</sup>

### □ *Facilitating the Requirements for Identification Cards*

In order to ensure that identity/residency cards are issued without delay and at the earliest possible time upon recognition, State authorities, NGOs and other relevant actors such as UNHCR should monitor their issuance. Attention must also be paid to situations causing undue delays or rendering impossible the issuance of these cards. In particular, no requirements for obtaining identity cards which recognized refugees cannot objectively or reasonably meet (such as original birth certificates) should be imposed. If such requirements are imposed alternative solutions such as waivers and substitute documents must be made available to refugees. As importantly, special assistance in meeting requirements which may prove difficult for refugees to satisfy, such as proof of a domicile address (residence) must also be readily available – this is especially relevant where

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<sup>311</sup> UNHCR, *Agenda for Protection* (see above at footnote 12), Goal 1, objective 11 (improving the registration and documentation of refugees), October 2003.



securing affordable accommodation is a problem. Further details on this are provided above in chapter 2 on Legal Residency Status, as well as chapter 4 on Housing.

□ *Long Validity Periods for Identification Cards*

Because identification cards in many countries also function as proof of a refugee's legal residency status in the host country, the validity period indicated on these cards may have significant repercussions in various areas, such as employment.<sup>312</sup> The refugee's sense of belonging in the host country, and ability to engage in certain long-term initiatives and projects may equally be affected.

States should therefore issue identity/residency cards with long validity periods, i.e. at least a two-year duration. Moreover, where recognized refugees are granted permanent residence or another long-term residency status, they should also be granted identity/residency cards with validity periods which reflect that long-term status (i.e. 5 to 10 years). A minimum period of validity for identity/residency cards issued to recognized refugees should be included in relevant legislation or regulations, so that the validity period is not subject to discretionary or arbitrary practices, even when such cards are issued at the local level.

## Section II: Convention Travel Documents

### A. International Standards

#### 1. 1951 Convention

□ *Obligation and Exception*

Under article 28 (para. 1) of the 1951 Convention, States Parties have an obligation to issue a travel document to every refugee lawfully staying (which includes recognized refugees) in their territory who wishes to travel abroad. This obligation is subject to an exception, namely, if compelling reasons of national security or public order require that it not be issued. In practice, this exception means that States may prevent the departure of a refugee from their country by refusing to issue him a travel document, if this refusal is based on the stipulated grounds. However, such exceptions may only be invoked for compelling reasons of national security and public order, the term "compelling" defining the degree of seriousness necessary to justify such a refusal. Only very serious cases involving national security and public order may therefore be subject to the exception.<sup>313</sup>

In contrast to this strict obligation to issue travel documents to persons **lawfully staying** in the territory, which is applicable *vis-à-vis* recognized refugees, other refugees on their territory (i.e. refugees who are there illegally or temporarily) have no such guarantees. In this case, host States are simply authorized, and not obligated, to issue them travel documents. The decision is left to the discretion of each State, although article 28 requests

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<sup>312</sup> Employment contracts are usually restricted to the term or validity period specified on the residency/identification card. This fact not only limits job security, but may also be an obstacle to potential employment opportunities since employers may feel that the refugee's residency in the host country is precarious, too short-term, or they may simply be unable to provide refugees with short-term employment contracts. Refugees who have only a short time remaining on their identification cards when searching for employment will, of course, be especially affected.

<sup>313</sup> Robinson (see above at footnote 4), p. 115.

that they give sympathetic consideration to cases of refugees who are in need of a travel document but are unable to obtain one from the country of their lawful residence.

□ *Travel Documents Issued Under Previous Agreements*

The second paragraph of this provision addresses the situation of travel documents which were issued to refugees under previous international agreements by Parties to the 1951 Convention,<sup>314</sup> and requires States Parties to recognize and treat these travel documents in the same manner as if they had been issued under article 28, so as to avoid having to replace all the old travel documents already issued.

□ *Specifications Governing Convention Travel Documents (CTD): Content, Form, Geographical & Temporal Validity, Renewal, Extension, and Recognition*

As referred to in the provision itself, article 28 is made complete with the Schedule to the 1951 Convention, which provides specifications governing, *inter alia*, the content, form, geographical and temporal validity, renewal, extension, and recognition by Contracting States of the CTD.<sup>315</sup> One such requirement in the Schedule is that the document be made out in at least two languages, one of which must be French or English. In all but exceptional cases, the document shall also be filled out with a large geographical validity, and be valid for either one or two years. Diplomatic or consular authorities abroad shall be authorized to extend the validity of the documents for a period not longer than six months.<sup>316</sup> The Contracting States visited by the refugee shall recognize the CTDs issued by the host country and affix visas, when applicable, to the refugee's document. Further, the host country is to readmit the refugee into its territory at any time during the validity of the document.

## 2. *Relevant ExCom Conclusions*

Relevant ExCom Conclusions also reaffirm the importance of travel documents for refugees who wish to travel temporarily outside their country of residence or for resettlement in other countries. They encourage Contracting Parties to abide by article 28, and highlight many of the specifications included in the Schedule and Annex. ExCom Conclusions Nos. 13 (1978) and 49 (1987)<sup>317</sup> are particularly relevant, as they not only reiterate the more important specifications in the Schedule, but also provide additional recommendations. ExCom Conclusion No. 13, recommends *inter alia*, that Contracting States also extend to refugees lawfully residing in their respective territory, the benefit of any bilateral and multilateral arrangements aimed at facilitating travel by their nationals (e.g. the simplification of visa formalities or abolition of visa fees). Refugees with CTDs would therefore be accorded the same treatment as nationals with regard to travel

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<sup>314</sup> Such agreements include the 1922 Arrangement concerning the Nansen Certificates for Russian refugees, the 1924 Arrangement for Armenian Refugees, and many others. For further details, see Robinson (see above at footnote 4), p. 114. Also refer to the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons which, in sec. IV A., urges governments to continue recognizing, and issuing travel documents under agreements in place previous to the 1951 Convention (such as the Inter-Governmental Agreement on Refugee Travel Documents signed in London on 15 October 1946), as well as to extend such travel documents to refugees recognized under the 1951 Convention, until they have undertaken their obligations under article 28 of the Convention.

<sup>315</sup> See in particular paras. 1, 4-9, and 13 of the Schedule to the 1951 Convention relating to the Status of Refugees.

<sup>316</sup> ExCom Conclusion No. 13 (XXIX), 1978, on Travel Documents for Refugees, reiterates some of these same recommendations, such as wide geographic and temporal validity, and extensions of the validity or renewal of the CTD through diplomatic or consular representatives abroad (of the issuing State).

<sup>317</sup> *Ibid.*; and ExCom Conclusion, No. 49 (XXXVIII), 1987, on Travel Documents for Refugees.

requirements by other Contracting States. For instance, if nationals of a country do not require visas to travel to a Contracting State, such as within the European Union, refugees with CTDs should be afforded the same treatment.<sup>318</sup>

ExCom Conclusion No. 49 notes various problems with regard to CTDs, many of which continue to persist in some countries today. These include: problems as regards arrangements for their issue; their geographical and temporal validity; the return clause; their extension or renewal; the transfer of responsibility for their issue; and the obtaining of visas. States are therefore urged to take appropriate legislative or administrative measures to implement effectively the provisions in relevant instruments (i.e. article 28 of the 1951 Convention, and the related Schedule and Annex), including clear instructions to national authorities competent to issue, renew and extend travel documents and grant visas to holders of CTDs.<sup>319</sup>

Since CTDs are specific to refugee situations, they are not referred to in international or regional human rights instruments. However, both the OAU Convention and the European Council Directive on Minimum Standards contain specific provisions on CTDs. The OAU Convention essentially reiterates in article VI (1)(3), similar guarantees as those in the 1951 Convention. It provides additionally in paragraph 2 however, that “[w]here an African country of second asylum accepts a refugee from a country of first asylum, the country of first asylum may be dispensed from issuing a document with a return clause.” For Member States of the European Union, article 25 of the Council Directive on Minimum Standards also reiterates similar obligations<sup>320</sup> relating to CTDs, stating that they are to “issue to beneficiaries of refugee status travel documents in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require.”

## **B. Recommendations**

In addition to the recommendations mentioned in the relevant instruments above (many of which address specific problems), the additional recommendations below are intended to address some further problems, including inconsistencies with the requirements contained in the Schedule to the 1951 Convention, and difficulties relating to the use of CTDs by recognized refugees.

### *1. Long Validity Periods*

In order to facilitate travel for recognized refugees, CTDs should be issued with a long period of validity, i.e. for a *minimum* two-year duration. Shorter terms of validity have been found to cause undue inconvenience and may impede a refugee’s ability to travel.

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<sup>318</sup> On a regional level, the European Agreement on the Abolition of Visas for Refugees, of 20 April 1959, ETS No. 31, (entered into force 4 September 1960) also provides for the exemption of visa requirements for refugees subject to the terms of that Agreement and to reciprocity. See article 1, in particular.

<sup>319</sup> ExCom Conclusion No. 49,(XXXVIII) of 1987, on Travel Documents for Refugees, paras. (c) and (d).

<sup>320</sup> This provision is not as comprehensive as that in the 1951 Convention however, since it does not include the obligation to “give sympathetic consideration” to issuing CTD to other refugees in their territory (second sentence of article 28(1) of the 1951 Convention). Nor does it include the possibility of an extension of the CTD while the refugee is abroad, as was recommended in ExCom Conclusion No. 49 (XXVIII), 1987.

## 2. *Wide Geographical Validity*

For similar reasons, CTDs should offer a wide geographical validity, namely, for all countries of the world, with the exception of the refugee's country of origin.

## 3. *Completing CTDs in an International Language*

Even when the CTDs themselves appear to satisfy the language specifications in the Schedule, national authorities in charge of filling out these documents should ensure that any blank sections, such as the geographical validity, are completed in an international language (English or French), and not only in the local language.

## 4. *Adopting Provisions Authorizing the Extension of CTDs While Abroad*

One of the potentially more serious problems facing recognized refugees travelling with a CTD, is the lack of legal provisions and an established practice which would provide for the possibility of *extending* or renewing their CTDs while abroad. Given the grave consequences that may result should a recognized refugee be unable to return to his or her country of asylum due to an expired CTD, it is recommended that States adopt a specific provision (preferably in their Asylum Law), providing explicitly for the right to the extension or renewal of CTDs while outside the country of asylum. As suggested in the Schedule to the 1951 Convention and the ExCom Conclusions, diplomatic and consular authorities should also be duly informed or trained in this regard. Moreover, and as recommended in ExCom Conclusions No. 13 and 49, it is important that CTDs be renewable from abroad even when their term has already expired, at the very least for the purposes of allowing the refugee to return to his or her country of asylum. In addition to fulfilling their obligations towards persons deemed deserving of asylum and their protection, such a *bona fide* practice would at the same time be likely to facilitate the issuance of visas for these persons, as countries of destination would be assured that the original asylum country would agree to the return of the recognized refugee, including in the event of an expired travel document.

States are urged as well to implement the more detailed recommendations in the above-mentioned ExCom Conclusions, especially those relating to a return clause in CTDs, the extension and renewal of CTDs, and the transfer of responsibility for the issuance of these documents.

## 5. *More Liberal Visa Requirements*

With regard to the imposition of visa requirements States are strongly encouraged to extend to refugees with a CTD, the same standard of treatment granted to nationals of that country with respect to visa requirements, as recommended in ExCom Conclusion No. 13.

## CHAPTER 10: RIGHT OF ACCESS TO COURTS AND RELATED JUDICIAL GUARANTEES

### MAIN INTERNATIONAL INSTRUMENTS

#### **1951 Convention relating to the Status of Refugees**

##### **Article 16**

##### **Access to Courts**

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

#### **Universal Declaration of Human Rights**

##### **Article 10**

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him.

#### **International Covenant on Civil and Political Rights**

##### **Article 14**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]

[...]

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail **in a language which he understands** of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of this defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have **legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;** [...]
- (f) To have the **free assistance of an interpreter** if he cannot understand or speak the language used in court;

[Emphasis added]

##### **Article 26**

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 person 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.

#### **Convention on the Elimination of All Forms of Discrimination against Women**

##### **Article 15**

1. States Parties shall accord to women equality with men before the law.
2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.
3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.
4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

## **Convention on the Rights of the Child**

### **Article 40**

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that :

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts of omissions that were not prohibited by national or international law at the time they were committed ;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees :

(i) To be presumed innocent until proven guilty according to law ;

(ii) To be informed promptly and directly of the charges against him or her, and if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation in the preparation and presentation of his or her defence ;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law [...]

(iv) Not to be compelled to give testimony or to confess guilt ; to examine or have examined adverse witnesses [...]

(v) If considered to have infringed the penal law, to have this decision and measures imposed thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures , authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

(NOTE: See also **Articles 3 and 12 of the CRC** relating respectively to the obligation, *inter alia*, for courts of law to have as the primary consideration the best interests of the child and the child's right to be afforded the opportunity to be heard in any judicial and administrative proceedings affecting him or her.)

## **International Convention on the Elimination of all forms of Racial Discrimination**

### **Article 5**

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice; [...]

### **Article 6**

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts or racial discrimination, which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

## A. International Standards

### 1. 1951 Convention

Paragraph 1 of article 16, which is absolute, contains no requirement of habitual residence, such that refugees enjoy free access to the courts of law on the territory of all Contracting States regardless of their place of ordinary residence. “Free access” is to be understood not as meaning that refugees are exempt from paying the ordinary charges which plaintiffs must pay in order to initiate legal proceedings, but only that no additional obstacles should be imposed on refugees. This article is only applicable to courts of law and does not include access to administrative authorities.<sup>321</sup> The provision in paragraph 1 is particularly important for refugees who have just been recognized and do not yet have a habitual residence. Since the general practice by most States today is to grant access to courts of law to foreigners, refugees would in any event benefit from this right on the basis of article 7(1) (the default provision) of the 1951 Convention.<sup>322</sup>

The provision under paragraph 2 of article 16 is intended to relieve refugees of the requirement ordinarily made of foreigners for a deposit intended to cover the court expenses of the other party in the event that the foreigner loses the case. It also provides that refugees are to receive national treatment with regard to free legal assistance, which refers to legal aid available under State-sponsored schemes. This article should be read together with article 29 of the 1951 Convention, which provides that refugees are not to be charged higher or additional charges than nationals of the State in question.<sup>323</sup> In order to benefit from the rights and national standard of treatment stipulated in paragraph 2, refugees must have their habitual residence in that Contracting State. Finally, in States other than that in which the refugee resides, he/she is to be granted the same treatment with respect to these rights as the nationals of the country of his habitual residence, according to paragraph 3.

### 2. International Human Rights Instruments

Rights relating to the administration of justice are guaranteed in many international instruments (and regional instruments, as seen below) and include an array of rights and judicial guarantees such as, *inter alia*: the functioning and independence of the courts; the right to a fair trial;<sup>324</sup> the right to equality before the law and the courts; rights specific to criminal investigations; and protection and redress for victims of crime or abuse of power. These rights are granted to *all* persons, and extend therefore to aliens, including refugees.

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<sup>321</sup> Grahl-Madsen (see above at footnote 53), p. 66.

<sup>322</sup> Robinson (see above at footnote 4), p. 94.

<sup>323</sup> Grahl-Madsen (see above at footnote 53), p. 64.

<sup>324</sup> The right to a fair trial is guaranteed in the ICCPR, articles 9, 14, and 15. In criminal cases, it includes, *inter alia*, the rights to be informed of charges upon arrest and to be brought promptly before a judge; to equal treatment before the courts; to a fair and public hearing by a competent and impartial court; to be presumed innocent; to have time and the facilities for the preparation of a defence; to communicate with a counsel of one's own choosing; to defend oneself in person or through legal assistance of one's choice; to be informed that counsel will be appointed if one does not have sufficient funds and the interests of justice require it; to have free assistance to an interpreter if one cannot understand the language used in court etc.

For the purposes of this reference guide however, the focus will be on provisions relating to such issues as, access to courts, legal aid, and some related judicial guarantees and topics that are of particular relevance to refugees.

With regard to the functioning of the courts, article 10 of the Universal Declaration and article 14(1) of the ICCPR both provide guarantees regarding basic legal rights and principles of justice that are equally applicable to everyone. Article 10 of the Universal Declaration states that:

“Everyone is entitled in full equality to a **fair and public hearing by an independent and impartial tribunal**, in the determination of his rights and obligations and of any criminal charges against him.” (Emphasis added)

The ICCPR further provides (article 14):

“1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

The rights in these provisions are broadly analogous and complementary, but not the *same* as those stipulated in the 1951 Convention, as they do not specifically provide that everyone has the same right to free and unconditional access to courts of law<sup>325</sup> – a guarantee which is granted to refugees in the latter. Should States specify particular conditions on the right of aliens (including refugees) to initiate proceedings for example, or impose a deposit (*cauti judicatum solvi*), refugees could then invoke the more generous standard of treatment granted to them under the 1951 Convention which exempts them from such conditions.

In addition to the right to a fair and public hearing, these human rights instruments also provide for the **equality of all persons before the law** and to the equal protection of the law without any discrimination, including on the grounds of national origin – provisions which are important to aliens and refugees, amongst others.

Article 26 of the ICCPR provides specifically that:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all person 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.”

Similarly, article 7 of the Universal Declaration provides for the right to equal protection under the law.

#### □ *Women*

As stipulated in article 26 of the ICCPR above, this right to equality and equal protection of the law is also guaranteed against discrimination on the grounds of sex, thus offering a

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<sup>325</sup> These provisions do not for example, provide an exemption from *cautio judicatum solvi*, and the right to initiate proceedings may be qualified or contingent on certain conditions for aliens.



special protection to refugee **women**. This protection is reiterated more explicitly in article 3 which provides that governments are to ensure the equal rights of men and women to the enjoyment of all civil and political rights in the Covenant. CEDAW also provides specific guarantees to women in its articles 2 and 15. By virtue of article 2, States Parties are obliged to “establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.” In article 15, further legal guarantees are stipulated including, *inter alia*: equality with men before the law; identical legal capacity (to men) with regard to civil matters (including with regard to contracts, administration of property and equal treatment at all stages of procedures in courts); the nullification of any contracts or private instruments restricting their legal capacity; and equal rights with men with regard to movement of persons and freedom of residence or domicile.

□ *Children*

In addition to the provisions in the CRC such as articles 3, 12 and 40 (see box in introduction to this chapter), other important international texts provide guidance on the application of juvenile justice even if they are not necessarily legally binding themselves.<sup>326</sup> These include for example: the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UN Doc. A/45/113 (1990)); United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) (UN Doc. A/45/112 (1990)); and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) (UN Doc. A/40/33 (1985)). Reference should be made to these international standards in cases involving refugee children or minors.

□ *Right to legal aid and the services of an interpreter: in the context of the right to a fair trial*

Articles 9, 14, and 15 of the ICCPR, which apply to all persons equally, contain the principal guarantees with regard to the right to a fair trial. These guarantees include amongst others, the right to free legal aid and the services of an interpreter, in the context of a criminal case. They are detailed in article 14 (3) of the ICCPR as follows:

“In the determination of any **criminal** charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail **in a language which he understands** of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have **legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay** for it;

[...]

- (f) To have the **free assistance of an interpreter** if he cannot understand or speak the language used in court; [...].” [Emphasis added]

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<sup>326</sup> While these instruments may not be legally binding themselves, some of the *specific* rights or provisions contained in these instruments can nonetheless be deemed legally binding in the context of other legal instruments (i.e. they may also be included in other instruments which *are* in fact binding).

The right to free legal aid and to the assistance of an interpreter are of course particularly relevant to refugees. In this connection, it is noteworthy that, in contrast to the provision in the ICCPR, article 16 of the 1951 Convention does not specifically restrict the right to legal aid to criminal cases. Where States offer more generous terms to their nationals, such as the provision of legal aid and interpreter services in civil cases too, refugees can invoke the provision of the 1951 Convention granting them the national standard of treatment.

□ *Protection Against Expulsions*

Also of particular relevance to refugees is the protection provided to foreigners in article 13 of the ICCPR, with regard to expulsions. This provision complements the relevant provisions in the 1951 Convention, and provides that a foreigner lawfully in the territory of the State Party may be expelled only in pursuance of a decision reached in accordance with the law, shall be allowed to submit the reasons against the expulsion (except where compelling reasons of national security otherwise require), and has the right to have his or her case reviewed by a competent authority or person.

### 3. *Regional Instruments*

At the European level, article 6 of the ECHR guarantees similar rights to those contained in the ICCPR, including minimum guarantees in the case of criminal charges such as: the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal; the right to legal assistance in case of insufficient means, or when it is in the interests of justice;<sup>327</sup> and the right to the free assistance of an interpreter in case of need.<sup>328</sup> Additional guarantees in criminal proceedings are also contained in Protocol No. 7 to the ECHR, and include, *inter alia*: the right of everyone convicted of a criminal offence to have his or her conviction or sentence reviewed by a higher tribunal (subject to some exceptions); as well as the right to seek compensation in case his or her conviction was reversed or pardoned due to an initial miscarriage of justice.<sup>329</sup> Also of interest in the same Protocol are: article 1 which offers aliens lawfully in the country, including refugees, guarantees against expulsion similar to those in the ICCPR; and article 5 which provides that spouses are to enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as well as in the marriage (during marriage and at its dissolution). Other detailed legal and judicial guarantees are provided in

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<sup>327</sup> With regard to the right to free legal assistance, the European Court of Human Rights has determined that the qualification “when the interests of justice so require” is not an alternative to the right to defend oneself, but rather an independent right with its own standards and conditions. Moreover, in view of the rulings rendered to date by the Commission and Court, this qualification should be given a broad interpretation, such that this right is brought “into play at whatever point a criminal accused may benefit from legal assistance.” See Gomien, Donna, David Harris and Leo Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Council of Europe Publishing, 1996, p. 195.

<sup>328</sup> Article 6 of the ECHR states:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]

3. Everyone charged with a criminal offence has the following minimum rights: [...]

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; [...]

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; [...]

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

<sup>329</sup> Articles 2 and 3 respectively, Protocol No. 7 to the ECHR.

articles 5-7, 13 and 14 of the ECHR, including, *inter alia*: rights relating to liberty and security of the person (in case of arrest or detention); rights relating to a fair trial in an impartial court; and the right to an effective remedy.

In the American and African contexts, access to courts and judicial guarantees are also addressed in the relevant regional human rights instruments. In particular, article XXIV of the American Declaration enshrines a general right to petition which entitles every person to “submit respectful petitions to any competent authority” including administrative authorities, and to obtain a prompt decision. Both articles 8 and 25 of the American Convention on Human Rights (ACHR) also relate to the right to access to justice. Moreover, while acknowledging that this right is not absolute, the Inter-American Court of Human Rights has established that the right to access to justice cannot be restricted on the basis of the migratory situation of the individual.<sup>330</sup> Comparable to those contained in the ICCPR, article 8 of the ACHR provides for a set of minimum guarantees,<sup>331</sup> (including the right to be assisted without charge by a translator or interpreter) which are applicable not only to criminal proceedings but also in proceedings for the determination of an individual’s rights and obligations of a civil, labour, fiscal, or any other nature.<sup>332</sup> Similarly, article 25 sets forth the right to judicial protection, entitling **every individual** to “simple and prompt recourse” before a competent court or tribunal for protection against acts that violate his or her fundamental rights. States are thus obliged to: ensure that any person claiming such remedy shall have his or her rights determined by the competent authority provided for by the legal system of the State; develop the possibilities of judicial remedy; and ensure that the competent authorities shall enforce such remedies when granted.

In the African context, judicial guarantees are provided in articles 3 and 7 of the African Charter on Human and Peoples’ Rights. These provisions provide for the equality of all individuals before the law, the right to equal protection of the law, and the right to have one’s cause heard. The latter in particular includes the following guarantees, *inter alia*: the rights to appeal; to a defence (including the right to be defended by counsel of his or her choice); to be tried within a reasonable time by an impartial court; and to be presumed innocent until proven guilty.<sup>333</sup> Article 12(5) also prohibits the mass expulsion of foreigners. In addition, with respect to children, the African Charter on the Rights and Welfare of the Child,<sup>334</sup> is an important regional complement to the CRC and establishes an African Committee of Experts on the Rights and Welfare of the Child which is empowered to receive State reports as well as communications from individuals, groups or non-governmental organizations recognized by the OAU, a Member State or from the United Nations (article XXXII). One of the noteworthy aspects of this Charter is that it

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<sup>330</sup> See Inter-American Court on Human Rights, *Juridical Condition and Rights of Undocumented Migrant Workers*, Advisory Opinion No. 18, September 17<sup>th</sup>, 2003, para. 122.

<sup>331</sup> In addition to the guarantees provided above, the American Convention also provides for the right to judicial review in cases of detention, and article 11 guarantees the right to the protection of the law against arbitrary or abusive interference with one’s private life, family, home, or correspondence, or of unlawful attacks on one’s honour or reputation.

<sup>332</sup> See I/A Court HR, *Baena Ricardo et al. Case*, Judgement of 2 February, 2001. Series C No. 72, paras. 124-130, and *Constitutional Tribunal Case*, Judgement of 31 January, 2001. Series C No. 71, paras. 68-71.

<sup>333</sup> Article 7 of the African Charter on Human and Peoples’ Rights.

<sup>334</sup> African Charter on the Rights and Welfare of the Child, adopted 11 July 1990 by the Organization of African Unity at the 26<sup>th</sup> Session of the Assembly of Heads of State and Government, held in Addis Ababa (entered into force November 1999).

defines the child as anyone under 18 without any exceptions.<sup>335</sup> It also contains a provision specifically on the administration of juvenile justice (article XVII) in relation to penal law and provides that the child shall, *inter alia*, have the right to special treatment in a manner consistent with his or her sense of dignity and worth and which reinforces his or her respect for human rights; not to be subjected to torture or degrading treatment if he is detained or imprisoned; to be separated from adults in their places of detention or imprisonment; to be informed of charges in a language he or she understands, and to be assisted by an interpreter; and to be afforded legal and other appropriate assistance for his or her or her defence. In addition, it stipulates that Member States are to set a minimum age below which children shall be presumed not to have the capacity to infringe penal law.

## **B. Recommendations**

### *1. Legal Assistance in Context: Problems Commonly Confronted by Recognized Refugees*

As other persons in society, recognized refugees may one day find themselves in legal proceedings of one type or another, or require legal counselling. The following are some of the types of problems refugees may face, and the special assistance they are likely to require:

- They may require legal assistance for the ordinary matters of life, such as a housing or property dispute, a criminal matter, or civil or matrimonial issues in case of a divorce or custody matter. However, what might otherwise be considered ordinary cases may require particular care in the case of refugees as they may present ‘hidden’ problems and security concerns (e.g. as aliens this may be a vulnerability to deportation and *refoulement*, or the case may indirectly jeopardize the security of family members still in the country of origin).
- As refugees, they may also have more difficulty accessing or defending their rights than nationals. Refugees may have rights in law but have more difficulty exercising them in practice due to: a lack of awareness on the part of relevant government structures and civil servants on the applicable regime of rights and benefits (i.e. those rights attached to their refugee or residency status); the lack of proper administrative mechanisms or other obstacles at the implementation level; or the imposition of heavy bureaucratic requirements that refugees cannot manage on their own. These types of problems have a tendency to occur in countries where refugees are not granted permanent residency status and a more obscure or exceptional regime is applied to them, which requires training or new administrative structures. In such cases, legal aid providers may be required to intervene with the relevant authorities on behalf of their clients, or to help them complete the necessary forms, papers, or procedures. Whenever possible, it may be helpful to have the text of the applicable law available during meetings with relevant authorities, as they may be unfamiliar with the rights of refugees. Refugee-specific NGOs, UNHCR or government refugee agencies may also have to conduct trainings in order to ensure better access of refugee rights.

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<sup>335</sup> *Ibid.*, Article II.

Particularly when refugees are not granted a mainstream (well-known) regime of rights or status, other legal difficulties with the legislative framework itself may also arise. For example, the legislation may be silent, confusing, contain obvious gaps, or pose other questions of interpretation, applicability (i.e. to recognized refugees) or implementation. Here legal aid providers may be able to use international law, national jurisprudence or other authoritative sources to propose an interpretation of domestic law to the relevant authorities that is in favour of their clients. At other times, the gap or conflict in the legislation is such that only an amendment to the legislation will remedy the situation. In such cases, legal aid providers may take action at both the legal and the advocacy levels in order to affect a change in the law.

- Refugees may also face specific legal problems directly or indirectly related to their refugee status or situation. For instance, the lack of relevant or original documents may in certain cases render more difficult their access to courts, as well as their chances of success within the legal proceedings themselves. Furthermore, matters or issues specific to refugees may require specialized legal assistance, such as those involving: CTDs (and certain other issues related to travel); identity documents; rights or obligations in the context of integration frameworks and rules applicable specifically to refugees; freedom of movement and residency; family reunification assistance and procedures; and all legal proceedings involving a possibility of deportation.
- In addition to the above, refugees may face a variety of other difficulties. For instance, the government and the private sector may at times have a tendency to treat refugees as simple foreigners, thereby denying them rights and services to which they are entitled. On occasion refugees may also be victims of discrimination. Finally, refugees are frequently impaired by the language barrier (verbal or written), and their lack of contacts and knowledge of the bureaucratic and governmental structures of the host country.

## 2. *Standard of Treatment: An Explicit Provision in Relevant Legislation*

States should adopt an explicit provision in relevant legislation (e.g. Law on Foreigners, or Refugee Law) specifically granting refugees free access to courts of law, legal aid (including the services of an interpreter as necessary), exemption from *cautio judicatum solvi*, and other judicial rights and guarantees on the same terms as nationals. This specific provision is recommended even where general rights and judicial guarantees are contained in national Constitutions or Charters.<sup>336</sup> In particular, if legal aid to aliens is subject to reciprocity agreements, this condition should be waived for refugees.

## 3. *Addressing the Special Needs of Refugees: In the Context of the Insufficiencies in Domestic Legal Systems*

In many countries, while access to courts and the right to a fair trial may be guaranteed in theory, a number of insufficiencies within the domestic legal system may render the system generally ineffective and particularly problematic for refugees. Insufficiencies of domestic legal systems may include for example: the general lack of resources of the judicial system (which can include a lack of infrastructure and of a trained judiciary and auxiliary staff);

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<sup>336</sup> If the relevant (refugee) legislation already provides for a general or default provision granting refugees the same rights as citizens or permanent residents however, this may not be necessary. Moreover, in some countries, there is no legal concept of *cautio judicatum solvi*, such that no exemption is necessary.

long delays; procedural complexities; lack of a solid tradition of the rule of law; discrimination; and problematic pre-trial procedures. From amongst these problems, refugees in particular may be especially affected by: the misuse or discriminatory application of pre-trial detention procedures (to aliens in general or refugees in particular); the lack of proper procedural and judicial safeguards against arbitrary deportation to the country of origin; and their general vulnerability, especially if they still lack the requisite language skills, knowledge about their rights or contacts in the country of asylum to properly protect and defend themselves when they are faced with a legal problem.

Even minor offences and regulatory breaches such as not carrying an identity card, the breach of camp rules (such as leaving the camp without the requisite permission) or failure to comply with conditions that are part of an integration programme, can sometimes have serious repercussions for refugees, particularly if they cannot yet communicate in the local language, and are subject to summary deportations, or are refused entry into the camp or basic assistance.

Moreover, in addition to making refugees aware of their rights, legal counsellors should (to the extent possible) also ensure that refugees are aware of judicial delays and other possible disadvantages or repercussions of going to court, as well as any alternative methods of resolving the matter, including mediation and out of court settlements.

#### 4. *Eligibility for Legal Aid: Legal Aid in Civil and Criminal Matters*

##### □ *Standard*

As recommended above, refugees should be provided access to legal aid in both civil and criminal matters on the same terms as nationals. Hence, if domestic law provides for legal aid in civil matters as well as in criminal cases, refugees should be entitled to this service as well; they are to be granted the same standard of treatment as nationals according to the 1951 Convention.

##### □ *Systems of Legal Aid*

Systems of legal aid can vary significantly from country to country. For example: as seen above, in some countries legal aid is granted for criminal cases only, while others also include civil matters. In some systems, legal aid is completely free of charge, whereas in others legal assistance is provided at reduced rates. In some countries the State or court appoints a legal representative while in others, the person is entitled to choose a legal representative themselves. With regard to these variables, refugees should be granted the same access and the benefits of legal aid on the same terms as nationals (with the exception of eligibility conditions which, by their nature, they may not be able to meet).

##### □ *Conditions for Eligibility*

The conditions for eligibility for legal aid can vary widely as well. In many countries, legal aid will be provided for criminal but not civil or administrative proceedings. And even in criminal cases, some States will only provide free legal defence for persons who are eligible and who have been charged with a crime punishable by more than ten years imprisonment for example, or for minors or persons declared mentally unfit. Financial or related conditions for eligibility also generally have to be met, and may include for instance: a certain maximum income, or proof that one is receiving public relief (minimum social assistance by the state) or unemployment benefits. It becomes important therefore, to ensure that certain conditions for eligibility for legal aid are not by their nature unduly

burdensome or impossible (including for technical or administrative reasons) for refugees to satisfy.

□ *Special Concerns and Assistance With Regard to Civil or Criminal Matters*

As mentioned above, there are often special concerns which accompany the conduct of legal matters for refugees. The **lack of key papers** usually required for the purposes of civil acts, such as marriage for example, may very well demand legal assistance or intervention. Similarly, legal aid providers may have to take special measures in refugee cases, not only to protect the specific right in question but also to protect simultaneously the **security, confidentiality, and status** of their clients – which may be compromised in certain situations if caution is not exercised. In addition, legal aid providers knowledgeable of refugee issues can play a valuable role in educating the judiciary regarding the special problems and concerns associated with refugee status, such as the need to avoid contacting the country of origin for certain information (or if this is done, the need to follow strict guidelines in doing so) and to provide certain protections against deportation in criminal cases.

5. *Translation/ Interpreter Services*

□ *Needs and Available Services*

In this respect, refugees may frequently require additional assistance, as domestic law and legal aid services are unlikely to cover the myriad of expenses related to translation and interpretation services that may be required in legal proceedings involving an alien who does not speak the host country language. Such assistance may be especially necessary in civil cases where these types of interpretation and translation services are less often included in legal aid programmes. Even in criminal proceedings however, where more services are often guaranteed by law (e.g. the right to be informed of the nature of the charges against a person in a language they understand, and being granted an interpreter during criminal proceedings in court), these will typically be insufficient to prepare a proper defence. The actual needs, such as the translation of all the required (original or supporting) documents in the case and the use of an interpreter throughout the duration of the case including during consultations with their lawyer etc., may often far exceed what the national legal aid system is equipped to provide or subsidize.

□ *Complementary Assistance*

The establishment of complementary translation and interpreter services (to those provided by the State) is therefore recommended. In some contexts the use of a friend for interpretation purposes may be sufficient while in others only the use of registered and State-approved translators/interpreters is permitted. Generally speaking however, complementary services in this domain will play an important part in ensuring that refugees are provided the best chances in their legal affairs as possible. For example, translation or language students could provide their services to refugees in the form of volunteer work with relevant refugee-assisting NGOs (it could even count towards university credits if practical clinics or stages are required as part of the academic programme). Ethnic, immigrant or refugee community service staff or assistance centres could also provide the relevant assistance or references for translators, or even organize their own volunteer services. And if necessary, UNHCR may be able to provide additional references for this purpose, and trusted and competent friends or relatives could also provide additional assistance when necessary and appropriate.

□ *Some Words of Caution*

A word of caution is however warranted with regard to using friends or relatives as this may sometimes pose a problem with regard to impartiality and confidentiality issues; the refugee may not wish to reveal certain information or parts of the 'story' to these persons, even though it may be critical to their defence or their attorney's ability to represent them effectively. It is also important for reasons of security to ensure that legal aid services, defence attorneys, judges, NGOs or anyone else assisting the refugee in legal matters are aware that embassies of the country of origin for instance, should *not* be contacted for references (nor of course, should their staff be used) of qualified translators and interpreters, even when it may be difficult to find native speakers in the asylum country.<sup>337</sup> Whenever at all possible, especially in certain circumstances which warrant particular caution, the profile of interpreters and translators with whom neither the refugee nor the organization assisting him are familiar, should be looked at closely, and references requested and verified. It is important to be alert to signs of mistrust, reluctance to use certain persons, and discomfort on the part of refugees with regard to particular interpreters or translators. When such is the case, one should respond to these signs or other information by verifying the reasons for this and, if not already done, checking the profile of the translators and interpreters more attentively (especially when they are regularly used by relevant refugee-assisting organizations and government agencies) in order to ensure that the security and interest of the refugee is not being placed in jeopardy by persons with political affiliations different from those of the refugee, or by persons who may be providing information to the country of origin, for instance.

6. *Administrative Authorities and Bodies*

Given the increasing importance that administrative tribunals, bodies or agencies are gaining in a wide range of matters in many national legal systems,<sup>338</sup> refugees should ideally also benefit from the same standard of treatment as nationals with respect to cases brought before such bodies. Ideally complementary legal assistance services in such cases will also be available, particularly where the State does not already provide nationals with many services in this area.

7. *Need For Training on Particularities of Providing Legal Assistance to Recognized Refugees*

By virtue of their refugee status, recognized refugees are vulnerable to some special problems when undertaking legal action or undergoing legal proceedings. Indeed, a legal recourse or proceeding which might be fairly straightforward for other persons may have adverse repercussions and indirectly pose a number of serious threats to the safety and status of a recognized refugee. Actors providing legal assistance to or representing refugees, as well as members of the judiciary need to be aware of these concerns and potential problems, and adopt legal strategies and preventative action which seek to protect the refugee's rights, as well as his or her status and safety. Specific training is therefore

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<sup>337</sup> For the same reasons, staff of the embassy should not be used for these purposes. In addition to placing the refugee at possible risk (even in the country of asylum), the safety and security of relatives and friends still in the country of origin may also be at risk.

<sup>338</sup> Many countries are increasingly delegating a wide variety of procedures (e.g., family reunification or sponsorship applications and appeals; work-related invalidity claims; applications and appeals with regard to eligibility for unemployment benefits; and applications and appeals with respect to the acquisition of permanent residency) to administrative bodies, courts or tribunals in order to alleviate the pressure on overburdened (and backlogged) courts.



recommended. The following are some of the situations (these are not exhaustive) in which special care or efforts must be taken when representing or counselling recognized refugees:

- In the event that criminal legal proceedings are taken against the recognized refugee, the legal assistance provider must take appropriate measures to protect the refugee from a cancellation of his or her status, or *refoulement*, whether it be in the form of an immediate expulsion or deportation after the sentence is served.
- Moreover, in some countries, even relatively minor offences may place a refugee's status and stay in the country in jeopardy, or prejudice his or her eventual application for naturalization for example. As such, care must be taken with regard to counselling clients to plead guilty even to a minor misdemeanour or offence simply because it may be less cumbersome than to go through the court proceedings and the punishment is relatively light.
- Civil cases, such as divorce, child custody or property claim cases, may pose confidentiality and security problems for the refugee, as courts often contact the country of origin in such cases in order to obtain relevant information on applicable country of origin marriage regimes, laws, and records. Precautionary and preventative measures must be taken in such cases, including with the judiciary.
- Other problems relate to the fact that many refugees may not have the requisite personal documents and records required by law to undertake a variety of civil actions, such as marriage, application for naturalization, and property-related claims. In such cases, alternative or substitute documentation must be explored.

#### 8. *Establishing Complementary Legal Assistance Services and Networks for Refugees*

Particularly in the absence of solid national legal assistance structures (governmental or non-governmental) and legal aid systems, it is recommended that complementary legal services be established or extended to recognized refugees. A variety of actors, especially in civil society, such as refugee-specific and human rights NGOs, university legal clinics, relevant refugee community structures, local Bar associations, and networks of pro-bono lawyers, can all provide essential legal services to refugees. In many instances, organizations and actors already active in providing legal assistance to asylum-seekers, will be the natural partners and be called upon to extend their services to recognized refugees.

##### □ *Specialized Legal Assistance*

The type and range of services these organizations provide to recognized refugees do not, however, generally relate to refugee status determination but rather to assisting this group in accessing or implementing their rights and benefits, and addressing particular civil and criminal matters. The knowledge and skills necessary to deal with this broad range of issues is therefore different from those involved in defending asylum claims and providing protection against *non-refoulement*. Training, the creation of specialized legal teams (staff) or focal points for recognized refugees within the organization, and the development of specialized legal materials such as reference books or manuals are therefore recommended.

□ *Referral and Network System*

Developing and putting in place a comprehensive referral and network system would also allow legal aid providers to provide more complete and effective services to their clients.<sup>339</sup>

They should include referral systems to relevant legal and non legal NGOs and other specialized organizations (such as those providing psycho-social assistance, material assistance, or more specialized legal services or integration assistance), health facilities, emergency services of various kinds, shelters for abused or destitute women and children, relevant government departments or services, and others. Including legal assistance providers in the network of refugee-assisting NGOs is also vital both to their work and to the quality of their services. Moreover, not only do such networks gain lobbying power and a greater capacity to improve their respective services by cooperating with each other, but legal assistance providers could draw from the experience and practical knowledge of colleagues dealing with other aspects of refugee assistance.<sup>340</sup>

9. *Advocacy and Monitoring Activities*

Legal assistance providers and human rights organizations in the host country are also ideally placed to undertake advocacy and monitoring activities on the rights of recognized refugees. They can have a valuable role to play by undertaking general advocacy activities for more inclusive laws, rights and services for recognized refugees and a greater respect for international or regional human rights standards. In addition, their knowledge of the legislative, bureaucratic and other practical problems in implementing the rights of recognized refugees could inform their efforts and make them effective advocates for particular reforms. This experience is also valuable for undertaking monitoring activities on the rights of refugees.

For both representational and advocacy activities it is essential that legal assistance providers be familiar with the standards in relevant international and regional legal instruments, including human rights instruments, as well as domestic legislation (especially legislation relating to aliens and refugees) and relevant bilateral agreements between countries.

Where legal assistance providers (or human rights organizations) do not have the capacity to undertake broad advocacy activities on behalf of refugees themselves, they may cooperate and provide their specialized inputs to other NGOs, relevant domestic, regional or international bodies (e.g. UNHCR, the national ombudsman, regional bodies such as the European Commission, or implementing/monitoring bodies of international human rights instruments) who can take on more organized advocacy programmes on specific issues. Monitoring how the rights of recognized refugees are observed in practice, the impact of certain legal requirements on the integration process of refugees, as well as the types of problems and case-loads being dealt with by legal assistance providers is also important for this purpose.

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<sup>339</sup> These systems could of course be beneficial to both asylum-seekers and recognized refugees.

<sup>340</sup> For example, social workers often understand and are particularly skilled at resolving bureaucratic and other obstacles to refugee rights, especially in accessing social benefits, education, and employment rights and in dealing with issues of personal documentation and residency. Where NGOs specializing in integration assistance (to recognized refugees) have already been established, they too could be an invaluable source of assistance and information. Indeed, when relevant, legal aid providers may deem it more appropriate to simply refer refugees to an integration NGO, or alternatively seek their advice and assistance in individual cases.

## 10. *Special Attention to Women and Children*

### □ *Women*

Women refugees may have some special legal assistance needs even once they are recognized. The following are some general guidelines and recommendations for legal service providers in order to assist them in protecting the rights and meeting the particular needs of refugee women clients.<sup>341</sup>

- Ensure that: women participate actively and equally in decision-making on relevant legal matters: that they are provided the possibility of expressing their wishes separately and confidentiality from their spouse (or another relative, especially if male); and that their decision is indeed entirely voluntary.
- Appropriate legal mechanisms and counselling services established to facilitate local integration and the exercise of relevant integration rights, should provide these services in a gender-sensitive manner and adopt strategies to ensure equal access to legal information and services to women. Telephone (legal) counselling and referral services, mobile legal clinics, or periodically providing legal assistance in places (and hours) normally frequented by women (e.g. setting up information tables or offices near schools, community centres, health care centres etc.) may help women get the legal information and assistance they need. This is especially necessary for women who are not easily mobile due to family duties, lack of transportation or who live in remote areas of the country.
- In addition, special efforts should be undertaken to identify and respond to the particular types of legal problems or assistance frequently required by refugee women in the country of asylum. They may for example require assistance in order to access or implement certain rights (or services) such as in the sphere of education, health services, social assistance, employment, or property rights. They may require help as well with certain types of applications or procedures, such as family reunification, naturalization, or residency issues. As importantly, legal assistance providers should be knowledgeable and able to provide legal assistance on a range of civil and criminal matters, in a manner which is gender sensitive and gender focused. These issues may include for example, domestic abuse, sexual harassment, assault or rape, divorce and legal separation, attempts at forced marriage, child custody and alimony issues, or even obtaining a marriage license, or a birth registration for a new-born etc.
- Legal assistance providers should help ensure that refugee women are provided with individualized documentation.
- The code of ethics or mandate of legal assistance providers (e.g. legal clinics, NGOs) should include a commitment to, *inter alia*: gender equality and gender sensitivity in their services; promoting human rights; and to advocating for the recognition and defence of women's human rights in the course of their representations and services with respect to their claims.

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<sup>341</sup> The guidelines and recommendations in this chapter have been drawn from: da Costa, 'Proposed Guidelines for Gender Sensitive Legal Clinics and Other Legal Aid [Assistance] Providers', December 2000, available in *Gender Training Kit on Refugee Protection and Resource Handbook*, UNHCR, December 2002, in the accompanying CD-ROM, under 'Miscellaneous Documents'.

- The presence of appropriately qualified and trained female staff (i.e. female legal assistance providers such as lawyers, legal counsellors, law students, interpreters) should be ensured, preferably at all stages of service delivery. This is particularly important of course, in sensitive cases, such as those involving any type of sexual or gender-based violence (SGBV), discrimination, or even a divorce or child-custody issue. It is essential as well for refugee women who may simply not feel comfortable addressing a man for cultural or other reasons. Putting a woman in a position where she must deal with a man instead of a woman in these situations may have negative consequences on her case as she is more likely to conceal some information or generally be less open about all the facts relevant to the case.
- Whenever possible special efforts should be made to provide training for staff members which include: training on gender-related issues, including legal, procedural and technical aspects of cases brought by women; the human relations aspect of dealing with gender cases, especially those involving violence; awareness-raising and recognition of gender issue and needs; and mechanisms to ensure equality of access to information and legal representation to women. Care should be taken that the type of legal services provided matches the needs of refugee women.
- Vulnerable women and women at risk, as well as other vulnerable persons should be given priority in access to services as well as follow-up, whenever possible.
- Mechanisms for women to provide feedback on appropriateness of systems and services should be put in place.
- Where possible, legal assistance providers should establish a referral system or network through which they may direct clients for psychological or social counselling, and emergency assistance services such as shelters for abused, exploited or destitute women.
- Policies should be adopted with respect to issues of client confidentiality, separation of files (with a spouse or other family member for example), conflict of interest situations, other potentially gender-related ethical issues, and the implementation of the specific guidelines or recommendations made above at all levels of service delivery.
- In keeping with domestic law, internal guidelines and procedures may also have to be adopted by legal assistance providers on how to proceed with cases of domestic abuse, divorce, and child custody for example.

□ *Children*

Children are granted special guarantees and protection in law, including in such instruments as the ICCPR, the CRC, and more specialized instruments dealing specifically with juvenile justice.<sup>342</sup> In keeping with the standards in these human rights instruments and guidelines, legal assistance providers should provide appropriate services, including

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<sup>342</sup> Specialized instruments include, *inter alia*: the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (G.A. res. 45/113, annex, 45 UN GAOR Supp. 8 (No. 49A) at 205, UN Doc. A/45/49 (1990)); the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) (G.A. res. 45/112, annex, 45 UN GAOR Supp. (No. 49 A) at 201, UN Doc. A/45/48 (1990)); and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) (G.A. res. 40/33, annex, 40 UN GAOR Supp. (No. 53) at 207, UN Doc. A/40/53 (1985).

where relevant and possible, training, monitoring and advocacy activities which promote and disseminate the standard of treatment and protection accorded in these international instruments. Some such guarantees and juvenile protection measures include:<sup>343</sup>

- The right of juvenile persons to procedures that take account of their age and the desirability of promoting their rehabilitation (Article 14(4) ICCPR);
- Any child alleged to have committed a criminal offence is to be treated in a manner consistent with his or her sense of dignity, as well as the desirability of promoting their reintegration in society. A child who has infringed penal law is also entitled to the right to a fair trial and to judicial guarantees, which include *inter alia*, the presumption of innocence; the right to have his or her case heard by an impartial and independent judicial body or authority, in the presence of legal or other appropriate assistance (usually also in the presence of his or her parents or legal guardians); the right not to be compelled to give testimony or guilt; to the free assistance of an interpreter; to have his or her privacy respected; and to an appeal process. (ARTICLE 40 CRC);
- Children deprived of their liberty are to be treated in a manner which takes into account the needs of someone of their age and are to be separated from adults unless it is considered in the child's best interest not to do so. (Article 37 CRC).

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<sup>343</sup> This section on juvenile justice has relied partly on the following source: OHCHR, *Training Manual on Human Rights Monitoring: Professional Training Series No. 7*, United Nations (OHCHR), New York and Geneva, 2001, p. 60 (section 9, Administration of juvenile justice).

## CHAPTER 11: PROPERTY RIGHTS

### MAIN INTERNATIONAL STANDARDS

#### **1951 Convention relating to the Status of Refugees**

##### **Article 13**

##### ***Movable and immovable property***

*The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.*

#### **Universal Declaration of Human Rights**

##### **Article 17**

1. *Everyone has the right to own property alone as well as in association with others.*
2. *No one shall be arbitrarily deprived of his property.*

#### **International Covenant on Civil and Political Rights**

##### **Article 26**

*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 grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

#### **Convention on the Elimination of All Forms of Discrimination against Women**

##### **Article 15**

[...]

2. *States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.*
3. *States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.*

##### **Article 16**

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: [...]*

*(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property whether free of charge or for a valuable consideration.*

#### **International Convention on the Elimination of All Forms of Racial Discrimination**

##### **Article 5**

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...]

(d) Other civil rights, in particular: [...]

- (v) The right to own property alone as well as in association with others;
- (vi) The right to inherit; [...]

## A. International Standards

### 1. 1951 Convention

Article 13 does not include a requirement of residence or domicile. As such, refugees may enjoy these rights regardless of the type of residence status they may hold and even if they do not have their residence where they wish to acquire property.<sup>344</sup>

This provision recommends that State Parties grant refugees treatment as “favourable as possible”, but stipulates that the minimum treatment required is that accorded to aliens generally in the same circumstances. It lists the rights covered by it, which beyond the acquisition of moveable and immovable property, include other rights deriving from these such as mortgaging, revenues, sale, administration of the property etc., as well as leases and other contracts relating to that property. The right to receive compensation for property which has been nationalized or expropriated is also a right relating to the acquisition of movable and immovable property.<sup>345</sup> Moreover, the term “property” should be understood in the broad sense as including tangible property as well as “property rights” such as bank accounts, securities and moneys.<sup>346</sup> The various forms of intellectual property or copyrights on the other hand, are covered by article 14 of the 1951 Convention, which accords refugees who are residents of the country of asylum the same treatment as nationals.<sup>347</sup>

One of the potential limitations of this provision is that if a country restricts the right of aliens to acquire moveable and immovable property only to those benefiting from reciprocity agreements, it may mean that refugees in effect do not enjoy this right. However, some authorities on the subject have argued that the right to acquire movable and immovable property should be considered as part of a minimum standard of treatment and therefore granted to foreigners (including refugees of course) as part of customary international law, even if no reciprocity agreements exist.<sup>348</sup>

Article 29 on fiscal charges in the 1951 Convention also protects refugees from any “duties, charges or taxes, of any description whatsoever [including those relating to property], [which] are other or higher than those which are or may be levied on their nationals in similar situations.”

### 2. International Human Rights Instruments

The Universal Declaration states that “Everyone has the right to own property alone as well as in association with others [...] No one shall be arbitrarily deprived of his

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<sup>344</sup> Robinson (see above at footnote 4), p. 88.

<sup>345</sup> Grahl-Madsen (see above at footnote 53), p. 55.

<sup>346</sup> Robinson (see above at footnote 4), pp. 88-89.

<sup>347</sup> Article 14 on Artistic rights and industrial property of the 1951 Convention reads:

“In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to **nationals** of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.” [Emphasis added]

<sup>348</sup> Grahl-Madsen (see above at footnote 53), p. 58, citing authorities on the subject including De la Pradelle, Borchard and Fachini.

property.”<sup>349</sup> However, the ICCPR and ICESCR do **not** contain a similar provision, although other provisions such as the prohibition of discrimination, including on the basis of property, may be of relevance.<sup>350</sup> Moreover, given the link in some cases between the right to property and socio-economic rights, such as the right to housing (often connected to property rights) and an adequate standard of living, provisions relating to these rights in various international human rights instruments may also be of relevance. For example, article 11 of the ICESCR provides for the right of everyone to an adequate standard of living for himself and his family, including amongst other things, adequate housing. Similar provisions regarding adequate living conditions, including housing are also contained in the following: CEDAW (article 14(2)(h) with respect to rural women and rural development); CRC (article 27(3) on rights related to the material needs of child); and the Universal Declaration (article 25(1)). Other provisions related to housing specifically, are further provided in CERD (article 5(e)(iii)) and of course, in the 1951 Convention (article 21).<sup>351</sup>

In addition, special guarantees are provided against racial and sexual discrimination in relation to property rights in CERD and CEDAW, respectively. According to article 5 of CERD, racial discrimination is prohibited and is to be eliminated in relation to civil matters, including the right to own and inherit property. The rights of women to full legal capacity and opportunities identical to that of men, including the right to conclude contracts and administer property is provided in article 15 of CEDAW. Furthermore, article 16 of that Convention provides for the right to non-discrimination in relation to marriage and the family, and more particularly, with respect to the ownership, acquisition, management, administration, enjoyment and disposition of property.

### 3. *Regional Instruments*

In the European context, Protocol No. 1 of the ECHR, which extends its rights to everyone within the territory of Contracting States, guarantees the right of enjoyment and protection of one’s existing property (movable and immovable), rather than the explicit right to acquire property.<sup>352</sup> However, in the particular context of the European Union, it is also relevant to take into account the Court of Justice ruling to the effect that according to European Union law, the right to acquire, use or dispose of immovable property (real estate) is implicit in the right to establish oneself and pursue an occupation in a Member State.<sup>353</sup>

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<sup>349</sup> Article 17 of the Universal Declaration.

<sup>350</sup> Article 26 of the ICCPR provides for example, for guarantees against discrimination and to the equal protection of the law (see box in introduction to this chapter). In addition, both the ICCPR and the ICESCR also contain as article 1 a provision regarding the right of all peoples to freely dispose of their natural wealth and resources and the right not to be deprived of their own means of subsistence.

<sup>351</sup> For more details on related housing rights please refer to chapter 4 (Housing) above.

<sup>352</sup> Article 1 of Protocol No. 1 to the ECHR reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

<sup>353</sup> Dent (see above at footnote 47), p. 116 referring to: Case 305/87, Re Ownership of Landed Property: *EC Commission v. Greece* [1989] ECR 1461, [1991] 1 CMLR 61.



In the Americas and African context, regional human rights instruments also provide for similar property rights to those in the Protocol to the ECHR mentioned above. Article 21 of the American Convention on Human Rights protects the general right of “everyone” to “the use and enjoyment of his property”, although “the law may subordinate the use and enjoyment to the interest of society.” It also provides for just compensation in the event of expropriation and the prohibition of usury and other forms of exploitation. Similarly, article XXII of the American Declaration on the Rights and Duties of Man contains the right to own “such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”

In the African Charter of Human and Peoples’ Rights, article 14 provides that: “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

## **B. Recommendations**

### *1. Situation and Relevance of Property Rights for Refugees*

There is relatively little information compiled and analyzed to date on the practices and experience with regard to the property rights of refugees. However, some very general patterns can be discerned, particularly with regard to certain restrictions, alternative solutions that have been employed, and how this issue of property rights is being broadly treated in some countries.

Although in most countries refugees, like other foreigners, are allowed to purchase moveable property without any difficulties or special conditions,<sup>354</sup> the **acquisition** of “real” or immovable property (real estate) is in many cases subject to a complete prohibition, special restrictions, or a requirement for an exceptional government permission (e.g. by the Ministry of Interior) in the case of foreigners and persons who are not permanent residents (including refugees). This is true of immovable property in general, and of land in particular, which is often regarded by States as a protected national asset or resource. As such, the property rights of foreigners, and therefore also of refugees in their host country, may depend on the general property situation in that country, including in relation to land.

Apart from rights of acquisition proper, **other property rights** are also of relevance, such as ownership rights and duties (i.e. in the event that foreigners have the right to acquire property, the issue is then whether as owners they have the same rights and duties as nationals), inheritance rights, and the right to other types of legal protection of property rights. Broadly speaking, ownership rights and the legal protections afforded foreigners with regard to their property tend to be the same as those granted nationals. Indeed, as has been noted above, these rights are the subject of several provisions in international and

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<sup>354</sup> Ownership of movables, such as motor vehicles for example, has not presented a challenge in most countries. For example, in several African countries, refugees have owned mini buses (in Kenya) and engaged in public sector transportation. Refugees in that region, as in others have also been known to own immovable property as well such as homes, or to be granted user rights over land for agricultural purposes where ownership is not possible.

regional human rights instruments.<sup>355</sup> National standards of treatment with regard to property rights may, however, fall below those provided in international human rights instruments. For example, they may include domestic restrictions and discriminatory provisions in relation to women's property and inheritance rights in particular.

## 2. *Standard of Treatment Relating to Ownership and Other Property Rights, as well as Acquisition*

### □ *Once the Property Has Been Secured*

In keeping with international and regional instruments, refugees should be granted the same standard of treatment as nationals with regard to the general rights and duties related to **ownership**, other property rights (such as *usus fructus* or '**user**' rights) and the **legal protection** of these rights.

### □ *The Right of Acquisition:*

To the extent possible, refugees should also be granted the same standard of treatment as nationals or permanent residents, with regard to the **right of acquisition** of both moveable and immovable property, including land.

Where this is not possible, however, special exemptions (such as for residential properties mentioned above) or legal alternatives to actual ownership rights should be granted refugees so as to ensure that they are not unduly affected by property restrictions on aliens generally. Special exemptions for refugees are particularly recommended with regard to business ventures, the acquisition of residential property (which includes land on which the flat or house is situated), as well as the acquisition of land or (long-term) user rights over the land when it is to be used for work, self-reliance or agricultural purposes, or for building a private home.

States Parties have an obligation to facilitate the integration of refugees. Granting refugees protection as well as a durable solution in the form of integration in the host country can therefore, also be viewed as implying the right to establish oneself and pursue an occupation – both of which are likely to require the right to acquire, use and dispose of moveable and immovable and property. Indeed, property rights can impact significantly on housing, economic rights, and the right to an adequate standard of living.

## 3. *Alternatives in Case of Prohibitions to Acquire Immovables and/or Land*

In some situations, aliens who are prohibited from acquiring immovables (land and real estate), may still be able to inherit, rent and acquire "user rights" (*usus fructus*) or other types of rights over either land or real estate (i.e. a building).

Where refugees are permitted to acquire immovables but **not** land, they may be able to legally separate the building from the land it is situated on, and simply purchase the building while renting the use of the land or acquiring user rights over it. Acquiring "user rights" or renting the land would also generally enable one to build on the land or otherwise use / exploit the land for agriculture or other similar purposes. Alternatively, one may be permitted to set up a (nationally registered) company which, as a separate legal entity, may purchase the piece of land. In some countries, acquiring land and other

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<sup>355</sup> For example, the right to just compensation in the event of expropriation is explicitly provided for in article 21 of the American Convention on Human Rights.

immovables may also be permitted if it is done in partnership with a national, although in some of these cases further restrictions might be applicable such as with regard to the percentage of the property owned by an alien (i.e. rules may exist regarding the maximum percentage that an alien may own of an immovable, so that the rest must be owned by nationals). Nonetheless, in some situations, joint ownership might be a viable legal arrangement.

Other countries may offer aliens the possibility of applying for a special dispensation for the acquisition of **residential property** (usually to a designated Ministry), such that advocating or negotiating with governments for such a dispensation for refugees (as a category of aliens, or individually) could be a useful measure. Each country may require a different solution or strategy for securing property rights for refugees, as much will often depend on the particular legislation and practices in that country. For example, in one country in central Europe, NGOs and legal counsellors helped refugees to claim the right to acquire the State-owned flats they were renting, when these were privatized, due to the **right of first option to buy** which they enjoyed by virtue of their rights as tenants.<sup>356</sup>

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<sup>356</sup> This was the case in the Czech Republic, where during the early stages of privatization, municipalities initially denied refugees the right to purchase their flats. However, because refugees who benefited from the right to occupy State owned flats under the first refugee housing scheme possessed the same certificate to inhabit such property as Czechs – a certificate which allowed tenants the option of purchasing their flats upon privatization – NGO counsellors were able to argue for and gain refugees the right to also purchase these flats. At that time recognized refugees were not granted permanent resident status automatically upon recognition.

## CHAPTER 12: FREEDOM OF RESIDENCE AND MOVEMENT

### MAIN INTERNATIONAL STANDARDS

#### **1951 Convention relating to the Status of Refugees**

##### **Article 21**

##### ***Housing***

*As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.*

##### **Article 26**

##### ***Freedom of Movement***

*Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.*

#### **Universal Declaration of Human Rights**

##### **Article 13**

- 1. Everyone has the right to freedom of movement and residence within the borders of each State.*
- 2. Everyone has the right to leave any country, including his own, and to return to his country.*

#### **International Covenant on Civil and Political Rights**

##### **Article 12**

- 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
- 2. Everyone shall be free to leave any country, including his own.*
- 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*
- 4. No one shall be arbitrarily deprived of the right to enter his own country.*

#### **International Covenant on Economic, Social and Cultural Rights**

##### **Article 11**

*1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*

#### **Convention on the Rights of the Child**

##### **Article 10**

*1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner [...]*

*2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties, under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.*

##### **Article 27**

*[...]*

*(3) States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of*

*need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.*

### **Convention on the Elimination of All Forms of Discrimination against Women**

#### **Article 15**

[...]

*4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.*

[NOTE: See also other rights contained in chapter 4 (Housing rights) above, including article 14(2)(h) of CEDAW]

### **International Convention on the Elimination of All Forms of Racial Discrimination**

#### **Article 5**

*In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:*

[...]

*(d) Other civil rights, in particular:*

*(i) The right to freedom of movement and residence within the border of the State;*

*(ii) The right to leave any country, including one's own, and to return to one's country;*

## **A. International Standards**

### *1. 1951 Convention*

Both the right to choose one's place of residence and the right to freedom of movement have the form of a mandatory obligation in article 26. Yet, the fact that this right is subject to "any regulations applicable to aliens generally in the same circumstances" means that there is some discretion as to restrictions to this right. Refugees may thus be subject to the same restrictions as other aliens (generally in the same circumstances) and be prohibited from circulating or entering restricted areas such as the following: strategic zones; areas of natural catastrophe, civil war or where the person's safety cannot be guaranteed; regions of the country for which a license is necessary to live due to overcrowding; and regions restricted to certain classes of aliens who only gain gradual access to all the regions of the country. Such rules and regimes, if they are applicable to aliens in certain circumstances are therefore also applicable to refugees in the same circumstances. What this provision ensures however, is that States may not impose restrictions on freedom of movement which are applicable only to refugees.<sup>357</sup>

With respect to the right to choose one's place of **residence** in particular, it is useful to refer to article 21 in the Convention as well. This latter provision stipulates that where housing is regulated by laws or regulations or subject to the control of public authorities, refugees lawfully in the territory are to be granted treatment at as favourable as possible, and **at least** as favourable as granted to aliens generally in the same circumstances; the minimum standard of treatment granted refugees is thus the same as in article 26 above.<sup>358</sup> The right to elect one's place of residence also implies the right to continue living in that place.<sup>359</sup>

<sup>357</sup> Grahl-Madsen (see above at footnote 53), pp. 110-112.

<sup>358</sup> For further details on housing and article 21, see chapter 4 (Housing Rights).

<sup>359</sup> Grahl-Madsen (see above at footnote 53), p. 111.

Article 9 of the 1951 Convention allows States to derogate from their obligations in article 26 in certain situations, such as in time of war or other grave exceptional circumstances. However, such derogations are subject to certain conditions, i.e. they must be against a particular person (rather than a group or category of persons), of a provisional nature, and in the case of an already recognized refugee, the State must show that the continuation of these provisional measures in that particular instance is necessary in the interests of national security.<sup>360</sup> Of particular note is the stipulation «in the case of a particular person», which makes it clear that the meaning of this provision is to restrict the applicability of provisional measures to individual persons, thereby effectively ruling out the possibility that the provision be used for large scale measures against groups of refugees.<sup>361</sup>

Article 8 of the 1951 Convention is noteworthy as well in relation to freedom of movement and residence, since it provides that “exceptional measures” which can include measures taken against foreign nationals during or after hostilities such as internment and other restrictions of movement, should not be applied to refugees solely on account of their nationality. This provision aims at exempting refugees who formally possess the nationality of the country which they have fled from being (unfairly) subjected to certain measures which are otherwise imposed on nationals of that country during times of war or international tension for example.<sup>362</sup>

Finally, it should also be mentioned that the right to freedom of movement contained in article 26 is applicable only within the territory of the State concerned and does not include the right to enter, leave or re-enter the national territory, which is dealt with under article 28 and the Schedule<sup>363</sup> and discussed further in chapter 9 above (see section on CTDs).

## 2. *International Human Rights Instruments*

Article 13 of the Universal Declaration states that “Everyone has the right to freedom of movement and residence within the borders of each State” and that furthermore, everyone has the right to “leave any country including his own, and to return to his country.”<sup>364</sup>

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<sup>360</sup> *Ibid.*, pp. 42-46 (on article of the 1951 Convention); and Robinson (see above at footnote 4), pp. 79-80. Article 9 reads as follows:

“Provisional Measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.”

<sup>361</sup> Grahl-Madsen (see above at footnote 53), p. 45. It should be noted that large scale measures against groups of refugees may nonetheless be permissible under article 31(2) of the 1951 Convention with regard to newly arrived refugees. This article would not appear to be applicable to recognized refugees however.

<sup>362</sup> Grahl-Madsen (see above at footnote 53), p. 37 and 39. Article 8 reads as follows:

“Exemption from exceptional measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.”

<sup>363</sup> Grahl-Madsen (see above at footnote 53), p. 111.

<sup>364</sup> Article 13(1) and (2) respectively, of the Universal Declaration.

In article 12, the ICCPR reiterates similar guarantees of freedom of movement and residence for all persons (including refugees) lawfully in the country, but also provides for certain exceptions in 12(3) as follows:

“The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the protection of the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”

Furthermore, the Covenant (as well as the Universal Declaration) requires that any such restrictions on this freedom must be applied without discrimination, including on grounds of national origin or status.<sup>365</sup> The Covenant does not therefore allow States to discriminate (including with regard to the application of restrictions) between legal residents, based on whether they are nationals or aliens, although restrictions on aliens may in certain circumstances be justified on the grounds, *inter alia*, of public order or public health (article 12, ICCPR).<sup>366</sup>

While article 26 of the 1951 Convention protects refugees in a more limited fashion, i.e. from restrictions on these freedoms which are specific to refugees and therefore **not** applicable to other aliens generally in the same circumstances,<sup>367</sup> the human rights instruments mentioned above provide broader guarantees against discrimination affecting both refugees and aliens (in relation to this right) and impose strict conditions on exceptions. Any limitations on this right must be in accordance with the law, and deemed justified in a democratic society for reasons such as the public good, security and the protection of others. The additional protection provided by these human rights instruments against discriminatory, as well as abusive or unjustified restrictions on the freedom of movement and residence is thus a significant complement to the standard of treatment and rights granted refugees in the 1951 Convention, and must be taken into account when analyzing refugee rights in this field. This includes special guarantees to prevent racial discrimination and discrimination against women with regard to this right. Article 15(4) of CEDAW thus stipulates that women are to have the same rights as men with regard to the movement of persons and the freedom to choose their residence and domicile. Article 5(d)(i) and (ii) in CERD provides for equality before the law to everyone, including with respect to the enjoyment of the right to freedom of movement and residence within the border of the State, and the right to leave any country and return to one’s country.

### 3. *Regional Instruments*

Article 2 of Protocol No. 4 to the ECHR contains similar guarantees (including against discrimination),<sup>368</sup> and similar conditions on restrictions to these rights<sup>369</sup> to those in the

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<sup>365</sup> Article 2 of the ICCPR and Universal Declaration.

<sup>366</sup> As, for example, where public order concerns are raised by a mass influx and the host State takes reasonable measures to restrict the movement of the refugees, especially during the emergency phase.

<sup>367</sup> Moreover, the provision on freedom from discrimination in the 1951 Convention is limited to discrimination between refugees. See for example, the commentary on this provision in Grahl-Madsen (see above at footnote 53), pp. 11-14.

<sup>368</sup> Article 14 of the ECHR provides that: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

<sup>369</sup> Article 2 of Protocol No. 4 to the ECHR reads as follows:

Covenant mentioned above. Restrictions on freedom of residence for example, such as those imposed by housing regulations or special programmes (see also article 21 on housing in the 1951 Convention) are therefore presumably permitted if they are not imposed in a discriminatory manner, and if they satisfy the stipulated conditions in that provision.<sup>370</sup> Within the context of the European Union, article 32 of the Council Directive on Minimum Standards addresses freedom of movement but does not provide any explicit mention of the right to freedom of residence. It states:

“Member States shall allow freedom of movement within their territory to beneficiaries of refugee or subsidiary protection status, under the same conditions and restrictions as those provided for other third country nationals legally resident in their territories.”

In the Americas, article 22 of the American Convention on Human Rights provides for the rights of “every person lawfully in the territory [to] move about in it and to reside in it subject to the provisions of the law.” Provisions restricting these rights must be consistent with stringent conditions relating to, *inter alia*, the protection of national security, public safety and public order, morals or health for example, or the freedoms of others.<sup>371</sup> This provision also stipulates the following additional guarantees: the right of everyone to leave any country freely; the right of every person not to be expelled from the territory of the State of which he or she is a national or be deprived of the right to enter it; the protection granted to aliens lawfully in the territory who may not be expelled except pursuant to a decision reached in accordance with the law; the right of every person to seek and be granted asylum in another country;<sup>372</sup> the more comprehensive right of every alien to protection against *non-refoulement*;<sup>373</sup> and the prohibition of the collective expulsion of aliens.

The African Charter, for its part, states that “[e]very individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by

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1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
  2. Everyone shall be free to leave any country, including his own.
  3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of “ordre public”, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
  4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interests in a democratic society.”

<sup>370</sup> See also chapter 4 (Housing rights) above; and article 21 of the 1951 Convention.

<sup>371</sup> As such, government restrictions on the movement of women (which would for instance, require women to be accompanied by a male relative when travelling abroad) are violations of this right, and constitute in addition, a case of sex-based discrimination which is prohibited under the ICCPR. See also OHCHR, *Training Manual on Human Rights Monitoring: Professional Training Series No. 7*, United Nations, NY, Geneva, 2001.

<sup>372</sup> Article XXVII of the American Declaration also provides for the right of asylum, in the following terms: “Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements”.

<sup>373</sup> Furthermore, in the context of international cooperation on criminal matters, article 13 of the Inter-American Convention to Prevent and Punish Torture specifically provides that: “Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or *ad hoc* courts in the requesting State.”



the law.”<sup>374</sup> Similar to its counterpart in the American Convention on Human Rights, this provision also provides for the right: to leave any country; to seek asylum elsewhere; to be protected against unlawful expulsions, as non-nationals legally admitted in the country; as well as to be protected against mass expulsions aimed at national, racial, ethnic or religious groups.

Article III of the OAU Convention is of some relevance in this context as well. Like the 1951 Convention, this instrument clearly states that refugees must respect the laws of the country of asylum,<sup>375</sup> but goes further by proclaiming that: (a) refugees must not take part in any subversive activities against an OAU Member State (article III(1)); and (b) requiring all States parties to prevent refugees from attacking other OAU States or engaging in activities likely to cause tensions between such States (article III(2)).<sup>376</sup>

This provision has typically been interpreted to limit political activity (e.g. freedom of expression and assembly), although there is concern that it is used by some States to justify restrictions on freedom of movement as well (on the grounds of national security or public order of the host State), notably by requiring that refugees remain in designated camps.<sup>377</sup> Moreover, with regard to alleged “political activities” these rights have sometimes been restricted simply on the basis of a refugee’s nationality or ethnicity – the preservation of good relations with the country of origin of the refugees being the main motivation in many such instances.<sup>378</sup> Given the sweeping approach to article III of the OAU by some Member States, it is necessary to remain attentive to the possible use of such grounds for restrictions on freedom of residence and movement too. Any such restrictions must be in line with rights and standards in international human rights instruments. In this connection, it is worth underscoring again that article 9 of the 1951 Convention, which allows States in certain circumstances to take provisional measures it considers essential to its national security, is only applicable to measures targeting a particular person, and is not applicable to justify large scale measures against groups of refugees.

Of particular interest in the African context as well however, are developments which are likely to *increase* rather than restrict the free movement of persons. Indeed, the emergence of regional communities, such as the East Africa Community (EAC), may come to be of some relevance to refugees since such communities and sub-regional agreements address and are likely to increase the free movement of persons, labour and services, and seek to provide common standards for Partner States with regard to relevant issues such as travel documents, employment policies, different types of residence permits and the rights of establishment and residence generally.<sup>379</sup>

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<sup>374</sup> Article 12 (1) of the African Charter on Human and Peoples’ Rights.

<sup>375</sup> Article 2 of the 1951 Convention provides: “Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.”

<sup>376</sup> No definition of “subversive”, “attacking” or “likely to cause tensions” is given in the OAU Convention, and it may be argued that it is particularly desirable to interpret the limits on political activity set out in article III in accordance with the human rights obligations of OAU States, especially as evidence suggests that some OAU States have interpreted this provision to prohibit *any* political activity at all (which can result in ‘preventative’ or punitive measures restricting freedom of movement). See also Mandal (see above at footnote 48), p. 2.

<sup>377</sup> *Ibid.*, pp. 20-21.

<sup>378</sup> *Ibid.*, p. 20.

<sup>379</sup> For example, the East Africa Community in its efforts to facilitate the free movement of labour is, amongst other things, to conduct a comparative Study for Partner States in order to: review and update domestic legislation in the context of international labour Conventions; harmonize key areas related to labour

## B. Recommendations

### 1. *Situation and Relevance to Refugees*

Most commonly, restrictions on the rights in article 26 of the 1951 Convention (and the relevant human rights instruments mentioned above) relate mostly to the freedom to choose a place of residence rather than the liberty of movement within the territory of a State, and are largely due to the lack of housing, employment restrictions, or restrictions due to overcrowding.<sup>380</sup> In this respect, it is useful to refer to article 21 in the 1951 Convention which accords refugees the same standard of treatment with regard to housing as aliens generally in the same circumstances.<sup>381</sup> However, there are some countries where restrictions to article 26 include significant limitations on freedom of movement as well, especially where *prima facie* refugees are restricted to designated camps and regions, for example.

Restrictions to freedom of movement can, amongst other things, deeply affect the ability of refugees to access or implement many other rights, including rights which are key to their functional integration and capacity to become self-reliant, such as the right to employment, State assistance, and education. The result is that these restrictions augment the vulnerability and dependence of refugees by creating and increasing poverty and violence, leave refugees more open to corruption (e.g. paying bribes to acquire day passes to leave the camp for example), abuse and exploitation, and they often have a particularly dire affect on women and children.

Some restrictions on the freedom to freely choose a place of residence can have a significant impact on the integration of refugees as well, including their ability to tap into available family and refugee community networks or other support structures, and their employment and educational prospects in specific communities or areas of the country.<sup>382</sup> In many instances the right to freedom of movement and to freely select a place of residence is contained in national constitutions, though it may then be subject to restrictions by law, which may be contained for example in the Foreigner's Law. For instance, some common restrictions on foreigners include the requirement that they register themselves and provide details on their place of residence with the competent authorities (e.g. municipalities, and /or the police), or that they apply for permission to change their place of residence with the relevant authorities. Some States also impose a requirement to notify the police or other relevant authorities in case an alien resides abroad for more than a certain specified period (e.g. six months or one year). It should be mentioned however, that many countries also make the same requirements of their nationals.<sup>383</sup>

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such as procedures and charges for work permits; streamline procedures and fees for granting residence permits. The Economic Community of West African States (ECOWAS) and the Southern Africa Development Community (SADC), which have similar objectives of free movement of persons, goods and services, could also in theory facilitate certain aspects of local integration such as residency rights for refugees from relevant countries.

<sup>380</sup> See, Grahl-Madsen (see above at footnote 53), pp. 111 and 83, as well as Robinson (see above at footnote 4), p. 112.

<sup>381</sup> For further details on housing and article 21, see chapter 4 (Housing rights).

<sup>382</sup> *Ibid.*, and chapter 3 (Employment).

<sup>383</sup> Although similar requirements may be made of nationals, it is also relevant to note that nationals may nonetheless have more flexibility in meeting or responding to these requirements. For example, they may

## 2. *Recommended Standard of Treatment*

At minimum, refugees should at least be granted the same treatment as other aliens generally in the same circumstance, and they should ideally be granted the same rights as citizens or permanent residents. There should be no discrimination against or between refugees<sup>384</sup> as regards the freedom of residence and movement. As shown above, articles 26, 21 and 9 support this recommendation, and respectively:

- prohibit States from imposing restrictions on freedom of movement which are applicable only to refugees (and not other aliens generally);
- provide that with regard to regulations regarding housing, refugees are to be accorded the same treatment as aliens generally in the same circumstances; and
- prohibit using article 9 (which allows for derogations to article 26) to adopt large scale measures against groups of refugees – provisional measures for reasons of national security are only permitted in relation to a particular person.

Moreover, it is also recommended that special consideration or exemptions (from restrictions imposed on other aliens generally) be granted to recognized refugees in certain circumstances. An easing of specific restrictions should, for example, be applied to traumatized refugees or others requiring other special care or consideration (such as access to family in other parts of the country).

## 3. *Including a Specific Provision in Domestic Law and Integration Frameworks*

It would be desirable that an explicit provision on freedom of residence and movement be included in relevant domestic legislation or integration frameworks regarding recognized refugees, and that this provision refer to articles 26 and 21 in the 1951 Convention, as well as a commitment to ensure that any restrictions on refugees in this regard be in compliance with standards and conditions in international human rights instruments.

## 4. *Providing Assistance and Monitoring of IDs and CTDs*

The unjustified refusal or inability of a government to issue a refugee an ID or CTD can obstruct a refugee's ability to exercise his or her right to freedom of movement and residence. For example, without an ID or other residency documents (e.g. a 'carte de sejour', 'propiska', municipal residency permit etc.) a refugee may be unable to freely move within the country as he may be arrested. Likewise, a document such as an ID or CTD (passport) is often necessary to establish a residence in a particular place or municipality, and to be able to freely leave the country and be able to return to it. As well, the denial of residency rights in the host country can affect the refugee's ability to access or implement many other rights and benefits, and eligibility to apply for naturalization. For more information regarding the importance of providing proof of a domicile address and establishing a residence please also see chapter 4 (Housing rights) and chapter 9 (ID and CTDs) above. Providing assistance to refugees in acquiring the requisite documents, proof

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have a summer or family home which they use as their official address of residence, or they may have the opportunity to be housed with family and friends in cities where they would not otherwise be able to reside.

<sup>384</sup> Discrimination between refugees is prohibited by virtue of article 3 of the 1951 Convention.

of domicile and residency permits, and monitoring both the issuance and decisions of relevant authorities with regard to these documents or permissions is therefore recommended.

5. *Assistance and Monitoring With Respect to Registration Requirements and Permission to Change One's Place of Residence.*

Similar to the above, assistance to refugees and monitoring of practices may also be necessary with regard to registration requirements and related permissions. Furthermore, to the extent possible, refugees should be exempt from having to register their place of accommodation with the police or having to request permission to change their residence, particularly where these requirements are not imposed on nationals or permanent residents and place **additional** administrative burdens on refugees such as, for example, when they are obliged to report to relevant authorities more than once a year and upon a change of address.

6. *Housing and Integration Programmes (Or Regulations): Ensuring Their Impact on the Freedom of Residence of Refugees Does Not Violate International Human Rights Standards*

With regard to freedom of residence, it is useful to be well acquainted with housing issues, municipal and other regulations (such as those requiring permission to reside in particular cities or regions), and programmes such as housing, employment and integration programmes specifically in place for refugees. For example, some refugee integration or housing programmes may require (rather than offer) that refugees reside in specified municipalities and may impose (direct or indirect) sanctions in the event a refugee does not conform to this condition. While such integration programmes may on the whole be beneficial to refugees, and some of these regulations may be viewed as necessary, it is also necessary to ensure that they are consistent with international human rights standards, including the principle of non-discrimination. With regard to such restrictive or punitive measures, please also see the recommendations in chapter 4 (Housing rights) above, which should be read as an integral part of the present chapter.

**CHAPTER 13:**  
**SELECTED CIVIL AND POLITICAL RIGHTS:**  
**FREEDOM OF EXPRESSION, ASSEMBLY AND ASSOCIATION**

**MAIN INTERNATIONAL STANDARDS**

**1951 Convention relating to the Status of Refugees**

**Article 2**

**General Obligations**

*Every refugee has duties to the country in which he finds himself, which requires in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.*

[...]

**Article 7**

**Exemption from reciprocity**

*1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.*

**International Covenant on Civil and Political Rights**

**Article 2**

*1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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 3**

*The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.*

[...]

**Article 19**

*1. Everyone shall have the right to hold opinions, without interference.*

*2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

*3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such as are provided by law and are necessary:*

*(a) For respect of the rights or reputation of others;*

*(b) For the protection of national security or of public order ('ordre public'), or of public health and morals.*

**Article 20**

*1. Any propaganda for war shall be prohibited by law.*

*2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. [...]*

**Article 21**

*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order ('ordre public'), the protection of public health or morals or the protection of the rights and freedoms of others.*

**Article 22**

*1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

*2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order ('ordre public'), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in the exercise of this right.*

*3. Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention.*

[...]

**Article 27**

*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.*

**Convention on the Elimination of All Forms of Discrimination against Women**

**Article 3**

*States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.*

[NOTE: **Articles 7 and 14(2) (e)(f)** are also relevant (where not restricted to citizens)].

**International Convention on the Elimination of All Forms of Racial Discrimination**

**Article 5**

*In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:*

[...]

(c) Political rights [...]

(d) Other civil rights, in particular:

[...]

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

[...]

(vi) The right to equal participation in cultural activities; [...]

**A. Context and Relevance**

The right to hold and express a political opinion or engage in political activities is a right which is protected in international human rights law, and is in many cases, considered by refugees as fundamental to their human dignity. Indeed, many refugees have been persecuted and forced to flee their country of origin precisely because of their political activities or beliefs. Political rights, including being able to express one's political opinion and engage in non-violent political activities is thus essential to their personal identity and self-determination.

Moreover, some former refugees emerge as political leaders at the end of the conflict or reform process in their country of origin. In this sense, the availability of political rights can be necessary for the achievement of durable solutions. Being able to undertake peaceful political activity and having a political *forum* in exile is often indispensable in order to have effective and representative interlocutors for future peace and reconciliation processes.

However, State practice in a number of countries still reflects a restrictive attitude with regard to the political rights of aliens in general, or refugees more specifically. The recent focus on international terrorism may also, if left unchecked, have a detrimental impact on

the political rights of refugees.<sup>385</sup> International and regional human rights instruments have built-in provisions which permit States to restrict illicit politically-motivated activities and, in certain circumstances, political rights in general. For example, the right to freedom of expression, assembly and association in the ICCPR can be legitimately restricted by Contracting States when this is provided by law and is necessary in a democratic society in the interests of national security, public order, public health or morals, and the rights and freedoms of others etc. The ICCPR (article 20) also allows States to prohibit propaganda for war, and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Such restrictions must, nonetheless, respect the right to freedom from discrimination prescribed in article 2 of the ICCPR, and not arbitrarily impose discriminatory restrictions on aliens or refugees.

However, in many cases restrictive measures relating to the political rights of aliens and refugees are taken for reasons other than those stipulated in the ICCPR, or measures are arbitrary taken against whole groups or categories of persons based solely on their nationality, for example. States may be concerned with public opinion or social cohesion, may have neglected to draw a clear distinction between permissible and illicit political activities or associations, or may be primarily motivated by their interests in maintaining good relations with the country of origin of the refugees. At other times, the ability of refugees to express their political views or form related associations may depend largely on the extent to which freedom of expression and related political rights are generally respected in the host country. In these various situations, international human rights standards and freedom from discrimination in the enjoyment of these rights should be respected and promoted, as should the dissemination of information relating to the rights and obligations of refugees in their country of asylum.

With respect to voting rights, under international law States are not obliged to grant non-citizens (including refugees) the right to vote or to stand for public office. Nonetheless, there is increasing support for<sup>386</sup> and recognition of the benefits of granting greater rights in this field, at least at the local level and after a reasonable period of residence. Indeed, with the increasing free movement of persons within regional communities (e.g. sub-regional communities in Africa such as ECOWAS, and in the European Union in the European context), rights related to political participation may well become increasingly acceptable for non-nationals. Irrespective of whether such voting rights are granted however, it would be important that the development of suitable channels allowing the views of refugees on matters affecting them to be raised with governments be both permitted and actively promoted by host States. In this regard, see the relevant recommendations in this chapter.

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<sup>385</sup> For a further discussion on terrorism and its impact on the political rights of refugees, see Mandal (see above at footnote 48), pp. 9-10, 14, and 21.

<sup>386</sup> For example, in the European context, the Parliamentary Assembly of the Council of Europe has encouraged Member States to grant the right to vote and to stand in local elections to all migrants legally established for at least three years, irrespective of their origin. See the Parliamentary Assembly Recommendation No. 1500 (2001).

## B. International Standards<sup>387</sup>

### 1. 1951 Convention and Regional Refugee-Specific Instruments

#### □ 1951 Convention

While the 1951 Convention does not contain any provisions specifically on the above political rights of refugees, articles 2, 3 and 7(1) provide general standards and obligations relevant to the right to freedom of expression, assembly and association. By virtue of article 7(1), the default provision in the 1951 Convention, refugees are to be accorded at minimum the same political rights as are granted other aliens generally in the host country.<sup>388</sup>

Articles 2 and 3, however, are also relevant to the political rights of refugees. In particular, article 2 stipulates certain obligations and lawful limits on the activities of refugees, stating that refugees have duties to the country of asylum, including the duty to respect its laws and measures taken for the maintenance of public order ('ordre public'). This provision reflects the general rule of international law to the effect that aliens must conform to the laws and regulations of the country of their residence.<sup>389</sup> It also allows the host State to restrict the activity of refugees (especially if the activity is of a political nature) as it would in the case of any category of aliens, namely, when this is necessary to protect public order – a term which in the context of this provision is closely linked to or similar to 'national security'.<sup>390</sup> While not defined in the Convention, "measures taken for the maintenance of public order" can be considered security measures or measures for the suppression of political activities on the part of any group of aliens, regardless of whether they are refugees, if these activities are considered dangerous to the State.<sup>391</sup> Importantly, it does not appear that this provision implies the right to adopt restrictive measures which are specific to refugees.<sup>392</sup> As pointed out by one commentator, this provision **only** provides that refugees must "**conform** to such measures; it does not confer on States rights which they would not otherwise have, to take special measures against refugees."<sup>393</sup> This interpretation would also be consistent with article 7(1) discussed above, according to which refugees are to be granted the same treatment as aliens generally.

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<sup>387</sup> This chapter draws significantly on the research contained in Mandal (see above at footnote 48). However, research relating to the relevant jurisprudence was updated as of August 2004.

<sup>388</sup> Although the Universal Declaration of Human Rights had only been adopted a few years before, and the two International Covenants (the ICCPR and the ICESCR) were still many years into the future, the Preamble to the 1951 Convention does refer generally to the linkage between human rights law and refugee law (notably in the first and second paragraphs of the Preamble), despite the fact that there is no specific provision on the political rights of refugees as such. See also the statement by UNHCR's Director for International Protection, *Refugee Survey Quarterly*, Vol. 23, No. 2004, p. 327.

<sup>389</sup> Robinson (see above at footnote 4), p. 60.

<sup>390</sup> In this regard see Grahl-Madsen (see above at footnote 53), pp. 4 and 5, in which he comments that the expression "public order" as used in article 2 seems to have approximately the same meaning as "national security" in articles 32 and 33 of the 1951 Convention. This interpretation is also generally supported by Robinson (see above at footnote 4), p. 61 in which this author comments that it refers to "everything essential to the life of the country, including its security."

<sup>391</sup> Grahl-Madsen (see above at footnote 53), p. 5.

<sup>392</sup> Restrictions to the freedom of movement appear to be a possible exception to this, however. See Grahl-Madsen (see above at footnote 53), p. 4.

<sup>393</sup> Grahl-Madsen (see above at footnote 53), *emphasis added*.



Moreover, the host State must comply with article 3 of the 1951 Convention (which applies to rights covered by article 7 (1)), which prohibits any discrimination *between* refugees, including in the enjoyment of political rights, solely on the basis of their race, religion or country of origin.

Another provision in the 1951 Convention is also noteworthy, although it expressly does **not** address activities of a political nature. Article 15, which covers the right of association, provides that with regard to “non-political and non-profit-making associations and trade unions”, Contracting States are to grant refugees lawfully staying in their territory the **most favourable treatment** accorded to nationals of a foreign country in the same circumstances. This provision includes the right of refugees to form or to join already existing trade unions, and associations with cultural, sports, social or philanthropic mandates.<sup>394</sup> Of particular note is the standard of treatment for these non-political associations, which is more favourable than that accorded under article 7 (discussed above) – the default provision applicable to political rights.

Noting the existence of article 15 is relevant in this context, particularly given the tendency in some States to categorize social and charitable refugee organizations as ‘political associations’ and to prohibit or restrict their activities on this basis. State practices of this type render it all the more important to advocate for the respect of international human rights standards with regard to non-violent political activities by refugees and to provide adequate training on these rights. Moreover, associations and activities undertaken by refugees which are social, philanthropic or artistic in nature for example, should be given special consideration, and from a refugee law point of view accorded the more generous standard of treatment provided in the 1951 Convention.

As mentioned above, international human rights instruments are applicable to refugees. In fact, the political rights of refugees are largely defined and protected by international human rights instruments – a body of law which is complementary to refugee law. As such, for the specific guarantees and substantive rights relative to the freedom of expression, assembly and association of refugees, as well as the extent and conditions under which political activities can lawfully be restricted, the general frame of reference remains largely human rights law, which is commented on further below.

#### □ *Regional Refugee Instruments*

In terms of regional refugee instruments, the **Cartagena Declaration** for its part, does not provide a particular standard of treatment with regard to the political rights of refugees. It simply refers in Part III, Conclusion 8, to the fact that Central American States should establish a minimum standard of treatment for refugees based on the provisions of the 1951 Convention (and its 1967 Protocol), as well as the American Convention on Human Rights, which essentially reflects the ICCPR provisions on political activity. In addition to the reference to the standards in these two important instruments, however, the Cartagena Declaration also contains some additional statements relevant in an interpretation of these rights. For example, in II (p) of the Declaration, is expressed the commitment “[to] institute appropriate measures in the receiving countries to prevent the participation of refugees in activities directed against the country of origin, while at all times **respecting the human rights** of the refugees.” [Emphasis added]. This emphasis on respect for the human rights of refugees and the relevant standards in human rights instruments is once

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<sup>394</sup> *Ibid.*, p. 62.

again visible in I (para. 5), and in III – Conclusions 10, 15 and 17, where reference is made to the application and the dissemination of the American Convention on Human Rights, and the function of the Inter-American Commission on Human Rights in dealing with and in enhancing the protection of refugees.

This situation is significantly different in Africa where the **OAU Convention** specifically provides that refugees must respect the laws of the host country, and further stipulates not only that they not take part in any subversive activities against an OAU Member State, but that all States Parties are to prevent refugees from attacking other OAU States or engaging in activities likely to cause tensions between such States.<sup>395</sup> It has been argued with regard to this Convention that the limits to political activity set out in this provision should be interpreted in light of the human rights obligations of OAU States. This would seem all the more necessary in light of the fact that article III does not provide any definition of key terms it employs, such as, “subversive”, “attacking” or “likely to cause tensions”.<sup>396</sup> Indeed, there is evidence that some States have interpreted this provision to prohibit all political activity connected to the refugee’s country of origin, or in certain cases, any political activity at all. At times, these restrictive measures have been taken against groups of aliens, including refugees, apparently on the basis of their nationality or ethnicity alone – often with the aim of preserving good relations with the country of origin of the refugees. It is recommended that host States refrain from adopting such a broad interpretation of article III, and respect and promote the standards relative to civil and political rights, including freedom of expression, contained in international human rights instruments and the African Charter.

## 2. *International and Regional Human Rights Instruments*

In general, human rights law does not tend to differentiate between the civil and political rights of aliens and citizens, with the exception of the right to vote or stand for election, which are generally accorded only to citizens.<sup>397</sup> The political rights of refugees are thus guaranteed by the same specific provisions relating to the freedom of expression, assembly and association contained in human rights instruments.<sup>398</sup> It should also be recalled from Part II: ‘Applicable International Legal Framework’ in this reference guide, that international refugee law and human rights law are complementary in nature, such that refugee rights are not restricted to those codified in refugee-specific instruments such as the 1951 Convention but actually encompass all human rights, with the exception of those which are limited to citizens. The content of the civil and political rights of refugees must

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<sup>395</sup> Article III of the OAU Convention reads as follows:

“Prohibition of subversive activities

1. Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the OAU.
2. Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio.”

<sup>396</sup> Mandal (see above at footnote 48), p. 2, para. 7.

<sup>397</sup> See for example, article 25 of the ICCPR; article 13(1) of the African Charter on Human and Peoples’ Rights; article 23 of the American Convention on Human Rights, which guarantee the right to vote and stand for public office only to citizens. For further details with regard to the right to participate in the electoral process (which is not covered in this reference guide), see Mandal (above at footnote 48), pp. 3-5, paras. 12-18.

<sup>398</sup> Freedom of conscience is often also used to refer to the holding of a political opinion but it does not constitute external behaviour or an activity, and is not covered in this reference guide.

therefore be based on the relevant standards in the major human rights instruments, and as developed in State practice through the work of the UN human rights treaty bodies and, where relevant, regional treaty bodies.<sup>399</sup>

Moreover, as mentioned above, while the exercise of human rights may be subject to some restrictions (on specific grounds and as established by law), these restrictions must be necessary in a democratic society to protect a legitimate and clear national or public interests or the rights and freedoms of others. The burden of demonstrating the validity of such a restriction rests on the State limiting the enjoyment of the right in question. Furthermore, the law must be consistent with guarantees of non-discrimination in international human rights law. These principles are laid out in articles 2, 19(3), 21 and 22(2) of the ICCPR, which exemplify provisions relating to non-discrimination as well as the strict grounds on which any restrictions to the rights to expression, assembly or association may be permitted.

As seen in more detail below, regional instruments such as the African Charter on Human and People's Rights contain similar guarantees and grounds for restrictions in their relevant provisions (e.g. article 2, 11), as well as additional statements on corresponding duties (and limitations) such as those in articles 27 and 29. It should be mentioned as well that in some instances, the legal norms and values advanced by sub-regional organizations, such as ECOWAS, IGAD, SADC and the Commonwealth of Nations in the case of Africa, are also important for refugee protection, including the protection of refugee political rights.<sup>400</sup>

Finally, while cultural and minority rights are not expressly addressed in this reference guide, there is in some cases a close link between these rights and the political rights analyzed in this chapter. For example, in practice refugees sometimes flee to neighbouring countries and integrate or live alongside minority communities of the same ethnic background. In such situations, the political rights deriving from minority rights can be especially relevant. The connection between legal status and entitlement to minority and political rights, an issue relevant to refugees in the above-mentioned situation, was addressed by the Human Rights Committee in General Comment No. 23 on the rights of minorities (article 27 ICCPR).<sup>401</sup> In that General Comment the Human Rights Committee clarifies the situation in the following manner:

“Article 27 [of the ICCPR] confers rights on persons belonging to minorities which ‘exist’ in a State Party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term ‘exist’ connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practice their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State Party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State Party, they would also for this purpose,

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<sup>399</sup> In particular, the general comments, recommendations, and where relevant, decisions of human rights treaty bodies which touch upon the legal status of non-nationals in relation to their rights, also affect and set standards for refugees and other persons of concern to UNHCR.

<sup>400</sup> For more details on this please refer to Part II (Applicable International Legal Standards), section A above.

<sup>401</sup> Article 27 of the ICCPR states:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

have the general rights, for example, to freedom of association, of assembly, and of expression. The existence of an ethnic, religious or linguistic minority in a given State Party does not depend upon a decision by that State Party but requires to be established by objective criteria.”<sup>402</sup>

□ *Freedom of Expression*

The ICCPR guarantees in article 19(1) freedom of expression to “everyone”, aliens (including refugees) and citizens alike.<sup>403</sup> The provision stipulates that this right includes “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” As with other provisions in this Covenant, article 19 too is subject to certain limitations as provided by law, and as necessary to ensure the respect of the rights or reputation of others, or the protection of national security, public order, health or morals.

However, in keeping with article 2(1), which prohibits discrimination in the enjoyment of rights on the grounds of, *inter alia*, national origin or race, it would appear that the host country could not impose greater limitations on aliens than on citizens without a reasonable justification. Moreover, it is important to note that these restrictions are not in relation to or concerned with the possible effects of any political statements on a third State (e.g. the country of origin), but address rather the interests of the host State itself.<sup>404</sup> This is worth mentioning given the fact that host States may sometimes perceive the granting of political rights to refugees as a possible source of tension or threat to its relations with the country of origin, and occasionally, their own social cohesion. In this respect, it should be stressed that international human rights law already provides host States with the ability to protect the legitimate concerns of the country of origin as well as respecting the sovereignty of other States.<sup>405</sup> Article 20 of the ICCPR is also of particular relevance to freedom of expression and imposes general limitations on this right (applicable also to refugees) by prohibiting “any propaganda for war” and any “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

At the **regional level**, article 13 of the American Convention on Human Rights reiterates essentially the same guarantees, lawful limits and definition of freedom of thought and expression as the ICCPR.<sup>406</sup> In October 2000 the Inter-American Commission on Human

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<sup>402</sup> Human Rights Committee, General Comment No. 23, (CCPR/C/21/Rev. 1/Add.5), of 08/04/94, at paragraph 5.2.

<sup>403</sup> See also, the Human Rights Committee General Comment No. 15 (1986) which emphasizes that States must ensure that aliens enjoy freedom of expression to the same extent as citizens.

<sup>404</sup> Mandal (see above at footnote 48), p. 6, para. 20.

<sup>405</sup> See for example, the following articles in the ICCPR which provide for restrictions based on the legitimate concerns of the State: 4; 19(3); 20(1); 21; 22(2). See also article 32 of the 1951 Convention, article III of the OAU Convention, and articles 23(2) and 29(3) of the African Charter on Human and Peoples’ Rights with respect to grounds for restrictions based on national concerns or the respect of the sovereignty of other States.

<sup>406</sup> Article 13 of the American Convention on Human Rights does contain some additional guarantees though, and reads as follows:

“Freedom of thought and expression

1. Everyone shall have the right to freedom of thought and expression. This right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of his choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
  - (a) respect for the rights or reputation of others; or

Rights also approved the Declaration of Principles on Freedom of Expression,<sup>407</sup> which was developed by the Office of the Special Rapporteur for Freedom of Expression and debated among different civil society organizations. This Declaration constitutes a basic document for interpreting article 13 of the American Convention on Human Rights. It was developed due to the recognition that there was a need for a legal framework in the region to regulate the effective protection of freedom of expression that would incorporate the principals already contained in different international instruments. The Declaration thus incorporates international standards into the inter-American system to strengthen protection of this right. Article 2 of this Declaration is of particular interest as it explicitly makes the connection between freedom of expression and the general prohibition of discrimination in the American Convention on Human Rights. It states in article 2:

“Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights. All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, colour, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.”

In the African context, article 9 of the African Charter provides for the right of every individual to receive information, and to express and disseminate his or her opinions within the law. This right, like others in the African Charter, has corresponding duties, including most notably those stipulated in articles 27 and 29 relating to the duty to exercise one’s rights with due respect for that of others and the duty to, *inter alia*, not compromise the security of the (host) State.<sup>408</sup> Article 23(2) relating to the prohibition to engage in

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- (b) the protection of national security, public order, or public health or morals.
3. The rights of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
  4. Notwithstanding the provisions of paragraph 2 above, public entertainment may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
  5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds considered as offences punishable by law.”

Case law emerging from the Inter-American Commission on Human Rights which may be of interest with respect to article 13 include, *inter alia*:

- *Estiverne v. Haiti*, Resolution No. 20/88, Case 9855 of March 24, 1988, available at: <http://www.cidh.org/annualrep/87.88eng/Haiti9855.htm>.

- *Steve Cark et al. v. Grenada*, Report No. 2/96, Case 10.325, of March 1, 1996, available at: <http://www.cidh.org/annualrep/95eng/Grenada10325.htm>.

<sup>407</sup> Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human at its 108th regular session in October 2000. The full text of the Declaration as well as its background and interpretative explanations are available at the following web site: <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=26&IID=1>.

<sup>408</sup> **Article 27 (2)** of the African Charter provides:

“[...] 2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”

**Article 29(3)(4) and (5)** of the African Charter provides:

“The individual shall also have the duty:

- [...] (3) Not to compromise the security of the State whose national or resident he is;
- (4) To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law; [...] »

subversive activities, particularly by persons enjoying the right of asylum (under article 12 of the Charter) is also noteworthy.<sup>409</sup> Indeed, these provisions are relevant as well with respect to the right to freedom of assembly and association addressed further below.

In Europe, it is article 10 of the ECHR which guarantees freedom of expression to everyone within its jurisdiction.<sup>410</sup> As with the other instruments mentioned above, the ECHR also subjects this freedom to limitations as prescribed by law and, as necessary in a democratic society, in the interests of national security, territorial integrity or public safety, and for the prevention of, *inter alia*, crime, the protection of health or morals, the reputation of others etc. In addition to these general restrictions however, the ECHR contains a particularity in that it appears to impose a further restriction on aliens through article 16, which provides as follows:

“Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the **political** activity of **aliens**.” (emphasis added)

This provision, which is applicable to the right to freedom of expression, freedom of peaceful assembly and association, and freedom from discrimination, would therefore seem to constitute a notable departure from the general guarantees entrenched in human rights law, including the ECHR itself.<sup>411</sup> Despite the lack of relevant case law on this provision,<sup>412</sup> it has, however, been argued (see below) that article 16 should be interpreted restrictively in the same fashion as have other restrictions in that Convention, such that it remain in line with the approach in the ICCPR. This argument points out how the ICCPR, a more contemporary instrument, does not contain any provisions equivalent to article 16, a provision which arguably represents a rather outdated perspective on the limited rights of aliens and has been superseded in this respect by the ICCPR.<sup>413</sup> There also appears to be merit to the suggestion by various commentators to the effect that article 16 should only be interpreted as restricting activities directly affecting the political process, such as, voting and standing for elections.<sup>414</sup> Such an interpretation would be consistent with the general

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<sup>409</sup> Article 23(2) of the African Charter on Human and People’s Rights states:

“2. For the Purposes of strengthening peace, solidarity and friendly relations, States Parties to the present Charter shall ensure that:

(a) any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State Party to the present Charter;

(b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.”

<sup>410</sup> See also article 1 which states that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

<sup>411</sup> In particular, it might appear to be inconsistent with articles 1 and 14 of the ECHR, which provide protection against discrimination and equal rights for all within its jurisdiction. Indeed, as noted in Mandal (see above at footnote 48), p. 6, footnote 16, the Parliamentary Assembly of the Council of Europe called for the revocation of article 16 through its Recommendation 799 (1977). Such recommendations do not have a legal effect.

<sup>412</sup> While the only case of any significance to date, *Piermont v. France*, is not especially helpful in interpreting article 16 (the nature of this provision was not explored since it was determined that the applicant did not actually qualify as an ‘alien’). Yet, as noted in Mandal (see above at footnote 48), p. 7, one member of the European Commission of Human Rights concluded in that case that the provision does not give States total discretion in its application and, for example, the principle of proportionality must still be respected. As of August 16, 2004, there was no other relevant case law on this provision.

<sup>413</sup> Mandal (see above at footnote 48), p. 7.

<sup>414</sup> Mandal (see above at footnote 48), p. 7, which refers to Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights* (1995) p. 510 and Nuala Mole, *Problems Raised by Certain Aspects of the Present Situation of Refugees from the Standpoint of the ECHR*, Council of Europe Human Rights Files No. 9 (revised) (1997), p. 47.

spirit of the ICCPR, and would limit voting rights in a similar fashion as its article 25. Moreover, as seen above, the ECHR already contains appropriate provisions expressly addressing the State's legitimate interest in restricting other forms of political activity that could have a detrimental impact on national security. Nonetheless, several States ratified the ICCPR expressly reserving the right to apply the Covenant in line with article 16 of the ECHR,<sup>415</sup> while many other States became party to the ECHR before ratifying the Covenant.

□ *Freedom of Assembly*

The ICCPR provides in article 21, that no restrictions may be imposed on this right other than those which are in conformity with the law and which are necessary in a democratic society in the interests of national security, public safety and order, and the protection of public health, morals, or of the rights and freedoms of others.

At the **regional level**, article 15 of the American Convention on Human Rights<sup>416</sup> also recognizes the right to peaceful assembly without arms, and provides that no restrictions may be placed on the exercise of this right except for the same type of limitations as are stated above in the ICCPR. The African Charter, in article 11 reiterates similar rights and guarantees, stating:

“Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.”

However, as mentioned above with regard to the right to freedom of expression, the general duties stipulated in articles 27 and 29 of the African Charter, as well as article 23(2) continue to remain relevant.

In the European context, the right of assembly, guaranteed under article 11 of the ECHR, is subject to the same specific limitation on the political activities of aliens contained in article 16. As discussed above however, article 16 should be interpreted narrowly, particularly in view of the fact that article 11 on the right of assembly already contains its own built-in restrictions. Indeed, in two relevant cases, the European Court of Human Rights found that the State has an obligation to take reasonable and appropriate measures to ensure that lawful demonstrations can proceed peacefully,<sup>417</sup> and cannot, furthermore, impose unreasonable and arbitrary restrictions on this right.<sup>418</sup>

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<sup>415</sup> Mandal (see above at footnote 48), p. 7, footnote 20, in which Austria, Belgium, France and Germany are listed as countries having made express reservations to apply the Covenant in line with article 16 of the ECHR.

<sup>416</sup> Article 15 of the American Convention on Human Rights states:

“Right to Assembly

The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others.”

<sup>417</sup> *Plattform ‘Arzte fur Leben’ v. Austria*, judgement of 21 November 1988, available in Court's case-law database (HUDOC), at <http://www.echr.coe.int>.

<sup>418</sup> *Ezelin v. France*, judgement of 26 April 1991 (also available through above website).

□ *Freedom of Association*

As with the other rights already addressed above, this right is guaranteed both in the ICCPR and in regional human rights instruments. Article 22 of the ICCPR, which provides for freedom of association including also the right to form and join trade unions, is granted to “everyone” and is therefore, equally applicable to citizens and aliens. However, the right to freedom of association may generally be restricted by law on the same grounds as the other political rights addressed in this chapter, such as on the grounds of national security, public order and the rights of others. Moreover, article 20 should also be borne in mind, since a political organization which engages in “propaganda for war” or “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence [...]” could lawfully be banned according to that provision. The ICCPR thus seems to provide significant protection for the right of refugees to form peaceful political organizations and associations, whether they take the form of associations providing social support to newly arrived refugees, organizations for advocacy of refugee rights or more political organizations which campaign for the peaceful change of government in their country of origin.<sup>419</sup>

The Covenant also explicitly reinforces the guarantees provided in the ILO Convention on Freedom of Association and Protection of the Right to Organize, of 1948.<sup>420</sup>

In terms of regional human rights instruments, article 16 of American Convention on Human Rights guarantees this right to everyone, and explicitly states some of the lawful purposes for which one may associate. It provides as follows:

“Everyone has the right to associate freely for ideological, religious, political, economic, labour, social, cultural, sports or other purposes.”

Paragraph 2 of this article further states that restrictions to this right may only be imposed by law, and as necessary in a democratic society, for the same reasons as stipulated in both the provisions on freedom of assembly and expression mentioned above.<sup>421</sup> In a noteworthy Mexican case relating to this provision, the Inter-American Commission on Human Rights decided that the expulsion of a group of priests also amounted to a violation of the right to associate freely for religious purposes.<sup>422</sup>

This right to freedom of association is granted to nationals and citizens alike in article 10 of the African Charter, as long as they abide by the law.<sup>423</sup> This expressly includes the negative right *not* to be compelled to join an association, which is however, explicitly subject to the obligation of solidarity contained in article 29 of the Charter – an obligation which includes the duty, *inter alia*, not to compromise the security of the State of whom

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<sup>419</sup> Mandal (see above at footnote 48), p. 8, para. 29.

<sup>420</sup> See ICCPR, article 22, para. 3.

<sup>421</sup> Article 16(3) does provide, however, that legal restrictions could be imposed on members of the armed forces and the police.

<sup>422</sup> *Loren Laroye Riebe Star, Jorge Alberto Baron Guttlein and Rodolfo Izal Elorz*, Report No. 49/99, Case 11.610 of 13 April 1999, available at: <http://www.cidh.org/annualrep/98eng/Merits/Mexico%2011610.htm>.

<sup>423</sup> **Article 10** of the African Charter on Human and Peoples’ Rights, reads as follows:

1. “Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligations of solidarity provided for in Article 29 no one may be compelled to join an association.”



one is a national or resident.<sup>424</sup> As mentioned above, articles 23 and 27 of the Charter may also be relevant.

The ECHR protects the right of association in article 11,<sup>425</sup> which has been interpreted by the Commission and Court as being more formal and organized than an assembly, thus satisfying the criteria of being a “voluntary grouping” for a “common goal.”<sup>426</sup> Unlike article 15 of the 1951 Convention (see section B 1 above) this ECHR provision makes no distinction between political and non-political associations or between profit-making and non-profit associations. Nonetheless, it continues to be subject to limitations possibly permitted under article 16, which as seen above pertains specifically to the political activity of aliens. In this regard, as well as in relation to the more general conditions on restrictions to the right of association (stipulated in article 11 itself), reference should be made to the discussion in the sections above on freedom of expression and the right of assembly in the European context. With respect to the State’s ability to restrict the freedom of association on national security grounds, the European Court of Human Rights held, in *Ozdep v. Turkey* (December 8, 1999) that such action was not justified in the case of political parties which do not advocate the use of violence.<sup>427</sup>

In connection with the freedom of association, one may also invoke articles 9 and 10 of the ECHR, which grant respectively the right to freedom of thought, conscience and religion, and the right to freedom of expression. These two provisions imply the right to public manifestations of one’s beliefs or religion as well as demonstrations, and are useful to consider when evaluating the freedom of association enjoyed by refugees under the ECHR.

In terms of the right to join or form trade unions, various other international instruments and declarations have been used to inform and interpret this right. Such instruments have included the ILO Convention Concerning Freedom of Association and Protection of the Rights to Organize, as well as the Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, which have been used by the Strasbourg organs in their interpretation of article 11 of the ECHR.<sup>428</sup>

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<sup>424</sup> Article 29(3) of the African Charter provides:  
“The individual shall also have the duty:  
[...]

3. Not to compromise the security of the State whose national or resident he is; [...]”

<sup>425</sup> Article 11 reads as follows:

1. “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

<sup>426</sup> Gomien *et al.* (see above at footnote 327), pp. 302 and 304.

<sup>427</sup> Mandal (see above at footnote 48), p. 8.

<sup>428</sup> Gomien *et al.* (see above at footnote 327), p. 307.

## C. Recommendations

### 1. *Observance of International Human Rights Standards in Relation to Prohibition of Discrimination and Restrictions on Civil and Political Rights*

Host States should ensure that with regard to political activity (other than the right to vote or stand for election), there is no discrimination against aliens generally or refugees specifically, and that any restrictions on related civil and political rights meet the conditions and standards in international human rights instruments (i.e. the ICCPR). Moreover, no discriminatory measures should be taken with regard to particular groups of refugees solely based on their nationality or ethnicity for example. Any risk to national security, public safety, public order, public health and morals or the rights and freedoms of others – grounds which warrant restrictions on certain civil and political rights if they are prescribed by law and necessary in a democratic society – should be evaluated on an individual basis. Criticism of another government, including that of the country of origin, should not automatically be equated with a risk to national security or public safety.

### 2. *Any Restrictions to Right of Association Should be Neither Arbitrary nor Expansive and Should not Extend to Non-Political and Not-For-Profit Associations*

The right of association in particular, including of non-political and not-for-profit associations, (such as a refugee-assisting association offering social assistance or counselling) has been the subject of restrictions in various countries. These restrictions may be direct, such as when there is an explicit prohibition against aliens establishing associations, or they may take the form of more indirect obstacles, such as administrative requirements which are impossible or difficult for refugees to satisfy, or the imposition of heavy fees. As mentioned in the recommendation above, international human rights standards should be observed with regard to the right to association and any restrictions relative to it.

Furthermore, associations of a non-political character, including those headed by refugees, should benefit from any preferential treatment that might be accorded by law. This includes distinguishing and exempting them from any existing restrictions or additional conditions that might be imposed on **political associations**. This is especially relevant as some States have arbitrarily imposed additional conditions or limitations on the establishment (or participation) of (all) associations of aliens, including refugees, often based on general apprehension that these will be used for political activities. This leads to restrictions which limit the exercise of political rights and impact unfairly on the civil rights of persons wishing to establish or participate in associations of a non-political character. Host States should ensure that non-political associations are not unduly affected by restrictions on political activities as such, or by arbitrary and indiscriminate limitations on the civic rights and participation by aliens and refugees in non-political organizations.

### 3. *Protecting Refugees, Including Refugee Women, From Political Intimidation or Exclusion*

The host State, with the assistance of the international community where necessary, should take reasonable steps to protect refugees against political intimidation or exclusion. This may entail for example, the separation of *prima facie* refugees from combatants, the sensitive policing of refugee camps in order to ensure that a particular political faction does

not gain control, or positive measures to enhance the role and participation of women and other marginalized groups in the relevant decision-making, representative and other institutions.<sup>429</sup> The *de facto* exclusion of certain groups of refugees from these processes and institutions, and civic and political life in general, has a direct impact on their ability to exercise many fundamental human rights, which in turn affect their general well being, health and ability to provide for themselves and their dependants. Thus, intimidation, exclusion and other such barriers to participation not only limit the actual exercise of the civil and political rights of these groups but also result in lack of access to other basic rights.

#### 4. *Promoting Refugee Associations Concerned With Social Welfare and Integration*

Host States should encourage the formation of refugee and immigrant organisations and associations, particularly those concerned with the social welfare and integration of newly arrived immigrants or refugees in the host country. Such organizations can play an effective and invaluable role in: reaching and assisting newcomers; identifying and helping persons with special needs; alleviating the stresses of living in a different culture and country, without the traditional support systems; providing networks and contacts, including for employment; and assisting in the longer-term process of adaptation and integration of different groups.

#### 5. *Promoting Channels for the Empowerment of Refugees*

Particularly where aliens are not granted the right to vote (for example, locally), host States should encourage and assist in establishing and promoting appropriate channels to permit the views of refugees on matters affecting them to be raised and discussed with the government of the host State (at the relevant level).<sup>430</sup> Such consultation mechanisms should ideally provide the opportunity for refugee groups to express their views at the early stages of the decision-making process.

In the establishment of such mechanisms (or opportunities for representation), it is important that the diversity of the refugee population be reflected and that women and traditionally marginalized (e.g. based on their ethnicity, age, level of literacy, economic or social status) refugee groups also be provided opportunities to put forth their concerns and interests. Ensuring the representation of marginalized refugee groups may require sensitivity and cultural knowledge, since inappropriate strategies in this regard may have negative consequences for both the marginalized group and relations with the wider refugee community. Political channels and consultation mechanisms for refugee groups should be formalized, be sufficiently funded and have a clear practical as well as symbolic role.

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<sup>429</sup> For further details on the separation of combatants from refugees, the policing of refugee camps and measures to enhance the participation of women and other marginalized groups, please see da Costa, Rosa, "Maintaining the Civilian and Humanitarian Character of Asylum", *Legal and Protection Research Series*, PPLA/2004/02, UNHCR, Department of International Protection, June 2004. See also, ExCom Conclusion No. 94 (2002), on the Civilian and Humanitarian Character of Asylum.

<sup>430</sup> For example, a 'Foreigner's Council' where the interests of foreigners and migrants are represented could be established. In the context of the Zambian Initiative, Development Committees were established.

6. *Providing Information to Refugees on Their Obligations, Human Rights, and the Laws of the Host State Enables Better Political Participation*

Accurate information relating to their obligations, the laws of the land and their human rights,<sup>431</sup> empowers refugees to adapt to and respect their obligations *vis-à-vis* their host State, as well as better protect their interests and rights. Efforts by Government, local communities or NGOs to promote understanding of such rights and obligations are also important to enable refugees to better understand and exercise their political rights in the host country, whether it be in relation to peaceful political campaigns regarding their country of origin, or with regard to their political participation in relevant institutions of their new host State.

7. *Awareness and Appropriate Measures to Address Incitement to Violence, Discrimination and Other Forms of Intolerance*

Host States should remain vigilante and adopt appropriate measures and laws to address acts such as advocacy of nationalistic, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, as well as propaganda for war (as per article 20 of the ICCPR). In addition to legal measures, preventive and sensitization programmes should also be used to promote non-violent and tolerant societies, and political participation. Such campaigns and measures should address possible negative perceptions of refugees, activities **against** refugees by groups or individuals in the host State, as well as activities **by**<sup>432</sup> refugees (such as violent acts or incitement to violence against another State, including their country of origin) fitting the description in article 20 of the ICCPR. In the implementation of all the above measures however, care should be taken to ensure that measures are not arbitrary and are taken against individual persons, rather than groups of refugees based on their ethnicity or other general affiliations.

8. *Advocacy and Training for Improved Recognition of the Political Rights of Refugees, Especially the Right of Association*

Advocacy efforts and training continue to be necessary for the recognition of the civil and political rights of refugees, and especially the **right of association** (including organizations of a peaceful political nature) which continues to be restricted in a significant number of States. In certain States this prohibition is total with regard to foreigners and the right of association is only granted to citizens. In other States, aliens are forbidden from founding, joining or financing **political** organizations, parties or movements, but are permitted to join or establish other types of associations such as those with a cultural, economic or other focus. States have also imposed other conditions, such as requiring that the majority of the members of any association be citizens of that country, or imposing heavy administrative costs for the establishment of such associations, even those with a social or philanthropic mandate.

Sensitization, training and advocacy efforts to improve recognition of the rights of refugees as contained in relevant legislation, such as domestic aliens' or refugee laws or relevant laws and bye-laws on associations, are likely to be more successful if complemented by

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<sup>431</sup> The Human Rights Committee in its General Comment No. 15 on the Position of Aliens (1986) states that States Parties to the ICCPR should inform aliens on their territory of the treaty's provisions.

<sup>432</sup> For further details relating to the obligations of States in this regard, see da Costa (see above at footnote 429).

legal provisions and information campaigns targeting the refugee population (and other relevant actors) on their obligations under the domestic law of the host State. Such programmes or provisions should define (a) what is a **political** organization or activity, (b) what constitutes **illicit** “political” activity and (c) what is permissible political activity. Domestic legislation and measures should be consistent with relevant international human rights standards in this regard.

## CHAPTER 14: NATURALIZATION

### MAIN INTERNATIONAL STANDARDS

#### **1951 Convention relating to the Status of Refugees**

##### **Article 34**

##### **Naturalization**

*The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.*

#### **Statute of the Office of the United Nations High Commissioner for Refugees,**

##### **Article 2(e)**

*Calls upon Governments to co-operate with the United Nations High Commissioner for Refugees in the performance of his functions concerning refugees falling under the competence of his Office, especially by:*

*[...]*

*(e) Promoting the assimilation of refugees, especially by facilitating their naturalization;*

#### **International Covenant on Civil and Political Rights**

##### **Article 24**

*[...]*

*3. Every child has the right to acquire a nationality.*

#### **Convention on the Rights of the Child**

##### **Article 7**

- 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to be cared for by his or her parents.*
- 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in the field, in particular where the child would otherwise be stateless.*

#### **Convention on the Elimination of All Forms of Discrimination against Women**

##### **Article 9**

- 1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.*
- 2. States Parties shall grant women equal rights with men with respect to the nationality of their children.*

#### **Other standards and practices of interest:**

- The **Convention relating to the Status of Stateless Persons** and the **Convention on the Reduction of Statelessness** are also relevant to refugees in relation to issues of statelessness;

- **Council of Europe Recommendation 564 (1969) on the Acquisition by Refugees of the Nationality of their Country of Residence** contains a suggested good practice drawn from the European context:

*[...]*

*9. Recommends that the Committee of Ministers, with a view to avoiding any perpetuation of the problems of European refugees, invite member governments:*

*(i) to facilitate naturalization:*

- (a) by a liberal interpretation of the legal requirements in respect of assimilation of refugees, taking particularly into account their total period of residence in the host country and the fact that most of them have adopted the way of life of the community which has welcomed them;*
- (b) by making every effort to remove, or at least reduce, legal obstacles to naturalization, such as the minimum period of residence when it exceeds five years, the cost of naturalization fees when it exceeds the financial possibilities of the majority of refugees, the length of time elapsing between the receipt of applications for naturalization and their consideration, and the requirement that refugees should prove loss of their former nationality;*

(ii) to accede to the United Nations Convention of 1961 on the Reduction of Statelessness and to treat *de facto* stateless refugees as though they were stateless *de jure*, in accordance with the resolution passed by the conference of Plenipotentiaries which adopted the aforementioned convention;

(iii) to adopt provisions in national legislation with a view to enabling refugee children, born in a country to which their parents came as refugees, to obtain the nationality of that country at birth and refugee youth to obtain the nationality of their country of residence at their request at the latest upon their coming of age;

(iv) to grant refugees married to a national of the country of residence special facilities for acquiring the nationality of their spouse.

## A. Naturalization in the Refugee Context

### 1. The Importance of an Effective Nationality

Although the granting of national citizenship continues to be a matter solely within the competence of each State, it is the most durable and often the most desirable long-term solution for recognized refugees wishing to end their refugee status and integrate in their host country. Indeed, while refugee status offers certain guarantees, refugees continue to be vulnerable in that they lack an effective nationality.<sup>433</sup> A refugee can neither return to his or her country of origin, nor rely on the comprehensive State protection normally attached to citizenship, even if granted certain rights such as the right of stay and protection from *non-refoulement* by the country of asylum.

### 2. Naturalization: Completion of the Integration Process

From a legal point of view, naturalization represents the objective completion of the integration process into a new society, the right to full legal and diplomatic protection of the State in question (both within and outside the country), and the acquisition of an effective nationality. Moreover, from a sociological perspective, it also indicates the existence of a subjective attachment and commitment to the host country on the part of the refugee.

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<sup>433</sup> As expressed by the drafters of the 1951 Convention: “[t]he position of a *de jure* or *de facto* stateless refugee is abnormal and should not be regarded as permanent”. See Grahl-Madsen (see above at footnote 53), p. 245. This lack of an effective nationality is evidenced for example, in the relative lack of State or diplomatic protection granted to recognized refugees while outside their country of asylum. In contrast to nationals who benefit from the protection of their country of origin while abroad and have the right of return to that country, recognized refugees have relatively few guarantees in these respects. For instance, while refugees travelling with valid Convention Travel Document (CTD) do have the right to return to the country of asylum, they are in a potentially precarious situation should their CTD expire. In that situation, refugees must essentially rely on the good will of that country, while nationals by contrast always have a guaranteed right of return to their country of citizenship regardless of the term of validity of their passports, so long as they can prove their nationality. This is further demonstrated in the following statement contained in para. 16 of the Schedule to the 1951 Convention, which stipulates that: “The issue of the document does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not confer on these authorities a right [duty] of protection.” (*Sic*).

## B. International standards

### 1. 1951 Convention

#### □ *Differing Degrees of Obligation*

While article 34 of the 1951 Convention does not contain an obligation of results in relation to naturalization, it does impose differing degrees of obligation on Contracting States. The first part of the provision consists of a general recommendation to facilitate the processes of naturalization and integration (assimilation), while the second imposes a more specific requirement to expedite naturalization proceedings and reduce the costs of naturalization.<sup>434</sup>

Moreover, by mentioning that *in particular*, costs should be reduced and the naturalization procedures expedited, it is implied in article 34 that other measures to facilitate naturalization are also encouraged, and that those stipulated are not intended to be exclusive. Indeed various other measures may be taken in order to facilitate naturalization, including easing the conditions for naturalization, such as by reducing the period of residence required or by not requiring proof of release from a former nationality (see alternatives to these requirements in the recommendations). The duty to facilitate naturalization as far as possible, also entails an obligation on the part of the relevant authorities to take decisions relating to naturalization in good faith.<sup>435</sup>

### 2. International and Regional Instruments and Documents

#### □ *Related Rights in International Instruments*

While international instruments do not provide for a right to naturalization as such, they do provide for rights closely linked to it, including the right to acquire a nationality, and women's rights to non-discrimination in relation to their nationality and that of their children. For example, a child's right to acquire a nationality is guaranteed in both the CRC and the ICCPR, with the latter stressing this obligation especially when the child would otherwise be stateless. Article 9 of CEDAW guarantees the equal rights of women and men with regard to the acquisition, change or retention of their nationality. In particular, marriage to a foreigner or the change of nationality by a husband should not automatically change the nationality of the wife, render her stateless or impose on her the nationality of the husband. Moreover, women are also to have equal rights with men with regard to the nationality of their children.

#### □ *When Refugees are Stateless or May Become Stateless*

The specific situation and rights of stateless persons, which are of course relevant to refugees when they are also stateless persons (*as per* the definition discussed below),<sup>436</sup> is

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<sup>434</sup> Robinson (see above at footnote 4), p. 141. The 1951 Convention also provides in article 29(1) that States are not to impose on refugees "duties, charges or taxes of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations".

<sup>435</sup> Grahl-Madsen (see above at footnote 53), p. 247.

<sup>436</sup> It must be noted that the *de jure* definition of statelessness provided in article 1 of the Convention on Statelessness, is not to be confused with the reference made in this reference guide to a refugee's lack of an **effective** nationality. Article 1 (1) of the Convention on Statelessness defines statelessness as follows: "For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law". This is a situation of statelessness based on the law. By contrast, the reference to the lack of an effective nationality mentioned in this reference guide simply refers to the fact that by virtue of the status and nature of being a refugee, one cannot in practice access the rights



addressed as well by international instruments. The Convention relating to the Status of Stateless Persons<sup>437</sup> not only guarantees certain social, juridical and economic rights to such persons, but also other important rights, including the right to administrative assistance (which aims to facilitate or render possible the exercise of certain rights by stateless persons), freedom of movement, identity papers, travel documents, expulsion, and most relevant here, naturalization. Article 32 on naturalization is in fact the same provision as article 34 of the 1951 Convention, except of course that it pertains to stateless persons as defined by the Convention on Statelessness.

The Convention on the Reduction of Statelessness<sup>438</sup> may also be relevant to refugees in a number of ways. For example, articles 1 and 4 provide for conditions under which Contracting States are to grant nationality to a person (who would otherwise be stateless) in their territory, while articles 5-8 refer to specific State obligations aiming to ensure that a person does not become or remain stateless. The latter are therefore relevant, **even** with regard to refugees who were not originally stateless, since they impose on Contracting States obligations aiming to guarantee against loss of nationality as well as to reduce statelessness in general, including through the effect of their naturalization laws or the implementation of naturalization procedures. Refugees are thus entitled to and should benefit from these same rights and protection against statelessness.

#### □ *Regional Instruments and Recommended Standards*

As an example of good practice in the European context, the Council of Europe has adopted several Recommendations and Resolutions on the acquisition by refugees of the nationality of their country of residence. Recommendation 654 (1969) to this effect, which was followed by an accompanying Resolution (1970), invites governments to facilitate naturalization by adopting a liberal interpretation of the legal requirements regarding the integration of refugees, and by removing or reducing the legal obstacles to naturalization. The latter could include shortening the required period of residence when it exceeds five years, reducing the costs and waiting period of the procedure, and waiving the requirement for proof of loss of a former nationality. It is also recommended that refugee children born in the country of asylum be able to obtain the nationality of that country at birth, that refugee youths be able to naturalize upon their request at the latest when they come of age, and finally that refugees married to a national be granted special facilitation in acquiring their spouse's nationality.<sup>439</sup>

In 1984, the Council of Europe adopted Recommendation 984<sup>440</sup> on the same topic, this time expressing concern that economic recession had brought about a resurgence of xenophobic and racist movements, as well as the conviction that naturalization within a reasonable time period is one of the most crucial factors for the integration of refugees. It justifies a more favourable treatment for refugees in that they constitute only a small percentage of the national population and do not therefore place an excessive burden on the receiving country. Moreover, facilitating naturalization for refugees does not discriminate

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and benefits related to nationality (such as State and diplomatic protection) and cannot be expected to return to or count on the protection and assistance of the country of origin.

<sup>437</sup> Convention relating to the Status of Stateless Persons of 28 September 1954 (entered into force 6 June 1960).

<sup>438</sup> Convention on the Reduction of Statelessness of 30 August 1961 (entered into force 13 December 1975).

<sup>439</sup> Para. 9(I)(iii)(iv), *Recommendation 654 (1969) on The Acquisition by Refugees of the Nationality of Their Country of Residence*, European Consultative Assembly (September 30, 1969).

<sup>440</sup> *Recommendation 984 (1984) on the Acquisition by Refugees of the Nationality of the Receiving State*, European Consultative Assembly (May 11, 1984).

against other foreigners, since unlike refugees, they continue to benefit from the diplomatic protection and assistance of their country of origin.

In 1997, a new comprehensive Convention, the European Convention on Nationality, containing modern solutions to issues relating to nationality suitable for all European States was adopted by the Council of Ministers and opened to signature on 6 November 1997.<sup>441</sup> Article 6(4)(g) of the Convention reaffirms the need for States Parties to facilitate the acquisition of nationality to refugees in particular, and states that:

“4. Each State Party shall facilitate in its internal law the acquisition of its nationality for the following persons: [...]  
(g) Stateless persons and recognised refugees lawfully and habitually resident on its territory.”

The American and African regional institutions have not developed such advanced standards as those in Europe. The American Declaration (article XIX) and the American Convention on Human Rights (article 20) do recognize the right to nationality however, and the Inter-American organs for the protection of human rights have examined the right to nationality in some cases.<sup>442</sup> The most specific decision on naturalization is the *Advisory Opinion on the proposed amendments to the naturalization provision of the Constitution of Costa Rica* issued by the Inter-American Court on January 19, 1984. The Opinion states that the naturalization rules of one State are subject to the prohibition of discrimination and to the principle of equality of the regional human rights system. However, the Court was of the opinion that: “[...]no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things [...] [and if] there exists a reasonable relationship of proportionality between these differences [substantial factual differences between individuals] and the aims of the legal rule under review.”<sup>443</sup>

## C. Recommendations

### 1. Residency Requirements Should Not Exceed 5 Years

In keeping with best practice standards,<sup>444</sup> and in order to restore an effective nationality to refugees and promote their full integration into society, the required period of residency in order to be eligible for naturalization should not exceed 5 years. Where this period exceeds five years, concerned States should reduce this requirement in the case of recognized refugees.

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<sup>441</sup> European Convention on Nationality, adopted 6 November 1997 (entered into force 1 March 2000). As of 5 May 2004, 13 States had signed the Convention.

<sup>442</sup> See, Inter-American Commission of Human Rights, *Case of Dilcia Yean and Violeta Bosica*, Report on Admissibility No. 28/01 of February 22, 2001 (Petition No. 12. 189); and Inter-American Court of Human Rights, *Case of Ivcher Bronstein vs Peru*. Judgement of February 6, 2001. Series A No. 74.

<sup>443</sup> Inter-American Court of Human Rights, *Proposed amendments to the naturalization provision of the Constitution of Costa Rica*, Advisory Opinion No. 4 of January 19, 1984. Series A No. 4, para. 57.

<sup>444</sup> The 1969 Council of Europe Recommendation and its accompanying 1970 Resolution on the Acquisition by Refugees of the Nationality of their country of residence, provides that countries where the required minimum period of residency exceeds five years should reduce this requirement in the case of recognized refugees (see text of article 9 (i)(b) in the Box on “Main International Standards” at the beginning of this chapter).

With regard to naturalization, consideration should also be given to the fact that in many countries refugees often have legal stay or residence in the country of asylum for several years while they are awaiting their RSD decision, or while they are under an alternative protection regime.<sup>445</sup> This period of stay should be taken into account in the eligibility criteria for permanent residence and/or naturalization, such that recognized refugees are either (i) eligible for naturalization within a maximum of 5 years of their total period of residence (legal stay) in the country, or (ii) after a maximum of 5 years of permanent residency in the host country when they have been granted permanent residency status automatically upon recognition.

## 2. *Harmonization of Asylum and Citizenship Laws, and Ensuring Residency Status is Compatible With Naturalization Requirements*

Refugee and citizenship legislation should be harmonized, as well as State practice, so as to ensure that refugees can indeed be eligible to apply for naturalization within a five year residency period in their host country. Amongst other reasons, the need for harmonization of the legislation stems from the fact that the status granted to recognized refugees may sometimes be inadequate or incompatible<sup>446</sup> with the residency requirements for naturalization. As recommended in chapter 2 on residency status, best practice standards grant refugees permanent residence or an equivalent durable residence status which is compatible with naturalization requirements and is granted automatically upon recognition, thereby permitting them to apply for naturalization at the earliest opportunity.<sup>447</sup>

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<sup>445</sup> This period of stay in the host country before recognition (of refugee status) is often not calculated towards permanent residency or naturalization, and the status granted to refugees during that time may even be incompatible with criteria for the latter. This places refugees at a clear disadvantage in comparison to other foreigners. Moreover, foreigners (including refugees) are frequently required to have a minimum number of years under an inferior status, before they can apply for permanent residence, which they must then also hold for several years in order to be eligible for naturalization. The total number of years of residency can therefore become inordinately long for refugees, who may typically have lived in the country for 2 or 3 years before recognition, acquired a regular residency status under which they may have to live for three years before becoming eligible for permanent residence for example, and then live under this status for 7 or 10 years before they are eligible for naturalization – a total of 13 to 16 years. In addition to this time, procedures to acquire permanent residence and naturalization in many countries involve long waiting periods of several years each. Given their vulnerability and lack of an effective nationality, these periods should be reduced for refugees *as per* the terms mentioned above.

<sup>446</sup> A refugee law may stipulate a legal status to refugees upon recognition that is **inadequate** for naturalization in that it is inferior, and a status or more removed from that required by the citizenship law, thus having the effect of unduly prolonging and rendering it more difficult for refugees to become eligible for naturalization. On the other hand, the status granted by virtue of the refugee law to recognized refugees will be **incompatible** with residency requirements in the citizenship law if the legal or refugee status granted is so temporary, subject to an automatic cessation or expiration (such as with the automatic cessation of refugee status), or so exceptional in nature that it would not render refugees eligible for a more secure and durable legal status (within a reasonable time frame and according to reasonable criteria) which is also compatible with naturalization.

<sup>447</sup> As noted in chapter 2 on residency status, it may be especially difficult for refugees to obtain permanent residency status if it is not granted automatically, particularly in light of the stringent requirements often demanded of applicants and the special socio-economic vulnerabilities and other barriers faced by refugees. Moreover, many countries may lack sufficient administrative or financial capabilities to process such claims at all, or within a reasonable period, and may not provide the requisite training necessary to recognize and address the special situation of refugees. Naturalization may thus become a distant or impossible prospect for refugees, who will remain without an effective nationality.

3. *Waiver of Other Conditions for Naturalization Incompatible With Refugee Status, or Which Refugees May Be Unable to Fulfil*

Other conditions for naturalization, and especially conditions which impose requirements incompatible with refugee status such as release from a former citizenship, and proof of a clean criminal record from the country of origin, should be waived or modified in the case of recognized refugees. For example, in the case of States not allowing dual or multiple citizenship, instead of requiring proof of release from a former nationality, one could simply require a declaration of renunciation to the former citizenship. Alternatively, States can adopt a flexible approach such as that in the European Convention on Nationality which provides that a State Party shall not make the renunciation or loss of another nationality a condition for the acquisition or retention of its nationality where such renunciation or loss is not possible or cannot reasonably be required.<sup>448</sup>

Alternative solutions should also be provided with regard to certain requirements which cannot always be met by refugees, such as providing original documents, including passports, birth certificates or diplomas. In these cases, alternative means of proof and documentation should be made available.<sup>449</sup>

4. *Comprehensive Policy Facilitating Naturalization for Recognized Refugees and Their Immediate Family Members*

Given that refugees may be considered vulnerable persons lacking an effective nationality, consideration should be given to facilitating naturalization in other ways also, especially as regards certain conditions for naturalization which may prove too difficult or indeed impossible for individual refugees to meet. For example, the economic situation in the host country may render it extremely difficult or impossible for the refugee to satisfy the particular requirements relating to financial self-sufficiency and housing, or a language requirement may serve to exclude an elderly or illiterate refugee.

Moreover, naturalization should be facilitated for the children of recognized refugees and other close family members, as a common citizenship can help safeguard the principle of family unity.

5. *Expediting Naturalization Procedures and Reduction of Costs*

In accordance with article 34 of the 1951 Convention, naturalization procedures should be expedited and the related costs reduced or waived for recognized refugees. This is especially important given that the naturalization procedure in many countries often involves long waiting periods of several years. Refugees who have managed to become eligible for naturalization should be given priority and permitted to adjust their status in this way as quickly as possible. The recommended measures are especially necessary where refugees suffer from an inadequate legal status or situation of insecurity.

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<sup>448</sup> Article 16 of the European Convention on Nationality.

<sup>449</sup> In this connection, also see article 25 on the administrative assistance to be granted to refugees by the host government, which is contained in the 1951 Convention.

## 6. *Solutions to Encourage the Obtaining of a More Durable Status*

In certain situations, such as in developing countries or countries with limited resources, refugees may be provided more assistance (either by the State, international community or NGOs) while they have refugee status than upon gaining a more durable residency status in the host country, such as naturalization. Often this assistance is essential to meeting some of their most basic needs, and they fear that they will lose this assistance if they acquire a different and more durable status in the country. This is especially the case in relatively poor asylum countries, where public relief allocations and other essential services are non-existent or insufficient, and refugees rely primarily on assistance from the international community. In such situations, creative solutions and incentives need to be identified (such as a transition period where assistance is prolonged and concerted efforts are made to increase self-reliance) in order to avoid prolonged dependency and encourage refugees to opt for a more durable status in the host State at the earliest opportunity. However, artificial or short-term solutions should be avoided as they are likely to simply result in irregular movements in the future. Another motive behind the reluctance to pursue a more durable residency status in certain cases is the hope of resettlement. Forward thinking strategies, public information and advocacy activities (including with relevant regional organizations) tailored to each situation and refugee group may also have to be developed in such cases.

## 7. *Providing Assistance With Applications for Naturalization or for Permanent Resident Status*

On this issue, legal aid providers can counsel refugees on the advantages of obtaining both permanent residence and the citizenship of the country of asylum, as well as assist them in the application procedure, if necessary. Some problems that they may encounter during this process could include a requirement for the release of a **former citizenship** (which may not even be possible according to the laws of that country, or will require communication with State authorities thereby potentially placing relatives still in the country of origin at risk), proof of a **clean criminal record** from the country of origin, and issuance of **arbitrary or unjustified negative decisions** to applications. In the event of the latter, legal aid providers can pursue the matter and request a justified and administratively acceptable decision.

As mentioned above, other barriers in this area also include a residency status granted to refugees which is incompatible with that required to apply for naturalization, and strict requirements (especially economic ones) which refugees may typically have difficulty meeting. In these respects, legal aid providers may also wish to undertake advocacy activities.

## 8. *Ensuring Naturalization Legislation is Compatible with International Instruments on Statelessness and Human Rights*

Given that some refugees may be stateless as well, legislation and procedures relating to naturalization should be compatible with State obligations under the Convention on Statelessness and the Convention on the Reduction of Statelessness mentioned above, as well as related human rights obligations such as those relative to nationality under CEDAW for example.

## 9. *A Comprehensive, Strategic Approach and Targeted Advocacy Activities*

**Advocacy** activities related to the facilitation of naturalization requirements (and/or permanent residency) and procedures for recognized refugees in particular, should be undertaken where appropriate. Special attention must be focused on this issue at strategic opportunities and with strategic actors. Opportunities for such advocacy may include when amendments to or new legislation is being undertaken (including in related areas).<sup>450</sup> Beyond relevant government authorities in the host country itself, advocacy activities should also target other key actors which increasingly include regional bodies or communities (such as the EAC, ECOWAS and SADC in the context of Africa) which deal with the free movement of persons and services, as well as the harmonization of related laws including residency and work permits, for example. Whenever at all possible, issues related to **refugee** integration, their freedom of work and movement, residency status, and eligibility to apply for naturalization, should be specifically raised and included in the context of such treaties.

In certain situations, particular groups of refugees in the host country may have important characteristics in common with the local indigenous population, such as language, cultural practices or ethnic affiliations, or may simply have already integrated and built their lives in the host country, including through marriage and long-term stay during which they developed strong social or economic ties. In developing countries which may have experienced mass influxes and protracted refugee situations, and whose borders may be naturally porous with similar ethnic groups living along State border areas, local integration and eventual acquisition of permanent residence or naturalization for certain groups of refugees (who happen to satisfy particular criteria related to integration capacity) may be an important part of a comprehensive durable solutions strategy. In these types of situations, governments have often been open to providing opportunities for full integration to certain groups of refugees, albeit usually on an individual basis. Such opportunities could be seized by undertaking advocacy activities for government measures to facilitate the acquisition of permanent residence and naturalization procedures. Awareness-raising activities may also be necessary for the refugee population itself, in order to sensitize and provide information on the benefits of such a status. Indeed, in certain cases, a situation analysis, which amongst other things evaluates the level of interest in integrating in the host country, should be conducted prior to advocacy activities with the government. Local integration as a durable solution would thus be guaranteed by a durable status for at least certain groups of refugees – often groups which have long been part of a larger protracted refugee situation.

During the design, implementation and evaluation of certain programmes, as well as during certain negotiations, such as on durable solutions strategies, self-reliance, local development or integration programmes, considerations relating to residency status and naturalization requirements (including their compatibility) should be analyzed. The reverse is also true, so that when activities for the promotion of local integration (such as those promoting the obtaining of a durable status or naturalization) are undertaken, it is important that other factors which may affect this be analyzed, including financial

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<sup>450</sup> Even if legislative amendments or new legislation do not pertain directly to the naturalization or citizenship laws of the country, certain aspects of the foreigners' law, refugee law, or even regulations relating to permanent or temporary residency status, may have important implications for a refugee's prospects of naturalization. Some relevant key issues are highlighted in the recommendations in this chapter.

assistance granted to persons with refugee status, self-reliance or development programmes for refugees, as well as any resettlement and repatriation initiatives.

#### *10. Targeted Public Information and Counselling Activities*

Persons or organizations such as NGOs providing services to refugees, including social and legal services for example, could include counselling and assistance in relation to nationality and naturalization issues or applications. For example, such organizations can provide information or assistance in relation to some of the following: the question of military service if compulsory in the host country; various issues relating to a new-born's nationality; cases of *de facto* or *de jure* statelessness; cases of loss of the former nationality (such as through marriage, or even the expiration of the passport of the country of origin, which cannot be renewed); assisting in resolving cases where renunciation of a former nationality is required; and generally assisting in the administrative and procedural aspects of the naturalization process. Accurate and timely information on nationality and naturalization issues should also be accessible to refugees who may traditionally have less access to information, such as unaccompanied children or children in a precarious situation *vis-à-vis* their nationality, women, or young persons who have just reached the legal age limit. Targeted activities with refugee groups or individuals with strong integration possibilities such as those mentioned above (e.g. who have ties with the host country, through marriage, common ethnic group, language) should also be envisioned.

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