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**NGO manual on international and regional
instruments concerning refugees and human rights**

United Nations High Commissioner for Refugees

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Throughout the present decade, UNHCR has increasingly recognised the important interlinkages between refugee protection, the prevention of refugee flows and the protection and promotion of human rights. This has led to a heightened awareness of the usefulness of the international framework for the protection of human rights for preventing the causes of displacement and, indeed, for protecting refugees. UNHCR's interest in and involvement with human rights information, standards and mechanisms has been growing accordingly. At the same time, as the High Commissioner has repeatedly made clear when speaking on this issue, the mandate of UNHCR and the mandates of human rights organisations are separate and distinct, and must not be confused.

During the same time period when this development was taking place, UNHCR, at the request of the General Assembly, facilitated dialogue between states in the Commonwealth of Independent States, including, in May 1996, the convening, along with several partners, of the *Regional Conference to Address the Problems of Refugees, Displaced Persons, Other Forms of Involuntary Displacement and Returnees in the Commonwealth of Independent States and Relevant Neighbouring States*. The Regional Conference produced a Programme of Action designed to better manage the existing population displacement flows in the CIS countries, for the purposes of preventing further involuntary displacement and helping the victims of such displacement. The principles upon which the framework for action is predicated focus, to a great extent, on human rights.

The present Manual brings together these two initiatives in a single document. Designed primarily for use by non-governmental organisations and practitioners in the countries of the CIS, the Manual is intended as a practical guide to existing international and European standards and mechanisms for the protection and promotion of human rights, particularly as these relate to refugees and the displaced. It has several objectives, perhaps the foremost being to raise awareness about these standards and mechanisms. The Manual also aims to show NGOs how to advocate for the important rights of the involuntarily displaced and to improve networking between organisations. Despite its specific focus on the CIS, the Manual is nonetheless broad enough in scope to be useful in other parts of Europe as well.

The Manual is divided, for ease of use, into three parts. First, it sets the scene by providing overviews of the population movements in the CIS countries and the CIS Conference and Programme of Action, and describes the categories of persons affected. Second, it summarises the main relevant international and regional human rights standards and mechanisms, and describes how they may be used. Third, it discusses, in a series of articles, a few specific human rights issues of particular concern to refugees and the displaced in the CIS, such as the principle of *non-*

refoulement, freedom of movement, the right to non-discrimination and the right to a nationality. Each article or section can stand on its own, for self or group study. The Manual also contains a glossary of terms, a selected bibliography and a guide to relevant international organisations and contact persons.

An editorial panel was established to organise and finalise the Manual. The panel was comprised of the authors of the various chapters, primarily NGOs, but in some cases international or regional organisations. Although all articles in the Manual were reviewed and commented upon by members of the editorial panel, the articles remain the sole responsibility of the individual authors. They do not reflect a consensus of views nor should they be taken to represent the views of UNHCR or the United Nations. UNHCR is extremely grateful for the kind assistance and co-operation of all members of the editorial panel and to the numerous UNHCR colleagues who commented on and helped in the editing and finalisation of the text.

UNHCR is pleased to have convened and facilitated this process. It is hoped that the Manual will contribute positively to encourage and assist NGOs and others working with the displaced in the CIS to find and promote durable solutions to their legal, social and economic problems.

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Accession

An action by which the government of a state agrees to be bound by a treaty which it has not signed.

Bonded labour

A system whereby a debtor pledges himself/herself as security and works as a slave for the lender in order to repay the debt.

Child

According to the United Nations Convention on the Rights of the Child, refers to a person under 18 years of age.

Commercial sexual exploitation of children

Describes the various activities through which children are exploited for their commercial value such as prostitution, trafficking and pornography. The phrase implies that the child is not only sexually abused but that there is a profit arising from the transaction where the child is considered as a sexual and commercial object.

Complaints procedure

The process, depending on the convention, whereby an individual or a state party to a convention can submit a claim to the appropriate monitoring body that a state party has not honoured its obligations under the convention. Conventions differ according to the process and admissibility of the process. See Chapter VI on International Mechanisms.

Consultative status

According to resolution of 1996/31 (25 July 1996) of the Economic and Social Council (ECOSOC) of the United Nations, certain arrangements exist within the United Nations such that certain non-governmental organizations are granted the standing to “consult” with bodies of ECOSOC. Certain functional commissions of ECOSOC, most importantly the Commission on Human Rights and its Sub-Commission on the Prevention of Discrimination and Protection of Minorities, require that NGOs must have consultative status before they may participate. NGOs are not required to possess consultative status in order to work within the treaty body system of the United Nations.

Customary international law

The existing legal rules and practices of states which are so prevalent and generally recognized that they have become the usual norms of civilized states even in cases where those rules are not codified in international treaties or conventions. Customary international law is binding upon all states in their relations with other states. Customary international law can be derived from the general practice of a majority of states, judicial or other legally authoritative decisions, and the opinion of scholars.

Deprivation of nationality

The loss of citizenship in a state; see “Stateless Persons”, “Nationality; Citizenship”.

Diplomatic protection

The right of a state under international law to protect its citizens and their interests against the actions of other states. Diplomatic protection includes the entire range of possible state action (including the issuance of passports, negotiation among states, and the use of force) to ensure that its citizens are treated in accordance with international law.

Due Process

A fair manner of adjudicating a person’s rights that is conducted by a court or other legal institution governed by the rules of publicly known laws, with provisions for appeal of unfavourable decisions.

Equality of treatment and opportunity

Migrant workers should be treated on an equal footing with national workers in respect of:

- all principal aspects of employment conditions, vocational training, membership of trade unions and enjoyment of the benefits of collective bargaining, and accommodation, in so far as such matters are regulated by law or regulations or are subject to the control of administrative authorities;
- social security, subject to certain limitations;
- employment taxes, dues or contributions payable in respect of the person employed;
- legal proceedings relating to the matters mentioned above.

Excluded from ratification

Whereas a government is not allowed to pick and choose at its own discretion among the articles of a Convention which it undertakes to apply, it may, however, exclude Annexes of a Convention from ratification. Moreover, a number of Conventions do, in fact, provide for certain exclusions, exceptions, or options. See “Reservations”.

Genuine effective link

A substantial, factual connection between a person and a state, such as birth on the state’s territory, descent from citizens of the state, or long-term habitual residence in the state, which can be used to determine whether a person is, or ought to become, a citizen of that state.

Governing body of the ILO

The GB is tripartite and elected every three years at the International Labour Conference. It draws up the agenda for the Conference and other ILO meetings, takes note of their decisions and decides on the consequent action to be taken. It appoints the Director-General and directs the activities of the ILO.

International Labour Conference (ILC)

The ILC elects the Governing Body of the ILO; adopts the ILO's budget, financed by contributions from member states; sets international labour standards; passes resolutions which provide guidelines for the ILO's general policy and future activities; and provides a world forum for the discussion of social and labour questions.

International labour conventions

These are open to ratification by member states. They are international treaties which are binding on the countries which ratify them. These countries voluntarily undertake to apply their provisions, to adapt national law and practice their requirements, and to accept international supervision.

International Labour Organization

The ILO engages in:

- the formulation of international policies and programmes to promote basic human rights, improve working and living conditions and enhance employment opportunities;
- the creation of international labour standards to serve as guidelines for national authorities in putting these policies into action;
- an extensive programme of international technical cooperation;
- training, education, research and publishing activities to help advance all these efforts.

The ILO is composed of a general assembly, the ILC, which meets every year; an executive council, the Governing Body; and a permanent secretariat, the International Labour Office.

International labour recommendations

These are not international treaties. They set non-binding guidelines which may orient national policy and practice. They may in themselves cover a particular subject or may supplement the provisions contained in conventions and spell them out in greater detail.

Irregular (illegal, unlawful) migration

Irregular migrants are persons

- who have not been granted an authorization of the state in whose territory they are staying that is required by law in respect of entry, stay or economic activity; or
- who failed to comply with the conditions to which their entry, stay or economic activity is subject.

Mail-order brides

A system whereby men in richer countries “choose” a future wife from “catalogues” displaying photos and text describing young women from poorer countries. There is very little protection for these women once they find themselves in trouble and sexually exploited in another country, and yet are officially married to a national from that country.

Nationality; citizenship

The relation between the state and a person which consists of reciprocal rights and duties of allegiance and protection.

Naturalization

The process by which a person acquires the citizenship of state upon the person's application when the person has not automatically acquired that state's citizenship through birth or marriage or under the terms of a citizenship law. The naturalization process in each state may be governed by the state's own regulations and definitions setting forth the process and criteria necessary to gain the state's citizenship.

Non-observance of ratified conventions

Through the ratification of an ILO convention, a member state formally undertakes to make the provisions of the convention effective both in law and practice. Upon ratification, governments have to ensure the observance of their obligations.

Optional protocol

A treaty which is additional to an existing treaty and which provides rights or obligations on parties which are not included in the original treaty. Only parties to the existing treaty may agree to be bound by the optional protocol. In terms of the human rights treaties discussed, the term optional protocol will often refer to a treaty which provides individuals with the right to make complaints about the non-observance by their governments of rights guaranteed in the existing treaty. One example here is the First Optional Protocol to the International Covenant on Civil and Political Rights.

Paedophile

An adult person who seeks and prefers sex with prepubescent children.

Ratification

An action by which the government of a state agrees to be bound by a treaty it has signed.

Regularly admitted migrants (as opposed to irregular migrants)

Regularly admitted (legal, lawful) migrants are persons who have been granted the requisite authorizations in respect of entry, stay and economic activity, and who comply with the conditions to which their entry, stay and economic activity are subject.

Regular residence

Regular or usual residence denotes the geographic location around which persons' lives revolve.

Renunciation of citizenship

The process or acts by which a national of a state relinquishes, or is considered by the state to have denied, his duties and rights in relation to the state.

Reservation

According to article 2 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, (1969) reservation means a unilateral statement, however phrased or named, made by a state or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state or to that organization. For more information refer to articles 26-30 of the Vienna Convention.

Right to self-determination

“By virtue of [this] right they [persons] freely determine their political status and freely pursue their economic, social and cultural development”. (Second sentence of article 1(1) of the International Covenant on Economic, Social and Cultural Rights).

Self-employed capacity

Self-employment as opposed to wage and salary earners.

Sex tourism

The commercial sexual exploitation of persons by people who travel from their own country to another, usually less developed, country to engage in sexual acts (often with children).

Smuggling of aliens

This phrase, mostly used by governments, refers to the criminal practice whereby desperate asylum-seekers and other migrants are lured into paying amounts of money (usually outrageously high) to be smuggled across borders – at times to be supplied with counterfeit travel documents – often at considerable personal risk. The relationship with the smugglers usually terminates once persons have arrived in the country of destination.

Standard-setting activities

Refers to the creation of International Labour conventions and recommendations.

Stateless persons

On the international level, a stateless person is one who is not considered a national by any state. In other words, a stateless person is one who is not a citizen, subject, or member of any state according to the legal criteria of each individual state.

Substantial connection

See “Genuine effective link”.

Trafficking in persons

The illicit and clandestine movement of persons across national and international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers and crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labour, false marriages, clandestine employment and false adoption. Research indicates that boys are also to be found among victims of traffickers.

Tripartite system

The ILO is unique among world organizations in that employers' and workers' representatives have an equal voice with those of governments in shaping its policies and programmes. This active involvement of employers and workers side by side with governments, which constitutes the very essence of tripartism, also characterizes every stage of the ILO's standard-setting activities.

World Congress against the Commercial Sexual Exploitation of Children

The first global meeting of its kind, met in Stockholm from 27-31 August 1996. Hosted by the Government of Sweden, the congress was organized in cooperation with the United Nations Children's Fund (UNICEF), the End Child Prostitution in Asian Tourism (ECPAT) global campaign and the NGO Group for the Convention on the Rights of the Child. Over 1,300 persons from more than 130 countries, including government representatives from 122 countries, participated in the Congress. The Congress adopted a Declaration and Programme of Action.

Population Displacement in the CIS Countries and the CIS Conference

Contributed by the International Organization for Migration

For the first time ever, the twelve CIS countries gathered in an international setting to discuss their migration and population displacement problems. During a one-year period, CIS representatives had the opportunity to meet regularly and to discuss at length their shared migration and displacement problems. In a context of faltering regional cooperation and of lagging dialogue on migration and refugee issues, the discussions and preparatory meetings alone made the Conference a success.

POPULATION DISPLACEMENT IN THE CIS COUNTRIES

Following the break-up of the Soviet Union in late 1991, the twelve countries of the Commonwealth of Independent States (CIS) have been confronted with population displacement of an unprecedented scale and complexity. The magnitude of the flows, estimated at around nine million people, makes them the most important migratory movements taking place in the region since the Second World War.¹ Their complexity is a result of a unique intermingling of pre-existing internal flows turned international (repatriation, labour migration); of new flows, whose typology is well known to the international community (refugee flows, flows of internally displaced persons, illegal migration, ecological migration, return of demobilized troops); and of new flows on which little or no international experience exists (return of formerly deported peoples).

Massive and diverse population movements are not a novelty for the CIS region. Throughout history, and particularly during the Soviet era, migration contributed to significantly reshaping the ethnic composition of the Russian Empire and later the USSR. Some of these movements were voluntary, featuring labour migrants in search of better work opportunities. Other movements were forced, like the mass deportations of political opponents, rich peasants (*kulaki*) and “untrustworthy” ethnic minorities.

¹ All the statistical data quoted in this article are taken from the *1996 CIS Migration Report*, IOM, Geneva, 1997.

Some movements were scrupulously planned by the central government, others chaotic and unmanaged. Motivations were varied, driven by individuals' social, economic or personal needs, or by the state's totalitarian concerns. The result of these movements was an intricate mixing of populations and ethnic groups, which has survived the demise of the USSR and constitutes today the human legacy of the Soviet Union.

The unleashing, in the newly independent states of the CIS, of ethnic tensions, internal strife and armed conflicts, the worsening of the social and economic situation, the degradation of the environment, the emergence of a return trend towards historical homelands, all provided strong challenges to the social and ethnic fabric inherited from the Soviet era. Shortly after 1991, migratory flows dramatically increased throughout the region, leading to a chaotic and painful reorganization of populations.

— TYPES OF POPULATION MOVEMENT —

The types of movements taking place within the region and the categories of persons comprise roughly ten groups: refugees, persons in refugee-like situations and asylum-seekers, internally displaced persons (IDPs), involuntarily relocating persons, repatriants, returning persons belonging to formerly deported peoples, ecological migrants, illegal migrants and labour migrants.

• CIS Refugees and Persons in Refugee-like Situations

Between 1989 and 1996, around 870,000 refugees and persons in refugee-like situations were counted in the CIS countries. The single event that generated the greatest number of such persons has been the armed conflict between Armenia and Azerbaijan over the Nagorno-Karabakh enclave, which has resulted in 218,950 refugees on the Armenian side and 185,000 on the Azerbaijani side. In addition, thousands of refugees have fled to the Russian Federation, Ukraine and other CIS countries.

Additional numbers of refugees have resulted from the other armed conflicts of recent years. In 1992, Ukraine received more than 60,000 persons fleeing the conflict in Trans-Dniestria (Moldova). As a result of the Abkhazian conflict, scores of refugees found shelter in the Russian Federation, Ukraine and other CIS countries. The civil war that devastated Tajikistan in 1992 and 1993 forced some 60,000 refugees to flee to Afghanistan and another 195,883 to neighbouring Central Asian countries, the Russian Federation and other CIS countries. By the end of 1996, 41,047 of the refugees living in Afghanistan and 11,343 of those living in CIS countries had returned to their former places of residence. Finally, the conflict in Chechnya resulted in the flight of several thousands of refugees to Ukraine, Kazakstan, Belarus and other CIS countries.

- **Non-CIS Refugees and Asylum-Seekers**

The CIS countries host some 47,000 refugees and asylum-seekers originating from Africa, southwest Asia and the Middle East. These persons are mostly located in countries close to the Western border such as the Russian Federation, Ukraine and Belarus, although some Central Asian countries have also reported growing numbers. The Russian Federation alone hosts 30,479 asylum-seekers from non-CIS countries, Ukraine another 1,105 and Belarus 4,000. Most often, these persons are in transit through the region in their journey towards Western Europe and do not intend to settle in the CIS countries. Nonetheless, many file asylum applications while waiting to move westwards or once they have been rejected by their intended country of asylum. This population generally uses the same channels, routes and networks as illegal migrants.

- **Internally Displaced Persons**

Internally displaced persons were first reported in the CIS region in conjunction with the conflict over Nagorno-Karabakh. As of today, the Armenian Government tallies 72,000 IDPs; while in Azerbaijan their number is as high as 549,030. In Georgia, the hostilities between the government and South Ossetian separatists resulted in 10,897 IDPs, and the war in Abkhazia in an additional 261,052 displaced. In Moldova, in 1992, 51,289 persons were displaced owing to the conflict in Trans-Dniestria, but practically all returned home after the cessation of the hostilities. In Tajikistan, by the end of 1996, 680,853 of the 697,653 IDPs had returned home. The largest IDP flow of recent years originates from Chechnya, with at least 148,542 persons displaced within the Russian Federation. Overall, the number of IDPs in the CIS countries can be estimated at around one million persons.

- **Involuntarily Relocating Persons**

The category of “involuntarily relocating persons” was coined within the context of the CIS Conference to define persons compelled to relocate to the country of their citizenship owing to armed conflict and other similar circumstances. The number of such persons however is difficult to estimate, owing to the lack of clarity in the citizenship status of the displaced and their reasons for leaving.

- **Repatriants**

Totalling over four million persons, repatriants (defined as persons returning voluntarily to the country of their citizenship or origin for the purpose of permanent residence) constitute by far the largest migrant group in the CIS region. Repatriation, which is motivated by economic, social or personal reasons, is not new to the region, as Russian-speakers have been steadily repatriating since the late 1970s. In the late 1980s however, this trend notably accelerated, owing to the deterioration of living standards and the worsening of the immigrants’ once privileged social status in the

Newly Independent States. The bulk of the repatriants originate from Central Asia, where large Russian-speaking communities had settled in the Soviet era, and from the Caucasus, where living conditions became unbearable due to continuous warfare. The overwhelming majority of the Russian-speaking repatriants are Russians and are heading towards the Russian Federation.

Since the late 1980s, the repatriation trend has involved other ethnic groups, particularly Central Asian groups. The most notable flows are taking place in Kazakstan, where between 1991 and 1996, 154,941 ethnic Kazaks repatriated from the Russian Federation, Uzbekistan, Mongolia and Iran. Similar trends are taking place in Uzbekistan and Moldova.

- **Returning Persons Belonging to Formerly Deported Peoples**

In the 1940s, eight entire peoples were deported from their historical homelands and resettled in the Siberian and Central Asian steppes. Three of them – Crimean Tatars, Meskhetians and Volga Germans – have been prevented from returning ever since. In the late 1980s, a trend to return picked up and relatively large numbers of persons belonging to formerly deported peoples started returning to their historical homelands.

Between 1989 and 1996, 183,400 Crimean Tatars returned to Crimea; as of today, 244,241 of them are residing there. Since 1992, 850,000 Volga Germans have emigrated to Germany, and only a few thousands have chosen to move back to their historical homeland in the Russian Federation. As for Meskhetians, in the summer of 1989, 60,000 of those who had settled in the Fergana Valley (between Uzbekistan and Kyrgyzstan) fell prey to communal violence and were forced to resettle, mainly in the Russian Federation and Azerbaijan.

- **Ecological Migrants**

Since the mid-1980s, some 739,000 ecological migrants have been forced to resettle owing to severe environmental degradation. The bulk of the displaced originate from the Chernobyl area (which cuts across Belarus, the Russian Federation and Ukraine), the Aral Sea basin (between Uzbekistan and Kazakstan) and the Semipalatinsk nuclear test site area (Kazakstan).

- **Illegal Migrants**

The slackening of border controls following the demise of the USSR opened up the region to migrants from African, Asian and Middle Eastern countries who were passing through *en route* to Western Europe. These migrants generally use the services of professional traffickers, who are usually linked to criminal networks involved in arms and drug smuggling. As the CIS countries lack the resources to return these migrants to their countries of origin, many of them remain stranded

within the region. Although illegal migrants in transit can be found throughout the region, they tend to concentrate in westernmost countries such as Belarus, Moldova, the Russian Federation and Ukraine, which have quickly become major hubs for migrant trafficking. Between 500,000 to 1,000,000 illegal migrants (particularly Afghans, Iranians and Iraqi Kurds) are estimated to be living in the Russian Federation alone. The Central Asian and Caucasus countries are increasingly reporting the passage of illegal migrants through their territory, thus underscoring the fact that these regions have become major transit areas.

Another group of illegal migrants that can be found in the CIS countries (and especially in the Russian Federation, Ukraine and Belarus) are former Soviet scholarship holders and former migrant workers from developing countries. When the USSR disintegrated, these people had been living in the country for some time. Being unable or unwilling to return home, they have stayed, joining the scores of other illegal migrants.

- **Trafficking in Women and Children**

A significant portion of the category of trafficked persons are women and children. This phenomenon differs from migrant trafficking overall, in so far as it is a form of exploitation and human rights abuse. Once trapped in debt bondage within transit or receiving countries, trafficked women are forced to work as prostitutes, domestic servants, or in sweatshops. The full scale of the problem remains unknown, because few women are prepared, or able, to come forward to the authorities. In addition, immigration laws that consider trafficked women as ordinary clandestine migrants and hence immediately deportable, discourage women from approaching the authorities.

- **Labour Migrants**

The deterioration of the socio-economic situation and the dramatic decline in living standards in all of the CIS countries since independence has led to high rates of both temporary and permanent emigration for work purposes. Since strong social, economic and cultural links remain among the former Soviet republics, these flows are predominantly confined to the boundaries of the region. Labour migration has taken on dramatic proportions in countries ruined by armed conflicts, such as Armenia, Georgia and Tajikistan. In the short term, such outflows have proved beneficial to these countries, reducing pressure on the labour market and thus serving as a sort of safety valve. In the long term however the drain is bound to prove detrimental, as it deprives these countries of skilled labour.

All the various population movements have had a conspicuous impact on the already difficult social and economic situation of the CIS countries. Outflows of skilled labour has led to a brain-drain and disrupted the local economies, while inflows have strained the social infrastructure (particularly in the education and health sectors)

and distorted the housing and labour markets. Relations between migrants, the local population and the authorities at the community level have become increasingly tense. All in all, the population flows have aggravated the precarious socio-economic situation of the CIS countries, thus contributing to their overall instability.

The CIS countries have been unable to cope with the problems engendered by these movements. Because the nature and scale of the flows have radically changed, concepts and structures inherited from the Soviet period have proven both inadequate and insufficient. New policies and legislation had to be devised without any institutional experience or trained personnel. The CIS countries moreover lacked appropriate and efficient infrastructures to manage the flows of migrants and refugees, which in turn has aggravated the displacement-related problems.

THE CIS CONFERENCE

The population displacement problems faced by the CIS countries were brought to the attention of the UN General Assembly in 1994, when a group of countries led by the Russian Federation secured the adoption of Resolution 49/173. This resolution called upon the UN High Commissioner for Refugees, “in consultation with concerned States and in coordination with relevant intergovernmental, regional and non-governmental organizations”, to “promote and develop a preparatory process, leading to the convening, not later than 1996, of a regional conference to address the problems of refugees, displaced persons, other forms of involuntary displacement and returnees in the countries of the Commonwealth of Independent States and relevant neighbouring States”.

The Conference, which was held in Geneva on 30 and 31 May 1996 under the joint auspices of UNHCR, the International Organization for Migration (IOM) and the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE), was the result of a prolonged preparatory process. A first Meeting of Experts, held in Geneva in May 1995, formally launched the process by identifying issues of concern and the methodology to address them. Two rounds of sub-regional meetings were then held, where existing problems and possible solutions were identified and discussed. On the basis of these discussions, a draft Declaration of Principles and Programme of Action were prepared by the Conference Secretariat, and were subsequently merged into a unified Programme of Action, which was submitted to and approved by the Conference in May 1996.

The objectives of the CIS Conference process were three-fold: to provide a reliable forum for the countries of the region to discuss population displacement problems in a humanitarian and non-political setting; to review the population movements taking place in the region, clarifying the categories of concern; and to devise an integrated strategy for the region by elaborating a Programme of Action.

For the first time ever, the twelve CIS countries gathered in an international setting to discuss their migration and population displacement problems. During a one-year period, CIS representatives had the opportunity to meet regularly and to discuss at length their shared migration and displacement problems. In a context of faltering regional cooperation and of lagging dialogue on migration and refugee issues, the discussions and preparatory meetings alone made the Conference a success.

The CIS Conference also helped shed some light – for the first time ever – on the nature, scope and scale of the population movements occurring in the region. In the course of the preparatory process, participants thoroughly analyzed the various flows taking place in the region, identified the types of movements which were of concern (some, like labour migration, were excluded) and scrupulously classified them. In doing so, they de-politicized some of the categories which had become sources of tension between CIS countries. Once the categories were clear, participants collectively assessed which ones could be dealt with within the framework of existing international standards, and which ones could not. In the first case, concepts used in the CIS region were standardized and put into line with relevant international conventions and instruments, while in the second case existing concepts were clarified and new categories devised.

Once the nature of the flows was clarified, participants were asked to analyze displacement-related problems and discuss possible solutions. The result of this exercise – once again a “first” in the region – was the elaboration of a Programme of Action containing the strategy to address migration and population displacement problems in the CIS countries. The Programme of Action was agreed upon by all participants along with a political commitment to implement it.

To make the strategy truly comprehensive and to ensure its effective implementation, the drafting process drew upon a wide spectrum of parties: the CIS countries themselves, who bear the primary responsibility for addressing the displacement problems taking place in their territories; neighbouring and other countries concerned with the impact of these problems on regional and international stability; and international organizations and NGOs active or interested in the region. Inter-agency cooperation was particularly enhanced by the joint organization of the process by UNHCR, IOM and OSCE, who drew on their institutional expertise to address a set of issues that go beyond any of their individual mandates.

— THE PROGRAMME OF ACTION —

The overall aim of the Programme of Action is to enable the countries of the CIS to better cope with population displacement taking place on their territory, prevent situations leading to population displacement, as well as manage and regulate other

types of migratory movements. In the opening Declaration, participants acknowledge the “pervasiveness and acuteness” of the population displacement problems taking place in the CIS countries, their potential for undermining political and economic transformation and their implications for international stability and security. One of the peculiar features of the CIS Conference process has been the remarkable degree of consensus among participants on the nature, scale and potential consequences of the displacement affecting the CIS countries, as well as on the measures needed to cope with it. This consensus deserves to be underlined, in view of the very complex and politically sensitive nature of the issues addressed in the process.

The Declaration continues by stating that while the primary responsibility for tackling displacement problems lies with the CIS countries themselves, international support and assistance are needed to enable these countries to succeed in their endeavours. The question of the balance between the level of commitment of the CIS countries and the commitment of other (Western) countries in the implementation of the Programme of Action has been most controversial throughout the Conference process. On the one hand, the CIS countries had come to the Conference with high expectations of Western assistance for the migrants and refugees present on their territory. On the other hand, Western countries stressed that before they committed any resources, the CIS countries had to demonstrate their own commitment to taking the necessary measures. Equilibrium was ultimately found at the point where neither party undertook any precise or binding commitment. Nonetheless, the Programme of Action remains a useful framework for the CIS countries to tackle their displacement problems in accordance with internationally accepted norms and standards.

The Declaration is followed by a chapter on “Principles”, which recalls internationally accepted norms and standards in the field of human rights, humanitarian and refugee law. The CIS countries are called upon to respect these principles in managing population movements with a view to preventing further displacement. In light of the political sensitivity of the matters addressed by the Conference, participants largely limited themselves to restating widely accepted norms rather than developing new standards for the unique types of movements taking place in the region, for which no body of law exists.

Chapter II of the Programme of Action, an “Institutional Framework” reviews measures necessary for the establishment of national migration systems and for the development of appropriate policies, legislative bases and administrative structures. The chapter is based on the acknowledgement that the systems and structures inherited from the Soviet period are inappropriate and insufficient to cope with the new flows, and that the lack of appropriate structures in turn aggravates population displacement problems. The CIS countries are therefore encouraged to develop their institutional capacity as a matter of priority, while international organizations are called upon to provide technical assistance.

Chapter III, the “Operational Framework” outlines the range of programmes required to address the assistance and protection needs of all groups affected by displacement in the CIS countries. The Operational Framework covers the needs of all groups from their arrival in the host country, to their return to and reintegration into countries of origin or previous residence, or their local integration. It is divided in three sections, dealing respectively with emergency assistance, repatriation/return/resettlement and integration. Given that existing needs far exceed the resources available within the CIS countries, the Operational Framework calls for international support and assistance.

The Programme of Action contains three additional chapters, which are intended to look beyond the management of current flows and set the tone for more long-term activities. Chapter IV, “Prevention” starts by re-emphasizing the main causes of population displacement, such as “violations of human rights[...]and humanitarian law, communal tension and internal strife, social and economic deterioration, environmental degradation, natural, technological and environmental disasters, internal and international conflicts”. The prevention of such situations is considered a matter of concern not only to affected countries, but to the international community as a whole. The chapter emphasizes the importance of monitoring and early warning mechanisms to acquire timely information on potential crises. A series of long-term preventive measures are presented to avoid further displacement. These include protecting and promoting human rights, preventing and reducing statelessness, promoting the social acceptance of migrants and refugees, enhancing environmental awareness and engaging in preventive diplomacy. Finally, the CIS countries are called upon to make full use of existing conflict resolution mechanisms, in the event of a conflict.

The strengthening of intergovernmental cooperation at the bilateral and multilateral levels, as well as of cooperation with international organizations and non-governmental organizations, is envisaged in Chapter V, “Cooperation” as an important means to reinforce national measures. The section on cooperation with non-governmental organizations is particularly well developed and has been met with satisfaction by local and international NGOs.

The Programme of Action closes with a chapter on “Implementation and Follow-up”, aimed at ensuring the sustainability of the CIS Conference in the long term. The lack of firm commitments in this chapter, except for those of the three sponsoring organizations – UNHCR, IOM and OSCE – is regrettable but reflects the different approaches to the Conference taken by the various groups of states. A joint UNHCR/IOM/OSCE Follow-up Unit is entrusted with monitoring the implementation of the Programme of Action. The Unit compiles yearly reports, which will be submitted to the Steering Group until the year 2000. Non-governmental organizations are invited to take part in the meetings as observers, and to submit independent reports. The Steering Group expresses its views on reports and recommendations of the Follow-up

Unit, and may make proposals to participating states and international organizations on the further implementation of the Programme of Action.

The Programme of Action also contains two annexes, the first one listing the countries and organizations which took part in the preparatory process, and the second one presenting the working definitions used throughout the document. Annex 2 – undoubtedly the most innovative part of the Programme – is divided into two parts. Part A contains three categories referring to “a universal definition and widely accepted concepts”, while part B contains five definitions “applying to situations in CIS countries” which “have been developed by these countries”, for “the specific purposes of this Conference process”. Participants therefore decided to draw a clear line between existing internationally accepted definitions, which were taken on without modifications, and new definitions, which were meant to cover situations specific to the CIS context.

The definitions contained in part A include that of “refugees”, which conforms with article 1, paragraph a(2) of the Convention relating to the Status of Refugees (1951); that of “internally displaced persons”, which makes reference to a working definition used by the Representative of the United Nations Secretary-General on Internally Displaced Persons in a 1995 report; and that of “illegal migrants”, which is based on the Programme of Action of the International Conference on Population and Development.

In part B, the category of “persons in refugee-like situations” refers to “persons who fled their country of citizenship or, if they are stateless, the country of their permanent residence, as a consequence of armed conflicts because their lives, safety or freedom were threatened. These persons are in need of international protection but may not all be covered by the 1951 Convention and its 1967 Protocol”. This category was coined on the basis of the Organization of African Unity and the Cartagena definitions of a refugee to encompass persons displaced outside their own country by armed conflicts.

By far the most contentious category was that of “involuntarily relocating persons” (IRPs), encompassing “persons who are forced to relocate to the country of their citizenship as a result of circumstances endangering their lives, such as armed conflict, internal disorder, inter-ethnic conflict or systematic violations of human rights and who are in need of assistance to resettle in their countries of citizenship”. This definition was coined to match the term “forced migrant” found in the Russian legislation.

In effect, during the preparatory process the Russian Federation had repeatedly requested that the category of “forced migrants” be discussed within the context of the Conference. Most CIS countries and the Baltic States however voiced strong concern at the inclusion of such a category in the Programme of Action, as the Russian authorities tend to categorise all ethnic Russians moving from the CIS and Baltic states to the Russian Federation as “forced migrants”, regardless of whether

they were actually compelled to leave. A compromise was reached by devising two separate categories, covering respectively persons who were compelled to leave, “involuntarily relocating persons”, and persons who left voluntarily “repatriants”.

Annex 2 furthermore, includes two definitions referring to movements which are specific to the CIS countries: “formerly deported peoples” defined as “peoples who were deported from their historic homeland during the Soviet period” and “ecological migrants”, defined as “persons who are obliged to leave their place of permanent residence and who move within their country or across its borders, due to severe environmental degradation or ecological disasters”. Although they lack precision, these definitions still constitute an initial and much needed attempt at categorizing the peculiar movements taking place in the region.

In conclusion, the CIS Conference was rather successful in achieving its immediate objectives: providing a forum for the CIS countries to discuss their displacement problems, reviewing the types of movements taking place in the region, and devising an integrated strategy. In the long term, the Conference could play an instrumental role by acting as a catalyst in bilateral and multilateral cooperation on population displacement matters in the CIS countries, as well as achieving a shared understanding of migration and refugee issues among the CIS countries and with the international community at large.

— THE FOLLOW-UP PROCESS —

The implementation of the Programme of Action adopted at the Conference is a complex and long-term endeavour which requires the active participation of all concerned parties (CIS governments, other countries, international organizations and non-governmental organizations) over a prolonged period. Pursuant to the concerted approach adopted in the course of the preparatory process, UNHCR and IOM have sought to involve the largest possible number of interested actors in the follow-up and implementation process.

The CIS countries have displayed a high level of commitment to the process. After having identified – together with UNHCR and IOM – national priorities relating to migration and refugees, they have taken a number of measures to implement the provisions contained in the Programme of Action. The level of priority attached to the various issues and the degree of effective implementation have varied across the twelve countries, but can overall be considered as satisfactory.

The implementation process has also featured improved inter-agency cooperation between IOM and UNHCR. Throughout the process, the two organizations have consulted regularly at both the headquarters and field level. In a number of CIS countries,

UNHCR and IOM have developed programmes that are not only complementary, but truly mutually supportive, thereby significantly enhancing their effectiveness.

As a practical step to translate the Programme of Action into concrete activities specifically addressing the needs of each CIS country, UNHCR and IOM, in the summer of 1996 – together with governments concerned – drafted national implementation plans and developed programmes for 1997. The plans indicate the priorities of each government concerned, the specific objectives, the roles and inputs of various actors and the expected results. The CIS countries have actively participated in the planning phase, giving high-level endorsement to the plans. In November 1996, a comprehensive presentation of programmes for all twelve CIS countries was made jointly by UNHCR and IOM with an appeal for funds. As funds started being provided in early spring, the two organizations stepped up their on-going activities, and launched new ones in several CIS countries.

One of the challenges of the implementation phase has been to draw other international organizations active in the region into the implementation process in order to ensure complementarity and avoid duplication. In the year since the Conference, a number of initiatives have been undertaken in this respect at both the field and headquarters level.

A number of interested countries have supported the Conference process through contributions to the joint UNHCR/IOM Appeal, or through other bilateral or multilateral channels. An inventory of the wide array of technical and financial assistance provided to the CIS countries is being developed by IOM, and will enable participants to have a complete picture of the initiatives under way in the region.

The Programme of Action emphasized the need to strengthen civil society. In the follow-up to the Conference, UNHCR has launched a number of NGO support initiatives in the CIS countries to familiarize a wide group of national and international NGOs with the Conference process and to identify areas of cooperation with NGOs in the implementation of the Programme of Action. To promote the involvement of NGOs at all levels of the implementation and monitoring of the Conference, specific measures to enhance the capacity of NGOs, particularly their networking and financial situation, need to be carried out. Both UNHCR and IOM have provided NGOs with technical and financial support, and have launched NGO capacity-building programmes.

In sum, in the year since the CIS Conference a first step has been made towards implementation of the Programme of Action. As implementation proceeds, UNHCR and IOM intend to continue their efforts to draw into the process all interested parties, and elicit from the organizations active in the CIS countries their full participation in this exercise. In order to succeed in this endeavour however, they will require the continued commitment and support of all participants.

Protection of Refugees, IDPs, Stateless Persons, Migrants and Migrant Workers and Minorities in the Commonwealth of Independent States

Contributed by the United Nations High Commissioner for Refugees

National legislation must, first and foremost, be brought into conformity with international human rights and related instruments in this area and be implemented effectively.

A major challenge for the countries in the CIS region, a few years after gaining independence and the end of the Cold War, is the development of an appropriate, comprehensive legal framework governing the phenomena of displacement, migration and related movements in conformity with international law and standards. It is a fact that irregular movements have a destabilizing effect and measures must be taken by governments to solve the problems arising from them.

It is in the national interest of the countries concerned to establish functioning registration, reception, identification and integration structures and procedures for those already displaced. At the same time, preventive measures, particularly in the legislative field, can be taken to give substance to the right of each individual not to be displaced. National legislation must, first and foremost, be brought into conformity with international human rights and related instruments in this area and be implemented effectively.

The objective of this paper is to identify existing international legal instruments and standards, at the universal and regional level, relating to refugees, internally displaced persons, stateless persons, migrants, migrant workers and minorities.

REFUGEES

Unlike most other people who leave their country, refugees seek admission to another country not out of choice but out of absolute necessity, to escape threats to their most fundamental human rights from which the authorities of their country of origin cannot or will not protect them.

When the UN General Assembly adopted the general refugee definition that was to be used in the UNHCR Statute, and with certain changes in the 1951 Convention relating to the Status of Refugees, it decided to move beyond earlier *ad hoc* definitions, based on specific situations, towards a more universally applicable definition.

According to these instruments a refugee is defined as a person who:

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.

This definition is universal in application.

In European countries, no international regional instruments exist specifically for the protection of refugees from conflict or internal upheaval who do not otherwise come within the terms of the 1951 Convention and the 1967 Protocol. It is nonetheless the practice of the great majority of these states to offer some form of protection to persons whose life or freedom might be at risk as a result of armed conflict or generalized violence if they were returned involuntarily to their countries of origin.

PRINCIPLES OF PROTECTION: INTERNATIONAL INSTRUMENTS RELATING TO REFUGEES

The 1951 UN Convention and its 1967 Protocol relating to the Status of Refugees are the most comprehensive instruments governing the legal status of refugees which have been adopted to date at the universal level. The purpose of these instruments is to provide basic standards for the protection of refugees in countries of asylum. They have been widely accepted by states, and there are currently 135 states parties to one or both of these instruments (as of 1 October 1997).

The 1967 Protocol is an independent, although integrally related, international instrument. By acceding to it, states undertake to apply the substantive provisions of

the 1951 Convention to all refugees covered by its definition without any dateline or geographical limitation.

The Convention and Protocol lay down comprehensive, minimum standards for the treatment of persons who are found to qualify for refugee status.

In order to provide for the legal status of refugees in the country of asylum, the Convention contains a legal regime regarding their rights and obligations. It also deals with a variety of matters which have an important effect on their day-to-day life, such as gainful employment, public education, public relief, labour legislation and social security. The Convention does not accord them a privileged position in these areas. It encourages contracting states to provide standards of treatment comparable, in some instances, to those accorded to nationals of the contracting states and, in other cases, to those accorded to nationals of a foreign country or aliens generally (in the same circumstances).

Regarding the scope of guidelines reflecting international consensus in this domain, it is important to mention resolutions of the General Assembly and of the Economic and Social Council as well as conclusions of the Executive Committee of the High Commissioner's Programme (EXCOM) which are directly related to the protection responsibilities of governments and the role of UNHCR.

In addition, international human rights instruments contain provisions that could be applied in certain circumstances for the protection of refugees. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides, for instance, in article 3 that no state party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he/she would be in danger of being subjected to torture. The 1989 Convention on the Rights of the Child makes special provision for refugee children in article 22.

In conflict situations the 1949 Geneva Convention relating to the Protection of Civilian Persons in Time of War and the 1977 First Additional Protocol assume particular importance among the legal tools available for the protection of refugees as civilian victims of the effects of hostilities.

The two universal refugee instruments are complemented by regional refugee instruments, notably the 1969 Organization of African Unity (OAU) Convention governing the specific aspects of refugee problems in Africa and, for Latin America, the 1984 Cartagena Declaration and the 1994 San José Declaration. The system has been further reinforced by a growing corpus of national law relating to the admission, recognition and protection of refugees. International and regional human rights instruments and international humanitarian law are invaluable additional legal tools of international protection.

Several instruments concerning refugees have been adopted within the framework of European institutions, particularly in the context of the European Union and the Council of Europe.

The European Convention for the Protection of Human Rights and Fundamental Freedoms has been interpreted by the European Court of Human Rights as implicitly prohibiting the return of anyone to a place where they would face a real and substantiated risk of ill-treatment (art. 3).

In the specific regional context of the CIS the following agreements relate, *inter alia*, to refugees and displaced persons:

– Agreement on the Protection of Refugees and Displaced Persons, signed in Moscow in September 1993;

– Agreement on the Establishment of “Inter-States Foundation” for Assistance to Refugees, signed in Almaty in February 1996.

The Moscow Agreement on the Protection of Refugees and Displaced Persons of September 1993 contains a refugee definition which extends to victims of violence and armed conflicts.

— CONCEPT OF INTERNATIONAL PROTECTION —

The concept of international protection relies on an international framework and on the continued practice of states in providing asylum to millions of refugees. The provision of asylum remains the single most important function for the protection of persons in need. Article 14(1) of the Universal Declaration of Human Rights recognizes that:

“Everyone has the right to seek and to enjoy in other countries asylum from persecution”.

Asylum can be defined as the protection provided by a state on its territory for aliens in need of protection. It is a protection mechanism but can also amount to a solution when provided on a long-term basis.

In this connection, it should be noted that article 33 of the 1951 Convention reflects a fundamental norm of international refugee law: respect for the principle of *non-refoulement*. It prohibits the expulsion or return of a refugee, in any manner whatsoever, to a territory where his/her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.

This principle covers not only expulsion and return but also measures such as rejection at the frontier. It applies to persons who have a well-founded fear of persecution in the sense of the 1951 Refugee Convention as well as to persons fleeing situations of violence and armed conflict. The application of the principle of *non-refoulement* is independent from any formal determination of refugee status and is regarded as forming part of customary international law. Thus, persons who, while meeting the criteria of the refugee definition, have not formally been granted refugee status, are protected by the *non-refoulement* principle.

International protection thus begins with securing admission, asylum, and respect for basic human rights, including the principle of *non-refoulement*, by states, without which the safety and even survival of the refugee is in jeopardy. It ends only with the attainment of a durable solution, ideally through the restoration of protection in the refugee's own country. It includes promoting the conclusion and supervising the application of international conventions for the protection of refugees at the global and regional level, promoting legislation and other measures at the national – and increasingly regional – level. The objective is to ensure that refugees are identified and accorded an appropriate status and standard of treatment, and that, with and through the national authorities, their safety and well-being are guaranteed in their countries of asylum. Since the ultimate goal of international protection must be to achieve a satisfactory solution for the refugee, the protection function also includes promoting with governments and with other international bodies, measures to remove or attenuate the cause of refugee flight so as to establish conditions that would permit refugees to return safely to their homes, and, when this becomes feasible, facilitating, assisting and monitoring the safety of voluntary repatriation. If safe return is not possible, it involves promoting and implementing the other durable solutions of resettlement or local integration.

UNHCR was established by the General Assembly of the United Nations in 1951 and mandated with the function of providing international protection to persons of its concern by, *inter alia*, supervising the application of international instruments relating to the protection of refugees. Under article 35 of the 1951 Convention and article 2 of the 1967 Protocol, states parties to the respective instruments have assumed an obligation to cooperate with UNHCR in the exercise of its functions, in particular by facilitating UNHCR's duty of supervising the application of the provisions of the Convention. In carrying out its mandate at a national level, UNHCR seeks to ensure a better understanding and a more uniform interpretation of recognized international principles governing the treatment of refugees.

Given the broad scope of the overall objective of international protection, it is appropriate that the UNHCR Statute describes the protection function of the High Commissioner as encompassing virtually all activities undertaken by her Office to promote solutions for refugees. As outlined in general terms in the Statute of the Office and demonstrated in the practice of UNHCR, international protection involves

seeking – in collaboration with governments as well as non-governmental organizations (NGOs) – to meet the whole range of needs that result from an absence of national protection.

Mention should also be made of the concept of burden-sharing which is the underlying principle of international refugee policy and a corollary of state responsibility in this area. Traditional burden-sharing instruments include participation in UNHCR refugee protection and assistance programmes, worldwide, both with financial and human resources. Other tools are resettlement and emergency preparedness systems.

The comprehensive responses to specific refugee situations, such as the elaboration of comprehensive plans of action in SouthEast Asia and Central America (CPA and CIREFCA), have major burden-sharing components. The burden-sharing discussion in Europe has concentrated on the uneven distribution of the numbers of asylum-seekers and refugees.

— REFUGEE STATUS — — DETERMINATION PROCEDURE —

The basic principles of international refugee law require that asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Consequently, every asylum-seeker should have access to status determination procedures and be assisted in presenting his or her claim. In case of a negative decision, an opportunity should exist for an independent review/appeal, during which time the asylum-seeker must be allowed to remain in the country.

The decision as to whether a person is entitled to refugee status is an obligation of each state party in accordance with its own national administrative and legislative framework. UNHCR is able to share its accumulated experience with governments regarding refugee status determination and the general handling of refugee problems.

The international standards governing refugee status determination derive from the 1951 Convention and its 1967 Protocol in conjunction with the right to seek and enjoy in other countries asylum from persecution, as set forth in article 14(1) of the Universal Declaration of Human Rights. Also of relevance are the conclusions of the Executive Committee of the High Commissioner's Programme (EXCOM). Articles 1, 3, 31, and 33 of the 1951 Convention are particularly relevant in this connection, as are EXCOM Conclusions Nos. 6, 8, 15, 22, 28, 30, 44, 58, 64, 65 and 68. Finally, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status provides concrete guidance to governments relating to refugee status determination. The Handbook has received the endorsement of the members of the Executive Committee and has been relied upon by the national courts and administrations involved in the handling of asylum claims.

In the interest of both the asylum applicants and the states concerned, status determination procedures should be fair and expeditious. Fair procedures, meeting the requirements of international protection, call for a careful examination of the claim by a clearly identified, qualified, knowledgeable and impartial decision-making body. Given the difficulties that genuine refugees often have in providing documentary or other evidence to support their claims, asylum-seekers who are generally credible and whose statements are coherent and plausible, should be given the benefit of the doubt in such procedures. The possibility for an independent review of negative decisions is also essential.

These safeguards are of critical importance, since an erroneous decision leading to the refugee's involuntary return to danger may have tragic consequences. The absence of sufficient guarantees against return of refugees to countries where they risk persecution may lead to a breach of the principle of *non-refoulement*.

INTERNALLY DISPLACED PERSONS

No generally accepted definition of who is an internally displaced person exists, though the 1995 Report of the Representative of the Secretary-General on Internally Displaced Persons to the Commission on Human Rights (doc. No. E/CN.4/1995/50 of 2 February 1995) proposes a working definition which reads as follows:

“Persons or groups of persons who have been forced to flee their homes or places of habitual residence suddenly or unexpectedly as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized State border”.

UNHCR has implicitly used a working definition according to which an internally displaced person is someone who, had he/she managed to cross an international boundary, would have fallen within the definition of a refugee of concern to UNHCR.

(See UNHCR's Operational Experience with Internally Displaced Persons, UNHCR, September 1994, p. 76).

For IOM, the term “displaced persons” includes persons who had to leave their homes as a result of armed conflicts, widespread violence, natural disasters or violations of human rights, and who have not crossed a border. The IOM working definition is therefore less restrictive than the usual definition referred to above: the Organization's involvement is not contingent upon the suddenness or magnitude of such migration movements; it may also include persons such as soldiers who, once demobilized, need to be reintegrated into civil society, back in their place of origin.

**PRINCIPLES OF PROTECTION:
INTERNATIONAL INSTRUMENTS RELATING TO IDPs**

The principal sources of existing standards for the protection of internally displaced persons, as well as the foundations for the articulation of further standards are found in international human rights law, particularly the Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social and Cultural Rights; international humanitarian law, which comprises the four Geneva Conventions of 1949 and the two Additional Protocols of 1977; and international refugee law, as embodied principally in the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol by analogy. These cover the minimum standards of human existence and dignity: physical safety, liberty, shelter, food, clothing, health care, work, and respect for the integrity of the person and the family as the most fundamental social unit.

International concern for the plight of internally displaced persons stems from recognition that involuntary displacement increases the vulnerability of affected populations with regard to the enjoyment of these basic human rights.

The responsibility for meeting these needs for protection and assistance without discrimination rests foremost with the state. In situations of displacement, the state may be required to take additional measures in order to safeguard these rights, particularly during periods of public emergency, which often coincide with the times of greatest need for protecting the displaced. Some of the most critical situations affecting the displaced, such as forcible relocation or return to unsafe areas and access to humanitarian assistance, may not be directly or sufficiently addressed by human rights law. Elaborated norms and procedures on humanitarian access and humanitarian assistance have, therefore, been advocated. Special guidelines for the protection problems that displaced women and children face may be necessary. Such guidelines have already been developed within the United Nations system in order to deal with the protection needs of refugees and important principles could be derived from them and further elaborated.

Humanitarian law, which codifies the principle that those not directly participating in the hostilities should be treated humanely, contains provisions which are of great value to the internally displaced. Particularly relevant is article 3, common to all four Geneva Conventions, which, in the case of armed conflicts not of an international character, categorically prohibits violence to life and/or person, the taking of hostages, and outrages upon personal dignity of persons. Of relevance also is article 17 of Protocol II additional to the Geneva Conventions (1977), which deals with displacement of civilian populations in internal conflicts and sets out restrictions on such movements. It provides guarantees to the civilian populations if these movements, for imperative reasons, have to take place and prohibits their being compelled to leave their own territories for reasons related to the conflict.

Despite the fact that internally displaced persons have much in common with refugees, refugee law in the strict sense applies by definition only to persons who have crossed an international border. While some have argued that this is an arbitrary distinction, it has specific consequences in international law, as a displaced person's presence in a country other than his or her own implicates a well-established international protective regime, the core of which is the concept of *non-refoulement*. For internally displaced persons, one of the most important rights provided for in refugee and human rights law is the right to seek asylum. It is important that this right not be undermined while efforts are being made to strengthen the standards for protection of internally displaced persons.

Given the similarities in many situations of internally displaced persons and refugees, important principles can be drawn by analogy from refugee law for the protection of internally displaced persons. For instance, the explicit recognition of a right not to be forcibly returned to areas where the life or freedom of the displaced person could be threatened is of vital importance. Other similar rights could include the right to flee to a safe area and stay there, the right to be provided with adequate documentation, the right not to be identified as a displaced person if it could result in discrimination, freedom of movement, the right to benefit from family reunification, and the right to voluntary return to the original area of residence.

As noted in the latest report to the Commission by the Representative of the Secretary-General on Internally Displaced Persons, it can be concluded that provisions of existing human rights and humanitarian law are not always detailed enough to cover the needs of the internally displaced, and that specific provisions may have to be enunciated. Specific provisions could include:

- ensuring safe access by displaced persons to essential facilities and commodities needed for survival;
- prohibition of deliberate starvation;
- providing personal documentation in order to ensure the ability to exercise all legal rights;
- guaranteeing freedom of movement and residence for the internally displaced, and protecting against arbitrary individual or mass transfers unless the security of civilians or imperative military reasons so demand;
- prohibiting forced return to conditions of danger;
- providing a right to return to one's habitual place of residence or to resettle in another safe place;
- respecting and ensuring the freedom and means to exercise the right to seek asylum;
- prohibiting the production and use of anti-personnel land-mines, of which the displaced are often victims;
- providing for specific protective measures for displaced vulnerable groups.

**PRINCIPLES OF PROTECTION:
INSTITUTIONAL ARRANGEMENTS**

No single international agency has a specific and comprehensive mandate to provide assistance and protection to internally displaced persons. Notwithstanding this shortcoming, programmes of protection and assistance relevant to the internally displaced currently exist in the international system. Within the United Nations system, the role of UNHCR is the most pertinent to the protection needs of the internally displaced. Despite the fact that this population is not expressly within UNHCR's basic mandate, UNHCR has often provided protection and assistance to internally displaced persons in specific circumstances, with the agreement of the authorities concerned.

Also within the UN, another organization whose mandate and activities are pertinent to the internally displaced is the Department of Humanitarian Affairs (DHA). As a coordinating body, DHA has the task of facilitating the response of the operational organizations of the United Nations system such as the United Nations Development Programme (UNDP), the United Nations Children's Fund (UNICEF), the World Food Programme (WFP), the World Health Organization (WHO) and others to humanitarian emergencies by ensuring the most effective deployment of its human, financial and material resources. Following a recent decision by the Inter-Agency Standing Committee (IASC), the Emergency Relief Coordinator will serve as the reference point in the United Nations system to receive requests for assistance regarding situations of internal displacement that require a coordinated international response.

In 1993, UNHCR adopted criteria for its involvement with the internally displaced, which were endorsed by the General Assembly. UNHCR may also become involved through special operations, undertaken at the request of the Secretary-General or the General Assembly, on a good offices basis. In all cases, UNHCR's activities on behalf of internally displaced persons must be based on the consent of the concerned state (or other relevant entities) and should receive adequate financial support. UNHCR emphasizes that its mandate and expertise are in the area of protection and solutions and that it should consequently be expected to act in pursuit of these basic objectives when it is requested or allowed to assist the internally displaced.

The United Nations human rights programme attaches great importance to the issue of internally displaced persons. The High Commissioner for Human Rights is coordinating human rights efforts in this regard and raises relevant issues with governments. The Representative of the Secretary-General on Internally Displaced Persons, appointed at the request of the Commission on Human Rights, has been mandated to review the need for the protection and assistance to internally displaced persons and to make appropriate recommendations to the Commission and the

General Assembly on these subjects. The UN human rights programme further offers, at the request of governments, advisory services and technical assistance on relevant human rights issues in this area.

With regard to the legal framework, the UN Commission on Human Rights developed policy on the human rights aspects of internally displaced persons. The Representative of the Secretary-General on Internally Displaced Persons has compiled and analyzed the norms pertinent to his mandate.

The International Committee of the Red Cross (ICRC) has had long experience in protecting civilians in armed conflict situations and more recently has been expanding its capacity to protect and assist civilians in internal conflicts. Of all the institutions dealing with the internally displaced, ICRC certainly has the clearest mandate to assist and protect victims of internal conflict who constitute, if not the largest group, at least the most complex one among the internally displaced. It also has become directly involved in situations of internal strife by exercising the right of humanitarian initiative.

IOM has the mandate to provide migration assistance, and sometimes de facto protection, to displaced persons (both internally and externally displaced), with the consent of the state concerned. On the basis of this mandate, the Organization has concluded with numerous member and observer states, cooperation agreements that stipulate the involvement of IOM in internal migration and the provision of migration assistance to internally displaced persons. IOM's various activities constitute, in specific circumstances, a form of protection insofar as they help ensure the realization of fundamental human rights.

On the regional level, several bodies have engaged in standard setting on internal displacement over the past few years. Particular mention should be made of the various activities of the Organization for Security and Cooperation in Europe (formerly CSCE) in the domain of protecting internally displaced persons, especially in the field of preventive action.

STATELESS PERSONS

According to article 15 of the 1948 Universal Declaration of Human Rights, "Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality". The notions that the right to a nationality, the need to ensure the realization of an effective nationality and the premise of nationality acting as a basis for the exercise of other rights, have been developed throughout the course of this century. They can be noted, for example, in the 1930 Hague Convention on Certain Questions Relating to the Conflict of

Nationality Laws promulgated under the auspices of the League of Nations following World War One, and the 1961 Convention on the Reduction of Statelessness promulgated under the auspices of the United Nations following the Second World War. The principles in these conventions have been elaborated upon and reinforced by other landmark conventions, court jurisprudence and state practice. The right to a nationality is a basic human right acting as a premise for the resolution of any issue or questions pertaining to nationality.

Given that everyone has the right to a nationality, how is this right to be realized, how is nationality to be ascribed? International law stipulates that it is for each state to determine, by the operation of domestic law, who are its citizens. This determination ought, however, to accord with general principles of international law and, in particular, principles relating to the acquisition, loss, or denial of citizenship. The codification of principles relating to nationality in international instruments such as the Universal Declaration has been a major development in international law.

Despite significant developments in international law and practice relating to nationality however, the international community currently faces numerous situations of statelessness and inability to establish a nationality. The problem has arisen in connection with state succession and the adoption of nationality legislation by new or restored states, but is also seen in areas of the world which have had no recent change in legislation and have undergone no transfer of territory. Those affected include life-long residents of a state, ethnic minorities, and significant numbers of women and children who are unable to establish their own links but must rather follow those of the husband or father.

The emergence of conflicts involving ethnic groups, numerous sudden cases of state succession, and increased displacement have brought the nationality issue to the forefront. The international community is, as a consequence, turning to international instruments which reflect developments made in international law and were structured to resolve problems such as those which have arisen. The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, developed under the auspices of the United Nations, serve as the reference points for international consensus on principles relating to nationality.

Citizenship, and the ability to exercise the rights inherent in nationality, act as stabilizing factors and aid in the prevention of involuntary movements between states. Hence, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness have taken on new relevance and political significance. Until recently the 1954 and 1961 Conventions were “orphan” conventions – not actively promoted due to the lack of a supervisory body or other mechanism which would disseminate them – but are now tools by which the international community can seek to address emerging and weighty problems relating to nationality.

Both individuals and governments seeking advice and assistance in nationality matters have approached UNHCR, including in the drafting and implementation of nationality legislation. An essential step in strengthening efforts to reduce statelessness and the inability to establish nationality, is securing accession to international instruments, or adherence to the principles they contain, which ensure, at a minimum: that persons will not arbitrarily be deprived of nationality; that they will be granted a nationality under certain circumstances in which they might otherwise be stateless; and that adequate protection will be available to those who, nonetheless, remain or become stateless.

Accession to the 1954 Convention relating to the Status of Stateless Persons is important because it provides stateless individuals with many of the rights necessary to live a stable life. Accession to the 1961 Convention on the Reduction of Statelessness does, moreover, serve to resolve many of the situations which result in statelessness. The 1961 Convention, embodying principles already generally accepted under international law, is a useful reference point for nationality legislation and can help resolve certain conflict of law problems.

An increase in accession and ratification of these international instruments would act, therefore, as an impetus for all states to work towards the reduction, and eventual elimination, of statelessness. NGOs are encouraged to participate in the promotion of these instruments, and the principles they contain, as a positive means of assisting states faced with statelessness issues. UNHCR has, moreover, been pleased to have worked with NGOs as implementing partners in addressing individual cases of statelessness in situations conducive to this type of programme. Such programmes will be further developed where possible.

Due to recent developments, statelessness, although not a new phenomenon, has taken on new dimensions. Its potential as a source of regional tension and of involuntary displacement has come to be more widely recognized. The General Assembly of the United Nations and the Executive Committee of the High Commissioner's Programme have respectively adopted resolutions and conclusions stressing the importance of the principles embodied in these instruments, and the need for states to adopt measures to avoid statelessness. The ability to exercise an effective nationality and the prevention and reduction of statelessness are a contribution to the promotion of human rights and fundamental freedoms, to the security of peoples, and to stability in international relations. UNHCR is pleased to participate closely with NGOs and states in the furtherance of these goals.

— **BACKGROUND OF THE STATELESS
PERSONS CONVENTIONS** —

Historically, refugees and stateless persons were less differentiated, with both receiving protection and assistance from international refugee organizations. The 1954 Statelessness Convention, originally drafted as a Protocol to the 1951 Convention relating to the Status of Refugees, was intended to reflect this link. The pressing needs of refugees in the wake of the Second World War and the impending dissolution of the International Refugee Organization prohibited detailed consideration of the statelessness issue at the 1951 Conference of Plenipotentiaries convened to consider both issues. The 1951 Convention was adopted, while the Statelessness Protocol, with articles mirroring those of the 1951 Convention, was postponed for adoption at a later date. Under the 1951 Convention, stateless refugees receive protection as refugees, nationality being one of many potentially relevant issues.

In 1954, the Statelessness Protocol was made a Convention in its own right, with provisions ensuring that stateless persons have a recognized status under the law. A strictly legal definition of stateless persons was adopted, covering only “a person who is not considered as a national by any state under the operation of its law” (*de jure* statelessness). While it was felt that a legal distinction between *de jure* and *de facto* stateless persons – those with an ineffective nationality or those who cannot establish their nationality – was necessary so as to distinguish a strictly legal problem from one with political or other factors the similarity in their positions was, nonetheless, recognized.

De facto stateless persons were, therefore, the subject of a recommendation in the Final Act of the 1954 Convention relating to the Status of Stateless Persons, as it was assumed that they had voluntarily renounced their citizenship and were, in any event, refugees. Hence, the Final Act:

“[R]ecommends that each Contracting State, when it recognizes as valid the reasons for which a person has renounced the protection of the State of which he is a national, consider sympathetically the possibility of according to that person the treatment which the Convention accords to stateless persons”.

Although no supervisory body was provided for in the 1954 Convention, there is every indication that this was due largely to time constraints and to the intended association with the 1951 Convention.

The Convention on the Reduction of Statelessness, in seeking to reduce statelessness, requires signatory states to adopt nationality legislation which reflects prescribed standards pertaining to the acquisition or loss of nationality. By incorporation into the Final Act, the 1961 Convention:

“Recommend[ed] that persons who are stateless de facto should as far as possible be treated as stateless de jure to enable them to acquire an effective nationality”.

Here again, the link between lack of nationality, lack of national protection and *de facto* stateless persons was recognized.

— UNHCR ACTIVITIES — CONCERNING STATELESSNESS —

UNHCR has always had responsibilities for stateless refugees, under its statutory function of providing international protection as well as under the 1951 Convention relating to the Status of Refugees. In recent years, furthermore, the Office has been encouraged to seek preventive action by addressing the causes leading to involuntary displacement. Clearly, the exercise of an effective nationality and the ability to exercise the rights inherent in nationality act as stabilizing factors in the prevention of involuntary and coerced movements between states.

There is a link between the loss or denial of national protection and the loss or denial of nationality. In the spectrum of rights, the prevention and reduction of statelessness is an important aspect of securing minority rights. While the basic human rights of stateless persons are, in principle, to be respected in the country of habitual residence, it is clear that there are a number of categories of persons who may not receive the national protection necessary for a stable life. The prevention and reduction of statelessness and the protection of stateless persons are important for the prevention of potential refugee situations.

UNHCR has been entrusted by the General Assembly with fulfilling the functions foreseen under article 11 of the 1961 Convention on the Reduction of Statelessness. When the 1961 Convention entered into force, UNHCR was asked provisionally to assume the responsibilities foreseen under article 11, “of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority”. As the agency designated to act as an intermediary between states and stateless persons under the 1961 Convention, it is incumbent upon UNHCR to provide expertise in the area of nationality legislation to states parties. The principles embodied in the 1961 Convention have served as a reference point for the determination of international law and international consensus regarding nationality.

Thus, while there are a minimal number of states signatory to the 1961 Convention, the general principles embodied in the Convention are inherent in citizenship legislation and practice in many states, and have served as a means of ascertaining consensus on the minimum legal standards to be applied to questions of nationality. These standards include the avoidance of statelessness and the granting of nationality to those who have a genuine and effective link with the state.

Of further relevance to UNHCR's interactions with states on questions pertaining to nationality is the Conclusion on The Prevention and Reduction of Statelessness and the Protection of Stateless Persons, adopted by the High Commissioner's Executive Committee and endorsed by General Assembly Resolution A/RES/50/152 of 9 February 1996. The General Assembly encouraged the High Commissioner to continue her activities on behalf of stateless persons, as part of her statutory function of providing international protection and of seeking preventive action, as well as her responsibilities under General Assembly Resolutions 3274 (XXIV) of 10 December 1974 and 31/36 of 30 November 1976, and:

“Request[ed] the Office of the High Commissioner, in view of the limited number of States party to these instruments, actively to promote accession to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, as well as to provide relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States;

Call[ed] upon States to adopt nationality legislation with a view to reducing statelessness, consistent with fundamental principles of international law, in particular by preventing arbitrary deprivation of nationality, and by eliminating provisions which permit the renunciation of a nationality without the prior possession or acquisition of another nationality, while at the same time recognizing the right of States to establish laws governing the acquisition, renunciation or loss of nationality”.

To this end, UNHCR has provided advice and assistance to governments and individuals in nationality matters, including in the drafting and implementation of nationality legislation. The Office will continue to provide technical and advisory services and promote the Statelessness Conventions as part of its responsibility under article 11 of the 1961 Convention, as well as in response to the request of its Executive Committee and of the General Assembly to “provide relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation”.

UNHCR is concerned with nationality legislation which could lead to displacement. In its resolution of 1996, the General Assembly expressed its concern that “statelessness, including the inability to establish one's nationality, may result in displacement”. There are numerous cases in which *de facto* statelessness has been shown to be related to population displacement. While some refugees are *de jure* stateless, most refugees are *de facto* stateless, making this category, or its potential creation, of great concern to UNHCR.

When the 1954 and 1961 Conventions were drafted, it was assumed that all *de facto* stateless persons were refugees and would, therefore, benefit from the 1951 Convention. It is now apparent that there are those who do not qualify as refugees but

whose nationality status is unclear. The situation of such a person in terms of a lack of national protection may be identical to that of a *de jure* stateless person. Since lack of protection may result in involuntary displacement, UNHCR is also concerned with promotional and preventive measures on behalf of such individuals.

UNHCR continues to explore promotional and preventive activities in this area to which it can contribute in collaboration with concerned states. The activities and assistance of NGOs, in cooperation with states as well as in close consultation with UNHCR as working partners, are valuable resources in the promotion of these goals.

MIGRANTS AND MIGRANT WORKERS

There is no legal definition of the word ‘migrant’ at the international level. In domestic legislation, emigrants and more often immigrants are defined, but sometimes these two concepts do not exist. Reference is only made to “aliens” and their right of entry, stay and work. This is especially the case in countries with no tradition of emigration or immigration.

The term “migrant” should be understood as covering in principle all cases where the decision to migrate is taken freely by the individual concerned, for reasons of “personal convenience” and without the decisive intervention of an external compelling factor. This term therefore applies to persons – and family members – moving to another country to better their material or social conditions and improve prospects for themselves or their family. The following persons clearly fall under this heading: migrant workers, investors and experts. Teachers and students comprise another group of persons who may as well be included in the category of migrants. Still there are others who may not fit neatly into this category such as unsuccessful asylum-seekers, expellees, transit “migrants” and nationals stranded abroad.

This section will focus on principles and rules on the protection and assistance to migrant workers, it being understood that all migrants are not necessarily migrant workers and that further elaboration will be needed on the protection and assistance to the broader category of migrants.

Several definitions of a migrant worker are given in various international instruments, at the universal as well as at the regional level.

The 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families defines the term ‘migrant worker’ as:

“a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”.

Article 11 of the 1975 ILO Convention Concerning Migrations in Abusive Conditions and the Protection of Equality of Opportunity and Treatment of Migrant Workers (No. 143) states:

“For the purpose of this Part of this Convention, the term “migrant worker” means a person who migrates or who has migrated 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 worker”.

Another definition can be found in the 1949 ILO Migration for Employment Convention (No. 97):

“For the purpose of this Convention the term “migrant for employment” means 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” (art. 11(1)).

The Council of Europe provides a definition of the term ‘migrant worker’ in article 1(1) of the 1977 European Convention on the Legal Status of Migrant Workers:

For the purpose of this Convention, the term “migrant worker” shall mean 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.

PRINCIPLES OF PROTECTION:

— INTERNATIONAL INSTRUMENTS RELATING TO MIGRANTS — AND MIGRANT WORKERS

• The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The 1990 Convention lays down a basic standard of treatment for all migrant workers, irrespective of their legal situation. Some of these rights are directly linked to employment (i.e. treatment not less favourable than applied to nationals in respect of remuneration, conditions of work, terms of employment, freedom to join any trade union and right to social security).

The 1990 Convention foresees additional rights of migrant workers and members of their families who are documented or in a regular situation. These rights concern: the freedom of movement in the territory of the state of employment; the right to form associations and trade unions; the right to enjoy political rights in the state of origin;

equality of treatment with nationals in the state of employment in respect of access to education, housing, social and health services; co-operatives and self-managed enterprises, and cultural life; the right to family reunification; exemption from import and export duties and taxes in respect of personal and household effects and of equipment necessary to engage in remunerated activity; the right to stay on the territory of the state of employment in case of termination of the remunerated activity, at least for a period corresponding to that during which they may be entitled to unemployment benefits, or, for the family in case of death of the migrant worker or dissolution of marriage; right to choose freely a remunerated activity with certain limitations; equality of treatment with nationals in respect of protection against dismissal, unemployment benefits, access to alternative employment.

The Convention foresees the establishment of a committee which is supposed to examine state reports on the measures they have taken to give effect to the provisions of the Convention, on difficulties affecting the implementation of the Convention, and on the country-specific characteristics of migratory flows. The Convention also foresees an inter-state and an individual complaints procedure, subject to respective declarations of the states parties concerned. The 1990 Convention has not yet entered into force. Only three states have so far ratified it (as of 1 May 1995).

- **The 1949 ILO Migration for Employment Convention (No. 97)**

The Convention provides that immigrants lawfully within the territory will enjoy treatment not less favourable than that accorded to nationals in respect of remuneration, membership of trade unions, enjoyment of the benefits of collective bargaining, accommodation, social security, employment taxes, dues and contributions and legal proceedings relating to the matters referred to in the Convention. The Convention also states that measures should be taken as appropriate by each member, within its jurisdiction, to facilitate the departure, journey and reception of migrants for employment.

There is no specific control procedure foreseen by the Convention. The general ILO procedures are applicable.

The 1949 Convention entered into force in 1952 and has so far been ratified by 40 states (as of 1 May 1995).

- **The 1975 ILO Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143)**

The Convention, in its first part, deals with the suppression of clandestine migration and manpower trafficking. The second part applies to migrant workers in a regular situation and aims at establishing the principle of equal opportunity and

treatment between migrant workers and nationals in respect to employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms.

There is no specific control procedure set up by the Convention. The general ILO procedures are applicable.

The 1975 Convention entered into force in 1978 and has been ratified by 17 states (as of 1 May 1995).

• **Other International Instruments**

In addition to the instruments mentioned above, the ILO adopted three recommendations on migrant workers:

- the 1949 Recommendation (No. 86) Concerning Migration for Employment;
- the 1975 Recommendation (No. 151) Concerning Migrant Workers (Revised);
- the 1955 Recommendation (No. 100) Concerning Protection of Migrant Workers in Underdeveloped Countries.

Other related international conventions concerning migrant workers are the following:

- ILO 1925 Equality of Treatment (Accident Compensation) Convention (No. 19) (in the field of social security);
- ILO 1926 International Convention on the Inspection of Emigrants;
- ILO 1935 Maintenance of Migrants' Pension Rights Convention (No. 48) (in the field of social security for workers);
- ILO 1952 Social Security (Minimum Standards) Convention (No. 102);
- ILO 1958 Discrimination (Employment and Occupation) Convention (No. 111);
- ILO 1962 Social Policy (Basic Aims and Standards) Convention (No. 117);
- ILO 1962 Equality of Treatment (Social Security) Convention (No. 118);
- ILO 1964 Employment Policy Convention (No. 122).

— **PRINCIPLES OF PROTECTION** — **AT THE REGIONAL LEVEL**

• **The 1977 European Convention on the Legal Status of Migrant Workers**

The Convention regulates the situation of migrant workers before their arrival on issues such as recruitment, medical examinations and vocational tests, contracts or definite offers of employment and appropriate information. Once in the receiving state the Convention regulates issues such as arrangements for work and residence

permits, family reunion, housing and transfer of savings. The Convention finally, also ensures that migrant workers are treated not less favourably than national workers of the receiving state regarding conditions of work, social security, social and medical assistance, taxation of earnings, right of access to courts and administrative authorities, unemployment, use of employment services and the right to organize for the protection of economic and social interests.

A Consultative Committee is set up by the Convention. Its main functions are two-fold: first, it examines proposals for facilitating or improving the application of the Convention or for amending it, and, second, it draws up periodical reports for the attention of the Committee of Ministers of the Council of Europe containing information regarding the laws and regulations in force in contracting parties on matters provided for in the Convention. The Committee is not empowered to take any decisions; this is the task of the Committee of Ministers.

The 1977 European Convention entered into force in 1983, and has been ratified by eight states (as of 1 March 1995).

- **Other Instruments in the Framework of the Council of Europe**

- 1955 European Convention on Establishment.
- 1961 European Social Charter and amending 1991 Protocol.
- 1972 European Convention on Social Security.

- **OSCE Instruments**

The 1975 Helsinki Final Act as well as the 1989 Vienna Concluding Document, the 1990 Charter of Paris for a New Europe and the 1994 Budapest Concluding Document lay down basic rights for migrant workers lawfully residing in the host country. These rights concern non-discrimination and equality of the rights between migrant workers and nationals of the host country in respect of conditions of employment and work, social security, opportunities of finding other suitable employment in the event of unemployment, and access to education. These instruments also accord the following rights to migrant workers: family reunification, enjoyment of satisfactory living conditions, especially regarding housing, and of their national culture.

Even if these texts are not considered legally binding, the principles agreed to constitute political commitments of the states concerned.

The “Human Dimension Mechanism of the OSCE” elaborated a system of supervision of a non-voluntary character which provides for the exchange of information and responses to requests for information (Vienna Mechanism). This mechanism was further strengthened by a system of missions of independent experts or rapporteurs to investigate violations of human dimension commitments (Moscow Mechanism).

MINORITIES

There is currently no definition in international law of a minority. The most frequently used definition in legal literature is the one given by Francesco Capotorti, the UN Special Rapporteur on the subject:

Minority is a group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

Another element sometimes added to this definition is the requirement of nationality of the state of residence, which excludes groups such as migrant workers and refugees.

The Human Rights Committee in a general comment on article 27 of the UN Covenant on Civil and Political Rights stated, however, in 1994 that article 27 “confers rights on persons belonging to minorities which ‘exist’ in a State party”. The Committee considers it not relevant to determine the degree of permanence that the term “exist” connotes. Just as individuals belonging to minorities need not be nationals or citizens, they need not be permanent residents, according to the Human Rights Committee.

— PRINCIPLES OF PROTECTION —

There is no specific legally binding instrument on minorities at the universal level and there are only two in the European context. However, references to minorities can be found in other instruments, either at the regional level or in instruments of a more general nature.

• **The 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities**

The 1992 Declaration which was adopted by the General Assembly in Resolution 47/135 is the only universal instrument in the field of protection of minorities, but has no binding character. It does not accord rights to minorities as such, but to individuals belonging to minorities. Furthermore, article 1 of the Declaration affirms that:

“States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories, and shall encourage conditions for the promotion of that identity”.

The Declaration recalls some general human rights applicable in the context of the protection of minorities. The principle of equality and non-discrimination is reiterated. The “right to participate effectively in cultural, religious, social, economic and public life” as well as “the right to establish and maintain their own associations”, are also specifically recognized.

The Declaration provides also specific rights to persons belonging to minorities, such as:

“[the] right to enjoy their own culture, to profess and practice their own religion and to use their own language,

[the] right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation, and

[the] right to establish and maintain without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties”.

— PRINCIPLES OF PROTECTION AT — THE REGIONAL LEVEL

• **The 1995 Framework Convention for the Protection of National Minorities**

The Framework Convention, adopted in the context of the Council of Europe, is the first multilateral treaty pertaining to the protection of national minorities in general. Its aim is to specify the legal principles which states undertake to respect in order to ensure “the effective protection of minorities and of the rights and freedoms of persons belonging to those minorities” (preamble).

The Framework Convention contains mostly programme-type provisions setting out objectives which the parties seek to pursue. These provisions are not directly applicable since the parties agreed “to implement the principles set out in this Framework Convention through national legislation and appropriate governmental policies” (preamble), thus enabling them to take particular circumstances into account.

The Framework Convention provides protection to persons belonging to national minorities who “may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others” (art. 3(2)).

Its main provisions reiterate rights and freedoms such as the right of equality before the law, freedom of religion, freedom of expression and the right to use the minority language. The parties also agreed to:

“promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, to refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will” (article 5).

- **The 1992 European Charter for Regional or Minority Languages**

The Charter, adopted in the context of the Council of Europe, contains measures of affirmative state action for promoting the use of regional or minority languages in the fields of education and culture, in legal procedures before courts and administrative authorities, by the media, in economic and social life. A specific “à la carte” system allows each contracting state to make its own selection of linguistic rights to be safeguarded.

Articles 16 and 18 of the Charter foresee the examination of State Reports by an independent Committee of minority experts.

The 1992 European Charter for Regional or Minority Languages has not yet entered into force (as of 1 March 1995).

- **Work in Progress**

An additional protocol to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms in the field of culture, containing provisions securing individual rights, especially for persons belonging to national minorities, is currently in the drafting stage in the framework of the Council of Europe.

— **OTHER HUMAN RIGHTS** —
PROVISIONS ON MINORITIES

- **The 1960 Convention against Discrimination in Education**

The Convention was adopted in the context of UNESCO. Article 5(1)(c) recognizes:

“the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language...”

Article (2)(b) authorizes the establishment or the maintenance, for religious or linguistic reasons, of separate educational systems or institutions.

There is no specific control procedure set up by the Convention, but persons belonging to minorities can use the individual complaints procedure set up within UNESCO.

The Convention entered into force in 1962 and has been ratified by 84 states (as of 1 April 1995).

- **Article 27 of the 1966 Covenant on Civil and Political Rights**

Article 27 grants individual rights to persons belonging to minorities and states that they:

“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”.

The Human Rights Committee, set up by the Covenant, ensures the supervision of the application of article 27.

The Covenant entered into force in 1976 and has been ratified by 126 states (as of 1 April 1995).

- **The 1989 Convention on the Rights of the Child**

Two provisions specifically refer to children who belong to a minority group. Article 17 states that:

“States Parties shall (...) (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous”.

Article 30 is more general since it states that:

“a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her religion, or to use his or her own language”.

The Committee on the Rights of the Child reviews the implementation of the Convention.

The Convention entered into force in 1990 and has been ratified by 171 states (as of 1 May 1995).

• **The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms**

There are no specific provisions for the protection and promotion of minority rights in this Convention. Persons belonging to minorities can, however, refer to the individual rights protected by the Convention, especially to article 14 which prohibits discrimination on grounds of association with a national minority. They can use the individual complaints procedure and appeal to the European Commission on Human Rights.

• **Documents Adopted in the Context of the OSCE**

The 1975 Helsinki Final Act states in its Principle VII of the first basket that:

“The Participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere”.

The 1989 Vienna Concluding Document sets forth far reaching mechanisms for protecting minority rights. These rights were reaffirmed and amplified at the Copenhagen Meeting in 1990, at the Geneva Meeting of Experts, at the Moscow Meeting in 1991, as well as in the Charter of Paris, signed by the OSCE Heads of State in November 1990, and the 1994 Budapest Summit Declaration.

The above mentioned documents foresee collective protection and promotion of the ethnic, cultural, linguistic and religious identity of national minorities in addition to individual rights for persons belonging to such minorities. The documents contain provisions affirming that persons belonging to national minorities or regional cultures can maintain and develop their own culture in all its aspects including: the right to use freely their mother tongue, to establish and maintain their own educational, cultural and religious institutions, organizations or associations, to profess and practise their religion, and to give and receive instruction on their own culture. They can also establish and maintain organizations or associations. The documents recognize the right for persons belonging to minorities to have contacts among themselves within their country as well as contacts across frontiers with citizens of other states with whom they share a common ethnic or national origin, cultural heritage or religious beliefs. The aim of these provisions is to preserve persons belonging to a minority from assimilation against their will. The documents also stress the principle of non-discrimination and full equality with other citizens and recognize that to belong to a national minority is a matter of individual choice from which no disadvantage should arise.

The participating states also have positive obligations such as to protect the ethnic, cultural, linguistic and religious identity of national minorities on their

territory, to create conditions for the promotion of that identity, and to ensure that persons belonging to national minorities have adequate opportunities for instruction of their mother tongue or in their mother tongue. They also undertake to respect the right of persons belonging to national minorities to effective participation in public affairs.

The 1991 document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE strengthens the procedure set up by the 1989 Vienna Concluding Document. It establishes a complex system of missions of independent experts or rapporteurs to investigate violations of human dimension commitments. A participating state can invite a mission to come on its territory to assist it in solving a particular problem. The most far reaching measure concerns the authorization for any OSCE participating state, with the support of at least nine other participating states, to dispatch an OSCE mission of rapporteurs to another participating state, even against the will of the latter, if it considers that “a particularly serious threat to the fulfillment of the provisions of the CSCE human dimension has arisen” in the state concerned (this last procedure is often referred to as the “Moscow Emergency Procedure”). This mission of rapporteurs will establish the facts, make a report and provide advice on possible solutions. The report may then be placed on the agenda of the next regular meeting of the Senior Council, which may decide on any follow-up action.

The 1992 Helsinki Document, “The Challenges of Change”, foresees the establishment of the post of an OSCE High Commissioner on National Minorities. The High Commissioner is considered an instrument of conflict prevention at the earliest possible stage and acts under the aegis of the Senior Council.

It is also worth mentioning that a number of bilateral treaties concerning relations between neighbouring countries concluded in the 1990s refer to the OSCE principles concerning protection of minorities.

ANNEX 1: Status of Ratification of Some Conventions in the CIS						
State	Convention on the Status of Refugees (1951)	Convention on the Status of Refugees Optional Protocol (1967)	Convention on the Prevention and Punishment of the Crime of Genocide (1948)	Geneva Convention (1949)	Additional Protocol I on the Protection of Victims of International Armed Conflicts (1977)	Additional Protocol II on the Protection of Victims of Non-international Armed Conflicts (1977)
	As of 1 Nov. 1997	As of 1 Nov. 1997	As of 1 Nov. 1997	As of 31 Jan. 1997	As of 31 Jan. 1997	As of 31 Jan. 1997
Armenia	1993	1993	1993	1993	1993	1993
Azerbaijan	1993	1993	1996	1993	—	—
Belarus	—	—	1954	1954	1989	1989
Georgia	—	—	1993	1993	1993	1993
Kazakhstan	—	—	—	1992	1992	1992
Kyrgyzstan	1996	1996	1997	1992	1992	1992
Rep. of Moldova	—	—	1993	1993	1993	1993
Russian Fed.	1993	1993	1954	1954	1989	1989
Tajikistan	1993	1993	—	1993	1993	1993
Turkmenistan	—	—	—	1992	1992	1992
Ukraine	—	—	1954	1954	1990	1990
Uzbekistan	—	—	—	1993	1993	1993

General Objectives of International Human Rights Treaties and their Application at the National Level

Contributed by the Office of the High Commissioner for Human Rights

Through their normal activities, treaty monitoring bodies are uniquely positioned to view the many ways in which the provisions can be applied, or misapplied, in states parties and to interpret and review these with the passage of time in the light of changing realities. The treaty bodies thus serve as a dynamic mechanism for continuous re-examination of international human rights standards.

One of the central purposes behind the establishment of the United Nations Organization is to identify the common values of humanity. According to its Charter, the United Nations was built on the determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human being and in the equal rights of men and women. It is charged with the promotion, *inter alia*, of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. As a result of the experience of the Second World War, there is today a widespread conviction that the effective international protection of human rights is an essential condition for international peace and progress.

The search for common values, although by no means concluded, has produced a reference point for human rights which all persons are endowed with by virtue of their humanity – the Universal Declaration of Human Rights. Adopted by the General Assembly in 1948, the Universal Declaration has become a source of guidance and inspiration to millions throughout the world and, by virtue of its moral force and increasing invocation around the world, is broadly considered to have become a part of customary international law.

The rights contained in the Universal Declaration of Human Rights have subsequently been elaborated in a number of international treaties, declarations, principles and guidelines. They were first translated into binding law in the form of two treaties, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. In the Covenants, states

recognized that, in conformity with the Universal Declaration of Human Rights, the enjoyment of economic, social and cultural rights is essential if respect for civil and political rights is to be meaningful, while at the same time recognizing that genuine economic and social development requires that people have the political and civil freedom to participate in the process. The international community has reaffirmed on numerous occasions that the two sets of rights are interdependent and indivisible. Today, the International Covenant on Civil and Political Rights is complemented by two Optional Protocols which have since entered into force, one establishing an individual complaints procedure and the second aiming at the abolition of the death penalty. Together with the Universal Declaration, the two Covenants and their Optional Protocols are referred to collectively as the International Bill of Human Rights.

The International Bill of Human Rights forms the ethical and legal basis for all of the human rights work of the United Nations. They enshrine global human rights standards and have been the inspiration for more than 50 supplementary United Nations human rights conventions, declarations and bodies of international minimum rules and principles. These additional standards have further refined international legal norms relating to a wide range of issues.

PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES

The human rights treaty system refers to the component of international standards in human rights which has been codified into binding international law and is supervised by independent monitoring mechanisms. It consists of five treaties adopted by the General Assembly, in addition to the two Covenants and the two Optional Protocols, which elaborate state obligations with respect to specific rights or aim to provide protection to specific vulnerable groups in society. These are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.¹ The implementation by states parties of each of the above treaties except the last, which has not yet entered into force, is monitored by expert bodies which meet periodically to review the situation of those rights in states which have acceded to the conventions. They are sometimes referred to as the principal international human rights treaties.

¹ The texts of the treaties and list of states parties to them may be requested from the Office of the United Nations High Commissioner for Human Rights, Information Desk, Palais des Nations, 8-14 avenue de la Paix, 1211 Geneva 10, Switzerland, or viewed via Internet on the United Nations Human Rights Website (<http://www.unhcr.ch>).

The drafting and ultimate adoption of the human rights treaties are the result of long consultations and negotiations among representatives of countries with different political, social and economic systems and various cultural, ethical and religious approaches to life, working with Non-Governmental Organizations (NGOs) and the Secretariat and agencies of the United Nations. The treaties are the expression of common standards and goals, many of them expressed for the first time in the language of human rights. The treaties enable states parties to seek their own national means to implement the provisions; they do not require that states adopt a certain form of government or economic system.

In contrast to the Universal Declaration, human rights treaties are legally binding agreements by which the conduct of states parties towards their own subjects can be assessed. By ratifying a human rights treaty, states become accountable to the international community, to other states which have also ratified the same treaty and to their own citizens and others resident in their territories. In some states, particularly in many newly independent countries, international treaties have been granted a status equal to national laws and their provisions are directly invocable in the national courts. In other states, new laws must be passed or existing ones modified in order to bring the national legal system in line with international treaty obligations.

For non-states parties as well, respect for international standards in the protection of human rights often has strong persuasive power in the interpretation of national laws. Consider the fact that the legal system in most states today provides for basic constitutional rights or a bill of rights. A common element in many legal systems is the right to be free from torture. A lawyer defending an alleged victim of torture who is accused of participating in activities to overthrow the government could find it useful to refer to the International Covenant on Civil and Political Rights. According to the Covenant, the prohibition of torture is non-derogable, even under a state of emergency which threatens the life of the nation. The lawyer may also find support in the jurisprudence of the United Nations Human Rights Committee where the Committee, upon examining allegations of an individual of having been tortured by government forces, determined those allegations to be true and upheld the right of the victim to an effective remedy, irrespective of the change of government which had since taken place.

The obligations incurred by states upon ratifying international agreements can generally be divided into positive and negative obligations. Positive obligations refer to actions which states parties are required to take. In the above example of a victim of torture, the final views of the Committee indicated that the offending state must provide an effective remedy to the victim. In general, elements of an effective remedy include a proper investigative machinery, an impartial and independent judiciary and court system, legal and other mechanisms for the punishment of the perpetrator, and adequate compensation to victims. Where they do not already exist, states parties are obliged to establish such mechanisms.

Negative obligations refer to the obligation of states to *refrain* from violating the rights of persons under their jurisdiction. During the course of examination of state reports, the Committee on Economic, Social and Cultural Rights has been confronted with instances where governments were found not only to be inactive in seeking solutions to extreme shortages of adequate housing but to be themselves large-scale evictors of disadvantaged families, having targeted their land for public projects. According to the Committee, instances of forced eviction are *prima facie* incompatible with the requirements of the International Covenant on Economic, Social and Cultural Rights and can only be justified in the most exceptional circumstances, in accordance with the relevant principles of international law.

The otherwise vague responsibilities of states to “protect” or “respect” human rights or to “ensure” their enjoyment is given practical meaning through the treaty provisions detailing specific positive and negative obligations of states parties. The combined application of both positive and negative obligations should, under ideal circumstances, have the effect of preventing all cases of human rights violations, not only when these are committed by government officials or agents but also when they are committed by private persons, organizations and enterprises.

Another common feature of central importance to the interpretation and implementation of the principal human rights treaties is their application to disadvantaged groups. The treaties recognize that the concept of equality means more than treating all persons in the same way, since equal treatment of persons in unequal situations will serve to perpetuate rather than eradicate injustice. True equality can only emerge from efforts directed towards addressing and correcting these situational imbalances. In this regard, the treaties draw attention to the need for positive action for the benefit of disadvantaged groups, including minorities, women, children and others. The non-discrimination articles of the treaties are therefore widely interpreted to mean that the provision of special measures for, or assistance to, disadvantaged groups does not constitute an act of discrimination, as long as it does not lead to separate rights for different groups and that it is not continued after its objectives are achieved.

If all sectors of society become familiar with their provisions, the human rights treaties can become a powerful tool in identifying problem areas, mobilizing efforts to address those problems and bringing about necessary changes in attitudes within the government and in society at large. Conversely, persons who are unaware of their human rights cannot ensure that their rights are respected. In the words of one treaty body, human rights education is itself a human right.² The treaties encourage activities in countries aimed at promoting knowledge among the general public of the treaties to which they are party. At another level, they encourage targeted human rights

² Committee on Economic, Social and Cultural Rights, E/1996/22, paragraph 324.

education to be provided to key sectors in the government structure and society that have main responsibility for the protection of human rights or are well situated to identify human rights abuses. The treaty bodies have repeatedly emphasized the importance of both conducting public awareness campaigns and of providing training in human rights, particularly for members of the judiciary and the legal profession, members of the police and security forces, doctors, teachers, social workers and family care professionals, among others.

Through their normal activities, treaty monitoring bodies are uniquely positioned to view the many ways in which the provisions can be applied, or misapplied, in states parties and to interpret and review these with the passage of time in the light of changing realities. The treaty bodies thus serve as a dynamic mechanism for continuous re-examination of international human rights standards. However, their role is a supportive one, offering their views and recommendations on the implementation of the treaties through constructive dialogue with states parties. They do not exercise judicial functions. They do not have enforcement tools at their disposal, such as an international police force or the ability to impose sanctions in some form or other, to ensure that states comply with their treaty obligations. States are encouraged to effectively implement the international human rights treaties but cannot be compelled to do so.

Treaty monitoring bodies engage states parties in a dialogue in which the government's position on a wide range of specific issues are articulated or, alternatively, a lack of policy or shortcomings in policy implementation are revealed. By contributing to this dialogue, members of civil society in a state party can gain the support and moral force of the international community in encouraging changes or improvements in relation to specific rights.³

Three of the treaties are strengthened by an individual complaints procedure, namely the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention on the Elimination of All Forms of Racial Discrimination. States parties may ratify the first Optional Protocol to the International Covenant on Civil and Political Rights, make a declaration under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or make a declaration under article 14 of the Convention on the Elimination of All Forms of Racial Discrimination to recognize the competence of the respective treaty monitoring body to receive, examine and adopt views on

³ Details on the principal functions of the treaty monitoring bodies, including the reporting process, can be found in the next chapter on monitoring mechanisms.

complaints submitted by individuals under the jurisdiction of those states claiming that their rights under the treaties have been violated.⁴ While individuals submitting complaints do not need to be nationals of those states, it must be clear that the protection of the rights of the complainant, whether as a citizen, permanent resident, or other status, is the responsibility of those states.

Below are summaries of the main provisions of the instruments which comprise the international human rights treaty system, followed in each section by a brief discussion on the nature of the rights contained therein and their application in states parties.

— INTERNATIONAL COVENANT ON ECONOMIC, — SOCIAL AND CULTURAL RIGHTS

The International Covenant on Economic, Social and Cultural Rights is based on the premise that the right to live a dignified life can never be attained unless all the basic necessities of life are adequately and equitably accessible to everyone. The Covenant provides for: the right to work; the right to enjoy just and favourable conditions of work; the right to form and join trade unions; the right to social security; the right to protection and assistance for the family, mothers, children and younger persons; the right to an adequate standard of living, including food, clothing and housing; the right to health; the right to education; and the right to take part in cultural life. The Covenant affirms that all peoples have the right to self-determination and that by virtue of that right they may freely determine their political status and freely pursue their economic, social and cultural development. It also reaffirms the equal right of men and women to enjoy these rights. The Covenant gives concrete meaning to the concept of a dignified life by breaking down this concept into its basic components, namely, the ability and facilities necessary to meet one's material needs, to develop intellectually and spiritually, and to interact with one's community and participate in cultural life. Economic, social and cultural rights are distinguishable from economic goals in general by nature of their status as legally enforceable rights that are subject to judicial review.

Because it includes the fulfillment of material needs as a human right, the implementation of the Covenant may appear to rest on the wealth of a nation. By this logic, all poor countries, by reason of being poor, would be considered to be in violation of the Covenant. Fortunately, this is not the case.

⁴ Complaints may be sent to the Office of the High Commissioner for Human Rights in the United Nations Secretariat; see address in the first footnote in this chapter. Further information on the criteria for admissibility of complaints is contained in the following chapter.

The Covenant acknowledges the influence of resource constraints on the extent and pace of its implementation and allows for the progressive achievement of full realization of the rights contained in it. In addition, a state's obligation under the Covenant to satisfy its people's material needs does not require it to be the direct provider. Rather, as the chief regulator of the national economy, the state is often better able to play the role of facilitator than provider. For the lowest-income groups, it may be desirable for a state to combine these roles.

Each State Party to the present Covenant undertakes to take steps, individually and through technical assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

[International Covenant on Economic, Social and Cultural Rights, art. 21(1)]

With respect to housing, for instance, the Committee on Economic, Social and Cultural Rights, which monitors the implementation of the Covenant, has identified a number of implications of the right to adequate housing. For a house to be adequate, it must contain certain facilities essential for health, security, comfort and nutrition, including access to safe drinking water, energy for cooking, and sanitation and washing facilities. It must be habitable, permitting adequate space for the inhabitants and protecting them from cold, heat and wind. It must be affordable. Tenure must be legally secure in such a way that inhabitants enjoy legal guarantees against forced eviction and harassment.

Action by governments can begin with the enactment of legislation obliging all home construction to fulfil these requirements. As facilitators, governments may redirect trends in construction, from upscale homes to more affordable homes, by providing tax and other incentives for the construction of affordable homes. As providers of direct material assistance, governments may subsidize home purchases by members of the poorest groups by selling low-cost bonds that can be applied toward the purchase of homes, grant low-interest loans or provide common shelters for homeless persons.

The Covenant also addresses the issue of resource constraints by drawing attention to the importance of mobilizing international support. It requires states parties to take steps, individually and through international cooperation, to implement the Covenant to the maximum of their available resources. For a state party to attribute a failure to meet at least the minimum core obligations to a lack of resources, it must first demonstrate that every effort has been made to use all available national and international resources at its disposition. The implications of maximizing

available resources apply not only to recipient countries but to donor countries as well. Particularly in the areas of food supplies, science and culture, the Covenant requires states parties to ensure an equitable distribution of world food supplies in relation to need and to respect the freedom necessary for scientific research and creative activity.

Economic, social and cultural rights are distinguishable from economic goals in general by their status as legally enforceable rights that are subject to review. There are a number which would seem capable of immediate application by national legal systems. These would include the obligation to provide equal pay to women and men for work of equal value, the obligation to restrict the employment of children in harmful work and to make such acts punishable by law. Another such provision would be the non-discrimination provision, which requires that economic, social and cultural rights be exercised without discrimination as to a number of possible factors, including race, sex, religion, social origin or other status. It is a disturbing trend in some developing countries where food is in critically short supply that access to these basic necessities should be limited to certain privileged sectors of society. In the words of the Committee on Economic, Social and Cultural Rights, lack of resources cannot be considered reason for failure to give effect to the non-discrimination provision; on the contrary, it is particularly in times of economic difficulty that disadvantaged groups of society require special attention.

— INTERNATIONAL COVENANT — ON CIVIL AND POLITICAL RIGHTS —

The International Covenant on Civil and Political Rights addresses the traditional responsibilities of the state to administer justice and maintain rule of law. When a crime is committed, for example, a store is robbed, persons turn to the state to investigate, arrest the perpetrators and administer appropriate punishment. In discharging these responsibilities, states must ensure that human rights are respected, not only those of the victim but also those of the accused.

The specific provisions of the Covenant include:

- the right to be free from torture, slavery, forced labour and arbitrary arrest or detention;
- the right of all persons deprived of their liberty to be treated with humanity;
- the right to freedom from imprisonment on the grounds of inability to fulfil a contractual obligation;
- the right to freedom of movement and freedom to choose a residence;
- the right of all persons to equal protection of the law, to equality before the courts and tribunals and to guarantees in criminal and civil proceedings;

- the right of all persons to recognition everywhere as a person before the law and the right to be presumed innocent until proved guilty according to law;
- the right to privacy and freedom from unlawful attacks on one's honour and reputation;
- the right to freedom of thought, conscience and religion;
- the right to freedom of opinion and expression;
- the right to peaceful assembly; the right to freedom of association;
- the right of men and women of marriageable age to found a family and the equal rights and responsibilities of spouses as to marriage, during marriage and upon its dissolution;
- the rights of children;
- the rights of citizens to take part in the conduct of public affairs, to vote, to be elected, and to have equal access to public service.

Recognizing that in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights as well as his economic, social and cultural rights,...

[International Covenant on Civil and Political Rights, preamble]

The Covenant also requires states parties:

- to inform arrested persons of the reasons for arrest;
- to bring persons arrested on criminal charges promptly before a judge and to guarantee trial within a reasonable time or release them;
- to place restrictions on the expulsion of aliens lawfully within its territory;
- to prohibit retroactive criminal legislation;
- to prohibit by law, propaganda for war or advocacy of national, racial or religious hatred;
- to provide protection to ethnic, religious or linguistic minorities which may exist in its territory.

As with the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights affirms the right of all peoples to self-determination and the equal right of men and women to the enjoyment of the rights and freedoms contained within.

As evident in the above list of the key provisions, most of the rights address the relationship between individuals and the state. The Covenant obligates states to build

into that relationship the necessary conditions for a state to effectively administer justice. Such conditions would include the existence of an independent and impartial judiciary, the existence of fair procedures for dealing with persons accused of crimes, during detention and trial, and the presumption of innocence of accused persons until they are proven guilty. In addition, states must honour the human rights of all persons, including those who have been tried and found guilty. No one, for example, can ever lose his or her right to be treated humanely, to be free from torture or to be free from slavery, even if he or she has become a convicted felon.

It is important to note that the Covenant applies equally to private relationships between individuals. It is not sufficient for a government not to practice slavery to satisfy the right of its people to be free from slavery; states parties must make all forms of slavery illegal and prosecutable under the law. Whenever it is alleged that persons were held as slaves, the state should make efforts to fully investigate the allegation and to bring the perpetrator(s) to justice.

With regard to public emergencies, under article 4 of the Covenant, states parties may declare certain rights suspended but are obliged to notify the Secretary-General of the United Nations in writing of declarations of states of emergency and specify which provisions are being suspended. Certain provisions may not be suspended under any circumstances, including those concerning the right to life, freedom from torture and slavery and freedom from imprisonment for debt.

Implementation of the Covenant is monitored by the Human Rights Committee. States parties are required to submit reports to the Committee periodically on their efforts to give effect to all provisions of the Covenant. States parties that have also ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty are also required to submit information, in their periodic reports, on the steps they are taking to implement the Second Optional Protocol.

— **CONVENTION AGAINST TORTURE AND OTHER CRUEL,
INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT** —

In most societies, members of the police and military, other public servants and national security agencies exercise tremendous authority. They bring order during public riots, they investigate crimes and arrest criminals; they are the formal instruments of control over society. The most common method of control is deprivation of liberty. Depending on the circumstances or severity of the crime, detention is used to prevent accused persons from fleeing, to punish those convicted of crimes, or to compensate the victims. In wartime situations, collective detention of real or suspected “enemies of the state” is not uncommon. Unfortunately, detention often sets the stage not only for lawful punishment but also for criminal acts of torture.

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

[Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment, art. 2]

For these reasons, a specific treaty was developed to address torture and other forms of cruel, inhuman or degrading acts and practices committed by public servants. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment elaborates on articles 7 and 10 of the International Covenant on Civil and Political Rights, which deal with the right to be free from torture and treatment of persons deprived of their liberty. It entered into force in 1987 and is monitored by the Committee against Torture.

For most people, the best examples of affronts to human dignity are perhaps best captured in the terminology used in this Convention. The words ‘torture’ calls to mind images of specific acts where severe pain is inflicted, such as beatings, floggings, electrocution or maiming of the body. The relevance of the Convention in such cases is clear.

However, infliction of pain also takes place in ways that escape codification with any precision. Certain forms of treatment in some societies may constitute physical or psychological torture which elsewhere would not be considered in that light.

The Convention defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by a person acting in an official capacity, directly or indirectly, on a person in order to obtain information or confession, to punish or to intimidate. Questions about whether certain specific acts constitute torture can best be addressed with information about the level of trauma caused by those acts. According to the Convention, neither a state of public emergency, including war, nor an order from a superior is acceptable as justification for torture.

At the preventive level, the Convention requires states parties to:

- take legislative, administrative, judicial or other measures to prevent acts of torture;
- not to expel, return or extradite a person to another state where there are substantial grounds for believing that he/she would be tortured;

- to criminalize by law all acts of torture, attempts to commit torture and complicity in torture;
- to ensure that all persons who may be involved in the custody, interrogation or treatment of persons under detention, including civil or military police, medical personnel and public officials, are trained about the prohibition against torture and other cruel, inhuman or degrading treatment or punishment;
- to systematically review interrogation rules, methods and practices and arrangements for the custody and treatment of persons deprived of their liberty.

When torture is alleged, states parties are required:

- to take the alleged perpetrator into custody, if circumstances so warrant;
- to submit the case to the competent authorities for prosecution;
- to consider torture as an extraditable offence and to cooperate with other states parties on criminal proceedings, including supply of evidence;
- to outlaw the use of statements obtained under torture as evidence, except against the person accused of committing torture.

States parties must ensure that individuals who claim to have been subjected to such treatment have the right to complain to, and have their case promptly and impartially examined by, competent authorities. At the same time, fair treatment of alleged victims implies fair treatment of the accused; under the Convention, persons accused of committing torture must also be guaranteed fair treatment at all stages of proceedings.

The objectives of the Convention are thus two fold:

- to prevent acts of torture and other acts prohibited under the Convention;
- to ensure that effective remedy is available to victims when such acts occur.

With respect to prevention, states are required under the Convention to establish laws and regulations and to promote respect for human rights among its public servants to minimize the incidence of such acts. Incommunicado detention, while not expressly prohibited under the Convention, is strongly discouraged by the Committee and is, in fact, indirectly prevented by the requirement that all detained persons be promptly brought before a judge. This is also a feature of other general international standards on the administration of justice.

Despite these measures, there may arise incidents where individuals are, or claim to have been, tortured. Governments that are committed to eliminating torture must also be committed to providing effective remedy to alleged victims. This is evident from the speed with which governments address complaints of torture. In many cases, the most important evidence is physical marks on the body, which can fade or disappear in time, often within days. The existence of a functional system for the administration of justice is thus critically important for victims of torture. The

Convention requires that complaints of torture be promptly and impartially investigated *wherever* there is reasonable ground to believe that an act of torture may have been committed in any territory under its jurisdiction.

In the long run, the prohibition of torture must cease to be a conscious effort and instead become a part of normal routine. To help states parties reach this point, the Convention requires that education and information regarding the prohibition against torture be fully incorporated into the training of civil servants and others that may be involved in the custody, interrogation or treatment of persons in detention, including all civil and military law enforcement officials and medical personnel. The Committee often recommends that training be provided to lawyers and judges as well.

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

The phenomenon of racial discrimination was one of the principal concerns behind the establishment of the United Nations and one of its major focuses of attention. The International Convention on the Elimination of All Forms of Racial Discrimination, which entered into force in 1969, is the oldest of the United Nations human rights treaties and the establishment of an expert body to monitor it, the Committee on the Elimination of Racial Discrimination, set the precedent for the establishment of five more monitoring bodies under the principle treaties.

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

Reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of racial barriers is repugnant to the ideals of any human society,

[International Convention on the Elimination of All Forms of Racial Discrimination, preamble]

The Convention defines the term “racial discrimination” as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin with the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights in any field of public life, including political, economic, social or cultural life.

By ratifying the Convention, states parties agree to eliminate discrimination in the enjoyment of civil, political, economic, social and cultural rights and to provide effective remedies against any acts of racial discrimination thereof through national tribunals and state institutions. They agree to prohibit racial discrimination by law and other means, as appropriate, to review governmental, national and local policies with a view to amending or rescinding discriminatory laws or regulations. They agree: to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, acts of violence or incitement to violence, and support of racist activities, including financial; to declare illegal organizations and organized activities which promote and incite racial discrimination and to declare participation in them as an offence punishable by law. They also agree not to engage in acts or practices of racial discrimination and to ensure that all public authorities and institutions act accordingly. They further agree not to support racial discrimination by any persons or organizations.

It is notable that the concept of racial discrimination, as defined in the Convention, actually covers a much wider range of grounds on which discrimination can take place than that commonly referred to as race. For example, questions can arise under the Convention about discrimination based on religion, which in many parts of the world is closely related to race, descent, ethnicity or national origin.

Membership in a group defined by racial, ethnic or other characteristics listed in the Convention is determined by self-identification. There are no strict rules that can be applied universally. Second or third-generation descendants from some minority groups may, in some countries, be integrated into a society, socially, culturally and economically, in such a way that they identify with the majority rather than the minority. In other places, members of minority groups may never identify with the majority society.

It is interesting to note the status of the right to freedom of opinion and expression in international human rights law. According to the Convention and to general international human rights law, there exists no contradiction between freedom of expression and the prohibition of views that promote racial discrimination. While the Convention aims to eliminate racial discrimination in the enjoyment of all human rights, including this basic civil right, it asserts that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, and socially unjust and even dangerous. The Convention requires states not only to prohibit but to actively punish the expression of views which promote racial hatred or spread ideas

of racial superiority. This may be viewed within the context of the International Covenant on Civil and Political Rights, according to which the freedom to manifest one's beliefs may be subject only to such limitations as are necessary to protect, *inter alia*, public morals or the rights and freedoms of others.

— CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN —

The basic principle of equality of rights for women has been codified in the Convention on the Elimination of All Forms of Discrimination against Women, which entered into force in 1981. Despite the existence of international instruments which affirm the rights of women within the context of all human rights, a separate treaty was considered necessary to combat the continuing discrimination against women evident in all societies. In addition to addressing the major issues, the Convention also identifies a number of specific areas where discrimination against women has been notorious, including participation in public life, marriage, family life and employment. The Convention sets specific goals and measures for the attainment of equality in all of those areas.

By ratifying the Convention, states parties agree to undertake:

- to embody the principle of the equality of men and women in their national legislation;
- to adopt legislative and other measures, including sanctions where appropriate, prohibiting discrimination against women;
- to ensure through national tribunals and other public institutions the effective protection of women against discrimination;
- to refrain from engaging in any act or practice of discrimination against women;
- to take measures to eliminate discrimination against women in the private sphere;
- to modify or abolish existing laws and penal provisions, regulations, customs and practices which constitute discrimination against women;
- to take measures in all fields, particularly the political, social, economic and cultural fields, to guarantee women the enjoyment of human rights on a basis of equality with men.

It also requires states to take measures:

- to modify social and cultural patterns to eliminate prejudices and to promote understanding of maternity as a social function and recognition of the common responsibility of men and women in the care of their children;
- to suppress the trafficking and exploitation of women;

- to eliminate discrimination against women in the political and public life of the country, ensuring the right to vote and be elected and the right to perform public functions at all levels of government;
- to grant women equal rights with men to acquire, change or retain their nationality and the nationality of their children;
- to ensure equality in the field of education at all levels and eliminate in textbooks, school programmes and teaching methods any stereotyped concepts of gender roles;
- to ensure all aspects of the right to work, including freedom to choose their profession, equal remuneration for work of equal value and prohibition of discrimination on the grounds of pregnancy, maternity leave or marital status;
- to ensure equal access to health care and ensure appropriate services in connection with maternity;
- to eliminate discrimination in other areas of economic and social life, including family benefits and financial credit;
- to address the particular problems faced by rural women and to ensure the application of the Convention to them;
- to ensure equality of women before the law, including the right to conclude contracts and exercise freedom of movement;
- to ensure equality in family law.

States Parties shall take in all fields, particularly 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.

[Convention on the Elimination of All Forms of Discrimination against Women, art. 3]

The Convention aims to advance the status of women by a dual approach. First, it requires states parties to grant freedoms and rights to women on an equal basis as men, no longer constraining women to traditional women's roles. It calls upon states to remove social and cultural patterns, through education and other means, which perpetuate gender-role stereotypes in homes, schools and places of work.

It is based on the premise that, unless states take active steps to promote the advancement of women, they will not be able to enjoy fully the basic human rights guaranteed in the other human rights treaties. It

encourages states parties to make use of positive measures, including preferential treatment, to advance the status of women and their ability to participate in decision-making in all spheres of national life – economic, social, cultural, civil and political.

Secondly, the Convention requires states parties to re-evaluate the contributions of women's traditional roles, including their roles in the domestic sphere and their participation in the informal economy or in non-remunerated activities. The fact remains that much discrimination against women takes place in their own homes by their husbands, families and communities which often sadly fail to appreciate the work of women. This is due, at least in part, to the failure to quantify the value of their contributions to the economy, whether at the family, local or national level. At the family level, the Convention enumerates the elements which would translate the principle of equality in family law into reality. One key element is financial independence; women will not enjoy true equality with men in their private lives until they enjoy financial independence. To do so, the Convention provides that women be able, on equal terms as men, to have access to credit and to have the financial and legal capacity to own homes or start businesses, enjoy family benefits, and be recognized with respect to property rights and inheritance laws.

In the area of maternity care, the Convention recognizes that reproduction is a function unique to women and that special treatment is the only way to guarantee true equality in this case. Special treatment includes not only maternity care, but full enjoyment of reproductive and health rights, including access to information and to safe and affordable facilities and treatment. For couples and individuals, it also includes the freedom to decide the number, spacing and timing of their children, free from discrimination and coercion.

— THE CONVENTION ON THE — RIGHTS OF THE CHILD —

It has been said that respect for human rights begins with the way society treats its children. The world of children is, in fact, different in many respects than that of adults. Unfortunately, the reality of many children is that they must live in conditions that deny them proper nurturing and care for their special needs, even in stable and developed societies. The Convention on the Rights of the Child, which entered into force in 1990, addresses the special needs of children with the full force of international law, representing the most comprehensive statement of children's rights ever made. Today, the Convention is close to achieving nearly universal ratification, having been ratified, acceded or succeeded to by nearly all countries and entities with the recognized capacity to conclude international agreements.

The Convention defines children as persons below the age of 18 years, unless national laws recognize an earlier age of majority. It encompasses the entire range of human rights: civil, political, economic, social and cultural. It establishes or reinforces obligations to create a safe and healthy environment in which a child can develop his or her personality and intellectual, moral and spiritual capacities.

The Convention specifically recognizes the right of all children:

- to enjoy their rights without discrimination of any kind, irrespective of their race, sex, religion, economic or social origin or the status of their parents;
- to be registered from birth and to acquire a nationality;
- to preserve their identity, including nationality, name and family relations;
- to be heard in judicial and administrative proceedings affecting them;
- to freedom of expression, freedom of thought, conscience, religion;
- to freedom of association and peaceful assembly;
- to privacy;
- to freedom from torture.

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[Convention on the Rights of the Child, art. 3(1)]

With respect to the family environment and care, states must:

- respect the rights and responsibilities of parents and family to provide children with guidance appropriate to their evolving capacities;
- support the joint responsibilities of parents in raising their children;
- provide special protection for children deprived of or abused in their family environment, through such means as alternative family care, institutional placement or social

programmes for recovery and reintegration;

- permit family reunification across national borders for the maintenance of child-parent relationships;
- prevent and remedy kidnapping or retention of children abroad;
- provide education, free and compulsory at the primary level, and encourage access to higher education.

Children in special circumstances should also be protected, with a view toward their full (re)integration in society, especially refugee children, children in armed conflicts and children in conflict with the law. States parties must actively prevent and remedy exploitation of children that is harmful to their welfare, including economic or sexual exploitation and the sale, trafficking or abduction of children.

The basic guiding principle underlining the Convention is that all rights and obligations contained therein are to be fulfilled in the best interests of the child. This is particularly significant with regard to the role of parents and family, which the Convention recognizes to have primary responsibility for the care of their children.

It must be the guiding principle behind all measures affecting children, especially those that would remove them from their family environment, as might be necessary with abused children, and in cases of adoption, admittance into a corrective institution, or other transfers.

One of the most significant contributions of the Convention to the field of child rights is recognition of their right to be actors in their own development. Children have the right to express themselves in all matters affecting their lives and enjoy due consideration for their views, in accordance with their age and maturity, including in judicial or administrative proceedings. According to the Convention, children can claim recognition of their evolving capacities; with due respect for the rights and duties of parents to provide guidance, children have the right to freedom of thought, conscience and religion, freedom of expression, and freedom from undue interference in their privacy.

At the same time, children are, by definition, persons at an immature stage in development. The Convention therefore requires a system for the administration of justice specifically applicable to children. In contrast with the adult system, the emphasis of such a juvenile justice system would be less on justice, in terms of punishment, than on promoting reintegration into society and the child's sense of dignity and self-worth. The Convention requires that a variety of programmes be made available toward that end, including counseling, probation, foster care, vocational training and other alternatives to institutional care. They also have the right not to be subjected to the death penalty or to be confined to lifetime imprisonment for crimes committed as minors. States parties are further required to establish a minimum age below which children shall be presumed not to have the capacity to infringe penal law.

There are other children who have different needs than those of children living in normal circumstances, whether they were born in different situations or underwent traumatic experiences. The Convention specifically mentions disabled children, children who have been subjected to economic or sexual exploitation, children who have been abducted or sold, children that have fled or participated in war, and children in conflict with the law. States parties are obliged to address the needs of these groups of children, collectively referred to as “especially vulnerable groups”, through such means as material assistance, psychological or other treatment and education to facilitate both recovery from the trauma and reintegration in society.

**INTERNATIONAL CONVENTION ON THE PROTECTION
OF THE RIGHTS OF ALL MIGRANT WORKERS
AND MEMBERS OF THEIR FAMILIES**

Human history is a history of movement, intellectually, culturally and geographically. One product of these movements has been increasing mobility of persons. Some of them are fleeing from war, civil conflicts and persecution; most are motivated by lack of opportunity to earn enough to sustain themselves and their families in their home countries so seek gainful employment in countries where prospects appear better, at least from a distance. Today, regardless of their motivation, millions of people are living as migrant workers, as strangers to the states where they reside. Unfortunately, as aliens, they may be targets of suspicion or hostility and the inability to melt into society often places them among the least-favoured groups in the host state.

Ideally, migrant workers should have a basic understanding of the language, culture and legal, social and political structures of the states to which they are headed. They should be informed in advance of the wages and working conditions and general living conditions they can expect to find on arrival. However, the fact is that most migrant workers are uninformed and ill prepared to cope with life and work in a foreign country. Most are unaware of their basic human rights and freedoms and, particularly in the case of illegal migrants, easily become vulnerable to exploitation akin to slavery and forced labour.

State Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as sex, race, colour, language, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

[International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art. 7]

Concern for the rights and welfare of migrant workers led to the adoption in 1990 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and will enter into force when it is ratified by 20 states. It defines migrant workers as persons who were, are, or will be engaged in a remunerated activity in a state of which they are not nationals. Its main purpose is to reinforce the entitlement of migrant workers to enjoy their human rights throughout the migration process, including preparation for migration, transit, stay

and return to their state of origin or habitual residence. As the most comprehensive agreement on migrant workers to date and the most recent of the principal international human rights instruments, the Convention codifies the civil and political, as well as economic, social and cultural rights of all migrant workers, regardless of their legal status, reflecting and building upon the standards established or reinforced by the treaties that preceded it. The Convention also specifies are as where the activities of, or benefits due to, migrant workers may be curtailed in relation to nationals of the host state. In this regard, the Convention fills an important gap left by the International Covenant on Economic, Social and Cultural Rights, which permits developing countries, with due regard to human rights and their national economy, to determine to what extent they would protect the rights of non-nationals.

Among the economic, social and cultural rights protected by the Convention are the right of migrant workers to enjoy conditions of work equivalent to those extended to nationals of the host state in accordance with national law and practice. Such conditions include remuneration, compensation for overtime work, health benefits, holidays and conditions upon termination of employment. States parties to the Convention also recognize, on an equal basis with host nationals and without discrimination by reason of irregularity of stay or employment:

- the right to join, participate in the activities of and seek the aid of lawful trade unions or other associations;
- under certain conditions, the right to social security;
- the right to emergency health care;
- the right of children of migrant workers to a name, nationality and access to education.

According to the Convention, migrant workers and members of their families shall not be arbitrarily deprived of their property, whether owned individually or collectively; when assets are appropriated, migrant workers have the right to adequate compensation.

The Convention also establishes or reinforces the civil and political rights of all migrant workers, regardless of their legal status, including their rights:

- to be recognized as a person before the law;
- to be free from arbitrary arrest and detention;
- to fair and public hearings by a competent, independent and impartial tribunal, in a language understood by them and with legal assistance of their choosing, provided at no cost to them if they are unable pay;
- to have cases of expulsion examined and decided individually by competent authorities;
- to liberty and security of the person;

– to freedom of thought, conscience, religion and expression, subject only to restrictions as necessary to respect the rights of others, to protect national security or prevent advocacy of national, racial or religious hatred.

Migrant workers or members of their families who are detained in a host state or state of transit for violation of provisions relating to migration are to be held separately from convicted persons or persons awaiting trial. Juveniles in detention, whether due to violations of provisions relating to migration or on criminal charges, should be separated from adults.

The Convention reinforces the non-derogable rights of migrant workers, by reason of their humanity, including their right to life, to be free from slavery and servitude, and to be free from torture or other inhuman or degrading treatment or punishment. At the same time, the Convention reaffirms that migrant workers and members of their families are obliged to comply with the laws and regulations of the host state and state of transit and to respect the cultural identity of these societies. The Convention draws strict distinctions between non-documented workers and migrant workers in regular situations and makes clear that states parties are not required to regularize the situation of non-documented workers. On the contrary, the Convention aims to eliminate illegal or clandestine movements and employment of migrant workers in an irregular situation and calls upon states parties to collaborate in this respect.

In the case of regular workers, the Convention confers upon them certain rights and privileges to facilitate their remunerated activities, address the needs of family members and help prepare them for reintegration in their home countries and the right to transfer their earnings, particularly when necessary for the support of their families, from the host state. They have equal access as nationals of the host state to public work schemes intended to combat unemployment, equal unemployment benefits and, in cases when an employer is in breach of contract, equal right to address the case to the competent authorities of the host state. Regular migrant workers are protected from any expulsion aimed at depriving them or a member of their family of the rights guaranteed by residence or work permits. They also enjoy protection of the family as the fundamental group of society, especially through family reunification, as well as efforts to teach the mother tongue and culture to children of migrant workers.

APPLICATION OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES AT THE NATIONAL LEVEL

The treaties are an enumeration of human rights. While their importance is indisputable, clearly, the treaties in themselves are not enough; concrete steps must be taken to give meaning to their provisions. Guidance as to what some of those steps should be, can be found in the treaties themselves, in the general comments of the treaty monitoring bodies and the suggestions of treaty body members during their dialogue with states parties. Although the specific means of implementation may be determined by each state party, the steps taken to lay the foundation for implementation of the treaties generally share a number of common elements, as outlined below.

– The provisions of the treaty should be incorporated into national law, preferably directly rather than through implementing legislation. The treaty bodies encourage the treaties to be granted a position in national law at the level of the Constitution or just below in order to prevail in case of conflict with other legal provisions. It should also be possible to invoke the treaty in a court of law.

– Relevant legislation affected by the treaty should be reviewed to ensure that it is in conformity with the new standards. Laws and regulations which are not in conformity should be either amended or abolished.

– New legislation should be adopted where there is a need to define a new area of the law (such as torture or racial discrimination). The definition should conform with that contained in the treaty and any corresponding prohibited activities should be criminalized as required. In the case of a wide-ranging treaty such as the Convention on the Rights of the Child, there should be omnibus legislation enshrining the major points and principles contained in the Convention (such as the primacy of the best interests of the child and respect for the views of the child). A broad range of related concerns (such as adoption, institutionalized children, children deprived of their liberty, etc.) should be brought together under a single legislative authority in an effort to coordinate and rationalize law and policy into a consistent and integrated whole in conformity with the letter and spirit of the Convention.

– There must be a strategy for implementing the standards along with adequate budgetary allocations to realistically accomplish the task. There should be an adequate policy framework to apply the standards and concrete goals should be set to serve as benchmarks for measuring progress in implementation. The process may be significantly enhanced through international cooperation and assistance. In addition, the strategy may provide for the active involvement of non-governmental organizations and professional organizations with a view to strengthening national capacity to maintain and increase the pace of implementation.

– There should be a mechanism for monitoring implementation and it should be sufficiently independent. Target groups should be identified and their situation monitored regularly. Statistical indicators should be devised to measure progress in the application of new standards. Where appropriate, there should be an ombudsman-like office to receive complaints with sufficient authority to intervene as warranted.

– There should be legal and effective remedy to alleged victims of human rights violations. This requires that legal statutes be enacted identifying specific violations as punishable crimes and entitling victims to compensation. It also implicitly requires that there be an independent judiciary that can guarantee fair trials and that access to legal aid be made available to all victims of human rights abuses. A growing body of case law serves as an important indicator of progress in the actual application of human rights standards.

– It is essential that the new standards be widely disseminated among the general public, including the target group protected by the treaty. An active educational campaign should be undertaken, particularly among:

(a) those whom the treaty aims to protect, such as ethnic or other minorities, as in the case of the International Convention for the Elimination of All Forms of Racial Discrimination;

(b) those responsible for implementing the new standards, such as judges and social workers, as in the case of the Convention on the Rights of the Child;

(c) those whose work is most affected by those standards, such as law enforcement and prison officials as in the case of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Active involvement of non-governmental organizations, the media and professional organizations is often useful in undertaking such campaigns. The work of the monitoring bodies, national and international, may also be publicized in an effort to heighten public and professional awareness.

These measures should be reported to independent committees of international experts called treaty bodies.⁵ States parties are required under the principal treaties to report periodically to treaty bodies. Beginning long before the actual report is received and examined by a monitoring committee, reporting is often referred to as a process rather than a single event. If undertaken in a conscientious manner, reporting in itself can contribute significantly to the national application of treaty provisions, as pointed out by the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child, by:

⁵ As discussed in the next chapter of this manual.

- ensuring that a comprehensive review is undertaken of all relevant national legislation, and administrative rules, procedures and practices and measuring their conformity with the human rights treaty concerned;

- ensuring that the state party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which those rights are, or are not, being enjoyed;

- providing a basis on which progress in implementing the instrument may be evaluated in the future, especially through the identification of problem areas and the elaboration of implementation priorities, including specific goals;

- encouraging and facilitating popular participation and public scrutiny of government policies;

- facilitating an exchange of information at the international level aimed at developing a better understanding of the common problems faced by states and the measures which might be taken to overcome obstacles in the implementation of the human rights instruments.

As the implementation of the international human rights treaties is an ongoing process, so must the reporting process be an ongoing one. New forms of discrimination, new methods of torture and retraction of civil liberties can and have emerged throughout history. The treaties set absolute standards for the protection of the dignity of all humans, but the practical meaning of the treaties depends on all members of society – civil society as well as government – remaining vigilant.

Description of the Principal Bodies and Monitoring Mechanisms in the Field of Human Rights

Contributed by the Office of the High Commissioner for Human Rights

CHAPTER BASED BODIES

The General Assembly is the main deliberative, supervisory and reviewing organ of the United Nations. It is composed of 185 member states, each of which has one vote. Decisions on important questions, such as those on peace and security, admission of new members and budgetary matters, require a two-thirds majority. Decisions on other questions are reached by a simple majority.

Under the Charter, the functions and powers of the General Assembly include the following:

- to consider and make recommendations on the principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments;

- to discuss any question relating to international peace and security and, except where a dispute or situation is currently being discussed by the Security Council, to make recommendations on it;

- to discuss and make recommendations on any question within the scope of the Charter or affecting the powers and functions of any organ of the United Nations except where a dispute or situation is currently being discussed by the Security Council;

- to initiate studies and make recommendations to promote international political cooperation; the development and codification of international law; the realization of human rights and fundamental freedoms for all,¹ and international collaboration in economic, social, cultural, educational and health fields;

¹ Normally, items relating to human rights are referred to the Third Committee.

- to make recommendations for the peaceful settlement of any situation, regardless of origin, which might impair friendly relations among nations;
- to receive and consider reports from the Security Council and other United Nations organs;
- to consider and approve the United Nations' budget and to apportion the contributions among members;
- to elect the non-permanent members of the Security Council, the members of the Economic and Social Council and those members of the Trusteeship Council that are elected; to elect jointly, with the Security Council, the Judges of the International Court of Justice; and, on the recommendation of the Security Council, to appoint the Secretary-General.

The General Assembly's regular session begins each year on the third Tuesday of September and continues usually until mid-December. At the start of each regular session, the Assembly elects a new President, 21 Vice-Presidents and the Chairmen of the Assembly's seven main committees.² To ensure equitable geographical representation, the Presidency of the Assembly rotates each year among five groups of states: African, Asian, Eastern European, Latin American and Western European.

At the beginning of each regular session, the Assembly holds a general debate, in which member states express their views on a wide range of matters of international concern.

In addition to its regular sessions, the Assembly may meet in special session at the request of the Security Council, of a majority of members of the United Nations, or of one member, if the majority of members concur. Emergency special sessions may be called within 24 hours of a request by the Security Council on the vote of any nine members of the Council, or by the majority of the United Nations members, or by one member, if the majority of the members concur.

The work of the United Nations year-round derives largely from the decisions of the General Assembly, that is to say, the will of the majority of the members as expressed in resolutions adopted by the Assembly.

² The Main Committees of the General Assembly are the following: a) Political and Security Committee, including the regulations of armaments, First Committee; b) Special Political Committee; c) Economic and Financial Committee, Second Committee; d) Social, Humanitarian and Cultural Committee; Third Committee; e) Trusteeship Committee, including Non-Self-Governing Territories, Fourth Committee; f) Administrative and Budgetary Committee, Fifth Committee and g) Legal Committee, Sixth Committee.

The work is carried out:

- by committees and other bodies established by the Assembly to study and report on specific issues, such as disarmament, outer space, peace keeping, human rights including decolonization, apartheid and assistance to vulnerable groups of people;
- in international conferences called for by the Assembly;
- by the Secretariat of the United Nations.

Several committees or commissions have been established by resolution of the General Assembly, in particular the Special Committee on Decolonization (or the Committee of 24), the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories as well as the Committee on the Exercise of the Inalienable Rights of Palestinian People. The International Law Commission has also been established by a General Assembly resolution.

• **International Law Commission**

The International Law Commission, established by the General Assembly Resolution 174(II) of 21 November 1947, consists of 34 members nominated by states members of the United Nations and elected for 5 years. They sit in their personal capacity and have recognized competence in international law.

The Commission's mandate is the promotion of the progressive development of international law and its codification. Its work includes:

- the preparation of draft conventions on subjects which have not yet been regulated by international law or in which the law has not been sufficiently developed in the practice of states;
- the more precise formulation and systematization of rules of international law in fields where there has already been extensive state practice, precedent and doctrine.

Its method of work begins with the appointment of a Special Rapporteur for each topic and formulation of a plan of work. Governments are requested to provide relevant administrative, legislative and judicial decisions, which are studied by the Special Rapporteur. A provisional draft is prepared and approved by the Commission and submitted to the General Assembly and governments for their observations. The Special Rapporteur studies the replies received, together with any comments made in the General Assembly, and submits a further report. On the basis of that report, the Commission adopts a final draft, which it submits to the General Assembly with its recommendations regarding further action.

Over the years, the Commission has participated actively in the preparation of a number of international instruments in the field of human rights, including the Convention on the Prevention and Punishment of the Crime of Genocide, the Statute of the Office of the United Nations High Commissioner for Refugees, the Convention relating to the Status of Refugees, the Convention relating to the Status of Stateless Persons and the Declaration on Territorial Asylum.

Sessions of the Commission normally begin in May in Geneva and last about 12 weeks. The Commission reports annually to the General Assembly. Secretariat services of the Commission are provided by the Codification Division of the Office of Legal Affairs of the United Nations.

— ECONOMIC AND SOCIAL COUNCIL —

The Economic and Social Council (ECOSOC) was established by the Charter as the principal organ to coordinate the economic and social work of the United Nations and the specialized agencies. The Council has 54 members who serve for three years, 18 being elected each year to replace 18 members whose three-year terms have expired.

Voting in the Economic and Social Council is by simple majority; each member has one vote.

The functions and powers of the Economic and Social Council are:

- to serve as the central forum for the discussion of international economic and social issues of a global or inter-disciplinary nature and the formulation of policy recommendations addressed to member states and to the United Nations system as a whole;

- to make or initiate studies and reports and make recommendations on international economic, social, cultural, educational, health and related matters;

- to promote respect for, and observance of, human rights and fundamental freedoms for all;

- to call international conferences and prepare draft conventions for submission to the General Assembly on matters falling within its competence;

- to negotiate agreements with the specialized agencies defining their relationship with the United Nations;

- to coordinate the activities of the specialized agencies through consultations and recommendations to the General Assembly and members of the United Nations;

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- to perform services, approved by the Assembly, for members of the United Nations and, upon request, for the specialized agencies;
 - to consult with non-governmental organizations (NGOs) concerned with matters with which the Council deals.

The Economic and Social Council generally holds two month-long sessions each year, one in New York and the other in Geneva. The year-round work of the Council is carried out in its subsidiary bodies, commissions and committees, which meet at regular intervals and report back to the Council.

Under the Charter, the Economic and Social Council may consult with NGOs which are concerned with matters within the Council's competence. The Council recognizes that these organizations should have the opportunity to express their views and that they often possess special experience or technical knowledge of value to the Council in its work.

Over 900 NGOs have consultative status with the Council. They are classified into three categories:

- Category 1 Organizations concerned with most of the Council's activities;
- Category 2 Organizations with special competence in specific fields of activity of the Council;
- Category 3 Organizations on the roster making occasional contributions to the Council, its subsidiary organs or other United Nations bodies.

NGOs which have been given consultative status may send observers to public meetings of the Council and its subsidiary bodies and may submit written statements relevant to the Council's work. They may also consult with the United Nations Secretariat on matters of mutual concern.

- **Commission on Human Rights**

In 1947, when the Commission on Human Rights met for the first time, its sole function was to draft the Universal Declaration of Human Rights.

That task was accomplished within a year and the Declaration was adopted by the General Assembly on 10 December 1948. Since then 10 December is celebrated annually as 'human rights day'.

The Commission on Human Rights, a subsidiary of the Economic and Social Council, is one of its seven functional commissions.³ It was set up in “nuclear” form by Council Resolution 5(I) of 16 February 1946. It is composed of 53 member states of the United Nations.

The Commission on Human Rights submits proposals, recommendations and reports to the Council regarding:

- international declarations or conventions;
- the protection of minorities;
- the prevention of discrimination on grounds of race, sex, language or religion;
- any other matter concerning human rights.

The Commission also assists the Council in the coordination of activities concerning human rights in the United Nations system.

The Commission on Human Rights meets once a year in Geneva for a period of six weeks. The Commission considers, in public session, the question of violations of human rights and fundamental freedoms in various countries and territories as well as other human rights situations. Governments and NGOs, in consultative status with the Economic and Social Council, present information on violations. Often representatives of governments under review are present to provide clarifications or replies. If a particular situation is deemed sufficiently serious, the Commission may decide to order an investigation by an independent and objective expert or to appoint experts to assess, in cooperation with the government concerned, the assistance needed to help restore full enjoyment of human rights.

In the 1990s, the Commission has increasingly turned its attention to the need of states to be provided with advisory services and technical assistance to overcome obstacles to securing the enjoyment of human rights. At the same time, more emphasis has been put on the promotion of economic, social and cultural rights, including the right to development and the right to an adequate standard of living. Increased attention is also being given to the protection of the rights of vulnerable groups in society, including minorities and indigenous people. Protection of the rights of the child and the rights of women, including the eradication of violence against women and the attainment of equal rights for women, falls into this category.

³ The others are: the Statistical Commission, the Population Commission, the Commission for Social Development, the Commission on the Status of Women, the Commission on Narcotic Drugs and the Commission on Crime Prevention and Criminal Justice.

This new emphasis finds eloquent expression in the Vienna Declaration and Programme of Action, the final document of the World Conference on Human Rights held in Vienna in 1993, which highlights democracy and development as an integral part of human rights.

• **Sub-Commission on Prevention of Discrimination and Protection of Minorities**

The Sub-Commission on Prevention of Discrimination and Protection of Minorities is the main subsidiary body of the Commission on Human Rights. It was established by the Commission at its first session, in 1947, under the authority of the Economic and Social Council.

The Sub-Commission is composed of 26 experts acting in their personal capacity, elected by the Commission with due regard for equitable geographical representation. Half the members and their alternates are elected every two years, and each serves a term of four years.

The Sub-Commission holds an annual four-week session, in August, in Geneva. In addition to members and alternates, sessions are attended by observers from member states and non-members of the United Nations, and from UN bodies, specialized agencies, other inter-governmental organizations, national liberation movements and NGOs in consultative status. Studies prepared by members of the Sub-Commission can include such topics as harmful practices affecting the health of women and children, discrimination against people infected by HIV/AIDS, freedom of expression, the right to a fair trial, the human rights of detained juveniles, human rights and the environment, the rights of minorities and indigenous peoples, the question of impunity of violations of human rights and the right to adequate housing.

The Sub-Commission has three working groups which meet before each session to assist with certain tasks. The working groups include: the Working Group on Communication, the Working Group on Indigenous Populations and the Working Group on Contemporary Forms of Slavery. In addition, the Sub-Commission occasionally establishes working groups to meet during the session to focus on matters requiring special attention.

• **Commission on the Status of Women**

The Commission on the Status of Women is the principal technical body of the United Nations for the development of substantive policy guidance with regard to the advancement of women. It was established by the Economic and Social Council in its Resolution 11(II) of 21 June 1946.

The Commission is composed of the representatives of 45 United Nations member states, elected by the Council for four-year terms.

Its functions are, *inter alia*:

– to prepare recommendations and reports to the Council on promoting women's rights in political, economic, social and educational fields;

– to make recommendations to the Council on urgent problems requiring immediate attention in the field of women's rights, with the object of implementing the principle that men and women shall have equal rights and to develop proposals to give effect to such recommendations.

Normally, the Commission meets biennially for a session of three weeks in New York or Geneva. However, since 1980, regular sessions of the Commission are held on an annual basis in Vienna.

The Commission operates under the procedure of the functional commissions of the Economic and Social Council. Its sessions are attended not only by members and alternates, but also by observers for other member states of the United Nations, representatives of bodies of the United Nations system, intergovernmental organizations and NGOs.

Representatives of specialized agencies, including the Food and Agriculture Organization (FAO), the International Labour Organization (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Health Organization (WHO), play an active part in the Commission's deliberations. Each of these agencies submits to the Commission, at each session, a report on its activities of special interest to women, as does the Inter-American Commission of Women.

TREATY-MONITORING BODIES

Whereas the General Assembly, the Economic and Social Council and their subsidiary bodies devote varying amounts of time and attention to supervising the application of human rights standards set out in international declarations, conventions and recommendations, a number of specialized bodies have been established solely to monitor the implementation of particular covenants and conventions by states which have ratified or acceded to them.

— HUMAN RIGHTS COMMITTEE —

The Human Rights Committee, established in accordance with article 28 of the International Covenant on Civil and Political Rights (General Assembly Resolution 2200 (XXI) of 16 December 1966) is composed of 18 members, acting in their personal capacity, who are nominated and elected by states parties to the Covenant for a term of four years.

Its functions are:

- to monitor the Covenant by examining initial and periodic reports submitted by the states parties;
- to receive individual communications concerning violations of the Covenant by states parties having adhered to the Optional Protocol to the Covenant.

The Committee holds three sessions per year, each of three weeks duration, one in New York and two in Geneva. It reports annually to the General Assembly, through the Economic and Social Council, on its activities. Secretariat services are provided by the United Nations High Commissioner/Centre for Human Rights in Geneva.

• **Reporting Procedure**

Article 40 of the Covenant requires states parties to submit initial reports to the Committee within one year of the Covenant coming into effect for the states concerned and thereafter whenever the Committee so requests. Other than initial reports, periodic reports are submitted every five years.

Initial reports must indicate, *inter alia*:

- measures adopted to give effect to rights in the Covenant and on the progress made in the enjoyment of these rights;
- the factors and difficulties, if any, affecting the implementation of the Covenant;
- the constitutional and legal situation in the country;
- the manner in which human rights knowledge, together with information about the workings of the Covenant, is promoted at every level of society within the state.

Periodic reports must also include, *inter alia*:

- detailed and specific information regarding changes and developments that have occurred since the consideration or submission of the previous report;
- information on action taken in conformity with comments adopted by the Committee.

The Committee regularly establishes a pre-sessional working group, composed of four members of the Committee, to assist it in the drafting of issues to be considered in connection with state reports and in the preparation of general comments. The list of issues has to be sent in advance to the reporting state.

The consideration of the report by the Committee takes place over two or three meetings held in public. The report is usually introduced by a government representative who may take the opportunity to state government policy on a range of issues and to update material in the report. Then, the representative proceeds to answer both written and oral questions raised by members of the Committee. Following consideration in public meetings, the Committee adopts, in a closed meeting its “Comments”, noting positive factors, drawing attention to matters of concern, and making suggestions and recommendations to the state party. Comments are issued as public documents at the end of each session of the Committee and included in the annual report to the General Assembly.

At the end of each session, a list of reports to be considered at the following session is made available. Once NGOs become aware that a state’s report has been received by the Committee, they should indicate their interest to the Secretariat and send material and written submissions with the request, for transmission to the members of the pre-sessional working group and the Committee in general. Meetings can take place on an individual basis or in the form of an informal group meeting with all or a significant number of the members together. NGOs are also entitled to attend the public Committee meetings, without participating in the discussion or the deliberations.

- **Individual Communications Procedure**

Under the Optional Protocol to the International Covenant on Civil and Political Rights, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit written communications to the Committee for consideration. No communication can be received by the Committee if it concerns a state party to the Covenant which is not also a party to the Optional Protocol. The Committee considers communications in the light of all written information made available to it by the individual and by the state party concerned and issues its ‘Views’ accordingly.

All steps of the procedure are confidential until the Views are adopted and reported in the Committee’s annual report together with a summary of the information made available to the Committee.

— COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS —

The Committee on Economic, Social and Cultural Rights was established by Economic and Social Council Resolution 1985/17 with a view to assisting the Council fulfil its responsibilities under the International Covenant on Economic, Social and Cultural Rights, which entered into force on 3 January 1976. It is composed of 18 experts, acting in their personal capacity who are nominated by states parties to the Covenant and elected by the Council for a term of four years.

Its functions are:

- to monitor the Covenant by examining periodic reports submitted by the states parties;
- to make recommendations to the Council.

The Committee meets twice a year, in May and November, for three weeks each. A pre-sessional working group composed of five members meets twice a year for one week immediately following the previous Committee session. Secretariat services are provided by the United Nations High Commissioner/Centre for Human Rights.

• **Reporting Procedure**

Under article 16 of the Covenant, states parties must submit reports to ECOSOC on measures they have adopted which give effect to the rights recognized in the Covenant and on the progress made in the enjoyment of those rights.

A state party must submit its first report within two years after it has ratified or acceded to the Covenant; subsequent reports must be submitted at least every five years or whenever the Committee so requests.

Reports must indicate, *inter alia*:

- factors and difficulties affecting the degree of fulfilment of the obligations;
- detailed description of steps taken to comply with individual articles.

Reports submitted are examined by the Committee in public meetings. The Committee seeks to determine, through constructive dialogue with representatives of the state party whose report is under consideration, whether the norms contained in the Covenant are being adequately applied and how the state might improve the implementation of the Covenant so that the rights enshrined in the Covenant can be fully enjoyed in its territory. On the final day of the session, the Committee adopts “Concluding Observations” summarizing its main concerns and making appropriate suggestions and recommendations to the state party.

While only members of the Committee and representatives of the relevant state party may participate in the dialogue, NGOs may present their concerns to the members of the Committee during the pre-sessional working group regarding states whose reports are due to be considered at the forthcoming session.

Concluding Observations are issued as public documents at the end of each session of the Committee and are included in the annual report of the Committee to ECOSOC.

The Secretariat has been asked by the Committee to compile lists of relevant NGOs active within states with a view towards soliciting their submissions when state reports are to be considered.

In any case, once NGOs become aware that a state's report has been received by the Committee, they should indicate their interest to the Secretariat and send material and written submissions for transmission to the members of the pre-sessional working group and the Committee in general. Meetings can take place on an individual basis or in the form of an informal group meeting with all or a significant number of the members together. NGOs are entitled to attend the public Committee meetings, but cannot participate in the discussions or deliberations.

- **Individual Communications Procedure**

In 1996, the Committee on Economic, Social and Cultural Rights, at its 15th session in Geneva, concluded consideration of a draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The draft Optional Protocol grants individuals or groups the right to submit communications (complaints) concerning non-compliance with the Covenant. The Optional Protocol was recommended by the Vienna Declaration and Programme of Action of the World Conference on Human Rights.

The report of the Committee on the subject was submitted for consideration by the Commission on Human Rights at its 53rd session held in Geneva, on 17 March – 25 April 1997.

- **Days of General Discussion**

The Committee usually devotes one day of its regular sessions to a general discussion on specific issues such as human rights education, the rights of elderly persons, the right to health and the right to housing. The discussion, in which representatives of international organizations and NGOs participate, is normally announced in advance. The relevant decisions of the Committee can be found in its annual report. All interested parties, including NGOs are invited to make written contributions.

— COMMITTEE AGAINST TORTURE —

The Committee against Torture was established in accordance with article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly Resolution 39/46 of 10 December 1984). It is composed of 10 members, acting in their personal capacity, who are nominated and elected by states parties to the Convention for a term of four years.

Its functions are:

- to monitor the Convention by examining initial and periodic reports submitted by the states parties;
- to receive individual communications concerning violations of the Convention by states parties which have accepted the optional procedure under article 22 of the Convention;
- to conduct inquiries on alleged systematic practice of torture in states which have accepted the procedure of article 20 of the Convention.

The Committee meets in Geneva twice each year in November and April-May for two weeks. It reports annually on its activities to the states parties of the Convention and to the General Assembly. Secretariat services are provided by the United Nations High Commissioner/Centre for Human Rights.

• **Reporting Procedure**

Under article 19 of the Convention, states parties are required to submit reports to the Committee on the measures taken to implement provisions under the Convention.

A state party must submit its first report within one year after it has ratified or acceded to the Convention; thereafter periodic reports must be submitted at least every four years or whenever the Committee so requests.

Initial report must indicate, *inter alia*:

- the general legal framework to prohibit and eliminate torture and cruel, inhuman or degrading treatment;
- national or internationally binding obligations on the state to provide greater protection than afforded by the Convention;
- national redress procedures for victims of violations of the Convention. The state is requested to provide information on cases dealt with by those authorities during the reporting period;
- the legislative, judicial, administrative or other measures in force which give effect to the relevant provisions of the Convention;

- any factors and difficulties affecting the practical implementation of the provisions of the Convention;
- statistical data on cases where measures giving effect to the respective provisions of the Convention have been enforced.

Periodic reports must also include, *inter alia*:

- legal and other measures adopted since the previous report to implement the Convention;
- new case law relevant to implementation of the Convention together with details of complaints and all other relevant proceedings and their outcome;
- difficulties impeding the implementation of the Convention.

Each report receives the attention of members designated as Country Rapporteurs and alternate Country Rapporteurs. The Rapporteurs are expected to undertake a detailed analysis of the report before its consideration by the Committee and to both identify key issues and prepare questions and comments to be put to the representatives of the government. Country Rapporteurs base their analysis on the report itself and also on reports of the United Nations Commission on Human Rights Special Rapporteur on Torture and submissions from NGOs.

The report is considered by the Committee in a public session. It is introduced by representatives of the state party who are expected to provide further information or elaborate on aspects of the report. The Country Rapporteur and the alternate present an exhaustive analysis of the report and Committee members then ask questions relating to specific articles of the Convention. At the end of deliberations, which usually extend over two consecutive three-hour meetings, the Committee adopts its “Conclusions and Recommendations” which may indicate whether it appears that some of the obligations of the state party under the Convention have not been implemented. The Committee’s Conclusions and Recommendations are transmitted to the state party.

The Committee may invite specialized agencies, appropriate United Nations bodies, regional intergovernmental organizations and NGOs in consultative status with the Economic and Social Council to submit information, documentation and written statements, as appropriate, relevant to the Committee’s activities under the Convention.

Notwithstanding the rule providing for submissions by NGOs at the initiative of the Committee, it is an established practice that NGOs send written submissions which are transmitted to the members of Committee and used during the discussion with the states parties. Meetings can also take place on an individual basis or in the form of an informal group meeting with all or a significant number of the members. NGOs are also entitled to attend the public Committee meetings, but cannot participate in the discussion or deliberations.

• Investigation Procedure

The procedure set out in article 20 of the Convention is confidential. The Committee is empowered to receive information and to institute inquiries concerning allegations of the systematic practice of torture.⁴ If it appears to the Committee that the information received is reliable and contains well-founded indications that torture is being systematically practised in the territory of the state party to the Convention, the Committee invites that state to cooperate in its examination of the information and to submit observations with regard to that information. It may also decide additional information is required either from the representatives of the state concerned or from governmental and non-governmental organizations as well individuals.

If the Committee considers that the information gathered warrants further examination, it may designate one or more of its members to make a confidential inquiry. In that case, it invites the state party concerned to cooperate in the inquiry. Accordingly, the Committee may request the state party to designate a representative to meet with the members of the Committee in order to provide any information considered necessary. The inquiry may also include, with the agreement of the state, a visit to the alleged site.

After examining the findings of the inquiry, the Committee transmits them, together with its comments and recommendations to the state party, inviting it to indicate action which it intends to take in response. Finally, after consultation with the state, the Committee may decide to publish a summary of the proceedings in its annual report.

• Individual Communications Procedure

A communication may be submitted, directly or through representatives under certain conditions, by individuals who claim to be victims of torture by a state which has accepted the competence of the Committee under article 22.

The function of the Committee is:

- to gather all necessary information, primarily by means of written exchanges with the parties (the state and the complainant);
- to consider the admissibility and merits of complaints;
- to issue its ‘Views’ accordingly.

⁴ The competence conferred upon the Committee is optional, which means that at the time of ratifying or acceding to the Convention, a State may declare that it does not recognize it and make reservation.

— **COMMITTEE ON THE ELIMINATION OF** —
DISCRIMINATION AGAINST WOMEN

The Committee on the Elimination of Discrimination against Women was established in accordance with article 17 of the International Convention on the Elimination of All Forms of Discrimination against Women (General Assembly Resolution 34/180 of 18 December 1979). The Committee is composed of 23 experts, acting in their personal capacity, who are nominated and elected by the states parties to the Convention for a term of four years.

Its function is:

– to monitor the Convention by examining initial and periodic reports submitted by states parties in close cooperation with UN specialized agencies, UN organs and bodies and also NGOs. The Committee reports annually to the General Assembly through the Economic and Social Council and the Council transmits these reports to the Commission on the Status of Women, for information.

The Committee meets for two weeks in January each year, in New York. Secretariat services are provided by the United Nations Division for the Advancement of Women.

• **Reporting Procedure**

Under article 18 of the Convention, states parties are required to submit reports to the Committee on legislative, judicial and other measures taken in accordance with the provisions of the Convention.

A state party must submit its first report within one year after it has ratified or acceded to the Convention; subsequent reports must be submitted at least every four years or whenever the Committee so requests.

Initial reports must indicate, *inter alia*:

– the country's political, legal and social framework and general measures used to implement the Convention;

– a detailed description of steps taken to comply with individual articles;

– any restrictions or limitations, even of a temporary nature, imposed by law, practice or tradition, or in any other manner, on the enjoyment of each right;

– the situation of non-governmental organizations and other women's associations and their participation in the elaboration and implementation of plans and programmes of the public authorities.

Periodic reports must also include, *inter alia*:

- legal and other measures adopted since the previous report to implement the Convention;
- actual progress made to promote and ensure the elimination of discrimination against women;
- any significant changes in the status and equality of women with men in the political, social, economic and cultural life of the country;
- matters raised by the Committee which could not be dealt with when the previous report was considered.

To consider adequately states parties' reports, the Committee established a pre-sessional working group for consideration of second and subsequent periodic reports. The pre-sessional working group is composed of five members of the Committee and its mandate is to prepare a list of issues and questions to be sent in advance to the reporting state. This enables reporting states to prepare replies for presentation at the session and thus contributes to a speedier consideration of second and subsequent reports.

In addition to the pre-sessional working group, the Committee has established two standing working groups which meet during the regular session of the Committee. The working groups consider ways and means of expanding the work of the Committee and of implementing article 21 of the Convention. Article 21 gives the Committee power to issue suggestions and recommendations on implementation of the Convention.

The actual consideration of the report by the Committee takes place over one to three meetings held in public. State representatives are given the opportunity to orally introduce the report to the Committee. Committee members then ask questions relating to specific articles of the Convention. They focus on the actual position of women in society in an effort to understand the true extent of the problem of discrimination. The Committee will accordingly request specific statistical information on the position of women in society, not only from the government but also from NGOs and independent agencies.

Following consideration of the report in public meetings, the Committee proceeds to draft and adopt, in private session, its 'Comments.' The Comments should cover the most important points raised during the dialogue between the members of the Committee and the reporting representative, emphasizing both positive aspects of the report and matters of concern. They also should indicate what the Committee wished the state party to detail in its next report. Comments enter the public domain

once adopted. They are immediately sent to the state party and included in the annual report to the Economic and Social Council and the General Assembly. The report is also submitted to the Commission on the Status of Women.

The reporting process is a difficult one and the preparation of reports can be a time-consuming and complex task. The process of collecting information can be facilitated by ensuring collaboration between the reporting agency, government departments and NGOs from which information can be obtained. One NGO, the International Women's Rights Action Watch (IWRAP) prepares, *inter alia*, independent country analyses on states whose reports are scheduled for consideration by the Committee. Information provided by IWRAP, contributions of local, national and regional NGOs are included in the analysis.

• **Individual Communication Procedure**

The possibility of introducing the right of petition through the preparation of an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women was recommended in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993. As part of the follow-up to the Conference, the Committee and the Commission on the Status of Women are studying the possibility of an optional protocol. Such a protocol would permit individuals under the jurisdiction of states parties accepting the protocol, to lodge complaints with the Committee alleging violation of their rights as set out in the Convention. It might also permit the lodging of complaints between states.

In the meantime, women may draw international attention to cases of discrimination through the Commission on the Status of Women and also through the individual complaints procedure monitored by the Human Rights Committee.

— **COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION** —

The Committee on the Elimination of Racial Discrimination was established in accordance with article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination (General Assembly Resolution 2106 A (XX) of 21 December 1965). The Committee is composed of 18 experts, acting in their personal capacity, who are nominated and elected by states parties to the Convention for a term of four years.

Its functions are:

– to monitor the Convention by examining periodic reports submitted by states parties;

– to examine individual communications concerning violations of the Convention by states parties which have accepted the optional procedure under article 14 of the Convention.

The Committee meets twice a year in Geneva for three weeks. Secretariat services are provided by the United Nations High Commissioner/Centre for Human Rights.

• **Reporting Procedure**

Under article 9 of the Convention, states parties are required to submit reports to the Committee on legislative, judicial, administrative and other measures taken in accordance with the provisions of the Convention.

A state party must submit its first report within one year from the entry into force of the Convention and thereafter every two years. The Committee may request a report from a state party at any time. Such a request normally falls within the Committee's early-warning measures and urgent procedures which are used to try to prevent massive violations of human rights before they occur.

Reports must indicate, *inter alia*:

- information on a very wide range of government activities;
- steps taken to eliminate racial discrimination;
- the actual situation within the state even with regard to issues and circumstances which may appear to be beyond the appropriate or normal purview of governmental interference;
- detailed information concerning the racial and ethnic configuration of society.

Each report receives the attention of a member designated as Country Rapporteur. He undertakes a detailed analysis of the report in preparation for consideration by the Committee and prepares a list of issues and comments to be put to the representatives of the government.

The report is considered by the Committee in public session. Representatives of the country concerned may introduce the report, answer questions from the experts and comment on the observations they make. The discussion between the Committee and the representatives of the reporting state ends with the concluding remarks of the Country Rapporteur and the members. The Committee then adopts its 'Concluding Observations' in meetings open to the public. The Committee reports annually to the General Assembly.

Once a state report has been scheduled for consideration, NGOs may send material for transmission to the Country Rapporteur and other members. Meetings

can take place on an individual basis or in the form of an informal group meeting with all or a significant number of the members. NGOs are also entitled to attend the public Committee meetings, but cannot participate in the discussions or deliberations.

• **State-to-State Complaints**

All states parties to the Convention recognize the competence of the Committee to receive and act on a complaint by a state that another state is not respecting provisions of the Convention. However, this procedure does not replace other procedures available to the parties concerned. So far, no state party has activated the procedure.

• **Individual Communications Procedure**

The procedure concerning communications from individuals or groups claiming to be victims of violations of the Convention came into operation in 1982. Where a state party has accepted the competence of the Committee under article 14 of the Convention, the Committee brings such communications confidentially to the attention of the state party concerned but does not reveal the identity of the individual or group claiming a violation.

The function of the Committee is:

- to gather all necessary information, primarily by means of written exchanges with the parties (the state and the complainant);
- to consider the admissibility and merits of complaints;
- to issue its ‘Opinion’ accordingly.

— **COMMITTEE ON THE RIGHTS** —
OF THE CHILD

The Committee on the Rights of the Child, was established in accordance with article 43 of the Convention of the Rights of the Child (General Assembly Resolution 44/25 of 20 November 1989). It is composed of 10 members, acting in their personal capacity, who are nominated and elected by states parties to the Convention for a term of four years. An amendment to article 43 of the Convention approved by a Conference of states parties and endorsed by the General Assembly in December 1995 provides for an increase in the membership from 10 to 18 members. The amendment will enter into force when accepted by two thirds of the states parties to the Convention.

Its function is:

- to monitor the Convention by examining periodic reports submitted by states parties in close cooperation with UNICEF, specialized agencies and other competent UN organs and bodies.

The Committee meets in Geneva three times a year. A pre-sessional working group of the whole Committee meets for one week immediately after the preceding session. Secretariat services are provided by the United Nations High Commissioner/Centre for Human Rights.

• Reporting Procedure

Under article 44 of the Convention, states parties are required to submit reports to the Committee two years after the Convention comes into effect for the state, and thereafter every five years, on measures taken to give effect to the rights in the Convention and on the progress made in the enjoyment of children's rights.

Initial reports on the implementation of the Convention must provide information with respect to the period covered by the report on:

- measures adopted by the state party, including the conclusion of and accession to bilateral and multilateral agreements in the field of children's rights, and changes which have occurred in legislation and practice at the national, regional and local levels, and, where appropriate, at the federal and provincial levels;
- the progress achieved in the enjoyment of children's rights;
- the factors and difficulties encountered in the full implementation of the rights in the Convention and on the steps taken to overcome them;
- any plans envisaged to improve and further the realization of the rights of the child.

Periodic reports must also include, *inter alia*:

- action taken to implement the Concluding Observations adopted by the Committee on the examination of the respective states' initial reports;
- steps taken to widely disseminate the previous report, as well as the Concluding Observations adopted by the Committee.

The pre-sessional working group, composed of all members of the Committee, meets in closed meetings at the end of each session. It considers reports scheduled for the next session. Its mandate is to identify areas in the reports which require clarification or raise concerns and prepare a list of issues for transmission to the states parties. States should provide written replies to be considered together with the report. To assist it in its task, the working group invites competent organizations to take part in the Committee's discussions and to submit their views. The organizations include specialized agencies and organs of the United Nations such as the ILO, WHO, UNESCO, UNICEF and UNHCR.

Consideration of the report by the Committee takes place over two or three meetings held in public. The report is usually introduced by a government

representative who may take the opportunity to refer to his or her government's policy on a range of issues concerning children and to update material in the report. Then, the representative answers both written and oral questions raised by members of the Committee. Following consideration of the report in public meetings, the Committee adopts in closed meeting its 'Concluding Observations' noting positive factors, drawing attention to matters of concern, and making suggestions and recommendations to the state party. Concluding Observations frequently include recommendations to states parties of technical cooperation programmes and assistance in implementation of the Convention. Such recommendations are transmitted to the relevant specialized agencies of the United Nations, such as the High Commissioner/Centre for Human Rights, UNICEF as well as other competent bodies. Concluding Observations are issued as public documents at the end of each session of the Committee and included in its biennial report to the General Assembly.

The role of non-governmental sources of information in the work of the Committee is highlighted in the Convention itself. The Committee has made considerable use of these provisions and has accorded an important role in its activities for national and international NGOs and other appropriate sources of information. An important initiative, taken by a number of NGOs which had been involved in the drafting of the Convention, has been the establishment of the NGO Group for the Convention on the Rights of the Child. This body, which has a full-time coordinator based in Geneva, both facilitates flows of information to and from the Committee, and forges national and regional alliances of children's NGOs in order to render more effective their contributions to the work of the Committee.

At the end of each session, a list of reports to be considered at the following session is made available. NGOs have the opportunity to send written submissions which are transmitted to the members of the pre-session working group and the Committee in general. Also, meetings can take place on an individual basis or in the form of an informal group meeting with all or several members. NGOs are also entitled to attend the public Committee meetings, but are not able to participate in the discussions or deliberations.

- **Days of General Discussion**

The Committee devotes one or more meetings of its regular sessions to a general discussion on one specific article of the Convention or on specific issues such as the situation of the girl child, the requirements for an appropriate system of juvenile justice, the economic exploitation of children and children and the media. Representatives of international organizations and NGOs participate in the Committee discussion which is normally announced in the report of the session immediately preceding that in which the discussion takes place. All interested parties, including NGOs, are invited to make written contributions.

NON-CONVENTIONAL MONITORING MECHANISMS

The Commission on Human Rights and the Economic and Social Council have established a number of extra-conventional procedures and mechanisms which have been entrusted either to working groups composed of experts acting in their individual capacity or to individuals designated as Special Rapporteurs, representatives or independent experts.

— MANDATE —

The mandates provided for by non-conventional procedures and mechanisms are either to examine, monitor and publicly report on human rights situations in specific countries or territories (known as country mechanisms or mandates) or on major phenomena of human rights violations world wide (known as thematic mechanisms or mandates).

— SPECIAL PROCEDURES OF THE COMMISSION ON HUMAN RIGHTS —

These procedures and mechanisms are collectively referred to as Special Procedures of the Commission on Human Rights. It should be noted that with regard to certain country situations and related thematic issues, the Secretary-General has directly been entrusted with similar monitoring and reporting responsibilities (known as country and thematic mandates entrusted to the Secretary-General). Currently there are 49 (27 country and 22 thematic) mandates, including 18 (10 country and 8 thematic) mandates entrusted to the Secretary-General.

The system of Special Procedures holds a prominent place on the frontline of the international monitoring of universal human rights standards and addresses many of the most serious human rights violations. The increase and the evolution of procedures and mechanisms in this area clearly constitute and function as a system of human rights protection, which was fully recognized by the Vienna World Conference on Human Rights in its Programme of Action.

All Special Procedures have the central objective of making international human rights norms more operative. Using constructive dialogue and cooperation with governments, they examine concrete situations, incidents and individual cases and investigate in an objective manner with a view to understanding the situation and recommending to governments, solutions to solve the problems and secure respect for

human rights. Urgent action procedures are resorted to on a regular basis when there is still a hope of preventing, in particular, possible violations to the rights to life, physical and mental integrity and security of person.

— **LIST OF NON-CONVENTIONAL
MONITORING MECHANISMS** —

Representative of the Secretary-General on Internally displaced persons;

Expert Member of the Working Group on Enforced or Involuntary Disappearances in the territory of the former Yugoslavia;

Special Rapporteurs on:

- Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights;
- Contemporary forms of racism, racial discrimination, xenophobia and related intolerance;
- Extrajudicial, summary or arbitrary executions;
- Independence of judges and lawyers;
- Promotion and protection of the right to freedom of opinion and expression;
- Religious intolerance;
- Sale of children, child prostitution and child pornography;
- Torture;
- Use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination;
- Violence against women, its causes and consequences.

Working Groups on:

- Arbitrary Detention;
- Enforced or Involuntary Disappearances.

Thematic Mandates entrusted to the Secretary-General on:

- Cooperation with representatives of United Nations human rights bodies (reprisals);
- Forensic science (human rights and);
- Mass exoduses (human rights and);
- Protection and promotion of fundamental human rights and freedoms in the context of HIV/AIDS;
- Question of enforced disappearances;

- Rape and abuse of women in the areas of armed conflict in the former Yugoslavia, particularly in the Republic of Bosnia and Herzegovina;
- Terrorism (human rights and);
- Thematic procedures (human rights and).

Special Representative of the Secretary-General on the situation of human rights in Cambodia;

Independent Experts appointed by the Secretary-General on:

- Guatemala (assistance in the field of human rights);
- Haiti (the situation of human rights in);
- Somalia (assistance in the field of human rights).

Special Representative of the Commission on Human Rights on the situation of human rights in Iran (the Islamic Republic of);

Special Committee to Investigate Israeli Practices affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories;

Special Rapporteurs on the situation of human rights in:

- Afghanistan
- Burundi
- Cuba
- Equatorial Guinea
- Iraq
- Myanmar
- Occupied Palestine, since 1967 and until now
- Republic of Bosnia and Herzegovina, the State of Bosnia and Herzegovina
- the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)
- Rwanda
- Sudan
- Zaire

Country Mandates entrusted to the Secretary-General on:

- Bougainville (human rights violations on the Papua New Guinea island of);
- Chechnya of the Russian Federation (the situation of human rights in);
- Cyprus (the question of human rights in);
- East Timor (situation of human rights);
- Estonia and Latvia (situation of human rights);
- Kosovo (the situation of human rights in);

- Occupied Arab territories, including Palestine (the question of the violation of human rights in);
- Occupied Palestine (situation in);
- Occupied Syrian Golan (human rights in);
- Southern Lebanon and West Bekaa (human rights situation in).

The Council of Europe: European Regional Standards and Mechanisms

*Contributed by the Human Rights Awareness Unit, Directorate of Human Rights,
Council of Europe*

THE COUNCIL OF EUROPE: FUNCTIONS AND STRUCTURE

The Council of Europe, headquartered in Strasbourg, France, was founded in 1949 as an organization for cooperation between the governments and parliaments of Europe. As of October 1997, it has forty member states.¹ Its aim is to achieve greater unity between its members in order to facilitate their economic and social progress and to safeguard the ideals and principles which are their common heritage (article 1 of the Statute). These central principles are:

- pluralist democracy;
- respect for human rights;
- the rule of law.

All the member states must embrace these principles and undertake to ensure, for all persons within their jurisdiction, the enjoyment of human rights and fundamental freedoms.

Of the 12 member states of the Commonwealth of Independent States (CIS), three have become members of the Council of Europe as of 15 October 1997 – Moldova in July 1995, Ukraine in November 1995 and Russia in February 1996 – thereby accepting specific human rights obligations, both political and judicial. Four others – Armenia, Azerbaijan, Belarus² and Georgia – have applied to join the organization, indicating their resolve to uphold its standards and principles. It was agreed in 1992 and confirmed in 1994 that Kazakstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan are situated outside the borders of Europe and thus not eligible for membership. (*See documents 6629 and 7103 of the Parliamentary Assembly*).

¹ Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”, Turkey, Ukraine and the United Kingdom of Great Britain and Northern Ireland.

² Consideration of Belarus’s application for membership was suspended by the Parliamentary Assembly in January 1997.

Within the Council of Europe, work to protect human rights and refugees is carried out by a number of different bodies. While perhaps the best known of these operate in the judicial field (the European Commission and Court of Human Rights), it is equally important to understand the political framework of the organization and other mechanisms that exist to safeguard the rights of vulnerable groups. Thus, both political and judicial elements are described below, with indications of how they can be used by non-governmental organizations (NGOs) working in human rights and refugee protection.

The chief political organs of the Council of Europe are as follows:

– The **Parliamentary Assembly**, made up of delegations of parliamentarians appointed by each national parliament and representing different political groups, meets in Strasbourg four times a year and is the deliberative forum for the Council's work. Many of the initiatives taken up by the Committee of Ministers and elaborated by committees of experts have their origins in the Parliamentary Assembly.

– The **Committee of Ministers** makes the executive decisions and guides the action of the organization. It is composed of the Ministers of Foreign Affairs from each of the 40 member states, who meet in Strasbourg twice a year. The Committee also meets through the ministers' local representatives (ambassadors), as often as necessary throughout the rest of the year.

– **Intergovernmental committees of experts** follow up activities assigned to them by the Committee of Ministers, drafting recommendations, resolutions, conventions and other legal and non-legal documents.

– The **Congress of Local and Regional Authorities of Europe** (CLRAE), a semi-parliamentary body, brings together national delegations of local and regional elected representatives.

Other mechanisms are judicial or quasi-judicial, operating under conventions or other legal agreements established within the framework of the Council of Europe. Four of the most important of these operate under:

- The European Convention on Human Rights;
- The European Social Charter;
- The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- The Framework Convention for the Protection of National Minorities.

All of the above structures are serviced by a European **Secretariat** under the authority of a Secretary General and Deputy Secretary General who are elected by the Parliamentary Assembly for terms of five years. A multinational staff of almost 1,500,

recruited from the different member states, carry out the work in some 15 different departments or 'directorates', including: the Office of the Clerk of the Parliamentary Assembly, the Directorate of Political Affairs, the Directorate of Social and Economic Affairs, the Directorate of the Environment and Local Authorities, the Directorate of Legal Affairs, the Directorate of Human Rights, the Secretariat of the European Commission of Human Rights and the Registry of the European Court of Human Rights.

- **Relations with NGOs**

At the time of writing, over 360 international non-governmental organizations have consultative status with the Council of Europe. The precise rules governing this relationship have been modified over the years and are currently contained in Resolution (93) 38, adopted by the Committee of Ministers in October 1993. Under the terms of this resolution, the Council may grant consultative status to international organizations which are particularly representative in the field(s) of their competence, as well as at the European level, and who through their work are capable of supporting the achievement of the closer unity mentioned in article 1 of the Statute, by contributing to Council of Europe activities and by making known the work of the Council of Europe among the European public.

When NGOs are granted such status, the committees of governmental experts and other bodies of the Committee of Ministers, the committees of the Parliamentary Assembly, the committees of the Congress of Local and Regional Authorities of Europe and the Secretary General may "consult" the organizations, in writing or by means of a hearing, on questions of mutual interest. To qualify for this status, organizations must be international and have a substantial membership in a number of Council of Europe member states. National and local NGOs may often be affiliated to one of these larger groups (e.g., Amnesty International, the International Helsinki Federation for Human Rights, the International Federation of Human Rights Leagues and so on), but many are not. On the whole, in practice, this does not make a great deal of difference.

It is not only through formal status, nor through a physical presence in Strasbourg, that non-governmental organizations can and do work in partnership with the Council of Europe in the human rights field. As can be seen in the discussion that follows, the Council works in a variety of ways with an increasing number of both international and national NGOs for the promotion and protection of human rights.

THE REGIONAL STANDARDS OF THE COUNCIL OF EUROPE

• **The European Convention on Human Rights**

The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) is undoubtedly the best known and arguably the most effective of the regional standards in the human rights field. States are obliged to sign the Convention on becoming members of the Council of Europe and to ratify within one year. By ratifying, they undertake to secure to anyone within their jurisdiction a number of civil and political rights and freedoms set out in the Convention. Subsequent protocols have extended the initial list of rights and the case law of the European Court and Commission of Human Rights has reinforced and developed these still further.

All of the contracting states, with the exception of Ireland (and the United Kingdom, which is currently in the process of doing so), have incorporated the Convention into their own national laws, enabling the domestic judiciary to take full account of its provisions when considering a grievance.

Once domestic judicial remedies have been exhausted, an individual may still seek redress in Strasbourg for an alleged breach of the Convention by a contracting state.

Two protocols to the Convention cover rights of specific interest to refugees and displaced persons: Protocol 4, concerning freedom of movement and freedom to choose one's own residence, freedom to leave a country and the right of a national to enter and not be expelled from his/her own country; and Protocol 7, article 1 of which guarantees that an alien lawfully resident in a state shall not be expelled without a proper hearing. But it has been in relation to other Convention provisions that cases of refugees and displaced persons have most often been heard by the European Commission and Court of Human Rights – in particular article 3, freedom from torture and inhuman or degrading treatment or punishment, article 5, the right to liberty and security of person, article 6, the right to a fair trial and article 8, the right to respect for private and family life, as well as article 13, the right to an effective remedy – all of which are dealt with in other substantive chapters of this manual.

• **The European Social Charter**

The European Social Charter was signed in Turin in 1961. As a complement to the European Convention on Human Rights, it aims to protect fundamental social and economic rights for the citizens of its contracting parties. Recent reforms resulted in a revised European Social Charter being adopted in 1996 updating and consolidating

both substantive provisions of previous texts and the mechanisms for supervising contracting states' compliance with their obligations under the Charter. (This has yet to come into force).

The Charter guarantees 19 fundamental rights both in the area of employment (non-discrimination in employment, prohibition of forced labour, the right to organize and bargain collectively, equality of treatment for migrant workers, and so on) as well as in the field of social cohesion (including, *inter alia*, the right to social security, to social and medical assistance, protection of children and adolescents, the right of migrant workers and their families to protection and assistance).

In the Appendix to the Social Charter, protection is extended to other persons, as follows:

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

The revised European Social Charter goes even further, stipulating that such treatment should be granted also to refugees as defined in the Protocol of 31 January 1967 to the Convention relating to the Status of Refugees as well as to stateless persons as defined in the 1954 Convention on the Status of Stateless Persons.

Articles 18 and 19 of the Charter require of contracting parties certain minimum safeguards for migrant workers and their families. Recommendations of the Committee of Ministers have in the past concerned, for example, the right for members of the family of a migrant worker to enter a contracting state in order to be reunited with him/her and the right of the migrant worker not to be arbitrarily expelled and otherwise to have equality with nationals in the conditions of employment.

• The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

In recent years the Council of Europe's efforts to guarantee human rights have laid increasing emphasis on preventing violations from occurring. Article 3 of the European Convention on Human Rights provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". The idea behind the drafting of the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was to prevent such ill-treatment of people deprived of their liberty.

The Convention provides non-judicial preventive machinery to protect detainees. It is based on a system of visits by members of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

Over the course of its almost 10 years of operation, through a series of detailed recommendations to relevant authorities in the contracting states, the CPT has been moving towards the gradual development of a corpus of standards against which detention conditions can be judged. These cover such matters as duration and place of detention, rights of notification and access, humane treatment, interrogation of suspects, selection and training of law enforcement officials, and mechanisms which assist in the prevention of ill-treatment.

The Committee does not confine itself to visiting prisons, but includes all places where persons are deprived by state authorities of their liberty: not only police stations, army barracks and psychiatric hospitals, but also holding centres for asylum-seekers, including airport holding centers.

• **The Framework Convention for the Protection of National Minorities**

While not the first instrument to be developed within the Council of Europe relevant to the protection of national minorities (the European Charter for Regional or Minority Languages was adopted in 1992), the Framework Convention for the Protection of National Minorities is certainly the most comprehensive document in this area, and is the first ever legally binding multilateral instrument devoted to the protection of national minorities in general.

Not including its preamble, the Framework Convention has 32 articles and is divided into five sections, the second of which contains the substantive provisions. The substantive provisions cover a wide range of issues such as:

- promotion of effective equality;
- promotion of the conditions regarding the preservation and development of culture and preservation of religion, language and traditions;
- freedoms of assembly, association, expression, thought, conscience and religion;
- access to and use of media;
- linguistic freedoms;
- education;
- cross frontier contacts;
- participation in economic, cultural and social life;
- participation in public life and prohibition of forced assimilation.

Unlike other texts adopted in this area, the Framework Convention recognizes the right of each individual – not just the collective – to exercise these freedoms.

A number of these principles are already covered by the European Convention on Human Rights. However, besides adding to its comprehensive nature, their inclusion in the Framework Convention is particularly important since the treaty is open to signature by non-member states at the invitation of the Committee of Ministers.

- **The European Convention on Nationality**

This Convention, adopted by the Committee of Ministers in May 1997, will be opened for signature by states in November 1997.

The Convention embodies principles and rules applicable to all aspects of nationality. It is designed to make the acquisition of a new nationality and recovery of a former one easier and to ensure that nationality is lost only for good reason and cannot be arbitrarily withdrawn. The Convention is also to guarantee that procedures governing applications for nationality are just, fair and open to appeal, and to regulate the situation of persons in danger of being left stateless as a result of state succession. It also covers multiple nationality, military obligations and cooperation between states parties.

The text represents a synthesis of recent thinking on this question in national and international law and is the first international text to do so. It reflects the demographic and democratic changes – in particular migration and state succession – which have occurred in central and eastern Europe since 1989.

Some of the essential principles behind the text are: prevention of statelessness; non-discrimination and respect for the rights of persons habitually resident on the territories concerned. In regularising questions of nationality, states must avoid all discrimination on ground of sex, religion, race, colour, national or ethnic origin, etc.

The Convention will come into force when three member states have ratified it. It is particularly significant that it will be open to signature not only by Council of Europe member states but also by the nine other states which took part in its preparation (including Armenia, Azerbaijan, Belarus, Georgia and Kyrgyzstan).

Meanwhile, some states which have recently adopted new laws on nationality have already based them on the content of this Convention (for example, the Baltic states), while others are planning to do so (including Ukraine).

OVERSIGHT OF STANDARDS AND OPPORTUNITIES FOR NGO PARTICIPATION

— POLITICAL —

• **The Parliamentary Assembly**

The Parliamentary Assembly provides a forum for debate and reflection for members of parliaments from throughout Europe. It meets for one week, four times a year, in plenary session (generally in January, April, June and September) to address long-term issues as well as matters of immediate concern. It is made up of parliamentarians appointed by the national parliaments of all 40 member states to reflect the whole spectrum of parliamentary opinion. Moldova has 5 representatives and 5 substitutes in the Assembly; Russia 18 representatives and 18 substitutes, and Ukraine 12 representatives and 12 substitutes.

In 1989 the Assembly created a “special guest” status to enable the legislatures of the new democracies to participate in its work. As of 1 October 1997, Armenia, Azerbaijan and Georgia were among those enjoying “special guest” status³ with 4, 6 and 5 seats respectively. Ineligible for membership in the Council of Europe, Kazakstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan are not represented in the Assembly. However, the Assembly maintains relations with the Parliamentary Assembly of the CIS. The current status of these relations is set out in Assembly Resolution 1126 (1997).

The real groundwork of the Parliamentary Assembly is carried out by fourteen committees. Those of particular interest in the current context include:

- the Committee on Legal Affairs and Human Rights, and its Sub-Committee on Human Rights;
- the Monitoring Committee;
- the Committee on Migration, Refugees and Demography, and its Sub-Committee on Refugees;
- the Social, Health and Family Affairs Committee;
- the Political Affairs Committee.

Each committee is made up of 65 representatives appointed by national delegations and ratified by the Assembly; 22 members sit on each sub-committee. The committees meet not only when the Assembly is in session, but between sessions as well, not necessarily in Strasbourg. While their discussions are held in private, they often invite experts to participate.

³ The Special Guest status of Belarus was suspended on 13 January 1997.

Following detailed work by these committees, the Assembly can take action in any or all of four ways:

- it can adopt a **recommendation** to be submitted to the Committee of Ministers for their action;
- it can address a **resolution** directly to governments, enlisting the support of national parliaments;
- it may frame an **opinion** on an issue referred to it by the Committee of Ministers;
- or it can give instructions to its subsidiary bodies, or to the Secretariat, in the form of an **order**.

Once a recommendation or an opinion is adopted, it is included on the agenda of the Committee of Ministers. Resolutions are widely disseminated to governments, parliaments, political parties and to other international organizations as well as to non-governmental organizations. The Parliamentary Assembly has often been referred to as the “democratic conscience of Europe”. Its recommendations and actions draw their strength from the unparalleled representative nature of this forum.

Human Rights Issues Covered

The Parliamentary Assembly has been particularly active in the human rights field, adopting recommendations and resolutions in recent years on such matters as: the establishment of an international court to judge war crimes; sects and new religious movements; the rights of minorities; children’s rights; AIDS and human rights; traffic in children and other forms of child exploitation. It has been instrumental in facilitating the passage of a number of conventions, agreements, resolutions and recommendations through the Committee of Ministers. Its proposals on the abolition of the death penalty in times of peace, a convention against torture and inhuman or degrading treatment or punishment, a convention for the protection of national minorities, are all examples of Assembly proposals eventually taken up by the Committee of Ministers and turned into legal agreements.

Among current general human rights concerns, it continues to call for total abolition of the death penalty, and for further protection of the rights of asylum-seekers.

The Parliamentary Assembly is also a forum in which specific country situations are discussed. In this context, it has taken on board such matters as the massive and flagrant violations of human rights in the territory of former Yugoslavia, the situation of human rights in Turkey and the human rights situation in Chechnya (in connection with Russia’s application for membership of the Council of Europe).

Refugee Issues

The massive displacement of persons in the CIS region has been a matter of particular concern to the Assembly, whose Committee on Migration, Refugees and Demography keeps the situation of refugees and displaced persons in Europe under special review. The Committee has carried out its own visits to particular states in the region and made substantive recommendations to governments in this regard.

More generally, in June 1997, conscious of the important role the Council of Europe and the application of its legal instruments have to play in guaranteeing observance of the rights of refugees, asylum-seekers and displaced persons, the Assembly adopted Recommendation 1334 (1997) “on refugees, asylum-seekers and displaced persons in the Commonwealth of Independent States”. The Recommendation called on the Committee of Ministers to launch an awareness-raising and training programme aimed at the CIS states that are members of the Council of Europe or have applied to join. The Recommendation also called for the implementation of measures concerning the protection of the rights of refugees, asylum-seekers and displaced persons from the Council of Europe’s legal instruments. It further called on the Committee of Ministers to closely monitor the observance of asylum-seekers’, refugees’ and displaced persons’ rights in the CIS states that are members of the Council of Europe, or have applied to join, regarding the principles of *non-refoulement* (protection against refusal of entry), the right to freedom of movement, freedom to choose one’s place of residence and non-discrimination. *The text of Recommendation 1334 (1997) is reproduced in Appendix 2.*

Under the auspices of the Committee on Migration, Refugees and Demography, special visits have also been undertaken and reports made on the situation of refugees and displaced persons in Transcaucasia, – for example, Document No. 7837, dated 3 June 1997. The Committee, and the Assembly as a whole, have highlighted the need for particular attention to be paid to the human rights of refugees and internally displaced persons when the applications for membership of the Transcaucasian republics are considered.

Admission Process

The Parliamentary Assembly plays a key role in the process of assisting applicant states to fulfil the basic requirements for membership of the Council of Europe, and it is on the favourable recommendation of the Parliamentary Assembly that the Committee of Ministers may accept a state’s application to join the Council of Europe.

In order to ensure that all applicant states accept the statutory principles of the Council of Europe, the Assembly carries out a complex and detailed examination with respect to the countries concerned, which may sometimes take a few years to complete. It requests selected experts to make an assessment of national human rights

legislation, and its implementation. As part of this process, fact-finding and observer delegations – including so-called “eminent lawyers”, such as members of the European Commission of Human Rights and Judges of the Court acting in their personal capacities – visit the country and meet with representatives of human rights NGOs, the media, trade unions, religious and other groups as well as government officials. Throughout the examination process, reports and publications, as well as other information about the human rights situation, are sent by various groups to the Parliamentary Assembly. Reports are drawn up by the Assembly delegations and are generally made public. These reports are issued by the Committee on Legal Affairs and Human Rights, as well as by the Political Affairs Committee.

In this context, visits were made by “eminent lawyers” in 1997 to Armenia (4-8 February), Azerbaijan (5-9 May) and Georgia (16-20 June) to assess and report on conformity of the legal order in those states with the standards of the Council of Europe. The reports to the Assembly following the first two of these visits are available in documents AS/BUR/Armenia (1997)¹ and AS/BUR/Azerbaijan (1997) 1. (The report on Georgia was still in progress at the time of writing).

Conditions of Admission

In a second stage, the Parliamentary Assembly provides the Committee of Ministers with its formal opinion on a candidate state’s readiness for membership. As a general rule, this formal opinion will include a series of specific commitments the state is willing to honour in relation to the basic principles of the Council of Europe, in particular to guarantee the protection of human rights. (*The opinions relating to Moldova – Opinion No. 188 (1995), to Russia – Opinion No. 193 (1996) and to Ukraine – Opinion No. 190 (1995) are reproduced in Appendix 3a, 3b, 3c.*)

The commitments have included undertakings to ratify the key human rights instruments of the Council of Europe, including protocols, within a specified period of time; to impose a moratorium on executions; to introduce laws and policies aimed at guaranteeing freedom of the media; and to ensure the independence of the judiciary. Where relevant, specific commitments in relation to refugees and displaced persons are undertaken. For example, Russia committed itself to “assist persons formerly deported from the occupied Baltic states or the descendants of deportees to return home according to special repatriation and compensation programmes”. Russia also committed itself to “co-operate in good faith with international humanitarian organizations and to enable them to carry on their activities on its territory in conformity with their mandates” (Paragraphs 7(xii) and 10(xxv) of Opinion No. 193 (1996)).

Monitoring Procedure

Once a state is admitted to membership, the Parliamentary Assembly then monitors the extent to which that state honours the commitments it has undertaken.

A special committee was established for this purpose in 1997. This Monitoring Committee is responsible for verifying the fulfilment of the obligations assumed by the member states under the various treaties to which they become parties as well as the honouring of other commitments entered into by them upon accession to the Council of Europe. Resolution 1115 (1997), setting out the terms of reference of the Monitoring Committee replaces Parliamentary Assembly Order No. 508 of April 1995, under which monitoring previously took place.

Under Resolution 1115 (1997), an application to initiate a monitoring procedure may originate from a committee of the Assembly or from not less than ten members of the Assembly representing at least two national delegations and two political groups. The Assembly may penalize persistent failure to honour obligations and commitments accepted, and lack of cooperation in its monitoring process, by adopting a resolution and/or a recommendation, or by not ratifying or annulling the credentials of a national parliamentary delegation. Should the member state continue not to respect its commitments, the Assembly may address a recommendation to the Committee of Ministers requesting it to take appropriate action.

The Role of NGOs

Non-governmental organizations holding consultative status with the Council of Europe may be consulted by the Assembly and its committees and receive its agenda and public documents. For their part, such organizations have a range of opportunities for bringing their views to the attention of the Assembly in writing or orally to an Assembly Committee. Several of the committees have close links with non-governmental organizations, whose representatives regularly attend meetings and contribute actively to the preparation of reports. All maintain relations with at least some of the non-governmental organizations in their field of interest, supplying them with papers and inviting them in when matters of particular relevance are under discussion.

In practice, a range of organizations active in the field of human rights and refugee protection – including several who do *not* enjoy consultative status with the Council of Europe – submit pertinent information to the various committees as well as to individual parliamentarians. The NGO *Memorial* was invited to a special hearing in September 1996 on the situation in Chechnya (before it became the first NGO from the CIS to be granted consultative status). But many others send in written information on matters of particular concern to them, for example, on executions that have taken place in Russia and Ukraine in spite of the moratorium that must be imposed on admission to the Council of Europe.

As can be seen, information from non-governmental organizations working in the areas of human rights and refugee protection is of continuing importance to the Assembly throughout the process of membership application and follow-up monitoring.

Correspondingly, the reports, recommendations and opinions of the Parliamentary Assembly, particularly insofar as they identify the obligations and commitments entered into by a state in order to be admitted to the Council of Europe, have considerable importance for the work of such non-governmental organizations. The recent opening up of the web site of the Council of Europe, at <http://www.coe.fr>, provides easier access to such texts.

- **Intergovernmental Work (Committee of Ministers)**

The Committee of Ministers is the decision-making organ of the Council of Europe through which “agreements and common action” by states are adopted and pursued. It is composed of the Ministers of Foreign Affairs of the 40 member states, who meet usually (together with the three observer states: Canada, Japan and USA) twice a year (in May and in November). Throughout the rest of the year, their Permanent Representatives (ambassadors) based in Strasbourg meet as often as is necessary. The Committee of Ministers agrees on an annual programme of inter-governmental activities (prepared by the Secretariat on the basis of government experts’ proposals) and sets the budget of the Council, thereby defining its programme priorities. It decides on any and all applications for membership or observer status with the Council of Europe. It also decides on applications for consultative status from non-governmental organizations. Its meetings are confidential and not open to participation by NGOs.

The Committee of Ministers has the power to adopt conventions and agreements which are binding on the states which ratify them. It also makes recommendations and adopts resolutions and declarations. These are texts containing policy statements or proposals for action to be taken by the governments of member states and can have significant influence at the national level.

The major part of the preparatory work on such texts is delegated by the Committee of Ministers to one of a range of intergovernmental expert committees established to deal with specific areas of concern. Many member states send specialists from the capital to participate in these committees, while others are represented by their local Strasbourg representatives.

The *Steering Committee on Human Rights* meets twice a year, generally in June and November. Currently on its agenda are matters such as: military obligation in cases of multiple nationality; the establishment of national commissions for the promotion and protection of human rights; and greater legal protection against discrimination. The *Steering Committee for Equality between Women and Men* tackles such issues as: combating violence against women; action against trafficking in women; the particular problems of equality faced by migrant women and women from culturally diverse backgrounds; and a proposal to include a fundamental right of women and men to equality in a protocol to the European Convention on Human

Rights. The *Steering Committee on the Mass Media* is the competent inter-governmental body for media law and policy issues, especially the defence and promotion of freedom of expression and information exercised through free, independent and pluralistic media. The *European Committee on Crime Problems* has worked on the European Prison Rules and discussed alternatives to imprisonment, limitations on the use of preventive detention, and many similar issues. The *Education Committee* has worked on human rights education, the teaching of history in schools, the particular problems of minorities and the general issue of intercultural education.

The *European Committee on Migration* acts as a pan-European forum for the discussion and exchange of experience on migration-related issues, focusing on integration and community relations and working in cooperation with a range of non-governmental partners, including immigrant organizations, police associations and many others.

Exceptionally, the Committee of Ministers sets up special *ad hoc* committees to deal with specific issues. The *Ad Hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR)* was established to promote the development of a common standpoint among member states for the solution of legal and practical problems with which they are confronted in the fields of asylum, refugees and stateless persons. Three subjects figure prominently on its current agenda: the concept of safe third country, the right to appeal by asylum-seekers and the question of the return of rejected asylum-seekers.

Human Rights Issues Covered

The Committee of Ministers has adopted resolutions, recommendations and declarations on a wide variety of different subjects including:

- regulating the use of personal data in the police sector;
- conscientious objection to compulsory military service;
- the European Prison Rules;
- the institution of the Ombudsman;
- foreign prisoners;
- legal aid and advice;
- asylum to persons in danger of persecution.

Human rights and related conventions adopted most recently include:

- the Framework Convention on the Protection of National Minorities, (1994);
- the Additional Protocol to the European Social Charter providing for a system of collective complaints (1995);
- the European Convention on the Exercise of Children’s Rights (1995);

- the revised European Social Charter (1996);
- the European Convention on Nationality (1997).

Monitoring Procedure

In parallel with the monitoring activities of the Parliamentary Assembly, the Committee of Ministers established a procedure at the highest level for monitoring compliance by member states with commitments arising from their membership in the Council. In November 1994, it issued a declaration to the effect that it would consider questions concerning the situation of democracy, human rights and the rule of law in any member state referred to it by a member state, by the Secretary General or on a recommendation from the Parliamentary Assembly. The Declaration states that the Committee of Ministers will take account of all relevant information available from different sources. It will consider in a constructive manner matters brought to its attention, encouraging member states, through dialogue and cooperation, to take all appropriate steps to conform with the principles of the Council's Statute. In cases requiring specific action, the Committee of Ministers may decide to:

- request the Secretary General to make contacts, collect information or furnish advice;
- issue an opinion or recommendations;
- forward a communication to the Parliamentary Assembly; or
- take any other decision within its statutory powers.

Effective implementation of the Declaration is currently being examined within the Council of Europe. The Declaration would seem to provide human rights NGOs with a further opportunity to present their concerns, through the Secretary General or the Parliamentary Assembly, on a variety of issues in the member states.

The Role of NGOs

Three NGOs – Amnesty International, the International Commission of Jurists and the International Federation of Human Rights Leagues – enjoy special observer status with the Steering Committee on Human Rights. This enables them to participate in discussions on the development of new standards and procedures in the human rights field. They have contributed both orally and in writing to several of the discussions just mentioned. Other NGOs have been granted observer status on an *ad hoc* basis with other expert committees mentioned above in relation to subjects on which they have a special competence. For example, four organizations have observer status with the European Committee on Migration and some twelve organizations with the European Committee on Crime Problems. NGOs holding consultative status with the Council of Europe and interested in equality issues have organized themselves into a special interest group, the chairperson of which represents them in an observer capacity at all meetings of the Steering Committee for Equality between Women and Men.

From time to time, committees may hold “oral hearings” to avail themselves of the expertise of NGOs or specially qualified individuals.

With the exceptions just mentioned, the deliberations of these committees and sub-committees are generally private, as are the meetings of the Committee of Ministers itself. However, as is true with respect to other inter-governmental fora, NGOs can often have the most substantial impact on their work by concentrating efforts on the national level and lobbying relevant government departments in their capital cities on issues of concern in Europe.

Just as importantly, once recommendations have been adopted by the Committee of Ministers, NGOs play an invaluable role in continuing to bring these to the attention of governments and overseeing their implementation at the national level. The recent development of the Council of Europe’s web site (<http://www.coe.fr>) should greatly facilitate access to and dissemination of such texts.

— JUDICIAL —

A list of signatures and ratifications by CIS member states of key European human rights instruments can be found in Appendix 1. As will be noted, apart from the Framework Convention for the Protection of National Minorities and the European Convention on Nationality, these treaties are – at present at least – open only for ratification by member states of the Council of Europe.

• **The European Convention on Human Rights**

As of 15 October 1997, 38 of the 40 member states of the Council of Europe, including Moldova and Ukraine, had ratified the European Convention on Human Rights, accepted the right of those within their jurisdiction to take individual petitions to Strasbourg and agreed to submit themselves to the compulsory jurisdiction of the European Court of Human Rights. The remaining two, recent member states – including Russia – signed the Convention on acceding to the Council of Europe and undertook to ratify within a short period of time.

Briefly stated, the Convention provides for a European Commission and Court of Human Rights to deal with individuals’ petitions as well as inter-state cases. The Commissioners and Judges act entirely independently of their national governments. Petitions are considered initially by the *European Commission of Human Rights* during one of its almost monthly two-week sessions. Of the more than 37,500 petitions received since it began its work in 1955, most have been declared “inadmissible” – for reasons such as they were manifestly ill-founded, or have concerned matters not covered by the Convention, have been brought against states

which are not party to the Convention or because domestic remedies have not been exhausted. Nevertheless, in these 42 years, some 3,852 have been declared admissible.

Once a petition is declared admissible, the Commission encourages the parties to reach a friendly settlement. If this is not possible, the Commission draws up a report setting out the facts of the case and its opinion and forwards this to the Committee of Ministers.

Within three months of the report being referred to the Committee of Ministers, a state concerned, the Commission, or, under certain circumstances, the petitioner, can bring it before the *European Court of Human Rights*. If the case is not referred to the Court, the Committee of Ministers will decide whether there has or has not been a violation of the Convention.

In the face of possible deportation or extradition, a petitioner may additionally apply to the Commission for “interim relief” while the merits of his/her case are being decided (rule 36 of the Commission’s rules of procedure).

When a case is referred to the Court, a public hearing follows. The Court’s judgement, reached by a majority vote, is final and binding on the state concerned. The state must take whatever steps are necessary to ensure compliance with the Court’s decisions and the rights under the Convention. The Court may require a state to pay financial compensation, including damages and the costs of the proceedings. The *Committee of Ministers* plays a crucial role in supervising the execution of the judgement where a violation has been found, ensuring that the state takes appropriate remedial action, for example, by means of new administrative procedures or by legislation.

The Role of NGOs

An NGO can currently bring a complaint to the *European Commission of Human Rights* alleging a violation of the European Convention on Human Rights *only* if that NGO itself can claim to be a victim of the alleged violation (article 25(1)). Thus, such cases often involve questions of freedom of expression, association or assembly.

However, NGOs can and do most usefully provide guidance, advice or even legal representation for individuals or groups of individuals who wish to bring complaints. They often give help to applicants in drawing up their original petitions, and then assist them through the ensuing stages of the proceedings. It is still fairly rare for them to represent applicants directly before the Commission; more often they will themselves appoint a lawyer to provide such representation. Quite often, a case will have been brought to Strasbourg on the initiative of an NGO when national remedies have proved ineffective on an important human rights issue. Such assistance is also often extremely important in helping to reduce the inequality of legal representation

of parties to proceedings. As Marek Nowicki has observed: “not many applicants can match the battery of specially trained legal experts a State generally has at its disposal”.

In all other respects, proceedings before the Commission are confidential. Nevertheless, as can be seen from its reports, the Commission does avail itself of human rights reports and studies drawn up by NGOs who are regarded as specially competent in the field.

In cases that come before the *European Court of Human Rights*, on the other hand, NGOs from time to time are permitted to file *amicus curiae* briefs which provide information contributing to the analysis of issues raised. Under the Rules of the Court “any person concerned other than the applicant” may submit written comments on specified issues. Individuals or groups must, however, show that they have a discernible interest in the case, and also that their intervention is in the interest of the proper administration of justice. A dozen or so such interventions have been made to date by a number of NGOs, for example:

– Amnesty International in the case of *Chahal vs UK (1996)* – concerning a Sikh activist whom the UK government wished to deport to India. They said he had been involved in terrorist activities and posed a risk to the national security of the UK. He claimed he faced a real risk of being tortured or killed if so deported.

In several of the cases where NGOs have interceded as *amici curiae*, their information and arguments have played an important role. It could be said that this has been particularly important in cases involving refugees originating from states which are not members of the Council of Europe.

New Machinery to be Established by Protocol No. 11

Protocol No. 11 to the European Convention on Human Rights provides for a single, permanent Court to be established to replace the existing Commission and Court. The change was prompted by the rapidly increasing number of states parties along with a need to reduce delays in cases being heard. The new system will come into effect as from 1 November 1998.

From that time, all applicants will have direct access to the newly-established European Court of Human Rights, which will meet full-time in Strasbourg. The right of individual application will be mandatory (at present it remains – if not in practice – optional). Any cases that are clearly unfounded will be screened out at an early stage by a committee of three judges. In the majority of cases, the Court will sit as a seven-judge Chamber, though in exceptionally important cases, it will sit as a Grand Chamber of 17 judges. The Committee of Ministers will no longer have jurisdiction to decide on the merits of certain cases, although it will retain its very important role of overseeing the enforcement of the Court’s judgements.

- **The European Social Charter**

The European Social Charter is currently in force in some 21 states members of the Council of Europe. At the time of writing, serious consideration is being given to its ratification by Ukraine (who signed it in May 1996), and similar consideration has begun in Russia.

The system of supervision of compliance with the provisions of the Charter is based on reports submitted by the contracting parties. These reports are examined by a Committee of Independent Experts, which meets six times a year and publishes a set of conclusions based on its examination of each state report. The Committee's conclusions are "negative" when the law or practice in a contracting party does not comply, in whole or in part, with an accepted provision. Its conclusions are "positive" when the situation is found to be satisfactory. In a second stage, the state report and the conclusions of the Committee of Independent Experts are passed on to a Governmental Committee for further review. This Committee is responsible for selecting those situations which should, in its view, be the subject of recommendations to the contracting parties by the Committee of Ministers. The latter then votes to adopt both a general resolution on the entire supervision cycle, as well as to make individual recommendations to states where appropriate.

In June 1995 the Committee of Ministers adopted an Additional Protocol to the Social Charter, providing for a system of collective complaints. This Protocol will come into force once five states have ratified it. (At the time of writing two states had ratified, while a further eight had signed). Under the Protocol, European trade unions and organizations of employers and other international NGOs, as well as national trade unions and employers' associations of the contracting party concerned will be able to submit collective complaints for examination by the Committee of Independent Experts. In addition, each state may allow national NGOs to file complaints against it alleging non-compliance with the provisions of the Charter.

The Role of NGOs

Trade union organizations play a critically important role in providing information to the control bodies set up to supervise the application of the European Social Charter. More generally, other NGOs – particularly national NGOs – regularly send comments to the Committee of Independent Experts on the different reports before them for consideration; it remains to be seen to what extent these are taken into account. Furthermore, under article 27(2) of the Charter, the Governmental Committee may consult representatives of NGOs when considering reports of contracting parties (although they have not availed themselves of this opportunity to date). Finally, when recommendations are issued by the Committee of Ministers to individual states, NGOs in those states have an important role to play in seeing that those recommendations are put into practice.

Articles 1(b) and 2 of the 1995 Additional Protocol providing for a system of collective complaints set out a specific role for non-governmental organizations in the operation of the complaints procedure. Once in force, this instrument will add substantially to the potential role to be played by NGOs in the control mechanism, allowing them, in certain circumstances, to lodge complaints against states they believe are failing to comply with one or more provisions of the Charter.

Of late, NGOs across Europe have become increasingly involved in efforts to raise awareness about social rights as human rights, an area somewhat neglected in past years. NGOs from Russia and Ukraine participate in a network of organizations working to spread knowledge about the European Social Charter and states' obligations thereunder, and have developed campaign materials and action plans expressly for this purpose.

• **The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**

As of 15 October 1997, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, had been ratified by 37 of the 40 member states of the Council of Europe, including Moldova (October 1997) and Ukraine (May 1997); it had been signed by the three others (including Russia), all of whom have undertaken to become parties to the Convention within a short period of time.

Under this Convention, the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* is charged with examining the treatment of persons deprived of their liberty, with a view to strengthening the protection of such persons from torture and inhuman or degrading treatment or punishment. To this end, the Committee is entitled to visit any place within the jurisdiction of the states parties to the Convention where persons are held by a public authority. The Committee has been functioning now for almost ten years and by 15 October 1997 had carried out 64 visits, visiting 31 states parties.

The CPT has two guiding principles namely, cooperation and confidentiality. Cooperation with the national authority is at the heart of the Convention: the object is to protect detainees rather than to condemn states for abuses. Therefore the Committee meets in private and its reports are strictly confidential. Nevertheless, if a country refuses to co-operate or fails to improve the situation in the light of the Committee's recommendations, the CPT may decide to make a public statement. Of course, the state itself may request publication of the Committee's report, together with its comments; to date, 43 reports have been published in this way. In addition, the CPT's annual report to the Committee of Ministers is made available as a public document.

The Role of NGOs

Non-governmental organizations regularly send general and specific information about conditions of detention and imprisonment to the CPT, especially in connection with visits it undertakes.

Now that the Committee has made visits to a substantial number of member states, and several of the reports of its visits have been made public by the governments concerned, NGOs – especially those focusing on detention issues – have begun to follow closely the Committee’s recommendations and their impact at the national level.

There still remains a good deal to be done to make better known the work of the CPT and the corpus of standards it has developed in the sphere of the prevention of ill-treatment. NGOs, national as well as international, play an invaluable role in this respect.

• The Framework Convention for the Protection of National Minorities

By its nature, a framework convention is different from a “normal” convention. While it is a convention in the sense that it is a legally binding instrument under international law, the word “framework” indicates that the substantive principles it enshrines are not directly applicable in the domestic legal orders of the states parties, but will have to be implemented through national legislation and appropriate government policies.

In elaborating the substantive principles, therefore, special emphasis was given to provisions of a “programme-type”. These define certain objectives which the states parties undertake to pursue through legislation and appropriate government policies at the national level.

The evaluation of the adequacy of the implementation of the Framework Convention by states parties will be carried out by the Committee of Ministers, assisted by an Advisory Committee. The members of the Advisory Committee – whose composition and procedure are determined by the Committee of Ministers – will have recognised expertise in the field of protection of national minorities. States parties will be required to file reports – within one year of entry into force and thereafter on a periodical basis, or as requested – containing full information on legislative and other measures taken to give effect to the principles of the Convention.

As of 15 October 1997, 13 member states of the Council of Europe have ratified the Convention, while a further 23 have signed it. It will enter into force on 1 February 1998. The Framework Convention is an open convention which non-member states may be invited to join, a factor which makes it particularly relevant to certain CIS member states. On 25 July 1997, Armenia became the first non-member state to sign.

• **The European Convention on Nationality**

At the time of writing, the European Convention on Nationality had not yet been opened for signature. Yet, as mentioned earlier, its influence could already be seen in the nationality laws being adopted in a number of states.

Entry into force requires ratification by 3 member states of the Council of Europe. Once it is in force, the competent authorities in each state party will be required to provide to the Secretary General of the Council of Europe information on matters relating to nationality, including instances of statelessness and multiple nationality, as well as about developments concerning the application of the Convention. The Secretary General will then send all relevant information to all states parties.

In fact, much information has already been received and is to be found in the Council of Europe's European Documentation Centre on Nationality (EURODOC), which centralizes nationality information and documentation for nearly all European states.

— **IN GENERAL** —

It is clear from the foregoing discussion that there is a need to establish in every member state of the Council of Europe a corpus of lawyers and non-governmental organizations who are fully conversant with the Strasbourg case-law and the corpus of standards built up by the CPT. Undoubtedly the most important role non-governmental organizations can and do play in respect of all human rights instruments, is to make them known in the different states of Europe: to promote awareness and understanding about them among the general population, to advise citizens, lawyers, judges and government officials on how they should be applied, and to be vigilant that they are applied in practice. The Council of Europe relies heavily upon the non-governmental sector to fulfil this role which it can only to a limited extent, perform itself. Thus, while the Council is not a funding agency, the Secretariat of the Council of Europe encourages and supports the efforts of non-governmental organizations in this respect – in the convening of meetings, issuing of publications, facilitating of translations, supplying documents, and so on.

This support is by no means limited to those organizations enjoying consultative status with the Council of Europe; on the contrary, it often involves national and local non-governmental organizations active at the grass roots level.

Specific on-going programmes include:

(a) Information meetings on human rights, organized in conjunction with academic institutions, lawyers associations and others in different member states, and attended largely by lawyers, judges and academics;

(b) support for NGO initiatives aimed at promoting human rights awareness and disseminating information about human rights throughout Europe and across all sectors of society;

(c) organization and support for training programmes in the human rights field.

In addition to such Europe-wide activities, *The Demosthenes Programme: Strengthening Democratic Reform in East and Central Europe* has, since 1990, sought to put at the disposal of the countries of Central and Eastern Europe the expertise the Council has acquired in respect of the rule of law and the protection of human rights. A number of the activities undertaken or supported under the Programme are now jointly funded by the European Union and an increasing number are being carried out in cooperation with the United Nations High Commissioner for Refugees.

Human rights activities have concentrated on constitutional and legislative reforms, and more recently greater emphasis has been given to training activities for groups such as the legal community and media professionals. Projects have been directed towards government authorities and governmental agencies and may be bilateral or multi-lateral. Increasingly, however, a number have been conducted with professional associations and non-governmental organizations not only as part of general efforts to strengthen civil society, but also reflecting the extent to which civil society is itself developing in those countries.

Activities include: expert missions to assist with particular legislative or administrative problems; organization of seminars with experts from different countries; contributions to initiatives by governmental and non-governmental institutions to promote better knowledge and training in fields such as human rights; study visits by senior officials, academics and lawyers; promotion of better information and documentation through new publications, translations, setting up of information centres, etc.; participation of governmental experts in the Council's expert committees and participation of individuals in numerous conferences and colloquies.

Some specific examples include:

– a seminar for NGOs on NGOs and human rights, co-organized with the Baku Office of the UNHCR (Baku, July 1997);

– a meeting for legal experts from Armenia, Azerbaijan and Georgia, concerning the compatibility of domestic legislation and its implementation with the requirements of the ECHR and other international human rights treaties (Tallinn, June 1997);

– a workshop with Donetsk Amnesty group for officials, trade unionists and NGOs, on provisions of the ECHR to protect free speech and fair trial (Donetsk, May 1997);

– a seminar on “Positive Actions to promote women in the decision-making process: interactions between the NGOs and the State structures”, organized in cooperation with the Moscow Centre for Gender Studies and the Ariadne Foundation for Gender Studies (Moscow, April 1997);

– a seminar on “Women and elections”, organized in cooperation with the Kharkiv Centre for Gender Studies (Kharkiv, April 1997);

– a workshop organized with the Urals legal aid clinic “Sutyazhnik” for NGOs and trades unionists from Urals region on how to use complaints procedures of the ECHR (Yekaterinburg, April 1997);

– a seminar for teachers to prepare a human rights education manual, organized by the Ukrainian Centre for Human Rights (Kyiv, September 1996).

NGOs have sometimes provided the first forum to discuss new human rights ideas in their country. In October 1997, the Kharkiv Group for the Protection of Human Rights is hosting a seminar for Ukrainian prison officials and NGOs on the European Convention for the Prevention of Torture. The Ukrainian Human Rights Centre provided the first forum for discussing the ombudsman institution in a seminar on “Non-Judicial means of Protecting Human Rights” in Kyiv in December 1996.

More generally, one NGO leader from the Moscow Research Centre on Human Rights compiled a brief Russian-language guide on “How NGOs can work with the Council of Europe to Protect Human Rights”, which has since been distributed at NGO seminars throughout 1997, and has been translated into Azeri. Support has been given to the translation of Council of Europe materials for regular human rights publications, such as *Express Khronika*.

Related to the human rights programmes is the *Demo-Droit* project which focuses on the judicial system, independence of the judiciary, access to justice and the reform of criminal codes and codes of criminal procedures. Another project, the *Themis Plan*, consists of training projects for, among others, policemen, judges, prosecuting authorities and prison administration officials.

All countries which are either member states of the Council of Europe or have applied for membership may take part in such programmes. In addition, a limited number of cooperation activities have also been implemented with Kyrgyzstan for the year 1996/1997.

APPENDIX I

Signatures and Ratifications of Key European Human Rights Instruments

as at 15 October 1997

MEMBER STATES								
	<i>ECHR</i>	<i>ECHR Prot 4</i>	<i>ECHR Prot 6</i>	<i>ECHR Prot 7</i>	<i>Social Charter</i>	<i>Soc.Chart Add Prot</i>	<i>CPT</i>	<i>FCNM</i>
Moldova	12.09.97	12.09.97	12.09.97	12.09.97		02.10.97	20.11.96	
Russian Fed.	s	s	s	s		s	s	
Ukraine	11.09.97	11.09.97	s	11.09.97	s		05.05.97	s
NON-MEMBER STATES								
Armenia								s
Azerbaijan								
Belarus								
Georgia								

Dates given are those on which a state has ratified the treaty in question.

“s” shows where a state has signed the treaty, indicating its intention to ratify as soon as possible.

[Note: Kazakstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan are not eligible for membership of the Council of Europe].

The following conventions are currently open for signature only by states members of the Council of Europe.

ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”) (1950).

Prot 4: Protocol No. 4 to the ECHR concerning, *inter alia*, the right to freedom of movement and to choose one’s residence, the right to enter and not to be expelled from the state of which one is a national.

Prot 6: Protocol No. 6 to the ECHR concerning abolition of the death penalty (1983).

Prot 7: Protocol No. 7 to the ECHR concerning, *inter alia*, the rights of aliens (1984).

Social Charter: European Social Charter (1961).

Soc Chart Add Prot: Additional Protocol to the European Social Charter providing for a system of collective complaints (1995).

CPT: European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987).

The Framework Convention for the Protection of National Minorities is open for signature by non-member states upon invitation by the Committee of Ministers.

FCNM: Framework Convention for the Protection of National Minorities (1994).

APPENDIX II

PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

1997 ORDINARY SESSION

RECOMMENDATION No. 1334 (1997)¹ *on refugees, asylum-seekers and displaced persons in the Commonwealth of Independent States (CIS)*

1. Population movements of a size and complexity unprecedented since the second world war have resulted in the displacement – mostly involuntary – of some 9 million people in the CIS region since the end of the 1980s.

2. These movements have had various causes, including economic, social and ecological problems, armed conflicts, manifestations of violent nationalism, human and minority rights violations and a general climate of insecurity and ethnic tension.

3. In addition to the serious humanitarian consequences for the victims, these displacements are such as to affect stability, security and peace not only in Europe but also in central Asia.

4. Of the twelve member states of the CIS, three have joined the Council of Europe and have therefore accepted specific human rights obligations, and four others have applied to join the Organization, thereby showing their desire to uphold its standards and principles.

5. Consequently, the Council of Europe, and in particular the application of its legal instruments, have an important role to play both in guaranteeing observance of the rights of refugees, asylum-seekers and displaced persons, and in helping to remove the causes of displacement in the region.

6. The Council of Europe must be particularly vigilant with regard to observance of the human rights of refugees, asylum-seekers and displaced persons, who are in a more precarious position than the rest of the population and are thus more vulnerable to human rights violations.

¹ *Assembly debate* on 24 June 1997 (19th Sitting) (see Doc. 7829, report of the Committee on Migration, Refugees and Demography, Rapporteur: Mr Filimonov). *Text adopted by the Assembly* on 24 June 1997 (19th Sitting).

7. The Council of Europe, while monitoring the situation and calling for remedies, must also assist the states concerned, particularly as certain violations may stem from the lack of a tradition of accepting refugees in the CIS and the difficult economic and social situation of the countries in question.

8. The Assembly welcomes the Regional Conference to Address the Problems of Refugees, Displaced Persons, Other Forms of Involuntary Displacement and Returnees in the Countries of the Commonwealth of Independent States and Relevant Neighbouring States, held in Geneva in May 1996, which provides the opportunity to explore the main problems of displacement in the region and devise an action programme to remedy them. However, the Conference is only the starting point of a process whose aim should be the implementation of specific cooperation and assistance programmes.

9. Consequently, the Assembly recommends that the Committee of Ministers, in the spirit of the historic Agreement on Cooperation between the Parliamentary Assembly of the Council of Europe and the Interparliamentary Assembly of the Commonwealth of Independent States, signed on 9 June 1997:

i. instruct its competent bodies to launch an awareness-raising and training programme, aimed at the CIS states that are members of the Council of Europe or have applied to join, for the implementation of the undertakings concerning the protection of the rights of refugees, asylum-seekers and displaced persons deriving from the Council of Europe's legal instruments;

ii. monitor closely the observance of asylum-seekers', refugees' and displaced persons' rights in the CIS states that are members of the Council of Europe or have applied to join, and especially the principles of *non-refoulement* or protection against refusal of entry, the right to freedom of movement, freedom to choose one's place of residence and non-discrimination;

iii. continue the Council of Europe's participation in the work of the Geneva Conference follow-up group and instruct the Secretary General of the Council of Europe to examine, in the context of the tripartite meetings with the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Organization for Security and Cooperation in Europe (OSCE), the implementation of joint programme for the CIS states that are members of the Council of Europe or have applied to join it;

iv. invite the CIS states that are Council of Europe members:

a. to ratify the Council of Europe's Framework Convention for the Protection of National Minorities as soon as possible;

b. to sign and ratify the European Charter for Regional or Minority Languages as soon as possible;

v. invite the CIS states that are members of the Council of Europe or have applied to join:

a. to observe strictly the fundamental principles of international law concerning the protection of the rights of refugees, asylum-seekers and displaced persons and, in particular:

– to observe the principle of *non-refoulement*;

– to respect the right of freedom of movement and freedom to choose one's place of residence in one's own country and to remove legislative and administrative barriers to freedom to take up residence, in particular the registration system known as "*propiska*";

– to ensure the *de jure* and *de facto* observance of the principle of non-discrimination in general, and with regard to refugees, asylum-seekers and displaced persons in particular;

b. to ratify, without reservation, the 1951 Geneva Convention on the Status of Refugees and its 1967 Protocol, if they have not already done so;

c. to bring their legislation and administrative practices into line with this convention and protocol and to put in place the necessary administrative structures to meet the obligations deriving from these texts;

d. to ensure the application of multilateral and bilateral agreements between CIS states concerning refugees, asylum-seekers and displaced persons and to secure the return of the refugees and internally displaced persons to the post-conflict zones;

e. to ensure strict compliance by local and regional authorities with legislation concerning refugees, asylum-seekers and displaced persons and, in particular, to ensure that administrative measures comply with constitutional instruments and laws;

f. to ensure that refugees and displaced persons have access to the labour market, health care, education, housing and social security benefits;

g. to join the Council of Europe's Social Development Fund as soon as possible so as to make full use of its resources to improve the situation of refugees, asylum-seekers and displaced persons on their territory;

h. to set up, in cooperation with the relevant international organizations, repatriation programmes for illegal immigrants and asylum-seekers whose asylum applications have been rejected;

vi. invite the member states to contribute generously to the funding of assistance programmes for refugees, asylum-seekers and displaced persons in the CIS.

APPENDIX III (a)

PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

1995 ORDINARY SESSION

OPINION No. 188 (1995)¹ *on the application by Moldova for membership of the Council of Europe*

1. Moldova applied to join the Council of Europe on 20 April 1993. The Committee of Ministers asked the Parliamentary Assembly to give an opinion, in accordance with Statutory Resolution (51) 30 A.

2. Declarations of sovereignty (23 June 1990) and independence (21 August 1991) marked the start of the process of transition in the Republic of Moldova towards a framework of parliamentary democracy.

3. Following the visit of an Assembly delegation from 20 to 22 July 1992, “special guest” status was granted to the Moldovan Parliament on 5 February 1993.

4. Parliamentary elections were held on 27 February 1994. Observers of the Assembly concluded that they were held “...under the best conditions possible, despite the boycott imposed by Transnistria”.

5. The process of transition to democracy has further been facilitated by intensive consultations with the Council of Europe on the preparation of a new constitution (adopted by parliament on 29 July 1994), an organic law granting special legal status to Gagauzia (adopted by parliament on 23 December 1994), as well as legislation on the organization of the judiciary and on minorities.

6. Prospects for the settlement of the Transnistrian question have improved. In the parliamentary elections of 27 February 1994, advocates of reunification with Romania – the prospect of which had generated the secessionist movement in Transnistria – won only 7.5 % of the votes.

¹ *Assembly debate* on the 27 June 1995 (18th Sitting) (see Doc. 7278, report of the Political Affairs Committee, Rapporteur: Lord Finsberg; Doc. 7325, opinion of the Committee on Legal Affairs and Human Rights, Rapporteur: MM. Columberg and Jeszensky; and Doc. 7331, opinion of the Committee on Relations with European Non-Member Countries, Rapporteur Mrs Durrieu). *Text adopted by the Assembly* on 27 June 1995 (18th Sitting).

In the “consultative referendum on the future status of Moldova” of 6 March 1994, 95 % of the votes (in a 75 % turn-out) voted for an independent republic. With these outcomes, the Transnistrian leadership seems more ready to negotiate a settlement within the republic’s existing internationally recognized borders. In parallel with the emergence of this settlement, the Russian 14th Army should be withdrawn, on the basis of the agreement signed in Moscow on 21 October 1994 and still to be ratified by Russia.

7. A report by two eminent jurists confirming the prospect of improvement in the compatibility of Moldovan legislation and of the legal system with the principles of the Council of Europe was released by the Bureau of the Assembly on 20 October 1994. The Assembly welcomes the setting-up by the Moldovan Government of a special interministerial committee to keep this matter under political review.

8. The following commitments have been entered into by the Moldovan parliament:

a. Articles 54 and 55 of the Moldovan Constitution will not be applied in a manner restricting fundamental human rights, contrary to international standards;

b. the role and functions of the Prosecutor’s Office will change, transforming this institution into a body which is in accordance with the rule of law and Council of Europe standards;

c. potential legal consequences of inadequate knowledge of the official language will be minimized and a significant extension of the time required for the learning of this language will be granted;

d. the responsibility for the penitentiary system will be transferred from the Ministry of Interior to the Ministry of Justice in autumn 1995;

e. a new Criminal Code and Code of Criminal Procedure in conformity with Council of Europe standards will be adopted within a year of accession;

f. Article 116, paragraph 2, of the Constitution will be modified in such a way as to ensure the independence of the judiciary in conformity with Council of Europe standards within a year of accession;

g. the country’s law and practice in the sphere of local self-government will be reformed in accordance with the European Charter of Local Self-Government.

9. Assembly committees and their rapporteurs have paid several visits to the country, including the region of Transnistria – most recently from 10 to 14 January 1995. Their conclusion is that membership of the Council of Europe at this juncture should strengthen the cause of democracy and the rule of law, improve the protection of human rights and freedoms and enhance political and economic stability in the region.

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10. Accordingly, on the basis of:
- i. Moldova's participation in various Council of Europe programmes;
 - ii. Moldova's cooperation under several conventions and partial agreements;
 - iii. the participation of a "special guest" delegation from the Moldovan Parliament in its proceedings since 5 February 1993,

the Assembly considers that Moldova, in the prospect of gaining full control of its territory, is able and willing, in the sense of Article 4 of the Statute, to fulfil the provisions for membership of the Council of Europe as set forth in Article 3: "Every member of the Council of Europe must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council".

11. Therefore, the Parliamentary Assembly, on the understanding that Moldova shares its interpretation of commitments entered into as spelt out in paragraph 8, and now intends:

a. to sign the European Convention on Human Rights at the moment of accession;

b. to ratify the European Convention on Human Rights and Protocols Nos 1, 2, 4, 7 and 11 within a year from the time of accession (subject to a declaration, if necessary, which would exclude the responsibility of the state of Moldova for any acts committed by organs which are *de facto* not under its control);

c. to sign and ratify Protocol No. 6 of the European Convention on Human Rights on the abolition of the death penalty in time of peace within three years of accession, and to uphold the moratorium on executions until total abolition of capital punishment;

d. to recognize, pending the entry into force of Protocol No. 11, the right of individual application to the European Commission and the compulsory jurisdiction of the European Court (Articles 25 and 46 of the Convention);

e. to withhold ratification of the CIS² Convention on Human Rights until the implications of the co-existence of that convention and the European Convention on Human Rights, especially as far as the control mechanisms are concerned, have been clarified by the Council of Europe; and furthermore not to ratify the said CIS convention without the prior agreement of the Council of Europe;

² Commonwealth of Independent States.

f. to sign and ratify within a year from the time of accession the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;

g. to sign and ratify a year from the time of accession the Framework Convention for the Protection of National Minorities and to conduct its policy towards minorities and the principles laid down in Assembly Recommendation 1201 (1993) on the question of an additional protocol to the European Convention on Human Rights on the rights of national minorities and incorporate it into the legal and administrative system and practice of the country;

h. to sign and ratify, within a year from the time of accession, the European Charter of Local Self-Government, and to study, with a view to ratification, the Council of Europe's Social Charter and the European Charter for Regional or Minority Languages;

i. to study, with a view to ratification, and to apply the central principles of other Council of Europe conventions – notably those on extradition, on mutual assistance in criminal matters, on the transfer of sentenced persons, and on laundering, search, seizure and confiscation of proceeds from crime;

j. to sign and ratify within a year from the time of accession the General Agreement on Privileges and Immunities (and its protocol);

k. to seek to settle international, as well as internal, disputes by peaceful means, as an obligation incumbent on all member states of the Council of Europe;

l. to confirm complete freedom of worship for all citizens without discrimination, and to ensure a peaceful solution to the dispute between the Moldovan Orthodox Church and the Bessarabian Orthodox Church;

m. to co-operate in the implementation of the Assembly's procedure on the honouring of commitments entered into at the time of accession to the Council of Europe on issues related to the Organization's basic values and principles, as well as in monitoring processes established following the Committee of Ministers' Declaration of 10 November 1994 (95th session),

Recommends that the Committee of Ministers:

- i.* invite Moldova to become a member of the Council of Europe;
- ii.* allocate five seats to Moldova in the Parliamentary Assembly.

APPENDIX III (b)

PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

1996 ORDINARY SESSION

OPINION No. 193 (1996)¹

on Russia's request for membership of the Council of Europe

1. The Russian Federation applied to join the Council of Europe on 7 May 1992. By Resolution (92) 27 of 25 June 1992, the Committee of Ministers asked the Parliamentary Assembly to give an opinion, in accordance with Statutory Resolution (51) 30 A.

2. Special guest status with the Parliamentary Assembly was granted to the Russian Parliament on 14 January 1992.

3. Procedure for an opinion on Russia's request for membership was interrupted on 2 February 1995 because of the conflict in Chechnya. On 27 September 1995, with the adoption of Resolution 1065, procedure was resumed on the grounds that Russia was henceforth committed to finding a political solution and that alleged and documented human rights violations were being investigated.

4. The Assembly has followed the events of December 1995 in Gudermes and the recent events in Pervomayskoye with deep concern. It firmly condemns the taking of hostages as an act of terrorism and a flagrant violation of human rights, which no cause can justify. At the same time, it considers that the Russian authorities did not show sufficient concern for the safety of the hostages. The apparently indiscriminate use of force cost the lives of many innocent people and violated international humanitarian law. The Chechen conflict cannot be resolved by the use of force. There will be no peace in the region, nor an end to terrorist attacks, without a political solution based on negotiation and on European democratic values.

¹ *Assembly debate* on the 25 January 1996 (6th and 7th Sittings) (see Doc. 7443, report of the Political Affairs Committee, Rapporteur: Mr. Muehleemann; and Doc. 7463, opinion of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr. Binding). *Text adopted by the Assembly* on 25 January 1996 (7th Sitting).

5. The Assembly notes that political, legal and economic reforms have been sustained. The legal system continues to show shortcomings, as noted by the Council of Europe legal experts (7 October 1994). Nonetheless, there is progress towards a general awareness of – and respect for – the rule of law.

6. Assurances of continued progress were given to the Council of Europe by the President of the Federation, the Prime Minister, the President of the Duma and the President of the Council of the Federation in their letter of 18 January 1995.

7. On the basis of these assurances and of the following considerations and commitments, the Assembly believes that Russia – in the sense of Article 4 of the Statute – is clearly willing and will be able in the near future to fulfil the provisions for membership of the Council of Europe as set forth in Article 3 (“Every member of the Council of Europe must accept the principles of the rule of law of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council...”):

i. Russia has been taking part in various activities of the Council of Europe since 1992 – through its participation in intergovernmental “cooperation and assistance” programmes (notably in the fields of legal reform and human rights), and through the participation of its special guest delegation in the work of the Parliamentary Assembly and its committees;

ii. “political dialogue” between Russia and the Committee of Ministers has been established since 7 May 1992;

iii. Russia has acceded to several Council of Europe conventions, including the European Cultural Convention;

iv. the following legislation is being prepared as a matter of priority, with international consultation, on the basis of Council of Europe principles and standards: a new criminal code and a code of criminal procedure; a new civil code and a code of civil procedure; a law on the functioning and administration of the penitentiary system;

v. new laws in line with Council of Europe standards will be introduced on the role, functioning and administration of the Procurator’s Office and of the Office of the Commissioner for Human Rights; for the protection of national minorities; on freedom of assembly and on freedom of religion;

vi. the status of the legal profession will be protected by law: a professional bar association will be established;

vii. those found responsible for human rights violations will be brought to justice – notably in relation to events in Chechnya;

viii. effective exercise will be guaranteed of the rights enshrined in Article 27 of the constitution and in the law on freedom of movement and choice of place of residence;

ix. conditions of detention will be improved in line with Recommendation A (87) 3 on European prison rules: in particular, the practically inhuman conditions in many pre-trial detention centres will be ameliorated without delay;

x. responsibility for the prison administration and the execution of judgements will be transferred to the Ministry of Justice as soon as possible;

xi. the state and progress of legislative reform will permit the signature and ratification, within the indicated timetable, of the European conventions listed hereunder in paragraph 10;

xii. the Russian Federation will assist persons formerly deported from the occupied Baltic states or the descendants of deportees to return home according to special repatriation and compensation programmes which must be worked out.

8. With a view to the fulfilment of these assurances and respect for these commitments, the Assembly resolves to establish – with the close cooperation of Russia’s national parliamentary delegation – its own parliamentary “advisory and control” programme under the authority of the committees responsible for the implementation of Order No. 508 (1995) on the honouring of obligations and commitments by member states of the Council of Europe. This programme will complement, and not prejudice, the monitoring procedure under Order No. 508 (1995).

9. As a contribution to long-term assistance and cooperation, the Assembly welcomes the European Union/Council of Europe joint programme for the strengthening of the federal structure and of human rights protection mechanisms and for legal system reform: particular attention should also be paid to support for, and the strengthening of, non-governmental organizations in the field of human rights and to the establishment of a civil society.

10. The Parliamentary Assembly notes that the Russian Federation shares fully its understanding and interpretation of commitments entered into as spelt out in paragraph 7, and intends:

i. to sign the European Convention of Human Rights at the moment of accession; to ratify the Convention and Protocols Nos. 1, 2, 4, 7 and 11 within a year; to recognise, pending the entry into force of Protocol No. 11, the right of individual application to the European Commission and the compulsory jurisdiction of the European Court (Articles 25 and 46 of the Convention);

ii. to sign within one year and ratify within three years from the time of accession Protocol No. 6 to the European Convention on Human Rights on the abolition of the death penalty in time of peace, and to put into place a moratorium on executions with effect from the day of accession;

iii. to sign and ratify within a year from the time of accession the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;

iv. to sign and ratify within a year from the time of accession the European Framework Convention for the Protection of National Minorities; to conduct its policy towards minorities on the principles set forth in Assembly Recommendation 1201 (1993), and to incorporate these principles into the legal and administrative system and practice of the country;

v. to sign and ratify within a year from the time of accession the European Charter of Local Self-Government and the European Charter for Regional or Minority Languages; to study, with a view to ratification, the Council of Europe's Social Charter; and meanwhile to conduct its policy in accordance with the principles of these conventions;

vi. to sign and ratify and meanwhile to apply the basic principles of other Council of Europe conventions – notably those on extradition; on mutual assistance in criminal matters; on the transfer of sentenced persons; and on the laundering, search, seizure and confiscation of the proceeds of crime;

vii. to settle international as well as internal disputes by peaceful means (an obligation incumbent upon all member states of the Council of Europe), rejecting resolutely any forms of threats of force against its neighbours;

viii. to settle outstanding international border disputes according to the principles of international law, abiding by the existing international treaties;

ix. to ratify, within six months from the time of accession, the agreement of 21 October 1994 between the Russian and Moldovan Governments, and to continue the withdrawal of the 14th Army and its equipment from the territory of Moldova within a time-limit of three years from the date of signature of the agreement;

x. to fulfil its obligations under the Treaty on Conventional Armed Forces in Europe (CFE);

xi. to denounce as wrong the concept of two different categories of foreign countries, whereby some are treated as a zone of special influence called the “near abroad”;

xii. to negotiate claims for the return of cultural property to other European countries on an *ad hoc* basis that differentiates between types of property (archives, works of art, buildings, etc.) and of ownership (public, private or institutional);

xiii. to return without delay the property of religious institutions;

xiv. to settle rapidly all issues related to the return of property claimed by Council of Europe member states, in particular the archives transferred to Moscow in 1945;

xv. to cease to restrict – with immediate effect – international travel of persons aware of state secrets, with the exception of those restrictions which are generally accepted in Council of Europe member states, and to facilitate the consultation of archives kept in the Russian Federation;

xvi. to ensure that the application of the CIS Convention on Human Rights does not in any way interfere with the procedure and guarantees of the European Convention on Human Rights;

xvii. to revise the law on federal security services in order to bring it into line with Council of Europe principles and standards within one year from the time of accession: in particular, the right of the Federal Security Service (FSB) to possess and run pre-trial detention centres should be withdrawn;

xviii. to adopt a law on alternative military service, as foreseen in Article 59 of the constitution;

xix. to reduce, if not eliminate, incidents of ill-treatment and deaths in the armed forces outside military conflicts;

xx. to pursue legal reform with a view to bringing all legislation in line with Council of Europe principles and standards: in particular, Presidential Decree No. 1226 should be revised without delay;

xxi. to extend its international cooperation to prevent – and eliminate the ecological effects of – natural and technological disasters;

xxii. to sign and ratify within a year from the time of accession the General Agreement on Privileges and Immunities of the Council of Europe and its additional protocols;

xxiii. to co-operate fully in the implementation of Assembly Order No. 508 (1995) on the honouring of obligations and commitments by member states of the Council of Europe, as well as in monitoring processes, established by virtue of the Committee of Ministers' Declaration of 10 November 1994 (95th session);

xxiv. to respect strictly the provisions of international humanitarian law, including in cases of armed conflict on its territory;

xxv. to co-operate in good faith with international humanitarian organizations and to enable them to carry on their activities on its territory in conformity with their mandates.

11. The Assembly recommends that the Committee of Ministers – on the basis of the commitments and understandings indicated above:

i. invite the Russian Federation to become a member of the Council of Europe;

ii. allocate eighteen seats to the Russian Federation in the Parliamentary Assembly;

iii. guarantee that the Organization's means and capabilities, in particular those of the Assembly and of the human rights institutions, are increased to meet the consequences of these decisions, and refrain from using the Russian Federation's accession to reduce the contributions of states which are already members.

APPENDIX III (c)

PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE

1995 ORDINARY SESSION

OPINION No. 190 (1995)¹ *on the application by Ukraine for membership of the Council of Europe*

1. Ukraine applied to join the Council of Europe on 14 July 1992. By Resolution (92) 29 of 23 September 1992, the Committee of Ministers asked the Parliamentary Assembly to give an opinion, in accordance with Statutory Resolution (51) 30 A.

2. To establish the primacy of its own laws over those of the Soviet Union, Ukraine made a declaration of sovereignty on 16 July 1990. On 24 August 1991, with the imminent dissolution of the Soviet Union, independence was declared in Ukraine and received massive public support in the referendum of 1 December 1991. A series of amendments to the Constitution of 1978 set the state on the path towards democracy.

3. Special guest status with the Parliamentary Assembly of the Council of Europe was granted to the Ukrainian Parliament on 16 September 1992.

4. Parliamentary and presidential elections were held in Ukraine in spring and summer 1994. Assembly observers of the first round of the parliamentary elections concluded that “the electoral process was fairly conducted and the election was free and fair, despite an apparently flawed electoral law...”. New laws on elections and political parties are now being prepared.

¹ *Assembly debate* on the 26 September 1995 (26th Sitting) (see Doc. 7370, report of the Political Affairs Committee, Rapporteur: Mr Masseret; Doc. 7398, opinion of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr Németh; and Doc. 7396, opinion of the Committee on Relations with European Non-Member Countries, Rapporteur: Mrs Severinsen). *Text adopted by the Assembly* on 26 September 1995 (26th Sitting).

5. In the course of 1994, after separate but coordinated visits effected at the request of the Assembly, two eminent jurists reported “spectacular progress” in bringing the constitutional provisions and general legislation of Ukraine into conformity with the Council of Europe’s general principles (notably the European Convention on Human Rights). They concluded that further profound reform was necessary, but that this might well be effected “after accession”. This report was released on 6 April 1995. It was the basis for the visit of the Assembly’s three rapporteurs to Ukraine (Kiev and Crimea) from 10 to 14 April 1995.

6. The constitutional situation has since been clarified – notably in regard to the separation of powers, the protection of human rights and the prospects for fast economic reform – with the signing by the President and the Parliament of Ukraine, on 8 June 1995, of a constitutional agreement on basic principles of the organization and functioning of state power and local self-government. This agreement should be followed by the adoption of a new constitution in conformity with the Council of Europe’s principles, not later than 8 June 1996. Meanwhile, provisions and concepts of the Constitution of 1978 which are incompatible with the agreement are made inoperative.

7. The Act of 17 March 1995, the Constitutional Agreement of 8 June 1995 and a presidential decree of 19 August 1995 confirm the special status of Crimea. The precise scope of its autonomy is to be laid down in the new Constitution of Ukraine, as well as in the Crimean Constitution which is now being drawn up by its parliament for approval by the Parliament of Ukraine.

8. Ukraine’s relations with the Russian Federation will be a determining factor for the security of the country, as well as for stability in the region. Ukraine is heavily dependent on Russia for energy. It is deeply in debt to the Russian Federation. More than 11 million (22%) of Ukraine’s 52 million population are ethnic Russians. Four million ethnic Ukrainians live in Russia. In Crimea – administrative authority over which was transferred to Ukraine in 1954 – ethnic Russians account for 70% of the population. Russia retains an interest in access to the ports of the Black Sea, which in turn give access to the Mediterranean. On 9 June 1995, an agreement was signed by the President of Ukraine and the President of Russia on division of the Black Sea fleet of the former Soviet Union and on access to the naval facilities in Sebastopol. This has removed a significant cause of tension and distrust. It should help towards the conclusion of a comprehensive treaty of friendship, cooperation and partnership, the provisional text of which was initialled on 8 February 1995.

9. A partnership and cooperation agreement between Ukraine and the European Union was signed on 14 June 1994. Progress in macro-economic stabilization and structural reform, despite unfavourable developments in terms of trade, enabled the signing of a further “interim agreement” on 1 June 1995. Membership of the World Trade Organization is envisaged.

10. With support from the European Union, the International Atomic Energy Agency and the G-7, Ukraine expects to close the Chernobyl nuclear power plant before the year 2000, according to a timetable announced on 19 May 1995. Following a decision to transfer all tactical and strategic nuclear weapons inherited from the former Soviet Union to the Russian Federation, Ukraine acceded on 5 December 1994, as a non-nuclear weapon-state to the Treaty on Non-Proliferation of Nuclear Weapons. Laws have been enacted to combat illegal trade in nuclear materials, after consultation with the International Atomic Energy Agency and the Nuclear Suppliers Group.

11. Accordingly, in the light of assurances given by the highest authorities of the state (letter of 27 July 1995 from the President of Ukraine, the President of the Parliament and the Prime Minister), and on the basis of the following considerations, the Assembly believes that Ukraine is able and willing, in the sense of Article 4 of the Statute of the Council of Europe, to fulfil the provisions for membership of the Council of Europe as set forth in Article 3: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council...".

i. Ukraine has been taking part in various activities of the Council of Europe since 1992 – through its participation in intergovernmental cooperation and assistance programmes (notably in the fields of legal reform and human rights) and the participation of its special guest delegation in the work of the Parliamentary Assembly and its committees;

ii. "political dialogue" between Ukraine and the Committee of Ministers of the Council of Europe was initiated on 13 July 1994;

iii. a joint European Union/Council of Europe programme for the reform of the legal and judicial system and local government is being prepared and its implementation is scheduled for autumn 1995;

iv. Ukraine has signed the Framework Convention for the Protection of National Minorities. Moreover, it has acceded to the European Cultural Convention, the European Convention on Information on Foreign Law and its additional protocol and the Europe Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities;

v. the following legislation, in conformity with Council of Europe standards, will be enacted within a year from accession:

- a new constitution;
- a framework-act on the legal policy of Ukraine for the protection of human rights;

- a framework-act on legal and judicial reforms;
- a new criminal code and code of criminal procedure;
- a new civil code and code of civil procedure;
- a new law on elections and a law on political parties;

vi. the role and functions of the Prosecutor's Office will change (particularly with regard to the exercise of a general control of legality), transforming this institution into a body which is in accordance with Council of Europe standards;

vii. the responsibility for the prison administration, for the execution of judgements and for the registration of entry to and exit from Ukraine will be transferred to the Ministry of Justice before the end of 1998;

viii. the independence of the judiciary in conformity with Council of Europe standards will be secured, notably with regard to the appointment and tenure of judges; the professional association of judges will be involved in the procedure for the appointment of judges;

ix. the status of the legal profession will be protected by law and a professional bar association will be established;

x. the Constitutional Court of Ukraine will be competent to decide on the compatibility of the acts of the legislative and executive authorities of the Autonomous Republic of Crimea with the Constitution and laws of Ukraine;

xi. a peaceful solution to the disputes existing among the orthodox churches will be facilitated while respecting the Church's independence *vis-à-vis* the state; a new non-discriminatory system of church registration and a legal solution for the restitution of church property will be introduced;

xii. the state and progress of legislative reform will permit the signature and ratification, within the delays indicated, of the European conventions listed hereunder;

xii. policy towards ethnic minorities will be further developed on the basis of the Framework Convention for the Protection of National Minorities and according to the principles of Assembly Recommendation 1201 (1993) on an additional protocol to the European Convention on Human Rights on this question.

12. The Parliamentary Assembly notes that Ukraine shares its interpretation of commitments entered into as spelt out in paragraph 11, and intends;

i. to sign the European Convention on Human Rights at the moment of accession; to ratify the Convention and Protocols Nos. 1, 2, 4, 7 and 11 within a year; to recognize, pending the entry into force of Protocol No. 11, the right of individual

application to the European Commission and the compulsory jurisdiction of the European Court (Articles 25 and 46 of the Convention);

ii. to sign within one year and ratify within three years from the time of accession Protocol No. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms on the abolition of the death penalty, and to put into place, with immediate effect from the day of accession, a moratorium on executions;

iii. pending further research on the compatibility of the two legal instruments, not to sign the Commonwealth of Independent States (CIS) Convention on Human Rights and other relevant CIS documents, given the fact that individual applications submitted under this convention might render impossible the effective use of the right to individual application under Article 25 of the European Convention on Human Rights;

iv. to sign and ratify within a year from the time of accession the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment;

v. to ratify within a year from the time of accession the Framework Convention for the Protection of National Minorities, and to conduct its policy towards minorities on the principles set forth in Assembly Recommendation 1201 (1993) and incorporate it into the legal and administrative system and practice of the country;

vi. to sign and ratify, and meanwhile to apply the basic principles of other Council of Europe conventions, notably those on extradition, on mutual assistance in criminal matters, on the transfer of sentenced persons, and on laundering, search, seizure and confiscation of proceeds from crime;

vii. to sign and ratify, within one year from accession, the European Charter of Local Self-Government and the European Charter for Regional or Minority Languages, to study with a view to ratification the Council of Europe's Social Charter, and meanwhile to conduct its policy in accordance with the principles of these conventions;

viii. to seek settlement of international disputes by peaceful means (an obligation incumbent upon all member states of the Council of Europe);

ix. to sign and ratify within a year from the time of accession the General Agreement on Privileges and Immunities of the Council of Europe, and its additional protocols;

x. to co-operate fully in the monitoring process for implementation of Assembly Order No. 508 (1995) on the honouring of obligations and commitments

by member states of the Council of Europe, as well as in monitoring processes established by virtue of the Committee of Ministers' Declaration of 10 November 1994 (95th Session).

13. For these reasons, the Assembly recommends that the Committee of Ministers:

- i. invite Ukraine to become a member of the Council of Europe;
- ii. allocate twelve seats to Ukraine in the Parliamentary Assembly.

International Mechanisms Treaty Bodies of the United Nations

Contributed by the International Service for Human Rights

NGOs should... have realistic expectations as to what they may accomplish by providing parallel reports. While the concluding observations of a treaty body may be extremely influential on a willing government, the recommendations of the committees can go unheeded by other governments.

This chapter will demonstrate the ways in which the United Nations human rights treaty bodies can be used by non-governmental organizations (NGOs) in the Commonwealth of Independent States (CIS) to support and strengthen the protection of refugees. As with most human rights endeavours at the UN, little will be achieved in the protection of refugee rights without the active and sustained effort of NGOs.

HUMAN RIGHTS TREATY BODIES IN THE CIS: THE ROLE OF NGOS

The six committees, or treaty-monitoring bodies, were established to monitor the implementation of rights guaranteed in certain United Nations conventions. The chart (see Annex One) shows the six treaty bodies and indicates which of the CIS countries have ratified as of 1 November 1997.

The committees meet regularly (in some case as frequently as three times per year) in Geneva or New York. Members of the treaty bodies are independent experts elected by the states parties to each convention. In addition to the meetings of the above committees, the chairpersons of six of the committees meet each September to consult with one another and outside bodies.

The powers of these treaty bodies vary, depending on the treaty. In general they review state reports, make comments on the implementation of the treaty (including their interpretation of articles of the treaty) and when applicable they receive individual petitions against a state party.

— REVIEW OF STATE REPORTS —

The main function of treaty bodies is to review and comment on reports submitted periodically (usually every four or five years) by states parties. During the sessions, representatives of the government under review are present to answer questions from the members of the treaty body. Although NGOs may attend they are not entitled to participate in the proceedings. Only members of the committees may put questions to representatives of the state party.

Periodic reports provide an outline by the state party of the situation in that state, with respect to the implementation of the rights guaranteed in the relevant convention. This can include a discussion of matters such as legislative provisions, judicial findings and various governmental programmes in place to ensure the implementation of the rights. Because states want to cast themselves in the most favourable light before the treaty bodies (and avoid a finding that the state is not doing enough to implement the rights they have agreed to guarantee) the reports can often fail to tell the entire story. For this reason it is vital that the treaty body members receive detailed and accurate information on the human rights situation from NGOs. Only then can the treaty body members make an objective assessment of the state party report. Most members of treaty bodies (who are independent experts and not representatives of their governments) welcome information submitted from NGOs, which they acknowledge as essential for them to carry out their duties effectively.

Although NGO information (known at the UN as “supplementary information”) is not required to be submitted in any particular format, NGOs with a relatively large amount of resources sometimes prepare what is often referred to unofficially as a “counter” or “parallel” report. A “counter” or “parallel” report is normally a comprehensive rebuttal to the government’s report. Another easier, and sometimes just as effective, alternative to a comprehensive rebuttal is a submission concerning one specific issue or article of the treaty that the state party should be reporting on.

The treaty body publishes its concluding observations on the state’s performance in respect to its obligations. The comments or observations made by a treaty body on the report of a particular state are often quite detailed and useful. The treaty body may indicate its disapproval of certain laws, policies or practices of the state, which it concludes are inconsistent with the state’s obligations under the treaty, are open to abuse or otherwise give rise to concern. These comments by the official body, authorized to interpret the treaty, carry a significant amount of weight and are generally taken quite seriously by most governments. They are useful tools for NGOs who are lobbying to change particular laws, policies or practices.

NGOs can ensure that the government’s report, their own counter reports and the concluding observations of the committee get as much publicity on the domestic level

as possible. Many governments, fully aware of their report's shortcomings, are often wary of publicizing it within their country and thus sparking a public debate.

Possible NGO Action

NGOs should obtain from the relevant secretary of a Committee the schedule of when a state report will be considered by the Committee.

All NGOs (including those without consultative status with the UN) may submit detailed and accurate information to treaty bodies regarding government policies or practices which violate the human rights of refugees. This information should be submitted to the secretary of the relevant committee in advance of the treaty body's consideration of that state's report.

NGOs should request a briefing meeting with the members of the committee before the treaty body meets with the delegation presenting a state report.

NGOs should use the reports and comments of the treaty bodies in supporting individual asylum claims and refugee rights issues.

NGOs should publicize government's reports as well as their own reports.

NGOs should campaign for universal ratification of the human rights treaties without reservations.

A word of caution. It is, of course, for each NGO to decide whether a contribution to a treaty body is an effective use of what are inevitably scarce resources. While an NGO can sometimes make most effective use of a treaty body by meeting with its members, either informally or in a scheduled meeting, this is not necessary for an NGO to make a useful contribution. NGOs are advised to contact the secretary of the relevant treaty body before planning a trip to Geneva or New York.

NGOs should also have realistic expectations as to what they may accomplish by providing parallel reports. While the concluding observations of a treaty body may be extremely influential on a willing government, the recommendations of the committees can go unheeded by other governments. Preparation of a parallel report (or a partial reply to the government report), while extremely useful for the committees, will rarely result in an immediate change in policy, even by willing governments. The process is a more gradual one.

**INDIVIDUAL PETITIONS AND THE EXHAUSTION
OF DOMESTIC REMEDIES**

Under some conventions, the treaty bodies may consider “petitions”, or complaints, received from individuals or groups who claim to have been victims of human rights abuses. In some cases complaints may also come from a state party which alleges that other states parties are not complying with their obligations under the relevant convention. Currently individual petitions may only be submitted:

- to the Human Rights Committee by individuals from states parties which have ratified Optional Protocol I to the International Covenant on Civil and Political Rights (ICCPR);

- to the Committee Against Torture (CAT) by individuals in a state party which has made a declaration under article 22 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;

- to the Committee on the Elimination of Racial Discrimination (CERD) by individuals or groups of individuals from a state party which has made a declaration under article 14 of the Convention on the Elimination of All Forms of Racial Discrimination.

Discussions are currently underway to elaborate additional protocols in order to expand the rights of individuals or groups to petition, that is to say to complain, to the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Discrimination against Women (CEDAW).

The appropriate committee will review a case, contacting the state and the petitioner for information, then provide a decision (“view”) on the petition. This emerging case law may be useful to those working on refugee and asylum cases at the national and regional level. If a committee rules in a petitioner’s favour, willing states will comply with the decision; unfortunately unwilling states may simply ignore the ruling. However, it is not easy to submit an individual petition and there are fairly strict rules on admissibility.

One such admissibility rule requires the exhaustion of domestic remedies. Individual complaints to treaty bodies can only be made once it has become clear that all national remedies (judicial, administrative and extraordinary) have failed to provide relief for the individual claiming that his or her convention rights have been violated. This stems from the fact that in international law it is the primary responsibility of the state to provide remedies for its citizens. In other words, aggrieved individuals must go through the process of asking for relief nationally, *even if they feel they would receive fairer treatment before a treaty body.*

The requirement of exhaustion of domestic remedies is set out in article 5(2)(b) of the first Optional Protocol to the ICCPR, article 14(7)(a) of ICERD and article 22(5)(b) of the Convention against Torture. A review of the wording of these provisions indicates that before a complainant is required to exhaust domestic remedies, the remedies must meet certain minimum criteria. The minimum criteria are as follows:

- For the first Optional Protocol to ICCPR domestic remedies:
 - (i) must not be unreasonably prolonged;
 - (ii) must be “available”.
- For ICERD domestic remedies must not be unreasonably prolonged.
- For the Convention against Torture domestic remedies:
 - (i) must not be unreasonably prolonged;
 - (ii) must be “available”;
 - (iii) must not be “unlikely to bring effective relief”.

It is up to the complainant to demonstrate in his or her written submission to the Committee that he or she has taken steps to exhaust all domestic remedies. If the complainant feels that certain remedies are not available, or are ineffective or unreasonably long, he or she should provide as much evidence as possible of the circumstances making the domestic remedy unavailable or ineffective.

If a committee determines that domestic procedures are still pending, then they may decide to suspend the matter and reconsider it later or they may declare the communication inadmissible. It must be stressed that if a complainant has not pursued a domestic remedy within a set time limit, barring exceptional circumstances, the relevant committee will not be able to consider the matter.

Possible NGO Action

NGOs could ensure that asylum-seekers and their families, as well as lawyers, know about the procedures of individual petition of the appropriate treaty bodies and assist in preparation of the communications.

NGOs should bear in mind that the processing of an individual petition before the committees can take up to three years, depending on the degree of cooperation by the states parties and the authors of the complaints. Before the Committee against Torture and the Human Rights Committee however, urgent action may be requested where both committees can take steps to avoid irreparable harm such as situations of possible expulsion or the imposition of the death penalty. NGOs should also be aware that many states simply ignore the rulings of treaty bodies arising from individual petitions.

— THE ROLE OF GENERAL COMMENTS —

With certain treaty bodies, experts will devote time to considering an article from the relevant convention and issue a General Comment on the article. General Comments provide states parties with an in-depth consideration of the right discussed and of the responsibilities of states parties in relation to the guarantee of that right. NGOs should be familiar with the General Comments of a committee and should refer to these comments in their discussions with committees.

Possible NGO Action

NGOs should contact committees to determine which articles of the relevant convention or covenant are to be the subject of a General Comment. The process usually continues over several sessions. Where an NGO has particular expertise in relation to a certain article or an awareness of particular problems with the article, their comments can be of immeasurable assistance to the Committee.

— NGOs WORKING IN COOPERATION —

National or regional NGOs which want to provide alternate information to treaty bodies may want to consider acting in cooperation with other national NGOs, international NGOs or NGO coalitions. Experts will often call on NGOs to submit joint reports to facilitate their task. A well-coordinated submission to a treaty on behalf of several NGOs in a country or region will obviously have more impact than a submission by one NGO alone. It will also make the task easier for the experts, thereby increasing the chances that they will read the submission thoroughly.

In addition, certain international NGOs which prepare alternate reports on particular countries for treaty bodies welcome input from NGOs in that country. NGOs may be invited to attend the treaty body session or a pre-session working group to present their alternate views. Many times in the past the teaming-up of national and international NGOs has resulted in more persuasive and complete information for the relevant treaty body. With such a pairing an international NGO combines its expertise relating to the procedures of the treaty body – and perhaps the personality and interests of many of the members – with the expertise of the national NGO, which is uniquely qualified to speak about the situation in the country and answer questions regarding legislation, policy, etc.

National NGOs, therefore, may want to consult with certain international NGOs regarding information which could be of interest to international NGOs. Similarly, national NGOs may provide information on the situation in their country to an NGO coalition, such as the NGO Group for the Rights of the Child, which provides alternative information to the Committee for the Rights of the Child.

CONSIDERATION OF THE SIX TREATY BODIES AND THEIR TREATIES

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE HUMAN RIGHTS COMMITTEE

The Human Rights Committee (CCPR) was established under the International Covenant on Civil and Political Rights (ICCPR). It is often regarded as the most important treaty body because the ICCPR is the most comprehensive and universal treaty dealing with civil and political rights. The CCPR was set up in 1976, and since then has commented on hundreds of periodic reports submitted by states and reached decisions on hundreds of individual communications (petitions). The CCPR is composed of 18 members elected by states parties to the ICCPR. The members are independent and do not act as representatives of their own states rather, they serve in their individual capacities. The CCPR meets three times a year (March-April, July and October), each time for three weeks, normally twice in Geneva and once in New York.

As of **30 November 1997**, all CIS countries except Kazakstan and Tajikistan were parties to the ICCPR, with only the Russian Federation and the Ukraine having reservations to one article, article 48(1).¹

- **State Party Reports**

The comments of the CCPR on a state party's report are made public after the representatives have had a chance to answer questions. However, NGOs can submit information to the CCPR in advance of its consideration of the state party's report thus providing information to allow the CCPR to ask specific questions and raise concerns.

¹ "The Union of Soviet Socialist Republics declares that the provisions of paragraph 1 or article 26 of the International Covenant on Economic, Social and Cultural Rights and of paragraph 1 of article 48 of the International Covenant on Civil and Political Rights, under which a number of states cannot become parties to these Covenants, are of a discriminatory nature and considers that the Covenants, in accordance with the principle of sovereign equality of States, should be open for participation by all States concerned without any discrimination or limitation".

It should be kept in mind that the ICCPR is about civil and political rights in general, and not specifically about refugee protection. It is therefore difficult for the CCPR to express concern in its concluding observations on a state's asylum policies. However, inasmuch as a state's asylum policy contravenes obligations stated in the convention, as they often do, the CCPR has the mandate to point out the deficiencies. In many instances where state party reports are being examined, the committee has asked questions of the state representative specifically concerning the detention or expulsion of refugees and asylum-seekers, and on several occasions, such concerns have been reflected in the concluding observations.

Example:

In 1994 the CCPR made the following comments about the USA:

The Committee is concerned that excludable aliens are dealt with by lower standards of due process than other aliens and, in particular, that those who cannot be deported or extradited may be held in detention indefinitely. The situation of a number of asylum-seekers and refugees is also a matter of concern to the Committee.

Case Studies:

In July 1995 the CCPR asked the UK delegation for clarification of the case of Joy Gardener, a Jamaican immigrant who had died while she was being deported by the UK authorities.

In the October-November 1995 meeting, the Committee expressed concern to the UK delegation about the fact that many Vietnamese asylum-seekers in Hong Kong are subject to long-term detention (*see arts. 9 and 10 of the Covenant*) and the conditions under which the deportation of Vietnamese who were not recognized as refugees was carried out.

If the Human Rights Committee were to express concern about a state's asylum policies or its treatment of refugees in the concluding remarks, NGOs could use this to lobby the government to make improvements. However, the Committee needs to have accurate and reliable information available in order to reach such conclusions. The reports submitted by states parties often provide insufficient information and are unlikely to acknowledge deficiencies in the state's asylum policies. Therefore, information from NGOs is crucial.

NGOs could submit information regarding refugee protection issues to the Human Rights Committee in advance of its consideration of a state party report. In accordance with rule 62 of its rules of procedure, the Committee establishes

working groups which meet before each session to prepare lists of issues concerning the reports to be considered by the Committee. A working group holds discussions with representatives of NGOs and specialized agencies in separate, informal meetings. A working group is composed of four members of the Committee and meets during the week immediately preceding the session. The lists of issues are then presented to the full Committee, which may offer suggestions for amendments or improvements before adopting them. Submitted information should be linked to provisions in the ICCPR, for example:

- unfair asylum procedures could be linked to article 13 (fair hearing before expulsion);
- Article 7 (prohibition of torture) carries implicit protection against being returned to a country where there is a risk of torture;
- policies that split refugee families could be linked to article 23 (protection of family life);
- freedom from arbitrary arrest or detention should be linked to article 9.

In addition, NGOs can use the conclusions and comments of the CCPR to support their work to defend refugee rights.

• **Individual Communications**

As noted in the introduction, there is an Optional Protocol to the ICCPR which, if ratified by a state party, allows individuals in that state to petition, at any time, the CCPR alleging a violation of rights set forth in the Covenant. As of **1 November 1997**, of the twelve CIS countries, only Azerbaijan, Kazakhstan and Tajikistan had not ratified this Optional Protocol.

If a “communication” under the Optional Protocol is declared admissible by the CCPR, then the Committee seeks information and comments from the government before the Committee reaches its “view” on the case. In order to be admissible, a communication must meet the following criteria:

- the communication must not be anonymous;
- the communication must be submitted by the victim, a close family member, or someone assigned by the victim to act on his or her behalf;
- all available domestic remedies must have been exhausted, unless the author of the communication can show such remedies are ineffective or the procedures for securing such remedies would be unduly prolonged;

– the communication cannot be considered if the same matter is currently being examined under another procedure of international investigation.

A number of individual communications have been submitted to the CCPR by refugees and asylum-seekers and in at least one case the Committee has reached a decision on the merits of the case. It may take up to three years for the CCPR to reach a decision on an individual case. However, the CCPR has a procedure of interim protection whereby it can ask a state not to take threatened measures (such as deportation) until the substance of the case is considered.

Possible NGO Action

NGOs can advise asylum-seekers, their families, and lawyers about the possibility of raising individual refugee cases before the CCPR.

• General Comments

General Comments can provide valuable information on the interpretation of an obligation of a state under a particular article. It is very important when preparing a response to a state party report or an individual petition to consult the General Comments to learn of the Committee's interpretation of the applicable articles.² For example, the Human Rights Committee, in its General Comment 20 of 1992 on article 7 said:

“In the view of the Committee, states parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end”.

² Further information on general comments (see HR1/GEN/1/Rev.3), on submitting individual cases or on the CCPR's consideration of state reports, including the schedule of when the reports of particular states will be considered, can be obtained from the Secretary of the Human Rights Committee, UN Centre for Human Rights, Palais des Nations, 1211 Geneva 10, Tel.: (41-22) 917 39 65/39 39, Fax: 917 00 99.

**INTERNATIONAL COVENANT ON ECONOMIC,
— SOCIAL AND CULTURAL RIGHTS AND THE COMMITTEE ON —
ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

The Committee on Economic, Social and Cultural Rights (CESCR) is the treaty body which monitors implementation of the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Due to many factors, not the least of which being that the treaty body is not specifically provided for in the Covenant, some difficulties were encountered in the establishment of the Committee which belatedly held its first session in 1987.

As of **1 November 1997**, all CIS countries except Kazakstan and Tajikistan were parties to ICESCR with only the Russian Federation and the Ukraine having a reservation to article 26(1) of the ICESCR.³

• **State Party Reports**

CESCR meets twice annually in Geneva, in May and in November. During sessions, like the other treaty bodies, the CESCR reviews reports in which states set out details of the steps they are taking to comply with the Covenant. States are to submit their reports within two years of ratification or accession, and thereafter every five years. The Committee is made up of 18 experts serving in their individual capacity. Like the CCPR and other treaty bodies, the CESCR publishes concluding observations on the state party concerned after review of its report. It is therefore an ideal forum to make known the violations of economic, social, and cultural rights that refugees may face. The CESCR has on many occasions expressed concern regarding the rights of refugees and asylum-seekers.

For example, in 1994, the CESCR stated:

*“In view of the non-discrimination clauses contained in article 2(2) of the Covenant, the Committee strongly urges the [Belgian] Government to fully ensure that persons belonging to ethnic minorities, refugees and asylum-seekers are fully protected from any acts or laws which in any way result in discriminatory treatment within the housing sector”.*⁴

³ See footnote 1, *mutatis mutandis*.

⁴ E/C.12/1994/7, paragraph 14.

Article 1 of the Covenant states that the right to self-determination⁵ is universal and calls upon states to promote the realization and respect of that right. Articles 6 to 15 of the Covenant (Part III) recognize the right to work; to the enjoyment of just and favourable conditions of work; to form and join trade unions; to social security; to protection for the family and children; to an adequate standard of living; to the enjoyment of the highest attainable standard of physical and mental health; to education; to take part in cultural life and to benefit from scientific advances. NGO information supplied to the CESCR should be linked to specific provisions of the Covenant, such as:

- the right to work (article 6);
- the right to adequate food, clothing, and housing (article 11);
- the right to basic education (article 13).

It should be kept in mind that there is a certain amount of debate as to the binding character of many of the obligations set out in the ICESCR (as opposed to the ICCPR, about which there is little debate). The general consensus is that the “right to work” does not mean that anyone arriving on the soil of a country has the automatic right to be provided by the state with a job. However, it is without question that states must, to the best of their resources, provide for the people in their territory and not prevent such rights from being realized. It is also without question, thanks to the non-discrimination clause, that states must not prevent certain segments of their society from realizing particular rights; for example, refugees must not be prevented from working simply because they are refugees.

Possible NGO Action

NGOs should submit information on countries that are due to present periodic reports, regarding policies which affect the economic, social or cultural rights of refugees.

NGOs should use the conclusions and comments of the CESCR to support their work in protecting refugees.

NGOs, irrespective of consultative status, are encouraged to address the Committee on the first afternoon of each session.

⁵ According to article 1(1): “By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

- **Individual Communications**

Many members of the Committee have expressed their support for the drafting of an optional protocol to the ICESCR similar to that of the ICCPR, which would enable it to receive individual communications concerning violations of rights referred to in the Covenant. No such procedure is yet in place.⁶

**CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL
— DISCRIMINATION AND THE COMMITTEE ON THE ELIMINATION OF —
RACIAL DISCRIMINATION**

The Committee on the Elimination of Racial Discrimination (CERD) was established by the Convention on the Elimination of All Forms of Racial Discrimination which was adopted in 1965. It is composed of 18 independent experts who serve in their personal capacity. States are obliged to report periodically to CERD on the measures they have taken to implement the Convention. The Committee meets for two three-week sessions, in March and August, in Geneva.

As of **1 November 1997**, all CIS countries except Georgia and Kazakstan were parties to the Convention on the Elimination of Racial Discrimination, none with reservations. An earlier reservation to article 22 by Belarus, the Russian Federation and the Ukraine was withdrawn.

- **State Party Reports**

After considering periodic reports, CERD draws up its “concluding observations” which often express concern about national laws and practices, which are not in line with the Convention and include recommendations for changes or other steps to be taken.

In the past there has been some confusion as to whether discrimination against non-nationals, like refugees, was covered by the Convention. Article 1(2) of the Convention states:

This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State party to this Convention between citizens and non-citizens.

⁶ Further information on how to submit information to CESCR can be obtained from the Secretary to the Committee on Economic Social and Cultural Rights, UN Centre for Human Rights, Palais des Nations, 1211 Geneva 10, Tel.: (41-22) 917 39 68/39 63, Fax: 917 00 99.

However, CERD has recently confirmed that it expects states parties to include information in their reports on laws and policies affecting non-citizens. CERD takes the view that discrimination against non-citizens may still be covered by the Convention (despite article 1(2)), for example, when one particular racial, religious or ethnic group is discriminated against. Also, some provisions of the Convention, such as those obliging states parties to make illegal and punish racist propaganda and racist violence, clearly affect non-nationals like refugees. In the past few years, CERD has often expressed concern about, or made recommendations concerning, the treatment of refugees and asylum-seekers in its concluding observations on state reports.

Example from 1993 CERD report:

[The German Government] ...should consider reviewing certain restrictive provisions recently adopted with regard to asylum-seekers, to ensure that they did not result in any discrimination in effect on grounds of ethnic origin.⁷

Example from the 1994 CERD report:

Insufficient information was provided in the [French Government's] report about the new laws of immigration and asylum. Concern is expressed that the implementation of these laws could have racially discriminatory consequences, particularly in connection with the imposition of limitations on the right of appeal against expulsion orders and the preventive detention of foreigners at points of entry for excessively long periods.⁸

Possible NGO Action

NGOs should submit information to CERD in advance of its consideration of a state party's report on policies and practices that discriminate against refugees and asylum-seekers on the basis of race. For example, refer to:

- policies which are directed towards refugees from one particular country and have the purpose or effect of discriminating against them on the basis of their race;***
- failure by the government to take action against groups that are using or advocating violence, or engaged in racist propaganda against refugees.***

⁷ (A/48/18).

⁸ (A/49/18 para. 144).

- **Individual Communications**

CERD is empowered to receive and consider complaints from individuals, or groups of individuals, who allege that a state party is in violation of provisions of the Convention. CERD however, may only receive and consider complaints if a state party has made a declaration under article 14 of the Convention recognizing its competence to do so. As of **1 November 1997**, only the Russian Federation and the Ukraine had made declarations under article 14.

So far CERD has considered very few individual communications.⁹ In order to be admissible, individual communications must not be anonymous and national or “domestic” remedies must have been exhausted, that is to say, all available legal remedies must have been sought in their own country before the individuals may bring a communication to CERD. CERD has not yet considered individual communications from refugees.

Possible NGO Action

NGOs should ensure that asylum-seekers and their families, as well as lawyers, are aware of the possibility of submitting individual communications to CERD in cases where refugees suffer racial discrimination, or where groups that are using or advocating violence or engaged in racist propaganda against refugees are not being prosecuted by the government.

⁹ Further information on CERD and on the schedule of upcoming state reports can be obtained from the Secretary, Committee of CERD, UN Centre for Human Rights, Palais des Nations, 1211 Geneva 10, Tel.: (41-22) 917 39 17, Fax: 917 00 99.

**CONVENTION ON THE ELIMINATION OF ALL FORMS OF
— DISCRIMINATION AGAINST WOMEN AND THE COMMITTEE ON —
THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN**

The Committee on the Elimination of Discrimination against Women (CEDAW) is the monitoring body of the Convention on the Elimination of All Forms of Discrimination against Women (1979). The Convention followed the earlier Declaration on the Elimination of Discrimination against Women which was proclaimed by the General Assembly on 7 November 1967.

As of **1 November 1997**, all of the CIS countries except Kazakstan were parties to the Convention and none had reservations. An earlier reservation to article 29(1) by Belarus, the Russian Federation and the Ukraine was withdrawn.

The Committee consists of 23 experts serving in their personal capacity. Although there has been discussion of moving the Committee's sessions to Geneva, in 1997 it was still meeting in New York, twice annually for three weeks, once at the end of January/beginning of February and once in the summer.

• **State Party Reports**

The basic task of CEDAW, as set out in article 17 of the Convention, is to consider the progress made in the implementation of the Convention. For this purpose, states parties to the Convention have to submit periodic country reports to the Committee every four years on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention. The first report has to be submitted within one year after entry into force of the Convention for the state concerned. The reports are examined in public meetings, but NGOs have no official right to speak during the sessions.

Although it is not explicitly mentioned in the Convention, the Committee could, in the examination of the reports, pay particular attention to the plight of refugee women. For this purpose, human rights and refugee organizations are valuable sources of information for the Committee, since the reports submitted by states do not always reflect the true situation. The submission of reliable alternative information related to the state party report is particularly useful to the experts in their task of scrutinizing the reports.

Possible NGO Action

NGOs could submit information on countries which will soon be presenting periodic reports, regarding policies on refugee women.

- **Individual Communications**

Numerous NGOs are calling for the adoption of an optional protocol to the Convention creating procedures to allow individuals to complain against their state for a violation of the Convention or allowing states to complain of violations of the Convention by other states. An optional complaints procedure would provide an important means of redress for victims and an avenue for furthering interpretation and application of the Convention. The 1993 World Conference on Human Rights had asked the Commission on the Status of Women (CSW) and the Committee to examine the possibility of introducing the right of individual petition, through the preparation of an optional protocol to the Convention. In March 1996, the CSW began examination of a draft for an optional protocol on individual communications. No such procedure is yet in place.¹⁰

- **General Comments**

The Committee has adopted general recommendations covering such issues as women's economic position, the impact of structural adjustment policies, maternity leave, and measures taken to allow women to combine child-bearing with employment and violence against women.

**CONVENTION AGAINST TORTURE AND OTHER CRUEL,
— INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT AND —
THE COMMITTEE AGAINST TORTURE**

The Committee against Torture (CAT) was established under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The CAT began work in 1988. The CAT is made up of 10 experts, elected by states parties to serve in their personal capacity. The CAT meets in Geneva, for two weeks in April and also November. Like the CCPR, the CAT is empowered to receive reports from states parties and to decide on individual communications.

As of **1 November 1997** all CIS countries except Kazakstan and Turkmenistan were parties to the Convention. No CIS countries had reservations to the Convention. An earlier reservation to article 30(1) by Belarus, Russia and the Ukraine was withdrawn as well as an earlier reservation to article 20 by Russia.

¹⁰ Further information on CEDAW, and on the schedule of upcoming state reports, can be obtained from the Secretary of the Committee of CEDAW, Room DC2-1236, Division of the Advancement of Women, Department of Policy Coordination and Sustainable Development, United Nations Plaza, New York, NY 10017, Tel.: (212) 963 50 86, Fax: (212) 963 34 63.

The Convention introduced two significant new elements to the United Nations' fight against torture. First, it specified that alleged torturers may be tried in any state which is a party to the Convention; alternatively they must be extradited to face trial in the state where their crimes are alleged to have been committed or a state in which the alleged perpetrator or victim resides. Second, it provided for international investigation of reliable reports of torture, including visits to a state, on consent of that state. Article 20 of the Convention provides a procedure whereby the Committee, upon receiving reliable information indicating that torture is being systematically practised in a state, may designate one or more of its members to make a confidential inquiry into the matter and report to the Committee. Such an inquiry may include a visit to the territory of the state in question on consent of that state.

Under article 22 of the Convention, states parties may recognize the competence of the Committee to consider communications from, or on behalf of, individuals claiming to be victims of a violation under the provisions of the Convention. Under article 21 of the Convention, states parties may recognize the competence of the Committee to consider communications from one state party which claims that another state party is not fulfilling its obligations under the Convention.

The CAT is potentially an extremely useful treaty body for NGOs working on refugee protection issues. Article 3 of the Convention against Torture provides:

“1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights”.

This explicit protection against *refoulement* where there is a risk of torture ensures that, at least regarding asylum-seekers who fear torture if returned, the CAT is a treaty body which has a refugee protection mandate. Furthermore, both in its examination of state reports and individual communications the CAT has shown its willingness to take this mandate seriously.

• **State Party Reports**

States parties to CAT are obliged to submit an initial report to the CAT within one year after becoming a party to the Convention against Torture, and thereafter periodic reports every four years. The CAT may also request supplementary reports. The meetings where states parties present their reports are public, but only members of CAT may put questions to the representatives of the state who present the report.

The CAT may make comments or observations on the report, and include these in the report of the meeting. NGOs can provide information to CAT in advance of its consideration of a state party report, and CAT can use the information in raising concerns at the public meeting where the report is considered.

Numerous states, which have presented periodic reports to the CAT, have been questioned by CAT members about measures taken to implement article 3 of the Convention against Torture. There have been questions about the procedures in place to ensure asylum-seekers are not returned to countries where they are at risk of torture and whether border officials have clear instructions not to summarily expel asylum-seekers. (Risk in this case has been interpreted by the CAT to mean “a foreseeable, real and personnel risk...”¹¹). There have also been questions about the treatment of asylum-seekers and refugees from specific countries. The CAT has also expressed its concern when answers to such questions have been unsatisfactory.

In order for the members of CAT to be in a position to put questions to representatives of states about the extent to which they are in compliance with article 3, they need to have accurate, detailed and up-to-date information. Since states parties are naturally inclined to claim that they are in full compliance with article 3, and the CAT members will not be able themselves to conduct background research on every country, this information usually is only available if submitted by NGOs.

Possible NGO Action

NGOs should submit information to the CAT on countries due to present periodic reports. This information should provide accurate and up-to-date information on:

- deficiencies in asylum procedures which could lead to people being forcibly returned to countries where they are in danger of being tortured;***
- any individual cases of asylum-seekers whose cases have been rejected and who, after being forcibly returned, have been tortured or threatened with torture;***
- government policies that are restrictive towards asylum-seekers from particular countries, especially where there is a well-documented practice of torture or serious human rights violations in that country.***

¹¹ Communication 28/1995, *E.A. v. Switzerland*.

• **Individual Communications**

As of **1 November 1997**, the Russian Federation was the only CIS country to have made a declaration under article 22 of the Convention against Torture, recognizing the competence of the CAT to receive individual communications. In order to be admissible, communications must satisfy similar requirements regarding individual communications to the ICCPR (see above).

Example:

In *Mutumbo v. Switzerland*,¹² a national of Zaire, who had sought asylum in Switzerland, had his claim rejected by the Swiss authorities. Mutumbo claimed he had been detained and tortured in Zaire on account of his perceived political views, but the Swiss argued that his claim was not credible. The CAT emphasised that, based on the conclusions of other UN human rights bodies, including the Commission on Human Rights, there was a consistent pattern of gross, flagrant or mass violations of human rights in Zaire and concluded that there were “substantial grounds” for believing he would be subject to torture if returned to Zaire. The CAT stated that Switzerland had an obligation not to expel Mutumbo to Zaire “or to any other country where he runs a real risk of being expelled or returned to Zaire or of being subjected to torture”.

Example:

In *Khan v. Canada*,¹³ the Canadian government noted that Khan had submitted medical evidence of his past torture in Pakistan only after his application for refugee status had been rejected, and claimed that this raised doubts about his credibility. However, the CAT, in November 1994, noted that such behaviour was not uncommon for torture victims and pointing out that “*evidence exists that torture is widely practised in Pakistan against political dissenters*”, concluded that Canada should refrain from expelling Khan to Pakistan.

¹² Communication 13/1993.

¹³ Communication 15/1994.

Possible NGO Action

*NGOs should ensure that asylum-seekers and their families, as well as lawyers, are aware of the procedures of submitting individual communications to the CAT, as long as the state concerned has declared that it accepts the competence of CAT to receive individual communications.*¹⁴

— **CONVENTION ON THE RIGHTS OF THE CHILD** —
AND THE COMMITTEE ON THE RIGHTS OF THE CHILD —

The Convention on the Rights of the Child was unanimously adopted by the United Nations General Assembly on 20 November 1989, 30 years after the adoption of the Declaration on the Rights of the Child. This Convention has been ratified by almost all of the states in the world. All twelve of the CIS countries are members of the Convention and none have made reservations.

The Convention provides that every child has the right to life, survival and development; no child under 15 should take part in hostilities; and when courts or other institutions deal with children, the child's best interests shall be a primary consideration. The Convention also stipulates that: children should not be separated from their parents except for their own well-being; states should protect children from physical or mental harm and neglect; disabled children have the right to special treatment, education and care; and that primary school education shall be free and compulsory. Also stipulated is that capital punishment or life imprisonment should not be imposed on children; and children of minority and indigenous populations should freely enjoy their own culture, religion and language. According to the Convention, each child shall enjoy these rights without discrimination.

The Committee on the Rights of the Child (CRC) was established under the Convention on the Rights of the Child and began working in 1991. The CRC is composed of 10 experts elected by states parties to serve in their individual capacities. On December 12 1995, the Conference of the States Parties to the Convention decided to enlarge the membership of the panel to 18 experts. The enlargement was endorsed by the United Nations General Assembly at its 1995 session. The CRC met twice a year until it was decided, in 1995, to hold a third session. The sessions, all in Geneva, are in January, May, and September, for three weeks each.

¹⁴ Further information on submitting individual cases to the CAT and the CAT's consideration of state reports, including the schedule of when the reports of particular states will be considered, can be obtained from the Secretary of the Committee against Torture, UN Centre for Human Rights, Palais des Nations, 1211 Geneva 10, Tel.: (41-22) 917 39 62/39 67, Fax: 917 00 99.

Although NGOs may attend the Committee's sessions, they may not take part in the discussion. However, the CRC has initiated a practice of holding a "general discussion day" once a year at its September meeting where a particular theme is discussed and where NGOs are encouraged to attend and participate in the discussions. Also, immediately after a CRC session there is a pre-session meeting to prepare for the next meeting of the Committee. NGOs may request to be invited to present information on the record of states due to report at the next session.

Regarding refugees, article 22 of the Convention on the Rights of the Child provides:

"States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties".

Also, article 2 of the Convention requires states parties to:

"...respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's [...] national, ethnic or social origin [...] or other status".

Both articles imply that refugees and asylum-seekers under the age of 18 (the age set by the Convention) should be entitled to all of the rights in the Convention, whatever their immigration status.

Example:

In the 8th session of the CRC, in January 1995, the Committee, based on reports from Danish NGOs, asked Denmark, "what measures have been taken to avoid asylum-seeking children being kept in custody while awaiting deportation?" One of the members also concluded "...the Alien Act merited re-evaluation to ensure that applications for (refugee) family reunification were handled humanely and effectively".

• **State Party Reports**

States parties are required to submit an initial report to the CRC within two years of becoming party to the Convention and thereafter every five years. These reports should cover the measures the state party has adopted to give effect to the rights recognized in the Convention.

There is no provision in the Convention allowing for the CRC to receive and decide on individual communications, so the CRC's sole function is to examine the reports of states parties. However, the CRC, under article 45(a) is empowered to request information relating to its consideration of these reports from the United Nations Children's Fund (UNICEF), other UN agencies and "other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates". The CRC has interpreted the term "competent bodies" to cover NGOs. In addition, the practice of the CRC has been to request information from NGOs on reports submitted by states parties. In many countries, NGOs working on children's rights have worked together to prepare a joint report to the committee which criticizes deficiencies or omissions in the state party report.

Possible NGO Action

NGOs should submit detailed and accurate written information to the CRC on countries which are due to present periodic reports, regarding policies on refugee children, up to the age of 18. NGOs should use the conclusions and comments of the CRC to support their work in protecting refugee children.¹⁵

¹⁵ Further information on the Committee, on the schedule of state party reports due to be considered by the Committee can be obtained from the Secretary of the Committee of the Rights of the Child, UN Centre for Human Rights, Palais des Nations, 1211 Geneva 10, Tel.: (41-22) 917 33 59/39 54, Fax: 917 00 99.

<p style="text-align: center;">ANNEX I Dates of Adherence to Treaty Bodies of the United Nations as of 1 Nov. 1997**</p>				
State	<i>International Covenant on Economic, Social and Cultural Rights ("ICESCR")</i>	<i>International Covenant on Civil and Political Rights ("ICCPR")</i>	<i>Optional Protocol to the International Covenant on Civil and Political Rights ("OPT")</i>	<i>Second Optional Protocol to the International Covenant on Civil and Political Rights ("OPT2")</i>
	<i>Monitored by the Committee on Economic, Social and Cultural Rights</i>	<i>Monitored by the Human Rights Committee</i>	<i>Supervised by the Human Rights Committee</i>	<i>Aimed at the abolition of the Death penalty</i>
Armenia	1993	1993	1993	—
Azerbaijan	1992	1992	—	—
Belarus	1973	1973	1992	—
Georgia	1994	1994	1994	—
Kazakstan	—	—	—	—
Kyrgyzstan	1994	1994	1995	—
Moldova	1993	1993	—	—
Russian Fed.	1973	1973	1991	—
Tajikstan	—	—	—	—
Turkmenistan	1997	1997	1997	—
Ukraine	1973	1973	1991	—
Uzbekistan	1995	1995	1995	—

** Adherence by ratification, accession or succession.

Note: In 1993 the Human Rights Committee requested Kazakstan, Tajikistan and Turkmenistan to submit reports to them, based on the principal that, in the opinion of the Committee, the peoples within the territory of the former Soviet Union, a party to the ICCPR, continue to be entitled to the guarantees in the Covenant, and states continue to be bound by the obligations entered into by the predecessor state. Parallel reasoning may be relied in arguing that certain CIS countries which have not themselves ratified certain human rights treaties are, nevertheless, bound.

State	<i>International Convention on the Elimination of All Forms of Racial Discrimination ("CERD")</i>	<i>Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW")</i>	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")</i>	<i>Convention on the Rights of the Child ("CRC")</i>
	<i>Monitored by the Committee on the Elimination of Racial Discrimination</i>	<i>Monitored by the Committee on the Elimination of Discrimination against Women</i>	<i>Monitored by the Committee against Torture</i>	
Armenia	1993	1993	1993	1993
Azerbaijan	1996	1995	1996	1992
Belarus	1969	1981	1987	1990
Georgia	—	1994	1994	1994
Kazakstan	—	—	—	1994
Kyrgyzstan	1997	1997	1997	1994
Moldova	1993	1994	1995	1993
Russian Fed.	1969*	1981	1987*	1990
Tajikstan	1995	1993	1995	1993
Turkmenistan	1994	1997	—	1993
Ukraine	1969*	1981	1987	1991
Uzbekistan	1995	1995	1995	1994

* Indicates that the state party has recognized the competence to receive and process individual communications of the Committee on the Elimination of Racial Discrimination under article 14 of the CERD or of the Committee against Torture.

The Rights of Refugees and Asylum-Seekers

Contributed by the United Nations High Commissioner for Refugees

“UNHCR today is very much an operational human rights organization, albeit for certain categories of people”.

Most people can turn to their own national governments for the protection of their rights and physical security. Refugees cannot. Their governments, in some cases, may be the very violators of their human rights, or are at least unable or unwilling to protect them against violations committed by others. Hence, refugees leave their home countries not out of choice but out of absolute necessity. They are forced to seek refuge in other countries to escape threats to their life or freedom, because of a general breakdown of law and order in their countries, persecution or violence targeted against them.

Once outside the borders of his or her country of origin, a refugee is not necessarily guaranteed a stable and peaceful future. Uprooted from the physical and cultural environment to which she or he has been accustomed, a refugee is often particularly vulnerable to discrimination and harassment. All too often refugees continue to be targets of systematic violence in their asylum countries.

This chapter will provide an overview of those rights under international law which have been specifically tailored for refugees and asylum-seekers. It will also discuss general human rights law of particular relevance to refugees. Issues relating to the legal definition of a refugee and the overall mandate of the United High Commissioner for Refugees have been dealt with in the first section of this manual.

UNHCR AND HUMAN RIGHTS

Although UNHCR is not mandated to deal generally with human rights concerns, its core function, the protection of refugees, clearly falls within the human rights domain. Referring to the linkage between human rights concerns and refugee issues, the High Commissioner has stated that:

“Human rights violations are a major factor in causing the flight of refugees as well as an obstacle for their safe and voluntary return home. Safeguarding human rights in countries of origin is therefore critical both for the prevention and for the solution of refugee problems. Respect for human rights is also essential for the protection of refugees in countries of asylum”.

In recent years, the heightened focus of UNHCR activities on prevention has required the organization to contribute actively to the promotion of human rights by, among other things, working with and through established human rights mechanisms. The High Commissioner stated in her address to the 50th session of the Commission of Human Rights in 1994 that:

“UNHCR today is very much an operational human rights organization, albeit for certain categories of people”.

In a recent policy paper, UNHCR identified three levels of interaction between its responsibilities and human rights generally:

(a) UNHCR promotes, and is guided by human rights standards

UNHCR, as the UN organ tasked with providing international protection to refugees, has a global mandate to ensure that the human rights of its beneficiaries are upheld in accordance with the international obligations of states hosting them. The provisions of international human rights treaties, both of universal and regional application, are immediately relevant to the protection of refugees.

(b) UNHCR uses and generates human rights information

UNHCR makes extensive use of country of origin information regarding human rights, primarily in the context of determining refugee status, but also in facilitating or promoting voluntary repatriation, which depends on an accurate assessment of conditions in countries of origin. UNHCR has an interest in human rights issues that affect its mandate and activities. In this connection, gathering information on human rights developments that may lead to refugee flows and/or hinder repatriation is a legitimate and necessary activity for UNHCR.

(c) UNHCR cooperates with human rights mechanisms, institutions and field operations

UNHCR is part of the UN's effort to promote respect for human rights. Cooperation with the other components of this system is, therefore, mutually beneficial. Human rights bodies, particularly treaty monitoring bodies, have also become increasingly aware of the relevance of refugee protection problems to their respective mandates and have actively been seeking UNHCR input into their deliberations.

In addition, UNHCR closely cooperates with other inter-governmental and non-governmental organizations, such as the Organization for Security and Cooperation in Europe (OSCE), in their mutual efforts to protect the human rights of refugees.

SPECIFIC RIGHTS OF REFUGEES AND ASYLUM-SEEKERS

The most fundamental right of refugees and asylum-seekers is that which protects them against forcible return (*refoulement*) to a territory where their lives or freedom would be threatened. The principle of *non-refoulement*¹ has been expressed in different forms in several international refugee and human rights instruments, most notably in article 33(1) of the 1951 Convention Relating to the Status of Refugees (hereinafter 1951 Convention).

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

This provision is of such fundamental importance that no reservations are permitted to it under the 1951 Convention. It is also an obligation under the 1967 Protocol by virtue of article 1(1). Unlike some provisions of the Convention, its application is not dependent on the lawful residence or entry into the territory of a contracting state. Protection against *refoulement* extends not only to recognized refugees but also to asylum-seekers whose claims have not yet been determined.

¹ Although this principle is in the heart of international protection, it is only briefly discussed here since a whole chapter is devoted to it elsewhere in this Manual.

It is generally accepted that the prohibition of *refoulement* is a norm of customary international law, thus binding on all states irrespective of whether or not they have acceded to international instruments recognising this principle.

International human rights law provides additional forms of protection in this area, which may be of relevance to refugees and asylum-seekers. Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates that no state party shall expel, return (“refouler”) or extradite a person to another state where there are substantial grounds for believing that he/she would be in danger of being subjected to torture. Article 7 of the International Covenant on Civil and Political Rights has been interpreted as prohibiting the return of persons to places where torture is feared. In the European context, article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has been interpreted by the European Court of Human Rights as implicitly prohibiting the return of anyone to a place where they would face a “real and substantiated” risk of ill-treatment in breach of the prohibition of torture or inhuman or degrading treatment or punishment.

— THE RIGHT TO SEEK AND ENJOY — ASYLUM IN OTHER COUNTRIES —

The right to seek and enjoy asylum in other countries is recognized in article 14 of the Universal Declaration of Human Rights, and finds firm roots in states’ constitutions and laws. The granting of asylum lies at the heart of international protection. It implies protection against *refoulement* and the possibility of remaining in the territory for as long as protection is required and until a durable solution is found.

For refugees to be able to exercise the right to seek asylum, it is essential that they be admitted to the territory of a state. The main refugee instruments do not contain provisions dealing specifically with admission to a territory, but the principle of *non-refoulement* is relevant in this context as it applies from the moment at which the asylum-seeker exercises his/her right to seek asylum. Thus, anyone presenting him/herself at a frontier post, port or airport is already within the state territory and jurisdiction, and therefore the state is under an obligation not to take any steps that could lead to the *refoulement* of that person.

A number of states have introduced measures aimed at discouraging the abuse of asylum procedures, or minimizing illegal immigration. These restrictions include visa requirements for growing numbers of nationalities; rejection at the frontier; interdiction at sea; penalties on airlines carrying insufficiently documented asylum-

seekers, and the introduction of the safe third country concept.² The introduction of these measures is not per se in breach of the country's international obligations of *non-refoulement*. When, however, these measures interfere with the ability of persons at risk of persecution to gain access to safety and to obtain asylum in other countries, then states act inconsistently with their international obligations towards refugees.

In order to address the problems which states might face in cases of large-scale influxes of refugees and asylum-seekers, the member states of UNHCR's Executive Committee adopted Conclusion No. 22.

1. In situations of large-scale influx, asylum-seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection [...] They should be admitted without any discrimination as to race, religion, political opinion, nationality, country of origin or physical incapacity.

2. In all cases the fundamental principle of non-refoulement – including non-rejection at the frontier – must be scrupulously observed.³

The granting of asylum is a peaceful and humanitarian act and is not to be regarded as an unfriendly act by other states, notably by the refugee's country of origin. UNHCR's Executive Committee emphasized in its Conclusion No. 15 of 1979 that decisions by states with regard to the granting of asylum shall be made without discrimination as to race, religion, political opinion, nationality or country of origin.

The 1951 Convention does not expressly oblige states to grant asylum to refugees within its territory, but most countries which have national refugee legislation provide for the right to asylum in such laws. Many states have indeed adopted the refugee definition as the criterion for the granting of asylum which entails a residence permit in one form or another. In addition, a number of European countries grant 'humanitarian status' to persons whom they do not consider as refugees under the 1951 Convention, but who would be in danger if returned to their country of origin as a result of generalized violence, foreign aggression, internal conflicts, or other circumstances which have seriously disturbed public order.

² Please see the discussion on the 'safe third country' concept under the section on Access to the Procedures for Determining Refugee Status.

³ Executive Committee Conclusion No. 22 (1981), para. II, A.

**— RIGHT TO ACCESS TO THE PROCEDURES
FOR DETERMINING REFUGEE STATUS —**

A person does not become a refugee because of formal recognition of his/her status, but is recognized because he/she is a refugee. Hence, recognition of refugee status is declaratory, that is by simply stating the fact that the person is a refugee.

Formal recognition is, however, essential for the refugee to enjoy all the rights accorded to refugees, and to regularize or legalize his/her stay in the country of asylum. Procedures for determining refugee status therefore are essential in order to ensure the effective implementation of the 1951 Convention and the 1967 Protocol.

Whilst the 1951 Convention does not contain provisions concerning procedures for the determination of refugee status, it is generally recognized that the establishment of fair and expeditious procedures for the determination of refugee status is indispensable for the identification of refugees. UNHCR's Executive Committee has recommended basic procedural requirements for such procedures in a number of Conclusions.⁴ The most important features of these recommendations can be summarized as follows:

- States should establish procedures for the formal determination of refugee status.
- The competent official (e.g. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of the contracting state, should have clear instructions for dealing with asylum cases.
- There should be a clearly identified authority – wherever possible a single central authority – with responsibility for examining requests and taking a decision in the first instance.
- The asylum-seeker should be given the necessary facilities, including the services of an interpreter, for submitting his case to the authorities concerned.
- The applicant should be given a complete personal interview by a fully qualified official.
- Skilled female interviewers should be provided for women asylum-seekers, and their access to status determination process should be ensured, even when accompanied by male family members.⁵

⁴ Most notably, Conclusions No. 8 (1977) on Determination of Refugee Status and No. 30 (1983) on The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status.

⁵ Executive Committee Conclusion No. 64 (1990) on Refugee Women and International Protection.

– A legal representative or guardian should be appointed to unaccompanied minors to ensure that the interests of the child are fully safeguarded.⁶

– If there is a negative decision on the claim to refugee status, the asylum-seeker should have the possibility of having the decision reviewed on its merits by an authority independent from the one which made the decision in the first instance. The appeal should have a suspensive effect, allowing the asylum-seeker to stay in the country while the appeal is pending.

It is also essential that authorities with special expertise be made available for the purposes of interviewing asylum-seekers with specific needs, such as unaccompanied minors, victims of sexual violence and mentally disturbed people.

In recent years there has been a growing tendency in certain countries to introduce measures aimed at restricting access to refugee status determination procedures and to asylum. One expression of this tendency is the policy whereby an asylum application submitted at a port of entry by a person who is arriving from a so-called “safe third country”, is normally rejected without the substantive claims being considered and with the applicant being returned to the third country concerned. The removal of an asylum-seeker to a third country cannot legitimately take place unless the removing country has duly established that the third country:

- (a) will admit the asylum-seeker to its territory;
- (b) will observe the principle of *non-refoulement* and will generally treat the asylum-seeker in accordance with accepted international standards;
- (c) will consider the claim according to a fair procedure and, if appropriate, provide effective protection and will allow him/her to remain as a refugee.

⁶ See UNHCR Guidelines on Refugee Children which provide detailed guidelines for determining the refugee status of unaccompanied children.

OTHER RIGHTS OF PARTICULAR IMPORTANCE TO REFUGEES

For refugees to be able to regularize their stay in countries of asylum and to integrate into those societies, it is essential that they enjoy a whole range of civil, political, economic, social and cultural rights. The 1951 Convention requires that the contracting states accord to refugees, a number of such rights and sets out the minimum standards for the treatment of refugees. The required standard of treatment under the 1951 Convention varies according to the specific right in question. For many rights, the Convention requires that refugees enjoy the same treatment as nationals of the asylum country. For others, the Convention proposes that refugees should be granted the most favourable treatment accorded to other foreigners or that they should receive at least the same treatment accorded to aliens generally.

The 1951 Convention requires that the state should grant to refugees the same treatment as to its own nationals in the following areas: access to courts, elementary education, legal assistance and exemption from the requirement to give security for costs in court proceedings, freedom of religion, labour legislation, social security, rationing, public relief, fiscal charges and protection of artistic rights and industrial property.

In respect of the right of association, and the right to engage in wage-earning employment, refugees should be granted the most favourable treatment accorded to nationals of a foreign country in the same circumstances.

Finally, as for property rights, the right to self-employment, right to practice liberal professions, housing, right to education, other than elementary, and freedom of movement, states should accord to refugees treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally.

Under the 1951 Convention, states may limit the application of some of the above rights to refugees “lawfully in the territory” or “lawfully staying in the territory”. The Convention does not specify the meaning of these terms, but on the basis of the *travaux préparatoires* it is reasonable to conclude that “stay” means something less than durable residence, but more than a transit stop, while “lawful” normally is to be interpreted in light of prevailing national laws and regulations.

The states parties to the 1951 Convention must ensure that all refugees enjoy the same standards of treatment, as foreseen by the 1951 Convention, regardless of their race, religion or country of origin. Article 3 of the 1951 Convention is a specific expression of the general rule of non-discrimination:

“The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion, or country of origin”.

The 1951 Convention is not meant to address all the human rights of refugees; it merely sets the minimum standards for the treatment of refugees. It is also important to remember that refugees, like any other people, are entitled to the whole range of rights laid down in international human rights law, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, as well as regional human rights instruments, such as the European Convention on the Protection of Human Rights and Fundamental Freedoms.

Most rights in international and regional human rights instruments are granted to everyone within the jurisdiction of the state, without distinctions between citizens and non-citizens. Clearly, therefore, refugees are also entitled to the full range of international human rights law.

The manner in which some of the rights are applied in the refugee context will be discussed below.

- **Freedom from Arbitrary Detention**

Situations where refugees or asylum-seekers are detained for no reason other than illegal entry or presence have become common. Article 31 of the 1951 Convention exempts refugees coming directly⁷ from a country of persecution from being punished on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Unlike ordinary aliens, asylum-seekers often do not possess valid travel documents or have no possibility of applying for a visa. UNHCR's Executive Committee has recognized that circumstances may compel a refugee or asylum-seeker to have recourse to fraudulent documents when leaving a country in which his/her physical safety or freedom is endangered (Conclusion No. 58). Penalizing an asylum-seeker for entering an asylum country without valid documents disregards the fact that his/her illegal entry or presence may be due to the need to find protection.

In 1986, UNHCR's Executive Committee adopted Conclusion No. 44 on the issue of detention, in which states identified detention as a measure which should normally be avoided, and should only be resorted to if necessary and only on grounds prescribed by law under the following exceptional circumstances:

⁷ UNHCR Guidelines on Detention of Asylum-Seekers clarify that "the term 'coming directly' covers the situation of a person who enters the country in which asylum is sought from the country of origin, or from another country where his protection could not be assured". See "Detention of Asylum-Seekers in Europe", European Series, Vol. 1, No. 4, UNHCR, October 1995.

1. to verify identity;
2. to determine the elements on which the claim to refugee status or asylum is based;
3. to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the state in which they intend to claim asylum;
4. to protect national security or public order.

The UNHCR Guidelines on Detention of 1996 provide further elaboration, in the light of subsequent developments in the field of human rights. They clarify the issue of detention, *inter alia*, as follows:

“The right to liberty is a fundamental right, recognized in all the major human rights instruments, both at global and regional levels. The right to seek asylum is, equally, recognized as a basic human right. The act of seeking asylum can therefore not be considered an offence or a crime. Consideration should be given to the fact that asylum-seekers may already have suffered some form of persecution or other hardship in their country of origin and should be protected against any form of harsh treatment. As a general rule, asylum-seekers should not be detained”.

Thus, detention of asylum-seekers which is applied for any other purpose, for example, as part of a policy to deter future asylum-seekers, is contrary to the principles of international protection.

If detention cannot be avoided, governments must, at least, ensure that the following standards are upheld:

- refugees and asylum-seekers should be informed of the reasons for detention and of the rights in connection thereto, in a language and terms which they understand;
- they should not be detained with common criminals;
- they should be provided with the opportunity to contact UNHCR or non-governmental organizations working with refugees;
- detention should not affect the (ongoing) asylum procedure;
- under no circumstances should detention be used as a punitive or disciplinary measure for failure to comply with administrative requirements or breach of reception centre, refugee camp or other institutional restrictions;

– escape from detention should not lead to discontinuation of the asylum procedure, nor to return to the country of origin, in accordance with the principle of *non-refoulement*.

Detention of minors is of particular concern. If detention cannot be avoided, it should be in accordance with article 37 of the Convention on the Rights of the Child. In other words, it should be a measure of last resort and for the shortest possible period of time. If refugee children are detained in airports, immigration holding centres or prisons, they must not be held under prison-like conditions. Special arrangements must be made for living quarters which are suitable for children and their families.

Different rules apply in situations where asylum-seekers or refugees are detained because of having been charged with a criminal offence. The commission of crimes naturally invokes criminal liability in accordance with the national laws of the asylum country. In those situations, refugees and asylum-seekers are entitled to the same procedural guarantees and minimum standards set out in international and regional human rights conventions as the citizens of those countries.

- **Freedom of Movement**

Article 26 of the 1951 Convention provides that:

“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”.

International human rights instruments require that states ensure the same protection of freedom of movement for aliens as for the nationals of that state. Article 12 of the International Covenant on Civil and Political Rights provides that “everyone lawfully in the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence”. These rights shall not be subject to any restrictions except those which are provided by law and are necessary to protect national security, public order, public health or morals or the rights and freedoms of others. All restrictions must be consistent with the other rights recognized in that Covenant, including the freedom from discrimination on grounds such as national origin. (*See article 2 of the Covenant*).

For refugees to be able to enjoy freedom of movement it is essential that the asylum country provide travel documents. Article 28 of the 1951 Convention requires that states parties issue to refugees lawfully staying in their territory, travel documents for the purpose of travel outside their territory. In view of the restrictions that some countries have imposed on the travel of undocumented persons within their own territories, it is also important that refugees be issued with identity documents, as is required under article 27 of the 1951 Convention.

The other dimensions of freedom of movement – namely the right to leave any country, including one’s own, and the right to return to one’s own country – are also relevant in the refugee context. The right to freedom of movement however, still poses problems for asylum-seekers whose status has not been regularized.

• **Freedom of Religion**

The 1951 Convention guarantees to refugees equality of treatment with nationals as regards freedom of religion. If national regulations restrict religious freedoms then the 1951 Convention does not necessarily prohibit similar restrictions on refugees. These restrictions should, however, be in line with a state’s international obligations. The guarantees of freedom of religion in international human rights instruments are clearly meant to ensure the greatest possible protection of religious freedom. These instruments generally protect the following:

1. the freedom to hold (or not to hold) a religion or belief;
2. freedom to adopt a religion;
3. freedom, alone or with others, to manifest one’s religion or belief through observance, worship, practice or teaching.⁸

• **Freedom of Assembly, Opinion, Expression and Association**

There is no provision in the 1951 Convention regarding the freedom of assembly, opinion or expression. The right of association is, however, spelled out in article 15 of the 1951 Convention according to which refugees shall enjoy the most favourable treatment accorded to aliens as regards non-political and non-profit making associations and trade unions.

Under international human rights law, the afore-mentioned rights are guaranteed for both citizens and non-citizens. Article 19 of the International Covenant on Civil and Political Rights provides that:

“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”.

⁸ See e.g. article 18 of the ICCPR.

Limitations to the freedom of expression may only be imposed on the grounds of:

1. respect for the rights or reputations of others;
2. protection of national security;
3. protection of public order;
4. protection of public health;
5. protection of public morals (ICCPR, art. 19(3)).

A further limitation on the right to freedom of expression and peaceful assembly in times of public emergency is contained in article 4 of the Covenant, however only under very limited and exceptional circumstances.

International and regional human rights law generally protect the right to meet and gather with others in a peaceful assembly. Article 21 of the International Covenant on Civil and Political Rights provides that “the right of peaceful assembly shall be recognized”. It further states that 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 interest of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.

• **The Right to Education**

In view of the critical importance of ensuring children have at least a basic education, refugee law as well as human rights law, emphasize the right of children to at least elementary education. The 1951 Convention therefore guarantees to refugees equality of treatment with nationals as regards elementary education. With regard to higher education, the Convention requires the state grant a refugee treatment as favourable as possible, and in any event, not less favourable than that accorded to aliens generally.

The Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights support the view that refugees should be treated on equal footing with the nationals of the asylum country with regard to access to education, including higher education.

• **The Right to Work**

In recognition of the importance of the right to work, three articles of the 1951 Convention are devoted to ensuring refugees’ right to work; article 17 on wage-earning employment, article 18 on self-employment, and article 19 on the practising of liberal professions.

Regarding the right to engage in wage-earning employment, the 1951 Convention requires that states grant refugees the most favourable treatment accorded

to nationals of a foreign country in similar circumstances. The articles dealing with self-employment and liberal professions provide that refugees should at least be treated the same as other foreigners. Hence, restrictions on the working rights of foreigners may also be applied to refugees. There are, however, two important exceptions to this.

The first exception, with regard to wage-earning employment, is that under article 17, any restrictions placed on non-nationals shall not be imposed on refugees if:

- they have completed three years of residence in the country; or if
- they are married to a national of that country; or if
- they have a child(ren) who is a national of that country.

The second exception, for those refugees who want to be self-employed or to practise a liberal profession, is that under articles 18 and 19, states undertake to accord “treatment as favourable as possible”. This imposes a positive obligation on states to make every effort to lift restrictions on the right of refugees to start their own business, or to practise a profession.

The right to work is also recognized in international human rights instruments, most notably in article 6 of the International Covenant on Economic, Social and Cultural Rights:

“The State 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”.

• **Right to Family Life**

During their flight from persecution, refugees often risk being separated from their family members. Such separation invariably leads to hardship and may create serious obstacles to a refugee’s integration in a new homeland.

Although the 1951 Convention does not specifically address the principles of family unity and protection of the family, the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons recommended that (Chapter IV, Part B):

“Governments [...] 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”.*

The subject of the reunification of separated refugee families was considered by the UNHCR’s Executive Committee in 1981 when it adopted Conclusion No. 24 which states that:

“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 the reunification of separated refugee families takes place with the least possible delay;

[...]

4. Given the recognized right of everyone to leave any country including his own, countries of origin should facilitate family reunification by granting exit permission to family members of refugees to enable them to join the refugee abroad.

5. It is hoped that countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family”.

These efforts find support from the principle of family unity which is affirmed by several international human rights instruments, starting with the Universal Declaration of Human Rights:

“The family is the natural and fundamental group unit of society and is entitled to protection by society and the state. (Universal Declaration, art. 16, paragraph 3).

No one shall be subjected to arbitrary interference with his privacy, family, home [...] Everyone has the right to the protection of the law against such interference” (Universal Declaration, art. 12).

The ICCPR contains similar provisions, the scope of which has been clarified by the Human Rights Committee in its General Comment No. 19 of 1990:

“The possibility to live together implies the adoption of appropriate measures, both at the internal level and, as the case may be, in cooperation with other states, to ensure the unity of reunification of families, particularly when their members are separated for political, economic or similar reasons”.

— **OBLIGATIONS OF REFUGEES** —

Refugees also have obligations in their asylum countries. Article 2 of the 1951 Convention provides that:

“Every refugee has duties to the country in which he finds himself, which require in particular that he conforms to its laws and regulations as well as to measures taken for the maintenance of public order”.

This article is actually a “reminder” of the essential duties common to nationals, as well as to foreigners in general, to comply with the laws of the country in which they find themselves, rather than a special duty tailored for refugees.⁹ According to one commentator, the “laws and regulations” refer to the “general laws established for the maintenance of good order and not operative only in the case of citizens”.¹⁰

This article does not provide any sanctions for a refugee who does not fulfil his duties, but obviously, refugees are subject to the laws and sanctions stipulated in the national legislation of the asylum countries.

MONITORING THE RIGHTS OF RETURNEES

In the previous sections we have been discussing refugees’ human rights in asylum countries. Equally important is that their rights are respected once they return back to their home countries.

In most situations, voluntary repatriation in conditions of safety and dignity to their areas of origin will be in the best interest of the refugees and is generally the best durable solution. Return is, however, often complicated; the returnees may not be welcomed by the remaining population; their homes might have been destroyed or occupied by others; or their lands might have been given to others for cultivation. Although the primary responsibility for ensuring the rights of the returnees lies with the national government, the need for supportive protection provided by the international community is evident in many cases. In fact, many refugees might be reluctant to return to their home areas unless there is a presence of international organizations which can protect them against abuse and from whom they can request assistance to resolve their problems.

⁹ See Grahl-Madsen, p. 2.

¹⁰ Vattel, as quoted by Grahl-Madsen, p. 5.

Before the international community can promote the repatriation of refugees, a number of conditions must be met. First and foremost, the return must be voluntary and has to take place in conditions of safety and dignity. The concept of safety according to the UNHCR Handbook on Voluntary Repatriation (1996), has three elements:

- legal safety such as public assurances or personal safety, integrity, non-discrimination and freedom from fear of persecution or punishment upon return;
- physical security including protection from armed attacks, and mine-free routes;
- material security, for example, access to land and means of livelihood.

The dictionary definition of “dignity” contains elements of “serious, composed, worthy of honour and respect”. In practice, dignity implies that refugees can return unconditionally and if they are returning spontaneously they can do so at their own pace; that they are not arbitrarily separated from family members; and that they are treated with respect and full acceptance by their national authorities, including full restoration of their rights.

— UNHCR’S ROLE AND INVOLVEMENT — IN RETURNEE MONITORING

UNHCR’s role in the protection of refugees returning to their homes is derived from its mandate to seek permanent solutions to the problem of refugees. The repatriation may happen in an organized manner in which case there is usually a formal agreement between the home government, UNHCR and the government of the asylum country. Repatriation also happens spontaneously, without UNHCR’s or the concerned government’s involvement.

According to the UNHCR Voluntary Repatriation Handbook, in any voluntary repatriation where UNHCR plays a part, the principle of safety and dignity does not cease to apply once the return movement is completed but applies and should be monitored until such time as the situation in the country of origin can be considered stable, national protection is again available and the returnee is reintegrated.

Returnee monitoring must, according to the Handbook, cover both the immediate consequences of repatriation, such as the fulfilment of amnesties or guarantees provided by the government, and the general enjoyment by returnees of human rights and fundamental freedoms on an equal footing with their fellow citizens.

The basic international law standard guiding returnee protection is the principle of non-discrimination. Returnee monitoring seeks to ensure that returnees are not

targeted for harassment, intimidation, punishment, violence, or denial of access to public institutions or services, or discriminated against in the enjoyment of any other rights.

In general terms, the following measures, listed in the Handbook, can be taken to ensure the respect of human rights in return situations:

- obtain a firm commitment by all relevant parties to abide by human rights and humanitarian principles;
- encourage broad international involvement in human rights monitoring;
- conduct basic awareness education for refugees/returnees;
- safeguard the right of the returnees to participate in elections following peace agreements and monitor equal access of returnees to voter registration and procedures.

In addition, the intervention by international organizations on a case by case basis in situations where human rights abuses have taken place, or are likely to take place, may be a form of protection in itself.

International organizations can also do much to facilitate the re-establishment of the rule of law by supporting the governments in capacity-building, for instance in the form of providing technical assistance and advice to the judicial systems and the law enforcement organs.

Moreover, international organizations present in the area of return often play a role in promoting confidence building measures aimed at reconciliation between the different factions of the population.

Of primary importance is that UNHCR must have direct and unhindered access to returnees, wherever they are located in the country of origin or habitual residence, to monitor their safety and conditions.

— RETURNEE MONITORING IN PRACTICE: —
THE CASE OF TAJIKISTAN¹¹

UNHCR as well as the International Committee of the Red Cross (ICRC) and other international organizations were actively involved in monitoring the return of the hundreds of thousands Tajik refugees or internally displaced persons who had been forced to leave their homes following the civil war which broke out in 1992. Some 43,000 of the estimated 60,000 refugees in Afghanistan were repatriated by the end of 1995. In addition, an estimated 98 % of the 600,000 internally displaced were reintegrated into areas of return by the end of 1995.

¹¹ This chapter is based on UNHCR Report on Tajikistan, January 1993 – March 1996, UNHCR 1996.

- **Activities**

UNHCR's activities in the returnee monitoring of Tajiks could be divided into three phases:

1. measures taken in the early stages of the repatriation to promote stabilization and confidence;
2. measures taken at all stages to prevent and stop individual instances of human rights violations;
3. long-term measures taken with a view to rebuilding the rule of law in the areas of return.

- **Early Stages of the Return**

Some of the first returnees had in fact been forced to return by the government for economic or political reasons. The situation in the areas of return remained very tense, and the returnees were far from being welcomed by the local population. This led to numerous instances of human rights violations. By initiating talks with the local community and the authorities, UNHCR illustrated an alternative to the use of force to control anger in the community.

- **Direct Intervention and Protection**

UNHCR's most significant function in terms of stabilizing the areas of former conflict has been to directly monitor the observance of the legal rights of the returnees. Throughout the operation, UNHCR field staff was present in the return areas to intervene on behalf of returnees whenever a problem with the authorities or other factions of the population arose.

UNHCR field staff also monitored human rights, intervened directly on a case by case basis, and investigated crimes against returnees. Before incidents could degenerate into larger conflicts, they helped resolve disputes, including unlawful house occupations. UNHCR also called on government officials to carry out the investigation of crimes and the resolution of disputes.

- **Strengthening the Rule of Law**

It became apparent during UNHCR's monitoring and protection activities that it was necessary to strengthen the rule of law and legal institutions, without which there would be no long-lasting solution. In late 1995, UNHCR provided assistance to the government to strengthen their institutional capacity through limited material support. It also assisted in building an independent judiciary which included the training of judges, support to lawyers' associations and providing support to the law enforcement branch of the government. In 1993, UNHCR also started providing

technical assistance in the drafting of certain legislation including refugee and human rights legislation.

• **Phase-Down of UNHCR's Operations**

As almost all internally displaced persons and some two-thirds of refugees returned, UNHCR phased down its activities, in late 1995, and handed over the in-country protection and human rights monitoring to the OSCE and the re-integration assistance projects to the UN Development Program. While voluntary repatriation from northern Afghanistan trickled down to the low level of some 1,500 per year in 1995 and 1996, UNHCR began to turn the focus away from assisted return to capacity-building and preventive activities consistent with the regional strategy adopted for the rest of Central Asia.

It is worth noting that many NGOs, such as Save the Children, Caritas and Shelter International, have been engaged in the activities which UNHCR staff used to carry out in the same areas.

**THE ROLE OF NGOS IN REFUGEE PROTECTION:
CONCLUSIONS AND RECOMMENDATIONS**

National and international non-governmental organizations play an important role in advocating for the refugee cause and in providing substantial aid for refugee populations. NGOs are, quite often, the first present on the ground to provide arriving refugees with much needed assistance and to raise international awareness of their problems. By their presence, NGOs provide a degree of safety to refugees and help them organize for their own welfare and protection. NGOs that are specialized in legal aid to refugees also play a significant role in lobbying governments for the adoption and implementation of refugee legislation.

One of the core functions of many NGOs involved with refugees is to bring violations of international protection principles to the attention of the public. At a time when some governments have shown a diminished interest in the cause of refugees, NGOs "have remained one of the few strong and consistent voices in support of protection".¹²

¹² Speech of Mr. McNamara, Director of the Division of International Protection of UNHCR, during the 58th session of the Executive Committee.

NGOs frequently act as UNHCR's operational and collaborative partners in carrying out specific programmes and activities. In an effort to enhance their cooperation, UNHCR and several NGOs launched a number of worldwide consultations known as PARinAC, Partnership in Action, which culminated in a Global Conference in June 1994.

The Conference identified five priority areas for cooperation:

- (a) refugee protection;
- (b) internally displaced persons;
- (c) emergency preparedness and response;
- (d) the continuum of relief to rehabilitation to development;
- (e) NGO/UNHCR partnership.

The conference adopted a number of recommendations that seek to define the agenda for NGO/UNHCR partnership in refugee protection. For instance, it was recommended that NGOs and UNHCR cooperate in the following fields:

- **Advocacy**

- Advocate and promote, in a complementary fashion, states' accession to, implementation of, and compliance with international refugee and human rights instruments.

- Advocate for host countries to observe the fundamental right to seek asylum, and its corollary international principle of *non-refoulement*.

- Advocate for host countries to observe the right to enjoy asylum.

- Advocate so that formal and informal 'safe third country' arrangements among governments do not result in interdiction and/or forced return of asylum-seekers.

- **Legal Assistance and Counseling**

- Provide legal assistance and counselling by culturally sensitive, trained staff to refugees and asylum-seekers.

- Cooperate in the provision of culturally sensitive and holistic psycho-social rehabilitation and counselling services to women survivors of torture and victims of sexual violence.

- **Sensitizing the Public on Refugee Matters**

- Make efforts to use the media to promote a greater acceptance of refugees.

– Promote the participation of civil organizations and other groups in the host communities to sensitize them about needs of refugees.

• **Operational Activities**

– Discuss ways and means to implement more effectively the UNHCR policy and protection guidelines on refugee women and on refugee children.

– Operationalize the specific protection needs of unaccompanied children.

– Establish repatriation committees involving NGOs, UNHCR and refugee representatives.

– Develop databases on the population profile of returnees and the actual situation in the country of origin.

– Develop information campaigns to provide a balanced information exchange with refugees, profiting from their knowledge of their country of origin.

– Establish effective early warning systems through which they can share essential information on root causes and on areas of prospective refugee flows, as a way of contributing to early conflict resolution and promoting peace-making and peace-building efforts.

• **Human Rights**

The conference also emphasized the importance of the linkage between the protection of refugees, returnees and displaced persons and the more general protection afforded under human rights instruments. In this regard, it was recommended that UNHCR and NGOs:

– Promote and disseminate widely the accession to the international human rights instruments.

– Focus on advocacy and media relations in order to promote wider support and awareness on basic human rights of refugees.

– Encourage states and *de facto* authorities to comply with human rights and humanitarian law applicable to refugees, asylum-seekers and displaced persons.

– Disseminate information on situations where the human rights of refugees and internally displaced persons have been violated.

– Report such instances to the appropriate UN bodies such as the High Commissioner for Human Rights and the Commission on Human Rights.

– Assume joint responsibility for ensuring necessary training, in particular for local NGOs, to strengthen their contributions for the protection of refugees and internally displaced persons.

– Provide local NGOs with assistance and promote their participation in international refugee fora, specifically the relevant preparatory meetings and appropriate UNHCR Executive Committee meetings.

– Conduct training seminars on refugee law, human rights law and humanitarian law for government officials, members of academic institutions and other concerned institutions and organizations.

The Principle of *Non-Refoulement*

Contributed by Amnesty International

In refugee protection it is vital to recognize the fundamental importance of the principle of non-refoulement in ensuring that no one is forcibly returned to a country where he or she risks becoming a victim of serious human rights violations.

The term ‘refoulement’ is not found in most dictionaries, although it has, by continual usage, become an accepted legal term relating to refugees. In treaty law it appears in the English version of article 33 of the 1951 Convention relating to the Status of Refugees (the Refugee Convention). In English it is often simpler to use the term “forcible return” (although this will depend on the particular context). *Refoulement* is different from deportation or expulsion, which are formal methods for removing from the jurisdiction of a state those who legally reside there.

Essentially, the principle applies to those who are refugees (according to the definition of article 1 of the Refugee Convention), but its benefit does not apply only to those who have been found to be Convention refugees. It must be assumed that any asylum-seeker with a *prima facie* claim may be a refugee, and so must be protected from return to a country where she or he may be at risk. In other words, the *non-refoulement* principle applies to all asylum-seekers unless their asylum request has been thoroughly examined in a fair and satisfactory refugee determination procedure which has established that the person concerned is not, in fact, a refugee.

There is much state practice to indicate that the principle is to be applied in situations of mass influx, and to those who may fall outside of the strict confines of the Convention definition, but who remain in need of international protection. It is clear that a principle of refuge has emerged such that states will not forcibly return a person to a place where they may be at risk of serious human rights violations.

In refugee protection it is vital to recognize the fundamental importance of the principle of *non-refoulement* in ensuring that no one is forcibly returned to a country where he or she risks becoming a victim of serious human rights violations. Therefore, as non-governmental organizations working to protect the rights of

refugees, it is important to insist on respect for the principle of *non-refoulement* as the key to providing people with effective and durable protection from being sent, against their will, to a country where they risk human rights violations, or to any third country where they would not be afforded effective and durable protection against such return.

The principle of *non-refoulement* has come under serious attack in recent years. For example, the creation of the legal fiction of “international zones” at airports or the use of “accelerated airport procedures” which take place before an asylum-seeker “enters” into a country, wrongly focuses on the physical location and legal status of the asylum-seekers in determining who benefits from the principle of *non-refoulement*. The principle is NOT solely about admission to a territory – it is about ensuring that refugees are not returned to a place where their lives or freedom are in danger.

This paper sets out the sources of the principle of *non-refoulement* and suggests the basic principles and safeguards that flow from it which are essential for the protection of people who would be at risk of serious human rights violations if returned against their will to the country they have fled or to some other country. All governments should follow these suggestions in order to ensure that they give to such people the protection they need.

— SOURCES OF THE PRINCIPLE —

• The 1951 Refugee Convention

The fundamental basis of international refugee law is the internationally recognized principle of *non-refoulement*. It places an obligation on states not to send any person against their will to a country where they would be at risk of serious human rights violations. It is set out in article 33 of the 1951 Convention relating to the Status of Refugees (Refugee Convention), as follows:

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

The principle of *non-refoulement* is recognized by the international community as a norm of customary international law, binding on all states whether or not they are party to the Refugee Convention itself.

As set out in article 33 of the Refugee Convention, the principle of *non-refoulement* prohibits states from expelling or returning “a refugee in any manner whatsoever...”, so the principle applies in a wide variety of situations.

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

[Convention relating to the Status of Refugees, art. 33]

For example, it can be invoked in a case where a government plans to expel a refugee, not directly to the country where they would be at risk of persecution, but to another (third) country from where they might in turn be expelled to the country where they would risk persecution (normally the country of origin). The principle of *non-refoulement* is also generally recognized as including non-rejection at the frontier, and applies whether or not the asylum-seeker is actually admitted, in a legal sense, into the territory of the state from which she

or he seeks protection. That is, it prohibits a state from rejecting or refusing to hear the claim of an asylum-seeker who asks for protection at a border-point.¹

In order to comply with their obligations to ensure the protection of asylum-seekers and refugees, governments must scrupulously observe the principle of *non-refoulement* in all cases where such people seek their protection.

¹ When the Refugee Convention was drafted, legal opinion and the views of states parties did not fully agree on whether the principle of non-refoulement encompassed non-rejection at the borders of states as well as non-return of those already within the territories of states. However, since then, the principle has been developed in international law and the 1967 Declaration on Territorial Asylum, adopted unanimously by the UN General Assembly, provides that no one entitled to seek asylum “shall be subjected to such measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution”.

**OTHER INTERNATIONAL STANDARDS DEFINING
THE PRINCIPLE OF *NON-REFOULEMENT***

The Refugee Convention does not precisely define what is meant by “persecution”. Moreover, its article 1(f) (the so-called “exclusion clause”) leaves open the possibility that in certain circumstances people seeking asylum who have committed war crimes, crimes against humanity or serious non-political crimes may be denied the protection of the Convention. Both the definition of “persecution” and the operation of the exclusion clause are the subject of extensive jurisprudence. But in the years since the adoption of the Refugee Convention, there have been several international standards adopted by the international community which show a clear trend in international law providing that in cases where the person would be at risk of torture, extrajudicial execution or “disappearance” the prohibition on *refoulement* is **absolute**, allowing no exceptions.

• **UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment**

Article 3 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment provides that:

“1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”.

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

Article 7 of the International Covenant on Civil and Political Rights (ICCPR) carries implicit protection against being returned to a country where there is a risk of torture. It provides that:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment...”

The Human Rights Committee (the treaty body established under the ICCPR) states its view on the provisions of article 7 in its General Comment 20 (44th Session, 1992). The Committee stated that the aim of the provisions of article 7 of the ICCPR is essentially to protect both the dignity and the physical and mental integrity of the individual and that, in its view:

“State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement...”

• **UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions**

Principle 5 of the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions provides that:

“No one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country”.

• **UN Declaration on the Protection of All Persons from Enforced Disappearance**

Article 8 of the UN Declaration on the Protection of All Persons from Enforced Disappearance states:

“No State shall expel, return (refouler) or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance”.

• **Conclusions of the UNHCR Executive Committee**

The UNHCR Executive Committee (EXCOM) is an intergovernmental body which, at its annual meetings (held in Geneva, usually in October) adopts conclusions (decisions) on specific aspects of refugee protection.

No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

[UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3]

For example, the UNHCR Executive Committee has adopted a number of Conclusions on the fundamental character of the principle of *non-refoulement*. In 1977, in Conclusion 6, the EXCOM noted that the principle was generally accepted by states and reaffirmed:

“the fundamental importance of the observance of the principle of non-refoulement – both at the border and within the territory of a State – of persons who may be subject to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees”.

Conclusion 22 addresses the situation in cases of large-scale influx:

“[I]n situations of large-scale influx, asylum-seekers should be admitted to the State in which they first seek refuge...In all cases the fundamental principle of non-refoulement – including non-rejection at the frontier – must be scrupulously observed”.

In its annual “Note on International Protection”, UNHCR often calls attention to violations by states of the principle of *non-refoulement* and often expresses its continued support of the importance of the principle as part of the framework for the protection of refugees and asylum-seekers.

While EXCOM Conclusions are not binding in the same strict sense that states parties to a treaty are bound to observe the provisions of that treaty, the conclusions represent the views of the international community (having been adopted, in most cases by consensus, by over 50 states) and carry persuasive authority – few governments would argue with their provisions. Moreover, article 35 of the Refugee Convention obliges states parties to “cooperate with [UNHCR] in supervising the application of provisions of the Convention”. Such cooperation should, at a minimum, include observing the provisions set out in conclusions of the UNHCR Executive Committee.

• **Exceptions to the General Rule**

Article 33(2) of the 1951 Refugee Convention expressly provides that the benefit of *non-refoulement* may not be claimed by a refugee, “whom there are reasonable grounds for regarding as a danger to the security of the country...or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country”.

What constitutes a “danger” and a “particularly serious crime” are questions that have been answered variously in the jurisprudence and do not lend themselves to categorical definition – there is no hard and fast definition or measurement of what these terms mean. However, given the gravity of the harm to the refugee if they are returned to a country they fled, due to a well-founded fear of persecution, it is vital that the application of article 33(2) be based on a proportionality test – i.e. what is the offence and what danger is posed to the host community in relation to the assessment of the harm to the refugee if returned.

— **USING THE PRINCIPLE** —
OF NON-REFOULEMENT

In order to ensure that the principle of *non-refoulement* is respected and that those in need of international protection are identified and not forcibly returned to a situation of risk, they must have access to an asylum procedure, they must not be sent to a third country (except under certain circumstances) and finally, the procedure for determining if they are refugees in need of protection must include certain guarantees and follow certain practices.

• **Access to Asylum Procedures for all Who Seek Protection**

In order to ensure that people who would risk serious human rights violations if returned to a particular country are identified as such and afforded protection, all asylum-seekers must have access to a fair and satisfactory asylum procedure. While recognizing that governments are entitled to control immigration and entry to their territory, in so doing governments should ensure, and demonstrate adequately, that asylum-seekers have effective access to their asylum procedures and that any restrictions on entry, such as visa requirements, sanctions on airlines or other transporters, or other similar restrictive measures, do not obstruct this access in practice.

• **Sending Asylum-Seekers to Third Countries**

The practice of sending of asylum-seekers who are, or who may be, in need of protection from serious human rights violations to a third country should be opposed unless the government sending them there has ensured (by seeking explicit guarantees) that they will be granted effective and durable protection, which should normally include legal protection, against forcible return.

• **Procedural Safeguards**

States' asylum procedures, including the procedures and practices followed at their airports and borders, must be adequate to identify asylum-seekers who would risk serious human rights violations if sent against their will to another country.

All governments should observe certain basic principles in their asylum procedures. These principles are essential in helping to prevent the forcible return of asylum-seekers at risk of serious human rights violations. These principles are based on international standards, such as are set out in the International Covenant on Civil and Political Rights and relevant conclusions adopted by the intergovernmental Executive Committee of UNHCR. They include specific practical measures which are necessary for the effective implementation of the international standards. They include the following:

– The fundamental principle of *non-refoulement* demands that national asylum procedures are adequate to effectively identify all those in need of protection.

– All asylum-seekers, in whatever manner they arrive within the jurisdiction of a state, must be referred to the body responsible for deciding on claims for asylum.

– The body responsible for deciding on claims for asylum must be an independent and specialized authority whose sole and exclusive responsibility is examining and making decisions on asylum claims.

– The decision-makers of that independent body must have expertise in international refugee law and international human rights law. Their status and tenure should afford the strongest possible guarantees of their competence, impartiality and independence.

– The decision-makers of that independent body must be provided with services of a documentation office whose task should be to impartially collect and provide them with objective and independent information on the human rights situation in asylum-seekers' countries of origin or any countries to which they might be sent.

– All asylum-seekers, at all stages of the procedure, must benefit from the right to legal counsel and interpreters, and the right to contact and to have access to UNHCR and non-governmental organizations.

– Asylum claims should be examined at first instance through a personal appearance by every asylum-seeker before the decision-makers of the independent body responsible for deciding on asylum claims, where there is a thorough examination of the circumstances of each case.

– All asylum-seekers must receive written reasons if their asylum claim is rejected, and have the right to appeal against a negative decision. The appeal should normally be of a judicial nature and must in all cases have a suspensive effect on expulsion.

– Special circumstances may warrant the exceptional treatment of an asylum claim or a group of claims from persons in a similar situation. (These circumstances may include, for example, a determination that an asylum claim is “manifestly unfounded” in the sense that it is clearly fraudulent or not related in any way to the criteria for granting refugee status set out in article 1(a) of the 1951 Refugee Convention or to criteria for defining other categories of persons who are protected from forcible return). Such exceptional treatment would permit only that the appeal against the decision at first instance be expedited, but such an expedited appeal must still in all cases have a suspensive effect on expulsion.

In addition to these essential principles certain practical measures are needed as safeguards to ensure the principles are fully observed in practice. Among the measures which are essential are the following:

– Border officials should be properly trained to identify and refer to the independent body anyone who may be at risk if turned away.

– All asylum-seekers should be given, in a language that they fully understand, the necessary guidance about the procedure to be followed and full information about their procedural rights.

– All asylum-seekers should be allowed access to appropriate non-governmental agencies providing advice and assistance to asylum-seekers.

– All officials involved in questioning or interviewing asylum-seekers and in making decisions on their applications should be instructed and trained to follow the procedural guidance given in paras 195-219 of UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*. All such officials, including border officials, should take into consideration the special situation of asylum-seekers, who might experience language or other difficulties in expressing or presenting a request for asylum, who may have had to flee without personal documents, and whose past experience may have caused them to be apprehensive of authority, to be afraid to speak freely, and to have difficulty giving a full and accurate account of their case.

These principles and safeguards are the minimum procedural standards needed for dealing with asylum requests and to ensure that asylum-seekers are not refouled to a country where they are at risk of serious human rights violations.

ANNEX I

— REFUGEE CASE STUDIES FOR TRAINING MODULE —

What follows are a series of case studies which Amnesty International (AI) uses in training sessions. The goal is to determine in each case which areas of AI's refugee mandate are relevant, and the types of concern AI would voice. A key is provided after each case for the trainer to use, outlining the relevant concerns. These cases are designed to illustrate the main issues that arise regarding the principle of *non-refoulement*. The answers provided are not exhaustive and the trainer is expected to provide a full explanation of the legal standards and refugee protection concerns that arise.

Trainers can use two or three cases in each training session, depending on the time schedule available and which cases seem the most relevant to the situation of the particular country.

Time frame: 15 minutes per case.

To be used for groups unsure of exactly how refugee work fits into AI's mandate and the standards AI calls for in campaigning for refugee protection.

– Distribute the summary of AI's Fundamental Standards for Refugees and briefly go over the procedural safeguards with the participants. Taking questions along the way, explain each point to the participants and why AI feels that point is necessary to ensure the protection of refugees. Confirm that each point is understood and encourage participants to think about the aspects of refugee protection in which their country is lacking. Take a break at this point so that people can “digest” this information.

– Upon returning from the break, divide the groups into small groups of between 3-6 people. Ask each group to appoint someone to report back to the full group at the end of the activity.

– Hand out the case studies. Each group may be given different cases, although the feedback session may be more productive if most groups have looked at the same cases.

– Give the groups about 10-15 minutes to discuss each case.

– Bring the sub-groups back together. Ask each group to report back on a case with any additional comments or questions from other groups. (If the groups have not seen all the cases then some method of giving a summary of the case is needed).

– The “response to cases” are given for your guidance and can be used to correct responses if necessary.

CASE 1:
TOMORROWLAND

Far away from Ausonia, a poor country torn by civil war and political violence, lies Tomorrowland, a peaceful and wealthy country. There is no major refugee-producing country near Tomorrowland, which receives only a small number of asylum-seekers, usually by plane. Recently, three asylum-seekers from Ausonia arrived in the airport of Tomorrowland's capital city and sought asylum; Mr. Hassan, Mr. Smith and Ms. Brown.

The Tomorrowland government announced three days later that Mr. Hassan will not be allowed to stay because information gained by an immigration official who interviewed him for 20 minutes showed that his application was "manifestly unfounded". This is despite evidence from a government doctor who has confirmed to the Tomorrowland press that Mr. Hassan's body bears signs of scarring consistent with torture. Mr. Hassan claims that he was involved in an unarmed opposition group in Ausonia, and was forced to flee the country after he was recently kidnapped by government agents clamping down on opposition forces. The Tomorrowland government has announced it will deport him to Oenotria, a neighbouring country of Ausonia which is accepting refugees for a short period prior to repatriation to their country of origin.

With regard to the other two asylum-seekers, it is understood that Mr. Smith was recently sentenced to death in Ausonia for "armed robbery and attempted murder" and he is apparently being held in prison while the Tomorrowland government considers a request for extradition from the Ausonia government. There is not thought to be any political aspect to his offences.

As for Ms. Brown, it seems that she had become depressed by the continuing violence and economic instability in her homeland and decided to travel to Tomorrowland to make a new life for herself.

On what grounds, if any, would AI oppose the Tomorrowland government's treatment of each of the three people?

What other concerns may AI have?

— **CASE 1: TOMORROWLAND** —
RESPONSE

Amnesty International opposes the forcible return of refugees to countries where they are likely to become victims of torture or execution. Amnesty International would therefore oppose the sending back of Mr. Hassan to Ausonia and would urge the Tomorrowland government to give Mr. Hassan effective and durable protection against refoulement. It is relatively clear that Mr. Hassan would fall under the refugee definition and is therefore entitled to international protection.

In addition, AI would oppose the sending back of Mr. Smith to Ausonia, as he would face the death penalty. AI is against the death penalty under any circumstances, and opposes the sending back of any person to a country where he would face this human rights abuse. It is important to note, however, that Mr. Smith might not fall under the definition of a refugee, as he has committed a serious non-political crime before fleeing his country. In any case, if a person faces the death penalty AI will oppose his return.

*AI would also be concerned about the sending of either of these men to a third country which would be likely to repatriate the refugees in turn. The principle of non-refoulement prohibits the sending of a person, **directly or indirectly**, to a country where he would face serious human rights violations.*

Finally, AI would be concerned about the detention of Mr. Smith.

Ms. Brown falls outside the AI mandate since, unlike the other two cases, there is no evidence that she would become a victim of human rights violations were she to return to Ausonia. However, Amnesty International would also be concerned that the procedure in Tomorrowland was insufficient to screen out refugees from migrants and that all asylum-seekers be given an opportunity to state why they need international protection. Specifically, AI would be concerned about the following points of the procedures followed:

1) Mr. Hassan's interview was obviously not of sufficient length for him to present his case effectively. AI believes that all asylum-seekers should have the benefit of a full review of the substance of their claim. Twenty minutes is obviously not sufficient for the merits of an asylum claim to be explained. As well, it is not clear whether he was given access to legal advice, to UNHCR and NGOs, and provided with an interpreter. AI would call for all of these.

2) Medical evidence should be taken into account, particularly evidence of torture.

3) There should be a right of appeal prior to expulsion. The asylum-seeker should be allowed to stay in the country during the course of the appeal.

4) AI would raise its concerns about fundamental standards for refugees regarding Ms. Brown's special circumstances and the need for individual and thorough examination of each case.

CASE 2:
ATLANTIS

For nearly a decade, Chanda was an active member of an opposition group in her country Auruncania, and had also helped to establish a local human rights organization. However, the government then started to crack down on opposition groups, and thousands of people, including many members of this opposition group, “disappeared”, were detained and died in custody, or were extra-judicially executed by the security forces. Chanda was herself arrested and was held in army camps for a year, during which time she was tortured.

Chanda was transferred to house arrest in an army headquarters building, from which she escaped and fled to neighbouring Bactria. However Bactria is not a party to the 1951 Convention relating to the Status of Refugees and does not have any procedures for persons to seek asylum. AI had recently published a report pointing to numerous cases of *refoulement* from Bactria and urged the government to ratify and implement the Refugee Convention.

Chanda did not seek asylum in Bactria and fled to Charybidis, another neighbouring country, which is not party to the Refugee Convention. Chanda remained in Charybidis long enough to obtain a tourist visa to enter Atlantis. In Atlantis, she lodged a claim for Convention refugee status. Pending a decision on her claim, she was given a one-month visa. However, though Chanda was not authorized to work in Atlantis, the government gave her no social assistance or aid to find housing.

What are AI’s main concerns raised in this case?

What might AI, as an NGO, do to address these concerns?

— **CASE 2: ATLANTIS** —
RESPONSE

Chanda would fall within AI's mandate, since she would clearly be at risk of detention and/or torture were she returned to Auruncania. AI would therefore call on the Atlantian government to afford Chanda effective and durable protection from refoulement. Though Chanda has transited through two other countries, (Bactria and Charybidis) AI believes that the country where an asylum-seeker has sought protection should normally assume responsibility for substantively examining that claim. In this regard it should be noted that international standards state that "asylum should not be refused solely on the grounds that it could be sought from another state".

If the Atlantian authorities were to attempt to expel her to Bactria or Charybidis, AI would call on them to obtain specific assurances from that country that Chanda would be given access to a fair and satisfactory asylum procedure, and would in any case be afforded protection from refoulement. AI would point out to the Atlantian government that neither of those countries are parties to the Refugee Convention nor have adequate procedures for individuals at risk to be given protection and would in particular call to the authorities' attention the many documented cases of refoulement from Bactria.

As well, AI would be concerned about the lack of social support given to Chanda, if her situation was so dire as to prevent her from pursuing her claim for refugee status. Though AI does not have general opinions on the provision of social assistance, insofar as the provision of assistance is so inadequate that people are in effect obstructed from claiming asylum or are induced to abandon their claims because they cannot survive, AI would express its concerns to the Atlantian authorities, that they are undermining their obligation to provide access to fair asylum procedures.

— **CASE 3:** —
XANADU —

Xanadu has recently ratified the 1951 Refugee Convention and its Protocol and has just issued an executive regulation laying out the procedure for refugee recognition. A vast country, Xanadu is surrounded by a number of refugee producing countries, where serious and large-scale political repression takes place.

Under the new regulation, people who have entered Xanada legally (i.e. with proper documents and authorization) wishing to seek asylum must do so within five days of their entry into the country. People who do not have authorization to enter Xanadu must apply for refugee status at the border upon attempting entry. People who fail to comply with the five day limit, or who have already entered the country “illegally” without applying for asylum at the border, are automatically disqualified from the procedure and are subject to immediate deportation to their country of origin. There is no right of appeal in these cases.

The regulation states that the body responsible for interviewing asylum-seekers and determining refugee status will be the Ministry of Defence. This Ministry is known for a hard line stance on security and is particularly sensitive about terrorist infiltration. Under the regulations, asylum-seekers whose cases are turned down are immediately deported. Although it is possible to appeal the decision to the courts, the deportation will not be stopped. The government has stated that it is possible to appeal through a Xanadese embassy in the asylum-seekers’ country of origin.

What are AI’s main concerns raised in this case?

What might AI, as an NGO, do to address those concerns?

— **CASE 3: XANADU** —
RESPONSE

AI would be gravely concerned about many of the provisions of the new regulation.

First, AI would be concerned about the obstructions to access to an asylum procedure in the regulation, and the fact that those asylum-seekers who fall foul of these provisions are to be immediately deported without the right to appeal. Any such time limit imposed on lodging claims for asylum is unnecessarily arbitrary and should be abolished. In addition, AI would be concerned about the provision in the regulation that people who have entered the country “illegally” would be disqualified from applying for asylum considering the nature of how refugees flee.

All individuals who come forward indicating their need for protection must be given access to a fair and satisfactory refugee determination procedure. All asylum-seekers should be given a full review of the substance of their claim; they should under no circumstances be disqualified because of technicalities. The obstructions to access in the regulation could lead to people at risk of serious human rights violations being sent back to their countries, which is a grave violation of the principle of non-refoulement.

AI would also be concerned about the responsible body being the Ministry of Defence. AI believes that governments should establish an independent body whose sole responsibility is refugee recognition. The body should be staffed with independent and impartial experts versed in international human rights law and refugee law. Only then can it be ensured that refugee recognition decisions are based solely on considerations of human rights, and not on other considerations, such as foreign policy or immigration concerns. In this context, AI would be particularly concerned that refugee recognition might be influenced by security considerations unrelated to the rights of refugees.

Finally, AI would be concerned that the right of appeal in the regulation is not an effective one. Given the serious consequences of a wrong decision, AI believes that all asylum-seekers should be given an effective right of appeal against a negative decision. This right of appeal should include a suspensive effect, meaning it should suspend the deportation of the asylum-seeker concerned pending the final outcome of any appeal.

CASE 4:
WONDERLAND

Wonderland, an affluent country, is a peninsula jutting out into the ocean, close to a number of refugee producing countries. Many people arrive clandestinely by boat and manage to evade border guards to arrive at the capital city, a booming economic area. Many of these people are thought to be economic migrants, however, it is clear that many are refugees fleeing persecution. Despite (or perhaps because of) the large number of refugees who arrive on its territory, Wonderland is not a party to the Refugee Convention and as such does not abide by its provisions.

There is an office of the UNHCR in the capital city which interviews asylum-seekers and, where appropriate, recognizes them as refugees. However, the government of Wonderland refuses to give these refugees asylum. It makes no differentiation between “illegal immigrants” and refugees, and if apprehended by the authorities, these UNHCR-recognized refugees are at risk of immediate deportation. The UNHCR looks for countries willing to accept refugees for resettlement. However, this process usually takes months, during which time these refugees are at constant risk of arrest and *refoulement*.

The government of Wonderland has recently announced a massive expansion of border guard facilities in the context of a crackdown on “illegal immigration”. It has stationed numerous garrisons of border guards on key points alongside the coastline, with orders to apprehend clandestine immigrants and deport them back to their country immediately. The UNHCR has expressed its wish to have a presence at some of these border posts, but has been turned down by the government. In addition, the government has announced its plans to send out border control ships in order to intercept boats with clandestine immigrants on the high seas before they enter Wonderland territory, and turn them back.

What are AI’s main concerns raised in this case?

What might AI, as an NGO, do to address those concerns?

— **CASE 4: WONDERLAND** —
RESPONSE

It should be noted first that the principle of non-refoulement is a principle of customary international law, binding on all states. Therefore, while Wonderland may not have a treaty obligation to recognize refugees and afford them the rights laid out in the Refugee Convention, it is still under a duty to ensure that those at risk of serious human rights violations in their country are given protection from refoulement.

AI would be gravely concerned that Wonderland fails to abide by this principle and regularly deports recognized refugees to their countries of origin. AI would state that the government should, at a minimum, ensure that all those recognized as refugees by the UNHCR are protected from refoulement pending resettlement. Specifically, this would include issuing clear instructions to law enforcement officials and other relevant officials regarding the treatment of refugees.

In addition, AI would be concerned about the lack of possibility at the border to seek asylum. AI would state that all those at the border indicating a fear of returning to their country should be referred immediately to the body responsible for determining refugee status (in this case, the UNHCR) and protected from refoulement pending a decision on their case. It should be noted that AI does not dispute the basic right of a government to restrict entry into their country. However, any measure taken in this regard must ensure that all persons wishing to seek asylum are given access to a determination procedure and are in any case protected from refoulement.

*As well, AI would be gravely concerned about the plans of the Wonderland government to send border control ships to the high seas and intercept “illegal immigrants”. The principle of non-refoulement, as stated in the Refugee Convention, prohibits the sending back **in any manner whatsoever** of a refugee to a country where he or she would face serious human rights abuses. That would include actions taken by government officials (like the border control personnel) on the high seas.*

Finally, AI would recommend to the Wonderland government that it become a party to the Refugee Convention and undertakes to abide by internationally recognized standards of refugee protection, including establishing a fair and satisfactory refugee status determination procedure.

Statelessness and Citizenship

Contributed by the Open Society Institute

“Citizenship has been called man’s basic right for it is nothing less than the right to have rights”.

The right to a nationality is universally recognized as a fundamental right since nationality or citizenship in a state is considered a prerequisite for the exercise of individual civil and political rights. In this discussion on statelessness and citizenship, “nationality” and “citizenship” will be used synonymously. Citizenship will be defined as the legal bond between states and individuals, consisting of reciprocal duties of allegiance and protection, and is the basis upon which states offer diplomatic protection or legal standing to individuals in the international arena. Nationality, therefore, will refer to citizenship in a state and not, as it is sometimes used, to refer to membership in a sociological or ethnographical group. Persons lacking this legal connection are referred to as “stateless persons”.

In the domestic context, stateless persons can often be vulnerable to abuse because they have fewer legal rights and protections than a citizen. Indeed, Earl Warren, in 1958, called citizenship, “man’s basic right for it is nothing less than the right to have rights”.¹ In the decades since that statement was made, international standards have been developed to protect stateless persons. Such protections however, are not a complete substitute for citizenship.

As we are about to discuss, statelessness can arise when new states are established, previous governments are restored, or countries gain independence. In the last decade, portions of the former Soviet Union have experienced many such changes in sovereignty. When the Soviet Union dissolved into Newly Independent States about one-fifth of the population was living outside their home republics. Knowledge about and legal protection of human rights are, in these circumstances, important tools to alleviate the situation of stateless persons.

¹ Earl Warren, 1958, quoted in Independent Commission on International Humanitarian Issues, *Winning the Human Race*, 1988, at 107.

BASIC RULES

Every state is entitled to determine who its citizens are according to its own rules and regulations. However, a state's domestic law and practices with respect to citizenship determination must comply with the minimum requirements of international norms. It is for each state to determine under its own law who are its nationals. This law shall be accepted by other states as long as it is consistent with international conventions, international custom and the principals of law generally recognized with regard to nationality. International norms provide the minimum level of acceptable treatment of persons with respect to citizenship and statelessness. International norms also circumscribe the state's discretion with regard to citizenship determinations and its treatment of stateless persons.

At their most fundamental level, international standards stipulate that everyone has a right to a nationality and no person can be arbitrarily deprived of nationality. Moreover, statelessness is to be avoided; that is, with few exceptions, persons should either be granted or allowed to retain a nationality in circumstances whereby they would otherwise become stateless. Finally, the fundamental rights of persons who nonetheless become stateless must be adequately recognized and protected.

SITUATIONS OF STATELESSNESS

Statelessness is a serious impediment for anyone. Stateless persons are often denied official documentation; they are severely restricted in their ability to obtain work, housing, and education. Stateless persons generally cannot travel legally across international borders because they cannot obtain passports. Furthermore, stateless persons have no right to participate in most political processes and usually lack the

benefits of the physical, legal, or diplomatic protection routinely offered by states to their nationals. Without the protection or assistance derived from citizenship in a state, stateless persons often become refugees or, if not refugees in the strict definition, they often suffer the same legal and humanitarian problems faced by refugees.

The rules on nationality of each state party shall be based on the following principles:

- (a) everyone has the right to a nationality;*
- (b) statelessness shall be avoided;*
- (c) no one shall be arbitrarily deprived of his or her nationality...*

[1997 Provisional European Convention on Nationality, art. 4]

Many circumstances give rise to statelessness, but some of the more common causes are:

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- conflict of laws between states;
 - transfer of territory upon a state's dissolution, succession, or restoration without adequate legislative or constitutional provisions with respect to citizenship;
 - loss of nationality through citizenship or marriage laws;
 - lack of state compliance with laws governing information on births and identity;
 - laws whereby nationality is based solely on descent (*jus sanguinis*) which can result in the inheritance of statelessness from a stateless parent;
 - renunciation of nationality without prior acquisition of another nationality.

One common situation of statelessness is the case in which a child is born on the territory of one country to parents who are citizens of another country. The law of the country in which the child is born may require that citizenship is determined through parental descent, while the law of the parent's country may grant citizenship by descent only to persons born on its territory. Due to the conflict of laws between the states involved, each state could ascribe a different nationality to the child according to domestic law, thus leaving the child stateless.

State succession may produce large populations of stateless persons, especially in cases where a former unitary state is succeeded by two or more separate states. Consider a person who was born and has always resided in the former, unitary state, we shall call X. Upon dissolution of state X into two separate states Y and Z, the individual would expect to be ascribed citizenship in the successor state Y on whose territory he was born and always resided. Based on the person's ethnic background or language, however, he may be faced with two equally unacceptable options. The individual may be given some status less than proper citizenship in the successor state Y or according to citizenship laws in some countries, may be ascribed the citizenship of another successor state, where he has never resided, in this case Z. In such a case, persons can become stateless in the only country in which they have ever lived.

Although many citizenship laws provide a mechanism whereby persons can apply for citizenship in the new state, such laws often require evidence of citizenship in the other successor state and a formal renunciation of that citizenship before an application for citizenship in the new state will be accepted. Language requirements also are sometimes imposed in naturalization cases. Even if an application for citizenship would eventually succeed, the cost and complexity of the application process and administrative rules often create insurmountable barriers for stateless persons.

Upon independence, Lithuania avoided this potential problem by granting Lithuanian citizenship to its resident non-Lithuanian-speaking populations. Turkmenistan similarly avoided these problems by permitting Russians to hold dual citizenship in both states given Russia's rule that all former Soviet citizens may claim Russian citizenship.

Latvia and Estonia, on the other hand, granted their citizenship only to persons and their descendants who were born on their territory prior to the Soviet invasion, potentially

giving rise to a sizable stateless population of about one million people. Latvia's citizenship law requires Russian-speaking residents to wait until the year 2000 to apply for naturalization, potentially leaving them stateless until then. Estonia invalidated Soviet passports in July 1996 and now requires two years of residence and Estonian-language competence to apply for naturalization. Although some Russian-speakers living in Estonia were able to choose and obtain Russian citizenship, many were relegated to an Estonian "alien passport" which serves only as a type of Estonian identity card for stateless persons. The resulting lack of clear claims of nationality for large numbers of ethnic Russians and other ethnic groups in these and other newly independent republics of the former Soviet Union has caused and exacerbated political tensions between Russia and its neighbors, at times resulting in threats of military intervention.

The term "stateless person" means a person who is not considered as a national by any state under the operation of its law.

[Convention relating to the Status of Stateless Persons, art. 1.1]

The timing of state successions and movements of people can also cause statelessness. For instance, large numbers of persons from Ukraine migrated to Tajikistan during the Soviet era. After the dissolution of the Soviet Union, these residents of Tajikistan returned to Ukraine, but arrived after the effective date of Ukraine's new, post-independence citizenship law. Although both

Tajikistan's and Ukraine's citizenship laws were rather permissive in extending citizenship to residents on their territory, the timing of the migrants' move resulted in their statelessness because they were not resident in either state as of the effective dates of the citizenship laws.

Population movements motivated by political considerations have also caused problems of statelessness in the territory of the former Soviet Union. Under the Stalin regime, for example, many of Georgia's Meshketian minority were settled in Uzbekistan. Having been resident and employed in Uzbekistan for 50-60 years, these persons and their families are neither refugees nor migrants in the international sense. They were evacuated from Uzbekistan by Soviet troops in 1989 during ethnic conflict and now reside as stateless persons in many countries of the Commonwealth of Independent States (CIS). Similarly, during the Afghan war from 1979 to 1989, thousands of children were moved from Afghanistan to the Soviet Union, mostly Russia, to avoid the conflict and to receive a communist education. With the fall of communist governments, these children, and the reasons for their migration to Russia, have been forgotten. They are not Russian citizens, remember little if anything about Afghanistan, and do not speak their native language. On the other side of the border, the anti-Soviet regime in Afghanistan now associates these persons with the former Soviet regime. Hence, they have no effective nationality and suffer as virtually stateless in the country where they have lived most of their lives.

Women and children are particularly vulnerable to problems of statelessness. Some citizenship laws provide that when a woman marries a non-citizen, she loses her nationality and acquires her husband's nationality. If the husband is stateless, the woman could lose her nationality upon marriage without gaining another. The problems may not end there. Some nationality laws also provide for citizenship only through paternal descent. In such a case, the couple's children may also be stateless even if they were born in the state of which the mother was a citizen before her marriage. Or, as is the case under the citizenship law of Kyrgyzstan, the father's citizenship is given absolute priority over the mother's when determining the citizenship of the children of divorced or separated parents, regardless of where or with whom the child is residing.

Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

[Universal Declaration of Human Rights, art. 15]

If the family resides outside the woman's state of original citizenship, other problems can arise. For instance, if the husband dies, the woman may have no right to enter her former state because she is no longer a citizen. Even if the woman has the ability to regain citizenship in her former state, the children may possess no recognized connection to their mother's former state upon which to

base their requests for citizenship. Even if they are allowed to return to the mother's former state, bureaucratic requirements are often used to restrict the exercise of their fundamental right to freedom of residence. For instance, although Russia formally abolished the "propiska" residence system on a national level in 1993, local authorities in some areas continue to enforce those former rules against migrants, thus relegating them to undesirable locations and preventing employment. In particular, this practice has been discriminatorily applied by local Moscow authorities against Baku Armenian refugees from Azerbaijan.

Documentary requirements may compound the problems confronting stateless persons, especially women and children. Wars, other conflicts, and administrative mistakes often create obstacles to verifying date and place of birth, marriage, parentage, or residence. For example, a child born in a refugee area outside of its parents' state of citizenship during an armed conflict may later find it difficult or impossible to document his/her parentage or date and place of birth. If secure and accessible storage of birth and marriage records is not maintained by state authorities, such a child may not be able to prove or apply successfully for citizenship.

Bureaucrats often, but improperly, ignore parts of the documentary record by, for instance, refusing to recognize birth certificates showing a person's life-long residence in newly independent states. Lack of appeal or independent review of such

bureaucratic decisions only compounds the documentation problems often faced by stateless persons and erode confidence in the rule of law.

Statelessness can therefore be created either by the operation of law (*de jure* statelessness) or by the operation of political, administrative, or other similar forces (*de facto* statelessness). *De facto* statelessness is often the result of practical problems that arise when trying to establish or apply for nationality. Whether arising *de jure* or *de facto*, statelessness results in the same problem: individuals are placed outside the protection of any state. In 1961 the United Nations Conference on the Reduction of Statelessness, in order to combat the problems of statelessness recommended that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them effectively to acquire a nationality.

INTERNATIONAL LEGAL STANDARDS

Adopted in 1948, the Universal Declaration of Human Rights provides that all persons have the right to a nationality and that no person shall be arbitrarily deprived of one's nationality or the right to change nationality.

Each Contracting State shall accord to stateless persons 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.

[Convention relating to the Status of Stateless Persons, art. 26]

Although the Universal Declaration is not an official treaty among states, it is nonetheless a standard of customary international law that applies to all persons. State action breaching its requirements would be a violation of international law.

In 1954, the United Nations adopted the Convention relating to the Status of Stateless Persons ("1954 Convention"). Although the 1954 Convention did not come into force until 1969 it articulates minimum standards for treatment by signatory states of stateless persons. "Stateless persons", were defined as those persons not considered a national by any state.

Generally, the 1954 Convention provides that basic human rights of stateless persons must be respected by their countries of residence without discrimination of race, religion, or country of origin.

The United Nations in 1961 adopted the Convention on the Reduction of Statelessness ("1961 Convention"), which came into force in 1975. Under the 1961

As of 1996, 30 States had ratified or acceded to the 1954 Convention and 16 States had ratified or acceded to the 1961 Convention. CIS states which have consented to the 1961 Convention are Armenia (18 May 1994) and Azerbaijan (16 August 1996). Azerbaijan has also acceded to the 1954 Convention.

Convention, signatory states are to provide mechanisms to acquire nationality to persons born on their territory. The 1961 Convention also limited the circumstances under which persons might lose their nationality without acquiring another. Under the nationality rules, which states are to adopt and practice in domestic laws, many people, who would otherwise be rendered stateless, are able to obtain a nationality.

Although most states have not acceded to the 1954 and 1961 Conventions, the general principles embodied in those instruments are drawn from basic provisions of citizenship legislation and practice in the majority of states. The Conventions are therefore reference points for determining customary international law and reflect an international consensus on minimum legal standards to be applied to nationality. Based in part on these Conventions and the practice of many states, the right to acquire a nationality and the right not to be deprived arbitrarily of one's nationality are now recognized as basic human rights under international law.² Although a state may not be required to grant its citizenship to an applicant, states have a general duty not to create a situation resulting in statelessness.

With few exceptions, applicable international standards require states to avoid acts or decisions that would render stateless anyone who has a genuine connection to the state. In particular, state practice reveals a general presumption that successor states will accord their nationality to persons with a "substantial connection" or "genuine effective link" to a territory over which the successor state is newly sovereign. Upon state succession, citizens in the affected territory should ipso facto lose their former citizenship and acquire that of the new state unless there is some indication of an even closer connection between the individual and another state.

² This most basic international standard with respect to statelessness is elsewhere expressly directed to particular categories of persons, see, e.g., *Convention on the Elimination of All Forms of Discrimination Against Women* (1979), art. 9 ("States parties shall grant women equal rights with men to acquire, change or retain their nationality... States parties shall grant women equal rights with men with respect to the nationality of their children"); *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, 179 (1966), art. 24 ("Every child has the right to acquire a nationality"); *Convention on the Rights of the Child*, 28 I.L.M. 1448, 1460 (1989), art. 7 ("The child... shall have... the right to acquire a nationality..."); *Convention on the Elimination of All Racial Discrimination* (1965), art. 5 ("States parties undertake... to guarantee... equality before the law... in the enjoyment of... the right to nationality..."); *Convention on the Nationality of Married Women* (1957), arts 1-3 (promoting "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to sex" including the right to a nationality and the right not to be arbitrarily deprived of nationality).

A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.

[Convention on the Reduction of Statelessness, art. 8]

Examples of the “substantial connection” or “genuine effective link” include birth on the state’s territory, descent from a citizen of the state, citizenship in a former federal state, or long-term residence in the state without a closer connection to any other state. Statelessness is often caused by the failure of a state to recognize the genuine connections that a person has with the state.

TREATMENT OF STATELESS PERSONS

The 1954 Convention relating to the Status of Stateless Persons offers protection to any “person who is not considered a national by any state under the operation of its law” (Article 1.1). This is a purely legal definition, based on the operation of a state’s law. The quality or attributes of citizenship in a particular state are irrelevant to the definition.

As noted above, the 1954 Convention’s most basic provision is that no one shall be arbitrarily deprived of nationality. The rule against “arbitrary” deprivation or denial of citizenship may seem somewhat abstract, but it is given concrete form through procedural “due process”. The procedural guarantees include most notably, the right to independent determinations of citizenship without discrimination on the basis of race, ethnicity, religion, political affiliation, or gender. The procedural process also allows the right to appeal unfavorable decisions. Although procedural protections do not guarantee a particular outcome, they do serve to place citizenship decisions under public scrutiny and make the application of those laws by state actors more transparent. This public scrutiny puts states in the position of justifying the policy objectives behind particular citizenship and naturalization laws and also helps subject their domestic laws to evaluation according to applicable international standards. Decisions without adequate judicial or independent review can be termed “arbitrary” and are prohibited by international standards, even when those laws have been followed in a formal sense.

Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer.

[Convention on the Reduction of Statelessness, art. 10]

This Convention shall not apply... to persons with respect to whom there are serious reasons for considering that:

- (a) they have committed a crime against peace, a war crime, or crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;*
- (b) they have committed a serious non political crime...*

[Convention relating to the Status of Stateless Persons, art. 1.2]

The 1954 Convention does not apply to persons for whom there are serious reasons to consider that they have committed a crime against peace, a war crime, a crime against humanity, acts contrary to the purpose and principles of the United Nations, or a serious non-political crime outside the country of their residence. Each state may follow its own procedures to determine through due process of law whether a particular person is eligible for the benefits provided by the Convention.

Under the 1954 Convention, stateless persons have both rights and duties with respect to their country of residence. Stateless persons are to be

granted the same rights of access to courts, elementary education, and freedom of religion as the country extends to its nationals. Stateless persons are also to have the same property and housing rights and rights of association as generally accorded to aliens by the country. In addition, stateless persons are to have freedom of residence, subject to the same restrictions generally applicable to aliens. Stateless persons are generally obliged to follow the laws and regulations of their country of residence.

One of the most important protections granted to stateless persons under the 1954 Convention is the right to identity and travel documents from the country in which they reside. Such documents do not grant citizenship, a presumption of citizenship, or national protection. As a practical matter, however, they are particularly important to stateless persons when travel is required for education, work, health care, or resettlement. A schedule to the 1954 Convention provides a model for such travel documents. Contracting states are obliged to recognize travel documents issued to stateless persons by other states.

The Contracting States shall issue identity papers to any stateless person in their territory who does not possess a valid travel document.

The Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory.

[Convention relating to the Status of Stateless Persons, arts, 27, 28]

The Contracting States shall not expel a stateless person lawfully staying in their territory save on grounds of national security or public order. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law.

[Convention relating to the Status of Stateless Persons, art. 31]

Stateless persons are not to be expelled unless expulsion is compelled in order to protect national security or public order. Except in the case of national security, expulsion of stateless persons may occur only after compliance with due process of law, which would include the right to a fair hearing by an independent legal body, such as a court of law, and the right of appeal. Moreover, all expulsions are restricted by the generally recognized international legal principle of *non-refoulement*.

REDUCING STATELESSNESS

Naturalization is the primary solution to the problem of statelessness. The 1954 Convention articulates the goals of assimilation and naturalization of stateless persons.

The 1961 Convention provides particular mechanisms for contracting states to achieve these goals. Under its terms, persons born on a state's territory are ordinarily to become citizens of that state, either upon birth or through an application process. The application may be conditioned on various factors, including residency, lack of criminal record, age restrictions, or the condition that the person has always been stateless. Based on the same conditions, contracting states are also to grant their nationality to a child born to parents who are citizens of the state if the child was born outside the territory of the state and would otherwise be stateless.

The 1961 Convention also provides that no deprivation of nationality shall occur if such deprivation will result in statelessness. Hence, renouncing one's nationality must be conditioned on the prior possession or acquisition of another nationality.

Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. 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.

[Convention relating to the Status of Stateless Persons, art. 32]

A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.

Such nationality shall be granted:

- (a) at birth, by operation of law;*
- or*
- (b) upon an application*

[Convention on the Reduction of Statelessness, art. 1]

Automatic loss of nationality through the operation of marriage, divorce, legitimization, or adoption laws is also to be conditioned upon the possession or acquisition of another nationality. In cases where a person may lose a nationality, the deprivation may occur only through due process of law with procedural guarantees. In all cases, nationality decisions must be made without discrimination on the basis of race, ethnicity, religion, or political grounds.

The 1961 Convention provides that statelessness is not to occur on the basis of transfer of territory

between states. Treaties should ensure this result. Where no treaties exist, a signatory state is to confer citizenship on persons who would otherwise become stateless as a result of territorial changes. As noted above, states may impose administrative requirements for acquiring citizenship and such requirements may apply even in situations of territorial transfer.

Under administrative regimes that require an application for citizenship based on proof of certain facts, such as the administrative requirements permitted under the 1961 Convention, it is critically important that children be registered upon birth and provided with documentation concerning their identity, the identity and citizenship of their parents, and their date and place of birth. It is also important that administrative rules and procedures with respect to acquiring or possessing nationality be clear, consistent, well documented, and enforceable. In cases where territory has been transferred, official records must exist and be accessible in order for a person to provide the proof necessary to obtain or retain citizenship. Statelessness often results as a practical matter where administrative rules are not known, notifications are not given, or administrative fees are not affordable.

Although a person's nationality is normally to be retained if its deprivation would result in statelessness, there are a few, strictly construed exceptions whereby a person may be denied or lose a nationality. A person may be denied

If the law of a Contracting State permits renunciation of nationality, such renunciation shall not result in loss of nationality unless the person concerned possesses or acquires another nationality.

[Convention on the Reduction of Statelessness, art. 7.1]

citizenship if a dual nationality would otherwise result. The protection afforded by the 1961 Convention does not apply where nationality was gained through fraud or misrepresentation. Also under the 1961 Convention, persons whose conduct seriously prejudices the state's vital interests can be denied or have their citizenship revoked. This could involve service in a foreign power or enemy state's armed forces or a formal declaration of allegiance to another state where such service or allegiance was expressly prohibited in a state's national legislation prior to accession to the 1961 Convention. Where a naturalized citizen has resided abroad for more than seven consecutive years and the naturalized citizen does not express an intent to retain nationality after notification through the state's normal administrative requirements, that person may become stateless even under the 1961 Convention. Similarly, a non-resident national who was born outside a state's territory may become stateless if the person fails to register following the age of majority plus one year despite notification of an impending loss of citizenship.

1997 COUNCIL OF EUROPE CONVENTION ON NATIONALITY

The Council of Europe's Committee of Ministers adopted a Provisional Convention on Nationality on May 14, 1997, and the Convention was opened for signature on November 7, 1997. The Russian Federation and Ukraine are member states of the Council of Europe and may sign the Convention. In addition, the Convention will also be open to signature by Armenia, Azerbaijan, Belarus, Georgia, and Kyrgyzstan, which are not member states of the Council of Europe but which participated in work on the Provisional Convention.

The 1997 Provisional Convention on Nationality proclaims many of the same rules as provisions of the 1954 and 1961 Conventions. Like those earlier conventions, the Provisional Convention on Nationality seeks to avoid statelessness, guarantees fair procedures in matters relating to nationality, makes possible for persons having a genuine link with a state party to acquire its nationality, and limits the situations in which a person may lose his/her nationality.³

³ See, e.g., *1997 Provisional Convention*, art. 5.1 ("The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, color or national or ethnic origin"); art. 6.2 ("Each State Party shall provide in its internal law for its nationality to be acquired by children born on its territory who do not acquire at birth another nationality"); art. 7.3 ("A State Party may not provide in its internal law for the loss of its nationality... if the person concerned would thereby become stateless..."); arts 11, 12 ("Each State Party shall ensure that decisions relating to the acquisition, retention, loss, recovery or certification of its nationality contain reasons in writing" and "be open to an administrative or judicial review..."); art. 18 ("In deciding on the granting or the retention of nationality in cases of State succession, each State Party concerned shall take account in particular of: (a) the genuine and effective link of the person concerned with the State; (b) the national residence of the person concerned at the time of State succession; (c) the will of the person concerned; (d) the territorial origin of the person concerned").

Persons possessing the nationality of two or more States shall be required to fulfill their military obligations in relation to one of the States parties only.

[1997 Provisional European Convention on Nationality, art. 21.1]

In addition, the Provisional Convention on Nationality specifically does not limit the right of persons to hold multiple nationalities. However, a state party remains free to enact its internal law to condition the granting of its nationality on the renunciation or loss of a person's citizenship in another state.

Moreover, in situations where renunciation or loss of citizenship is not a reasonable possibility, e.g., where a refugee cannot rely upon his former state's cooperation in terms of citizenship matters, states parties are not to require renunciation or loss as a condition for the acquisition or retention of their nationality.

Under the Provisional Convention, citizens of a state party with more than one nationality are to enjoy the same rights and be subject to the same duties as other nationals of the state party. Furthermore, persons with more than one nationality are to be required to fulfill the military service of only one state party of which they are a citizen. States parties are free to make their own arrangements regarding how to implement this rule in actual situations or to follow the detailed rules set forth in article 21.

PROVISIONS OF AN ADEQUATE CITIZENSHIP LAW

To determine whether a citizenship law is adequate under international standards it can be evaluated through its likely effect on two groups of people:

1. the initial group of persons who will be citizens as defined in the law;
2. the group of persons who may acquire citizenship later.

In the situation of newly emerging or restored independent states, citizenship laws should be as inclusive as possible when defining the initial body of citizens. Hence, citizenship laws should define the initial body of citizenship at least broadly enough to include:

- residents of the state at the point of independence who held citizenship in the state prior to independence;
- persons not resident in the state but who hold the citizenship of the state at the point of independence and no other citizenship;

- non-residents who were born in the state or have some other effective link or substantial connection with the state who have not acquired citizenship elsewhere;
- non-citizens who were habitually resident in the state at the point of independence but who have failed to acquire citizenship elsewhere;
- persons born on the territory of the state;
- persons descended from citizens of the state, whether from one or both of the parents, without regard to the gender of the parent who is a citizen.

With regard to the ability to acquire citizenship after independence, citizenship laws should provide effective mechanisms to grant citizenship to the following groups:

- persons born on the state’s territory who do not acquire citizenship elsewhere;
- foundlings on the state’s territory;
- persons who have formed a genuine and effective link to the state, such as habitual residence or descent;
- stateless persons or refugees who are lawfully and habitually resident in the state.

Furthermore, the criteria for naturalization should be clearly delineated in any citizenship law in order to prevent arbitrary decisions.

Citizenship laws should expressly deal with the occasions under which a person may lose or renounce their nationality. Hence, citizenship laws should provide:

- a mechanism by which to renounce one’s citizenship, but only if renunciation is expressly conditioned upon the retention or acquisition of another nationality;
- the precise grounds upon which a citizen may be deprived of the state’s nationality;
- the procedures and appeal mechanisms which will serve to prevent arbitrary deprivations of citizenship.

PROTECTION MECHANISMS

Because the problems of statelessness and refugee status often overlap, the United Nations High Commissioner for Refugees (UNHCR) is the agency designated to act as intermediary between states and stateless persons.

Since 1975, UNHCR has assumed the responsibilities under article 11 of the 1961 Convention of “a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority”. This assistance formally extends only to persons who can prove they are *de jure* stateless and only in relation to signatory states. Where the

cause of a person's statelessness is not clearly *de jure*, the person may rely on a "humanitarian plea" based on the Final Act of the 1954 Conference recommending that *de facto* stateless persons be accorded the same treatment as *de jure* stateless persons. Also, advocates and government actors should consider whether the person is subject to protection as a refugee. (*Please see Chapter VII on Refugee Rights for further information*).

UNHCR also offers advisory and technical assistance to governmental bodies that deal with issues of nationality and citizenship. As recently as February 6, 1996, the United Nations General Assembly requested UNHCR provide advice to states regarding preparation and implementation of nationality legislation and asked states "to adopt nationality legislation with a view to reducing statelessness, consistent with fundamental principles of international law, in particular by preventing arbitrary deprivation of nationality, and by eliminating provisions which permit the renunciation of a nationality without the prior possession or acquisition of another nationality...".

UNHCR has expertise to assist states in drafting nationality legislation, and has recently commented on both Armenia's and Azerbaijan's citizenship legislation. In cases of disputed nationality claims, UNHCR can help non-governmental organizations (NGOs) and other advocates determine whether an individual is stateless or has means of redress with respect to nationality.

Similarly, the High Commissioner on National Minorities (HCNM) of the Organization for Security and Co-operation in Europe (OSCE) has commented on various citizenship laws drafted in Newly Independent States, including Estonia's Law on Aliens and Latvia's citizenship legislation. Latvia's parliament reconsidered its law based on comments from the OSCE's HCNM.

NGOs can help prevent statelessness and offer protection to stateless persons through a variety of actions at the national level. In the long term, the interests of stateless or potentially stateless persons can be protected by state accession to the 1954, 1961, and 1997 Conventions and NGOs should advocate for such state action. Even where formal accession does not occur, legislation expressly embodying the norms and procedural guarantees of the Conventions would benefit stateless persons or those in danger of becoming stateless. NGOs should therefore monitor the development, amendment, and enactment of citizenship laws and advocate for the inclusion of the international norms and suitable provisions.

NGOs can also focus their assistance to stateless persons by assisting them in reporting their situation to local UNHCR offices or to the Geneva headquarters. Persons wishing to report abuses of the human rights of stateless persons, or wishing to bring attention to the imminent danger of such abuses, may also contact the UN Centre for Human Rights in Geneva. Such problems can also be raised before the

OSCE by notifying the High Commissioner on National Minorities. (*Please see Chapter VI on International Mechanisms for more information on possible activities by NGOs*).

In most cases, it is not difficult to determine to which state an individual has a genuine effective link for purposes of nationality decisions. Rather, difficulties in preventing or reducing statelessness often occur as a result of legislative, judicial, administrative, and political decisions which fail to recognize basic principles of international law with respect to nationality. General principles of international law require that states not deprive persons arbitrarily of their nationality, that persons be granted nationality in circumstances where they would otherwise become stateless, and that persons who are stateless be adequately protected in their basic human rights. Accession by all states to the 1954 and 1961 Conventions, accession by eligible states to the 1997 Provisional Convention, and modification or passage of national legislation to comply with the applicable international standards are important steps towards preventing statelessness and the hardships associated with it.

Treatment of Prisoners

Contributed by Human Rights Watch

Indeed, the great majority of the millions of persons who are imprisoned worldwide at any given moment are confined in conditions of filth and corruption, without adequate food or medical care, with little or nothing to do, and in circumstances in which violence from other inmates, their keepers, or both is a constant threat.

“Prisoners go to prison as punishment not for punishment”.

Held in captivity and limited in their ability to communicate with the outside world, prisoners are exceedingly vulnerable to abuse. Whether motivated by a desire to inflict punishment, an interest in obtaining information, or out of mere neglect, the mistreatment of prisoners is appallingly common. Indeed, the great majority of the millions of persons who are imprisoned worldwide at any given moment are confined in conditions of filth and corruption, without adequate food or medical care, with little or nothing to do, and in circumstances in which violence from other inmates, their keepers, or both is a constant threat.

International protections of the human rights of prisoners are based on fundamental notions of human dignity. They embody the principle that, no matter what crime the individual may have committed, no one can be stripped of certain basic rights.

State practices that violate the rights of prisoners include: physical beatings; the application of electrical shocks; rape or other sexual abuse; involuntary medical or scientific experimentation; pulling out of the nails; excessive solitary confinement; overcrowded and unsanitary conditions of confinement; inadequate food; and excessive barriers to contact with the outside world, including correspondence and visits.

The treatment of prisoners is a topic that merits serious attention in the Commonwealth of Independent States (CIS). Not only do many CIS countries have relatively high rates of imprisonment, but it has been widely recognized that physical

abuse of prisoners, substandard and in some cases subhuman conditions of detention, and lack of adequate medical care in the region's penal facilities are among its most entrenched human rights problems.¹

INTERNATIONAL LAW AND PROTECTION OF THE RIGHTS OF PRISONERS

The chief international and regional human rights instruments binding on the countries of the CIS region clearly extend their protections to prisoners. Most fundamentally, several treaties, echoing article 5 of the Universal Declaration of Human Rights, prohibit torture and other forms of ill-treatment. Since prisoners are particularly vulnerable to such abuses, this chapter will focus on these provisions.

Except where otherwise specified, the term “prisoner” as used here comprises persons incarcerated as the result of conviction for a crime, persons detained awaiting trial, and persons held in administrative detention. The category of administrative detention includes persons held in immigration detention.

The International Covenant on Civil and Political Rights (ICCPR), which contains a comprehensive listing of human rights protections, proclaims in its article 7 that: “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment”. Article 7 of the ICCPR also specifies: “In particular, no one shall be subjected without his free consent to medical or scientific experimentation”. Using almost the same wording as the ICCPR, article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) declares: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. The omission, in the European Convention, of the term “cruel” is of little practical consequence, as its other terms particularly the term “inhuman”, have been interpreted as barring cruel treatment. Article 37 of the Convention on the Rights of the Child, relevant to the protection of incarcerated minors, similarly prescribes: “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”.

¹ See, e.g., Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1994/37, U.N. Doc. E/CN.4/1995/34/Add.1 (stating, in describing prison facilities of the Russian Federation, that: “The Special Rapporteur would need the poetic skills of a Dante or the artistic skills of a Bosch adequately to describe the infernal conditions he found in these cells. The senses of smell, touch, taste and sight are repulsively assailed. The conditions are cruel, inhuman and degrading; they are torturous.”); see generally Moscow Center for Prison Reform, *In Search of a Solution: Crime Criminal Policy and Prison Facilities in the Former Soviet Union* (Moscow: Human Rights Publishers, 1996) (describing prison conditions in Moldova, Uzbekistan, Ukraine, Lithuania, Belarus, Kazakstan, and Russia).

The U.N. Standard Minimum Rules for the Treatment of Prisoners

The U.N. Standard Minimum Rules for the Treatment of Prisoners are the most comprehensive international standards governing the treatment of prisoners. The rules were adopted in 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Consisting of ninety-five provisions, the rules set out to describe “what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions”. (Standard Minimum Rules, art. 1).

Compared to other U.N. documents addressing the conditions under which prisoners may be held, the rules are extremely detailed. They cover such topics as “Clothing and Bedding”, “Exercise and Sport”, “Instruments of Restraint”, “Retention of Prisoners’ Property”, “Classification and individualization”, and other issues that are peculiar to penal institutions. Some of their requirements are categorical, such as the rule that drinking water should be available to all prisoners whenever they need it, while others, such as the rule that, “so far as possible”, prisoners should be separated according to their classification are more flexible.

The Standard Minimum Rules are a success in that they have been recognized as authoritative by governments and prison officials in a great many countries. Unfortunately, the record of government compliance with the rules, despite official pronouncements to the contrary, is much less encouraging. Few in any prison system can honestly claim to follow all of the rules. Like many human rights provisions, they are too often honoured in the breach.

The rules are not legally binding in the same way as human rights treaties such as the ICCPR, but they nonetheless constitute an authoritative guide to binding treaty standards. For example, their prohibitions on placing prisoners in dark cells, reducing prisoners’ diets beyond the limits of health, and using instruments of restraint as forms of punishment, are relevant in interpreting the ICCPR’s broad prohibition on cruel, inhuman, or degrading treatment or punishment.

*It should be noted, however, that the rules themselves license some departures from the standards they set by virtue of a reservation contained in their introductory section. This provision states that: “**In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places at all times**”. (Standard Minimum Rules, art. 2).*

As its title suggests, it is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) that contains the most detailed protections against torture and other abusive treatment. Article 1 of the CAT defines torture as:

“...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”.

Article 2 of the CAT mandates that each state take “effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”. In particular, each state is obliged, among other things, to make torture a criminal offence punishable by appropriately serious penalties; to institute prompt and impartial investigations of incidents of torture; to either prosecute or extradite persons who have committed torture; to protect persons complaining of torture from retaliation; to compensate and rehabilitate victims of torture; to bar statements made under torture from judicial or other official proceedings; and to provide training to a wide variety of government officials, including law enforcement personnel, regarding the prohibition against torture.

The CAT also includes provisions relating to cruel, inhuman or degrading treatment. Article 16 of the CAT, in particular, requires that each state “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture”. Like the other treaties cited above, however, the CAT does not expressly define “cruel, inhuman or degrading treatment or punishment”.²

Notably, the prohibitions on torture and other ill-treatment contained in the above treaties are cast in absolute terms, recognizing no grounds for exception. Moreover, they are among the few human rights protections that are not subject to derogation in any circumstances. The ICCPR and European Convention, in particular, permit states to derogate from a number of their human rights obligations in emergency situations, yet they make no such allowance regarding the prohibition on torture and other ill-treatment. The CAT similarly permits no derogation.

² An early draft of the CAT, following the wording of article 1 of the U.N. Declaration Against Torture, described torture as “an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment”, which suggests a similar gradation in the degree of harm inflicted. U.N. Doc. E/CN.4/1285 (1978).

Besides barring torture and ill-treatment, the ICCPR also expressly provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” (ICCPR, art. 10). It then goes on to mandate that “the reformation and social rehabilitation of prisoners”, be an “essential aim” of imprisonment. (The European Convention, in contrast, lacks any such provisions). It should be noted that these provisions, which are more broadly conceived than the prohibitions against torture and other ill-treatment, overlap considerably with the latter protections, but also supplement them. In contrast with provisions against torture and other ill-treatment, however, these provisions may be suspended in times of public emergency.

ELEMENTS OF TORTURE

The definition of torture codified in the CAT contains several discrete elements. These elements will be analyzed in the order in which they arise in the text of the instrument.

The first relevant element is that of severity. Torture is abuse of greater severity than cruel, inhuman, or degrading treatment or punishment because it causes “severe pain or suffering” (CAT, art. 1). Nonetheless, the predominant view among international experts and authorities is that there is no clear line separating torture from other prohibited ill-treatment. Similarly, it is also generally accepted that there is no easy separation between prohibited ill-treatment and ill-treatment that is not prohibited. Rather than clear categories, most experts see a continuum in which a number of factors are relevant, including the nature and intensity of the practice, its purpose, its duration and frequency, and the vulnerability of the victim. As the European Commission has explained, the assessment of whether a given practice is sufficiently severe to violate article 3 “is, in the nature of things, relative and will depend on all the circumstances of the case”.³ What may be torture or prohibited ill-treatment if continued for an extended period of time, or if practised upon a child or other vulnerable person, may fall below the minimum level of severity in other circumstances.

Given the absence of distinct categories, the U.N. Human Rights Committee has tended in its rulings to find violations of article 7 of the ICCPR without further specifying whether a given practice constitutes torture or other prohibited ill-treatment.⁴ The European Commission of Human Rights and European Court of Human Rights, in contrast, have been more prone to distinguish between the various

³ Lukanov v. Bulgaria, App. No. 21915/93, Eur. Comm. H.R., Decision of 12 Jan. 1995, H.R. Dec. & Rep. 108.

⁴ See, e.g., Ca e.g. Bulgaria, App. No. 21915/93, Eur. Comm. H.R., Decision of 12 Jan. 1995, H.R. Dec.

degrees of abuse.⁵ In several cases, it has specifically described the acts at issue as torture, as opposed to ill-treatment. It has also made an effort to describe the different kinds of prohibited ill-treatment, defining degrading treatment, for example, as treatment that “grossly humiliates an individual before others or drives him to act against his will or conscience”.⁶

The second relevant element is intent or purpose. Unlike ill-treatment, which can be inflicted through sheer indifference, and often is, a finding of torture indicates that the pain was inflicted with some goal or motive. Significantly, however, the range of requisite motives is quite broad. Not only does the CAT specifically enumerate common motives for inflicting pain, such as punishment and obtaining information, it includes the broad category of suffering inflicted “for any reason based on discrimination of any kind”.

The third relevant element is state involvement. Under the CAT, torture must be “inflicted by or at the instigation of or with the acquiescence of a public official or other person acting in an official capacity” (CAT, art. 1). Although this requirement indicates that some degree of state involvement is necessary, its language suggests that an official’s failure to stop abuse may in some circumstances constitute torture.⁷ Moreover, it is well established that the failure to stop abuse may constitute prohibited ill-treatment and, in particular, that the authorities’ duty of care extends to providing prisoners with reasonable protection against assaults from other prisoners.⁸

⁵ See, e.g., *Ireland v. U.K.*, App. No. 5310/71, Eur. Court H.R., Judgment of 18 Jan. 1978, Ser. A No. 25; Eur. Comm. H.R., Report of 25 Jan. 1976, 19 Y.B. Eur. Conv. on Human Rights 512.

⁶ *T.V. v. Finland*, App. No. 21780/93, Eur. Comm. H.R., Decision of 2 Mar. 1994, H.R. Dec. & Rep. 140.

⁷ The U.N. Human Rights Committee, in interpreting the ICCPR’s prohibition on torture and other ill-treatment, has taken a similar position with regard to the requirement of state involvement. Its General Comment 20, for example, speaks broadly of “[t]hose who violate [the prohibition], whether by encouraging, ordering, tolerating or perpetrating prohibited acts.” Human Rights Committee, General Comment 20, article 7 (Forty-fourth session, 1992), U.N. Doc. HRI/GEN/1/Rev.1 (1994).

⁸ See, for example, *Report to the Finnish Government on the Visit to Finland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 20 May 1992*, pp. 26-27.

The Detention of Refugees and Asylum-Seekers

Many countries around the world detain non-citizens who have entered their territories illegally or without proper documentation, confining them, sometimes for long periods of time, in prisons, jails, “camps”, or immigration detention centers. In a 1986 report, for example, the UNHCR’s Executive Committee noted that “several thousand refugees and asylum-seekers throughout the world are currently the subject of different types of detention measures”. (Executive Committee of the High Commissioner, Thirty-seventh Session, Doc. No. EC/SCP/44, August 19, 1986).

The UNHCR strongly discourages states from detaining refugees and asylum-seekers. Most objectionable, from the perspective of sound refugee policy, is the long-term detention of refugees and asylum-seekers under harsh conditions, a practice that some states have resorted to as a deterrence measure.

With regard to conditions of detention, it should be emphasized that international standards regarding the treatment of prisoners are fully applicable to detained refugees. Moreover, “refugees and asylum-seekers shall, whenever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered”. (EXCOM Conclusions No. 44, 1986).

Finally, refugees’ access to international protection must be maintained. In particular, refugees and asylum-seekers should be allowed to contact UNHCR, and UNHCR, for its part, should be allowed to intervene on their behalf.

**MENTAL SUFFERING AND THE EXAMPLE
OF PROLONGED SOLITARY CONFINEMENT**

Torture and other ill-treatment may involve mental suffering as well as, or instead of, physical suffering. Acts that might cause mental suffering sufficient to constitute torture include, for example, undergoing a mock execution or being forced to watch the torture of family members.

Solitary confinement, particularly for long periods and particularly when combined with extreme sensory deprivation, may also cause severe mental suffering. The jurisprudence of the various international fora is, however, rather inconsistent on this topic. The U.N. Human Rights Committee has, for example, ruled that article 7 of the ICCPR was violated when an Uruguayan prisoner was held in solitary confinement for over a month in a cell with 24 hour-a-day artificial illumination.⁹ More generally, it noted in one of its General Comments that “prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7” (Human Rights Committee, General Comment 20, art. 7).

The European Commission, on the other hand, has been generally more tolerant of solitary confinement. Although it has acknowledged that “complete sensory isolation coupled with complete social isolation can destroy the personality”, it has, for example, ruled that the long-term solitary confinement of terrorism suspects did not constitute prohibited ill-treatment, even though the suspects “were undeniably held in almost total isolation”.¹⁰

⁹ Larrosa v. Uruguay (88/1981), Report of the Human Rights Committee, GAOR, 38th Sess., Supp. No. 40 (1983).

¹⁰ Krocher and Miller v. Switzerland, App. No. 8463/78, Eur. Comm. H.R., Report of 16 Dec. 1982.

— CONDITIONS OF CONFINEMENT —

Detention conditions in many CIS countries violate international human rights standards. Among the problems plaguing the region's prisons and jails are extreme overcrowding, unsanitary and dangerous physical circumstances, insufficient food, lack of sunshine and exercise, lack of medical care, and barriers to prisoners' contact with family, friends, and legal counsel. Depending on their severity, these problems may constitute cruel, inhuman and degrading conditions of confinement, or they may violate the ICCPR's mandate that prisoners be treated with humanity and with respect for their inherent dignity. Significantly, the state's obligation to treat persons deprived of their liberty with dignity and humanity is a fundamental and universally applicable rule, one whose application cannot be made dependent on the availability of material resources. (Human Rights Committee, General Comment 21, art. 21). In other words, states cannot justify substandard conditions of confinement by claiming that they lack the funds to pay for improvements.

Violations of international standards have been found, for example, where a prisoner was held in a police lock-up and given only five minutes of recreation per day, only five minutes for hygiene in the morning, a shower once a week, and insufficient food; and where a prisoner was detained in an overcrowded cell, denied his clothing and forced to sleep on the floor, so that he fell ill in two weeks.¹¹ In contrast, in a case involving prisoners who "benefit from basic amenities during detention, including medical treatment, adequate diet, recreational facilities as well as contacts with their relatives and representatives", no violation was found.¹² The U.N. Standard Minimum Rules for the Treatment of Prisoners are of great value in assessing conditions of detention, providing an authoritative guide for interpreting broad treaty provisions.¹³

¹¹ *Párkányi v. Hungary*, Communication No. 410/1990, U.N. Doc. CCPR/C/45/D/410/1990 (1992); *Womah Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994).

¹² *Fillastre and Bizouarn v. Bolivia*, Communication No. 336/1988, U.N. Doc. CCPR/C/43/D/336/1988 (1991).

¹³ *Womah Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994). See inset describing the Standard Minimum Rules.

Finally, international standards require the separation of certain categories of prisoners. Under the ICCPR and the Convention on the Rights of the Child (CRC), juveniles must be separated from adults; this basic rule helps prevent younger prisoners from being abused by older prisoners, a common problem.¹⁴ In addition, the ICCPR requires that accused prisoners be separated from convicted prisoners, and “be subject to treatment appropriate to their status as unconvicted persons”. While the ICCPR does not provide any express guidance as to what such treatment would entail, the U.N. Standard Minimum Rules for the Treatment of Prisoners requires, among other things, that unconvicted prisoners be allowed to wear their own clothing, be allowed to communicate with their lawyers, family and friends, and not be required to work. (Standard Minimum Rules, arts. 88-93). Surprisingly, no treaties mandate the separation of men and women prisoners, although the U.N. Standard Minimum Rules for the Treatment of Prisoners do contain such a requirement.¹⁵

With regard to detained refugees and asylum-seekers, there is as yet no treaty provision requiring that they be held separate from criminal detainees. The United Nations High Commissioner for Refugees Executive Committee, however, has formally recommended such separation.

OTHER RIGHTS

Although the above protections are particularly relevant to prisoners, it is important to note that prisoners are not excluded from other human rights protections as well. The common formulation of this basic norm is that “prisoners go to prison *as* punishment not *for* punishment”. In other words, it is the deprivation of liberty, as well as any restrictions that necessarily flow from it, that is the legitimate sanction for crime. Accordingly, as the U.N. Human Rights Committee has emphasized, prisoners cannot “be subjected to any hardship or constraint other than that resulting from the deprivation of liberty” (Human Rights Committee, General Comment 21, art. 10).

¹⁴ ICCPR, art. 10(2)(b); CRC, art. 37(c). Article 37(c) of the CRC does allow for an exception to this general rule when “it is considered in the child’s best interest not to [separate the child from adults]”, an exception that presumably allows a child to be confined together with his or her relatives. Article 10(3) of the ICCPR mandates, in addition to separation from adults, that juvenile prisoners “be accorded treatment appropriate to their age and legal status.” Neither treaty definitively specifies at what age a juvenile becomes an adult, but the CRC establishes 18 as the age of majority “unless under the law applicable to the child, majority is attained earlier.” CRC, art. 1. Similarly, the U.N. Human Rights Committee has stated that while the age of majority “is to be determined by each State party in the light of relevant social, cultural and other conditions”, the ICCPR suggests that “all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice.” Human Rights Committee, General Comment 21, article 10.

¹⁵ Standard Minimum Rules, article 8(a). In addition, the failure to separate women from men prisoners could in many circumstances violate the women’s right to be free of torture or other ill-treatment, for example, if sexual abuse resulted.

Among other things, prisoners retain the right to observe and practice their religion; to maintain contact with their families; to be free of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, or birth; and to be free of unjustified invasions of their privacy.¹⁶ Of course, the “normal incidents of imprisonment” such as monitoring by prison guards, the imposition of prison uniforms, and searches will generally not be deemed to violate these rights.¹⁷

NGO ACTION

Non governmental organizations (NGOs) have a vital role to play in protecting the human rights of prisoners. The following are among the many possibilities for NGO action in this area:

- Monitor conditions in prisons, police lock-ups, and other places of detention by inspecting such facilities and interviewing prisoners privately and confidentially.

- Particularly where it is difficult to obtain access to places of detention, obtain information about prison conditions and the treatment of prisoners by interviewing prisoners’ family members, prisoners on furlough, and former prisoners.

- Meet with governmental authorities responsible for managing the prisons and other places of detention to describe problems and recommend reforms.

- Provide information to, and meet with, representatives of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), if the country concerned is a member of the Council of Europe. (*See Chapter Five on European human rights protections*).

- Press for the criminal prosecution of prison guards and others responsible for serious prison abuses.

- Disseminate information about abusive prison conditions and the mistreatment of prisoners to the national and international media. Write opinion pieces for newspapers and periodicals describing how such abuses violate international human rights standards.

¹⁶ Interference with a prisoner’s correspondence may, for example, amount to a violation of his right of privacy. *Blanco v. Nicaragua*, Communication No. 328/1988, U.N. Doc. CCPR/C/51/D/328/1988 (1994).

¹⁷ See, e.g., *McFeeley v. U.K.*, App. No. 8217/78, Eur. Comm. H.R., Decision on admissibility of 16 Dec. 1976, 20 Dec. & Rep. 44.

– Bring legal challenges to prison abuses in domestic courts, asserting both domestic and international protections of prisoners’ human rights. If domestic remedies are unavailable, ineffective, unreasonably prolonged, or have already been exhausted, file petitions with an international body such as the Human Rights Committee or the European Commission of Human Rights. (Before doing so, ascertain that the state concerned is in fact a party to the relevant human rights treaty).

– Hold educational seminars on the humane treatment of prisoners, inviting government officials, representatives of other NGOs, academics, the media, and the public.

Because of their isolation, lack of protection, and, usually, lack of political, economic and social power, prisoners are all too frequently subject to abuse. Undoubtedly, the common misperception that prisoners have no rights contributes to the likelihood of abuse. It should thus be firmly emphasized that international human rights instruments not only extend their general protections to cover prisoners, but even include protections specifically designed to benefit prisoners.

Non-Discrimination and the Protection of Minority Rights

Contributed by the International Commission of Jurists

...both past and present experience show that a high proportion of violations of the human rights of individuals takes place because those individuals differ in some respect, and are discriminated against on that ground.

...all the main international human rights instruments go to considerable lengths to emphasize the illegitimacy of such discrimination.

NON-DISCRIMINATION

The principle of non-discrimination is fundamental to the concept of human rights.¹ The primary characteristic that distinguishes human rights from other rights is their universality, except where the instrument specifically restricts the enjoyment of a right for a clear and justified reason, as for example, in restricting the right to vote to adults, or in requiring special protection for women and children. However, both past and present experience show that a high proportion of violations of the human rights of individuals takes place because those individuals differ in some respect, and are discriminated against on that ground. Accordingly, all the main international human rights instruments go to considerable lengths to emphasize the illegitimacy of such discrimination.

¹ This chapter was written by Ms. Yvonne Salmon, Christ's College, University of Cambridge (UK), and edited by Dr. Nathalie Prouvez, Legal officer for Europe and the CIS, International Commission of Jurists.

— INSTRUMENTS OF INTERNATIONAL LAW DEALING —
WITH NON-DISCRIMINATION —

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

Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that:

“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 any distinction of any kind, such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status”.

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

Article 2(2) of the International Covenant on Social, Economic, and Cultural Rights (ICESCR), provides:

“The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

- **UNESCO Convention against Discrimination in Education**

Article 1(1) of the UNESCO Convention against Discrimination in Education (1960) prohibits discrimination on the grounds of, “race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth”, which has the “purpose or effect” of “nullifying or impairing equality of treatment in education”.

- **The ILO Convention Concerning Discrimination in Respect of Employment and Occupation**

The ILO Convention Concerning Discrimination in Respect of Employment and Occupation (Convention No. 111, 1958) protects equality of opportunity, and treatment in employment, for all.

Article 1 defines discrimination for the purposes of the Convention as any distinction made on the basis of “race, colour, sex, religion, political opinion, national extraction or social origin”, which affects equality of opportunity or treatment in employment.

• European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) prohibits discrimination in relation to the rights and freedoms guaranteed by the Convention, “on any ground 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”.

The list of grounds for discrimination is exhaustive in the ICESCR, in the UNESCO Convention against Discrimination in Education and the ILO Convention No. 111. In contrast the ICCPR and the ECHR prohibit discrimination “on any ground”. This expression is followed in each case by the words “such as”, making it clear that the catalogue of grounds which follows is given only by way of example. The ECHR mentions among the grounds “association with a national minority” which is not mentioned in the two International Covenants.

— THE PROHIBITION OF DISCRIMINATION — AND THE PRINCIPLE OF EQUALITY

Discrimination may occur both as a result of differentiation, and as a result of a lack of differentiation. Mere “equality in law” does not recognize or value the differences between human beings. A law applied identically to unequals, is as unjust as a law applied differently to equals.

The attainment of “material equality” may require that positive rights be granted, in order to put the vulnerable on an equal footing with the rest of society. This may include, for example, measures to facilitate the equal access of people with disabilities to transport. The differentiation through affirmative action measures is “legitimized” by its aim: to put vulnerable groups on an equal footing with the majority. Therefore, differential treatment is not considered discriminatory if “the criteria for such differentiation are reasonable and objective, and if the aim is to achieve a purpose which is legitimate”.²

Equality in law precludes discrimination of any kind, whereas equality, in fact, may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.

[Advisory Opinion of the Permanent Court of International Justice, Minority Schools in Albania, of 6 April, 1935]

² General Comment No.18 para. 12, UN Doc. A/48/40, emphasis added.

“The principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration.” (Belgian Linguistic Case, European Court of Human Rights).³

— PROTECTION AGAINST RACIAL DISCRIMINATION —

In addition to the instruments mentioned above, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1966) prohibits racial discrimination.

CERD defines racial discrimination as:

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural and any other field of public life” (art. 1(1)).

The aims of the Convention include:

- prohibiting racial discrimination by authorities and private organizations;
- making it a criminal offence to incite racial discrimination.

CERD covers discrimination in regard to “human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

Article 5 sets out the duties for states to guarantee the right of everyone to equality before the law, notably in the enjoyment of:

- the right to equal treatment before the courts and all the organs administering justice;
- the right to protection against violence, whether inflicted by government officials or by any individual group or institution;
- political rights including the right to participate in elections;

³ *Case relating to Certain aspects of the Laws on the use of Languages in Education in Belgium (Merits)*, Judgment of 23 July 1969, Public. ECHR, Series. A. Vol. 6, 34.

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- other civil rights, including the right to:
 - freedom of movement;
 - nationality;
 - freedom of thought, conscience and religion;
 - freedom of opinion and expression;
 - freedom of peaceful assembly and association.

 - Economic, social and cultural rights, including the right to:
 - work;
 - housing;
 - public health and social security;
 - education and training.

CERD provides that states have to condemn, and take steps to eliminate, racial discrimination. They have a duty to prohibit and bring to an end, by all appropriate means, including legislation, racial discrimination by any persons, group or organization.

States parties should bring criminal proceedings against racist organizations at the earliest moment. The Committee on the Elimination of Racial Discrimination (CERD Committee) recommends that they make such organizations illegal and prosecute those who take part in them.

States must declare an offence punishable by law, all dissemination of racist ideas, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, including the financing of such acts. Organizations and all other propaganda activities which promote and incite racial discrimination must be declared illegal. Participation in such organizations or activities must be declared an offence punishable by law.

The prohibition of the dissemination of ideas based on racial hatred is compatible with the right to freedom of opinion and expression. Some freedoms and rights are not absolute but subject to limitations. All rights and freedoms must be balanced with the rights and freedoms of other people.

“Even in societies most zealous of safeguarding the right of free speech, there are laws against defamation and sedition. Laws against incitement to racial discrimination or hatred are no less necessary to protect public order or the rights of others” (CERD Committee).

States are placed under an obligation to ensure effective protection and remedies against racial discrimination. The CERD Committee recommends the establishment of national institutions to facilitate the implementation of the Convention and the provision of “intensive training to law enforcement officials to ensure that in the

performance of their duties, they respect as well as protect the human rights of all persons without distinction as to race, colour or national or ethnic origin”.

States should take “special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them”, in order to guarantee the full and equal enjoyment of human rights. Article 1(4), legitimizes such special provisions, “provided... that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups, and that they shall not be continued after the objectives for which they were taken have been achieved”.

— ALIENS AND THE RIGHT OF — NON-DISCRIMINATION —

Most instruments entitle non-nationals to the same rights as nationals as long as they are present in the territory of the state. The rights set out in the two International Covenants apply to aliens and nationals alike. In addition, article 13 of the ICCPR prohibits the arbitrary expulsion of aliens.

Article 16 of the European Convention, however, states that the prohibition on discrimination guaranteed in article 14 of the ECHR, shall not prevent states from imposing restrictions on the political activities of aliens. Similarly, the exercise by non-nationals of the rights to free expression under article 10 of the ECHR, and freedom of association under article 11, may be restricted on grounds of national security.

Article 18 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) guarantees migrant workers, and their families, equality with the nationals of the state before the law. Treatment “not less favourable than that which applies to nationals of the State of employment”, in respect of pay and other conditions of work, is ensured under article 25. This provision is mirrored in the European Convention on the Legal Status of Migrant Workers (1977), and article 19 of the European Social Charter (1961), with regard to nationals of contracting parties.

CERD is inapplicable to “distinctions, exclusions, restrictions or preferences made by a State Party ...between citizens and non-citizens” (art. 1(2)). It has been observed, however, that this could deprive migrant workers and foreigners, who are exposed to xenophobia and discrimination, from the right to effective protection and remedies enshrined in article 6. During a UN seminar to assess the implementation of CERD, the Vice-Chairperson, Luis Valencia-Rodriguez, explained that article 1(2) has no impact on the implementation of article 6, thereby allowing aliens access to tribunals and courts if they claim to be victims of discrimination.

**PROTECTION AGAINST DISCRIMINATION
ON GROUNDS OF SEX**

The International Covenant on Civil and Political Rights secures equality of treatment for all. Article 3 expressly guarantees the “equal rights of men and women to the enjoyment of all civil and political rights set forth in the Covenant”. This is mirrored in other general provisions against discrimination in international and European law. In addition, there are more specific instruments aimed at eradicating sexual discrimination.

The International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979) has as its aim, the elimination of discrimination against women, and demands full equality between the sexes.

Article 1 defines discrimination against women as:

“[Any] distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women ... of [their] human rights...”

Article 2 requires from states parties not only that they condemn, but also that they take appropriate measures to eliminate discrimination.

Article 4 introduces the possibility of positive discrimination, and provides for temporary measures designed to accelerate real equality between men and women.

Rights Protected under CEDAW

CEDAW enumerates the rights which a state party is bound to protect in its national law.

These include the right of women to:

- participate in public and political life and elections;
- represent their governments at the international level and participate in international organizations;
- equality before the law;
- equality in the family;
- equal right to education;
- equal right to health care;
- the same employment opportunities as men;
- free choice of profession and employment;
- equal pay for equal work.

Article 8 of the European Social Charter (ESC) of the Council of Europe provides protection for employed women. Article 1 of the Additional Protocol amending the ESC, guarantees the right to equal opportunities and equal treatment in employment, expressly prohibiting discrimination on grounds of sex.

Violence against Women

The Committee for the Elimination of Discrimination against Women (CEDAW Committee) has advised that discrimination against women does include gender-based violence. This is defined as violence directed towards a woman because of her gender, or violence which affects women disproportionately. The CEDAW Committee has recommended that criminal penalties be imposed, and where necessary, safe shelters for victims of family violence be set up.

Special Provisions for Refugee Women

The Geneva Convention Relating to the Status of Refugees (1951) is gender neutral, and there has been a reluctance to acknowledge that women have problems as a “particular social group” under article 1a(2). However, the status of women asylum-seekers under the Convention was recognized by UNHCR. The UNHCR Guidelines on the Protection of Refugee Women (July 1991) outline the measures which may be taken to improve the protection granted to these women.

Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949), recognizes the particular vulnerability of women in war time and calls for additional protection, “in particular against rape, enforced prostitution, or any form of indecent assault”.

PROTECTION OF CHILDREN FROM DISCRIMINATION

Article 10(3) of the International Covenant on Economic, Social and Cultural Rights provides that states parties should take special measures of protection and assistance on behalf of all children and young persons, without any discrimination for reasons of parentage or other conditions.

Non-discrimination is an important principle in the UN Convention on the Rights of the Child (CRC) (1989). Article 2 of the CRC places responsibility on states to ensure children enjoy the rights laid out in the Convention without discrimination of any kind, including the status of their parents.

The provisions of the European Convention apply to all, irrespective of age, and the European Court of Human Rights has condemned, for instance, discrimination between illegitimate and legitimate children.

Refugee children may suffer double discrimination, by virtue of their vulnerability. Article 22 of the CRC requires that states take appropriate measures to ensure that a child refugee, or one seeking refugee status, receives protection in accordance with rights set forth in the CRC, and other international human rights instruments.

PROTECTION OF PEOPLE WITH DISABILITIES FROM DISCRIMINATION

There is no specific international instrument on the rights of persons with disabilities. Persons with disabilities have to rely on general provisions prohibiting discrimination enshrined in the ICCPR and ICESCR.

For the purpose of the ICESCR, “disability-based discrimination” may be defined as any distinction, exclusion, restriction or preference or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.

“The right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, provided in Article 6(1) of the ICESCR, is not realized when persons with a ...disability are effectively confined to certain occupations or to the production of certain goods. The need for artificial barriers to employment must be removed, and the institutionalization of persons with disabilities cannot be regarded as an adequate substitute for the social security and income support rights of such persons” (Committee on Economic, Social and Cultural Rights).

PROTECTION OF MINORITY RIGHTS

The issue of minorities is long-standing and was one of the reasons for establishing the Sub-commission on the Prevention of Discrimination and the Protection of Minorities, in 1947, a subsidiary body of the UN Commission on Human Rights. The rights of persons belonging to ethnic, religious and linguistic minorities was the subject of one of its early studies. A further major study on this issue has recently been completed. New approaches towards the implementation of effective international protection of minorities are now beginning to emerge.

Minorities demand measures to preserve the very characteristics which distinguish them from the rest of society. As a result of the emphasis of modern human rights law on the individual as the holder of rights, minorities have to rely on a combination of provisions for equal treatment, and various other guarantees.

— **DEFINITION OF A MINORITY** —
UNDER INTERNATIONAL LAW

Attempts at defining a “minority” have failed and the term is not defined in any major instrument. International and European law instruments refer to “ethnic, religious and linguistic” groups as minorities, occasionally adding the term “racial” or “national”. The common thread throughout all of the definitions put forward, is a combination of objective characteristics with a subjective intention to retain those characteristics. To meet the objective characteristics of a minority, a group must:

- be smaller in relation to the rest of the population;
- be different from the rest;
- hold a non-dominant position.

The existence of an ethnic, religious or linguistic minority in a given State does not depend upon a decision by that State party but requires to be established by objective criteria.

[Human Rights Committee]

A minority is a group divided from the majority by linguistic, ethnic or cultural traits and which wishes to preserve and in most cases even strengthen its identity.

[Max van der Stoep, OSCE High Commissioner on National Minorities]

— **PROTECTION OF MINORITY RIGHTS** —
UNDER INTERNATIONAL LAW

The increased interest in minority issues, has been reflected over the past few years in developments both at the universal and European level.

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

Under Article 27 of the ICCPR, “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”.

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a state, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristic which distinguish them from the majority, and satisfying the ensuing special needs.

[Advisory Opinion of the Permanent Court of International Justice, *Minority Schools in Albania*, of 6 April, 1935]

In line with their reporting obligations under the Covenant, many states parties have provided reports on their minority policies under article 27. These reports have sometimes been followed by observations from the Human Rights Committee (HRC). In addition, the individual's right to complain as provided in the First Optional Protocol to the Covenant has been exercised in relation to article 27 on many occasions.

“The purpose of Article 27 is to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole” (Human Rights Committee).

According to the Human Rights Committee, “the rights enjoyed under Article 27 of the Covenant are not to be confused with self-determination in Article 1 of the Covenant”. However, the HRC has interpreted article 27 generously, for example, finding that economic activity, if an essential element in the culture of an ethnic community, may fall under article 27. The HRC has stated that the terms used in article 27 indicate that persons who share a common religion, culture or language are to benefit from protection and “need not be citizens of the State party”.

In article 27, the emphasis lies on protecting the rights of individuals belonging to minorities. Nevertheless, the states parties to the ICCPR are required to take measures to protect minority groups, both from acts committed by the state, and from the acts committed by private parties within the state. Furthermore, the Human Rights Committee has stated in a case brought by a tribal chief on behalf of his people that it had no objection to the fact that “a group of individuals, who claim to be similarly affected, collectively submit a communication about alleged breaches of their rights”.

The HRC justified different treatment necessary to ensure protection of minority rights, providing “it is a case of legitimate differentiation”.

“Although the rights protected under Article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their

culture and language and to practice their religion, in community with other members of the group” (General Comment on article 27, the Human Rights Committee).

• **UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992)**

This Declaration provides for the protection of “the existence and the national or ethnic, cultural, religious and linguistic identity of minorities, and ...promotion of that identity” (art. 1(1)). It has no implementing mechanism as yet.

Article 2 of the 1992 UN Declaration emphasizes the rights of minorities to:

- have their own culture;
- practise their own religion;
- use their own language in private and public;
- participate in decisions on the national and regional level concerning their minority.

Under article 4, states shall take measures to:

- ensure that minorities enjoy full equality before the law;
- enable minorities to develop their culture;
- provide opportunities for minorities to learn their mother tongue;
- encourage knowledge of the minorities’ culture, history, traditions, and language;
- consider measures to enable minorities to participate in the economic progress and development of the country.

• **UNESCO Convention against Discrimination in Education**

Education has an important role to play in the preservation and promotion of minority identity. The UNESCO Convention against Discrimination in Education provides:

“It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and ...the use or the teaching of their own language...” (art. 5(c)).

Article 29 of the ICRC also provides that “the education of the child shall be directed to the development of respect for the child’s cultural identity, language and values”.

• **The Convention on the Prevention and Punishment of Genocide**

Minorities are often the unfortunate victims of genocide, which is now considered a violation of customary international law. The Convention on the

Prevention and Punishment of Genocide (1948) provides a minimum standard of a “right of existence”.

Article 2 of the Convention defines genocide as:

- killing or causing serious bodily or mental harm to members of the group;
- deliberately inflicting conditions calculated to bring about the destruction of the group;
- preventing births;
- forcibly transferring children out of the group;

where the intention is to destroy in whole or in part a national, ethnic, racial or religious group.

— PROTECTION OF MINORITY RIGHTS — IN THE OSCE SYSTEM

The Conference for Security and Cooperation in Europe (CSCE) has dealt with the protection of minorities through the Concluding Document of the Copenhagen Meeting (1990), the Charter of Paris for a New Europe (1990) and the report of the Meeting of Experts on National Minorities (Geneva, 1991).

In these documents, the emphasis is largely on the protection of *persons* belonging to minorities rather than on the protection of collective rights. However, the Charter of Paris also provides that the ethnic, cultural, linguistic, and religious identity of national minorities must be protected.

The Helsinki Follow-up Meeting in 1992 decided, in the light of the crisis in the Former Yugoslavia, that states should refrain from “all attempts, by the threat or use of force, to resettle persons with the aim of changing the ethnic composition of areas within their territories”.

The OSCE has acknowledged the potential volatility of minority tensions, and the mandate of the High Commissioner on National Minorities (HCNM), established at the Helsinki Meeting in 1992 is first and foremost preventive, through fact-finding and the promotion of dialogue on minority situations.

The HCNM’s mandate prevents him from dealing with individual cases. The role of the HCNM is to promote dialogue, confidence and cooperation among the parties. Since the post was created in 1993, the HCNM, Mr. Max van der Stoep, has been concerned with a range of minority group issues, notably in the Balkans and the Former Soviet Union.

**PROTECTION OF MINORITY RIGHTS
IN THE COUNCIL OF EUROPE**

• **European Convention on Human Rights (ECHR)**

The ECHR contains a number of provisions which, under certain circumstances, can be very useful in connection with minority issues. Examples include article 5 (the right to liberty and security of persons), article 8 (privacy and family life), article 9 (freedom of thought, conscience and religion), article 10 (freedom of expression), article 11 (freedom of peaceful assembly and association) and article 2 of the First Protocol to the Convention (the right to education).

Article 14 expressly prohibits discrimination in the enjoyment of the rights it sets forth, on grounds of “association with a national minority”. Article 25 of the ECHR, which governs the right of petition, entitles “any non-governmental organization or group of individuals claiming to be the victim of a violation of one of the rights set forth in this convention” to lodge a complaint. However, most applications which try to advance group rights are rejected as manifestly ill-founded.

• **European Charter for Regional or Minority Languages**

The Charter was opened for signature in 1992 but has not yet entered into force. It aims to protect languages “that are traditionally used within a given territory of a State by nationals of the State who form a group numerically smaller than the rest of the State’s population; and different from the official languages of that State” (art. 1). The Charter itself excludes from its scope, dialects of the official language of the state or languages of migrants.

The contracting parties are obliged to report on their policy regarding regional and minority languages. The Committee of Ministers, assisted by a committee of experts, determines whether a violation has taken place.

• **Framework Convention for the Protection of National Minorities**

This Convention, which was adopted by the Council of Europe in 1995, is the first legally binding multilateral instrument devoted to the protection of national minorities. The Committee of Ministers will monitor its implementation, a task in which it is to be assisted by an advisory committee consisting of persons with “recognized expertise in the field of the protection of national minorities”.

The Convention categorically states that “it does not imply the recognition of collective rights”, and the emphasis lies on the protection of persons belonging to national minorities. The Convention links the protection of national minorities with

the issues of peace and security. It is stressed that the protection it provides must not be allowed to result in the violation of territorial integrity and the national sovereignty of states. In other words, the protection afforded under the Convention may not be invoked in order to achieve secession.

— PROVISIONS TO PRESERVE THE CULTURAL IDENTITY — OF THE MIGRANT WORKER —

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides the right of migrant workers to:

- respect for their cultural identity (art. 31);
- the right to freedom of thought, conscience and religion (art. 12);
- the freedom of parents to ensure the religious education of their children according to their own convictions (art. 12(4));
- the right to freedom of expression (art. 13(2));
- protection against unlawful interference with their privacy, family and home (art. 14);
- protection against measures of collective expulsion (art. 22).

— MEANS TO SAFEGUARD THE RIGHTS — OF INDIGENOUS PEOPLE —

Indigenous peoples continue to be among the groups which suffer the greatest discrimination in all countries. As well as suffering the worst housing, health conditions, educational opportunities and employment conditions, they are losing their land and resources, upon which their survival depends. In an attempt to rectify this, the United Nations General Assembly has proclaimed the ten years starting from 10 December 1994 as the Decade of the World's Indigenous People. The goal of the decade is to strengthen international cooperation for the solution of problems faced by indigenous peoples. One day of every year (9 August) is to be observed as the International Day of Indigenous People.

The CERD Committee has considered the situation of indigenous people and the Human Rights Committee has examined cases brought by indigenous persons alleging violations of their rights under article 27 of the ICCPR. The United Nations Working Group on Indigenous Populations, created in 1982, is the centre of indigenous activities within the United Nations system. As well as reviewing government policies and making recommendations to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, it also functions as a

forum attended annually by 500 to 600 indigenous representatives who are able to exchange views with governments, NGOs and United Nations agencies.

• **ILO Convention Concerning Indigenous and Tribal peoples in Independent Countries**

The main international instrument to protect the rights of indigenous people is the International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, adopted in June 1989, which entered into force in September 1991. In its preamble, the Convention stresses the need to adopt “new international standards ...with a view to removing the assimilationist orientation of the earlier standards”.(para. 5) The term “integration” is conspicuously absent from the Convention. It affirms that no state or social group has the right to deny the identity of indigenous peoples, and places responsibility on states for ensuring, with the participation of indigenous peoples, their rights and integrity.

Tribal peoples are defined in article 1(a) of Convention No. 169 as those:

“whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partly by their own customs or traditions or by special laws or regulations”.

Indigenous populations are those which:

- have a historical continuity with societies that developed on their territories (art. 1(b));
- consider themselves to be distinct from other sectors of society;
- are non-dominant;
- are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity; in accordance with their own cultural patterns, social institutions and legal systems as the basis of their continued existence as peoples;
- self-identification is one criterion for determining the groups to which the Convention applies (art. 1(2)).

The Convention guarantees indigenous and tribal people the enjoyment of “the full measure of human rights”, without discrimination, emphasizing in particular their land rights, the safeguarding of their natural resources, the prohibition on forcible relocation of people, the need for consultation and penalties for unauthorized intrusion and the prohibition of discrimination in employment. Measures to eradicate prejudice are called for in article 31.

Article 1(3) makes it clear that the term indigenous or tribal peoples “shall not be construed as having any implications as regards the rights which may attach to the

term under international law”, so negating any claim to the right of self-determination under the Convention.

Article 6 provides for the consultation of indigenous peoples through their representative institutions with regard to measures affecting them.

Article 7, states that the peoples concerned shall have the right to:

- decide their own priorities for the process of development;
- exercise control over their social, economic and cultural development.

The land rights safeguarded in Part II of the Convention include:

- respect for the special importance of land to indigenous peoples (art. 13);
- the rights of ownership and possession over the lands which they traditionally occupy (art. 14);
- rights to natural resources on their lands (art. 15);
- protection from removal from the lands they occupy (art. 16);
- the right to transfer land (art. 17);
- penalties for unauthorized intrusion on their lands (art. 18);

• **Draft Declaration on the Rights of Indigenous Peoples (1994)**

This Declaration goes further than the Convention, but it is not legally binding. It gives indigenous peoples the right to:

- collective and individual protection from ethnocide and cultural genocide (art. 7);
- autonomy in matters relating to their own internal and local affairs including religion, education and housing (art. 27);
- the freedom to decide on the structures of their autonomous institutions (art. 28).

NGO ACTION

NGOs have a potentially fundamental role in the implementation of equality provisions and in the protection of minorities. Their role in information exchange at the national and international level is pivotal, giving non-state actors the opportunity to communicate with international organizations. NGO action of particular value in this area, includes public education, the dissemination of information on international procedures and standards, and promotion of conflict resolution at local levels.

Freedom of Movement

Contributed by Human Rights Watch

The right to freedom of movement is a basic ingredient of liberty. The freedom to leave one country for another, for example, “allows an individual to choose the society in which he will live”.

The right to freedom of movement¹ encompasses the right to leave any country, to return to one’s own country, and to move freely within a country. Subject to certain restrictions, it is enshrined in several international conventions and in the constitutions and laws of many states. It must be emphasized, however, that freedom of movement does not include a general right to enter the country of one’s choice, even though it is precisely this missing component of the right to freedom of movement that people most often desire.

The right to freedom of movement is a basic ingredient of liberty. The freedom to leave one country for another, for example, “allows an individual to choose the society in which he will live”.² It gains special urgency when other freedoms are denied, serving as a right of last resort. As one commentator has bluntly observed, “A State which denies to its citizens the right to emigrate reduces itself to the level of a prison”.³ The right to return to one’s own country similarly guards against government repression by barring the state from exiling disfavored groups or individuals. The right to move freely within a country strengthens an individual’s ability to choose his or her livelihood and associations, protects against segregation, and fosters the free flow of information.

¹ Human Rights Watch would like to acknowledge the assistance of Mr. Anupam Chander, a lawyer practising in the city of New York.

² Stig Jagerskiold, “The Freedom of Movement”, in *The International Bill of Rights* 166 (Louis Henkin, ed., 1981).

³ Lauterpacht, *An International Bill of the Rights of Man* 130 (1945), quoted in Alan Dowty, *Closed Borders: The Contemporary Assault on Freedom of Movement* 16 (1987).

As a general rule, state practices that violate the right to freedom of movement include: requiring exit visas and imposing criminal sanctions for attempts to leave the country without such visas; denying citizens the right to return to their own country; expelling persons from their own country on racial, ethnic, religious or political grounds; and assigning persons to specific places of residence. Thus, the Berlin Wall, Soviet exit restrictions and the mass expulsion of Asians from Uganda stand as prominent recent violations of the right to freedom of movement by repressive regimes.

The members of the Commonwealth of Independent States (CIS) have a mixed record with regard to permitting freedom of movement. These countries generally do not impose exit restrictions on individuals who wish to leave their territories, thus respecting the first component of the right to freedom of movement. They also generally respect the second component of the right to freedom of movement, namely, the right to return to one's own country. It should be noted, nonetheless, that the prevalence of armed conflict in some countries in the region acts as an effective obstacle to the exercise of this right, as does returnees' fear of retribution by repressive government forces. Finally, the third component of the right to freedom of movement, the right to move freely within a country, is violated on a broad scale in the region due to, among other things, government enforcement of mandatory residence permit (*propiska*) requirements.

INTERNATIONAL LAW SOURCES

Following the example set in the Universal Declaration of Human Rights, numerous international human rights treaties protect the right to freedom of movement. Foremost among them is the International Covenant on Civil and Political Rights (ICCPR), the primary basis for this chapter's analysis of the topic.

Article 12 of the ICCPR provides that:

“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.

Everyone shall be free to leave any country, including his own.

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.

No one shall be arbitrarily deprived of the right to enter his own country”.

Everyone has the right to freedom of movement and residence within the borders of each State.

Everyone has the right to leave any country, including his own, and to return to his country.

[Universal Declaration of Human Rights, art. 13]

The Fourth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms grants similar protections. Article 2 of the Fourth Protocol affirms that:

“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.

Everyone shall be free to leave any country, including his own.

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.

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 interest in a democratic society”.

Notably, the Fourth Protocol goes into greater detail than the ICCPR in protecting the right of nationals to return to (and remain in) their country. In article 3, it provides:

“No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

No one shall be deprived of the right to enter the territory of the State of which he is a national”.

RULES SPECIFICALLY PROTECTING ALIENS

Aliens are often particularly vulnerable to restrictions on freedom of movement, including the threat of expulsion from a state's territory. Anticipating this eventuality, several treaties – in particular, the ICCPR, the Fourth Protocol to the European Convention, and Convention on the Status of Refugees (Refugee Convention) – specifically restrict states' power to expel aliens. Each of these treaties, it should be noted, contains prohibitions of a different scope and focus. Article 13 of the ICCPR, concerned with due process, provides:

“Any alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority”.

Article 4 of the Fourth Protocol declares simply that: “Collective expulsion of aliens is prohibited”. The Refugee Convention, which does not protect all aliens but only refugees, provides in article 32(1) that states “shall not expel a refugee lawfully in their territory save on grounds of national security or public order”. As originally drafted, the Refugee Convention only covered persons who became refugees during a specific time period, but it has since been extended, via its 1967 Protocol, to cover all refugees.

Each Contracting State shall accord to stateless persons 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.

[Convention relating to the Status of Stateless Persons, art. 26]

In addition, echoing the due process concerns reflected in article 13 of the ICCPR, the Refugee Convention provides in article 32(2) that such expulsions:

“shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority”.

The Refugee Convention also restricts states' power to assign refugees to specific areas within their territories. Article 26 of the Refugee Convention mandates that:

“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”.

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.

[International covenant on Civil and Political Rights, art. 12]

The Refugee Convention also shows particular concern for equipping refugees with the documentation necessary to make effective their right to freedom of movement. In article 27, it requires: “The Contracting State shall issue identity papers to any refugee in their territory who does not possess a valid travel document”. Similarly, in article 28(1), it provides:

“The Contracting State 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”.

The remainder of article 28(1) states that the provisions of the Refugee Convention will apply with respect to such documents, and that the state party to the Convention may issue such documents to other refugees in their territory, giving particularly sympathetic treatment to those refugees who are unable to obtain travel documents from their country of lawful residence.

The Contracting State shall issue to stateless persons 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 stateless person in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence.

[Convention relating to the Status of Stateless Persons, art. 28]

Finally, the Convention relating to the Status of Stateless Persons (Stateless Persons Convention) protects the right of stateless persons lawfully within a country to move freely within that country. Like the Refugee Convention, it also includes safeguards with regard to travel documentation. (*For further discussion of the Stateless Persons Convention and the problem of statelessness, see the chapter on Statelessness and Citizenship*).

GENERAL CRITERIA FOR EVALUATING RESTRICTIONS ON FREEDOM OF MOVEMENT

The right to leave a country and to travel freely within a country may be restricted only under narrow circumstances. According to article 12(3) of the ICCPR, all restrictions must be:

1. provided by law;
2. necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others;
3. consistent with the other rights recognized in the ICCPR.

Article 2(3) of the Fourth Protocol of the European Convention sets out roughly similar criteria for evaluating restrictions on the right to leave a country. It states, in particular, that such restrictions must be:

1. in accordance with law;
2. 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.

Restrictions on the right to travel freely within a country are assessed under the same criteria, except that one further justification for restrictions is recognized. In article 2(4), the Fourth Protocol allows restrictions on this right “in particular areas” where such restrictions are lawfully imposed and are justified by the public interest in a democratic society.

Thus, except for the circumstances provided for in article 2(4), both the ICCPR and the Fourth Protocol require that all restrictions on the freedom to leave and to move freely within a country be “necessary” to an appropriate end. Because of this requirement, a key issue in assessing freedom of movement restrictions is in which circumstances may restrictions be deemed necessary. Adopted on November 26, 1986, the 1986 Strasbourg Declaration on the Right to Leave and Return, (hereafter the Strasbourg Declaration) is an authoritative guide to interpreting the scope of the

right to freedom of movement and provides some direction on this issue. Drafted by experts on freedom of movement at a meeting convened by the International Institute of Human Rights it explains that a restriction can be considered necessary only if it “responds to a pressing public and social need, pursues a legitimate aim and is proportionate to that aim” (Strasbourg Declaration, art. 4(c)).

Another requirement included in both the ICCPR and the Fourth Protocol is that restrictions on the right to leave a country and to travel freely within a country must be, respectively, “provided by law” or “in accordance with law”. The purpose of this requirement is to ensure that restrictions are only imposed via general rules, usually established legislatively, thereby precluding unlimited administrative discretion.⁴

Among the most significant stated grounds for restricting the right to leave and to travel freely within a country is the protection of national security. Treaty references to this subject were inserted to allow states to protect themselves from political or military threats. Justifications for restrictions on this ground, however, cannot be merely speculative. Rather, as the Strasbourg Declaration explains, the restrictions must be necessary to prevent a “clear, imminent and serious danger” to the state. (Strasbourg Declaration, art. 4(d)).

Besides national security grounds, a state may restrict the freedom to leave and to travel freely within a country if restrictions are necessary to protect “public order (*ordre public*)”. The French phrase *ordre public* refers to “the principles of the legal and political system in the country and impl[ies] notions of public security, health and peace” (art. 4(d)). The Strasbourg Declaration further defines this phrase as denoting “the universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based” (Strasbourg Declaration, art. 4 (e)).

The right to return to one’s country is regulated differently than the right to leave and the right to move freely within a country. The ICCPR bars arbitrary deprivations of this right, without describing which substantive grounds might constitute a legitimate basis for a deprivation or restriction of this right. The Fourth Protocol, in contrast, which only extends the right to nationals of a country, does not permit any deprivations of the right.

Everyone shall be free to leave any country, including his own.

[International Covenant on Civil and Political Rights, art. 12]

⁴ See, for example, *Peltonen v. Finland*, Communication No. 492/1992, U.N. Doc. CCPR/C/51/D/492/1992 (1994) (“The Committee further notes that the Finnish authorities, when denying the author a passport, acted in accordance with Section 9, subsection 1(6), of the Passport Act, and that the restrictions on the author’s right were thus provided by law”).

Finally, with regard to all of the above components of the right to freedom of movement, it should be noted that the ICCPR and the Fourth Protocol permit states to derogate from certain of their human rights obligations, including their obligation to protect the right to freedom of movement, in emergency situations. Article 4(1) of the ICCPR, in particular, permits such derogations in time of “public emergency which threatens the life of the nation”. Article 15(1) of the European Convention, similarly, permits derogations in time of “war or other public emergency threatening the life of the nation”. Such derogations, however, must be narrowly tailored to the crisis at hand. In the words of both treaties, they are permissible only “to the extent strictly required by the exigencies of the situation”.

No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national

[Fourth Protocol, International Covenant on Civil and Political Rights, art. 3]

It should also be noted that the ICCPR in no circumstances permits derogations that “involve discrimination solely on the ground of race, colour, sex, language, religion or social origin” (ICCPR, art. 4(1)). Echoing some of these grounds, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which is non-derogable, specifically bars

racially or ethnically discriminatory restrictions on freedom of movement, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) bars gender discrimination with regard to freedom of movement. In particular, article 5(d) of the CERD bars states from making distinctions on the basis of race, colour, or national and ethnic origin, regarding individuals’ enjoyment of “the right to freedom of movement and residence within the border of the State” and “the right to leave any country, including one’s own, and to return to one’s country”. Article 15(4) of the CEDAW mandates that states “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”.

THE RIGHT TO LEAVE ANY COUNTRY

The right to leave any country, protected under article 12(2) of the ICCPR and article 2(2) of the Fourth Protocol to the European Convention, employ the same wording, and can be restricted only in narrow circumstances. It must be emphasized, however, that the right to leave a country does not imply a corresponding right to enter another country. As a general rule, states are free to turn away foreigners who wish to enter their territories. As one means of doing so, they may impose visa requirements that bar people from reaching their territories.

In other words, the practical scope of the right of exit can be greatly limited by other countries' unwillingness to permit entry. People may attempt to leave one country to escape economic hardship or environmental devastation, for example, but find that neighboring countries have barred their entry, effectively negating their right to leave the first country. The only exception to the general principle that states are free to reject foreigners at the border is with regard to asylum-seekers who would be in danger of persecution if denied entry.

"A State which denies to its citizens the right to emigrate reduces itself to the level of a prison".

As mentioned above, national security is one of the primary grounds for restriction of the right of exit. On the basis of this justification, for example, states may legitimately prohibit active duty military personnel from leaving the country.

In addition, national security grounds have frequently been invoked to bar the departure of persons subject to mandatory military service. The *travaux préparatoires* to article 12(3) of the ICCPR support this justification, suggesting that states agreed that the right to leave the country could not be relied upon, *inter alia*, in order to avoid national service.⁵ Nonetheless, the legitimacy of relying on the military service requirement for denying the right to exit a country is far from universally acknowledged. In its review of the fourth periodic report of the Russian Federation, for example, the U.N. Human Rights Committee stated that it "regrets that all individuals not having yet performed their national service are excluded in principle from enjoying their right to leave the country".⁶ Similarly, during consideration of the third periodic report of Finland by the Committee, several committee members expressed concern about the restrictions on the issuance of passports under the Finland's Passport Act, which permits the authorities to deny passports to persons aged 17 to 30 who are unable to demonstrate the performance of military service.⁷ In a subsequent challenge to Finland's passport restrictions, however, the Committee ruled that the denial of a passport to an individual who failed to perform his military service did not violate his right to exit.⁸

National security is also used as grounds for barring the departure of persons with access to state secrets. Nonetheless, no country can permanently deny the right to leave to an individual because of that individual's previous access to state secrets.

⁵ See E/CN.4/SR.106, p. 4 (USA); E/CN.4/SR.150, para. 41 (DK); E/CN.4/SR.151, para. 4 (U); E/CN.4/SR.315, p. 12 (USA).

⁶ Human Rights Committee, Comments on Russian Federation, U.N. Doc. CCPR/C/79/Add.54 (1995).

⁷ Human Rights Committee, Comments on Finland, U.N. Doc. CCPR/C/SR.1016.

⁸ Peltonen v. Finland, Communication No. 492/1992, U.N. Doc. CCPR/C/51/D/492/1992 (1994).

The public order justification, which overlaps in some cases with the national security justification, provides another important ground for restricting the right to leave. One significant group whose right to leave may be restricted under the public order justification are persons who are legitimately subject to criminal sanctions or proceedings. In other words, convicted criminals have no right to leave the country in which they are incarcerated, nor do individuals who are awaiting trial.⁹ Other applications of the public order justification are more disputable. In particular, it is extremely doubtful whether the “brain drain” phenomenon, in other words the emigration of highly educated individuals, constitutes a threat to public order sufficient to justify restrictions on emigration, although states have asserted this justification.

In addition, a state can restrict departure for public health reasons as in situations of quarantine but such measures must be temporary.

Notably, no state can use the denial of the right to leave as a means to repress dissent or to punish dissenters, as any discrimination on political or religious grounds would be inconsistent with treaty protections on freedom of thought, conscience and religion. (*See, for example art. 18 of the ICCPR*). Nor can a state restrict a woman’s right to leave on the grounds of her sex, such as, by imposing spousal or parental approval requirements not imposed upon men. Such differential treatment would violate prohibitions on gender discrimination. (*See, for example, art. 26 of the ICCPR*).

Furthermore, a state cannot erect unreasonable procedural hurdles to leaving the country. In other words, the individual’s right to leave imposes a correlative obligation on the state to provide such documents and procedures as necessary to the practical exercise of the right. Passports, if required to leave a country, must be made available at a reasonable cost and within a reasonable amount of time. As the U.N. Human Rights Committee explained in a recent case, the acquisition of a passport enables an individual to implement the right to leave.¹⁰ In several cases decided in 1982 and 1983, the Committee ruled that Uruguay had to issue passports to its nationals residing abroad. Moreover, appropriate appeal procedures should be available to allow individuals to challenge adverse decisions with respect to the right to travel. (Strasbourg Declaration, art. 10(f)).

⁹ See *González del Río v. Peru*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987 (1992). There are, however, reasonable limits to the amount of time that a state may legitimately restrict a person’s right to leave because of pending criminal proceedings. Where those proceedings are “unduly delayed” the resulting restriction on the right to leave will cease to be justified. In the *González del Río* case, for example, the Committee found that criminal proceedings that had been pending for seven years “barring the defendant from leaving the country during that period” violated his right to freedom of movement.

¹⁰ *Peltonen v. Finland*, Communication No. 492/1992, U.N. Doc. CCPR/C/51/D/492/1992 (1994).

Finally, the mere fact of being an alien provides no basis for restricting an individual's right to exit a country. The U.N. Human Rights Committee has specifically stated that “[d]ifferences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified under article 12, paragraph 3 [of the ICCPR]”.¹¹

THE RIGHT TO RETURN TO ONE'S OWN COUNTRY/EXILE

While there is no generalized right to enter the country of one's choice, there is a more specific right to enter one's own country. Both the ICCPR and the Fourth Protocol to the European Convention protect this right, although the scope of the two provisions varies somewhat.

Under both treaties, the right to return is guaranteed to all citizens of a country, regardless of whether they were born in the country or were born abroad and have never been in the country. The Fourth Protocol, however, only protects the right of *nationals* to enter their country, while the ICCPR is worded somewhat more broadly, protecting one's right to enter one's “own country”.¹²

In light of the ICCPR's more inclusive language, experts have suggested that the ICCPR protects the right of permanent residents of a country to return to it. Offering a middle ground in the debate on this topic, the Strasbourg Declaration provides: “*Permanent legal residents who temporarily leave their country shall not be arbitrarily denied the right to return to that country*” (Strasbourg Declaration, art. 7).

The text of the ICCPR, unlike that of the Fourth Protocol, seems to anticipate that states may place certain restrictions on the right to enter one's own country. Rather than barring all deprivations of the right, the ICCPR only bars “arbitrary” deprivations. In fact, the drafters of the ICCPR discussed the possibility that exile, as an alternative to imprisonment, might legitimately be imposed as a punishment for crime. This potential restriction was in fact the only one specifically considered by the drafters, many of whom felt strongly that it would not be permissible. Their absolutist view on this issue is codified in the Fourth Protocol, which clearly and unequivocally bars the use of exile. It has also prevailed in authoritative interpretations of the ICCPR.¹³

¹¹ Human Rights Committee, General Comment 15, “The position of aliens under the Covenant”, Twenty-seventh session, 1986, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994).

¹² The drafters of the ICCPR, in fact, considered limiting the coverage of this provision to nationals but specifically rejected this phrasing, opting for a more generous formula. Jagerskiold, *supra* note 1, at 180.

¹³ See, e.g., Human Rights Committee, Comments on Dominican Republic, U.N. Doc. CCPR/C/79/Add.18 (1993) (stating: “The Committee also underlines that punishment by exile is not compatible with the Covenant”).

The right to return to one's own country implies a prohibition against expulsion from one's own country, since expulsion is generally coupled with a denial of the right to return. Additionally, even though states can generally bar aliens from entering their territory, their ability to expel them is constrained by due process requirements. It should be noted, however, that the "right to remain" although implied in various treaties provisions is nowhere expressly protected.

THE RIGHT TO MOVE FREELY WITHIN A COUNTRY

Using the same wording, both the ICCPR and the Fourth Protocol protect the right to freedom of movement within a country. (ICCPR, art. 12(1); Fourth Protocol to the European Convention, art. 2(1)). These provisions apply to "everyone lawfully within the territory of a State", which includes foreigners lawfully admitted to the country as well as citizens of the country. In addition, the Refugee Convention protects this right with specific regard to refugees. (Convention relating to the Status of Refugees, art. 26).

As with the right to leave a country, national security concerns permit a state to restrict the movement of military personnel in active service. Members of the military, for example, may be restricted to a military base. Similarly, a state can bar travel into security zones or military bases within its territory. But such zones "cannot be used to restrict access to substantial parts of a state's territory".¹⁴ Nor can security concerns justify permanent or long-term restrictions on the movement of a substantial part of the population.

Legitimate public order restrictions on internal movement include "traffic regulations, measures directed to promote general public safety, and legitimate criminal sanctions for acts which the state is entitled to prohibit under the [ICCPR]".¹⁵ Thus the state may, as noted with regard to the right to leave, imprison people in accordance with the law or restrict their movements pending criminal proceedings, as well as impose necessary public health quarantines.

Both the ICCPR and the Fourth Protocol also allow restrictions on internal movement when necessary to respect the rights and freedoms of others. Such restrictions consist primarily of the prohibition of trespass on the private property of others.¹⁶

¹⁴ Jagerskiold, *supra* note 1, at 174.

¹⁵ *Ibid.*

¹⁶ *Ibid.* at 175.

Because all restrictions on internal movement must be consistent with the other provisions of the ICCPR, restrictions on movement cannot be denied on the basis of “any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (ICCPR, art. 26). Thus, no person may be exiled to a remote region of the country because he or she holds political or religious beliefs currently out of favour with the government, or because of his or her ethnic background.

Notably, the right to move freely within a country comprises the right to choose one’s residence within that country. This right means that “residence cannot be assigned, and it implies a right to settle where one will if a place to live is available”.¹⁷ Like the right to move freely, the right to choose a residence applies equally to citizens and aliens lawfully admitted to a country.

The U.N. Human Rights Committee, in reviewing a periodic report of the Russian Federation, commented as follows on the freedom of internal movement in that state:

*“Although federal law has provided for the abolition of the propiska system [of internal passports], the Committee is concerned that at regional and local levels, the residence permit system is still applied in practice, thus violating not only the [Russian] Constitution, but also article 12 of the Covenant... The Committee recommends that the abolition of the propiska system be carried out all over the country without exceptions”.*¹⁸

Residence requirements targeted at specific individuals have been upheld, however, when countries have invoked national security concerns.¹⁹

¹⁷ Jagerskiold, supra note 1, at 175-76.

¹⁸ Human Rights Committee, Comments on Russian Federation, U.N. Doc. CCPR/C/79/Add.54 (1995).

¹⁹ See *Celepli v. Sweden*, Communication No. 456/1991, U.N. Doc. CCPR/C/51/D/456/1991(1994) (upholding residence restriction, imposed under Swedish anti-terrorism law, on Turkish citizen of Kurdish origin living in Sweden).

NGO ACTION

Non-governmental organizations (NGOs) can assist in protecting the right to freedom of movement. The following are a few suggestions for NGO action on this issue:

- Disseminate information about illegitimate restrictions on freedom of movement to the national and international media. Write opinion pieces for newspapers and periodicals describing how such restrictions violate international human rights standards.

- Bring legal challenges to such illegitimate restrictions in domestic courts, asserting the right to freedom of movement. If domestic remedies are unavailable, ineffective, unreasonably prolonged, or have already been exhausted, file petitions with an international body such as the Human Rights Committee or the European Commission of Human Rights. (Before doing so, ascertain that the state concerned is in fact a party to the relevant human rights treaty).

- Lobby government authorities to lift all restrictions on freedom of movement that are not justified under international human rights provisions.

The right to freedom of movement is an essential element of liberty that serves the secondary purpose of allowing escape from repression. It is recognized and protected by many international instruments, most notably, the International Covenant on Civil and Political Rights. As described in these instruments, the right to freedom of movement includes three crucial components: the right to leave a country, the right to return to one's own country, and the right to travel and choose a place of residence within a country.

The Rights to Freedom of Opinion and Expression & Peaceful Assembly and Association

Contributed by the Armenian Centre for Democracy and Human Rights

The rights to freedom of opinion and expression and peaceful assembly and association, as articulated in relevant international and regional instruments of human rights law, constitute one of the cornerstones of a free and open society.¹

The right to freedom of opinion and expression is a prerequisite for one of the most important components of a democratic state and society: the existence of a free and independent press providing for a whole spectrum of opinions and views, including critical assessment of the actions of authorities. It is also particularly important for the functioning of an NGO community in any country. In fact, NGOs serve as a major instrument in the exercise of the right to freedom of opinion and expression since, by their very nature, NGOs are supposed to monitor government activity from an independent and often critical viewpoint.

Based on a premise that governments are the only entities capable of violating human rights, the existence of organizations, such as NGOs, provides a counterbalance to government authority by offering a vehicle for individuals to express disagreement, if warranted, to government policy. The necessity of such a counterbalance is the foundation of democratic theory which prescribes a division of powers and the creation of a system of checks and balances within government. Together with a free press, the existence of an efficient and outspoken NGO community establishes this vital system of checks and balance with the government as a whole.

The right to freedom of peaceful assembly and association is also absolutely crucial for a free and open society. Again, this right, mandated by major international and regional instruments of human rights law, acquires primary importance in the light of NGO activity. The creation of NGOs and their free and unimpeded operation can only succeed if this right is respected. Without the right to peacefully assemble or to associate with other people, the right to freedom of opinion and expression would

¹ CDHR would like to express its gratitude to Mr. Jon Hoisaeter and Mr. Artashes Melikian, UNHCR Liaison Office in Armenia, for their contributions to the preparation of this article.

prove meaningless. Individuals cannot achieve substantial results working in a vacuum therefore, the concerted efforts of a group of like-minded individuals are needed. Rallies, demonstrations, marches as well as the organized work of NGOs concerned with human rights violations and government policy (plus a number of other activities necessary for a democratic state and society) are based on the right to freedom of peaceful assembly and association. Moreover, this right provides an opportunity for people to participate in public life and political struggle in the country according to personal beliefs and convictions.

Everyone shall have the right to hold opinions without interference.

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.

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 only be such as provided by law and are necessary:

(a) for respect, of the rights or reputations of others;

(b) for the protection of national security or of public order (ordre public), or of public health or morals.

[International Covenant on Civil and Political Rights, art. 19]

In short, this right, in concert with the right to freedom of opinion and expression, provides a basis for the existence and operation of counterbalance forces to government, and maintains the equilibrium of power between state and society. In this way, a civil society can effectively prevent the unlawful domination of the government and prospective violations of human rights.

Without the right to freedom of opinion and expression and the right to peaceful assembly and association, implemented through a free and independent press and a vibrant NGO community, a democratic and civil society cannot develop.

FREEDOM OF OPINION AND EXPRESSION

Already the French Declarations of the Rights of Man and of the Citizen of 1789 termed freedom of expression as one of the most precious rights of man. It is today widely regarded as one of the most important civil and political rights.

The first time international law proclaimed the right to freedom of opinion and expression – without distinction on the basis of race, color, sex, language, religion, political belief or other opinion, national or social origin, property, birth or other status, was in the Universal Declaration of Human Rights. Although the Declaration is not a legally binding document, its provisions are currently considered part of the body of international customary law. The Declaration proclaimed:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” (Universal Declaration of Human Rights, art. 19).

The International Covenant on Civil and Political Rights (ICCPR) a legally binding treaty acceded to by more than 120 states also incorporated in article 19 the right to freedom of opinion and expression almost in the same terms as proclaimed in the Universal Declaration of Human Rights:

“Everyone shall have the right to hold opinions without interference.

Everyone shall have the right to freedom of expression; 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” (ICCPR, art. 19).

It may be noted that article 19 of the ICCPR recognizes not only freedom from government interference, but also implies that states parties are obligated to protect freedom of opinion and expression against interference by third parties. Articles 19(1) and 19(2) may be seen as a continuation of each other in that section one protects ideas and opinions expressed in the private sphere while section two protects them in the public sphere.

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.

[International Covenant on Civil and Political Rights, art. 22]

Since immediately after the adoption of the Universal Declaration of Human Rights there still was no effective protection of human rights at the international level, the tendency was to elaborate and insure respect for these rights on a regional level.² The Council of Europe started to work in this direction and adopted, in 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms. Signed in Rome on 4 November, 1950, the Convention stressed the right to freedom of expression and opinion:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers” (European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10).

Thus, according to these provisions, every individual has the right to:

- hold an opinion;
- express this opinion;
- receive, share and discuss information and ideas.³

The right of freedom of opinion and expression is also incorporated in other human rights instruments. According to the Convention on the Rights of the Child (art. 13) these rights fully apply to minors.

The content of these international instruments is often reflected in the constitutions of states. This is of utmost importance, as human rights are mainly implemented on a national level. International instruments have a complementary role where national legislation is inadequate, unclear or absent. With the possible exception of the European Convention on Human Rights, international mechanisms for enforcement of human rights are still elementary.

² Lillich and Newman at p. 326.

³ English, Kathryn and Stapleton, Adam. *The Human Rights Handbook*, Human Rights Center, University of Essex, 1995, p. 73.

— **RESTRICTIONS AND LIMITATIONS** —

It is recognized that the right to freedom of expression is not without limitations. Unrestricted dissemination of information may be harmful both to individuals and the society at large. Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR) proclaims that the exercise of the right to freedom of expression “carries with it special duties and responsibilities”. Therefore the ICCPR imposes certain restrictions on this right which may only be provided by law and which are necessary for:

- respect of the rights or reputations of others;
- protection of national security, public order, public health or morals (ICCPR art. 19(3)(b)).

Thus, any restrictions and interference must be based on law, serve one of the listed purposes and be necessary for attaining this purpose. The term ‘necessary’ implies that restrictions must be proportionate to the purpose sought. As an exception to the rule, limitations must be interpreted narrowly in case of doubt.

The limitation to respect of the rights or reputations of others raises the conflict between freedom of expression and protection of the individual. The principle of proportionality must be observed in order not to undermine either of these rights. However, not every attack on the reputation of others can be sanctioned. Particularly in the political arena, freedom of expression is of fundamental importance for the formation of political opinions and development of democracy.

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10]

With regard to national security restrictions can be permissible only in serious cases of political or military threats to the nation.

‘Public order’, another restriction, is a comprehensive concept and must be interpreted in a particularly narrow and strict way, or it could undermine the right completely. The term public order incorporates prevention of disorder and crime and also the protection of the fundamental principles on which democracy is based.

Lawful restrictions to protect public health and public morals typically include the restriction on the advertisement of health-threatening substances and restrictions on pornographic or blasphemous publications. However, this does not mean that a state can prohibit anything that may offend the majority. Also here a narrow interpretation of the restriction calls for a liberal interpretation of public morals.

The ICCPR art. 20 complements art. 19 as it expressly prohibits propaganda for war and advocacy of national, racial or religious hatred.

It should be noted that the limitations which apply to freedom of expression do not justify pre-censorship by the authorities. The authorities may punish expression that has gone beyond the limits, but cannot demand that individuals obtain permission before expressing themselves.

With regard to the right to ‘hold opinions without interference’, as stated in article 19(1), the ICCPR does not provide for any exceptions or restrictions.

The European Convention for the Protection of Human Rights and Fundamental Freedoms does not distinguish in the same sense between the right to freedom of expression and the right to freedom to hold opinions. Both these rights, according to article 10(2) may be subject to such restrictions prescribed by law and are necessary in a democratic society for the following purposes:

- to protect the national security, territorial integrity, public safety, health or morals, reputation or rights of others;
- to prevent disorder or crime, disclosure of information received in confidence;
- to maintain the authority and impartiality of the judiciary.

— IMPLEMENTATION —

As mentioned above, notwithstanding the incorporation of the right to freedom of opinion and expression into national legislation, the implementation of this right may encounter substantial difficulties. Some commentators have stated, “it is vastly more difficult to obtain international agreement on procedures for implementation than on substantive norms.

For, while states with disparate social systems may agree without too much difficulty on objectives, they have radically different methods for translating these objectives into reality”.⁴

It is in the implementation of the norms that an NGO community may and shall intervene by monitoring the observance of human rights in the national context, reporting on violations through international machinery, raising awareness in the country at large, targeting specific groups for protection and training and participating in the elaboration of national legislation and policy to promote human rights.

(For more on the role NGOs could play in monitoring and promoting human rights and reporting violations to and through international bodies, please see Chapter VI).

— DENIAL OF THE RIGHT —

The main protector of the right to freedom of opinion and expression should be the state itself. However, in many countries governments deny this right through different means.

As mentioned, ideally the recognized international norms concerning the freedom of expression should be reflected in the national constitutions. An obvious denial of the right is refusal to adopt national legislation in conformity with international law.

Restricting access to the facilities necessary for exercising the right (printing presses, broadcasting facilities, etc.) is a more subtle way of keeping government control over the flow of information. Access can sometimes be restricted by state monopolies.

Direct censorship, sometimes under the pretence of protecting citizens, has been, and still is, a serious problem in many states. Even more widespread is self-censorship imposed by individuals because of the fear of repercussions resulting from their actions.

⁴ Lillich and Newman at p. 8.

FREEDOM OF PEACEFUL ASSEMBLY AND ASSOCIATION

In spite of its obvious importance, freedom of assembly and association is one of the least developed precepts in international human rights law, notwithstanding the fact that the right is guaranteed by all major human rights instruments.

The term “assembly” is not clearly defined, but it is recognized that not every assembly of individuals requires protection. Only intentional, temporary gatherings of several persons for a specific purpose are regarded as protected by the right to freedom of assembly. Freedom of association is conceived as a subjective right of the individual to create an association with like-minded individuals or to join an existing association. It also covers the collective right of an existing association to perform activities in pursuit of the common interest of its members.⁵

The Universal Declaration of Human Rights, for the first time in international law, proclaimed in article 20 (1-2) that “everyone has the right to freedom of peaceful assembly and association” and that “no one may be compelled to belong to an association”.

ICCPR declared in article 21 that “the right of peaceful assembly shall be recognized” and in article 22(1) that:

“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”.

The European Convention for the Protection of Human Rights and Fundamental Freedoms also declared in article 11(1) that:

“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”.

The Convention on the Rights of the Child and the 1951 Convention relating to the Status of Refugees also contain provisions to ensure the rights of peaceful assembly and association are available to vulnerable groups.

The essence of the right to freedom of peaceful assembly and freedom of association is the liberty to openly and collectively pursue a cause of common interest in an organized manner, either through *ad hoc* arrangements or through a permanent institutionalized activity, without interference by the state authorities.

⁵ See CCPR Commentary, Nowak, N. P. Engel.

— **RESTRICTIONS AND LIMITATIONS** —

The right to freedom of assembly and association is not absolute. The ICCPR (art. 21 and 22(2)) envisions certain restrictions on the right to freedom of peaceful assembly and association. These restrictions shall be prescribed by law and be necessary for the:

- protection of national security or public safety;
- protection of public order;
- protection of public health or morals;
- protection of the rights and freedoms of others.

In fact, with regard to the right to freedom of peaceful assembly such restrictions shall be “imposed in conformity with the law” (art. 21), which in practice means that no special legislative acts are needed to implement such restrictions. For example, the police may disperse a crowd if it blocks the free movement of traffic without requiring such legislative measures.⁶

The European Convention for the Protection of Human Rights and Fundamental Freedoms similarly places restrictions on the right to freedom of peaceful assembly and association provided that such restrictions are prescribed by law and are necessary in a democratic society for the following purposes:

- to protect national security or public safety;
- to prevent disorder or crime;
- to protect health or morals;
- to protect the rights and freedoms of others (art. 11(2)).

It is important to note that the necessity of restrictions is linked to the phrase “in a democratic society” to underline that any limitation must be in conformity with certain minimum democratic principles. Thus, a government cannot legitimately prevent the establishment of new organizations on the grounds that similar organizations already exist or prohibit organizations that are addressing politically sensitive subjects since these reasons do not meet the specific criteria mentioned above. Registration and disclosure requirements may be acceptable under international law, however only so far as these requirements serve, and are proportionate to, a reasonable and justifiable purpose.

⁶ See English and Stapleton, at p. 77.

As mentioned above, it is a general principle of international human rights law that restrictions on a substantive right are to be interpreted narrowly. To be “necessary in a democratic society”, any limits placed by a government on freedom of association should be proportional to the public interest they are protecting.

Both the ICCPR and the European Convention stipulate that the right to freedom of peaceful assembly and association⁷ shall not prevent the imposition of lawful restrictions in the exercise of this right on members of the armed forces or the police. In fact, the European Convention mentions, in addition to the members of the armed forces and police, lawful restrictions in the exercise of this right by members of the administration of the state (art. 11(2)).

— IMPLEMENTATION —

Accession by states to these major instruments, and even the incorporation of the above cited provisions in domestic law do not yet mean their implementation in accordance with the letter and spirit of international human rights law. The assumption with regard to the role of NGOs in monitoring and promoting the right to freedom of opinion and expression, is equally valid with regard to the right to freedom of peaceful assembly and association as well as the whole body of the human rights law, either conventional or customary. NGOs may and should take an active position in raising awareness inside and outside a country on its human rights situation and ways of improvement.

— DENIAL OF THE RIGHT —

Like the right to freedom of opinion and expression, the right to freedom of peaceful assembly and association is denied in many countries by different means. Through legislation, unreasonable registration procedures, banning of political parties and organizations, propaganda and persecution, governments may unlawfully limit and sometimes destroy the operation of non-governmental entities. NGOs, of course, are supposed to play an important role in monitoring and reporting such breaches of international law.

⁷ In ICCPR, only the right to freedom of association, art. 22(2).

THE CIS COUNTRIES: LEGISLATION AND POLICY

In general, the constitutions and laws of the CIS countries provide for the rights to freedom of opinion and expression and peaceful assembly and association. The majority of the CIS countries have acceded to the major instruments of international human rights law and incorporated the corresponding provisions in their legislations. These rights have been formally declared by the Constitution of the Russian Federation (art. 29, 30 and 31), Constitution of Ukraine (art. 34, 36 and 39), Constitution of Armenia (art. 24, 25, 26), Constitution of Georgia (art. 19, 24, 25, 26), Constitution of Turkmenistan (art. 26, 27, 28), Constitution of Uzbekistan (art. 29, 33, 34) and the constitutions of other CIS states as well.

Furthermore, in a number of the CIS countries these provisions are reflected in laws on public organizations providing, *inter alia*, the basis for the creation and development of NGOs. In Armenia, for example, the Law on Public Organizations declares that it regulates the “exercise of a person’s constitutional right to organize into unions/associations as it relates to the formation, operation, reorganization and dissolution of public organizations” (Law of the Republic of Armenia on Public Organizations, art. 1). Thus, this law not only implements the right to freedom of association, but also provides the legal framework for the creation and operation of the NGO sector – that is, for the organized expression and advocacy of ideas espoused by a group of like-minded people. Thus the law reaffirms the individual right to freedom of association as well as regulates the collective right of operational freedom for NGOs. However, the law does not expressly prohibit interference by third parties in the operation of NGOs, but only prohibits such interference by state authorities.

In addition to acceding to the major instruments of international human rights law and incorporating its provisions in domestic law, the states of the CIS have been pursuing a policy of active participation in the activity of international organizations. This policy is considered the most effective way to integrate into the world community and gain international legitimacy by the newly independent CIS countries.

However, as much as this is true, a number of very serious problems still persist. Suppressive actions, common to several of the CIS states⁸, include a lack of access to mass media for the political opposition, restrictive registration procedures, use of economic subsidies to influence information flow, censorship and self-censorship, closure of newspapers and television and radio broadcasting, banning of political parties and organizations, restriction of journalistic access to public information, and state monopolies controlling the production and distribution of information.

⁸ See Country Reports on Human Rights Practices for 1996 by the U.S. Department of State.

Many CIS countries have also adopted laws that restrict the scope of the legislation that is meant to protect freedom of expression.

In fact, formal accession to international instruments and even their incorporation in domestic law may mean little in practice. The mentality of some government and law enforcement officials throughout the CIS countries has been negative towards the implementation of human rights provisions. The roots of such a mentality are in the absence of established democratic processes and structures in the Soviet empire for more than seventy years, coupled with the traditional socialist antagonism towards international human rights law. To eliminate the influence of the Soviet legacy, time and effort on the part of both CIS governments and society is needed.

CIS countries have to address these issues in order to ensure full respect for the right to freedom of opinion and expression, and peaceful assembly and association. Of course, NGOs may play an invaluable role in this process.

The promotion of human rights in any state will depend on the balance of power, the quality of legislation, the independence of the judiciary and the level of awareness in the society at large. In all these areas NGOs can contribute to the development of civil society. In particular, when it comes to dissemination of information, NGOs could play a vital role in raising awareness about the right to freedom of opinion and expression and peaceful assembly and association. Through publications, roundtables, workshops and a presence in public debate, NGOs can be catalysts for disseminating the idea and content of these rights.

New technology also provides new opportunities to seek and disseminate information. Satellite television and the Internet provide uncensored channels of information although for most NGOs the use of new technology often requires considerable financial resources.

In conclusion, the rights to freedom of opinion and expression and peaceful assembly and association are prerequisites for the very existence of NGOs and an important tool for them to freely pursue their cause. The NGO community's promotion of these rights is a valuable contribution to the development of democracy and rule of law in the newly independent CIS countries as well as worldwide.

The Right to a Remedy

Contributed by the Lawyers Committee for Human Rights

In general, a remedy should seek to undo, repair or compensate an individual for the violation of his/her rights.

Individuals derive certain rights from international law. For these rights to have meaning, they must be enjoyed domestically. The most effective guarantee of a state's compliance with its international human rights obligations is the establishment of effective and accessible procedures through which individuals can assert their rights on the domestic level. This reflects the basic principle of international law, that states are the primary guarantors of human rights, and that an individual whose rights have been violated should first turn to his/her national legal system to seek a remedy.

In general, a remedy should seek to undo, repair or compensate an individual for the violation of his/her rights. Depending on the nature of the right which allegedly has been violated, some remedies, or even combinations of remedies, may be more appropriate than others.

For instance, where a person has been arbitrarily detained he/she should have access to an administrative or judicial process in order to appeal this decision and to have the decision which violated his rights rescinded. In other cases, remedies can be limited to a determination that the violation of a right has occurred, which may have a deterrent effect on similar violations in the future, and provide indirect measures of relief such as compensation or the criminal prosecution of responsible officials.

Where domestic procedures fail to ensure the individual's rights and to provide full redress for any violation, international review of a state's actions is a central premise of the international human rights system. But only when the aggrieved individual has exhausted all effective domestic remedies available, should he/she seek redress at a higher level. This general requirement of human rights procedure is known as the duty to exhaust domestic remedies.

This chapter will review the international and regional human rights instruments that provide a right to domestic remedy in the case of a violation. In particular, the chapter will underline the need for remedies to be effective and the responsibility of a state to provide a fair procedure, whether administrative or judicial, for establishing that a violation has occurred and the measures necessary to remedy it.

THE RIGHT TO A DOMESTIC REMEDY

The principal human rights treaties recognize and mandate a right to a domestic remedy for breaches of specific rights guaranteed in them. Many of these instruments deal with rights which are susceptible to abuse in an asylum or forced displacement context. It is important to stress that the right to a remedy should be provided to all persons within the jurisdiction of a state and should apply without discrimination to aliens and nationals alike.

The following rights to a domestic remedy are of note to refugees, displaced peoples and their advocates.

- **Universal Declaration of Human Rights**

Article 8 of the Universal Declaration of Human Rights provides to all persons the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted by the constitution or by law.

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

One of the most important treaty sources of the right to remedy is the International Covenant on Civil and Political Rights (hereafter referred to as the ICCPR) which guarantees rights equally to citizens and non-citizens of a country.¹

Article 2(3) sets out the obligation on states parties to provide an effective remedy to victims of violations of rights stated in the Covenant.

Article 9(5) of the Political Covenant grants victims an “enforceable right to compensation” where an individual has been subjected to unlawful arrest and detention.

Article 14(6) of the Covenant specifies compensation for miscarriages of justice.

As with all treaties, its obligations are legally binding only on states parties, but since it is a widely accepted instrument (currently with 136 states parties) that covers a broad range of civil and political rights, it is a possible and useful recourse for displaced peoples and their advocates.

¹ See Article 3 of the ICCPR, which is common to the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; it applies with the exception of only a few political rights such as the right to vote.

Each State party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

[ICCPR, article 2(3)]

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

Another important source of the right to a domestic remedy for human rights violations is the European Convention on the Protection of Human Rights and Fundamental Freedoms – hereafter the European Convention on Human Rights (ECHR). For the nearly 40 states that have ratified the European Convention, the right to a remedy, expressed in article 13, creates a legal obligation to provide victims of violations of rights under the Convention with “an effective remedy before a national authority”. Article 1 of the European Convention makes it clear that the substantive rights of the Convention are to be enjoyed by everyone, including non-citizens, within the territory of the states parties.

• **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which has 101 states parties, mandates investigation into allegations of torture. It also “ensure[s] that any individual who alleges he has been subjected to torture ...has the right to complain to, and to have his case promptly and impartially examined by, competent authorities [of the State Party]” (art. 13 emphasis added).

On the specific point of remedies, the Convention stipulates that:

“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full a rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation” (art. 14(1) emphasis added).

The Convention against Torture applies to all persons irrespective of whether they are citizens or non-citizens of a state.

- **Convention on the Elimination of All Forms of Racial Discrimination**

The Convention on the Elimination of All Forms of Racial Discrimination contains a somewhat less specific remedy provision. Its 148 states parties are legally bound by the Convention to assure “to *everyone* within their jurisdiction [citizens and non-citizens] effective protection and remedies” (*emphasis added*) for breaches of the rights guaranteed by the Convention in their domestic systems.

Article 6, the Convention’s remedy provision, includes the right of the victim to seek “just and adequate reparation or satisfaction for any damage suffered as a result of [racial] discrimination”.

ELEMENTS OF THE RIGHT TO A REMEDY

— THE SCOPE OF THE RIGHT TO A REMEDY —

The Universal Declaration of Human Rights gives an individual the right to an effective domestic remedy for acts “violating the fundamental rights granted him by the constitution or by law”. Hence, the scope of its remedy provision is potentially rather broad, since the rights granted by the constitution or by law may, at least superficially, be more numerous than the rights guaranteed by the Declaration.

Unfortunately, both the ICCPR and the European Convention have remedy provisions which are more restrictive in scope. Article 2(3)(a) of the ICCPR guarantees an effective remedy only for those “rights and freedoms as herein recognized”.

Similarly, article 13 of the ECHR only provides an effective remedy for “rights and freedoms as set forth in this Convention”. The right to a remedy therefore is only guaranteed in relation to another right or freedom recognized by the Convention and does not provide a general right of appeal against any decision of a public authority.

Given that the right to a remedy has been most developed in the case-law and jurisprudence of the European Court and to a limited extent by the Human Rights Committee (HRC) with regard to the ICCPR, we shall limit our analysis below to these two instruments.

— THE REQUIREMENTS OF AN EFFECTIVE REMEDY —

Both the European Convention and the International Covenant on Civil and Political Rights adopt a similar approach to interpreting what is an effective remedy.

It should be noted at the outset that the demands placed on national systems by the ECHR and the ICCPR are not onerous. Where no single remedy suffices to meet the requirements of an effective remedy, one may have to resort to the entirety of remedies provided for under domestic law. Moreover, neither the ECHR nor the ICCPR specify that the remedy must be judicial in character. Article 2(3)(b) of the Political Covenant merely provides that states parties must:

“ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any

other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy”.

Hence, while states parties should place priority on judicial remedies, the Political Covenant only specifies that all persons who avail themselves of their right to a remedy under the ICCPR have a right to a decision by a competent domestic authority and if possible a judicial authority. Similarly, under the terms of article 13, a remedy may be sought from a quasi-judicial body, an administrative authority or a political body. While decisions made solely by political and subordinate administrative organs (especially governments) are not likely to constitute an effective remedy within the meaning of article 2(3)(b), within these parameters states have considerable flexibility as to the form of the remedy they wish to provide.

In order for a remedy to be considered effective, it must meet the following criteria.

a) The remedy must exist within the national legal system

The first question to be asked is, of course, whether a domestic remedy exists at all for the particular harm alleged. If a remedy does exist, then its effectiveness should be judged according to the nature of the right which one claims has been violated. A remedy's effectiveness should be judged more sternly, the more serious the violation which it is intended to remedy. For instance, in a recent case concerning the decision to expel an asylum-seeker from the United Kingdom on national security grounds, the European Court found that the English system of judicial review² was inadequate to safeguard a person's rights under article 3 of the ECHR (not to be subjected to torture or inhuman or degrading treatment or punishment), when applied under the restrictions applicable to national security cases. The English Court's review was limited to considering whether the Secretary of State had taken into account the evidence that the applicant might be persecuted. The English Court could not assess whether, in the light of the risk of persecution, the decision to deport had been irrational because it could not see the material security evidence. The European Court noted that:

*“given the irreversible nature of the harm that might occur if the risk of ill-treatment materialized and the importance that the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what a person may have done to warrant expulsion or to any perceived threat to the national security of the expelling state”.*³

² This is a procedure which allows a court to rule that a discretionary decision of the executive is unlawful based on the grounds that it is tainted with illegality, irrationality or procedural impropriety.

³ *Chahal vs United Kingdom* (70/1995/576/662) p. 39, ss 151.

While such scrutiny need not be provided by a judicial authority, the Court will consider the nature of the powers and guarantees which the process affords and the seriousness of the risk faced by an individual. Based on these considerations, the Court in *Chahal* determined that the extent of the review procedures provided was inadequate as it could not address the question of risk, apart from national security considerations. Hence, in this case judicial review was judged not to meet the requirements of an “effective” remedy in respect of an article 3 claim.⁴

b) The remedy must be legally available to a victim

Certainly, it is not enough that a remedy is available in the national legal system if the applicant is not able to take effective advantage of it. If, for instance a remedy is only made available to nationals and is not accessible to aliens, or if it is restricted to a particular gender, then it cannot be judged “effective”. In principle, the person concerned must have access to the remedy him/herself in the sense that he/she must have the status of a party before the national authority and, in particular, he/she must be in a position to institute an appeal and initiate the national proceedings.

c) The remedy must be practically accessible

A remedy does not become inaccessible simply because the procedure is subject to specific arrangements or conditions, such as meeting deadlines, or even providing guarantees that legal costs will be paid. However, such restrictions must be neither arbitrary nor unreasonable.

d) The remedy must be timely

Domestic remedies whose application is “unreasonably prolonged” are deemed ineffective. The “unreasonably prolonged” application of domestic remedies refers to situations where the process of pursuing a remedy takes several years. The situation could arise, for example, as a result of a state’s demands of onerous, unreasonable, or unnecessary conditions on the exercise of the particular domestic remedy.

⁴ One should note that when taken in conjunction with article 3 of the European Convention, article 13 can prove a powerful weapon in the arsenal of asylum-seekers and refugees when faced with refoulement. An effective remedy with respect to safeguarding rights under article 3, implies that states should institute effective internal procedures for appeal against expulsion measures which would enable the asylum-seeker to indicate before a court or at least an independent administrative authority their fears regarding the prospect of being sent back to their country of origin or handed over to the authorities of a third country. Should such procedures not be provided, an asylum-seeker can always have recourse to a possible hearing before the European Commission in order to enforce his/her right under article 3 and article 13. Moreover, in *Aksoy vs Turkey 1996*, the European Court specified that article 3, when taken in conjunction with article 13, requires that states fully investigate allegations of torture.

e) The remedy must have an objective chance of success

The remedy provided must have an objective prospect of success in order for it to be effective. The body administering the remedy, therefore, must comply with a number of procedural guarantees. However, these guarantees are not as strict as those which would be required of a judicial body.

f) The administrative body must be composed of members who are impartial and who enjoy the safeguards of judicial independence

Any situation in which an authority is “judge in its own cause” will not conform with the requirement of effectiveness. For instance, it has been held by the European Court of Human Rights that, in the case of measures restricting the right of detainees to send and receive correspondence, the fact that they were entitled to appeal to a government minister could not be regarded as satisfying the requirements of article 13. The Court indicated that, given that the government minister had written the directives in question, he would in reality “be judge in his own cause”.

g) An administrative body must conduct its deliberations in a manner consistent with the principles of natural justice and the duty of fairness

This is certainly not a high threshold. It is likely that only serious procedural irregularities would lead to a remedy being judged ineffective because they did not meet the principles of natural justice or fairness. The requirements of natural justice are simply that an administrative body act fairly and in good faith, without bias and in a judicial temper; that it give each party the opportunity to adequately state his case and to correct or contradict any relevant statement which is prejudicial to his case. Relevant documents which are looked at by the tribunal should be disclosed to the interested parties and a judge must declare any interest which he has in the subject matter of the dispute before him.

— **THE PROVISION OF INTERIM RELIEF** —

The question of whether, and to what extent, the lodging of an appeal should have the effect of, for example, suspending an expulsion decision, in order for it to constitute an effective remedy has not so far been settled.

In general, the effectiveness of an appeal before a national authority does not imply that the appeal suspends the carrying out of the decision under appeal. However the requirements for the effective protection of fundamental rights could in exceptional cases make it necessary for an appeal to be suspended. In particular this would apply to the deportation of asylum-seekers who claim to be exposed to a

serious risk of torture or other ill-treatment in the country of destination. The European Court has indicated that the possibility of appealing a decision denying entry to an asylum-seeker, which could only be exercised from outside the country, would not be considered an effective remedy.

— ENFORCEMENT —

States are obligated not only to provide remedies but also to enforce them. An authority which merely issues an advisory opinion cannot be said to be effective. Rulings on complaints of violations of a substantive right under the ICCPR or the ECHR must be binding. Hence, the powers and guarantees vested in a tribunal are relevant in determining its effectiveness. An appeal must be organized in such a way as to allow the person concerned to report the alleged violation of the Convention to a competent national authority which can both deal with the substance of the relevant Convention complaint and grant appropriate relief.

Hence in *Barutissio v. Uruguay*, the HRC found a violation of article 2(3)(c), where, despite a decision by a military court ordering a person's release, the person remained in prison for a further three years. The only response to numerous applications by the person's attorney was that if the prison authorities did not comply with the court's release order, the judges could do no more.⁵

Where judicial or administrative remedies are being sought, effective enforcement entails the execution of an enforceable judgement rescinding a decision by a lower court or tribunal which has violated a right guaranteed by the ICCPR or the ECHR. An example would be the rescinding of an unlawful conviction in violation of articles 6(2), 14 or 15 of the ECHR. In addition, many rights of the Covenant can be enforced by an administrative act or by some other action by the responsible organ. Again, an example of proper enforcement would be the release of an arbitrarily detained person, the granting of permission to enter, leave or reside in a country, or the legalization of an unlawfully prohibited political party, trade union or religious society.

In cases of a violation of the Covenant by a law, the requirement of article 2(3)(c) is satisfied when the law is rescinded, whether by the legislature or by a competent court.

In other cases such as arbitrary detention or the deportation of an alien, remedies are often limited to a determination that a violation has occurred. The determination in itself should have a deterrent effect on similar violations in the future or could provide indirect measures of relief, such as compensation or the criminal prosecution of responsible organs.

⁵ No. 25/1978 ss 12-13.

In many of its decisions in which it finds a violation of rights guaranteed by the Covenant, the HRC stresses that states parties are obligated to:

- a) provide victims with an effective remedy, including compensation;
- b) to investigate the alleged violations;
- c) to ensure that similar violations do not occur in the future.

However, apart from the rights to compensation for unlawful detention or a faulty criminal conviction guaranteed by articles 9(5) and 14(6), the Covenant does not contain any express legal basis to enforce compensation. The difficulty is that the Committee lacks power analogous to that of the European Court of Human Rights under article 50, to grant the victim of a violation just compensation that is binding under international law.⁶

— THE TYPE OF REMEDY —

Neither article 13 of the ECHR nor article 2(3) of the ICCPR specify what type of remedy is to be provided or what effect an appeal must have in order to be considered effective.⁷ Indeed, once a remedy is identified it is not necessary to show the certainty of a favorable outcome.⁸ The contracting parties therefore have a wide margin of discretion. The effect of a successful appeal may, depending on the case, entail setting aside, withdrawing or modifying the decision in violation of the Convention, appropriate redress or the imposition of penalties on the individual or body which made the decision.

The important point to note however, is that the effects of such measures must, either individually or cumulatively, be capable of remedying the situation in violation of the Convention, failing which the remedy is no longer held to be effective.

The issue of whether the right to a remedy can be said to require states parties to implement preventive remedies has been somewhat more difficult. Does the right to a remedy apply only after a violation of a substantive right has occurred, or are states parties required to take preventive measures to safeguard a right?

⁶ See discussion in Nowak commentary on the ICCPR, page 65.

⁷ But see *Aksoy vs Turkey 1996* supra note 5 at page 8.

⁸ *Pine Valley Developments Ltd & Others v. Ireland*, Judgement of 29 Nov. 1991. Series A, No. 222; 1992 14 EHRR 319. This view was affirmed in *Costello-Roberts v. United Kingdom*, Judgement of 25 March 1993, Series A No. 247-C (1995); 19 ERR 112.

With respect to the ICCPR, the Human Rights Committee has established that:

*[T]he Covenant provides that a remedy shall be granted whenever a violation of one of the rights guaranteed by it has occurred; consequently it does not generally prescribe preventive protection, but confines itself to requiring effective redress ex post facto.*⁹

More generally however, the right to a remedy specified in the ECHR and the ICCPR may well prescribe some degree of preventative protection for individuals. Indeed, with reference to its General Comment on the right to life, the HRC has made it known that the right to life enshrined in article 2 requires that a state take preventive measures to safeguard it, such as deterring the disappearance of persons.¹⁰

— THE DUTY TO EXHAUST LOCAL REMEDIES —

The duty to exhaust domestic remedies applies only when remedies are available, effective, and pursuing them does not take too long. If effective remedies within the meaning of article 13 of the ECHR and article 2(3) of the ICCPR are available, their exhaustion is a prerequisite to the admissibility of a complaint before either the HRC or the European Commission. Where the remedy provided by a state is ineffective for any of the reasons discussed above, (for instance, an unreasonable delay in judicial proceedings) such remedies do not need to be exhausted.¹¹

Where a state party provides a system of remedies that surpasses the minimum, the additional remedies must also be exhausted to the extent that the individual may be reasonably expected to do so.

Although the availability of more remedies may make admissibility more difficult, it is likely that the exhaustion of certain remedies, such as complaints to supervisory authorities or submissions to ombudsmen may be disregarded by the Human Rights Committee and the European Commission when determining whether a complaint is admissible.

⁹ C.F. et Al vs Canada Doc. A/40/40, p. 217, pr 6.2.

¹⁰ See discussion in Nowak page 62 and Herrera Rubio v. Columbia No. 161/1983 s.s 10.3.

¹¹ See Judgement of the European Court of Human Rights in *Akhdivar and Others V. Turkey (1996)* where, the Court ruled that the requirement to exhaust domestic remedies had been met, despite the fact that the applicants had not sought to avail themselves of any remedy before the Turkish Courts. Given the particular circumstances of the case – namely, the existence of severe civil strife in the region where the events complained of had taken place, in addition to a state of martial law - the Court ruled that it would be unlikely that the applicants complaint against the security services would receive a meaningful investigation or encounter any chance of success.

**WHEN CAN THE RIGHT TO A REMEDY BE
INVOKED IN INTERNATIONAL LAW?**

We have seen that the right to an effective domestic remedy exists in international law. We shall now briefly examine when this right can be invoked in international law.

The Human Rights Committee has stated that the remedy provision may be invoked only after there has been a violation of one of the rights protected by the Covenant.

With respect to the European Convention on Human Rights, article 13 states that any individual whose Convention rights and freedoms “are violated” should have an effective remedy before a national authority. Yet, despite this expression, the Court has held that it is not a prerequisite for the applicability of article 13 that a violation of one of the substantive Convention rights has already occurred. Article 13 clearly provides a guarantee which is autonomous of the other rights provided by the ECHR and requires that where an individual considers him/herself to have been prejudiced by a measure allegedly in breach of the Convention, he/she should have a remedy before a national authority in order both to have the claim decided and, if appropriate, to obtain redress.

However, not all claims can be guaranteed under article 13. The Court has added the precondition that the claim must be arguable in terms of the ECHR. A definition of what constitutes an “arguable” case remains problematic and it appears that the Court will consider the circumstances of each individual case in making its assessment.

The Court in the case of *Powell and Rayner v. The United Kingdom*,¹² held that a grievance could not be called unarguable even if it had been judged by the Commission to be “manifestly ill-founded”. The Court recognized that some “serious claims” might ultimately be rejected as manifestly unfounded despite their arguable character.

It is likely that an applicant will have to present a *prima facie* case for violation of one of the Convention rights.¹³ This threshold requirement is likely to be met wherever the Commission finds that a complaint is admissible.

It follows that under the Convention an asylum claimant who has an arguable case must have access to a national remedy. The international mechanisms and procedures which exist in order for an individual to take advantage of this right are examined in other chapters of this guide.

¹² Judgement of 21 February 1990, Series A No. 172.

¹³ *Boyle and Rice v. United Kingdom*, Judgement of 27 April 1988, Series A, No. 131 (1988) 10 ERR 425.

The Right to a Fair Trial

Contributed by the Lawyers Committee for Human Rights

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 charge against him.

(Article 10, Universal Declaration of Human Rights)

In order to stand a chance of success, a claim of a human rights violation before appropriate authorities, judicial or otherwise, must be examined in proceedings that meet international standards of fair trial and due process. These are provided for in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms – hereafter the European Convention on Human Rights, (ECHR) – amongst other instruments. These international fair trial standards will now be examined in relation to civil/administrative hearings and criminal trials.

CIVIL/ADMINISTRATIVE LAW

Article 14(1) of the ICCPR provides that:

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights or 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” (emphasis added).

Article 6(1) of the European Convention reads:

“In the determination of his civil rights and obligations ...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” (emphasis added).

— SCOPE OF APPLICATION —

It is clear that these provisions are intended to have a wide scope of application and apply to all proceedings aimed at resolving a legal dispute, irrespective of whether they are judicial or administrative in nature. Indeed, in its interpretation of article 6(1), the European Court of Human Rights has adopted a liberal interpretation of the phrase *civil rights and obligations* which has often been at odds with a state's classification of the dispute. These due process guarantees have been held to apply not only to civil litigation between private individuals but also to disputes between an individual and a public authority which impacts upon the exercise of private rights.¹

While the case law of the European Commission indicates that article 6 of the European Convention does not apply to procedures relating to the expulsion or extradition of an alien, the due process guarantees laid down by article 6(1) in many cases apply to the decisions of administrative tribunals.

— CONTENT OF THE RIGHT
TO A FAIR TRIAL —

Article 6(1) of the ECHR and article 14(1) of the ICCPR which we have seen apply to both criminal and non-criminal cases can be said to lay down the minimum guarantees of a fair trial.

• **Access to a Court**

It is noted above that article 13 of the ECHR has not been said to require a judicial remedy in every case. The general assumption underlying article 6(1) however, is that it includes the right of access to a court.² Although no express mention of access to a court is made in article 6, the Court regards such access as an essential aspect of the rule of law, which, according to the preamble of the ECHR, is part of “the common heritage” of Council of Europe member states, to which each state commits itself upon becoming a member of the organization (art. 3, Statute of the Council of Europe).

¹ *Ringeisen v. Austria*, Judgment of 16 July 1971, Series A, No. 13; (1979-1980) 1 EHRR 455.

² *Golder v. United Kingdom*, Judgment of 21 Feb 1975, Series A, No. 18; (1979-1980) 1 EHRR 524.

In addition, this right of access must not only exist but it must be effective.³ Hence, while states are not obliged in every instance to provide financial assistance, the Court has held that a positive obligation is placed upon states to do so where such assistance proves indispensable for effective access to the court.⁴ Moreover, while this right of access is not absolute, any regulation or restriction which is imposed by a state must not be such that “the very essence of the right is impaired”. Any restrictions imposed on access must have a legitimate purpose and be proportional to the aim sought.⁵

Article 14(1) of the ICCPR begins by mandating that “all persons shall be equal before the courts and tribunals”. This has been interpreted to signify that all persons must be granted, without discrimination, the right of equal access to a court. On the one hand this indicates that the establishment of separate courts for different groups of people based on their race, colour, religion, political or other opinion, national or social origin, property, birth or other status would be a contravention of article 14(1). On the other hand, the establishment of special courts with jurisdiction over all persons belonging to the same category such as military personnel, remains a thorny issue. According to the Human Rights Committee (HRC), this practice is not prohibited under article 14(1) as long as the procedural guarantees are observed. In addition while the HRC has not ruled across the board that the trials of civilians by military courts are prohibited, it has indicated its concern at such a practice.⁶

• Equality of Arms

The most important element of a “fair hearing” is the principle of “equality of arms”. This principle requires that both parties to a particular case be treated equally in the process and before the body determining the case. Equality of arms governs both civil and criminal cases and applies to all aspects of the proceedings. Thus, for example, both parties should have the same right to present evidence to the deciding body and, when one party presents evidence to the body, it has to make the evidence available to the other party. The equality of arms principle also mandates that both parties have access to counsel and the Human Rights Committee and the European Commission and Court of Human Rights have recognized that victims of human rights abuses may need legal assistance in preparing and presenting their cases. Hence, offering a detained asylum-seeker the opportunity of filing an application for refugee status may not be an effective remedy to the risk of *refoulement* if the asylum-seeker does not have access to legal counsel or competent advice, particularly if his case is complex. This is because without access to counsel, the application may not have an objective chance of success and thus the remedy cannot be considered “effective”.

³ *Airey v. Ireland*, Judgment of 9 Oct. 1979, Series A, No. 32; (1979-80) 2 EHRR 305.

⁴ *Ibid.*

⁵ *Ashingdane v. United Kingdom*, Judgment of 28 May 1985, Series A, No. 93; (1985) 7 EHRR 528.

⁶ HRC General Comment 13/21 d / Article 14.

- **Independent and Impartial Tribunal**

Article 6(1) of the ECHR and article 14(1) of the ICCPR further specify that cases be heard by an independent and impartial tribunal established by law.

An independent tribunal has been defined as one which is “independent of the executive and also of the parties”.⁷ The requirement of independence presupposes that there exists a separation of powers in which the judiciary is institutionally protected from undue influence by, or interference from, the executive branch and to a lesser degree from the legislative branch. In order for a tribunal to be independent, it must have been established by law to perform adjudicative functions, that is, to determine matters within its competence on the basis of rules of law (substantive) and in accordance with proceedings conducted in a prescribed manner (procedural). Other factors to consider when assessing whether a tribunal is sufficiently independent is the position and terms of appointment of judges, their conditions of tenure, their qualifications, salaries, relationship with political parties and so on.⁸ The requirement of impartiality refers to the presence of bias, or the lack thereof, and its bearing on the final outcome of the case. Certain factors will raise a *prima facie* implication that a court is not being impartial in its deliberations, such as where a judge has taken part in the proceedings in some prior capacity or has a personal stake in the proceedings. The impartiality of a court or tribunal is also likely to be compromised where a judge has an evidently pre-formed opinion or when he/she is related to the parties.

- **Reasoned Decisions**

In addition to being competent, independent, and impartial, the body deciding the case should give reasons for its decisions in order to avoid arbitrary, erroneous, or biased decisions. Reasons should also be given for decisions so that the accused is provided with sufficient information in order to exercise his/her right of appeal.

- **Trial without Undue Delay**

A further requirement of a fair trial is that an applicant be protected from excessive procedural delays and be brought to trial within a “reasonable” time period. This right is interpreted flexibly and the reasonableness of a delay will vary between criminal and non-criminal cases, the former generally requiring more urgency than the latter. Factors such as the complexity of the case, the conduct of the applicant and the conduct of the competent administrative and judicial authorities are all important issues to consider when determining the reasonableness of a delay.

⁷ *Ringeisen*, *ibid* at 5.

⁸ See discussion in, *What is a Fair Trial – A Basic Guide to Legal Standards and Practice*, a report of the Lawyers Committee for Human Rights, October 1995.

• Public Hearing and Public Decision

Other due process requirements include that the hearing be conducted publicly and that the decision be made public, unless for one of the permitted reasons this is not possible.

Article 6(1) of the ECHR specifies that:

“Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

Article 14(1) of the ICCPR provides that:

“[...] The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children”.

Indeed, the requirement of a public hearing by necessity implies the right to an oral hearing at the trial court level. As far as criminal cases are concerned, this assumption flows naturally from the guarantees contained in article 6(3).⁹

⁹ Article 6(3) of the ECHR provides that:

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;*
- b) to have adequate time and facilities for the preparation of his defense;*
- 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;*
- d) to examine or to have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

• **Right for the Accused to be Present at the Hearing**

In contrast to criminal cases, where there is a general right for the accused to be present at his hearing, the European Commission has held that this right extends to only certain non-criminal cases; namely where the personal character and manner of life of the party concerned is directly relevant to the decision or where an assessment of an applicant's conduct is involved. Sometimes it will be sufficient that there is an oral hearing at which an individual is represented by a lawyer.

CRIMINAL CASES¹⁰

In criminal cases the procedural rights should be read in conjunction with the provisions of article 11 of the Universal Declaration of Human Rights which are declaratory of customary international law and hence binding on all states. In addition, reference should be made to the specific rights guaranteed by the European Convention in articles 6(2) and 6(3) and to articles 9, 10, 14 and 15, of the ICCPR, which in totality, can be said to govern the fairness of a trial.

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

[Universal Declaration of Human Rights, art. 11]

¹⁰ The following discussion draws on *What is a Fair Trial – A Basic Guide to Legal Standards and Practice*, a report of the Lawyers Committee for Human Rights, October 1995.

— SCOPE OF APPLICATION —

The due process guarantees stipulated by the ICCPR and ECHR provisions apply “not only upon the formal lodging of a (criminal) charge but rather on the date on which certain activities substantially affect the situation of the person concerned”.¹¹ Depending on the circumstances of the case, these “activities” could obviously coincide with the moment of arrest. Furthermore, acts such as the publication of a warrant or the search of premises or persons have also been held by the European Court and Commission to be covered by the due process guarantees.

Fair trial guarantees must be observed until all the criminal proceedings, including those on appeal, have been completed.

Moreover, given that there is no uniform concept of what constitutes a crime, the Court and Commission have been prepared to extend the procedural guarantees of article 6 to cover wider administrative hearings and disciplinary proceedings. Despite the case where a state classifies a sanction as disciplinary or regulatory in nature, the Court can adopt a position that the charges and penalties involved are more akin to a criminal case. In deciding whether article 6 guarantees should apply to particular proceedings, the Court will consider a number of factors:

- whether the provisions defining the offence belong, according to the legal system of the respondent state, to criminal law, disciplinary law or both concurrently;
- the nature of the offence;
- the degree of severity of the penalty which the person concerned risks incurring.¹²

These criteria have been applied in a number of contexts including prison disciplinary proceedings where the outcome might lead to a lengthening of the sentence.¹³

¹¹ Nowak Commentary on ICCPR at 244. *Eckle v. Germany*, Judgment of 15 July 1982, Series A, No. 51 (1983) 5 EHRR 1.

¹² *Engel & Others v. Netherlands*; Judgment of 8 June 1976, Series A, No. 22; (1979-1980) 1 EHRR 647.

¹³ *Campbell and Fell v. United Kingdom*, Judgment of 28 June 1984, Series A, No. 80; (1985) 7 EHRR 165 and *ibid.*

— **CONTENT OF THE RIGHT** —
— **TO A FAIR TRIAL** —

Along with the procedural rights described above, a number of additional rights exist to ensure a fair trial in criminal cases. The minimum procedural guarantees accorded by article 14(3) of the ICCPR correspond in large part to those minimum guarantees laid down in article 6(3) of the ECHR, albeit with important differences of detail. Note that these rights are minimum rights and should be read and applied as such.

• **Right to be Presumed Innocent Until Proven Guilty According to Law**

This principle is a fundamental tenet of the right to a fair trial which has been enshrined in article 11 of the Universal Declaration of Human Rights. According to article 14(2) of the ICCPR, “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”. Similarly, article 6(2) of the European Convention also provides for the presumption of innocence.

As a basic component of the right to a fair trial, the presumption of innocence, *inter alia*, means that the burden of proof in a criminal trial lies on the prosecution and that the accused has the benefit of the doubt. Despite the fact that article 14(2) does not specify the standard of proof required, it is generally accepted that guilt must be proved beyond a reasonable doubt¹⁴ or “to the intimate conviction of the trier of fact, whichever standard of proof provides the greater protection for the presumption of innocence under national law”.¹⁵

The presumption of innocence, must in addition, be maintained not only during a criminal trial *vis-à-vis* the accused but also in relation to a suspect throughout the pre-trial phase.

All officials involved in a case, in addition to all public authorities, are obligated to maintain the presumption of innocence by “refraining from prejudging the outcome of a trial”.¹⁶ This basic principle was held to have been violated in a French case where an applicant was declared to be guilty at a press conference, held shortly after his arrest and prior to the filing of charges against him, by a Minister of the Interior and a police superintendent in charge of conducting a criminal investigation into the applicant’s case.¹⁷

¹⁴ General Comment 13 (21) d / of the HRC (article 14).

¹⁵ Ibid.

¹⁶ General Comment 13 (21) d / of the HRC (article 14).

¹⁷ *Allet de Ribemot v. France*, Judgment of 10 February 1995, Series A, No. 308.

- **Prompt Notification of the Charges and Interpretation**

Article 14(3) (a) of the ICCPR provides that in the lodging of any criminal charge everyone is entitled, in full equality “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”. This corresponds to article 6(3)(a) of the ECHR.

The right to be informed extends to both the exact legal description of the offence (“nature”) and the facts underlying it (“cause”).

The requirements of prompt notification have yet to be uniformly interpreted but this has generally been taken to coincide with the moment when a charge is lodged or directly thereafter, with the opening of the preliminary judicial investigation or with the setting of some other hearing that gives rise to clear official suspicion against a specific person.¹⁸

The information must also be provided to the accused in a language which he understands, meaning that translation is compulsory; the form of such translation, whether oral or written, will depend on the manner in which the charge is initially conveyed. An indictment for instance, must obviously be translated into writing.

- **Right to an Interpreter**

Moreover, in the determination of any criminal charge, everyone is entitled to have the free assistance of an interpreter if he cannot understand or speak the language used in court. (Article 14(3)(f) of the ICCPR and article 6(3)(a) and 6(3)(e) of the ECHR).

In order to have the benefits of a fair trial, this right has been extended to include the translation and interpretation of all documents or statements in the proceedings which are essential for defendants to understand.¹⁹

Whereas the right to legal assistance is not provided free in every case, the right to interpretation is to be provided free, regardless of the financial resources of the defendant. This right applies equally to nationals and aliens, although it cannot be demanded by someone who is sufficiently proficient in the language of the court.

¹⁸ Nowak Commentary at 255.

¹⁹ *Luedicke, Belkacem and Koc v. Germany*, Judgment of 28 November 1978, Series A, No. 29; (1979-80) 2 EHRR 149.

• **Right to Adequate Time and Facilities for the Preparation of a Defense**

In the determination of any criminal charge, everyone is entitled to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing. (Article 14(3)(b) of the ICCPR which corresponds with the obligation laid down in article 6(3)(b) of the ECHR). The right applies not only to the defendant but also to his/her defense counsel and is to be observed in all stages of the proceedings.

What constitutes “adequate time” will largely depend on the nature of the proceedings and the factual circumstances of a case. Issues such as the complexity of the case, the defendant’s access to evidence and the time limits provided for in domestic law for certain actions in the proceedings will be pertinent in assessing whether adequate time has been given to the accused and his counsel to prepare a defense.

As far as the “facilities” with which the accused should be provided, the most important are those which would enable the accused to communicate in confidence with his defense counsel. This applies to all stages of the criminal proceedings and is particularly relevant in the pre-trial stage. All arrested, detained and imprisoned persons must be provided with adequate opportunities to be visited by, and to communicate with, a lawyer without delay, interception or censorship, and in full confidentiality throughout the proceedings.

In addition, the accused and his defense counsel should have access to all appropriate information, files and documents necessary for the preparation of a defense.

• **Right to a Defense/Right to Legal Assistance**

Everyone shall be entitled to be tried in his/her presence and to defend him/herself in person or through legal assistance of his/her own choosing.²⁰ If an accused does not have legal assistance he/she must be informed of this right by the court. Where he/she lacks the financial means to employ a defense counsel, the accused has the right to have legal assistance assigned to him by the court at no cost, in any case where the interests of justice so require. Whether the interests of justice require the state to provide for representation depends primarily on the seriousness of the offence and the potential maximum punishment.²¹

²⁰ Article 14(3)(d) of the ICCPR. Similarly, article 6(3)(c) of the ECHR gives those accused of crimes the right to defend themselves; the right to legal assistance and the right to free legal assistance if they cannot afford it and if the interests of justice so require. The aim of all three is to ensure that defendants have the benefit of a defense that is practical and effective.

²¹ Nowak commentary at 259-260.

The right to counsel applies to all stages of criminal proceedings including the preliminary investigation and pre-trial detention. An individual's right to choose counsel freely thus begins to apply when a suspect or accused is first taken into custody, regardless of whether he/she is formally charged at that point.

Whilst the right to be tried in one's presence has not been held by the HRC to preclude trials in absentia, the Committee has made it clear that such trials are only permissible in certain circumstances where the state has made sufficient efforts to inform the accused about the impending court proceedings, thus enabling him/her to prepare his/her defense.

- **Examination of Witnesses**

According to article 6(3)(d) of the ECHR and article 14(3)(e) of the ICCPR, in the determination of any criminal charge, everyone is entitled to "examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". This right is an essential part of the principle of equality of arms. Neither article, however, gives defendants the right to call witnesses without restriction, but only under the same conditions as witnesses summoned against him/her. While a court is thereby given a fairly free hand in summoning witnesses, it must do so in keeping with the principles of fairness and the equality of arms. In addition, article 14(3)(e) has been concretely interpreted to mean that the prosecution must inform the defense of witnesses it intends to call at trial so that the accused is given sufficient time in which to prepare his defense. The defendant also has the right to be present during the testimony of a witness and may be restricted in doing so only where a witness reasonably fears reprisal by the defendant. However, in no case can a witness be examined in the absence of both the defendant and counsel. Similarly, the use of testimony from anonymous witnesses is impermissible as this would represent a violation of the defendant's right to examine or have examined witnesses against him/her.

- **Prohibition of Self-Incrimination**

In the determination of any criminal charge, everyone is entitled "not to be compelled to testify against himself or to confess guilt" (art. 14(3)(g), ICCPR). This provision is aimed at prohibiting any form of coercion, whether direct or indirect, physical or mental that could be used to achieve such an end. Although not explicitly stated, it is a well-established interpretation that evidence obtained in such a manner is inadmissible in court. Article 15 of the Convention against Torture, provides that:

"Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made".

- **Right to Appeal**

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. (ICCPR, article 14(5)) This is aimed at ensuring that at least two levels of judicial scrutiny of a case exist, the second of which must take place before a higher tribunal. The guarantees of a fair trial continue to govern all appellate proceedings and the review undertaken by such a tribunal must be genuine and timely. This right of appeal belongs to all persons regardless of the severity of the offence and of the sentence pronounced in the first instance.

- **Principle of *Ne Bis In Idem***

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of the country. Article 14(7) aims to ensure that no person is tried for the same crime twice. In the opinion of the HRC it would appear that double jeopardy applies only to prohibit subsequent trials which occur within the same jurisdiction.

APPENDIX I

— DUE PROCESS IN PROCEDURES FOR — — DETERMINING REFUGEE STATUS —

Neither the 1951 United Nations Convention Relating to the Status of Refugees nor its 1967 Protocol stipulate a particular procedure for the determination of refugee status. However, UNHCR has recommended the following basic guidelines to ensure that a minimum standard of fairness underpins the asylum determination procedure. Although UNHCR's guidelines are not a part of any legally binding international instrument, they may prove a useful tool in lobbying for improved standards for refugees. However, it is important to note that these standards merely reflect the *bare minimum* of what is to be expected of a fair asylum procedure.

1. The competent official to whom applicants address themselves at the border or in the territory of a contracting state should have clear instructions for dealing with cases that might come within the purview of the relevant international instruments. The official should be required to act in accordance with the principle of non-*refoulement* and to refer such cases to a higher authority.

2. Applicants should receive the necessary guidance as to the procedure to be followed.

3. There should be a clearly identified authority – wherever possible a single central authority – with responsibility for examining requests for refugee status and taking a decision in the first instance.

4. Applicants should be given the necessary facilities, including the services of a competent interpreter for submitting their cases to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.

5. If applicants are recognized as refugees, they should be informed accordingly and issued documents certifying their refugee status.

6. If applicants are not recognized, they should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.

7. Applicants should be permitted to remain in the country pending a decision on their initial requests by the competent authority referred to in paragraph (3) above, unless it has been established by that authority that the requests are clearly abusive.

Applicants should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is still pending.¹

— PARTICULAR RIGHTS OF CHILDREN —

The ICCPR contains not only a separate article dealing with the rights of the child (art. 24) but also various procedural provisions to protect juveniles. Article 6(5) prohibits the death penalty for persons under the age of 18; articles 10(2) and (3) require that juveniles be separated from adults in pre-trial detention and in prison; article 14(1) obligates the states parties to conduct criminal trials against juveniles in such a manner “as will take account of their age and the desirability of promoting their rehabilitation”. These rights were brought together under article 40 of the 1989 Convention on the Rights of the Child and developed further (see discussion below).

Article 14(4) does not expressly obligate states to establish juvenile courts. Nevertheless they must ensure that criminal trials against juveniles are conducted differently than those against adults, this being normally accomplished by juvenile courts. The type of trial which is best suited to the particular age of the juveniles is to be decided independently by the states parties. However the ICCPR does mandate that a juvenile trial take into account the interest of promoting the rehabilitation of the juveniles. This precept is based on the view that juveniles should as far as possible be spared the stigma of crime and that offences by juveniles should not be counteracted with punishment but rather with educational measures.²

• The Convention on the Rights of the Child

The treaty which specifically elaborates standards concerning children is the 1989 Convention on the Rights of the Child (CRC). The near universal ratification of the treaty lends it particular significance as an advocacy tool. The rights laid down in the CRC are granted without discrimination³ to **all** persons under 18 years of age.⁴ Hence the CRC applies equally to all children whether they be nationals of a country or refugees, asylum-seekers, rejected asylum-seekers or the undocumented.

¹ These standards were elaborated in the Conclusions on International Protection. Report on the 28th session of the Executive Committee to the High Commissioners Program UN Doc. A/32/12/Add.1 (1977) at 12-16.

² Art. 40(1) of the Convention on the Rights of the Child refers in this regard to the objective of promoting the child's reintegration and the child's assuming a constructive role in society.

³ Article 2 of the CRC.

⁴ Article 1 of the CRC.

The CRC lays down very specific juvenile justice rights (articles 37-40) which should be applied as a minimum in any situation in which children are deprived of their liberty because of violations of criminal or delinquency laws. In addition to the UN rules referred to above, the General Assembly has adopted detailed standards especially for situations where minors are accused of violating the law.⁵

Article 37 stipulates that:

a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

Article 40 stipulates that:

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 or omissions that were not prohibited by national or international law at the time that 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 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 and presentation of his or her defense;

⁵ See the UN Standard Minimum Rules for the Administration of Juvenile Justice (1985) commonly referred to as the Beijing rules (UN General Assembly Resolution 40/33, 29 November 1985).

(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, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or to have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence 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 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 recognized 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; counseling; 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.

Trafficking in Persons: A Special Reference to Women and Children

Contributed by the World Council of Churches

The large organizations often hide their activities behind some form of legal business and will “sell” women to other groups and brothels for example. There are also middle-sized organizations who will exploit women directly, often reducing them into debt-bondage. The final level of involvement includes private individuals such as cabaret owners.

The CIS Conference Programme of Action comprises operational measures aimed at providing the necessary assistance to all categories of migrants, from the moment of their arrival in the host country to their return and reintegration in their countries of origin. Although trafficking in persons was not specifically addressed as such at the CIS Conference, the number of nationals of the CIS region (in particular women and children) who are victims of this pernicious form of population displacement is rapidly increasing. This requires the establishment of assistance and return programmes. NGOs are often the first to be in contact with victims and have to advocate for such programmes. This section aims at equipping them to better deal with this modern form of slavery.

A GLOBAL PERSPECTIVE

As noted by NGO researchers and governments officials, a problem in responding to the issue of trafficking in persons is the lack of a precise and coherent definition for this multi-faceted problem.

In 1994, the United Nations General Assembly defined trafficking as the:

“illicit and clandestine movement of persons across national and international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the profit of recruiters,

traffickers and crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labour, false marriages, clandestine employment and false adoption. (General Assembly Resolution, 49/166 of 23 December 1994)".

Research indicates that boys are also to be found among victims of traffickers.

The International Organization for Migration (IOM), an inter-governmental organization, while acknowledging that there is no internationally accepted definition of trafficking in women, has worked on a tentative definition, mostly from a migration angle. It thus sees:

Trafficking in women as any illicit transporting of migrant women and/or trade in them for economic or other personal gain. This may include the following elements:

- facilitating the illegal movement of migrant women to other countries, with or without their consent or knowledge;
- deceiving migrant women about the purpose of the migration, legal or illegal;
- physically or sexually abusing migrant women for the purpose of employment, marriage, prostitution or other forms of profit-making abuse.¹

The Global Alliance Against Traffic in Women, (GAATW) an NGO body, adopted a working definition of trafficking in women which includes:

"All acts involved in the recruitment and/or transportation of a woman within and across national borders for work or services by means of violence or threat of violence, abuse of authority or dominant position, debt-bondage, deception or other forms of coercion".²

It further defines forced labour and slavery-like practices (often resulting from trafficking) as:

"The extraction of work or services from any woman or the appropriation of the legal identity and/or physical person of any woman by means of violence or threat of violence, abuse of authority or dominant position, debt-bondage, deception or other forms of coercion".³

¹ *Trafficking of Women to Countries of the European Union: Characteristics, Trends and Policy Issues*, paper submitted by IOM to the Conference on Trafficking in Women for Sexual Exploitation, Vienna, June 1996, p. 3.

² *Trafficking in Women, Forced Labour and Slavery-like Practices in Marriage, Domestic Labour and Prostitution*, Marjan Wijers and Lin Lap-Chew, GAATW, The Netherlands, March 1997, p. 15.

³ *Ibid*, p. 15.

The Council of Europe Parliamentary Assembly defines trafficking in women and forced prostitution as any legal or illegal transporting of women and/or trade in them, with or without their initial consent, for economic gain, with the purpose of subsequent forced prostitution, forced marriage, or other forms of forced sexual exploitation.⁴ The use of force may be physical, sexual and/or psychological, and includes intimidation, rape, abuse of authority or a situation of dependence.

Trafficking in persons can thus be seen in a variety of perspectives such as:

- a moral problem, since the traditional definition of trafficking links it with prostitution, turning victims into the subject of moral judgement by society;
- a problem of organized crime as traffickers are frequently associated with large or middle-scale criminal organizations;
- a migration problem as trafficking often entails illegal border crossing;
- a labour problem as victims of trafficking are often exploited in slavery or bond labour situations;
- or a human rights problem as victims suffer violations of a whole range of internationally defined rights (freedom from slavery or servitude, freedom of movement, freedom from torture and ill-treatment, freedom from sexual exploitation, right to rest, etc.).

As European Commissioner for Immigration, Anita Gradin, stated in her opening speech at the Conference on Trafficking in Women organized in June 1996 in Vienna:

“The slave trade for the purpose of sexual exploitation poses us with a multi-faceted problem. We need to tackle it from many different points of view. It concerns migration policies, judicial systems in different countries, law enforcement and police cooperation and, not least, preventive measures and the support for the victims. It also concerns human rights, equality between women and men, the distribution of wealth among nations”.

This section of the manual does not attempt to tackle the current debates on the nature of prostitution (often resulting from trafficking), nor on the forced versus free prostitution concepts. Rather it seeks to raise awareness about the general plight of victims of trafficking and to equip NGOs and non-lawyer practitioners with means to assist victims, from a human rights angle.

⁴ Recommendation 1325, on Traffic in Women and Forced Prostitution in Council of Europe Member States, adopted 23 April 1997 (13th sitting).

TRAFFICKING IN PERSONS: AN OLD PHENOMENON

The practice of trafficking in persons is encountered in all regions of the world and was denounced as early as the end of the nineteenth century. Earlier still, the most staggering example of this practice is the slave trade from Africa, which extended from the sixteenth to the eighteenth century. Between 10 and 40 million Africans were forcibly removed from their continent in order to work in the plantations and mines of the colonial world.

States parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

[Convention on the Elimination of all Forms of Discrimination Against Women, art. 6]

Contemporary causes of forced migration include political, economic, social and environmental factors. The spectrum runs from immediate threats to life, safety and freedom due to war or persecution, to situations where

economic conditions make the prospect for survival marginal or non-existent. Legal official channels are increasingly beyond the reach of asylum-seekers and other migrants as an increasing number of countries implement restrictive immigration policies and the demand for foreign labour diminishes. Pressure to escape from difficult situations and lack of information on the situation in the country of destination then turn migrants and asylum-seekers into easy prey for organized crime.

Traffickers generally have links with powerful criminal organizations often working on a very large scale, for which trafficking in persons is a side activity. According to research carried out by the Council of Europe, three kinds of organizations are active in trafficking of women. There are well-structured large organizations, operating on an international scale with strong political and economic contacts in countries of origin, at points of transit and of arrival. The large organizations often hide their

The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic in any form.

The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.

[Declaration of the Rights of the Child, principle 9]

activities behind some form of legal business and will “sell” women to other groups and brothels for example. There are also middle-sized organizations who will exploit women directly, often reducing them into debt-bondage. The final level of involvement includes private individuals such as cabaret owners.

The phrase “smuggling of aliens”, mostly used by governments, refers to the criminal practice whereby desperate asylum-seekers and other migrants are lured into paying amounts of money (usually outrageously high) to be smuggled across borders – at times to be supplied with counterfeit travel documents – often at considerable personal risk. The relationship with the smugglers usually terminates once persons have arrived in the country of destination. This aspect of trafficking in persons falls within the scope of government programs to combat organized crime and will not be addressed here.

TRAFFICKING IN WOMEN: THE CIS CONTEXT

Trafficking in women is a considerably under-reported offence and there is general agreement that further research is needed on its causes, scope, extent, methods and consequences plus the routes used and the role of organized crime. Until a few years ago, it had not been seen as a priority by governments. The general lack of interest by states in the human rights of migrants is not surprising, considering that it is estimated that migrant-producing countries currently receive about US\$ 60 billion a year in migrant remittances, considerably more than granted in official development assistance.

However, research developed by NGOs since the fall of the Berlin Wall clearly define the major trends in the growing traffic in women from Central and Eastern Europe and the CIS region. Recent information programmes set up by inter-governmental bodies such as the International Organization for Migration, illustrate the growing concern on the part of governments in the region. INTERPOL, the International Criminal Police Organization, stated in 1988 that European countries were increasingly confronted with the phenomenon of trafficking in women. INTERPOL sub-branch, EUROPOL is also looking into the problem.

Although the transition from 70 years of totalitarian rule to the present system has taken place in a relatively orderly manner, some 5 million people have migrated through the former Soviet Republics since the dissolution of the USSR in 1991. This is the largest refugee and migrant flow since the Second World War in the region. Social and economic instability is the direct result of the breakdown of national economic and political systems. With little access to decently paid jobs and little opportunity to search elsewhere, women constitute a particularly vulnerable group, all the more so in the case of single mothers (an increasing occurrence in former CIS

states). Motives and conditions thus pushing women from Central and Eastern Europe and the CIS region to migrate are quite similar to those applicable to women from many Third World countries.

Aside from the traditionally low level of risk involved for traffickers in human beings for whom the initial investment is considerably less than trafficking in drugs or arms, trafficking in women from Eastern and Central Europe and the CIS region presents additional advantages to the traffickers. Nationals of these states often do not need visas for many European countries. Whenever required, tourist visas are granted more willingly as the racial and religious factors often inhibiting the granting of such visas do not go against women from these countries. Traffickers incur lower travel costs as most travel takes place by road and the women's "European appearance" enables them to more easily evade customs checks or police controls in the streets of Western European cities.

Finally, most women are misinformed on the potential risks involved in migrating to countries of Western Europe. This is further aggravated as victims or survivors of trafficking are either too frightened (trafficking is often practised by extremely violent organized groups) or too ashamed to tell the truth about their situation, particularly in cases where they manage to maintain links with relatives and friends in their countries of origins.

Under these circumstances an offer of a job in a West European country is very appealing, even when the conditions are dubious.

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour.

[International Covenant on Civil and Political Rights and Optional Protocol thereto, art. 8]

According to research conducted by the Foundation against Trafficking in Women (STV) in the Netherlands, the trafficking of women in and from the Central and Eastern European Countries (CEECs) is carried out by professional criminal organizations. Malafide (*see "mail-order brides" entry in glossary*) marriage agencies transport women to Western Europe for large sums of money. Reports from Switzerland speak about agencies that organize beauty contests and send the winners on so-called modeling tours, which turn out to be one-way tickets to brothels. Some women are promised summer jobs as waitresses in Germany, then transported with false documents and forced into prostitution. In the Netherlands, STV meets many women who were offered jobs in restaurants or bars by malafide employment

Definition: Trafficking in Persons

The illicit and clandestine movement of persons across national and international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations for the profit of recruiters, traffickers and crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labour, false marriages, clandestine employment and false adoption.

agencies, advertising in newspapers or through posters in official employment agencies. Women are also recruited by people they know, friends of friends, old neighbours and acquaintances of their family. They are often brought into the Netherlands with false documents, which makes them completely dependent on the pimps.

The traffic in women from the CEECs seems to be mainly controlled by East European criminal groups, operating in the recruiting as well as in the destination countries. They are highly organized, extremely violent, and often involved in other criminal activities, such as the arms trade, drug smuggling and bribery of authorities.

Approximately three quarters of the victims of trafficking assisted by STV in 1994 were women under the age of 25. Many victims aged between 15 and 18 came from Central Europe. From data obtained from questionnaires filled in by a research sample of 155 women, STV was able to assess that 44 cases were from Central Europe, and 64 from Eastern Europe and the CIS countries, mainly the Russian Federation and Ukraine.

Russian women are being tricked into prostitution and slavery by organized criminals who tell them they have been selected to be part of folk music groups. (The Washington Post, March 1997).

Other research indicates cases where husbands and relatives of the women knowingly push them into trafficking for prostitution in Western European countries, which they perceive as the only economically viable alternative to financially support their families.

Definition: Mail Order Brides

A system whereby men in richer countries "choose" a future wife from "catalogues" displaying photos and text describing young women from poorer countries. There is very little protection for these women once they find themselves in trouble and sexually exploited in another country, and yet are officially married to a national from that country.

Due to increasingly restrictive immigration policies of Western European countries, women lacking prospects at home and looking for work abroad are easily driven into the arms of dubious organizations and middlemen. Rejected asylum-seekers are also increasingly targeted by traffickers.

According to IOM findings, in the hierarchy of prostitution, trafficked women are said to receive the lowest salary and work the longest hours. Data from the IOM Migration Information Programme survey of STV victims shows that, at best, the majority were able to keep no more than 25 percent of their earnings from prostitution. Young women from Central Europe were most likely to report that they were forced to prostitute themselves without payment.

Trafficked women are frequently forced into a situation of extreme dependency which is comparable to that of being a hostage. In many instances, violence, or the threat of violence was used to control the women. Again, young women from Central Europe seem to be especially vulnerable with a high proportion of them reporting the most difficult working conditions. Trafficked women are easily controlled because they are often forced to live on the premises where they work. The language barrier and frequent changes of working premises also further isolates them from the outside world.

The illegal status of women in prostitution or domestic labour prevents them from reporting ill-treatment and abuse. The withdrawal of identity papers by their employers or pimps further restricts their ability to approach authorities. Women in prostitution are also extremely prone to be infected by sexually transmitted diseases and constitute a high risk population group for HIV/Aids transmission. Many young women are also reported to suffer from mental health problems resulting from ill-treatment, horrendous “working conditions” and confinement in their “working” place.

Aside from security concerns, the threat of deportation is another powerful factor inhibiting trafficked women to lodge complaints. In cases where trafficked women manage to escape their exploiters, they are generally likely to be deported by the authorities and returned to their countries of origin. Shame also stops many trafficked women from informing their families, if they manage to escape the control of the traffickers and pimps.

Hardly any data is available about the fate of women once they have been forcibly repatriated to their countries of origin.

TRAFFICKING IN CHILDREN

The report of the World Congress against Commercial Sexual Exploitation of Children, organized in Stockholm in August 1996 makes gruesome reading. Hosted by the Government of Sweden, the Congress was organized in cooperation with the United Nations Children's Fund (UNICEF), the End Child Prostitution in Asian Tourism (ECPAT) global campaign and the NGO Group for the Convention on the Rights of the Child. (Out of over 60 statements by heads of delegations at the plenary meetings of the World Congress, the only government from the countries of the former Soviet Union to make a declaration was Latvia).

The huge illegal trade in children (child prostitution, child pornography and the trafficking of children for sexual purposes) is currently believed to involve about two million children under the age of 16 years worldwide.

The commercial exploitation of children, the Congress report states, is a global phenomenon pervading both developing and developed countries. The Declaration of the World Congress defines the commercial exploitation of children as "sexual abuse by the adult and remuneration in cash or kind to the child or a third person or persons... (It) constitutes a form of coercion and violence against children and amounts to forced labour and a contemporary form of slavery".⁵ A major concern is the proliferation of child prostitution, child pornography and trafficking of children – at the national level and across frontiers, across the globe.

The abhorrent practices behind the commercial sexual exploitation of children include rape, murder, abduction, bribery, false marriage, illegal adoption, illegal immigration, bonded labour, extortion and *mail-order brides*. While the phenomenon affects millions of girls and boys, the report indicates that in many settings, it is girls who constitute the majority of the victims. The phenomenon of commercial sexual exploitation is aggravated by deep-seated cultural attitudes that discriminate against women and the girl child.

Although little thorough research on trafficking in children in the CIS region is available there is a general agreement that trends observed in Central and Eastern Europe fully reflect the situation developing in the CIS.

⁵ Report of the World Congress Against Commercial Sexual Exploitation of Children, Stockholm, Sweden, 27-31 August 1996, p. 6.

While Asia and South America have been faced with enormous problems of child prostitution for the past few decades, Eastern Europe has emerged as a new area of concern. The demand factor is also linked to the presence of old and new beliefs of a perverted kind, such as the new notion that by having sex with the young, one can protect oneself from HIV/AIDS.

The phenomenon is spreading and civil society has to exhibit extreme vigilance in order to unveil this practice. For instance, an article written by Zhamakhan Tuyakbayew, Chairman of the State Investigation Committee of the Republic of Kazakstan, in March 1997, referred to the unknown whereabouts of almost 1,500 people, including 102 minors. Careful monitoring of any reference to unaccounted or missing children and research into these occurrences will contribute to lifting the present invisibility of trafficking in children.

According to an estimate from a report by the European Network of ECPAT (End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes) mission in 1996 there are at least 100,000 street children in the whole of the CIS. Children who live on the streets come from broken families, families with great social problems or from children's institutions. They are exposed to sexual abuse, both in the form of pure coercion and in situations where they give their consent in order to obtain food or money for food. They support themselves by begging, theft and other petty crimes. The former communist children and juvenile organizations have crumbled and the attitude towards these children on the part of the community and the general public is often very harsh and prejudiced. Furthermore, social welfare systems have been forced to close or cut down as a result of the disintegration of former institutions and the economic situation. Such a population constitutes an easy prey to organized traffickers.⁶

National and international trafficking in girls follows the same path as trafficking in women and largely goes from East to West. The largest groups involved in this traffic are girls from Russia, Ukraine and the Caucasus. The recruitment of girls is done through advertisements or direct recruitment via friends, in bars, discotheques or even outside institutions for young girls. The advertisements

Definition: Sex Tourism

The commercial sexual exploitation of persons by people who travel from their own country to another, usually less developed country, to engage in sexual acts, often with children.

⁶ See *Commercial Sexual Exploitation of Children in Some Eastern European Countries (The Baltic States, Poland, Romania, Russia, Hungary)*, a study by Helena Karlén and Christina Hagner, ECPAT, March 1996.

offer girls well paid work as bar girls or dancers, and in certain cases as au pairs (live-in family helpers). The person who does the recruiting attends to all formalities which in many cases means false documentation which uses an older age for the minor or claims another nationality in order that the girls may reach the planned destinations. Once in countries of destination, the younger girls are kept in private homes where they are exploited sexually. The final destinations are not only large cities. There is a large problem of prostitution with girls from the East in border regions with Western European countries and along important truck roads. There is also traffic within countries when, during the summer months, prostitution moves out to vacation and tourist areas. In the Baltic States prostitution rings move to districts by the Baltic Sea.

Sex trafficking in boys from the East to the West follows a different pattern. According to ECPAT, more data is available on trafficking of Romanian, Polish and Czech boys than trafficking in CIS states. The youngest boys are transported by adults while the older teenage boys often travel alone or together with a group of friends. Girls are usually confined to bars and brothels while the boys usually meet their “customers” outdoors, such as in railway stations. Social workers and police in Berlin give common accounts on a clear pattern around the main railway stations. Subway-Berlin is a social project running a drop-in centre for boy prostitutes. During 1995, they registered 816 visits but social workers claimed that far from all the boys visited their shelter. Half the boys came from Romania, 20% were Germans and the rest came from Poland, the Czech Republic, Russia, Hungary, Slovenia and Bosnia. When the boys are 13-14 years old they usually start to come to Subway, but their youngest visitor so far was nine years old. Boys in the age group 10-11 years old who come to the station are immediately recruited by *paedophiles* and moved into their private apartments. A few years later they are back at the station and then they also start to visit Subway-Berlin. The social workers at Subway-Berlin claim that the German boys are nearly always homosexuals themselves, while this is more unusual among the boys from the East.

As is the case for girls, prostitution of boys is controlled and organized by adults.

INTERNATIONAL LEGISLATION

The Universal Declaration of Human Rights, adopted in 1940 sets the stage for most of the international treaties and conventions against trafficking. Article 4 states that no one shall be held in slavery or servitude and that slavery and the slave trade shall be prohibited in all its forms. Article 5 states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 7 of the International Covenant on Civil and Political Rights (ICCPR) forbids cruel and inhuman or degrading treatment; article 8 forbids slavery, slave

No one shall be held in slavery or servitude, slavery and the slave trade shall be prohibited in all their forms. (Art. 4).

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. (Art. 5).

[Universal Declaration of Human Rights]

traffic, serfdom and forced or compulsory labour.

Article 6 of the International Covenant on Economic, Social and Cultural Rights recognizes the right to work, including the right of all persons to have the opportunity to support themselves by means of work they have freely chosen or accepted; article 7 recognises the right of all persons to fair and reasonable conditions of employment.

Article 6 of the UN Convention on the Elimination of All Forms of Discrimination against Women, of December 1979, deals with the traffic in women and requires states to take any appropriate measures, including legislation, to combat all forms of traffic in women and the exploitation of women by prostitution. In General Recommendation 19, the Committee on the Elimination of Discrimination against Women draws attention to the fact that in addition to established forms of trafficking there are new forms of sexual exploitation, including *sex tourism*, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals.

As most trafficking in persons occurs across national boundaries, it is particularly necessary to tackle the problem at the global level. Four conventions were concluded on the issue before the Second World War. In December 1949, the United Nations adopted the Convention for the Suppression of Traffic in Persons and of the Exploitation of Prostitution of Others which was intended to replace the four older conventions from 1904, 1910, 1921 and 1933. The 1949 Convention applies equally to adults and children. All the pre-war conventions and the 1949 Convention were concerned with combating the traffic in persons for the purposes of prostitution. Any discussion on the modern phenomena of trafficking however, should also include the transportation of persons under false promises or false identities.

Furthermore, ever since 1949, it has been accepted that the notion of consent of the trafficked person is irrelevant to the definition of trafficking. The notion stems both from a human rights viewpoint whereby the exploitation of another person is inherently wrong, and also the consideration that a person could at first consent to being trafficked with a view to becoming a prostitute but with little actual knowledge of the slave-like working conditions and ill-treatment they would subsequently experience.

According to article 17 of the 1949 Convention, states shall undertake to adopt or maintain such measures as are required to check the traffic in persons of either sex for the purpose of prostitution. In particular, they undertake to make such regulations as are necessary for the protection of immigrants or emigrants, and in particular women and children, both at the place of arrival and departure and while *en route*.

The 1949 Convention provides for a very limited monitoring mechanism. Seventy-one states are currently party to the Convention, including four CIS states.

The 1949 Convention however, has a limited definition of trafficking in persons that does not include many of the modern attributes of the phenomenon such as the enticement of persons under false promises.

According to article 1:

“The Parties to the present Convention agree to punish any person who, to gratify the passions of another;

(1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;

(2) Exploits the prostitution of another person, even with the consent of that person”.

States parties are obliged to notify the UN Secretary-General of the legislation and regulations on the subject of the Convention which are currently in force and to inform him/her every year of new acts and regulations in connection to the application of the Convention. The Secretary-General must publish the information periodically and send it to all UN member states. However, the Convention does not provide for a supervisory body, to systematically study the information. Monitoring mechanisms are equally absent or limited in the conventions concluded before the Second World War.

In practice, information supplied by states parties to the 1949 Convention is submitted to the Working Group on Contemporary Forms of Slavery of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. There is no systematic study of the information.

The Working Group was set up in 1974, has five members, chosen from amongst the Sub-Commission’s independent experts (elected by the UN Commission on Human Rights) and meets every year, prior to the Sub-Commission. The agenda includes the traffic in children, slavery and the slave trade, child prostitution and child pornography, children in the armed forces, the traffic in persons and the exploitation of prostitution of others. NGOs can attend the meetings of the Working Group.

The role of the Working Group is especially important, however, in respect to International Labour Organization (ILO) conventions, such as the Forced Labour Convention of June 1930, Convention 29, which has 141 ratifications, including 5 by CIS states. Due to the tripartite structure of the ILO, NGOs play a limited role in the ILO system. Only employers' or employees' organizations can submit representations to the ILO against a state party which fails to observe an ILO convention. Human rights organizations can therefore only raise cases of violation through one of those organizations. The ILO can refer to statements made by NGOs in the Working Group, especially if these statements are included in official UN documents. Other ILO conventions dealing with forced labour include Conventions 79 and 90 concerning night-time work of young persons. Convention 138 relates to child labour. (*See the Chapter contributed by the ILO on protection in the labour market for more information*). In June 1998, the ILO will draft a new convention on the most exploitative forms of child labour.

The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted in December 1990, stipulates that migrant workers or members of their families must not be held in slavery or servitude and that forced labour may not be demanded from them. However, this Convention only has 10 states parties to date and is waiting for another 10 ratifications to come into force. Notwithstanding this, the Convention presents a set of standards which insist on respect for the basic rights of all migrants, regardless of status.

Trafficking in children is clearly a major violation of international human rights law. Article 19 of the Convention on the Rights of the Child adopted in November 1989, requires states parties to take all appropriate legal and administrative measures and measures of a social and educational nature to protect children against exploitation, including sexual abuse. Article 32 governs conditions for child employment. Article 34 specifically refers to the obligation for states to protect children from sexual abuse and from their exploitative use in pornographic performances. Article 35 requests states to prevent the abduction of, the sale of, or traffic in children for any purpose or in any form. Article 37 addresses the prohibition of torture or other cruel, inhuman or degrading treatment or punishment. (According to article 1, a child is defined as every human being below the age of eighteen).

Finally, the UN Commission of Human Rights approved a "programme of action" for the prevention of the traffic in persons and the exploitation of the prostitution of others, at its 1996 session.

On yet another register, the Tourism Bill of Rights and The Tourist Code adopted by the World Tourism Organization (WTO) in 1985 contains provisions requesting states to prevent the use of tourism to exploit others for prostitution purposes. It also contains provisions relating to tourism professionals, as well as tourists.

NATIONAL REMEDIES⁷

This is not the place to conduct an analysis of the national legislation of each CIS country. It is however worth noting that a series of national safeguards would notably contribute to the fight against trafficking in women, as well as to the rehabilitation of victims. In February 1997, STV in Holland and the Global Alliance against Traffic in Women (GAATW) in Thailand drafted some “Standard Minimum Rules for the Treatment of Victims of Trafficking in Women and Forced Labor/Slavery-Like Practices” which would guarantee basic legal protection and possibilities for redress for the victims. The Minimum Rules include guarantees to:

- the right to freedom from persecution or harassment by those in positions of authority;
- access to competent translators during legal proceedings;
- access to free legal assistance and legal representation during criminal or other proceedings;
- access to legal possibilities of compensation and redress;
- provisions to enable women to press criminal charges and/or to take their offenders to court and adequate protection as witnesses (such as protection from harassment and other measures deemed appropriate to guarantee the women’s safety, etc.);
- legal permission to stay in the host country if return to one’s home country is unsafe or, if necessary, assistance to return;
- protection against reprisals either from the side of the violators or from the side of the authorities.

Legislation along these lines is already found to a certain extent in the Netherlands and Belgium. Similar provisions are currently under consideration in Italy.

⁷ See also the Concluding Recommendations from the International Conference on the Trafficking of Newly Independent States Women Abroad, held in Moscow, November 3-5, 1997 available from the Global Survival Network, Washington, www.globalsurvival.net.

A far as trafficking in children and sexual offences is concerned, the ECPAT Eastern European Network makes the following recommendations:

- ensure that all forms of sexual abuse of children are subject to public prosecution;
- press criminal charges against all customers of prostitutes under the age of 18 years, i.e. even customers of youths who have passed the age at which they can give their consent to sexual relations;
- criminalize all dealings in child pornography, even possession;
- adapt the trial proceedings related to sexual offences against children in order to satisfy the child's special need of protection and support (such as respecting the child's anonymity, protecting the child from reprisals, avoiding re-victimizing the child through lengthy interrogation procedures, etc.);
- protect those children who lose legal proceedings against the risk of prosecution for false accusation or of being harassed by other means.

On application of the law some possible activities are to:

- educate police, prosecutors, judges and attorneys on the UN Convention on the Rights of the Child and on sexual offences against children and their consequences;
- establish special units within the police in order to combat paedophile criminality and sexual offences against children;
- develop cooperation between police, social workers, psychologists and other vocational categories which come into professional contact with sexually exploited children;
- develop police and juridical cooperation by, *inter alia*, having all those countries not yet members join INTERPOL's Standing Working Party on Offences against Minors;
- introduce and apply rules of extra-territorial criminal responsibility whereby perpetrators who avoid proceedings in the country where the crime was committed may be tried in their home countries;
- find ways of keeping the perpetrator and the victim apart without the child being punished further by, for example, being torn away from his/her established environment.

ACTIVITIES FOR NON-GOVERNMENTAL ORGANIZATIONS

As acknowledged in the CIS Conference Programme of Action, strengthening cooperation with NGOs is a necessary complement to measures taken by the governments of the CIS countries. This is certainly a way to move forward in curtailing trafficking in women and children, combating “illegal” migration and criminal activities, and assisting in the return of undocumented migrants and victims of trafficking. (*See in particular paragraphs 36, 37, 38 and 42 of the Programme of Action*).

Although independent NGOs are a new feature on the CIS scene, they deserve every encouragement as they will play an increasingly crucial role. With respect to the complex issue of trafficking in women and children they are in a unique position with their experience at the grass roots level and independent status to win the confidence of women and children who are victims of trafficking.

In view of the fact that CIS countries are mainly countries of origin of trafficked persons, it is obvious that one of the most important contributions NGOs can make on this issue is prevention. They should therefore:

- engage in awareness raising efforts on this issue by way of public information campaigns;
- inform people about their rights;
- “educate” the media so that reporting changes from “sensationalism” to protection of victims from a human rights and rehabilitation angle;
- disseminate information on the actual situations and dangers in potential countries of migration; (IOM and UNHCR already provide such information programmes in certain Central and Eastern European countries).
- conduct field research especially in the CIS region. Their findings should be supplied to government institutions in CIS and Western European countries.

As an initial step, NGOs can also open free telephone lines so that victims can talk about their problems.

NGOs can provide counseling to the victims and encourage them to denounce their traffickers. In this case they must be prepared to give extensive support to victims whose security might be threatened and for whom this can be yet another ordeal. Collaboration with the police is necessary.

Shelters for victims should also endeavour to offer medical assistance to victims who suffer from HIV/AIDS and other sexually transmitted diseases, as well as from mental health problems.

As has been stated, very little is known about the fate of women returned to their countries of origin. NGOs can offer counseling services as well as psychosocial assistance. NGOs can also offer victims a place to meet other victims, thus breaking the isolation and sense of shame by opening discussions with women who have had similar experiences. Very good examples of such work exist in other regions, notably in Asia. The Filipino NGO BATIS, for instance, has a programme entirely geared toward rehabilitation and counseling to Filipino migrant women and their children who return to the Philippines.

As for children, more research is needed into the situation of children who are returned to their countries of origin.

As is the case for many other human rights issues, NGO advocates can greatly increase their impact through networking with other NGOs and organizations, at the national, regional and international level, such as trade unions, churches, women's groups, children's advocacy groups, etc. Networking not only enables NGOs to exchange experiences but, more usefully, it enables NGOs to devise common strategies at the regional and international levels to carry out effective lobbying.

Advocacy can be exerted at the national level, to achieve ratification of international treaties and conventions not yet ratified by CIS countries. In cases where the relevant country has already ratified a given treaty or convention, NGOs should be actively involved in monitoring its implementation.

A number of networks and coalitions already exist at the international level, such as the Global Alliance Against Traffic in Women, based in Bangkok, Thailand, of which STV is a member in the Netherlands. Both organizations have published a resource book in June 1995. The book contains full details about some 80 organizations addressing the problem of trafficking in women around the world. Each entry lists the address of the organization, with a short description of its mandate, together with its focus and strategies, as well as the services it provides.

An excellent example of such NGO mobilization can be found in the La Strada project, a programme for the prevention of traffic in women in Central and Eastern Europe. This project is supported by four partner organizations: the Dutch Foundation against Trafficking in Women (STV), the Young Women's Christian Association of Poland (YWCA), the Polish Feminist Association (PSF) and the Central European Consulting Center for Women's Projects (ProFem), based in the Czech Republic. La Strada is primarily funded by the PHARE and TACIS Democracy programme of the European Union, as well as by many other funds. La Strada project could profitably be used as a case study for NGO training.

As for trafficking in children, ECPAT's extensive experience in this topic makes it the best global network of organizations and individuals working together for the elimination of child prostitution, child pornography and the trafficking of children for sexual purpose.

Concerning the application of the UN Convention on the Rights of the Child, NGOs should contact the NGO Group for the Convention on the Rights of the Child.

**NGO Group for the Convention on the Rights of the Child
c/o Defence for Children International**

**1, rue de Varembe
P.O. Box 88
1211 Geneva 20
Switzerland**

**Tel.: (41-22) 734 05 58
Fax: (41-22) 740 11 45**

This a coalition of international non-governmental organizations, enjoying observer status with the UN, which work together to facilitate the implementation of the convention. The NGO Group provides a focal point to two-way information flow between the non-governmental community and the UN Committee on the Rights of the Child. It has created subgroups to follow the activities of the UN, on issues such as child labour, sexual exploitation, refugee children, etc. To facilitate the monitoring and implementation of the convention at the national level, the NGO Group is working to encourage the creation and development of national coalitions of NGOs. At present, the NGO Group has made contact with approximately 64 such national coalitions. The NGO Group offers support and assistance to national coalitions as they carry out their children's rights monitoring tasks.

The Right to Protection on the Labour Market

Contributed by the International Labour Organization

The unique strength of the International Labour Organization derives from the manner in which the tripartite system enables the representatives of workers and employers, on an equal footing with those of governments, to take part in all discussions and decision-making.

The International Labour Organization (ILO) has long been concerned with the special problems of migrant workers. A basic text on the subject is the Migration for Employment Convention (Revised), 1949 (No. 97), which contains a series of provisions designed on the one hand to assist migrants for employment and on the other hand to secure equality of treatment in various fields. In 1975 the ILO adopted the Migrant Workers (Supplementary Provisions) Convention No. 143 which contains further provisions aimed at eliminating abusive conditions and promoting equality of treatment and opportunity. In the first place Convention No. 143 provides that governments must respect the basic human rights of all migrant workers. They must also prevent irregular migration for employment and stop migrant trafficking activities. Secondly, governments must declare and pursue a policy to secure equality of treatment in respect of matters such as employment and occupation, social security, and trade union and cultural rights. The full texts of international labour conventions and recommendations concerning migrant workers (excluding those that cover only social security) is available in a handy little brochure free of charge from the ILO in Geneva.

The unique strength of the International Labour Organization derives from the manner in which the tripartite system enables the representatives of workers and employers, on an equal footing with those of governments, to take part in all discussions and decision-making. This active involvement of employers and workers side-by-side with governments also characterizes every stage of the ILO's standard-setting activities. The success of this work largely depends on the extent to which workers and their organizations make use of the rights conferred on them with a view to promoting a more effective and widespread application of ILO standards. Workers' organizations have an important role to play both at the national and international level in monitoring the effective application of ratified conventions. The procedures through which the non-observance of ratified conventions may be challenged, will be dealt with in Chapter VI of this manual.

The International Labour Organization (ILO)

The International Labour Organization (ILO) has the obligation, as stipulated in its Constitution, to protect the interests of workers who have been obliged or have wanted, for economic or other reasons, to seek work in a foreign country. To that end, the ILO engages in:

- *the formulation of international policies and programmes to promote basic human rights, improve working and living conditions and enhance employment opportunities;*
- *the creation of international labour standards to serve as guidelines for national authorities in putting these policies into action;*
- *an extensive programme of international technical cooperation;*
- *training, education, research and publishing activities to help advance all these efforts.*

Although in general, and apart from some explicit exceptions, the conventions and recommendations adopted by the International Labour Conference cover all workers irrespective of their nationality, it was nevertheless accepted to adopt a number of international labour standards devoted exclusively to migrant workers or including provisions relating to migrant workers in more general instruments.

Many resolutions adopted by the International Labour Conference, frequently on the initiative of one or more workers' delegates to the Conference, also contain requests that the Governing Body¹ should place a particular matter on the agenda of the Conference with a view to the adoption of one or more international labour conventions or recommendations. Thus the adoption in 1975 of a new international convention (No. 143, see above) concerning the protection of migrant workers, and of a recommendation on the same subject, was the result of resolutions submitted in 1971 and 1972 by a number of workers' delegates. It is not surprising that the initiative can more often than not be traced to the trade unions because it is after all the workers who benefit directly from international standards. Trade unions, in turn, are encouraged to collaborate with NGOs for a fruitful exchange of information.

¹ The GB is tripartite and elected every three years at the ILC. It draws up the agenda for the Conference and other ILO meetings, takes note of their decisions and decides on the consequent action to be taken. It appoints the Director-General and directs the activities of the ILO.

Although it is not possible, in the space of a few pages, to describe in any detail how the ILO works, we hope that the following chapters will help NGOs and migrant workers to use the standards and machinery of the ILO as instruments for the purpose of protecting those workers' rights and freedoms in the country to which they have moved temporarily or in the hope of settling. To the extent that this goal is achieved, it will strengthen the hands of all who see in international labour standards an important means of promoting human rights and social justice.

ILO Conventions

Conventions are open to ratification by member states. They are international treaties which are binding on the countries which ratify them. These countries voluntarily undertake to apply their provisions, to adapt national law and practice to their requirements, and to accept international supervision.

Conventions are adopted because the International Labour Conference believes that certain standards should be applied. An adopted convention is then open to ratification; and when ratified by a country, that country's laws and practices should conform to the convention. Conventions may be directly incorporated in laws, or regulations may come into force which are based on their principles. Despite the fact that conventions cannot be enforced, they nevertheless influence the conditions of work and life of millions of workers.

Recommendations, on the other hand, are not international treaties. They set non-binding guidelines which may orient national policy and practice. They may in themselves cover a particular subject or may supplement the provisions contained in conventions and spell them out in greater detail. Recommendations can carry a certain moral force.

ILO'S FUNDAMENTAL HUMAN RIGHTS CONVENTIONS

Conventions on fundamental human rights cover basic principles on freedom of association, abolition of forced labour and non-discrimination in employment and occupation. These principles apply to all workers and also to child labour.

The ILO's Declaration of Philadelphia (1944)² states that:

- Labour is not a commodity;
- freedom of expression and association are essential to sustained progress;
- all human beings have the right to pursue their material and spiritual development in conditions of freedom, dignity, economic security and equal opportunity.

These principles, to which all member states commit themselves,

have influenced the evolution of human rights action globally. Several of the freedoms contained in the Universal Declaration of Human Rights were included at the request of the ILO, which is responsible within the UN system for their protection. More than 75 ILO Conventions are relevant to the achievement of the UN's International Covenant on Economic, Social and Cultural Rights. The ILO's fundamental human rights conventions are:

- **Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)**

Establishes the right of all workers and employers to form and join organizations of their own choosing without prior authorization, and lays down a series of guarantees for the free functioning of organizations without interference by the public authorities.

*The International Labour
Conference*

*The ILC elects the Governing
Body; adopts the ILO's budget,
financed by contributions from
member states; sets international
labour standards; passes reso-
lutions which provide guidelines
for the ILO's general policy and
future activities; and provides a
world forum for the discussion of
social and labour questions.*

² The General Conference of the International Labour Organization meeting in its Twenty-sixth Session in Philadelphia in 1944, adopted the so-called "Philadelphia Declaration" concerning the aims and purposes of the International Labour Organization and the principles which should inspire the policy of its Members.

- **Right to Organize and Collective Bargaining Convention, 1949 (No. 98)**

Provides for protection against anti-union discrimination, for protection of workers' and employers' organizations against acts of interference by each other, and for measures to promote collective bargaining.

- **Forced Labour Convention, 1930 (No. 29)**

Requires the suppression of forced or compulsory labour in all its forms. Certain exceptions are permitted, such as military service, convict labour properly supervised, emergencies such as wars, fires, earthquakes, etc.

- **Abolition of Forced Labour Convention, 1957 (No. 105)**

Prohibits the use of any form of forced or compulsory labour as a means of political coercion or education, or punishment for the expression of political or ideological views, workforce mobilization, labour discipline, punishment for participation in strikes, or discrimination.

- **Discrimination (Employment and Occupation) Convention, 1958 (No. 111)**

Calls for a national policy to eliminate discrimination in access to employment, training and working conditions, on grounds of race, colour, sex, religion, political opinion, national extraction or social origin and to promote equality of opportunity and treatment.

- **Equal Remuneration Convention, 1951 (No. 100)**

Calls for equal pay for men and women for work of equal value.

- **Minimum Age Convention, 1973 (No. 138)**

Aims at the abolition of child labour, stipulating that the minimum age for admission to employment shall not be less than the age of completion of compulsory schooling.

— **RATIFICATION OF THE FUNDAMENTAL** —
HUMAN RIGHTS CONVENTIONS

In May 1995, following the ILO's 75th Anniversary and the discussions in the World Summit on Social Affairs, a campaign for the ratification of these conventions was launched by the Director-General of the ILO. Between then and early 1997, more than 20 ratifications of these conventions were registered, and at least 30 others were declared by governments to be under active consideration.

The ILO Website

For more information about ILO's work and to gain access to ILO's databases NATLEX and ILOLEX, visit ILO's homepage located at:

<http://www.ilo.org>

NATLEX contains information on labour, social security and related human rights legislation on a national basis where legislation on migrant workers is one of the subject matters covered by the database.

ILOLEX contains information about international labour standards, ratifications of member states and the reports of the supervisory bodies on the application of standards.

To gain access to the website of ILO's migration branch, go into the homepage of the department called "EMPFORM". There you will find a hypertext link to MIGRANT's website.

The total ratifications for each of these conventions follows:

Convention No. 29: 143 ratifications,
including:
Azerbaijan, Belarus,
Kyrgyzstan, Russian Federation,
Tajikistan, Ukraine.

Convention No. 87: 119 ratifications,
including:
Azerbaijan, Belarus,
Kyrgyzstan, Moldova,
Russian Federation, Tajikistan,
Ukraine.

Convention No. 98: 133 ratifications,
including:
Azerbaijan, Belarus,
Kyrgyzstan, Moldova,
Russian Federation, Ukraine.

Convention No. 100: 127 ratifications,
including:
Armenia, Azerbaijan,
Belarus, Kyrgyzstan,
Russian Federation,
Tajikistan, Ukraine.

Convention No. 105: 120 ratifications
including:
Georgia and Moldova.

Convention No. 111: 123 ratifications,
including:
Armenia, Azerbaijan,
Belarus, Kyrgyzstan,
Moldova, Russian Federation,
Tajikistan, Ukraine.

Convention No. 138: 51 ratifications,
including:
Azerbaijan, Belarus,
Kyrgyzstan, Russian Federation,
Tajikistan, Ukraine.

INTERNATIONAL LABOUR STANDARDS DEVOTED TO MIGRANT WORKERS AND THEIR FAMILIES

Under the ILO instruments (C.97 and C.143), the term “migrant for employment” means “a person who migrates, from one country to another with a view to being employed otherwise than on his own account”. Straight away, this definition excludes people who migrate to work in a self-employed capacity.

The following international conventions and recommendations have been adopted by the ILO to protect the interests of migrant workers in particular:

- C.97
Migration for Employment Convention (Revised), 1949.
- R.86
Migration for Employment Recommendation (Revised), 1949.
- R.100
Protection of Migrant Workers (Underdeveloped Countries) Recommendations, 1955.
- C.143
Migrant Workers (Supplementary Provisions) Convention, 1975.

*The full text of these standards is available in a handy little brochure, free of charge, from the International Labour Office
CH-1211 Geneva 22
Switzerland*

This definition is largely instrumental: it aims to delineate the scope of the conventions or certain of their provisions by delimiting the field of application. These instruments specify that the definition includes any person admitted as a migrant for employment on a legal basis. *A priori* this does not exclude from the category of “migrants for employment” people who have not been admitted to the country of employment with a legal status as a migrant worker. These people, who might be called irregular, undocumented or illegal migrant workers, are not covered by Convention No. 97. However, their situation is provided for in the first part of Convention No. 143.

Certain categories of people may not be considered as migrant workers: neither the artist employed for a series of shows nor the lawyer representing a client before a court is a “migrant”. Other categories such as seamen or seasonal workers have been

The main conventions and recommendations dealing with social security matters concerning migrant workers are:

- *C.118
Equality of Treatment (Social Security) Convention, 1962.*
- *C.157
Maintenance of Social Security Rights Convention, 1982.*
- *R.167
Maintenance of Social Security Rights Recommendation, 1983.*

excluded from the scope of these instruments owing to the existence of standards which apply specifically to this category or to special difficulties of application. They are nevertheless migrants and workers. Other categories, such as students, may raise problems in relation to making a distinction between the non-economic activities in which they are primarily involved and the activities carried out within the framework of a job, whether or not it is paid, which they are carrying out in parallel. The question is not just a theoretical one since certain groups of people excluded by the conventions may add up to a large number of workers.

Consideration must also be given to the family of the migrant worker. Numerous provisions in ILO instruments apply in general provided there is regular residence in the migrant worker's country of employment. However, these provisions are restricted to certain aspects of the situation of the migrant worker's family. Any review of national legislation and practices needs to cover the totality of the family's situation, whether the family remains in the country of emigration or resides in the country of employment. In addition, it is necessary to consider the concept of "family" used in national legislation, which may vary significantly from one country to another.

A migrant worker is defined by many legal attributes and situations: he or she is a *foreigner*, a *migrant for employment*, a *wage earner*, a *person subject to social security* (paying contributions and deriving benefits) and a *foreign resident*. Under each of these statuses, he or she would be subject to certain laws and regulations.

— THE RIGHTS OF MIGRANT WORKERS —

There are so many rights and freedoms in international labour conventions and recommendations that a certain selection had to be made for this article. Those that were considered to be of least relevance to the great majority of today's ordinary migrant workers have not been mentioned here. Information on the article of a certain Convention (C.) or paragraph of a Recommendation (R.) which covers the respective rights and freedoms will be given in brackets.

• **Before Leaving the Home Country and During the Journey to the New Country**

Information about Working and Living Conditions

A worker has the right to know, before leaving the home country, the general conditions of work and life in the intended country of work, and the employment opportunities which exist there. {R.86, para. 5(2)}

Recruitment

Only public authorities, prospective employers or private agencies should carry out the recruitment of migrant workers. Recruitment by employers or agents should be subject to prior authorization and carried out under official supervision. The intending migrants should thus have the right to protection against various possible forms of exploitation, such as the charging of excessive fees, the use of misleading propaganda, and attempts to evade immigration controls. {C.97, art. 3; C.97, Appendix I, art. 3, and Appendix II, art. 3}

Contracts

Migrant workers have the right, where governments supervise what goes into an employment contract, to receive before departure a written contract of employment, covering conditions of work and terms of employment, particularly the rate of pay. {C.97, Appendix I, art. 5, and Appendix II, art. 6. See also R.86, Model Agreement, art. 22}

Facilitated Departure

When workers leave their own country, especially for the first time, they usually need help to cope with the practical and administrative steps involved. They have the right to assistance from the public authorities to deal with documentary and other formalities; and they should not be charged for the service. {C.97, art. 2; C.97, Appendix I, art. 4 and 6, and Appendix II, art. 4 and 7}

Medical Attention

Workers, and members of their families authorized to accompany them, should have a medical examination and attention before departure, during the journey and on arrival. {C.97, art. 5; R.86, para. 12 and 14; R.100, para. 8}

Free Travel

Migrant workers who have been recruited or engaged by an employer should not have to pay the cost of their own travel, nor, in appropriate cases, that of their families. While there is, strictly speaking, no absolute right to free travel, the recruiter or the employer is expected to pay travelling expenses. The transport of migrant workers should in any case be subject to official authorization, and any fare charged should be reasonable. {R.100, para.7}

• On Arrival

Customs Exemption

Migrant workers have the right to take into their country of work, free of customs duty, their personal effects – including those of members of their families authorized to accompany or join them – as well as the tools of their trades. {C.97, Appendix III, art. 1}

Assistance in Finding Suitable Employment

Where a migrant needs assistance in finding suitable employment, he or she is entitled to the services of the appropriate public authority, without payment of fees or administrative costs. {R.151, para. 2(a) in conjunction with C.97, art. 2. See also C.97, Appendix II, art. 9 and 10}

Settling In

During an initial period in the country of work, migrant workers are entitled to any necessary assistance in settling into their new environment. Possible types of service include interpretation, help with documentation and other formalities, and the supply of information and guidance on personal and family problems such as housing. There should be no discrimination when it comes to access to accommodation. {C.97, art. 6(1)(a)(iii); C.97, Appendix I, art. 6(c), and Appendix II, art. 7(c); R.100, para. 21 and 22}

• During Employment

Wages and other Terms of Employment

With regard to wages, migrant workers have the following rights:

- equality with the nationals of the country of work;
- minimum wage rates, fixed either by collective bargaining or by the competent authority;
- participation, through their representatives, in the operation of statutory processes for fixing wages, where they exist;
- to receive payment in the form of cash, at regular intervals;
- where food, housing, clothing and other essential supplies and services form part of remuneration, to controls on the part of the competent authority so as to ensure that such “payments in kind” are adequate, fair, and do not exceed a certain proportion fixed by the authority.

The principle that migrant workers should receive treatment at least equal to that which is applied to nationals of the country concerned also covers other terms of employment, including hours of work, rest periods, holidays with pay, welfare facilities and other benefits. The most important aspects of this matter are dealt with separately in the following subparagraphs. {C.97, art. 6(1)(a)(i); R.100, para. 23, 25 and 36; R.151, para. 2}

Working Conditions

The physical conditions under which migrants work are not separately regulated by ILO standards. There are, however two ways in which their rights are protected: firstly, by general standards governing such matters as working hours, protection against toxic substances or dangerous machinery, noise and vibration, as well as those designated to give special protection to women and young workers. Secondly, by the application of the “equal treatment” principle referred to previously, which should ensure that migrant workers enjoy the same protection as the nationals of the country in which they work. {C.143, art. 12(g)}

Job Security

A migrant worker also has the right to “equal treatment” in respect to job security. While no international labour convention establishes an absolute right to a job, migrant workers should not be subject to discrimination if the work force has to be reduced, for example, for reasons of redundancy. {C.143, art. 8; R.151, para. 2(d)}

Promotion

The fact that a migrant worker may have been recruited for a particular job does not mean that he or she must remain in the same position regardless of experience, ability or conduct. He/she should be given the same opportunities for promotion as nationals of the country. {R.100, para. 38, 39 and 40; R.151, para. 2(c)}

Social Security

There are a number of relevant international labour conventions in this field, and it would not be possible to summarize all of them here. However, migrant workers have a certain number of basic rights, for example, to treatment no less favourable than that enjoyed by nationals of the country concerned, in respect of such matters as benefits for employment injury, maternity, sickness, invalidity, old age, death, family responsibilities and unemployment. Where a migrant leaves his or her former country of employment, he or she should not suffer a loss of rights. Benefits should basically follow him or her wherever he or she may reside. {C.118; C.97, art. 6(1)(b); R.100, para. 45, 46 and 47; C.143, art. 10; R.151, para. 34; C.157; R.167}

Health and Safety

Migrant workers have special needs in respect to health and safety, and therefore should benefit from special measures additional to those applicable to workers in general. Special measures include measures to protect them against illnesses to which they were not exposed in their country of origin, and to which they have reduced immunity; advice and help with psychological problems arising from an unfamiliar working and living environment; and instruction and training in the prevention of occupational accidents and diseases, including familiarization with warning signs and symbols relating to work hazards. {R.100, para. 45 and 46; R.151, para. 20, 21 and 22}

Trade Union Rights

The right of all workers in member states of the ILO to belong to trade unions is protected by several conventions, Nos. 87 and 98 in particular, and by the Constitution of the ILO, so that this basic right must be respected even in countries whose governments have not ratified the conventions. In addition, the conventions and recommendations concerning migrant workers contain several references to the obligation to guarantee the trade union rights accorded to local workers to migrant workers.

The principal rights in this area, apart from the rights to form and join unions, are as follows:

- the right to engage in collective bargaining;
- to elect representatives for this and other purposes;
- to use machinery for arbitration and conciliation for the settlement of disputes;
- to be consulted by management on matters affecting conditions of work and terms of employment.

{C.87; C.97, art. 6(1)(a)(ii); C.98; C.135; R.143; C.141; R.149; C.143, art. 10; R.151, para. 2(g)}

Access to Courts

Migrant workers can make use of courts in the same way as nationals when they feel aggrieved about their working conditions, trade union rights or social security matters. {C.97, art. 6(1)(d); C.143, art. 9(2); R.151, para. 33 and 34}

Access to Other Jobs and Vocational Training

Jobs must be open to migrant workers irrespective of the level of skills involved but according to the worker's level of qualifications. If the migrant worker wishes to acquire more skills, he has the same right as nationals to do so.

Access to jobs, however is not unconditional. A government may require a minimum period of two years of lawful employment before a migrant worker has a free choice of work in the sense that he can pick up such other jobs as are available. A government may restrict access to limited categories of employment, in particular the civil service, where this is considered necessary in the interests of the state. {R.100, para. 38, 39 and 40; C.143, art. 14(a) and (c); R.151, para. 2(b) and (d). See also C.97, art. 8, and R.151, para. 31}

Freedom of Movement

Migrant workers are free to move at any time from one place to another in the country of work, providing that they are lawfully within the territory, subject only to limitations which apply also to national workers. {C.143, art. 14(a)}

• Social and Civic Rights

Education and Culture

Migrant workers are entitled to equal treatment in respect of education, and in addition, to assistance if necessary in learning the language of the country where they work. Facilities should be provided for their children to learn their own mother tongue.

Migrant workers and their families have the right to participate in the cultural life of the country on a basis of equality with nationals and at the same time to maintain their own culture. They also have the right to practise their religion and to adhere to national customs and ceremonies. {R.100, para. 49(d) and (e); C.143, art. 12(f); R.151, para. 7}

Transfer of Funds to Home Country

Within the boundaries of possible limits on the import and export of currencies, migrant workers have the right to transfer such part of their earnings and savings as

they wish – a right which, in practice, enables them to contribute substantially to the welfare of their family members who have stayed behind in the home country. {C.97, art. 9}

Family Reunification and Visits

There is no absolute right to family reunification, but the relevant ILO standards recommend that measures be taken in this direction by the governments concerned.

During paid annual holidays, migrant workers should be allowed to visit their families after at least one year of service, in cases where a family cannot join the worker. Alternatively, the family should be allowed to visit the worker for a corresponding period. {C.143, art. 13; R.151, para. 13, 14, 15, 16, 17, 18 and 19}

Advisory Services

In adapting to an unfamiliar situation, migrant workers need, and are entitled to receive, assistance and advice from the competent authority. This would normally include information on social matters, including aid from the social services – given if possible in the mother tongue of the persons concerned, otherwise with interpretation and translation facilities. These services should be provided free of charge. {C.97, art. 2; R.151, para. 7(1)(a) and 24}

• Repatriation

Appeal against Arbitrary Decisions

Migrant workers have the right to appeal against a decision to terminate their employment or to deprive them of their resident status. The workers affected are entitled to challenge the decision, and if successful, to reinstatement or time to find alternative employment, and to compensation for loss of wages. Migrant workers have the same right to legal aid as national workers, and should have the possibility of being assisted by an interpreter. {R.151, para. 32, 33 and 34}

Travel Costs

Existing ILO standards do not provide an absolute right to free travel back to the home country. However, if a migrant worker fails, for a reason for which he or she is not responsible, to secure the employment for which he or she has been recruited, or other suitable employment, he or she will not have to pay the cost of his or her return, nor that of members of his or her family who have been authorized to accompany or join him or her.

A migrant worker and his family members who are expelled from a country may have to pay his or her own travel costs but he or she does not have to bear the costs

of the administrative or judicial procedures leading to the expulsion, or of implementing the order, for example of police escorts to the frontier. {C.97, Appendix II, art. 9; R.100, para. 10; C.143, art. 9(3)}

Assistance with Arrangements

The arrangements for leaving the country of employment can be complicated and difficult, and migrant workers are entitled to assistance in dealing with the problems involved. Irrespective of whether they were present or employed legally or illegally, they have a right to outstanding remuneration, severance pay, compensation for holidays not taken, as well as, in certain cases, the reimbursement of social security contributions. If any difficulty arises in obtaining these entitlements, they should enjoy equal treatment with national workers as regards legal assistance. {C.143, art. 9(1) and (2); R.151, para. 33 and 34}

Rights of Returning Migrants in the Home Country

Assuming that they have retained the nationality of their state of origin, migrant workers have the right to assistance when they return to their home country, to whose finances they will normally have contributed during their absence abroad by sending home a part of their earnings. They are entitled to unemployment benefits, if necessary and if it exists, assistance in obtaining work – for example by not being obliged to satisfy conditions as to previous residence or employment. Their rights in the field of social security would also include rights acquired in the course of their employment abroad.

As in the case of arrival in the country of employment, migrant workers and their families should be exempt from customs duty on their personal possessions, including hand tools and portable equipment which they have owned for an appreciable time and which they intend to use in the course of their occupation. {C.97, Appendix III, art. 2; R.86, para. 20}

INFLUENCE OF INTERNATIONAL LABOUR STANDARDS ON NATIONAL LEGISLATION

Global standards have the purpose of fixing a floor below which regional, bilateral or national laws and practices should not fall. The value of conventions and recommendations depends largely on the action taken to make them effective at the national level. In general, international labour standards do not overwrite domestic law.

When a convention or recommendation has been adopted by the International Labour Conference, the text of the new “instrument” is sent to all member states so that they may consider applying it. The government must then submit both conventions and recommendations to the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action. The ‘competent authority’ will in most cases be the national parliament, legislative assembly or congress. It is for that body to decide whether the action of the International Labour Conference should be followed up at national level, by translating the international standards into national legislation.

The examination of a new convention or recommendation often leads the government to introduce new social measures. This may be merely with a view to bringing the national legislation into line with internationally adopted standards, or may be the first step towards ratification and formal acceptance. The influence of ratified conventions may make itself felt in various ways and at different procedural stages. Ratification entails, firstly the obligation to make the convention effective in national law, secondly reporting requirements towards the ILO and, thirdly, the possibility that the observance by the ratifying state of the rights recognized and the other provisions included in the convention will be challenged at the international level. Recommendations cannot formally be ratified or create international obligations; they offer guidance and inspiration for national laws and practices.

In some countries, legislative amendments which are necessary to give effect to a convention are introduced by the very act which authorizes ratification. In some cases, even if no reference is made to a ratified convention in the relevant legislation, its influence is demonstrated by the fact that its essential provisions are reproduced word for word in national legislation.

PROCEDURES IN RESPECT OF NON-OBSERVANCE OF ILO STANDARDS

— THE GENERAL SUPERVISION — OF STANDARDS

- **Periodic Reports by Governments**

Member states of the ILO are required to report on the effect given to conventions they have ratified. Every second year, reports deal with particularly important conventions, such as those on trade union rights and migrant workers; other conventions are normally reported on every fourth year. In general, the reports describe the extent to which the conventions in question are made effective through legislation, through practice, or both.

- **Special Reports**

In addition to the above, member governments may be requested to report on the law and practice in their countries with regard to specific conventions which they have not ratified, and with regard to recommendations. This provides the basis of a general survey of a subject, from which certain conclusions may be drawn. In effect, this ‘survey’ provides detailed information regarding the scope and limits of the standards summarized here in simple language.

- **The Committee of Experts**

The reports referred to above are examined by the ILO Committee of Experts on the Application of Conventions and Recommendations. This is made up of independent persons of eminence in law or social questions and who possess a detailed knowledge of the labour field. Experts are drawn from all parts of the world and they are appointed by the Governing Body of the ILO in their personal capacity for a period of three years. The Committee’s fundamental principles call for impartiality and objectivity in pointing out the extent to which it appears that the position in each state is in conformity with the terms of the conventions and the obligations which that state has undertaken by virtue of the Constitution of the ILO.

- **The Conference Tripartite Committee**

Unlike the Committee of Experts, this Committee, appointed during each session of the International Labour Conference, is tripartite. The three sides – government,

employer and worker – have equal voting strength. The Committee's function is to examine and discuss with representatives of the governments concerned the reports of the experts, and to report in turn to the Conference.

- **The Freedom of Association Committee**

The existence of the Committee on Freedom of Association of the Governing Body of the ILO reflects the importance which the ILO as a whole attaches to this subject. It can receive complaints from trade unions to the effect that freedom of association is being infringed upon, regardless of whether the government concerned has ratified the relevant conventions.

— **THE ROLE OF TRADE UNIONS** —

- **Information for Members**

The ILO would not be able to function effectively if the workers did not participate fully in its work, especially concerning the creation and application of standards. Trade unions therefore have an invaluable role to play in ensuring that workers know what the ILO is, and how to make good use of its machinery.

- **Relations with Governments and Employers**

Trade unions need to maintain good working relationships with governments. This includes a constant exchange of information. Trade unions have the right to receive copies of the periodic reports on conventions submitted by governments to the ILO, and to comment on them, directly to the ILO if they wish.

Relations with employers are equally important, so that the principle of tripartism can be reflected at national and local levels. Standards and other ILO matters should be discussed regularly, so that both workers' and employers' organizations can participate in national efforts to improve the conditions of the workers as well as the well-being of the country.

- **International Trade Union Organizations**

Cooperation with international trade union organizations is practically indispensable if workers are to use the services of the ILO to the full extent possible. These organizations are of two types: global confederations to which national trade union centres are affiliated, and sectoral organizations catering for individual national trade unions, for example metalworkers. Belonging to either of these types of international organizations greatly strengthens the affiliated unions.

- **Relations with the ILO**

All trade unions have the right to maintain direct relations with the ILO, and can seek its advice and information. As regards the application of ratified conventions, unions are entitled to send information to the ILO, and to raise a case if necessary; they can do this alone, or with the backing of an international trade union organization.

— **THE ROLE OF NGOs** —

Despite the fact that ILO's collaboration with NGOs has grown significantly at the grass-roots level over the years, only a selected group of NGOs are granted official status with the Organization to be represented at the Labour Conference and other ILO meetings. Whereas both, workers' and employers' organizations, play an active role in the ILO, NGOs are not allowed to take part in discussions and decision-making. By forming alliances with the social partners (workers and employers) or with governments, NGOs may be able to influence decision-making and to put in representations alleging non-compliance with a ratified convention. NGOs are encouraged to elaborate networks with the social partners and to collaborate with labour unions in drawing their attention to problems and obstacles that migrant workers may have to face in a foreign country. Unions may then want to raise the case and make use of the ILO complaints procedures.

Although NGOs play a very limited role in ILO's discussions and decision-making processes, they are encouraged to embark on ratification and promotion campaigns with regard to international labour conventions and recommendations. This can be done on a national as well as an international level. NGOs are an important intermediary link to inform the public and concerned groups about their rights, which international instruments are at their disposal and what the ILO can do for them.

There are many NGOs whose aims and activities are of interest to the International Labour Organization and which are in a position to afford it valuable cooperation. Therefore, the ILO established a 'Special List' of non-governmental international organizations in order to place the ILO's relations with these organizations on a systematic footing. Only NGOs which meet certain conditions are eligible for admission to the 'Special List' (a list of conditions to be met and of documents to be submitted is available from the ILO, Geneva). Eight non-governmental international organizations have been granted full consultative status,³ while twelve have regional consultative status.

³ Certain NGOs are granted enhanced powers of access to the ILO and its official organs.

The mere fact of inclusion in the special list does not of itself confer on any organization the right to participate in ILO meetings. It does, however, facilitate consideration of the advisability of inviting the organization to a particular meeting.

As far as representation at the International Labour Conference is concerned, the President of the Conference may, in agreement with the Vice-Presidents, permit representatives of NGOs with which the ILO has established consultative relationships and with which standing arrangements for representation at the Conference have been made, to make or circulate statements for the information of the Conference on questions which are being considered by the Conference, other than administrative and financial questions. Only NGOs with full consultative status are invited to be represented at meetings of the Governing Body.

In addition to participation in ILO meetings by NGOs on the Special List, the Office is ready at any time to take into account information and suggestions of a technical character provided by such an organization if the Director-General considers the information of real value.

CONSTITUTIONAL PROVISIONS REGARDING
— **THE NON-OBSERVANCE OF INTERNATIONAL** —
LABOUR CONVENTIONS

• **Articles 24 and 25 of the Constitution**
Text and Commentary

Article 24

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.

Article 25

If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

These two articles enable trade unions to make formal representations when they feel that a government is disregarding a convention which it has ratified. They are in addition to the right, referred to earlier, to challenge governments before the Committee of Experts and through the Conference Committee.

• **Articles 26 to 29**
Text and Commentary

Article 26

1. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles.

2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, as hereinafter provided for, communicate with the government in question in the manner described in article 24.

3. If the Governing Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry⁴ to consider the complaint and to report thereon.

4. The Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference.

5. When any matter arising out of article 25 or 26 is being considered by the Governing Body, the government in question shall, if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government in question.

⁴ Such commissions are composed of three prominent persons appointed in a personal capacity. The quasi-judicial nature of their proceedings and the full independence in which they are expected to function are reflected in the fact that their members are requested to make a solemn declaration in which they undertake "to perform their duties and exercise their powers honourably, faithfully, impartially and conscientiously".

Under the article 26 procedure, several workers' delegates to the 1981 International Labour Conference lodged a complaint against the Government of the Dominican Republic for violating, *inter alia* and insofar as Haitian migrant workers were concerned, the ILO conventions on forced labour (Nos. 29 and 105). A Commission of Inquiry was set up which investigated the matter in both the Dominican Republic and Haiti and which unearthed a great deal of information suggesting that both governments were to some extent in contravention of international labour standards.

Article 27

The Members agree that, in the event of the reference of a complaint to a Commission of Inquiry under article 26, they will each, whether directly concerned in the complaint or not, place at the disposal of the Commission all the information in their possession which bears upon the subject matter of the complaint.

Article 28

When the Commission of Inquiry has fully considered the complaint, it shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken.

Article 29

1. The Director-General of the International Labour Office shall communicate the report of the Commission of Inquiry to the Governing Body and to each of the governments concerned in the complaint, and shall cause it to be published.

2. Each of these governments shall within three months inform the Director-General of the International Labour Office whether or not it accepts the recommendations contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice.

— POSSIBLE ACTION IN THE CASE OF NON-RATIFICATION — OF PERTINENT ILO CONVENTIONS —

Where the pertinent conventions are not ratified – and this is unfortunately the case in many ILO member states and especially in migrant-receiving countries – the Office can offer information and policy advice under technical cooperation auspices. There is also the possibility of invoking 'special surveys' on discrimination suffered by migrant workers.

The Director-General can further offer his good offices, and this at the national level as well when several countries are involved. One notable case was the expulsion of tens of thousands of Egyptian and Tunisian workers from the Libyan Arab Jamahiriya in August 1985. The Director-General of the ILO offered his good offices to assist the countries in finding solutions to problems such as the non-payment of wages, compensation due to premature termination of employment, reimbursement of social security contributions, etc. Government representatives of the Libyan Arab Jamahiriya and Tunisia met under the Office's auspices and discussed the methods proposed to deal with those problems in the light of the Organization's standards.

Finally, it has to be noted that not all the complaints filed have led to a Commission of Inquiry but where such a commission has been appointed, the result has almost always given satisfaction to the workers affected.

PROTECTION ON THE EUROPEAN LEVEL: THE COUNCIL OF EUROPE'S EUROPEAN SOCIAL CHARTER

As a complement to the European Convention on Human Rights which protects civil and political rights, the European Social Charter, a European treaty which was signed in Turin in 1961, promotes the protection of fundamental social and economic rights to the citizens of its contracting parties. It is now in force in twenty European states: Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, Norway, the Netherlands, Malta, Portugal, Spain, Sweden, Turkey and the United Kingdom. In addition, the following states have signed⁵ but not yet ratified the Charter: the Czech Republic, Hungary, Liechtenstein, Poland, Romania, Slovakia, Switzerland and Ukraine.

The revised European Social Charter which combines in a single instrument the rights set out in the Charter as amended, the rights set out in the Additional Protocol and eight new rights, was opened for signature on 3 May 1996 and will come into force after the first three ratifications. It was drafted in such a way as to be an autonomous instrument, but with the same supervisory machinery⁶ as the Charter.

⁵ The signature is a preliminary step by which a State endorses a treaty but is not yet legally bound by it.

⁶ A Committee of Independent Experts monitors the regular submission of state reports on the compliance of national legislation with the Social Charter.

The Charter lays down standards governing the main human rights in working life as well as social protection and the protection of particular groups, such as migrant workers and their families. For migrants, these are specific rights in addition to those guaranteed by the Charter which apply on an equal footing to nationals of any contracting party and to nationals of other contracting parties. Articles 18 and 19 require of the contracting parties certain minimum safeguards for migrant workers and their families. Article 18 secures the right to engage in a gainful occupation in the territory of other contracting parties, and article 19 secures the right of migrant workers and their families to protection and assistance.

Within the meaning of these articles, a “migrant worker” is a person who is a national of a contracting party to the Charter and who is lawfully resident or working regularly within the territory of another contracting party. The effect of this European human rights instrument is therefore limited by the condition of reciprocity which means that the instrument is only applicable to the citizens of the twenty European states mentioned above.

APPENDIX I

— ILO MEMBER STATES —

- | | | |
|------------------------------|-------------------------------|---|
| 1. Afghanistan | 41. Cyprus | 81. Jordan |
| 2. Albania | 42. Czech Republic | 82. Kazakstan |
| 3. Algeria | 43. Denmark | 83. Kenya |
| 4. Angola | 44. Djibouti | 84. Korea, Republic of |
| 5. Antigua & Barbuda | 45. Dominica | 85. Kuwait |
| 6. Argentina | 46. Dominican Republic | 86. Kyrgyzstan |
| 7. Armenia | 47. Ecuador | 87. Lao, People's Democratic
Republic |
| 8. Australia | 48. Egypt | 88. Latvia |
| 9. Austria | 49. El Salvador | 89. Lebanon |
| 10. Azerbaijan | 50. Equatorial Guinea | 90. Lesotho |
| 11. Bahamas | 51. Eritrea | 91. Liberia |
| 12. Bahrain | 52. Estonia | 92. Libyan Arab Jamahiriya |
| 13. Bangladesh | 53. Ethiopia | 93. Lithuania |
| 14. Barbados | 54. Fiji | 94. Luxembourg |
| 15. Belarus | 55. Finland | 95. Macedonia, the former
Yugoslav Republic of |
| 16. Belgium | 56. France | 96. Madagascar |
| 17. Belize | 57. Gabon | 97. Malawi |
| 18. Benin | 58. Gambia | 98. Malaysia |
| 19. Bolivia | 59. Georgia | 99. Mali |
| 20. Bosnia & Herzegovina | 60. Germany | 100. Malta |
| 21. Botswana | 61. Ghana | 101. Mauritania |
| 22. Brazil | 62. Greece | 102. Mauritius |
| 23. Bulgaria | 63. Grenada | 103. Mexico |
| 24. Burkina Faso | 64. Guatemala | 104. Moldova, Republic of |
| 25. Burundi, the Republic of | 65. Guinea | 105. Mongolia |
| 26. Cambodia | 66. Guinea-Bissau | 106. Morocco |
| 27. Cameroon | 67. Guyana | 107. Mozambique |
| 28. Canada | 68. Haiti | 108. Myanmar |
| 29. Cape Verde | 69. Honduras | 109. Namibia |
| 30. Central African Republic | 70. Hungary | 110. Nepal |
| 31. Chad | 71. Iceland | 111. Netherlands |
| 32. Chile | 72. India | 112. New Zealand |
| 33. China | 73. Indonesia | 113. Nicaragua |
| 34. Colombia | 74. Iran, Islamic Republic of | 114. Niger |
| 35. Comoros | 75. Iraq | 115. Nigeria |
| 36. Congo | 76. Ireland | 116. Norway |
| 37. Costa Rica | 77. Israel | 117. Oman |
| 38. Côte d'Ivoire | 78. Italy | 118. Pakistan |
| 39. Croatia | 79. Jamaica | |
| 40. Cuba | 80. Japan | |

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|--|--------------------|
| 119. Panama | 164. United States |
| 120. Papua New Guinea | 165. Uruguay |
| 121. Paraguay | 166. Uzbekistan |
| 122. Peru | 167. Venezuela |
| 123. Philippines | 168. Viet Nam |
| 124. Poland | 169. Yemen |
| 125. Portugal | 170. Yugoslavia |
| 126. Qatar | 171. Zaire |
| 127. Romania | 172. Zambia |
| 128. Russian Federation | 173. Zimbabwe |
| 129. Rwanda | |
| 130. Saint Lucia | |
| 131. Saint Vincent & the
Grenadines | |
| 132. San Marino | |
| 133. Sao Tome & Principe | |
| 134. Saudi Arabia | |
| 135. Senegal | |
| 136. Seychelles | |
| 137. Sierra Leone | |
| 138. Singapore | |
| 139. Slovakia | |
| 140. Slovenia | |
| 141. Solomon Islands | |
| 142. Somalia | |
| 143. South Africa | |
| 144. Spain | |
| 145. Sri Lanka | |
| 146. Sudan | |
| 147. Suriname | |
| 148. Swaziland | |
| 149. Sweden | |
| 150. Switzerland | |
| 151. Syrian Arab Republic | |
| 152. Tajikistan | |
| 153. Tanzania, United
Republic of | |
| 154. Thailand | |
| 155. Togo | |
| 156. Trinidad & Tobago | |
| 157. Tunisia | |
| 158. Turkey | |
| 159. Turkmenistan | |
| 160. Uganda | |
| 161. Ukraine | |
| 162. United Arab Emirates | |
| 163. United Kingdom | |

APPENDIX II

— LIST OF COUNTRIES WHICH HAVE RATIFIED
INTERNATIONAL LABOUR CONVENTIONS NO. 97 AND 143 —

Convention No. 97, Migration for Employment Convention (Revised), 1949

Date of entry into force:

22 January 1952

Country	Entry into force	Excluded from ratification
Algeria	19 Oct. 1962	Annex II
Bahamas	25 May 1976	Annexes I, II and III
Barbados	08 May 1967	Annexes I, II and III
Belgium	27 July 1953	
Belize	15 Dec. 1983	Annexes I, II and III
Bosnia and Herzegovina	02 June 1993	
Brazil	18 June 1965	
Burkina Faso	09 June 1961	
Cameroon	03 Sept. 1962	Annexes I, II and III
Cuba	29 Apr. 1952	
Cyprus	23 Sept. 1960	Annexes I, II and III
Dominica	28 Feb. 1982	Annexes I, II and III
Ecuador	05 Apr. 1978	Annexes I, II and III
France	29 Mar. 1954	Annex II
Germany, Federal Republic of	22 June 1959	
Granada	09 July 1979	Annexes I, II and III
Guatemala	13 Feb. 1952	
Guyana	08 June 1966	Annexes I, II and III
Israel	30 Mar. 1953	
Italy	22 Oct. 1952	
Jamaica	26 Dec. 1962	Annexes I, II and III
Kenya	30 Nov. 1965	Annexes I, II and III
Malawi	22 Mar. 1965	
Malaysia	03 Mar. 1964	Annexes I, II and III
Mauritius	02 Dec. 1969	Annexes I, II and III
Netherlands	20 May 1952	
New Zealand	10 Nov. 1950	Annex I
Nigeria	17 Oct. 1960	Annexes I, II and III
Norway	17 Feb. 1955	
Portugal	12 Dec. 1978	
Slovenia	09 June 1992	
Spain	21 Mar. 1967	

St. Lucia	14 May 1980	Annexes I, II and III
United Republic of Tanzania (Zanzibar)	22 June 1964	Annexes I, II and III
The Form. Y. Rep. of Macedonia	17 Nov. 1991	
Trinidad and Tobago	24 May 1963	Annexes I, II and III
United Kingdom	22 Jan. 1951	Annexes I and III
Uruguay	18 Mar. 1954	
Venezuela	09 June 1983	
Yugoslavia	04 Dec. 1968	Annex III
Zambia	02 Dec. 1964	Annexes I, II and III

***Convention No. 143, Migrant workers (Supplementary Provisions)
Convention, 1975***

*Date of entry into force:
9 December 1978*

Country	Entry into force	Excluded from ratification
Benin	11 June 1980	
Bosnia and Herzegovina	02 June 1993	
Burkina Faso	09 Dec. 1977	
Cameroon	04 July 1978	
Cyprus	28 June 1977	
Guinea	05 June 1978	
Italy	23 June 1981	
Kenya	09 Apr. 1979	
Norway	24 Jan. 1979	Part I
Portugal	12 Dec. 1978	
San Marino	23 May 1985	
Slovenia	09 June 1992	
Sweden	28 Dec. 1982	
The form Y. Rep. of Macedonia	17 Nov. 1991	
Togo	08 Nov. 1983	
Uganda	31 Mar. 1978	
Venezuela	17 Aug. 1983	
Yugoslavia	19 June 1981	

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London SW9 9TL, United Kingdom
Tel.: (44-171) 924 95 55
Fax: (44-171) 738 41 10

Article XIX

International Centre on Censorship
Lancaster House
33 Islington High Street
London N1 9LH, United Kingdom
Tel.: (44-171) 278 92 92
Fax: (44-171) 713 13 56

**Association for the Prevention of
Torture (APT)**

P.O. Box 2267
CH-1211 Geneva 2, Switzerland
Tel.: (41-22) 734 20 88
Fax: (41-22) 734 56 49

**Catholic Institute for International
Relations (CIIR)**

22 Coleman Fields
London N1 7AF, United Kingdom
Tel.: (44-171) 354 08 83
Fax: (44-171) 359 00 17

**Centre for Justice and International
Law (CEJIL)**

1522 K. Street, Suite 910
Washington, DC 20005, USA
Tel.: (1-202) 842 86 30
Fax: (1-202) 371 80 32

**Churches' Commission on
International affairs of the World
Council of Churches (CCIA-WCC)**

150, route de Ferney
P.O. Box 2100
CH-1211 Geneva 2, Switzerland
Tel.: (41-22) 791 61 11
Fax: (41-22) 791 03 61

**Coalition for an International
Criminal Court (CICC)**

c/o WFM-IGP
777 UN Plaza, 12th Floor
New York, NY 10017, USA
Tel.: (1-212) 599 13 20
Fax: (1-212) 599 13 32

**Conference of European Churches
(CEC)**

150, route de Ferney, P.O. Box 2100
1211 Geneva 2, Switzerland
Tel.: (41-22) 791 61 11
Fax: (41-22) 791 62 27

Defence for Children International

Case Postale 88
1211 Geneva 20, Switzerland
Tel.: (41-22) 734 05 58
Fax: (41-22) 740 11 45
Internet: dci-hq@pingnet.ch

**Food First Information and Action
Network (FIAN)**

P.O. Box 10 22 43
69012 Heidelberg, Germany
Tel.: (49-62-21) 83 06 20
Fax: (49-62-21) 83 05 45

**Habitat International Coalition +
Centre on Housing Rights and
Evictions (HQ Mexico)**

8, rue Gustave Moynier
1202 Geneva, Switzerland
Tel.: (41-22) 738 81 67
Fax: (41-22) 738 81 67

**International Centre for Human
Rights and Democratic Development**

63, rue de Brésolas
Montréal
Quebec H2 Y IV7, Canada
Tel.: (15-14) 283 60 73
Fax: (15-14) 283 37 92

International Federation for Human Rights (FIDH)

17, passage de la Main d'Or
75011 Paris, France
Tel.: (33-1) 43 55 25 18
Fax: (33-1) 43 55 18 80

International Human Rights Law Group

1601 Conneticut Avenue NW
Suite 700
Washington, DC 20009, USA
Tel.: (1-202) 232 85 00
Fax: (1-202) 232 67 31

International League for Human Rights

432 Park Av. South
New York, NY 10016, USA
Tel.: (1-212) 684 12 21
Fax: (1-212) 684 16 96

International Women's Rights Action Watch

Hubert H. Humphrey Institute of Public Affairs
140 Humphrey Centre
301-19th Avenue South
Minneapolis, MN 55455, USA
Tel.: (1-612) 625 55 57
Fax: (1-612) 625 63 51

(Prepares alternative NGO reports to CEDAW)

Jacob Blaustein Institute for the Advancement of Human Rights
165 East 56 St.
New York, NY 10022, USA
Tel.: (1-212) 759 06 90
Fax: (1-212) 751 40 17

Interrights

Lancaster House
33 Islington High Street

London N1 9LH
United Kingdom
Tel.: (44-171) 278 32 30
Fax: (44-171) 278 43 34

Lutheran Office for World Community

777 UN Plaza, 10th Floor
New York, NY 10017, USA
Tel.: (1-212) 808 53 60
Fax: (1-212) 808 54 80

Maastricht Centre for Human Rights

University of Limburg
P.O. Box 616
6200 MD Maastricht, Netherlands
Tel.: (31-43) 388 32 33 / 31 24
Fax: (31-43) 325 78 18

Minority Rights Group

379 Brixton Road
London SW9 7DE
United Kingdom
Tel.: (44-171) 978 94 98
Fax: (44-171) 738 62 65

Network on International Human Rights/Réseau des Droits de la Personne au Plan International (RDPPI)

1, rue Nicholas Street
Suite 300
Ottawa, Ontario K1N 7B7, Canada
Tel.: (1-613) 241 70 07
Fax: (1-613) 241 53 02

NGO Group for the Rights of the Child

c/o Defence for Children International
1, rue de Varembe, P.O. Box 88
CH-1211 Geneva 20, Switzerland
Tel.: (41-22) 734 05 58
Fax: (41-22) 740 11 45

NOVIB

Human Rights Desk
Amaliastraat 7
2514 JC, The Hague
Netherlands
Tel.: (31-70) 342 16 21
Fax: (31-70) 361 44 61

**Oxford Committee for Famine
Relief UK / Ireland (OXFAM)**

274 Banbury Road
Oxford, OX2 7D2
United Kingdom
Tel.: (44-1865) 31 13 11
Fax: (44-1865) 31 24 17

**Pax Christi – International
Catholic Peace Movement**

P.O. Box 1942
1211 Geneva 1
Switzerland
Tel.: (41-22) 731 32 68/329 81 20
Fax: (41-22) 329 80 16

Physicians for Human Rights

100 Boylston Street, Suite 702
Boston, MA 02116
USA
Tel.: (1-617) 695 00 41
Fax: (1-617) 695 03 07

Quakers UN Office New York

777 UN Plaza
New York, NY 10017
USA
Tel.: (1-212) 682 27 45
Fax: (1-212) 983 00 34

Reporters Sans Frontières

5, rue Geoffroy-Marie
75009 Paris
France
Tel.: (33-1) 44 83 84 84
Fax: (33-1) 45 23 11 51

**Robert F. Kennedy Memorial Centre
for Human Rights
(RFK)**

1206 30th Street NW
Washington DC 20007
USA
Tel.: (1-202) 333 18 80
Fax: (1-202) 342 74 45

SOS-Torture

World Organization Against Torture
37, rue de Vermont
1211 Geneva 20
Switzerland
Tel.: (41-22) 733 31 40
Fax: (41-22) 733 10 51

**Unrepresented Nations' and Peoples'
Organization
(UNPO)**

P.O. Box 85878
2585 CN The Hague
Netherlands
Tel.: (31-70) 360 33 18
Fax: (31-70) 360 33 46

**Raoul Wallenberg Institute of Human
Rights and Humanitarian Law**

University of Lund
Stora Gråbröersgatan 17
P.O. Box 11 55
221 05 Lund
Sweden
Tel.: (46-46) 222 12 00
Fax: (46-46) 222 12 22

**Women's International League for
Peace and Freedom
(WILPF)**

1, rue de Varembe
1211 Geneva 20
Switzerland
Tel.: (41-22) 733 61 75
Fax: (41-22) 740 10 63

**List of Trade Union
Confederations in the CIS**

**General Confederation of Trade
Unions**

42 Leninsky Prospekt
117119 Moscow
Tel.: (7-095) 938 72 15
Fax: (7-095) 938 21 55

**Armenian Trade Union
Confederation**

Yerevan, Armenia
Tel.: (374-2) 58 36 82
Fax: (374-2) 56 15 44

**Azerbaijan Trade Union
Confederation**

3 Youth Square
Baku, Azerbaijan
Tel.: (892-2) 92 66 59/92 55 39
Fax: (892-2) 92 72 68

**Congress of Democratic Trade
Unions of Belarus**

24, Zakharova Street
220005 Minsk
Tel.: (375-17) 233 31 82/210 15 00
Fax: (375-17) 233 13 16

**Federation of Trade Unions of
Belarus**

Prospekt Macharava 21
220126 Minsk
Tel.: (375-17) 223 90 62/223 89 93
Fax: (375-17) 223 90 14

Georgian Trade Union Amalgamation

Anaga Street 7
380122 Tbilissi
Tel.: (995-32) 38 88 90
Fax: (995-32) 38 61 69

**Trade Union Federation of
Kazakstan**

37 ul. Zheltoksan
480003 Almaty
Tel.: (7-3272) 39 28 01
Fax: (7 3272) 32 39 62

**Confederation of Trade Unions of
Kazakstan**

Raymbek Street 120/124 ap. 52
480004 Almaty
Kazakstan
Tel.: (7-3272) 32 83 18
Fax: (7-3272) 32 83 18

**Trade Union Federation of
Kyrgyzstan**

207 Chui Prospekti
720032 Bishkek
Tel.: (7-3312) 22 28 23
Fax: (7-3312) 22 34 23

**General Federation of Trade Unions
of Moldova
(FGSRM)**

Str. 31 August 129
2012 m. Chisinau
Tel.: (373-2) 23 76 74
Fax: (373-2) 23 76 98

**Federation of Independent Trade
Unions of Russia
(FNPR)**

42 Leninsky Prospekt
117119 Moscow
Tel.: (7-095) 938 89 85
Fax: (7-095) 938 22 93

**Russian Labour Confederation
(KTR)**

42 Leninsky Prospekt
117119 Moscow
Tel.: (7-095) 938 82 70
Fax: (7-095) 938 82 70

**All-Russia Confederation of Labour
(VKT)**

Kijjanovskogo 13-2-37
117218 Moscow
Tel.: (7-095) 124 40 79
Fax: (7-095) 124 40 79

**Trade Union Federation of
Tajikistan**

Dom Profsoyuzov
Khieboni Rudaki 20
734012 Dushanbe
Tel.: (7-3772) 22 35 43
(7-3772) 23 35 16
Fax: (7-3772) 23 17 94

**Trade Union Federation of
Turkmenistan**

Saparmurada Turkmenbashi Shayoli 13
Ashghabat
Tel.: (7-3632) 25 48 68
Fax: (7-3632) 25 21 30

**Federation of Trade Unions of the
Ukraine**

Maidan Nezalechnocti 2
252012 Kiev 12
Tel.: (380-44) 228 87 98
Fax: (380-44) 228 87 98/228 87 21

**National Confederation of Trade
Unions of the Ukraine**

Grinchenko Street 7
252001 Kiev
Tel.: (380-44) 229 63 34
(380-44) 212 30 15
Fax: (380-44) 276 31 64

**Trade Union Federation of
Uzbekistan**

Pravda Vostoka kuchasi 24
700165 Tashkent
Tel.: (7-3712) 56 70 78/56 78 49
Fax: (7-3712) 56 47 97