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# Human Rights and Refugee Protection

Self-study Module 5, Vol. II



**UNHCR**

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

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## **VOLUME II: HUMAN RIGHTS AND REFUGEE PROTECTION**

### **Overview**

This document, which focuses on international human rights law, is one of a series of self-study modules developed by UNHCR's Division of International Protection Services in 2006. UNHCR first published a *Human Rights and Refugee Protection* training module in October 1995 (Volume I) and October 1996 (Volume II). That earlier module helped to create a greater awareness and understanding of human rights issues in the context of refugee protection. But human rights law is constantly evolving, and advances in this field over the past decade including those impacting on the protection of refugees and other persons of concern to UNHCR have been enormous.

The case-law of the human rights courts, including the European Court and the Inter-American Court, has undergone extensive development while United Nations human rights supervisory bodies (*e.g.* the treaty bodies) and regional bodies, such as the African Commission and Inter-American Commission on Human Rights, have developed the content and widened the scope of human rights standards. Increasingly, these standards are being applied to the protection of refugees and other persons of concern to UNHCR – that is, to asylum seekers, returnees, stateless persons, and internally displaced persons. In fact, it is now acknowledged that international refugee law, international human rights law, and international humanitarian law should be applied in concert to best protect refugees and other persons of concern to UNHCR.

## **Volume II**

This Volume is divided into three Parts. Part A (Chapters 1 to 7) examines groups of people who have specific protection needs. Part B (Chapters 8 to 20) examines substantive rights. Part C includes exercises for self-study, a list of further readings, and answers to the exercises. Each Part includes a set of key learning objectives.

The main objective of Volume II is to examine specific refugee-related topics. For a general knowledge of international human rights law as enshrined in public international law, please refer to Volume I.

This Manual focuses on using international human rights law to strengthen the protection of refugees; it does not provide specific guidance for determining refugee status, although developments in the sphere of human rights law can impact on the proper interpretation of the refugee definition, namely of the term “persecution” and the five grounds. Thus, readers may wish to complement this Manual with the *Manual on Refugee Status Determination* (self-study module 2), when appropriate. This manual, which focuses on protecting refugees and asylum-seekers, should be consulted in conjunction with the *UNHCR/Inter-Parliamentary Union Handbook on Nationality and Statelessness*, the *Guiding Principles on Internal Displacement* and the forthcoming *Inter-Agency IDP Protection Handbook*.





**Chapter 1**      **Introduction: The convergence of international human rights law and international refugee law**

Refugees may be exposed to numerous human rights violations. They may not only have suffered, or fear suffering, human rights violations in their countries of origin, but may continue to experience human rights violations during all phases of the displacement cycle.

International human rights law helps to protect refugees by setting standards that establish what might be considered persecution and by providing mechanisms to protect refugees and asylum-seekers against *refoulement* and expulsion, arbitrary detention, threats to life and physical security, lack of shelter, food, education, or medical care, sexual abuse, or separation from family members.

The **Executive Committee** acknowledges “the multifaceted linkages between refugee issues and human rights and *recalls* that the refugee experience, in all its stages, is affected by the degree of respect by States for human rights and fundamental freedoms.” ExCom Conclusion No.95 (2003)

Human rights law can be used to help protect refugees and other persons of concern to UNHCR in various ways:

### **1.1 Prevention and early warning**

Information on human rights and their implementation assists UNHCR staff in assessing actual or potential situations that may lead to refugee flows and/or hinder voluntary repatriation. Such information may be gathered from a variety of sources, including concluding observations of UN treaty bodies, case law of human rights courts, reports of other UN agencies, NGO reports, press releases, and UNHCR field staff. This information allows UNHCR staff to alert their colleagues as well as government counterparts and propose preventive measures, in cooperation with governments and other UN and regional organizations.

### **1.2 Refugee status determination**

Although it is not necessary to identify a past human rights violation in order to establish a well-founded fear of persecution, human rights law can assist in identifying forms of persecution.

All human rights mechanisms examined in Volume I provide valuable country of origin information and assist UNHCR in identifying and addressing international protection needs. UNHCR staff should use human rights information from countries of origin to assist in determining refugee status. Compliance with human rights norms can also improve individual asylum procedures. For example, the duty of States to provide specific protection to women, children, and elderly persons should be invoked to encourage States to enhance gender and age-specific safeguards in their asylum procedures.

Human rights standards are also relevant when assessing the viability of an internal protection/relocation/flight alternative (IPA/IRA/IFA). Compliance with human rights norms in an alternative location will determine the extent to which an individual would be protected in that area. Under the “reasonableness test”, which involves an assessment of the risk of future persecution and whether relocation would expose the individual to undue hardship, human rights standards may help to determine whether the well-founded fear would subsist in the alternative location, and whether relocation is sustainable economically and socially.

### **1.3 Ensuring refugee rights and quality of asylum**

Since asylum-seekers and refugees are entitled to most of the rights and fundamental freedoms envisaged in international human rights instruments, human rights law provides a complementary legal framework that strengthens the protection of refugees and asylum-seekers. Human rights norms provide additional protection to that afforded by refugee law (for example, Article 3 of the CAT; see Chapter 9 below). In addition, human rights norms may also help to determine the scope and content of some of the provisions included in the 1951 Convention. For example, while Article 22 of the Convention stipulates that “States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education,” human rights instruments set the scope and content of the right to education (Article 13 of the ICESCR; see Chapter 19 below).

### **1.4 Achieving durable solutions**

Information on human rights standards is also relevant for assessing the most appropriate durable solutions in a given case: voluntary repatriation, local integration or resettlement. For example, repatriation can hardly be truly voluntary and safe when the country of origin is unable, or unwilling, to guarantee the fundamental human rights of returnees. UNHCR is mandated to monitor the human rights situation of returnees in the context of voluntary repatriation. Similarly, successful local integration in an asylum country requires that refugees are guaranteed legal, physical, and material security and can lead normal lives. Resettlement may be necessary when the fundamental rights of a refugee are at risk of being violated in a country of asylum and voluntary repatriation is not a viable option.



## PART A

# GROUPS WITH SPECIFIC PROTECTION NEEDS

“The Executive Committee ... calls on States to promote and protect the human rights of all refugees, and other persons of concern, paying special attention to those with specific needs, and to tailor their protection responses appropriately.”

*ExCom Conclusion No. 102 (2005)*

### Learning Objectives:

- Familiarize the reader with human rights standards for the protection of people with specific protection needs
- Raise awareness about the role of international human rights law in protecting vulnerable and disadvantaged groups

The following section examines the human rights concerns of some groups of people who have specific protection needs.

Under international human rights law, special protection measures that favour vulnerable and disadvantaged groups do not constitute discrimination. On the contrary, sometimes such measures are expressly required to guarantee that the persons concerned enjoy rights equal to all other persons (see Chapter 10 below). As expressed by the Human Rights Committee, “the principle of equality sometimes requires States Parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination .... For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation ...” (General Comment No. 18, paragraph 10).





## Chapter 2 Women and Girls

## **Relevant Instruments and Documents**

### **Refugee Law**

ExCom Conclusions Nos. 39 (1985), 54 (1988), 60 (1989), 64 (1990), 73 (1993), 85 (1998), 89 (2000), and 98 (2003)

UNHCR Guidelines on Sexual and Gender-based Violence against Refugees, Returnees and Internally Displaced Persons (2003)

UNHCR Guidelines on International Protection: Gender-related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002)

UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation (2002)

UNHCR Note on Certain Aspects of Sexual Violence against Refugee Women (1993)

UNHCR How-to Guide 6: Monitoring and Evaluation of Sexual and Gender-based Violence Programmes (2000)

Agenda for Protection, Goal No. 6

### **Human Rights Law**

Convention on the Elimination of Violence against Women (CEDAW) (1979) and its Optional Protocol (CEDAW-OP) (1999)

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1985)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)

Articles 2, 3 & 26 International Covenant on Civil and Political Rights (ICCPR) (1966)

Articles 2 & 3 International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)

Articles 2 & 3 African Charter on Human and Peoples' Rights (African Charter) (1981)

Article 14 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950)

Article 1 American Convention on Human Rights, "Pact of San Jose" (ACHR) (1969)

CEDAW General Recommendation No. 12 on violence against women

CEDAW General Recommendation No. 14 on female circumcision

CEDAW General Recommendation No. 19 on violence against women

CEDAW General Recommendation No. 24 on women and health

Committee on the Rights of the Child, General Recommendation No. 6 on the Treatment of unaccompanied and separated children outside their country of origin, Thirty-ninth session, 17 May – 3 June 2005

Human Rights Committee General Comment No. 28 on equality of rights between men and women (Article 3)

Committee on Economic, Social and Cultural Rights General Comment No. 16 on equality of rights between men and women (Article 3)

Declaration on the Elimination of Violence against Women, UNGA Resolution 48/104 of 20 December 1993

### **International Criminal Law**

Rome Statute of the International Criminal Court (2000)

### **Others**

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (2000)

Recommended Principles and Guidelines on Human Rights and Human Trafficking, Office of the United Nations High Commissioner for Human Rights, 2002.



Refugee women have many of the same needs as refugee men, including protection from *refoulement* (see Chapter 9 below) and freedom of movement (see Chapter 15 below). However, since refugee situations may expose women and girls to a wider range of risks of human rights violations, they also have some specific additional needs.

## **2.1 Risks of women's rights violations during their refugee life cycle**

Women's human rights may be violated during all stages of their lives as refugees. These risks must be carefully identified and analysed in order to prevent violations and maximise protection. Human rights instruments establish the standards of permissible conduct towards women during their forced displacement.

### **2.1.1 In the country of origin**

In some countries, women are subject to severe discrimination. For example, they may be unable to participate fully in society, unless they are represented by men. They may be unable to inherit property, unable to take decisions regarding their marriages, and may be denied an education. Violence against women may be socially acceptable or occur with the acquiescence of the State, which may take no action to prevent or punish this type of violence. For cultural or political reasons, women may be punished when they refuse to wear specific traditional clothing, such as the *achador*, *hijab*, or *burqua*, or may be forced to undergo medical treatments that are dangerous to their health, such as forced sterilization or genital mutilation.

Human rights standards help to assess the nature of the treatment women may suffer in their country of origin. It is well established under international human rights law, for example, that acts of violence against women are serious violations of the prohibition of discrimination against women (see CEDAW General Recommendation No. 19); that rape can amount to torture or inhuman or degrading treatment (see ECtHR *Aydin v. Turkey*); that some harmful traditional practices, such as female genital mutilation, polygamy, marital rape, and forced marriages of girl children also violate women's rights (see CEDAW General Recommendation No. 24); and that women victims of trafficking suffer serious restrictions in the enjoyment of their rights.

### **2.1.2 During armed conflict**

Women are exposed to a high risk of sexual violence during armed conflicts. The systematic rape of women perceived to be on the enemy's side is often used to demonstrate power and to degrade the victim, her family and her community at large.

Women who have been raped and then escape from sexual violence might be exposed to social exclusion and further violence if they return to their places of origin.

### **2.1.3 On their way to security**

In a number of countries, women are not allowed to travel on their own. Thus, during flight, they are often dependent upon other women or men who accompany them or act as their guardians. Women in this situation may be forced to provide sexual services to men in exchange for protection, food, or the handling of formalities upon arrival in a country of asylum. The risk of rape is also high.

### **2.1.4 In refugee camps**

Unfortunately experience has shown that in refugee camps, women face an increased risk of being coerced into sex to gain access to food and shelter; they may also face a greater risk of violence, including rape. Where women are excluded from the food-distribution process, they may become particularly dependent upon men, who may distribute food unjustly and inappropriately.

In all these situations, women are frequently responsible for other, more vulnerable, family members, such as children and the elderly.

### **2.1.5 In the country of asylum**

At reception or detention centres in the country of asylum, women may suffer sexual abuse and/or violence as “payment” for goods received, such as food, blankets, and water. During refugee status determination procedures, women travelling with male family members may not be given the opportunity to present their own claims. Even if they are allowed to speak, they may find it difficult to speak frankly to a male interviewer or through a male interpreter, particularly if some aspects of their asylum claims involve sexual violence or questions of family honour.

States that host women asylum-seekers must treat them in accordance with international standards. Thus, States Parties to human rights instruments are obliged to take all appropriate measures to protect refugee and asylum-seeking women against violations of their rights and to avoid discrimination against them, including in the enjoyment of economic, social, and cultural rights.

## **2.2 Relevant human rights standards**

States Parties to human rights treaties are obliged to take special care in dealing with women asylum-seekers and refugees. At the universal and regional levels, human rights instruments recognize the importance of women’s rights in particular through: the

principle of non-discrimination and equality between men and women (Articles 2, 3 and 26 of the ICCPR, Articles 2 and 3 of the ICESCR, and Articles 2 and 3 of the African Charter); the protection of the family (Article 10 of the ICESCR, Article 18(3) of the African Charter, Article 23(1) of the ICCPR, and Article 12 of the ECHR); guaranteeing the right of consent to marriage and equality of spouses during and after marriage (Article 23(3) and (4) of the ICCPR); the duty to take affirmative action aimed at protecting women (Human Rights Committee, General Comment No. 18); and the duty to prevent and punish all forms of violence against women (see below). Since some criminal behaviours, such as rape, are covered by international prohibitions of torture or cruel, inhuman or degrading treatment or punishment (see below), provisions prohibiting torture and other ill-treatment (Article 7 of the ICCPR) should also be considered.

Of particular importance are conventions specifically designed to protect women, including the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) and its *Optional Protocol* (1999), the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (1994), and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003). See Vol. I for a discussion of the main features and supervisory mechanisms of each instrument.

***Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol (CEDAW-OP).*** Under the CEDAW States Parties are obliged to take “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” (Article 3). States are also obliged to work towards the modification of social and cultural patterns of individual conduct in order to eliminate “prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” (Article 5).

The implementation of the Convention is supervised by the Committee on the Elimination of Discrimination against Women. Under the Optional Protocol to CEDAW, after exhausting domestic remedies, individuals are allowed to submit complaints to the Committee alleging violations of the rights set forth in the Convention. The Committee can initiate a confidential investigation when it has received reliable information that a State

Party is gravely or systematically violating the rights set forth in the Convention (see Vol. I).

***Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.*** This treaty recognizes the right of every woman to be free from any physical, sexual, or psychological violence in both the public and private spheres. States Parties assume the obligation to pursue, by all appropriate means and without delay, policies to prevent, punish, and eradicate such violence. Significantly, the Convention specifically mentions refugee and internally displaced women. States Parties are obliged “to take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socio-economically disadvantaged, affected by armed conflict or deprived of their freedom” (Article 9).

***Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.*** Under this instrument, States are committed to combating all forms of discrimination against women through appropriate legislative, institutional, and other measures, and to ensuring that women can enjoy a range of human rights, particularly economic, social, and cultural rights. The Protocol requires States Parties to take all appropriate measures to ensure increased participation of women in: local, national, regional, continental, and international decision-making structures to ensure physical, psychological, social, and legal protection of asylum-seekers, refugees, returnees, and displaced persons, particularly women; all levels of the structures established for the management of camps and settlements for asylum-seekers, refugees, returnees, and displaced persons, particularly women; and all aspects of planning, formulating, and implementing post-conflict reconstruction and rehabilitation (Article 10). In addition, States Parties must protect women asylum-seekers, refugees, returnees, and internally displaced persons against all forms of violence, rape, and other forms of sexual exploitation, ensure that such acts are considered war crimes, genocide and/or crimes against humanity, and ensure that perpetrators of those crimes are brought to justice before a competent criminal jurisdiction (Article 11).

### **2.3 Prohibition of discrimination on the ground of sex**

The prohibition of discrimination on the ground of sex is included in the general provisions prohibiting discrimination, including

Article 2 of the ICCPR, Article 2 of the African Charter, and Article 1(1) of the ACHR. In addition, some human rights instruments, such as the ICCPR and the ICESCR, include specific provisions on the right to equality between men and women, thus stressing the principle of equality between the sexes (see, for example, Article 3 of the ICCPR and Article 3 of the ICESCR).

States must present compelling justification for any difference in the treatment accorded to men and women in their territory. Generally, discrimination implies treatment less favourable than that accorded to another person or group, without proper justification (see Chapter 10). Immigration legislation and other bodies of law, for example, cannot impose restrictions based solely on sex. As stated by the **European Court of Human Rights (ECtHR)**, immigration legislation that allows entry of foreign wives of legally resident men but that specifically restricts the entry of foreign husbands would be discriminatory (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*).

In some circumstances the principle of non-discrimination requires States to take affirmative action or protective measures to prevent or compensate for structural disadvantages. These measures entail special preferences which should not be considered discriminatory because they are designed to remove obstacles to the advancement of disadvantaged groups and encourage equal participation. As established in Article 4(1) of the CEDAW, “Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination [...] but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.”

**Key concepts:**

**SEX:** refers to the biological characteristics of males and females.

**GENDER:** denotes the social characteristics assigned to men and women. It is not static or innate, but evolves in response to changes in the social, political, and cultural environment.

*See Sexual and Gender-Based Violence against Refugees, Returnees, and Internally Displaced Persons: Guidelines for Prevention and Response (UNHCR, 2003).*

## 2.4 Sexual and gender-based violence

Acts of sexual and gender-based violence violate the human rights of the victim. This kind of violence perpetuates the stereotyping of gender roles that deny the human dignity of the individual and stymie human development. The overwhelming majority of the victims/survivors of sexual and gender-based violence are women

and girls. Nonetheless, boys and men are also targets of sexual and gender-based violence.

Sexual and gender-based violence infringes a number of human rights principles enshrined in international human rights instruments, such as the right to life and security of the person (Articles 6 and 9 of the ICCPR, Article 2 of the ECHR, and Article 4 of the African Charter), the right to the highest attainable standard of physical and mental health (Article 12 of the ICESCR); the right to freedom from torture or cruel, inhuman, or degrading treatment or punishment (Article 7 of the ICCPR and Article 5 of the ACHR); and the prohibition against discrimination (Article 3 of the ICCPR, Article 3 of the ICESCR, and Article 14 of the ECHR).

Although no provision in the **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)** explicitly mentions violence against women, the CEDAW Committee has clearly stated that States Parties must take measures to eliminate violence since it is a form of discrimination against women prohibited under the Convention (see CEDAW General Recommendations Nos. 12 and 19 on violence against women). The issue of sexual and gender-based violence is a cross-cutting theme that all UN treaty bodies consider from different perspectives. In view of this fact, the protection of refugees and asylum-seekers is also covered. For example, CEDAW Committee has urged the Government of Spain to provide adequate protection to women asylum-seekers against domestic violence (CEDAW Concluding Observations Spain, 1999). It is thus important that UNHCR staff and advocates provide information on this issue to the treaty bodies.

Several other international instruments specifically address sexual and gender-based violence against women and girls, including the **United Nations Declaration on the Elimination of Violence against Women** (1993), and the **Beijing Declaration and Platform for Action** (1995).

The **Rome Statute of the International Criminal Court** (Rome Statute) defines rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity as a crime against humanity when knowingly committed as part of a widespread or systematic attack directed against any civilian population (Article 7). It also considers these acts to be war crimes when they take place in the context of and are associated with international or non-international armed conflict. (For more information on the Rome Statute, see Vol. I, Chapter 2)

### What constitutes violence against women?

Violence against women shall be understood to encompass, but not be limited to, the following:

- Physical, sexual, and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence, and violence related to exploitation;
- Physical, sexual, and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions, and elsewhere, trafficking in women, and forced prostitution;
- Physical, sexual, and psychological violence perpetrated or condoned by the State, wherever it occurs. (Article 2 of the Declaration on the Elimination of Violence against Women, UNGA Resolution 48/104 of 20 December 1993).

The Sub Commission on the Promotion and Protection of Human Rights adopted in its 58<sup>th</sup> session resolution 2006/18 on systematic rape, sexual slavery and slavery-like practices during armed conflicts. It considers therein that “the verdicts of the International Criminal Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda and the Special Court for Sierra Leone acknowledging that rape and, more recently, sexual enslavement are crimes against humanity, and the special recognition in the Rome Statute of the International Criminal Court that sexual violence and sexual slavery committed in the context of either an internal or an international armed conflict may constitute crimes against humanity, war crimes and genocide falling within the jurisdiction of the Court, represent a significant step in the protection of women's human rights as they challenge the widespread acceptance that torture, rape and violence against women are an integral part of war and conflict and hold the perpetrators of such crimes accountable”.

The Geneva Conventions and the Rome Statute of the International Criminal Court both codify the crime of rape (see Vol. I, Chapter 2). The International Criminal Tribunal for Rwanda (ICTR) and the International Tribunal for the Former Yugoslavia (ICTY) have elaborated on the concept of rape as torture and as war crime (see *Prosecutor v. Jean-Paul Akayesu*, the *Celibici case*, and Vol I., Chapter 4).

Under human rights law, rape is an affront to human dignity and can amount to a violation of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (Article 7 of the ICCPR, Article 3 of the ECHR, Article 5 of the African Charter, and Article 5 of the ACHR). Relevant case-law has been developed by the African Commission on Human and Peoples’

Rights (see *Malawi African Association, Amnesty International, Ms. Sarr Diop, Union Inter africaine des Droits de l'Homme and RDDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de l'Homme v. Mauritania*), the European Court on Human Rights (see *Aydin v. Turkey*), and the Inter-American Commission on Human Rights (see *Rivas Quintanilla v. El Salvador [Case 10.772]*).

The fact that rape can amount to torture or other ill-treatment is significant considering the absolute nature of the prohibition of torture and that, under international human rights law, the State's obligations under the prohibition of torture and other ill-treatment include the following obligations: to undertake legislative, administrative, judicial, and other measures to protect individuals from torture and cruel, inhuman or degrading treatment or punishment inflicted by individuals acting in their official, unofficial, or even private capacities; to take measures to prevent a recurrence; to investigate complaints about ill-treatment by competent authorities; and to bring to justice those responsible.

In sum, States Parties to major human rights treaties violate the prohibition of ill-treatment if they fail to take measures to protect women refugees or asylum-seekers from rape. In light of the absolute nature of the prohibition of torture and that it is a norm of customary international law, protection obligations also exist for countries which are not party to the relevant human rights treaties.

#### **What constitutes violence against women?**

The Executive Committee "deplores gender-related violence and all forms of discrimination on grounds of sex directed to refugee and displaced women and girls, and calls upon States to ensure that their human rights and physical and psychological integrity are protected, and they are made aware of these rights." ExCom Conclusion No. 85 (1998)

## **2.5 Trafficking and exploitation of women for prostitution**

The risk of trafficking increases when individuals are displaced. Women and girls are extremely vulnerable to abuse by traffickers and others who seek to exploit them for prostitution. Nonetheless, men and boys can also be victims of trafficking and prostitution.

According to the **Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime**, trafficking in persons means:

"the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of



vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

The **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)** requires States to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women (Article 6). If a State is party to the CEDAW Protocol and fails to take adequate measures to protect women against trafficking and sexual exploitation, an individual may submit a complaint to the CEDAW Committee (see requirements in Volume I). As the CEDAW Committee has noted, trafficked women and those forced into prostitution tend to be marginalized and are particularly vulnerable to violence and in greater need of legal protection (General Recommendation No. 19).

Similarly, the Convention on Rights of the Child (CRC) and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography requires that States take all appropriate measures to prevent the sale or traffic of children for any purpose or in any form (Article 35). This complements the protection offered by article 34 of the CRC. (See below under section 3.4) Child victims of trafficking should not be penalized, but should be perceived, received and treated as victims and be provided with the necessary assistance.

In addition to the specific provisions of article 6 CEDAW and 34 and 35 of the CRC, these practices may directly or indirectly lead to violations of several rights envisaged in human rights instruments, such as the right to life (*e.g.* Article 6 ICCPR, Article 2 ECHR); the right to be free from cruel, inhuman or degrading treatment (*e.g.* Article 5 ACHR, Article 7 ICCPR); the right not to be subject to slavery (*e.g.* Article 5 African Charter, Article 8 ICCPR); the right to personal liberty and security (*e.g.* Article 37 CRC, Article 9 ICCPR, Article 7 ACHR, Article 6 African Charter and Article 5 ECHR); freedom of movement (*e.g.* Article 12 ICCPR, Article 22 ACHR, Article 12 African Charter); and equal protection before the law (Article 26 of the ICCPR, Article 3 of the African Charter, and Article 24 of the ACHR). If a woman has been trafficked, there may be substantial grounds for believing that her life or integrity would be in danger if returned to her country or origin. Such risks must be carefully assessed, as – at least in the current understanding of the Human Rights Committee – human

rights obligations under the ICCPR have an extraterritorial dimension and entail the protection against *refoulement* in case of a real risk of irreparable harm. Article 6 and/or 7 of the ICCPR (see Chapter 9 below) prohibits the return of a person to a place where he/she might be at risk of irreparable harm.

According to the **Recommended Principles and Guidelines on Human Rights and Human Trafficking** (UN Doc E/2002/68/Add.1) drafted by OHCHR, “anti-trafficking measures must not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers” (Principle 3). Moreover, “safe (and, to the extent possible, voluntary) return shall be guaranteed to trafficked persons by both the receiving State and the State of origin. Trafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families” (Principle 11).

UNHCR staff must be aware that trafficked persons may have a claim to refugee status, either for reasons related to the act of trafficking or otherwise. To ensure that they are adequately protected, it is important to identify these people as early as possible. It is also important that appropriate procedures are in place to receive and consider asylum claims from trafficked persons, and that the principle of *non-refoulement* is respected.

## **2.6 Harmful traditional practices**

Many societies adhere to traditional cultural practices that may violate women’s rights, perpetuating gender discrimination and the subordination of women. These practices include female genital mutilation; early marriage; various taboos or practices that prevent women from controlling their own fertility; forced feeding of women; traditional birth practices; son preference and female infanticide; early pregnancy; dowries; and honour killings. These practices persist “because they are not questioned and take on an aura of morality in the eyes of those practicing them” (OHCHR, Fact Sheet No.23, Harmful Traditional Practices Affecting the Health of Women and Children).

A particularly harmful traditional practice is female genital mutilation (FGM). Human rights supervisory bodies, such as the CEDAW Committee and Committee on Economic, Social and Cultural Rights have consistently condemned this practice as being discriminatory and constituting a violation of women’s right to physical integrity and their right to health. Under CEDAW, States

Parties are required to take appropriate and effective measures to eradicate this practice (see General Recommendation No. 14).

The **Special Rapporteur on Traditional Practices Affecting the Health of Women and Children** has condemned this practice in her reports (see Vol. I, Chapter 5). In the continent most affected by FGM, the African Union has adopted the **Optional Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**. The Protocol requires States Parties to undertake “prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalization and para-medicalization of female genital mutilation and all other practices in order to eradicate them” (Article 5).

#### **Women at a refugee status determination procedure**

In order to take into account the particular needs of refugee women, all those who make decisions on refugee status should have access to information on human rights conditions and social roles as they affect women in the countries of origin. In other words, the social, cultural, traditional, and religious norms and the laws affecting women in the country of origin should be assessed against the human rights instruments that provide a framework of international standards for recognizing the protection needs of women.

States Parties to human rights conventions must undertake all necessary measures to eliminate gender-related cultural barriers. This may entail, for example, providing qualified female interviewers and interpreters, since women may feel ashamed or dishonoured when discussing the details of their claims with male authorities, and ensuring that female asylum-seekers and refugees can obtain personal identity documentation independently from their male relatives and in their own names. In addition, States must refrain from returning a woman to a country if there are substantial grounds for believing that she would be subject to torture or other ill-treatment, such as punishment for having committed adultery (see *Jabari v. Turkey*).

#### **For further information, see:**

##### *Volume I:*

Special Rapporteur on Violence against Women

Convention on the Elimination of All Forms of Discrimination against Women

Protocol to the African Charter on the Rights of Women in Africa

Inter-American Convention on the Prevention,

Punishment and Eradication of Violence against Women

##### *Volume II:*

Chapter 10: Non-discrimination

Chapter 12: Survival rights

Chapter 12: The right to health

Chapter 14: The right to due process

Chapter 19: The right to education





## Chapter 3

## Children (girls and boys)

## **Relevant Instruments and Documents**

### **Refugee Law**

ExCom Conclusion Nos. 47 (1989), 59 (1989), 84 (1997), and 98 (2000)

UNHCR Policy on Refugee Children (1993)

UNHCR Guidelines on Protection and Care of Refugee Children (1994)

Inter-Agency Guiding Principles on Unaccompanied and Separated Children, UNHCR, UNICEF, ICRC, IRC, Save the Children (UK), World Vision International (2004)

UNHCR Revised Guidelines for Prevention of and Response to Sexual and Gender-based Violence against Refugees, Returnees and Internally Displaced Persons (2003)

UNHCR Meeting the Rights and Protection Needs of Refugee Children, An independent evaluation of the impact of UNHCR's activities (2002)

Agenda for Protection, Goal No. 6

UNHCR Working with Unaccompanied Children: A Community-based Approach (1996)

UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (1997)

### **Human Rights Law**

Convention on the Rights of the Child (CRC) (1989), in particular Articles 3, 20, and 22

Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (2002)

Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (2002)

Article 24 of the International Covenant on Civil and Political Rights (ICCPR)

Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

Article 18(3) and Article 19 of the African Charter on Human and Peoples' Rights (African Charter)

African Charter on the Rights and Welfare of the Child, in particular Article 23

Article 16 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (1988)

Human Rights Committee, General Comment No. 17 on the rights of the child (Article 24)

Committee on the Rights of the Child, General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin

Inter-American Court, Advisory Opinion OC-17/02 on the juridical condition and human rights of the child, 28 August 2002

### **Others**

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (2000)

Action for the Rights of Children (ARC), OHCHR, Save the Children, UNHCR, UNICEF (October 2002)

The substantive rights set forth in the major human rights treaties apply to all human beings and thus also to children. As is true for adults, the enjoyment of the rights envisaged in human rights treaties is not limited to children who are nationals of States Parties to the treaties, but are to be enjoyed by *all* children irrespective of their citizenship or residence status, including asylum-seeking, refugee, stateless and migrant children.

Although human rights apply to adults and children alike, some human rights treaties, such as the **Convention on the Rights of the Child (CRC)**, to which nearly every State in the world is party, and the **African Charter on the Rights and Welfare of the Child** were adopted with a specific aim to strengthen the protection of children and to include some rights not covered in other international human rights instruments. Article 22 CRC is the only provision in an international human rights treaty which explicitly refers to refugee protection. It provides an important legal tool in particular in countries which are not party to the 1951 Convention.

The principle of the “**best interest of the child**” codified in Article 3 and further referred to in other provisions of the Convention on the Rights of the Child must underpin all measures and decisions taken in relation to refugee and other displaced children. While this principle could not and should not lead to the granting of refugee status to a child who does not satisfy refugee criteria, the principle must be respected during all stages of the displacement cycle and is an important principle to enhance the protection of these children. This principle must be secured by procedural safeguards and certain fundamental decisions concerning the future of the child require a formal Best Interest Determination. (UNHCR Guidelines on Formal Determination of the Best Interests of the Child as well as CRC General Comment No. 6).

### **3.1 Violations of refugee children’s rights**

Girls and boys may be particularly exposed to human rights abuses when they are refugees or otherwise displaced. Human rights violations, such as underage military recruitment, domestic violence, infanticide, forced or underage marriage, female genital mutilation, forced labour, forced prostitution, child pornography, and trafficking might occur during all phases of the displacement cycle. Those refugee children who are unaccompanied or separated from their families are particularly vulnerable to human rights abuses (see Committee on the Rights of the Child, General Comment No. 6).

### **3.2 Relevant human rights standards**

Under human rights treaties, States are not only obliged to respect and ensure that children enjoy all rights enshrined in those instruments, they are also obliged to take special measures to protect children (see, for example, Article 24 of the ICCPR, Article 10 of the ICESCR, Article 18(3) of the African Charter, Article 19 of the African Charter on the Rights and Welfare of the Child and Article 16 of the Protocol of San Salvador).

As explained in Volume I, States Parties to human rights treaties are not only obliged not to commit any of these abuses, but they also have a duty to protect against abuses perpetrated by non-State actors (see Vol. I, Chapter 3).

The **International Covenant on Civil and Political Rights (ICCPR)**, recognizes the right of every child to receive from her/his family, society, and the State, without discrimination, the protection required by her/his status as a minor (Article 24). The implementation of this provision requires the adoption of special measures to protect children. Such measures must be non-discriminatory, including between national and non-national children (see Human Rights Committee, General Comment No. 17). As the Human Rights Committee notes, in most cases, the measures to be adopted are not specified in the Covenant; it is for each State to determine those measures in the light of the protection needs of children in its territory and within its jurisdiction. The Committee notes that such measures may cover economic, social, and cultural rights as well as the civil and political rights enumerated in the Covenant. Thus, children who are asylum-seekers and refugees may invoke this provision when they are deprived of, or denied access to, adequate food, water, housing, clothing, health care, and education. If this provision is violated, an individual may submit a complaint under the ICCPR's First Optional Protocol (see Vol. I).

Under the **Convention on the Rights of the Child (CRC)**, all children under the jurisdiction of a State Party and regardless of their status, are entitled to all human rights, including the right to the highest attainable standard of health and access to health care services (see Vol. II, Chapter 12), the right to education (see Vol. II, Chapter 19), and the right to be registered at birth (see Vol. II, Chapter 13). Under the CRC, children are defined as human beings below the age of eighteen years unless, under the national law applicable to the child, majority is attained earlier. Since the Convention emphasizes the “best interest of the child” principle (Article 3), States Parties are obliged to determine the best interest of the child in “all actions concerning children,



whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.” This principle must also underpin all decisions concerning the fate of refugee children and other children of concern to UNHCR including family reunification and the search for a durable solution.

In addition, under Article 22 of the CRC, 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.

Measures must thus be put in place to ensure that in assessing and processing the child’s request for refugee status, due consideration is given to the child’s degree of mental development, level of maturity, and ability to articulate a claim in light of her/his personal, family, and cultural background and that child specific forms and manifestations of persecution, such as underage recruitment, are taken into account.

In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the Convention. Unaccompanied or separated asylum seeking children should also be appointed a guardian to represent their best interests and a legal representative supporting them in processing the asylum request.

Under Article 22 of the CRC, States also have a duty to cooperate with UNHCR and other UN agencies and non-governmental organisations in protecting and assisting child refugees and asylum-seekers and to trace the parents or other family members in order to obtain the information necessary for reunification with her/his family. Article 20 of the CRC emphasizes the desirability of continuity in a child’s upbringing and of considering the child’s ethnic, religious, cultural, and linguistic background when considering solutions for children temporarily or permanently deprived of their family environment.

Since this Convention is the most widely ratified human rights instrument, with 192 States Parties, it is a particularly important instrument with regard to those States which are not party to the 1951 Convention.

The principle arising from Article 3 of the CRC, that the best interest of the child shall be a primary consideration, should be applied in a systematic manner in any planning and policy-making by the Office which affects a child of concern to UNHCR. It shall permeate all protection and care issues involving UNHCR. (UNHCR Guidelines on Formal Determination of the Best Interests of the Child)

The **African Charter on the Rights and Welfare of the Child**, obliges States Parties to take specific protective measures for refugee and internally displaced children (Article 23). States Parties must also ensure these children's enjoyment of all the rights set forth in the Charter and in any other international human rights and humanitarian instrument to which the State is party. As with Article 22 of the CRC, States also agree to cooperate with international organizations that protect and assist refugees in protecting and assisting child refugees and asylum-seekers, and to help to trace the parents or other close relatives of an unaccompanied refugee child in an effort to achieve family reunification.

The **American Convention on Human Rights** (ACHR) provides for general protection of children under Article 19. According to the Inter-American Court on Human Rights (IACtHR), this provision must be interpreted in light of the CRC and the 1951 Convention, "therefore, protection measures must be considered in the course of determination of refugee status and in treatment of refugee and asylum-seeking children, especially when they have been separated from their parents or guardians." An Advisory Opinion of the IACtHR has also stressed that States must adopt special measures to protect child refugees and asylum-seekers based on the principle of the best interests of the child (*Inter-American Court, Advisory Opinion OC-17/02 on the juridical condition and human rights of the child, 28 August 2002*).

In an Advisory Opinion, the Inter-American Court has noted that the following guarantees must be respected when determining children's refugee status:

1. The right to a hearing for the child to file his or her request for asylum and to freely express his or her opinion, within a reasonable term and before a competent, impartial, and independent authority. [...] Likewise, to ensure the greatest possible participation by the child, the procedure must be adequately explained to him or her, together with decisions reached and their possible consequences; also, whenever it is appropriate, the State should guarantee that the child receives assistance from a legal representative who is prepared for this function;
2. Adoption of special measures that allow the asylum request of a child to be studied in a more flexible manner, taking into account that children generally experience persecution in a different manner from adults; these measures might include granting of the benefit of the doubt when analyzing the request, less rigid standards of evidence, and a more expedite procedure; and
3. An assessment of the degree of mental development and maturity of the child by a specialist with the required training and experience; if the child is

not sufficiently mature, more objective factors must be considered when analyzing his or her request, such as conditions in the country of origin and situation of his or her next of kin.

4. [...] Any State decision that affects the unity of the family must be adopted in accordance with the right to fair trial set forth in the American Convention. To respect unity of the family, the State must not only abstain from acts that involve separation of the members of the family, but must also take steps to keep the family united or to reunite them, if that were the case.

### 3.3 Children in armed conflicts and the prohibition against child recruitment

Children affected by armed conflict may be victims of human rights violations and have the right to special protection and treatment. Often these children flee their home countries to other, usually neighbouring, countries. Refugee girls and boys are among those at greatest risk of underage recruitment.

Under the **Convention on the Rights of the Child**, States have a duty to respect and ensure respect for rules of international humanitarian law, applicable in armed conflicts, that are relevant to children, and to take all feasible measures to protect and assist children affected by armed conflict (Article 38). The CRC also stipulates that States must take all feasible measures to ensure that persons under the age of 15 do not take a direct part in the hostilities and are not recruited into their armed forces.

The **Optional Protocol to the CRC on the Involvement of Children in Armed Conflict** broadens the protection provisions of the CRC by stating that a person under 18 years should not take direct part in hostilities and that States should take all feasible measures to ensure that children under 18 are not compulsorily recruited.

The Committee on the Rights of the Child acknowledges in its General Comment No. 6 the extraterritorial dimension of the Convention on the Rights of the Child and holds that the prohibition of *refoulement* derives from its provisions:

#### **f) Respect for the principle of *non-refoulement***

26. In affording proper treatment of unaccompanied or separated children, States must fully respect *non-refoulement* obligations deriving from international human rights, humanitarian and refugee law and, in particular, must respect obligations codified in article 33 of the 1951 Refugee Convention and in article 3 of the CAT.

27. Furthermore, in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such *non-refoulement* obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-

sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.

28. As under-age recruitment and participation in hostilities entails a high risk of irreparable harm involving fundamental human rights, including the right to life, State obligations deriving from article 38 of the Convention, in conjunction with articles 3 and 4 of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, entail extra-territorial effects and States shall refrain from returning a child in any manner whatsoever to the borders of a State where there is a real risk of under-age recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties.

The **African Charter on the Rights and Welfare of the Child** was the first regional treaty to establish 18 as the minimum age for all recruitment and participation in hostilities.

The International Labour Organization (ILO) **Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour** declares that “forced or compulsory recruitment of children for use in armed conflict” constitutes one of “the worst forms of child labour” prohibited in the Convention, and calls for programmes of action to eliminate child soldiering with “all necessary measures to ensure the effective implementation and enforcement [...] including the provision and application of penal sanctions or, as appropriate, other sanctions.”

The adoption of the **Rome Statute of the International Criminal Court** was an important development in the campaign against the use of children in armed conflict. It defines the following acts as war crimes: “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities” in an international armed conflict; and “conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities” in a non-international armed conflict.

### **3.4 Sexual and other forms of exploitation**

Children are more vulnerable to exploitation and abuse during displacement. Boys and girls of all ages are at risk, but adolescent girls are the principal targets for sexual exploitation and abuse.

The Convention on Rights of the Child (CRC) requires States to undertake to protect the child from all forms of sexual exploitation and sexual abuse and to take all appropriate national, bilateral and multilateral measures to prevent: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual

practices; (c) the exploitative use of children in pornographic performances and materials.

To more directly and effectively combat sexual exploitation, an **Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography** was adopted and entered into force in 2002. This Protocol supplements the CRC with detailed requirements for criminalizing violations of children's rights related to the sale of children, child prostitution and child pornography. Since 1990, there is also a *Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography* (see Vol. I).

### **3.5 Unaccompanied and separated children (girls and boys)**

Separation from their closest relatives and caregivers is particularly devastating for refugee and other displaced children, and further aggravates their vulnerability and risk of suffering human rights violations.

When outlining the motives for issuing its General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, the Committee referred *inter alia* to the following protection gaps:

"Unaccompanied and separated children face greater risks of *inter alia* sexual exploitation and abuse, military recruitment, child labour (including for their foster families) and detention. They are often discriminated against and denied access to food, shelter, housing, health services and education. Unaccompanied and separated girls are at particular risk of gender based violence, including domestic violence. In some situations, such children have no access to proper and appropriate identification, registration, age assessment, documentation, family tracing, guardianship systems or legal advice. In many countries, unaccompanied and separated children are routinely denied entry to or detained by border or immigration officials, and in other cases they are admitted but are denied access to asylum procedures or their asylum claims are not handled in an age and gender sensitive manner. Some countries prohibit separated children who are recognized as refugees from applying for family reunification; others permit reunification but impose conditions so restrictive as to make it virtually impossible to achieve. Many such children are granted only temporary status which ends when they turn 18, and there are few effective return programmes."

When working to protect unaccompanied and separated children, refer to the *General Comment on the treatment of unaccompanied and separated children outside their country of origin* (General Comment No. 6) issued by the Committee on the Rights of the Child, and the *Inter-Agency Guiding Principles on Unaccompanied and Separated Children* (2004).

**For further information see:**

*Volume I:*

Convention on the Rights of the Child

African Charter on the Rights and Welfare of the Child

*Volume II:*

Chapter 2 Trafficking and exploitation of women for prostitution

Chapter 9 *Non-refoulement*

Chapter 11 Judicial protection against detention

Chapter 12 Survival rights

Chapter 13 Legal identity and status

Chapter 16 Family unity

Chapter 17 The right to work and the prohibition of child labour

Chapter 19 The right to education



## Chapter 4

## Elderly persons

## Relevant Instruments and Documents

### Refugee Law

UNHCR Standing Committee: "The Situation of Older Refugees" (EC/48/SC/CRP.39), 14 August 1998

UNHCR "Older Refugees: Looking Beyond the International Year of Older Persons," UN Doc. EC/50/SC/CRP8, 7 February 2000

### Human Rights Law

*Non-discrimination clauses in major human rights instruments*

Article 18(4) of the African Charter on Human and Peoples' Rights (African Charter)

Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Article 17 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)

Article 23 of the European Social Charter Revised (Revised) (1996)

Article 25 of the Charter on Fundamental Rights of the European Union (2000)

Committee on Economic, Social and Cultural Rights General Comment No. 6 on the economic, social, and cultural rights of older persons

UNGA Principles for Older Persons

Elderly refugees are among the most vulnerable refugees. Not only do they often suffer exclusion from social and economic life in their countries of origin, but many elderly refugees continue to experience human rights violations in countries of asylum. When protecting the rights of elderly refugees and asylum-seekers, it is necessary to adopt an age-sensitive approach to avoid further discrimination and exclusion.

## 4.1 Relevant human rights standards

In contrast to the rights of children, no specific international human rights treaty has yet been adopted for the human rights of the elderly. Equally, human rights law is often not applied or interpreted in an age sensitive manner. The principles of dignity and non-discrimination form the basis of rights for elderly persons stipulated in international instruments (see Vol. II, Chapter 10). The Universal Declaration of Human Rights, the ICCPR, and the ICESCR contain no explicit reference to older persons, but many provisions of these instruments are relevant to ensuring equal opportunities and the full participation of the elderly. The ICESCR Committee expressly addresses the economic, social, and cultural rights of older persons in its General Comment No. 6, stating that even though not specified as prohibited grounds for discrimination in the Convention, the inclusion of the phrase "other status" should be interpreted as including age. It is beyond doubt that the principle of non-discrimination enshrined in the



ICESCR, ICCPR, CERD, and CEDAW prohibits discrimination on the grounds of age.

Three regional human rights instruments specifically mention older persons as a group in need of special protection. Article 18(4) of the **African Charter on Human and Peoples' Rights** stipulates that the elderly shall have the right to measures of special protection in keeping with their physical or moral needs. The **Protocol to the African Charter on the Rights of Women in Africa** calls for special protection for elderly women. Article 17 of the **Protocol of San Salvador** stipulates that everyone has the right to special protection in old age and calls upon States to progressively provide suitable facilities, food, and medical care for elderly persons who lack them; to implement programmes to enable the elderly to take part in productive activity, and to foster the establishment of social organizations aimed at improving the quality of life of the elderly.

Article 23 of the **European Social Charter (revised)** establishes the right to social protection for the elderly. According to this provision, States Parties agree to adopt measures to: enable the elderly to remain full members of society for as long as possible by providing adequate resources and information about available services; enable the elderly to choose their lifestyle freely and live independently for as long as possible by providing adequate housing and services; and guarantee support for older persons living in institutions.

In addition, Article 25 of the **Charter on Fundamental Rights of the European Union** (2000) stipulates the rights of the elderly “to lead a life of dignity and independence and to participate in social and cultural life.”





## Chapter 5

## Disabled persons

## Relevant Instruments and Documents

### Refugee Law

ExCom Conclusion No. 47 (1987)

### Human Rights Law

Draft Convention on the Rights of Persons with Disabilities and the Draft Optional Protocol to the International Convention on the Rights of Persons with Disabilities (subject to final adoption and entry into force)

*Non-discrimination clauses in major human rights instruments*

Article 25 of the Universal Declaration of Human Rights (UDHR) (1948)

Article 23 of the Convention on the Rights of the Child (CRC)

Article 18 of the African Charter on Human and Peoples' Rights (African Charter)

Article 13 of the African Charter on the Rights and Welfare of the Child (1990)

Article 15 of the European Social Charter (ESC) (1961)

Article 6 of the Protocol of San Salvador

Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999)

Article 23 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

International Labour Organization (ILO) Convention No. 159 concerning Vocational Rehabilitation and Employment (Disabled Persons)

Committee on Economic, Social and Cultural Rights, General Comment No. 5 on persons with disabilities

CEDAW Committee, General Recommendation No. 18 on disabled women

Rule 21 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, UNGA Resolution 48/96 (1993)

Disabled persons can fully enjoy their fundamental human rights only after numerous cultural and social barriers are overcome, changes in values and greater understanding at all levels of society are promoted, and the social and cultural norms that perpetuate myths about disability are forsaken. When disabled persons become displaced or when refugees become disabled, they face even greater obstacles to the enjoyment of their human rights.

In general, international human rights instruments protect the rights of persons with disabilities through the principles of equality and non-discrimination. The Universal Declaration of Human Rights (UDHR) refers expressly to disabled persons, stipulating in Article 25 that “everyone has the right to security in the event of [...] disability;” but neither the ICCPR nor the ICESCR contain any explicit reference to persons with disabilities. Nonetheless, many provisions of the Covenants and other universal and regional human rights treaties can be applied to ensure that persons with disabilities enjoy equal opportunities and full participation in society.

## 5.1 Relevant human rights standards

In August 2006, the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities reached agreement on the **Draft Convention on the Rights of Persons with Disabilities** and the **Draft Optional Protocol to the International Convention on the Rights of Persons with Disabilities**. The Convention and the Protocol was to be formally sent to the General Assembly for adoption at its session in September 2006. They will then be open for signature and ratification by all countries.

While the Convention does not create new rights, it summarises existing human rights standards and specifically prohibits discrimination against persons with disabilities in all areas of life, including civil rights, access to justice and the right to education, health services and access to transportation. More specifically, Article 11 is devoted to situations of risk and humanitarian emergencies and stipulates that States parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

Furthermore, several international and regional human rights instruments already contain specific provisions concerning persons with disabilities (see list above).

While the **International Covenant on Economic, Social and Cultural Rights (ICESCR)** does not contain any specific provision on the protection of people with disabilities, the Committee on Economic, Social and Cultural Rights adopted a General Comment on persons with disabilities (General Comment No. 5) which establishes that disability falls under the “other status” ground of discrimination prohibited in Article 2 of the ICESCR.

The **Convention on the Rights of the Child (CRC)** accords special rights to disabled children (Article 23). It states that “States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life.” In addition, it stipulates that the conditions of life for such a child should “ensure dignity, promote self-reliance, and facilitate the child’s active participation in the community.” Article 23(2) provides for the right of the disabled child to special care and assistance, and Article 23(3)

further specifies the steps to be taken by the State Parties to implement this right, particularly in the areas of education, training, health care services, rehabilitation services, preparation for employment, and recreation opportunities. Article 23(4) addresses the issue of international cooperation in exchanging information about preventive health care, and medical, psychological, and functional treatment of disabled children.

The **African Charter of Human and Peoples' Rights** stipulates that the disabled shall be entitled to special measures of protection (Article 18(4)). Similarly, Article 13 of the **African Charter on the Rights and Welfare of the Child** addresses the rights of handicapped children.

The **Protocol of San Salvador** stipulates that “States Parties undertake to adopt measures to make the right to work fully effective [...] in particular, those directed to the disabled” (Article 6). The Protocol also sets out the right to social security in case of disability (Article 9).

The **European Social Charter (revised)** states that disabled persons have the right to independence, social integration, and participation in the life of the community (Part I, No. 15) and enumerates steps that States shall undertake to this end, such as promoting access to employment and education (Article 15).

Although the **European Convention** does not specifically provide for the protection of disabled persons, the ECtHR has heard several cases in which disability was at issue. The ECtHR has noted that the absence of any intention to humiliate or debase cannot conclusively rule out a finding of violation of Article 3 of the ECHR (prohibition of torture and ill-treatment) and that suffering may also arise because conditions of detention are not appropriate for someone with a disability. The ECtHR's assessment of the minimum level of severity depends on the circumstances of the case, including the duration of the treatment, its physical and mental effects, and, in some cases, the victim's sex, age, and health. Therefore, according to the ECtHR, “to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3” (see *Price v. the United Kingdom*). Given these findings, it is assumed that if a disabled asylum-seeker is detained, States must take measures to avoid his/her ill-treatment.

Two international conventions have been drafted that directly address the rights of disabled persons. The **Inter-**

**American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities** (1999) is the only regional convention of its kind in the world. Under this Convention, States Parties agree to: adopt measures to eliminate discrimination against persons with disabilities, ensure access to facilities and services, provide services to ensure optimal level of independence and quality of life for persons with disabilities, and implement educational campaigns to increase public awareness and promote respect for and co-existence with persons with disabilities so that discrimination can be eliminated (Article 3). States Parties also agree to cooperate to eliminate discrimination (Article 4) and to promote the participation of organizations of persons with disabilities in formulating the measures and policies needed to implement the Convention (Article 5).

The **International Labour Organization (ILO) Convention No. 159 concerning Vocational Rehabilitation and Employment (Disabled Persons)** (1983) establishes principles of vocational rehabilitation and employment policies aimed at equal opportunity and suggests measures to be taken at the national level to develop rehabilitation and employment services for disabled persons.







## Chapter 6

## HIV positive persons and AIDS victims

## Relevant Instruments and Documents

### Refugee Law

Guidelines for HIV/AIDS interventions in Emergency Situations (issued by UNHCR, UNAIDS, and WHO)

UNHCR Policy and Guidelines on Refugees and AIDS (1988)

Refugees, HIV and AIDS: UNHCR's Strategic Plan 2005-2007

UNHCR Note on HIV/AIDS and the Protection of Refugees, IDPs and Other Persons of Concern (2006)

UNHCR 10 Key Points on HIV/AIDS and the Protection of Refugees, IDPs and Other Persons of Concern 2006

### Human Rights Law

*Non-discrimination clauses in major human rights instruments*

International Guidelines on HIV/AIDS and Human Rights (1998) and its Revised Guideline 6: Access to prevention, treatment, care and support (2002), adopted by the Office of the High Commissioner for Human Rights (OHCHR) and the Joint United Nations Programme on HIV/AIDS (UNAIDS)

UNAIDS/WHO Policy Statement on HIV Testing (2004)

CRC Committee, General Comment No. 3 on HIV/AIDS and the rights of the child

CEDAW Committee, General Recommendation No. 15 on women and AIDS

ESCR Committee, General Comment No. 14 on the right to the highest attainable standard of health

HIV-positive persons and AIDS victims are often stigmatized and at high risk of discrimination and denial of some economic and social rights, including access to health care facilities or education, and may also be denied certain civil rights, such as the right to privacy and freedom of movement. There are thus several protection issues relating to refugees and asylum-seekers affected by HIV/AIDS, including discrimination against HIV-positive refugees and asylum-seekers, mandatory testing, confidentiality of test results, detention, segregation, expulsion, and *refoulement* of HIV-positive refugees or asylum-seekers, denial of adequate HIV-prevention information, or denial of equitable access to HIV-related care and treatment.

## 6.1 Relevant human rights standards

In general, international human rights instruments protect the rights of persons with HIV/AIDS through the principles of equality and non-discrimination (see Chapter 10 below) as they generally prohibit discrimination on any ground including “health status.”

States Parties to human rights treaties are obliged to ensure that refugees living with HIV/AIDS are not discriminated against at any time during their lives as refugees. Therefore, restriction of the right to liberty and security (see Chapter 11 below) or the right to

freedom of movement (see Chapter 15 below) based on suspected or real HIV/AIDS status alone would be incompatible with human rights norms.

Some human rights instruments, such as Article 12 of the ICESCR and Article 24 of the CRC, provide for equal enjoyment of the right to the highest attainable standard of health, a right that is also to be guaranteed to asylum-seekers and refugees (see Chapter 12 below). Therefore, States Parties to these treaties must refrain from taking measures that would deny or limit refugees' and asylum-seekers' equal access to preventive, curative or palliative pharmaceutical products or to medical technologies used to treat HIV/AIDS.

States must also adopt affirmative-action measures to ensure that refugees living with HIV/AIDS can enjoy their rights including their right to the highest attainable standard of health (see Chapter 10 below). This means, for example, that States must take special measures to ensure that women and children have access to voluntary HIV tests and to necessary health services. In this context, the Committee of the Child notes *inter alia*, that it is now widely recognized that comprehensive treatment and care includes anti-retroviral and other drugs, diagnostics and related technologies for the care of HIV/AIDS, related opportunistic infections and other conditions, good nutrition, and social, spiritual and psychological support, as well as family, community and home-based care. Particular measures must also be taken to prevent mother-to-child transmission of HIV. In this context, the Committee on the Rights of the Child specifies that States parties must take steps, including the provision of essential drugs, *e.g.* anti-retroviral drugs, appropriate antenatal, delivery and post-partum care, and making HIV voluntary counselling and testing services available to pregnant women and their partners. The Committee recognizes that anti-retroviral drugs administered to a woman during pregnancy and/or labour and, in some regimens, to her infant, have been shown to significantly reduce the risk of transmission from mother to child. In addition, States parties should provide support for mothers and children, including counselling on infant feeding options (for further details see Committee on the Rights of the Child, General Comment No. 3 on HIV/AIDS and the rights of the children, and see also CEDAW Committee, General Recommendation No. 15 on women and AIDS).

The obligation to take special protection measures for persons living with HIV/AIDS must be met at all times, including during emergency situations. These crisis situations facilitate HIV

transmission and aggravate the impact of AIDS on refugees' well-being. Therefore, governments and international agencies, including UNHCR, must adopt measures to prevent the spread of HIV and to care for those affected by the disease.

States must also take measures to avoid creating negative stereotypes or stigmatization of HIV/AIDS-affected refugees and asylum-seekers. They must provide education and information explicitly designed to change discriminatory attitudes associated with HIV/AIDS.

States must also respect and ensure the individual's right to privacy (see Chapter 16 below). They must respect the confidentiality of information relating to a person's HIV status and refrain from imposing mandatory HIV/AIDS testing (see *the* Committee on the Rights of the Child, General Comment No. 3 on HIV/AIDS and the rights of children).

**For further information see:**

*Volume II:*

Chapter 12 Survival rights: the right to the highest attainable standard of physical and mental health and lack of adequate medical treatment, and the prohibition of *refoulement*



## Chapter 7

## Non-nationals

## Relevant Instruments and Documents

### Human Rights Law

Preamble and Article 1 of the Universal Declaration of Human Rights (UDHR)

Articles 2 and 13 of the International Covenant on Civil and Political Rights (ICCPR)

Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

Articles 1, 5, and 16 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Preamble and Article 2 of the African Charter on Human and Peoples' Rights (African Charter)

Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant

Human Rights Committee, General Comment No. 15 on the position of aliens under the Covenant

Committee on the Elimination of Racial Discrimination, General Recommendation No. 11 on non-citizens

Committee on the Elimination of Racial Discrimination, General Recommendation No. 30 on discrimination against non-citizens

Report of the sub-Commission on the Promotions and Protection of Human Rights, Commission on Human Rights, Sixtieth session, Item 16 of the provisional agenda

## 7.1 Relevant human rights standards

Under human rights instruments, rights are generally granted to “everyone”, regardless of their nationality, their lack of nationality, or their legal status in the country in which they find themselves. States are obliged to ensure rights to all individuals within their territories and under their jurisdiction (Article 2 ICCPR). The Human Rights Committee, by way of teleological interpretation, has found that the requirements “within their territory” and “under their jurisdiction” do not need to be met cumulatively.

In its General Comment 31, the Human Rights Committee found that

“States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation”

In general, non-nationals such as asylum-seekers, refugees, migrant workers, and others who may find themselves in the territory or subject to the jurisdiction of the State Party benefit from the rights guaranteed in human rights treaties without discrimination. This general rule has some exceptions, such as that regarding the political participation of aliens (see Article 16 of the ECHR).

Article 2 of the **International Covenant on Civil and Political Rights (ICCPR)** stipulates that “Each State Party has to respect and to ensure *to all individuals within its territory and subject to its jurisdiction* the rights recognized in the Covenant” (emphasis added). Exceptionally, some of the rights are specifically applicable to citizens, such as Article 25 (the right to vote and to stand for elections), while Article 13, on procedural rights against expulsions, applies only to aliens lawfully in the territory (see Chapters 15 and 18 below).

In its General Comment No. 15, on the position of aliens under the ICCPR, the Human Rights Committee notes that the Covenant does not recognize the right of aliens to enter or reside in the territory of a State Party. It is, in principle, a matter for the State to decide who it will admit to its territory. However, the General Comment stresses that “in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.” The Human Rights Committee has also stressed the prohibition of discrimination concerning aliens’ enjoyment of the Covenant’s rights.

Article 1 of the **American Convention on Human Rights (ACHR)** addresses the duty “[...] to ensure to *all persons* subject to their jurisdiction the free and full exercise of those rights and freedoms, without discrimination [...]” The **European Convention on Human Rights and Fundamental Freedoms (ECHR)** establishes that its rights are granted to “everyone within [a State Party’s] jurisdiction” (Article 1), with some limited exceptions, such as Article 16 (restrictions on political activities of aliens) and Article 2 of its Protocol No. 4 (freedom of movement that is protected only for “everyone lawfully” in the territory of a State Party). Article 2 of the **African Charter on Human and Peoples’ Rights** establishes that “every individual shall be entitled to the enjoyment of the rights and freedoms [...] without distinction of any kind [...]”

Article 1(2) of the **Convention on the Elimination of All Forms of Racial Discrimination (CERD)** states that “this Convention shall not apply to distinctions, exclusions, restrictions

or preferences made by a State Party to this Convention between citizens and non-citizens.” While this provision allows for certain distinctions to be made, these must nonetheless conform to the principle of non-discrimination as stipulated in human rights instruments.

Indeed, in its General Recommendation No. 30 on discrimination against non-citizens, the CERD Committee notes that although some rights, such as the rights to participate in elections, to vote, and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. Thus, States Parties are obliged to guarantee equality between citizens and non-citizens in the enjoyment of the Convention’s rights to the extent recognized under international law.

The CERD Committee also emphasises that different treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in light of the object and purpose of the Convention, are not applied in pursuit of a legitimate aim and are not proportional to the achievement of this aim (see Chapter 10 below). The Committee also includes several recommendations for States Parties, including:

- Ensuring that *legislative guarantees* against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens;
- Ensuring that *immigration policies* do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin;
- Ensuring that particular groups of non-citizens are not discriminated against with regard to *access to citizenship or naturalization*, and being aware of possible barriers to naturalization that may exist for long-term or permanent residents; and
- Being aware that in some cases *denial of citizenship for long-term or permanent residents* could result in creating disadvantages for them in access to employment and social benefits, which violates the Convention’s anti-discrimination principles.



### Learning Objectives:

- Familiarize the reader with existing international legal standards regarding the rights most relevant for the protection of refugees and asylum-seekers
- Illustrate how the various human rights mechanisms at the universal and regional levels operate in practice and may help to protect refugees and asylum-seekers

In an effort to familiarize the reader with international human rights standards so that he/she will be able to identify potential risks, violations and remedies and respond accordingly, this Part of Volume II focuses on the core content of 13 substantive rights that are of particular relevance to refugees and asylum-seekers. While the specific treaty norms that protect each right are discussed below, the procedural aspects of supervisory mechanisms are examined in Volume I. Knowledge of these standards will enable UNHCR staff and partners to work to increase the capacity of States to respect, protect and fulfil the entire range of human rights of persons of concern. Equally, a better understanding of the scope and content of specific human rights will enable refugees, asylum-seekers, and their advocates to challenge violations of the rights examined here by using the supervisory mechanisms as described in Volume I.

The rights discussed in the following chapters are those that are specifically relevant in situations of forced displacement. Nonetheless, it is important to recall that refugees and asylum-seekers are entitled to the full range of human rights, including the right to life.

Human rights violations may occur at any time during a person's life as a refugee. Therefore, when examining violations of human rights, consideration must be given to the acts that occur before displacement, during flight, during the stay in a country of asylum, or after the person has found a durable solution to his/her plight.

States have duties that relate to each of these substantive rights. These duties encompass three levels of obligation: to respect, to protect, and to fulfill (see Volume I).





## Chapter 8

### The right to seek and enjoy asylum from persecution

## Relevant Instruments and Documents

### Refugee Law

Article 33 of the Convention relating to the Status of Refugees

ExCom Conclusions Nos. 82 (1997), 93 (2002), 94 (2002), and 97 (2003)

Article II of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

UN Declaration on Territorial Asylum, UNGA Resolution 2312 (XXII) (1967)

### Human Rights Law

Article 14 of the Universal Declaration of Human Rights (UDHR)

Article XXVII of the American Declaration of the Rights and Duties of Man (ADHR)

Article 22(7) of the American Convention on Human Rights (ACHR)

Article 18 of the Charter of Fundamental Rights of the European Union

Article 12(3) of the African Charter on Human and People's Rights (African Charter)

Article 22 of the Convention on the Rights of the Child (CRC)

UNHCR's Executive Committee has stated that "the institution of asylum, which derives directly from the right to seek and enjoy asylum set out in Article 14(1) of the Universal Declaration of Human Rights, is among the most basic mechanisms for the international protection of refugees" (Conclusion No. 82). However, some practices imposed by States, such as administrative detention of asylum-seekers, strict visa requirements, closing of borders, the imposition of carrier sanctions, inspection of travellers in foreign airports, and limiting access to determination procedures have the effect of deterring asylum-seekers and may in certain circumstances lead to restrictions of the right to seek and enjoy asylum.

## 8.1 Relevant human rights standards

Although the Universal Declaration of Human Rights envisages the right to seek and enjoy asylum (Article 14), this provision was not included in the ICCPR. Therefore, this right is not protected at the universal level in a binding treaty.

Following the adoption of the UN Declaration on Territorial Asylum in 1967, a draft Convention on Territorial Asylum was elaborated and discussed at the United Nations Conference on Territorial Asylum in 1977. However, the Conference failed to adopt the draft convention, and no further attempt has been made since then to develop or codify a right pertaining to territorial asylum in an international treaty.

At the regional level, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and the African Charter on Human and People's Rights contain provisions on asylum, albeit with different wordings.

Article 14 of the **Universal Declaration of Human Rights** refers to the right “*to seek and to enjoy* in other countries asylum from persecution.” Consistent with the 1951 Convention, this right “may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”

Article XXVII of the **American Declaration of the Rights and Duties of Man goes beyond the Universal Declaration of Human Rights** by establishing that “Every person has the right, in case of pursuit not resulting from ordinary crimes, *to seek and receive* asylum in foreign territory, in accordance with the laws of each country and with international agreements.” Despite the importance of both the Universal and American Declarations, and their value to establish a common *opinio juris* when assessing the existence of customary public international law they are not strictly speaking binding upon States, as they are not “treaties” in the legal sense.

The **American Convention on Human Rights (ACHR)**, which is binding upon States Parties, has a wording similar to the American Declaration, establishing in Article 22(7) that “Every person has *the right to seek and be granted* asylum in a foreign territory, in accordance with the legislation of the State and international conventions, in the event he is being pursued for political offences or related common crimes.” Note, however, that this article refers to “political offences or related common crimes” while the American Declaration is broader by mentioning only “pursuit not resulting from ordinary crimes”.

Article 12(3) of the **African Charter on Human and People’s Rights** recognizes the right “*to seek and obtain asylum* in other countries in accordance with the laws of those countries and international conventions.”

The rights contained in the ACHR and the African Charter give rise to an obligation for State Parties to establish fair and efficient procedures for the examination of asylum claims. Arguably, such procedures should guarantee due process rights (Articles 8 and 24 of the ACHR and Article 7 of the African Charter), including the right to appeal in case of rejection and the provision of legal assistance to asylum-seekers for the status determination process (see Chapter 14 below).

The Inter-American Commission on Human Rights (IACmHR) has heard some cases concerning asylum. It has determined that a State violated the right to asylum of one of its nationals by refusing to allow her to travel abroad to seek asylum (*Case 7.602 [Cuba]*).

In a case against the Bahamas, the petitioners, on behalf of 120 Cubans and eight Haitian nationals who were detained in Nassau, alleged that the State violated the victims' rights guaranteed by the American Declaration on Human Rights because of the lack of domestic procedures through which asylum-seekers could assert their claims or pursue release while their claims to refugee status were pending. The petitioners alleged that these failures constituted violations of, among other principles, Article XXVII, the right to asylum, of the ADHR. In addition, the petitioners maintained that the Bahamas was also in violation of Article 33 of the 1951 Convention and its 1967 Protocol. The petitioners requested that the IAmCHR issue precautionary measures against the State to prevent irreparable harm to the victims (see *120 Cuban Nationals and 8 Haitian Nationals detained in the Bahamas, Case 12.071*).

In the landmark *Haitian Interdiction case*, the IAmCHR determined that the United States had breached Article XXVII of the ADHR when it summarily interdicted on the high seas and repatriated Haitians, thus preventing them from exercising their right to seek and receive asylum in foreign territory as provided by the ADHR (*Case 10.675 [United States]*).

The Inter-American Court of Human Rights (IACtHR) and the African Commission on Human and People's Rights (African Commission) have yet to address the scope and content of the right to asylum. The supervisory mechanisms established by the ICCPR do not apply in the absence of any reference to a right to seek asylum in this instrument.



## Chapter 9

## The principle of *non-refoulement*

## Relevant Instruments and Documents

### Refugee Law

Article 33 of the Convention relating to the Status of Refugees

ExCom Conclusions Nos. 6 (1977), 7 (1977), 22 (1981), 30 (1983), 85 (1998), and 102 (2005)

IOM/FOM Nos. 57/98 & 61/98

UNHCR Note on International Protection (1994)

UNHCR Complementary Forms of Protection, Global Consultations on International Protection (2001)

Article II (3) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

Article III of the Bangkok Principles on the Status and Treatment of Refugees

### Human Rights Law

*The prohibition of torture and other cruel, inhuman or degrading treatment or punishment*

Article 5 of the Universal Declaration of Human Rights (UDHR)

Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Article 7 of the International Covenant on Civil and Political Rights (ICCPR)

Article 16 of the International Convention for the Protection of All Persons From Enforced Disappearance

Article 22(8) of the American Convention on Human Rights (ACHR)

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Article 8 of the Declaration on the Protection of All Persons from Enforced Disappearance

Principle No. 5 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions

Article 2 of the Cairo Declaration on the Protection of Refugees and Displaced Persons in the Arab World (adopted by a Group of Arab Experts, meeting in Cairo from 16 to 19 November 1992 at the Fourth Arab Seminar on "Asylum and Refugee Law in the Arab World")

Human Rights Committee, General Comment No. 20, which replaces General Comment No. 7 concerning the prohibition of torture and cruel treatment or punishment (Article 7)

Human Rights Committee, General Comment 31 on the nature of the general legal obligation on States Parties to the Covenant

CAT Committee, General Comment No. 1 on the implementation of Article 3 of the Convention in the context of Article 22

Committee on the Rights of the Child, General Comment No. 6 on treatment of unaccompanied and separate children outside their country of origin

UN Declaration on Territorial Asylum, UNGA Resolution 2312(XXII) (1967)



The principle of *non-refoulement* is established in Article 33 of the 1951 Convention.

**Article 33 of the 1951 Convention: prohibition of expulsion or return (“refoulement”)**

1. 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.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Under this provision, protection against *refoulement* is available to refugees falling under the 1951 Convention; asylum-seekers whose claims are still pending; and persons who have fled their countries and who are entitled to protection under the OAU Convention or the Cartagena Declaration.

Furthermore, it is generally accepted that protection against *refoulement* also applies to persons arriving at the border, including during large-scale influxes of refugees. The Executive Committee (*inter alia* in ExCom Conclusion, No. 6 (XXVIII) – 1977) has reaffirmed on various occasions the importance of the fundamental principle of *non-refoulement* – both at the border and within the territory of a State – with regard to persons who may be subjected to persecution if returned to their country of origin, irrespective of whether or not they have been formally recognized as refugees.

Contrary to human rights law, where *non-refoulement* obligations are of absolute nature, *non-refoulement* protection under international refugee law contains important exceptions (see textbox). These exceptions to the principle of *non-refoulement* are conclusively stipulated in Article 33(2) of the 1951 Convention. In addition, the application of an exception under Article 33(2) requires procedures in which due process guarantees must be strictly observed (see *Manual on Mandate RSD* and *Self-Study Module 2 on Refugee Status Determination*).

It is also generally accepted that the prohibition of *refoulement* as codified in Article 33 of the 1951 Convention also forms part of customary international law. Therefore, all States must respect this principle irrespective of whether they are a party to the 1951 Convention or apply a geographical limitation.

## 9.1 Relevant human rights standards

*Refoulement* is also prohibited explicitly or implicitly in a number of human rights instruments (see list above). *Non-refoulement* obligations under international refugee law and those based in

international human rights law may overlap, but are not congruent. Furthermore, the scope of the *non-refoulement* obligations explicitly codified or deriving from various human rights treaties differ according to their source. It is therefore important to evaluate each case according to the rights applicable in the specific country together with the risks involved.

The prohibition of *refoulement* under human rights instruments also protects people who do not meet the criteria of the refugee defined in Article 1A(2), for example when the risk of being subjected to a serious human rights violation is not linked to one of the Convention grounds. Furthermore, under human rights instruments, there are no limitations or categories of excluded persons, i.e. there is no equivalent to Article 1F or Article 33(2) of the 1951 Convention. *Non-refoulement* obligations under human rights norms may therefore also apply with regard to individuals who have been properly denied refugee status, either by not being included under the definition or due to application of the exclusion provisions.

*Non-refoulement* obligations under human rights law would also entail protection against chain-refoulement, that is, removal to a country from which the individual would, in turn, be transferred or returned to another country where he or she would be subject to a serious human rights violation from which the *non-refoulement* obligation derives.

Human rights law also requires that exceptions to the principle of *non-refoulement* allowed under refugee law must comply with the principle of due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a third country. States are responsible for any measure such as interception practices or rejection at the frontier which result in direct, indirect or *de facto refoulement* (see Vol. II, Chapter 12). States must establish mechanisms to ensure that individuals with international protection needs are identified. Assessment of an individual's risk must be made in an age and gender-sensitive manner when considering the applicability of *non-refoulement* obligations.

## **9.2 Scope of *non-refoulement*: A comparison**

### **9.2.1 1951 Convention and Protocol (Article 33) and customary international refugee law**

**Who is protected:** Refugees and asylum-seekers: Those with a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion and those persons whose status is under examination.

**From what harm?** Threat to life or freedom (or similarly serious human rights violations amounting to persecution) on account of one of the five grounds (race, religion, nationality, membership of a particular social group or political opinion [see *UNHCR Handbook*, paragraphs 51-60]).

**Agent of persecution?** State or non-State actors (see *UNHCR Handbook*, paragraph 65).

**Exceptions:** Reasonable grounds for regarding an asylum-seeker as a danger to the security of the asylum country or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country. The application of an exception requires procedures in which guarantees of due process are strictly observed (see *Manual on Mandate RSD and Self-Study Module 2 on Refugee Status Determination*).

**Burden of proof:** As a general rule, the burden of proof lies with the person submitting a claim. However, the applicant may not be able to support his/her statements with documentary or other proof. If the applicant's account appears credible, he/she should be given the benefit of the doubt, unless there are good reasons to the contrary (see *UNHCR Handbook*, paragraphs 196-197).

**Assessment:** In assessing the overall credibility of the applicant's claim, the adjudicator should take into account such factors as the reasonableness of the facts alleged, the overall consistency and coherence of the applicant's story, corroborative evidence adduced by the applicant in support his/her statements, consistency with common knowledge or generally known facts, and the known situation in the country of origin. Credibility is established when the applicant has presented a claim that is coherent and plausible and does not contradict generally known facts.

**Standard of proof:** The Handbook states that an applicant's fear of persecution should be considered well-founded if he/she "can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable..."

### **9.2.2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3)**

**Who is protected:** Any person, including rejected asylum-seekers.

**Standard of proof:** Substantial grounds for believing that he/she would be in danger of being subject to torture.

**From what harm:** Torture as defined in Article 1 of the CAT (see Volume I), i.e. the *non-refoulement* obligation under Article 3 CAT

does not apply to cases of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

**Agent of persecution:** State agents. Non-State actors only when they act upon the instigation or with the consent or acquiescence of a State agent or when they *de facto* occupy and exercise quasi-governmental authority over the territory.

**Exceptions:** No exceptions. The nature of the activities in which the person is engaged is not relevant.

**Burden of proof:** It is the responsibility of the claimant to present an arguable case. The potential victim must establish that the danger of torture is personal and present. Contradictions or inconsistencies in the presentation of facts adduced by the person that do not raise doubts to the material elements of the claim will not undermine the application.

**Remedy:** The principle of *non-refoulement* should and in many countries is invoked in national courts. Individuals may submit complaints alleging violation of the right to the CAT Committee (see Volume I on requirements). However, it is generally necessary to exhaust domestic remedies first, and the State Party must have recognized the competence of the Committee to receive individual communications. In extremely grave cases, interim measures to suspend the execution of an expulsion decision may be requested to the Committee.

**Assessment:** The risk must be assessed on grounds that go beyond mere theory or suspicions, although it does not have to meet the test of being “highly likely”. The “substantial grounds” may be based not only on activities committed in the country of origin, but also on activities undertaken by the person in the receiving country. The existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not, as such, constitute sufficient grounds for determining that a particular person is in danger of being subjected to torture upon his return to that country; additional grounds must exist in order to show that the individual concerned is personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person could not be considered to be in danger of being subjected to torture in his/her specific circumstances.

**Effects of the decision:** The State must refrain from expelling, returning or extraditing the individual to a country where he/she is in danger of being subjected to torture or any State to which the individual may subsequently be expelled, returned or extradited to the country where torture is feared. The CAT Committee’s finding

of a violation does not affect the authorities' decision to grant asylum. However, it is the State's responsibility to find a solution that allows it to comply with the prohibition of *refoulement*. These solutions may be of a legal nature (such as the decision to admit the applicant temporarily), or of a political nature (identifying a third State that is willing to admit the individual to its territory and that agrees not to return or expel the individual).

If a *refoulement*, expulsion or removal has occurred, the right to an effective remedy contained in Article 3 requires an opportunity for an independent and impartial review of the decision when there is a plausible allegation that Article 3 of the CAT has been violated (see *Agiza v. Sweden*).

### **9.2.3 International Covenant on Civil and Political Rights (Articles 6 & 7)**

**Who is protected:** Any person, including rejected asylum-seekers.

**Standard of proof:** Substantial grounds for believing that there is a real risk of irreparable harm.

**From what harm:** Any irreparable harm, such as deprivation of life (Article 6 of the ICCPR) or torture or cruel, inhuman or degrading treatment or punishment (Article 7 of the ICCPR), either in the country from which removal is to be effected or in any country to which the person may subsequently be removed (see General Comment No. 31, paragraph 12). Unlike CAT, under the ICCPR there is no requirement that torture be for a particular purpose, such as obtaining a confession or punishing someone, in order to fall within the prohibition. It is sufficient if what is inflicted on an individual reaches a certain level of severe pain and suffering to constitute torture.

**Agent of persecution:** State or non-State actors.

**Exceptions:** No exceptions. The nature of the activities in which the person is engaged is not relevant.

**Burden of proof:** Responsibility falls to the applicant to demonstrate the risk.

**Remedy:** The principle of non-refoulement should and in many countries is invoked in national courts. Individuals may submit complaints alleging violation of the right to life or the prohibition against torture or other ill-treatment to the Human Rights Committee (see Part I on requirements). However, it is generally necessary to exhaust domestic remedies first, and the State must be a party to the First Optional Protocol to the ICCPR. In extremely grave cases, interim measures to suspend a decision of expulsion may be requested.

**Assessment:** That the individual is personally at real risk of being subjected to irreparable harm upon return.

**Effects of the decision:** The State must refrain from expelling, returning or extraditing the individual to a country where his/her life is in danger or where there is a danger of being subjected to torture, or any country to which the person may subsequently be removed.

#### **9.2.4 European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3)**

**Who is protected:** Any person.

**Standard of proof:** “Substantial grounds for believing that there is a real risk” of treatment prohibited by Article 3 of the ECHR in the receiving State. If the applicant has not yet been deported, the existence of the risk is assessed not when the deportation or extradition order is issued but when the case comes before the ECtHR. When the applicant has already been expelled, the existence of the risk is assessed at the time the extradition occurred.

**From what harm:** Torture and inhuman treatment.

**Agent of persecution:** State or non-State actors (see, for example, *H.L.R. v. France*, *Ahmed v. Austria*, and *D. v. the United Kingdom*).

**Exceptions:** No exceptions. The nature of the activities in which the person is engaged is not relevant. It does not even matter if the applicant poses a threat to national security.

**Burden of proof:** Responsibility falls on the applicant. However, the Court will assess the existence of a real risk of treatment contrary to Article 3 in light of all materials placed before it or, if necessary, material obtained *motu proprio* (see *Cruz Varas v. Sweden*).

**Remedy:** The right enshrined in article 3 should and frequently is invoked in national courts in many countries. Individuals may submit complaints alleging violation of the prohibition against torture to the ECtHR (see Vol. I on requirements). However, it is generally necessary to exhaust domestic remedies first. In extremely grave cases, interim measures to suspend a decision of expulsion may be requested.

**Assessment:** “Substantial grounds for believing that there is a real risk” of being subjected to torture, inhuman or degrading treatment or punishment in the requesting country. A “real risk” is not a certainty, but a fact very likely to occur. The ECtHR does not focus on whether the risk is one of torture or ill-treatment. The ECtHR is not restrictive in terms of what kind of evidence may be

considered. It takes into account “all the material placed before it, and if necessary, material obtained of its own motion” (*Chahal v. the United Kingdom*).

**Effects of the decision:** Decisions of the ECtHR are binding and the execution of the Court’s judgments are supervised by the Committee of Ministers of the COE (Article 46 ECHR). The State must refrain from expelling, returning or extraditing the individual to a State where he/she is in danger of being subjected to torture or other ill-treatment, or to any other State from which the person might subsequently be removed to face torture.

### **9.3 The right to life and the prohibition against refoulement**

Human rights supervisory bodies have interpreted the right to life as encompassing the State’s obligation to refrain from extraditing, deporting, expelling or otherwise removing a person from its territory, where there are substantial grounds for believing that his/her life is at risk in the country to which the removal is to be effected, or in any country to which the individual may subsequently be removed.

The Human Rights Committee in its General Comment No.31 (para 12) expressed:

“Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.”

An explicit *non-refoulement* obligation has been included in the *International Convention for the Protection of All Persons from Enforced Disappearance*, which was adopted during the first session of the newly established Human Rights Council in Spring 2006 and which following further adoption by the General Assembly shall be open for signature, ratification and adhesion.

Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance stipulates:

1. No State Party shall expel, return (“refouler”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.
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 or of serious violations of international humanitarian law.

This prohibition includes the risk of enforced disappearance or extra-legal, summary or arbitrary execution (see, for example, Article 8 of the Declaration on the Protection of All Persons from Enforced Disappearance, and Principle No. 5 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions).

Complexities arise when an individual faces extradition to a country where he/she has been, or would be, condemned to the death penalty. Abolition of the death penalty is not expressly required under international law, although there are several instruments that commit States Parties to abolishing the death penalty. However, capital punishment can only be applied under very restricted circumstances and otherwise entails a violation of the right to life. Among other requirements, the death penalty must be ordered by a court, for a crime for which that penalty is provided by law. It cannot be imposed except for the most serious crimes and following proceedings that strictly respect all procedural safeguards for a fair trial.

The Human Rights Committee has examined in several cases whether the fact that a country has abolished death penalty requires it to refuse extradition of an individual to a country still applying capital punishment. While in an earlier decision (*Kindler v. Canada*) the Committee concluded that the extradition would not amount to a violation of the Covenant, in 2003 the Committee considered in the case of *Judge v. Canada* the growing international consensus in favor of the abolition of the death penalty and decided to review its application of Article 6 of the Covenant. It concluded that for countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. In addition, the Committee found a separate violation of Article 6 and of Article 2(2) (right to an effective remedy) of the ICCPR as the individual was deported to the USA before he could exercise his right to appeal.

To overcome the above legal obstacles for extradition, State practice often makes use of diplomatic assurances intended to guarantee that a death sentence will not be issued or carried out. These assurances may, considering all relevant information concerning the individual case, only be relied upon if:

- i. they are a *suitable* means to eliminate the danger to the individual concerned, and
- ii. if the sending State may, in good faith, consider them *reliable* (see more on this under section 9.6 below).



The ECtHR has held that extradition of a person to a country where he/she risks the death penalty would not, in itself, raise any issue either under the right to life (Article 2) or the prohibition of torture and other ill-treatment (Article 3). However, the manner in which the death penalty is imposed or executed, as well as the personal circumstances of the condemned persons and conditions of detention, may result in a violation of the absolute prohibition against torture and ill-treatment. This will be the case, for example, if the person would be subject to the “death-row phenomenon.” which has been considered as inhuman and degrading treatment (see *Soering v. the United Kingdom*) or if the sentence is executed by flogging, whipping or stoning to death (see *Jabari v. Turkey*).

Recently, the Court modified and further developed its position. In the case of *Bader and Others v. Sweden* (Judgement of 8 November, 2005), the ECtHR held unanimously that the applicants’ deportation to Syria would amount to a violation of Article 2 (right to life) and Article 3 (prohibition against inhuman or degrading treatment) of the ECHR.

In 2002, Mr. Bader had made several requests for asylum in Sweden, all of which were rejected. A deportation order was issued. In Syria in 2003, Mr. Bader was convicted, *in absentia*, of complicity in a murder and was sentenced to death in Syria. His family then submitted a new application for asylum, which was also rejected. In their submission to the ECtHR, the applicants complained that if deported to Syria, Mr. Bader would face a real risk of arrest and execution contrary to Articles 2 and 3 of the ECHR. The Court noted that the Swedish Government had obtained no guarantee from the Syrian authorities that Mr. Bader's case would be re-opened and that the public prosecutor would not request the death penalty at any retrial. The Court determined that Mr. Bader had a justified and well-founded fear that the death sentence against him would be executed if he was forced to return to his home country. Moreover, since executions are conducted without any public scrutiny or accountability, the circumstances surrounding his execution would inevitably cause Mr. Bader considerable fear and anguish while he and the other applicants would all face intolerable uncertainty about when, where, and how the execution would be carried out. The ECtHR also found that the judgement against Mr. Bader had been in flagrant denial of the right to a fair trial. Given this specific circumstance, the Court determined that the death sentence imposed on Mr. Bader following an unfair trial would inevitably cause the applicants additional fear and anguish if they were forced to return to Syria, as there was a real possibility that the sentence would be enforced in that country. Thus, the ECtHR concluded that there were

substantial grounds for believing that Mr. Bader would be exposed to a real risk of being executed and subjected to treatment contrary to Articles 2 and 3 of the ECHR if he was deported to Syria.

#### **9.4 Children (girls and boys) and the principle of *non-refoulement***

In affording proper treatment of unaccompanied or separated children, States must fully respect *non-refoulement* obligations deriving from international human rights, humanitarian and refugee law and, in particular, must respect obligations codified in article 33 of the 1951 Refugee Convention and in article 3 of the CAT. Furthermore, in fulfilling obligations under the Convention on the Rights of the Child, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such *non-refoulement* obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services.

As under-age recruitment and participation in hostilities entails a high risk of irreparable harm involving fundamental human rights, including the right to life, State obligations deriving from article 38 of the Convention, in conjunction with articles 3 and 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, entail extra-territorial effects and States shall refrain from returning a child in any manner whatsoever to the borders of a State where there is a real risk of under-age recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties.

In assessing application of the prohibition against *refoulement* in relation to a child asylum-seeker, it is essential to take into account the principle of the “best interest” of the child (Art. 1 of the CRC; see Chapter 3 above). Since the authorities are obliged to look at the child’s best interest as “a primary consideration,” the best

interest of the child outweighs other legitimate considerations, such as immigration control. For example, Article 1 of the CRC may prohibit the repatriation of unaccompanied children who have no supportive family network in their country of origin.

## 9.5 Implementing legitimate expulsion or deportation orders

ExCom has reiterated “that return of persons found not to be in need of international protection should be undertaken in a humane manner, **in full respect for human rights and dignity** and, that force, should it be necessary, be proportional and undertaken in a manner consistent with human rights law; and emphasizes that in all actions concerning children, the best interests of the child shall be a primary consideration” Conclusion No. 96 (2003).

As stated by the ECtHR, a certain “inevitable” amount of suffering is linked to the implementation of an expulsion order. However, some types of behaviour may raise issues covered by the prohibition against torture and other ill-treatment and even covered by the right to life. From the case-law of human rights bodies, in particular the ECtHR, it is clear that when law-enforcement officials are permitted to use force, the force must not be more than “absolutely necessary” and must be strictly proportionate to the achievement of permitted aims (see, for example, *Jordan v. the United Kingdom*). Thus, in the implementation of a rejected asylum-seeker’s deportation, any use of force by enforcement officials must be the minimum necessary. Similarly, States must not put human life at risk when lawfully detaining asylum-seekers (see *Nachova et al. v. Bulgaria*).

### Rejected asylum-seekers and the right to an effective remedy

According to human rights instruments, when a rejected asylum-seeker subject to expulsion to another country has grounds to fear torture or cruel, inhuman or degrading treatment or punishment, he/she should have an effective remedy against the decision (see Articles 3 and 13 of the ECHR, Articles 22(8) and 25 of the ACHR, and Articles 2.3, 6 and 7 of the ICCPR).

If there are no mechanisms in place or if existing mechanisms are ineffective, interim measures of protection should be requested of the international human rights bodies (see Volume I for requirements).

## 9.6 Terrorism and the prohibition of *refoulement*

Terrorism constitutes a challenge to human rights in many ways. Acts of terrorism violate the human rights of their victims. Therefore, States are obliged under international human rights law to maximise the protection against terrorism of all individuals on their territory and under their jurisdiction, including of refugees and asylum-seekers. Another human rights dimension is the unwarranted association of terrorism and foreigners, including refugees and asylum-seekers, made *inter alia* by certain media and

politicians willing to exploit public fears about the terrorist threat which may exacerbate discrimination and xenophobia towards foreigners. The resulting stigmatisation increases a risk of attacks and harassment against refugees and asylum-seekers on the basis of their perceived ethnicity or religion. Issues related to the revision of asylum systems from a security viewpoint and those related to ensuring respect of the principle of *non-refoulement* therefore constitute only one part of a complex challenge.

Already under Security Council Resolution 1373 (2001), States have an obligation to take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts.

In the recent and more elaborate United Nations Plan of Action, annexed to the United Nations Counter Terrorism Strategy, adopted by the General Assembly on 8 September 2006, States *inter alia* resolved to undertake a number of “measures to prevent and combat terrorism, in particular by denying terrorists access to the means to carry out their attacks, to their targets and to the desired impact of their attacks; to refrain from organizing, instigating, facilitating, participating in, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that our respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens” (section II, paragraph 1, (A/60/L.62)). More specifically, in relation to refugees, States resolved “to take appropriate measures, before granting asylum, for the purpose of ensuring that the asylum-seeker has not engaged in terrorist activities and, after granting asylum, for the purpose of ensuring that the refugee status is not used in a manner contrary to the provisions set out in section II, paragraph 7, above” (United Nations Counter Terrorism Strategy, Plan of Action, section II, paragraph 1, (A/60/L.62)).

As a fundamental underlying obligation, States “must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law” (UN Security Council Resolutions 1535 (2004), 1624 (2005), see also UN Security Council Resolution 1373 (2001)).

All *non-refoulement* obligations deriving from international refugee and human rights law (outlined above) must be fully respected. In particular, States are under an obligation not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life or torture.

In the context of terrorism, but not confined to it, the question arises whether and to what extent legal obstacles to extradition or other ways of transferring a person to another country could be addressed by diplomatic assurances. The conditions under which the sending State is permitted to remove a person to another country on the basis of diplomatic assurances have been examined by international, regional and national courts in cases involving extradition to a risk of capital punishment or serious violations of fair trial as well as expulsion or deportation to a danger of torture or other forms of ill-treatment. The issue has also been addressed by human rights treaty bodies, for example the CAT (*Agiza v. Sweden*), and experts mandated by the United Nations Commission on Human Rights and its Sub-Commission. This has led to the development of clear criteria, and it is now well established that the sending State acts in keeping with its human rights obligations only if such assurances effectively remove the risk that the individual concerned will be subjected to violations of the rights guaranteed therein. Thus, diplomatic assurances may, considering all relevant information concerning the individual case, only be relied upon if:

- i. they are a *suitable* means to eliminate the danger to the individual concerned, and
- ii. if the sending State may, in good faith, consider them *reliable*

The UN Special Rapporteur on torture expressed the view that: “in circumstances where there is a consistent pattern of gross, flagrant or mass violations of human rights, or of systematic practice of torture, the principle of *non-refoulement* must be strictly observed and diplomatic assurances should not be resorted to.” Similarly, the Sub-Commission on the Promotion of Human Rights in its Resolution on the Transfer of Persons, “confirms that where torture or cruel, inhuman or degrading treatment is widespread or systematic in a particular State, especially where such practice has been determined to exist by a human rights treaty body or a special procedure of the Commission on Human Rights, there is a presumption that any person subject to transfer would face a real risk of being subjected to such treatment and recommends that, in such circumstances, the presumption shall not be displaced by any assurance, undertaking or other commitment made by the

authorities of the State to which the individual is to be transferred” (U.N. Doc. E/CN.4/Sub.2/2005/L.12, 4 August 2005, paragraph 4). For more details please refer to the UNHCR Note on Diplomatic Assurances and International Refugee Protection, August 2006.

**Special Rapporteur on the promotion and protection of human rights while countering terrorism**

In its Resolution 2005/80, the Commission on Human Rights appointed a special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism for a three-year term with the mandate to, among other activities:

- Make concrete recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism;
- Gather, request, receive, and exchange information and communications from and with all relevant sources;
- Identify, exchange, and promote best practices on measures to counter terrorism that respect human rights and fundamental freedoms; and
- Develop a regular dialogue with all relevant actors, including governments, relevant UN bodies, specialized agencies and programmes, non-governmental organizations, and other regional and sub-regional international institutions.

**For further information see:**

*Volume II:*

Chapter 12 Survival Rights: lack of adequate medical treatment and the prohibition of *refoulement*.



## Chapter 10

## The principle of non-discrimination

## Relevant Instruments and Documents

### Refugee Law

Article 3 of the Convention relating to the Status of Refugees

Handbook on Procedures and Criteria for Determining Refugee Status

ExCom Conclusion No. 104 (2005)

Article IV of the OUA Convention Governing the Specific Aspects of Refugee Problems in Africa

### Human Rights Law

*The principle of equality and non-discrimination*

Article 2 of the Universal Declaration of Human Rights (UDHR)

Articles 2, 3 and 26 of the International Covenant on Civil and Political Rights (ICCPR)

Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Article 2 of the Convention on the Rights of the Child (CRC)

Articles 1(1) and 24 of the American Convention on Human Rights (ACHR)

Articles 2 and 3 of the African Charter on Human and Peoples' Rights (African Charter)

Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Article 1 Protocol No. 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Human Rights Committee, General Comment No. 15 on the position of aliens under the Covenant

Human Rights Committee, General Comment No. 18 on non-discrimination

CERD Committee, General Recommendation XXX (2004) on non-citizens

The right to equal treatment and the prohibition against discrimination under human rights law provide broader protection than the provisions under international refugee law. While under the 1951 Convention refugees are granted only some rights on an equal footing with citizens (see Articles 4 on religion, 14 on artistic rights and industrial property, 16 on access to courts, 22 on public education, 23 on public relief, and 24 on labour legislation and social security), under human rights treaties, rights are generally granted to “everyone” under the jurisdiction of the State (see Chapter 7 above). In addition, while Article 3 of the 1951 Convention refers to the prohibition against discrimination of refugees on the grounds of “race, religion and country of origin,” and the enumeration is exhaustive, the non-discrimination provisions under human rights law are broader in scope, cover



more grounds of prohibited discrimination, and the grounds listed are generally not exhaustive.

### **10.1 Discrimination during a refugee's life**

Discrimination can affect refugees during each stage of their forced displacement:

- Tension arising from ethnic, racial or religious discrimination can cause refugee flows;
- During displacement, refugees may be seen as an unwelcome disruption in the lives of local people among whom they have sought safety; and
- Discrimination can affect local integration in the host country, resettlement to a third country, or voluntary repatriation to the refugee's country of origin.

UNHCR's Executive Committee has reaffirmed the importance of education and other programmes to combat racism, discrimination, and xenophobia (Conclusion No. 85[g]) and has appealed to States to combat intolerance, racism, and xenophobia and to foster empathy and understanding through public statements, appropriate legislation, and social policies, especially concerning the special situation of refugees and asylum-seekers (Conclusion No. 77 [h]). The Committee has also indicated that host countries may need technical and financial support to adapt and revise their national legal and administrative frameworks to allow refugees equal enjoyment of rights, services and programmes without discrimination (Conclusion No.104 [l]).

### **10.2 Relevant human rights standards**

The general principle of equality before the law and non-discrimination is a fundamental element of international human rights law. The right to equality and non-discrimination is recognized in several human rights instruments (see list above).

Prohibited discrimination under human rights law includes any *distinction, exclusion, restriction or preference* that is based on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and that has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by all persons, on an equal footing, of all of the rights contained in human rights instruments.

While most human rights treaties prohibit discrimination in relation to the enjoyment of the rights they enumerate, some instruments provide for protection that is not limited to the

enjoyment of those rights. For example, Article 26 of the ICCPR, Article 3 of the ACHPR, Article 24 of the ACHR, and Protocol No. 12 of the ECHR establish free-standing rights to equality, which means that their application is not confined to the rights contained in those treaties.

For example, the provision on non-discrimination in Article 14 of the ECHR is limited as it prohibits discrimination only with regard to the “enjoyment of the rights and freedoms” set forth in the Convention. To bridge this gap, Protocol No. 12 of the ECHR establishes a free-standing right to equality on a number of grounds, including sex, race, colour, language, religion, national or social origin, and birth. Therefore, any act or omission by a public authority, including when exercised on the basis of discretionary power, must not be discriminatory.

Similarly, Article 26 of the ICCPR also establishes a free-standing non-discrimination provision, so its application is not confined to the rights contained in the ICCPR. According to this article “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The Human Rights Committee noted in its General Comment 18 that “the Covenant neither defines the term discrimination nor indicates what constitutes discrimination. According to the Committee the term “discrimination” as used by the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.” The non-exhaustive nature of the list provided in Article 26 ICCPR allows for its application to cases of discrimination based on citizenship or absence thereof.

The CESCR also contains an explicit non-discrimination provision in its Article 2(2) which stipulates that “the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Article 2(3) stipulates that “Developing Countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”. In accordance with general principles of human rights law and in the light of the object and purpose of the Covenant, the exception in article 2(3) should be interpreted narrowly.

### **10.3 Scope and content of the principle of non-discrimination under human rights law**

Efforts to protect refugees and asylum-seekers are often thwarted by discrimination, racism, and xenophobia. Protecting refugees and asylum-seekers from all forms of discrimination requires understanding of the right to equality which, although not absolute, imposes on States limits to their discretion to draw distinctions between individuals under their jurisdiction. Human rights law provides the standards necessary to determine when a distinction is considered discriminatory and the mechanisms to challenge distinctions if they are arbitrary or disproportionate.

#### **10.3.1 When does a “distinction” not amount to “discrimination”?**

It is well established in international human rights law that not all distinctions in treatment constitute discrimination. The Human Rights Committee noted in its General Comment No. 18: “the enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance. In this connection, the provisions of the Covenant are explicit. For example, article 6, paragraph 5, prohibits the death sentence from being imposed on persons below 18 years of age. The same paragraph prohibits that sentence from being carried out on pregnant women. Similarly, article 10, paragraph 3, requires the segregation of juvenile offenders from adults. Furthermore, article 25 guarantees certain political rights, differentiating on grounds of citizenship.”

The principle of non-discrimination may actually require differentiation in that persons who are different should be treated differently. Although not all differences in treatment are discriminatory, international law establishes criteria for determining when a distinction amounts to discrimination. In essence, it is possible to say that a distinction is compatible with the principle of equality when

- It has an *objective* and *reasonable justification*;
- It pursues a *legitimate aim* compatible with human rights law; and

- There is a ***reasonable relationship of proportionality*** between the means employed and the aim to be realized.

### **10.3.2 Affirmative action**

In some circumstances, the principle of non-discrimination requires States to take affirmative actions or protective measures to prevent or compensate for structural disadvantages or to protect particularly vulnerable groups.

Affirmative actions are aimed to remove obstacles to the advancement of disadvantaged groups such as women, minorities, indigenous peoples, refugees, internally displaced persons and disabled persons and are of temporary character, meaning that they must not continue after their objectives have been achieved. Affirmative actions measures cannot be considered discriminatory. Therefore, if a State provides privileged access to education programs to marginalized or disadvantaged groups, for example, or if it provides special assistance support to mothers, such measures would not be contrary to the principle of equality.

States are thus required to establish procedural safeguards to ensure fair access to refugee status determination procedures for women, children, elderly, and disabled persons. Article 4 of the CEDAW expressly provides that special measures, such as quotas, and affirmative actions that are aimed at accelerating *de facto* equality between men and women are not considered discriminatory.

### **10.3.3 Direct and indirect discrimination**

Discrimination with the “purpose” or the “effect” of nullifying or impairing the equal enjoyment or exercise of the rights is prohibited under human rights law.

The concept of “indirect” discrimination refers to an apparently “neutral” law, practice or criterion that has been applied equally to everyone but the result of which has a disproportional or unreasonable impact on one group compared to another. In determining the existence of indirect discrimination, it is not relevant whether or not there was intent to discriminate on any of the prohibited grounds. Rather, one must examine the consequences or effects of a law or action (see Human Rights Committee, *Derksen v. the Netherlands*).

### **10.3.4 Discrimination by private individuals**

Discriminatory practices by non-State actors may constitute serious threats to the enjoyment of human rights by asylum-seekers and refugees. States Parties to human rights instruments are obliged to prevent discrimination by private actors.

Some human rights treaties, such as the CERD and CEDAW, expressly refer to the obligations of States Parties to eliminate discrimination in the private sphere. Under Article 2 of the CERD, for example, States Parties “undertake not to sponsor, defend or support racial discrimination by any persons or organizations.” Similarly, under Article 2 of the CEDAW, States Parties undertake to “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”

In their monitoring work, treaty bodies have also dealt with cases of asylum-seekers and refugees who suffered discrimination by private entities. For example, when examining the report of Australia, the CERD Committee expressed concern about the media’s biased treatment of asylum-seekers. In accordance with the obligations set out in Article 7 of the CERD, the Committee has required States Parties to take actions to counter any tendency to target, stigmatize, stereotype or profile asylum-seekers on the basis of race, colour, descent, and national or ethnic origin, especially by the media, and society at large (see CERD Concluding Observations Australia, 2005, and CERD Concluding Observations United Kingdom of Great Britain and Northern Ireland, 2003).

#### **10.4 Non-discriminatory treatment of asylum-seekers and refugees**

Non-discriminatory treatment requires that persons who are in analogous circumstances should be treated equally even if the comparison is between nationals and asylum-seekers or refugees. Although States enjoy a certain margin of discretion in assessing whether and to what extent differences in otherwise similar situations justify different treatment, any unreasonable differentiation between nationals and asylum-seekers would amount to discrimination. Similarly, the right not to be discriminated against in the enjoyment of the rights guaranteed under human rights treaties is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different. Refugees and asylum-seekers are often at a disadvantage compared with other sectors of the population, with the result that positive measures (affirmative actions) are required to make up for the differences and place them in a situation similar to other persons within the jurisdiction of the State concerned.

Human Rights supervisory bodies examining States Parties’ reports generally assess the discrimination suffered by asylum-seekers and refugees in the country of asylum in individual status

determination procedures (see the CERD Concluding Observations Denmark, 2002) and in the enjoyment of all rights in the country of asylum, including economic, social, and cultural rights (see *the* CERD Concluding Observations United Kingdom of Great Britain and North Ireland, 2001).

### **10.5 Racism and xenophobia against asylum-seekers and refugees**

Since asylum-seekers and refugees are not in their home country, are usually speaking a different language, and often belong to a different ethnic group than the population of the host country, they are particularly vulnerable to racial discrimination. Under human rights instruments, States must take appropriate measures to combat discriminatory practices, including racism and xenophobia. Generally, human rights treaty bodies express grave concern about acts of discrimination and racism against asylum-seekers and refugees. They have called on States to combat discriminatory attitudes and prejudices by:

- Establishing educational programmes promoting tolerance towards asylum-seekers and refugees (see the CERD Concluding Observations Switzerland, 2002);
- Penalizing discriminatory behaviours against them; and
- Providing the necessary means to make redress available for acts of discrimination and other violations.

Refugees and asylum-seekers should have legal protection against racist and xenophobic acts, and the perpetrators of such crimes should be openly condemned and effectively punished.

#### **The prohibition against advocacy of hatred**

If asylum-seekers or refugees are threatened with or exposed to violence because of their race or ethnic origin, or private or public groups or organizations publish or use racist propaganda directed against refugees, it is important to consider that:

- Article 20(2) of the ICCPR and Article 13(5) of the ACHR prohibit any advocacy of national, racial or religious hatred, and require States to prohibit such behaviours through legislation (see Chapter 18 below).
- Article 4(a) of the CERD requires States to make illegal: the dissemination of ideas based upon racial superiority or hatred; incitement to racial discrimination; acts of violence against a race or group of person of another colour or ethnic origin; incitement to such acts of violence; and provision of any assistance, including financial assistance, to racist activities. In addition, Article 4(b) requires States to make illegal any organizations and propaganda that promote and incite racial discrimination, as well as participation in such organizations or propaganda.

## 10.6 Discrimination against certain categories of asylum-seekers

The principle of non-discrimination also applies when considering different groups of asylum-seekers. Any distinction in treatment by the State also has to be reasonable, objective, proportional, and with a legitimate aim. A categorical denial of access to asylum-procedures for asylum-seekers from a particular country or ethnic background will never be justified. By contrast, applying different procedures to asylum-seekers of different origins (*e.g. prima facie* procedures, accelerated or standard procedures) based on the assumption that they present different protection needs and paired with sufficient procedural safeguards, could be a legitimate differentiation which complies with the principle of non-discrimination. Conversely, if a State provides certain social benefits to only one category of asylum-seekers, such measures might amount to discrimination if the differentiation of treatment is not justified.

If UN treaty bodies receive information on discrimination among different asylum-seekers, it is highly likely that they will respond. For example, in reviewing the report of Costa Rica, the CERD Committee expressed concern at the discriminatory application of legislation on refugee status determination that, according to information received, set different requirements for different nationalities. The Committee recommended that the State ensure equal treatment for all asylum-seekers during refugee status determination proceedings, “and in particular [to] Colombians” (CERD Concluding Observations Costa Rica, 2000).

If distinctions among asylum-seekers are made on the grounds of sex or race, such treatment may be illegitimate under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Elimination of Racial Discrimination (CERD), and victims may submit an individual complaint (see Vol. I).







## Chapter 11

**The right to liberty and security of person: Non-penalization for illegal entry, judicial protection against detention, and conditions of detention**

## Relevant Instruments and Documents

### Refugee Law

Article 31 of the 1951 Convention relating to the Status of Refugees

ExCom Conclusions Nos. 44 (1986), 72 (1993), and 85 (1998)

UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-seekers (1999)

Detention of Asylum-seekers and Refugees: The Framework, the Problem and Recommended Practice (ExCom Standing Committee, 1999)

UNHCR Guidelines on Protection and Care of Refugee Children (1994)

Global Consultations Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees (Geneva Expert Round Table, 2001)

### Human Rights Law

*The right to liberty and security of person*

Article 9 of the Universal Declaration of Human Rights (UDHR)

Article 9 of the International Covenant on Civil and Political Rights (ICCPR)

Article 37 of the Convention on the Rights of the Child (CRC)

Article 7 of the American Convention on Human Rights (ACHR)

Article 6 of the African Charter on Human and People's Rights (African Charter)

Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Human Rights Committee, General Comment No. 8 on the right to liberty and security of the person (Article 9)

Human Rights Committee, General Comment No. 15 on the position of aliens under the Covenant

Human Rights Committee, General Comment No. 27 on freedom of movement (Article 12)

Inter-American Court, Advisory Opinion OC-17/02 on the juridical condition and human rights of the child, 28 August 2002

*Right to humane conditions of detention*

Article 10 of the International Covenant on Civil and Political Rights (ICCPR)

Article 5 of the American Convention on Human Rights (ACHR)

Article 5 of the African Charter on Human and People's Rights (African Charter)

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Article 24 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (women in distress, including women in detention)

Human Rights Committee, General Comment No. 21: Replaces General Comment No. 9 concerning humane treatment of persons deprived of liberty (Article 10)

UN Rules for Juveniles Deprived of their Liberty (1990)

UN Standard Minimum Rules for the Treatment of Prisoners (1955)

UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1990)

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Standards-Substantive sections of the CPT's General Reports (CPT/Inf/E [2002] 1-Rev. 2003)

In Conclusion 44, the Executive Committee of UNHCR notes “with deep concern that large numbers of refugees and asylum-seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum, pending resolution of their situation”. The issue of arbitrary detention of asylum-seekers and refugees requires ongoing attention. Detention should, in principle, be avoided because of the hardships it causes; and should, if at all, only be imposed in full compliance with established human rights standards.

Human rights principles complement refugee law by recognizing several rights, such as freedom of movement (see Chapter 15 below) and the right to liberty and security of person. Of course, human rights law does not grant complete freedom from arrest or detention. Deprivation of liberty is a legitimate form of State control over persons under their jurisdiction. However, human rights standards provide substantive limitations and procedural guarantees that arrest or detention will not be arbitrary or unlawful.

### 11.1 Refugee law standards

Under international refugee law, refugees shall not be punished because of their illegal entry or presence as long as they came directly from the country where they feared persecution, present themselves to the authorities without delay, and show good cause (flight from persecution is considered good cause).

A teleological interpretation of Article 31(1) of the 1951 Convention reveals that refugees are not required to have come “directly” from their country of origin. The intention appears to be that that Article 31(1) should also apply when refugees pass through other countries or territories where they were threatened with *refoulement*.

UNHCR’s Executive Committee has expressed that, in view of the hardship it imposes, detention should normally be avoided (ExCom No. 85).

#### Article 31 of the 1951 Convention

“1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened... enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country...”

Therefore, refugees and asylum-seekers should not be penalized or exposed to unfavourable treatment solely because their presence in the country is considered unlawful.

### **11.1.1 Exceptions**

Under international refugee law, there are four permissible exceptions to the general rule that asylum-seekers should not be detained. Asylum-seekers may be detained:

- To **verify identity** (when identity is undetermined or in dispute);
- To **determine the elements on which the claim for asylum is based**;
- In cases where asylum-seekers have **destroyed their travel or identity** documents or have used fraudulent documents in order to mislead the authorities of the country in which they intend to claim asylum; and
- To **protect national security and public order**.

Detaining asylum-seekers is considered lawful and not arbitrary if it complies with national law, the 1951 Convention, and international human rights law (see below). In making the decision to detain, authorities should determine whether detention is reasonable and proportional to the objectives to be achieved. If judged necessary, detention should only be imposed on a non-discriminatory basis.

## **11.2 Relevant human rights standards**

Human rights provisions provide for procedural and substantive guarantees that arrest or detention will not be arbitrary or unlawful; that it will be subject to judicial or administrative review; and that any detained person must be informed, at the time of the detention, of the reasons and charges. Human rights standards also require that detention must be exercised in a non-discriminatory manner and that detaining children is a last resort that, if imposed, must comply with several rigorous requirements.

Human rights supervisory bodies have specified that these principles apply to all types of detention, whether in criminal cases or not, including administrative, preventive as well detention in the course of immigration control.

### **11.2.1 The right to liberty**

The right to liberty and security is codified in Article 9 of the UDHR and further elaborated in Article 9 of the ICCPR (further developed by General Comment No. 8), Article 37(b) of the CRC,

Article 7 of the ACHR, Article 5 of the ECHR and Article 6 of the ACHPR. All these provisions establish certain procedural guarantees and minimum standards of protection against arbitrary arrest and detention.

The **European Convention on Human Rights and Fundamental Freedoms** differs from the other conventions in that it exhaustively defines the cases in which a person may be deprived of her/his liberty. Article 5(1) (f) allows the arrest or detention of a person “to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.” However, Article 5 also establishes several rights of the detained person, including the right to be informed promptly, in the language which he/she understands, of the reasons for his/her arrest or detention and of any charge against him/her; the right to be brought promptly before a judge or other judicial authority; the right to legal proceedings through which the lawfulness of his/her detention shall be decided speedily by a court and his/her release ordered if the detention is not lawful; and the enforceable right to compensation if the individual has been victim of arrest or detention in contravention of the provision.

Under the **Convention on the Rights of the Child**, detention of children shall only be used as a measure of last resort, for the shortest appropriate period of time (Article 37[b]), and taking into account the best interests of the child (Article 3).

### **11.2.2 The right to personal security**

Since the right to personal security has not been defined as clearly as the right to liberty, the scope of this right differs among the various human rights conventions. Under the ICCPR, the right to personal security is independent of the guarantee of liberty. This means that the right to security is not limited to situations of formal deprivation of liberty. Thus, even when the individual is not under State custody, a State may not ignore a known threat to the life of a person under its jurisdiction. The State has an obligation to take reasonable and appropriate measures to protect all persons under its jurisdiction.

The **ECtHR** has examined the obligation to protect an individual against attacks by private persons, but has done so under the protection of the right to life (Article 2). The ECtHR has noted that under certain well-defined circumstances, there is a positive obligation on the authorities to take preventive measures to protect an individual whose life is at risk from criminal acts perpetrated by another individual. Nonetheless, such an obligation

must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities. The test established by the **ECtHR** is that “authorities knew or ought to have known at the time of the existence of a real risk to the life of an identified individual from the criminal acts of a third party, and that they failed to take measures within the scope of their power which, judged reasonably, might have been expected to avoid that risk” (*Osman v. the United Kingdom*).

The **Human Rights Committee** has found a State Party in violation of Article 9 of the ICCPR because the State had ignored threats to the personal security of the petitioner (*Delgado Paez v. Colombia*). Mr. Delgado had to flee the country and seek asylum in France, where he was granted refugee status.

### **11.3 Scope of the freedom from arbitrary detention**

#### **11.3.1 What is detention?**

Detention does not only involve jails. Detention is confinement within a narrowly bounded or restricted location, including prisons, closed camps, public or privately operated detention facilities, hotel rooms, or, where freedom of movement is substantially curtailed. Confinement in airport transit zones where the only opportunity to leave this limited area is to depart the territory of the asylum country also constitutes detention. To determine whether an asylum-seeker is in detention, the cumulative impact of the restrictions, as well as the degree and intensity of each of them, should be assessed (see UNHCR’s *Handbook for Parliamentarians: A Guide to International Refugee Law*).

#### **11.3.2 What constitutes an “arbitrary” arrest or detention?**

According to human rights standards, no one shall be subject to arbitrary arrest or detention. “Arbitrariness” is not only to be equated with “against the law” and must be interpreted more broadly to include elements of inappropriateness, injustice, and lack of predictability.

Even if detention is considered lawful initially, it should not continue beyond the period for which the State Party can provide appropriate justification. Remand in custody pursuant to lawful arrest must be: lawful (according to the law), reasonable, and necessary in all circumstances (such as, for example, to prevent flight).

States have the burden of proving that an arrest or detention complies with all of these requirements. If a State fails to demonstrate the reasons it gives to justify the detention of a

particular asylum-seeker, it will be in violation of the right to liberty.

The **Human Rights Committee** has addressed this right in the case of *A. v. Australia*. The applicant was a Cambodian national who had landed by boat illegally in Australia and applied for refugee status. His application was rejected by the Determination of Refugee Status Committee and the applicant appealed. “A” was detained throughout the four years during which his refugee status was being determined. Although the Committee recognized that the detention of asylum-seekers is not arbitrary *per se*, it determined that the decision to keep a person in detention should be periodically reviewed so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification.

As noted by the Committee, “the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.” The Committee was particularly concerned about the length of the applicant’s detention, and condemned Australia’s blanket policy of detaining “boat people.”

The Human Rights Committee has determined that, when the asylum-seeker held in detention has a health problem, the State Party must demonstrate not only the “reasonableness” and “necessity” of the detention but also that “there were not less invasive means of achieving compliance with the immigration policies,” such as the imposition of reporting obligations, sureties or other conditions that would take account of the person's deteriorating condition. In the case of *C. v. Australia*, the Committee not only found Australia in violation of Article 9 due to the length of detention (more than two years) and the lack of a substantial review by a judicial authority, but it also found that his continued detention, when the State Party was aware of his mental condition, and the failure to take the steps necessary to ameliorate his mental deterioration also constituted a violation of his rights under Article 7 (prohibition of torture and other ill-treatment) of the ICCPR.

The **ECtHR** has noted that detention with the aim of facilitating removal could only be justified as long as deportation proceedings were in progress. Thus, if proceedings are not carried out with due diligence, detention would no longer be permissible under Article 5 (1)(f) (see *Chahal v. the United Kingdom*).

## 11.4 Requirements for the detention of asylum seekers

While detention of asylum-seekers is not, *per se*, against human rights law, States must comply with the following requirements:

- Detention **must not be arbitrary** and must be based on grounds and procedures established by law. The term “arbitrary” must be interpreted broadly to include “elements of inappropriateness, injustice, lack of predictability and due process of law.”
- **Information** concerning the reasons for an **asylum-seeker’s** arrest must be given to him/her promptly, and authorities must also inform him/her of the right to **request legal advice and to contact UNHCR**.
- The detained **asylum-seeker must have prompt access to legal and other appropriate assistance**, be accorded the **right to challenge the lawfulness of the deprivation of his/her liberty** before a court or other competent, independent, and impartial authority, and obtain a prompt decision on any such action.
- Detention **must not take place in prison facilities** where convicted criminals are held.
- The **conditions of detention must be humane** and respectful of the dignity of all individuals (see below under “treatment of detainees”).
- Detention which was initially lawful, *e.g.*, when it was used during an investigation, **must not continue when those needs or risks originally justifying detention are no longer present**. A judicial authority must be empowered to review the continuation and conditions of detention.

## 11.5 Detaining asylum-seekers in transit zones (airports and ports)

The ECtHR has addressed the practice of detaining asylum-seekers in a transit zone, such as an airport, a land border crossing or a port, while their applications are being processed. In the case of *Amuur v. France*, which concerned holding aliens in the international zone of an airport, the ECtHR determined that the sovereign right of States to control aliens’ entry into and residence in their territory must be exercised in accordance with the provisions of the ECHR, including Article 5. Asylum-seekers held in airport detention centres should therefore be granted the same rights as asylum-seekers held in other detention facilities in



accordance with the European Human Rights Convention and the 1951 Refugee Convention.

According to the **ECtHR**, “holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations. Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty – inevitable with a view to organizing the practical details of the alien’s repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered – into a deprivation of liberty. In that connection, account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country. Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties. Above all, such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status.”

The ECtHR added: “the mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one’s own, being guaranteed, moreover, by Protocol No. 4 to the ECHR. Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in.” The ECtHR concluded that the holding of the applicants in the transit zone of the Paris-Orly airport for 20 days was, in view of the restrictions imposed, equivalent to a deprivation of liberty.

In the case of *Shamsa v. Poland* (Judgement of 27 November 2003), the ECtHR examined whether or not the applicants were, in effect, in detention while in the transit zone of Warsaw airport. The **ECtHR** looked at the nature, duration, and modalities of the restriction of liberty and concluded that they were, in fact, in detention. The applicants were guarded by the border police and had no freedom of movement. When examining the legality of the detention, the **ECtHR** noted that the applicants were kept in the

transit zone only on the basis of the internal rules of the border guards. According to the **ECtHR**, these rules cannot be considered as a legal basis for detention. The **ECtHR** identified a legal vacuum in Polish legislation in that there were no specific laws concerning detention of aliens after the expiry of the deadline for their expulsion. The Court further indicated that a detention measure lasting for a number of days must be decided by a tribunal, a judge or a person with judicial powers. The detention of the applicants in the transit zone beyond the deadline for their expulsion was considered to violate Article 5(1) of the ECHR.

Following these decisions, it is possible to conclude that in cases where asylum-seekers are detained in airports, for example, several specific additional requirements must be met:

- There must be a clear **law** in force at the time of detention.
- The law must pertain to the **particular circumstances** of their detention.
- The asylum-seeker must be given access, **within reasonable time, to refugee status determination procedures**.
- The asylum-seeker must be given access, **within a specific time, to legal, humanitarian, and social assistance** during detention.
- The detention measure **must be decided by a tribunal, a judge or a person with judicial powers**.
- **The detention cannot go beyond the deadline for expulsion.**

### **11.6 Detention of children (girls and boys)**

The requirements for the detention of children are even more restrictive than those set out above. In addition to all the above-mentioned requirements, the detention of a child must comply with the following requirements:

- The detention or imprisonment of a child shall be used only as a **measure of last resort and for the shortest appropriate period of time** (Article 37 of the CRC).
- In the exceptional case of detention, conditions of detention must be governed by the **best interest of the child and must take into account the needs of persons of her age** (Article 37 [c] of the CRC).
- As a general rule, children **must be separated from adults**, unless it is considered in the child's best interest not to do so (for example, small children should be kept with their mothers).

- Children must be provided with **prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative** (Article 37[d] of the CRC).
- Children have **the right to maintain contact with their family**.
- Children have the **right to continue their education**, which should take place outside the detention premises (Article 28 of the CRC).
- Children have the **right to recreation and play** (Article 31 of the CRC).

An advisory opinion of the IACtHR expressly refers to the detention of child asylum-seekers, noting that “as a rule, children should not be detained and, instead, they should receive lodging and adequate supervision by State authorities in charge of the protection of children. If there are no other alternatives, detention must be an *ultima ratio* measure and one adopted for the shortest possible period; likewise, children should have at least the minimum procedural guarantees granted to adults.” (Inter-American Court, Advisory Opinion OC-17/02 on Juridical Condition and Human Rights of the Child, 28 August 2002).

### **11.7 Conditions of imprisonment or detention**

Asylum-seekers compelled to live in detention centres or similar forms of closed collective accommodations must be treated in a humane manner. Article 10 of the ICCPR and Article 5 of the ACHR guarantee to all persons deprived of their liberty the right to humane treatment and to certain minimum conditions of pre-trial detention and imprisonment. Although Article 5 of the ECHR does not deal with the conditions of detention, complaints on conditions of detention and treatment of asylum-seekers could nevertheless be argued on the basis of other articles of the ECHR, notably Article 3.

The **Human Rights Committee** has referred to the scope of the right to humane treatment in its General Comment No. 21. Article 10(1) of the ICCPR states that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” According to the Committee, this provision applies to all persons deprived of liberty under the laws and authority of the State who are held in prisons, hospitals, detention camps, correctional institutions or elsewhere. As the Human Rights Committee notes, the application of this rule cannot be dependent on the material resources available in the State Party. This rule must be applied without distinction of any

kind, such as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This article defines “detention” as any situation where a person is not free to leave the place where the State has compelled them to live. This is undoubtedly applicable to detained asylum-seekers; it may also be applicable to asylum-seekers who are not detained but who are compelled to live in accommodation centres.

“Ill-treatment”, according to the **ECtHR**, is treatment “that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterized as degrading and also fall within the prohibition of Article 3 [of the ECHR]. The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.” (*Pretty v. the United Kingdom*)

### **11.7.1 Standards for conditions of detention**

Conditions during detention must not amount to “ill-treatment.” There must be no prolonged solitary confinement, no prolonged detention without charge, no denial of medical treatment, and no denial of contact with family or friends.

Other conditions, such as lack of a mattress or other bedding, inadequate sanitation, absence of ventilation or electric lighting, denial of exercise, inadequate medical attention, denial of food, or inadequate quality and quantity of food, lack of clean drinking water, denial of prompt assistance in case of asthma attack, inadequate hygienic or sanitary conditions, denial of access to personal mail, and lack of necessary measures to accommodate a disabled person, could also, depending on the circumstances, amount to ill-treatment.

A number of United Nations standards relating to detention have been developed and should also be applied to refugees and asylum-seekers in detention. Among them are the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and

Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).

The State remains responsible for the protection of human rights even when private companies manage detention or accommodation facilities.

The **Human Rights Committee** has stated that in order to assess conditions of detention, the cumulative effect of the conditions should be considered as well as the specific allegations. Denial of medical treatment, however, is an immediate violation of Article 10 (1) of the ICCPR.

The **ECtHR** has examined the conditions of detention under Article 3 of the ECHR. For its assessment, the **ECtHR** considers the particular circumstances of the detainee, the stringency of the measure and its duration, the objective pursued, and the effect on the person concerned. The **ECtHR** has also examined the negative consequences of detention on the health of the detainee and the lack of proper medical care while being detained.

The **African Commission** has examined conditions of detention under the protection of the right to life. It has stated that denying medication to a prisoner, endangering his life but without causing his death, constitutes a violation of the right to life (see *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organizations v. Nigeria*). It has also noted that starving prisoners and depriving them of blankets, clothing, and health care violate the right to health (see *Malawi African Association and Others v. Mauritania*).

Most UN treaty bodies examine the conditions in detention or reception centres for asylum-seekers and require that States improve such conditions, if necessary. The CERD Committee, for example, has expressed concern over the overcrowding of reception centres in Ceuta and the Canary Islands, Spain (CERD Concluding Observations Spain, 2004), while the Committee on Economic, Social and Cultural Rights has expressed concern about the living conditions in some reception centres for asylum-seekers in the Netherlands (CESCR Concluding Observations The Netherlands, 1998).

The Optional Protocol to the UN Convention against Torture (OPCAT), which entered into force on 22 June 2006, will further strengthen the protection against torture by establishing an international Subcommittee on the Prevention of Torture with a mandate to visit places of detention in States parties. Equally, the Protocol requires States parties to set up national preventive

mechanisms, which are also to be provided with access to places of detention and prisoners held there. Following these visits, the Sub-Committee and the national preventive mechanisms will make recommendations for improvements in the treatment and the conditions of persons deprived of their liberty, and work with relevant authorities to ensure the implementation of the recommendations.

### **11.8 Prohibition of cruel, inhuman or degrading treatment or punishment of asylum-seekers pending refugee status determination**

The prohibition of cruel, inhuman or degrading treatment or punishment contained in many major human rights instruments (see list above) could also be used to protect asylum-seekers in host countries, even when they are not detained. This aspect of the right may deserve further attention and development.

Asylum-seekers applying for refugee status may find themselves in one or more of the following situations: They may have to face lengthy procedures that leave them uncertain about their legal status; their freedom of movement may be limited; they may not be allowed to work or have no possibility of finding employment; they may have very limited economic resources and no or inadequate welfare benefits; they may be treated less favourably than nationals or non-nationals in the enjoyment of social and economic rights; and/or they may find it difficult to adapt to life in the host country because they speak a different language.

Although it may not be possible to consider any of these conditions in themselves as “cruel, inhuman or degrading treatment,” they may, cumulatively, and if suffered over prolonged periods of time or considering the particular vulnerabilities of the individuals concerned, deriving from their age, sex, physical or mental health, in extreme cases amount to treatment prohibited under Article 7 of the ICCPR, Article 3 of the ECHR, and Article 5 of the ACHR.

#### **For further information see:**

*Volume I:*

UN Charter-based mechanisms: Working Group on Arbitrary Detention  
Special Rapporteur on Torture



## Chapter 12

## The survival rights (economic, social and cultural rights)

## **Relevant Instruments and Documents**

### **Refugee Law**

Articles 21 and 23 of the Convention relating to the Status of Refugees

ExCom Conclusion No. 104 (2005)

UNHCR Inter-Office memorandum No. 104/2001 on voluntary repatriation and the right to adequate housing

UNHCR Reception Standards for Asylum Seekers in the European Union (2000)

UNHCR Reception of Asylum Seekers, Including Standards of Treatment in the Context of Individual Asylum Systems (2001)

### **Human Rights Law**

#### ***Right to an adequate standard of living (food, clothing and housing)***

Article 25 of the Universal Declaration of Human Rights (UDHR)

Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

Article 37 of the Convention on the Rights of the Child (CRC)

Article 14 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Article 26 of the American Convention on Human Rights (ACHR)

Article 16 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Article 4(1) of the European Social Charter (ESC) and Article 31 of the European Social Charter Revised (ESC)

Articles 5, 14, and 18 of the African Charter on Human and People's Rights (African Charter)

Articles 15 and 16 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Committee on Economic, Social and Cultural Rights, General Comment No. 12 on the right to adequate food (Article 11)

Committee on Economic, Social and Cultural Rights, General Comment No. 7 on the right to adequate housing: forced eviction (Article 11.1)

Committee on Economic, Social and Cultural Rights, General Comment No. 4 on the right to adequate housing (Article 11)

#### ***Right to health***

Article 25 of the Universal Declaration of Human Rights (UDHR)

Article XI of the American Declaration of the Rights and Duties of Man (ADHR)

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Article 24 of the Convention on the Rights of the Child (CRC)

Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Article 28 of the Convention on the Protection of the Rights of All Migrant Workers



and Members of Their Families (CMW)

Article 10 of the Protocol of San Salvador

Article 16 of the African Charter on Human and Peoples' Rights (African Charter)

Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Article 14 of the African Charter on the Rights and Welfare of the Child

Article 11 of the European Social Charter (ESC) (see appendix to the ESC for exception *ratione personae*)

Committee on Economic, Social and Cultural Rights, General Comment No. 14 on the right to the highest attainable standard of health (Article 12)

CEDAW Committee, General Recommendation No. 24 on women and health

It is often difficult for asylum-seekers and refugees to fully enjoy their right to a minimum level of subsistence, including the right to an adequate standard of living, which covers adequate food, water, clothing, and safe shelter, and the right to the highest attainable standard of physical and mental health. Several human rights instruments provide for the protection of these rights. In addition, the prohibition of discrimination enshrined in human rights treaties can be applied when refugees are subjected to unequal access to the means of meeting their basic needs (see Chapter 10 above). Denial by States of minimum survival conditions to asylum-seekers and refugees may lead to a violation of the prohibition against ill-treatment or, ultimately, the right to life found in major human rights treaties (see Chapter 11 above).

### 12.1 Relevant human rights standards

All economic, social, and cultural rights set out in human rights treaties (see list above) are applicable to “everyone” under the jurisdiction of the State Party, and refugees and asylum-seekers are therefore also covered by these rights.

Even though economic, social, and cultural rights instruments establish the principle of “progressive realization” using “available resources” (see Article 2 of the ICESCR and Article 4 of the CRC), it is generally agreed that this principle does not exclude the imposition of obligations that are not limited by State resources. States are obliged to “take steps” to continuously improve conditions, and they have a duty to refrain from adopting deliberately retrogressive measures (see CESCR General Comment No. 3 and the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*).

In addition, States Parties to these instruments have an immediate obligation to avoid discrimination in access to adequate food, clothing, housing, and health care. As noted above, the non-discrimination principle requires non-discriminatory treatment

between nationals and non-nationals, including asylum-seekers and refugees (see Chapter 10 above).

Article 2(3) of the ICESCR stipulates that “developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”. The reference to “due regard to human rights” suggests that this provision is not a legitimate basis to deny to refugees access to economic rights.

The Committee on Economic, Social, and Cultural Rights has issued several General Comments explaining the components of the right to an adequate standard of living, including the right to adequate housing (General Comments Nos. 4 and 7), the right to food (General Comment No. 12), and the right to water (General Comment No. 15). Through these General Comments, the Committee provides the most comprehensive interpretation of these rights under international law, in particular by setting the specific obligations of the State.

### **12.1.1 The right to adequate food**

Without food, it is impossible to enjoy other rights. The right to food and the inherent dignity of the human person are inseparable. While the right to food has to be realized progressively, States are obliged to take all actions necessary to mitigate and alleviate hunger as provided for in Article 11(2) of the ICESCR, even in times of natural or other disasters.

According to General Comment 12, the core content of the right to adequate food includes:

- **Availability:** Food should be provided in quantity and quality sufficient to satisfy the dietary needs of individuals.
- **Safety:** Food should be free from adverse substances. States should establish a range of protective measures, through both public and private means, to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages of the food chain. Naturally occurring toxins must also be identified and avoided.
- **Acceptability:** The type of food provided should conform to cultural preferences and needs.
- **Availability:** This includes the possibility for an individual to feed himself/herself directly from productive land or other natural resources, or the existence of functioning distribution,

processing, and market systems that can move food from the site of production to where it is needed.

- **Accessibility:** This encompasses both economic and physical accessibility. *Economic accessibility* implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be such that the ability to meet other basic needs is not threatened or compromised. Socially vulnerable groups, such as refugees, asylum-seekers who are not entitled to work, and other particularly impoverished segments of the population may need assistance through special programmes. *Physical accessibility* implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill, and persons with persistent medical problems, including the mentally ill. Refugees, victims of natural disasters, and other disadvantaged groups may need special attention and sometimes priority consideration.

### 12.1.2 The right to adequate housing

The right to housing means more than just a roof over one's head; it should be seen as the right to live somewhere in security, peace, and dignity. According to the Committee on Economic, Social and Cultural Rights, the core content of the right to adequate housing includes:

- **Security of tenure:** Security of tenure is the cornerstone of the right to adequate housing. It protects people against arbitrary eviction, harassment, and other threats.
- **Affordability:** The principle of affordability stipulates simply that the amount a person or family pays for their housing must not be so high that it threatens or compromises the fulfillment of other basic needs.
- **Habitability:** For housing to be considered adequate, it must be habitable. Inhabitants must be ensured adequate space and protection against the cold, damp, heat, rain, wind or other threats to health, or structural hazards.
- **Accessibility:** Housing must be accessible to everyone. Disadvantaged groups, such as the elderly, the physically and mentally disabled, HIV-positive individuals, victims of natural disasters, children, refugees, and other groups, should be ensured some degree of priority for housing.
- **Location:** For housing to be adequate, it must be situated so that it allows access to employment, health-care services,

schools, childcare centres, and other social facilities. It must not be located in polluted areas.

- **Cultural adequacy:** The right to adequate housing includes the right to reside in housing that is considered culturally adequate. This means that housing programmes and policies must take into account the cultural aspects of housing, allowing for the expression of cultural identity and recognizing the cultural diversity of the world's population.

### **12.1.3 The right to the highest attainable standard of physical and mental health**

The right to health is not and naturally cannot be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment, and experimentation. Entitlements include the right to a system of health protection that provides equality of opportunity for people to enjoy the highest attainable level of health.

The right to health incorporates:

- **Availability:** Functioning public health and health-care facilities, goods and services, and programmes must be available in sufficient quantity within the State Party. The precise nature of the facilities, goods, and services will vary depending on numerous factors, including the country's level of development. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs.
- **Accessibility:** Health facilities, goods, and services have to be accessible to everyone, without discrimination, within the jurisdiction of the State Party. Accessibility includes non-discrimination, physical accessibility, economic accessibility/affordability, and accessibility of information.
- **Acceptability:** All health facilities, goods, and services must respect medical ethics and be culturally appropriate, that is, respectful of the culture of individuals, minorities, peoples, and communities. They should also be sensitive to gender and life-cycle requirements, and designed to respect confidentiality and improve the health status of those concerned.

- **Quality:** Health facilities, goods, and services must also be scientifically and medically appropriate and of good quality. This requires skilled medical personnel, scientifically approved and unexpired drugs, approved hospital equipment, safe and potable water, and adequate sanitation.

Article 12 of the CEDAW protects women's right to access to health care. The CEDAW Committee has also defined the scope and content of the right, recognizing the special needs of women (see CEDAW Committee, General Recommendation No. 24 on women and health). As the CEDAW Committee notes, States Parties should ensure that adequate protection and health services, including trauma treatment and counselling, are provided for women in especially difficult circumstances, such as those trapped in armed conflict and those who are refugees.

## **12.2 Age and gender perspective**

States and international organisations should integrate an age and gender perspective in their policies and programmes so that these survival rights can be enjoyed. States must remove any legal and social barriers that may prevent or discourage women from exercising their economic, social, and cultural rights on an equal basis to men (see the CESCR General Comment No. 14 and Articles 3 and 12 of the CEDAW). If a State provides goods and/or services to satisfy these rights, it must do so without discrimination between men and women refugees. States are also obliged to ensure that children who are asylum-seekers and refugees have access to the enjoyment of these rights without discrimination of any kind. When designing, implementing and prioritising assistance programs, it must be taken into account that denying or restricting food or health care may have a stronger impact on children and the elderly. Shortages that a healthy adult may tolerate can cause serious harm to the health of a child and interfere with other rights.

## **12.3 Refugees' and asylum-seekers' enjoyment of economic, social and cultural rights**

Although asylum-seekers and refugees are in principle guaranteed, under human rights instruments, the same rights as nationals of asylum States, they often may not have the same opportunity as others to achieve an adequate standard of living on their own. Where deficits occur States must thus provide the goods and services needed until the asylum-seekers and refugees can satisfy their own needs.

Human rights treaty bodies generally require States to report on the enjoyment of these rights by all populations under their

jurisdiction, including by asylum-seekers and refugees. The Committee on Economic, Social and Cultural Rights has strongly urged States Parties to ensure that asylum-seekers are protected from any measures or laws that may, in any way, result in discriminatory treatment within the housing sector (see CESCR Concluding Observations Belgium, 1994). It also has recommended that the applications of asylum-seekers be processed expeditiously and that refugees be accorded health, economic, and educational rights in accordance with the Covenant (see CESCR Concluding Observations Germany, 1988). The Committee also monitors compliance with the principle of non-discrimination in the enjoyment of social benefits and access to health care.

Refugees who return to their country of origin must also be guaranteed the enjoyment of their economic, social, and cultural rights. The right to adequate housing and property restitution is particularly important in this context (see Chapter 20 below). The right of refugees to return to their country entails the right to recover the homes from which they were previously evicted (restitution). If this is not possible, then refugees have the right to adequate compensation for any loss incurred.

#### **12.4 Non-discrimination in the enjoyment of economic, social, and cultural rights**

Human rights instruments proscribe discrimination in access to economic, social, and cultural rights even if such discrimination is between nationals and asylum-seekers. As discussed in Chapter 10 above, non-discriminatory treatment requires that persons who are in analogous circumstances be treated equally. Asylum-seekers must therefore enjoy the same benefits that nationals in the same circumstances receive. If a State provides special public support, in cash payments or any other benefits, to homeless persons, pregnant women, families with disabled children, or low-income students, for example, asylum-seekers should be entitled to those benefits under the same conditions as nationals. Any unnecessary or unreasonable differentiation between nationals and asylum-seekers would amount to discrimination.

The Committee on Economic, Social and Cultural Rights has expressed its concern when asylum-seekers, refugees, and stateless persons have been excluded from the constitutional guarantees for the enjoyment of economic, social, and cultural rights that are extended to all citizens in a State Party (see CESCR Concluding Observations China, 2005). It has strongly recommended that States Parties assess whether their legislation has any discriminatory impact on refugees or asylum-seekers, and has urged States to take remedial actions if the legislation proves to

have a discriminatory effect (see CESCR Concluding Observations Denmark, 1999). In another instance, the Committee determined that a policy in which asylum-seekers had access to subsidised health care only in emergency situations did not comply with the provisions of the Covenant and urged the State to extend the subsidised health-care system to asylum-seekers without discrimination (CESCR Concluding Observations Italy, 2000).

### **12.5 Limitations to the enjoyment of economic, social, and cultural rights under the ICESCR**

According to Article 4 of the ICESCR, any restriction or limitation of the rights enumerated in the Covenant must be “determined by law,” be “compatible with the nature of these rights,” and be done “solely for the purpose of promoting the general welfare in a democratic society.” Any restrictions on refugees’ economic, social, and cultural rights would thus have to be justified under this provision.

For example, a State Party would have to justify its actions under Article 4 of the ICESCR if it wished to impose restrictions on the economic, social, and cultural rights of asylum-seekers in the belief that those restrictions would prevent more asylum-seekers from arriving, would combat illegal immigration, would reduce the economic incentives that attract people to the country in breach of its immigration laws, would limit bogus asylum claims, or discourage those who have already lodged their claims from pursuing them. Even where such policy may be based on national law, it would still need to satisfy the test of serving the purpose of promoting the general welfare.

### **12.6 Lack of adequate medical treatment and the prohibition of *refoulement***

According to the ECtHR’s human rights case-law, in certain exceptional circumstances an expulsion may be prohibited when a lack of health care in the country of origin threatens the well-being of the individual concerned. In the case of *D. v. the United Kingdom*, the ECtHR determined that removing an AIDS patient in the terminal stages of his illness to his country of origin, St. Kitts and Nevis, where no facilities to treat his illness would be available to him, “would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.” The ECtHR reiterated that Article 3 of the ECHR did not only cover treatment intentionally inflicted by public authorities or non-State agents, but was also applicable when the authorities of a State were unable to afford appropriate protection. “To limit the application of Article 3 in this manner

would be to undermine the absolute character of its protection,” the ECtHR found.

However, in a case involving a Colombian national infected with HIV and suffering from Hepatitis B, the ECtHR determined the application inadmissible under Article 3 of the ECHR. Although the situation in Colombia would be less favourable for the applicant, his condition did not appear to have reached an advanced or terminal stage, and treatment was, in principle, available in Colombia. According to the Court, the circumstances were not of such an exceptional nature that expulsion would amount to treatment proscribed by Article 3 of the ECHR.

In *S.C.C. v. Sweden*, the ECtHR stated that “aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling state.” Only in exceptional circumstances “owing to compelling humanitarian considerations” may an expulsion result in a violation of Article 3 of the ECHR. The difficulty is in determining what is understood by “very exceptional circumstances.” In some more recent cases, such as *Bensaid v. the United Kingdom*, the ECtHR did not find that such circumstances existed.





## Chapter 13

## The right to legal identity, status and documentation

## Relevant Instruments and Documents

### Refugee Law

Article 27 and 28 of the Convention relating to the Status of Refugees

Article VI of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

ExCom Conclusions Nos. 35 (1984), 49 (1987), and 91 (2001)

UNHCR Registration Guide (1994)

### Instruments on Statelessness

Article 27 and 28 of the Convention relating to the Status of Stateless Persons

### Human Rights Law

Articles 16 and 24(2) of the International Covenant on Civil and Political Rights (ICCPR)

Article 7 and 8 of the Convention on the Rights of the Child (CRC)

Article 18 of the American Convention on Human Rights (ACHR)

Article 5 of the African Charter on Human and Peoples' Rights (African Charter)

Article 6 of the African Charter on the Rights and Welfare of the Child

Principle 20 of the Guiding Principles on Internal Displacement

Human Rights Committee, General Comment No. 17 on the rights of the child (Article 24)

Inter-American Court, Advisory Opinion OC-17/02 on juridical condition and human rights of the child, 28 August 2002

Personal documentation is a key tool in refugee protection. It provides proof of identity and status as a protected person, and gives countries of asylum an important means of ensuring that no refugee will be returned to danger. Although the right to identity documents is not explicitly referred to in any major human rights treaty, it may be asserted indirectly under some provisions. Examples are the right to recognition as a person before the law (Article 16 ICCPR and Article 3 of the ACHR), the right of every child to be registered immediately after birth (Article 24(2) of the ICCPR and Article 7 of the CRC) as well as the right of the child to “preserve its identity, including nationality, name and family relations as recognized by law without unlawful interference”, in cases where a child is illegally deprived of some or all of the elements of his or her identity, and the provision of “appropriate assistance and protection, with a view to re-establishing speedily his or her identity” as codified in Article 8 of the CRC.

Seizure of or denial of access to such documents may violate the prohibition of discrimination, since the lack of documentation may result in an inability to secure such fundamental rights as the right to a nationality or the right to education and health care. The lack of documents may also affect the enjoyment of other rights, including the right to family life (if parents are unable to register

children at birth or if the lack of passports prevents family reunification), freedom of movement (see Chapter 15 below) and the right to work (see Chapter 17 below). In addition, a lack of personal documents may expose the individual to harassment by law enforcement officers or to arbitrary detention.

### **13.1 The right of every child to be registered immediately after birth and the right to have a name**

It is essential to register refugee children at birth in order to ensure that they can enjoy all human rights, including access to education and health care. Birth registration facilitates the tracing of family members when a child has become separated from his or her family.

According to the Human Rights Committee, the right of every child to be registered immediately after birth and have a name (Article 24(2) of the ICCPR) is closely linked to a child's right to special measures of protection, and it is designed to promote the recognition of the child's legal personality.

While Article 7(1) of the CRC and Article 24 of the ICCPR refer to the right of the child to be registered after birth and to have a name, Article 18 of the ACHR has a broader formulation. It refers to the right of "every person" to a name, adding that the law shall regulate the manner in which this right is to be ensured for all. The other major regional human rights instruments do not contain provisions concerning the right to a name.

### **13.2 The right to recognition as a person before the law**

Personal documentation for asylum-seekers and refugees is closely linked to the right of every person to be recognized as a person before the law (Article 16 of the ICCPR). Without proper identification papers in the country of asylum, refugees and asylum-seekers may be excluded from the protection afforded by the legal system in violation of Article 16.

### **13.3 The right of the child to preserve her/his identity**

According to Article 8 of the CRC: "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity."

A determination of what is in the best interest of the child who is an asylum-seeker requires an assessment of the child's identity, including her/his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities, and protection needs.

### **13.4 The lack of personal documentation and violations of other human rights**

If asylum-seekers and refugees do not receive the proper documentation they may face difficulties in effectively enjoying other rights such as the rights to education, food, and health. Lack of documentation may increase the risk of *refoulement* and constitute for refugees an obstacle in exercising their right to return to their own country (Article 12(4) ICCPR).

After examining the report of Croatia in 1995, the **CERD Committee** expressed its concern that Bosnian Muslims were confronted with difficulties and delays in obtaining the documentation necessary “to allow them access to essential social and humanitarian services in Croatia, and have thus been obliged to return to sometimes life-threatening situations in Bosnia and Herzegovina” (CERD Concluding Observations Croatia, 1995).

The **IACtHR** has noted that the “existence of children without a nationality places them in an unprotected situation internationally, as they do not receive the benefits and rights enjoyed by citizens, and if the State also denies them their birth certificates when they are born in the country of refuge [sic], this places them at permanent risk of being arbitrarily expelled and therefore of being separated from their families, which very often leads to “children's loss of many other rights through the loss of this first one” (Advisory Opinion OC-17/02 on juridical condition and human rights of the child).

In a case involving two girls who were born in the Dominican Republic but were denied their nationality because their parents were of Haitian origin, even though the Constitution establishes the principle of *jus solis*, the **IACtHR** determined that the State had violated the right to nationality (Article 20 of the ACHR), the right to equal protection (Article 24), the right to juridical personality (Article 3), the right to a name (Article 18) in conjunction with the rights of the child (Article 19), and the obligation to respect rights (Article 1.1) (Case of *The Yean and Bosico Children v. Dominican Republic*).

Unaccompanied or separated children must be identified, registered, and issued personal identity documents as soon as possible. The “best interest of the child” principle must be

respected at all times, and the child's age and gender must be considered.

#### **The right to a nationality**

Nationality is a legal bond between an individual and a State generally arising from descent, birth on the territory, naturalisation or upon state succession. Nationality is usually based on a "genuine and effective link" or an "appropriate connection" between the individual and the state such as descent or birth in the territory. The UDHR and article 24(3) of the ICCPR recognize the right of every child to acquire a nationality. According to the Human Rights Committee, this right does not necessarily make it an obligation for States to give their nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he/she is born. Discrimination encountered in acquiring nationality based on whether a child is born out of wedlock or to stateless parents, or based on the nationality status of one or both parents violates international law. The *right to acquire a nationality* is also protected under Articles 7 and 8 of the CRC (for children) and by Article 9 of the CEDAW (for women), under which States must grant women equal rights with men to acquire, change or retain their nationality. At the regional level, article 20 of the ACHR establishes not only that every person has the right to a nationality but also that "every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality." Persons arbitrarily deprived of their nationality are protected by international human rights law, refugee law, and instruments on statelessness. See Article 5 of the CERD, Articles 1 to 3 of the Convention on the Nationality of Married Women, the Convention on the Reduction of Statelessness, and General Comment no.17 of the Human Rights Committee.





## Chapter 14

### The right to due process, including during refugee status determination procedures

## Relevant Instruments and Documents

### Refugee Law

Article 16 of the Convention relating to the Status of Refugees

ExCom Conclusion Nos. 8 (1977), 30 (1983), and 87 (1999)

### Instruments on Statelessness

Article 16 of the Convention relating to the Status of Stateless Persons

### Human Rights Law

Article 11 of the Universal Declaration of Human Rights (UDHR)

Article 14 of the International Covenant on Civil and Political Rights (ICCPR)

Articles 5 and 6 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Article 6 and Article 7, Protocol No. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Articles 8 and 25 of the American Convention on Human Rights (ACHR)

Articles 7 and 12(3) of the African Charter on Human and People's Rights (African Charter)

Inter-American Court, Advisory Opinion OC-17/02 on juridical condition and human rights of the child, 28 August 2002

The right to seek asylum requires that individual asylum-seekers have access to fair and effective procedures for the examination of their claims. Although the 1951 Convention sets no specific requirements for national refugee determination systems, the Executive Committee and the Refugee Status Determination Handbook provide guidance.

While States may exercise a certain discretion in the design of their asylum procedures and may introduce accelerated procedures based on protection considerations, basic procedural safeguards enshrined in human rights instruments must always be respected.

## 14.1 Relevant human rights standards

Under human rights instruments States Parties are obliged to provide asylum-seekers with fair and efficient procedures through which they can present their claims for asylum. These procedures must include an appeal mechanism if the initial decision is negative.

The **International Covenant on Civil and Political Rights** provides individuals, including asylum-seekers and refugees, with extensive rights relating to fair trial in the determination of a “criminal charge” and of a person’s “rights and obligations in a suit at law” (Article 14). The Human Rights Committee has not clearly established if a “suit at law” would cover refugee status determination procedures, but it has not ruled out the possibility that it may apply in expulsion proceedings.



According to the Committee, determination of “a person’s rights and obligations in a suit at law” covers situations in which the determination is made by a court of law or where administrative decisions are subject to judicial review. Hence, in principal, refugee status determination may fall under Article 14 to the extent that RSD is used to determine the “rights and obligations” of asylum-seekers, specifically the right to be protected against *refoulement*.

The guarantees of Article 14 may also apply in deportation cases after the individual committed a crime. When facing deportation, if there is a real risk that an individual will suffer a violation of the guarantees established in Article 14 in the receiving country, he/she may assert as much and must then prove that such violation will be “the necessary and foreseeable consequence” of the deportation. However, if the receiving country has tribunals in place to examine the individual’s case and can review the conviction and sentencing in the event of a prosecution in that country, the Human Rights Committee is unlikely to find that deportation violates Article 14.

The **American Convention on Human Rights** establishes broader protection of the right to a fair hearing than the ICCPR. Article 8(1) of the ACHR protects the right to fair trial both in “any accusation of a criminal nature” and in the determination of “rights and obligations of a civil, labour, fiscal or *any other nature*.”

Under the ACHR, there is no doubt that the guarantees of the right to a fair trial apply to the refugee status determination procedure. The IACtHR has clearly stated that the right to fair trial must be respected in any act or omission on the part of the State bodies in a proceeding, whether of a punitive, administrative or judicial nature (see *Baena Ricardo et al, Judgement of 2 February 2001, Inter-Am Ct. H.R. [Ser. C] No. 72 [2001] paragraph 124*). Article 25 of the ACHR is also relevant as it provides for the right to “simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate [an individual’s] fundamental rights [as] recognized by the constitution or laws of the State concerned or by this Convention.”

As stated in an Advisory Opinion of the IACtHR, the right to fair trial (Article 8), “which covers all administrative or judicial proceedings where rights are determined, must be respected during the process of deciding on refugee status, as this mechanism permits determination of whether a person fulfils the requirements to enjoy the right to asylum and protection against *refoulement*. Likewise, the right to simple and effective remedy that protects against acts that breach fundamental rights, set forth in Article 25 of the ACHR, must be applied, with no discrimination, to all persons subject to the jurisdiction of the State, including all

individuals who are not nationals of that State” (Inter-American Court, Advisory Opinion OC-17/02 on juridical condition and human rights of the child, 28 August 2002).

The same Advisory Opinion also indicated that Article 22(7) of the ACHR (the right to seek and be granted asylum) and Article 22(8) (the prohibition of *refoulement*) must be seen in conjunction with Article 8(1) (the right to a fair trial). Thus, States must ensure that refugee status determination procedures are examined by a competent authority provided for by the legal system of the State. If the initial finding is negative, then the asylum-seeker must have a simple and prompt recourse to a competent court or tribunal.

Article 7(1) of the **African Charter on Human and Peoples’ Rights** provides for the right to a fair trial. The protection provided under this article is less comprehensive than that provided for under Article 14 of the ICCPR, but according to the jurisprudence of the African Commission, the right to a fair trial must be respected in cases of expulsion. The Commission has determined that expelling refugees, either individually or *en masse*, without granting them the opportunity to have their cases heard, violates Article 7(1) (see *Communication 27/89, Organisation Mondiale Contre la Torture et al. v. Rwanda*; *Communications 27/89, 46/91 and 99/93, Organisation Mondiale Contre la Torture and Association Internationale des Juristes Democrates, Commission Internationale des Juristes, Union Interafricaine des Droits de l’Homme v. Rwanda*; and *Communication 71/92, Rencontre Africaine pour la Defense des Droits de l’Homme v. Zambia*). Although the African Commission has not yet addressed the question of whether Article 7 extends to refugee status determination, it has referred to the State’s obligation to extend legal assistance to refugees in cases that affect their enjoyment of international refugee protection.

Article 6 of the **European Convention on Human Rights** establishes the right to due process. In principle, this provision does not encompass extradition or asylum petitions. However, if the decision to grant asylum is taken by an administrative body, Article 6 requires that a competent tribunal reviews the decision (see *Zumtobel v. Austria*).

Although issues under Article 6 ECHR did not arise, it is important to take into account the standard developed by the ECtHR in *Jabari v. Turkey*. In that case, an Iranian national lodged an application for asylum in Turkey. The application was declared inadmissible because the applicant missed the five-day time limit within which such an application must be made. She was therefore issued with a deportation order. Her recourse against

the deportation order before the Ankara Administrative Court was also dismissed. The ECtHR reviewed the status determination procedure undertaken by the Turkish authorities, and was not persuaded that the authorities conducted any meaningful assessment of the applicant's claim, including its arguability. The ECtHR criticized the law that required the asylum-seeker to submit her claim for asylum within five days of arrival in Turkey. According to the ECtHR, the failure of the applicant to comply with the five-day registration requirement seems to have prompted the State not to examine the factual basis of her fears of being removed to Iran. The ECtHR determined that an automatic and mechanical application of a time-limit for submitting an asylum application must be considered at variance with the prohibition of *refoulement*. A substantial assessment of the risk to which the person would be exposed if deported is necessary in order to comply with that prohibition.

The ECtHR concluded that given the irreversible nature of the harm that would occur if torture or ill-treatment occurred after deportation, and the importance of Article 3 of the ECHR, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there are substantial grounds for fearing treatment contrary to Article 3 of the ECHR. This judgement reinforces UNHCR's view that appeals against negative asylum decisions must, in principle, suspend those decisions (*see Jabari v. Turkey*).

The **Committee against Torture** has also addressed the importance of the right to due process in refugee status determination procedures. It recommended that a State "make the process for granting refugee status more efficient in order to reduce the long period of uncertainty for asylum-seekers and refugees" (CAT Concluding Observations Costa Rica, 2001). It has also recommended that the State "regulate procedures for dealing with and deciding on applications for asylum and refugee status which envisage the opportunity for the applicant to attend a formal hearing, and to make such submissions as may be relevant to the right which he invokes, including pertinent evidence, with protection of the characteristics of due process of law" (CAT Concluding Observations Venezuela, 1999).

The Committee monitoring compliance with the **Convention on the Elimination of All Forms of Racial Discrimination** has recommended that a State take measures to make the "asylum procedures more equitable, efficient and unbiased" (CERD Concluding Observations United Kingdom of Great Britain and Northern Ireland, 2003).

### Refugee status determination procedures

**1. Referral of asylum-seekers to RSD authorities:** The competent official to whom the applicant addresses himself or herself at the border or in the territory of a State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority.

**2. Registration and identification of asylum-seekers:** Asylum-seekers should be issued certificates entitling them to reside legally in the country of asylum pending the adjudication of their refugee claim. Female asylum-seekers should have equal rights in obtaining such documentation independent of their male relatives and should have the documentation issued in their own names.

**3. Legal advice and representation:** Asylum-seekers should receive legal counselling and information in a language they understand, on the procedures to be followed, and on their rights and obligations during the process. Female asylum-seekers and children should be counselled on their rights, including the right to submit an individual application when family members accompany them. The country of asylum should provide all necessary facilities to asylum-seekers to ensure that they are able to comply with all formalities, including free-of-charge services of qualified and neutral interpreters. Female interpreters should be made available for female asylum-seekers to reduce the obstacles posed by gender-related cultural barriers. A legal representative should be designated for a child separated from his/her family to represent the child's best interests.

**4. Opportunity to contact UNHCR:** Asylum-seekers should be informed that they have the opportunity to contact UNHCR and/or a legal advisor or representative of their choice.

**5. Adequate time to prepare the asylum request:** The asylum request should be examined promptly. However, considering the many obstacles that asylum-seekers face, there should be no time limits for lodging the application.

**6. Personal interview with a qualified official:** Asylum-seekers should have the opportunity to present their case in person to a qualified official competent to make an individual, objective, and impartial decision. The official should take into consideration and seek to establish all relevant facts and allow the asylum-seeker to present a substantial description and provide proof of the circumstances of the case. Qualified interpreters should be provided free-of-charge. Female interviewers and interpreters should be provided for female asylum-seekers, since women may feel ashamed or dishonoured discussing the details of their claims with male authorities, particularly if they have been victims of sexual violence. Special provisions should be made for child asylum-seekers, guided by the "best interest" principle.

**7. The decision:** The authority should reach a decision in light of country-of-origin information and by assessing whether the applicant's case would fall within the refugee criteria or any other forms of protection employed by the country of asylum. Applicants must be informed, in writing, of the decision.

**8. Appeals:** Asylum-seekers whose requests have been rejected must be allowed a reasonable time to apply to have their cases formally reconsidered and must be informed of the procedures for doing so. The appellate body should be independent, impartial, and empowered to review the facts as well as the law in any given case. It should be a different authority from that which denied the request. An applicant should be allowed to remain in the country while an appeal to a higher administrative authority or court is pending.

**9. Documentation for recognized refugees:** Asylum-seekers who are recognized as refugees should be informed accordingly and issued with documentation certifying their refugee status.



## Chapter 15

**The right to freedom of movement, procedural rights in expulsion, and the prohibition of collective expulsion of aliens**

## Relevant Instruments and Documents

### Refugee Law

Articles 26, 31 and 32 of the Convention relating to the Status of Refugees

### Human Rights Law

Article 13 of the Universal Declaration of Human Rights (UDHR)

Articles 12 and 13 of the International Covenant on Civil and Political Rights (ICCPR)

Article 15(4) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Article 10 of the Convention on the Rights of the Child (CRC)

Articles 2, 3, and 4 of Protocol No. 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Article 1 of Protocol No. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Article 22 of the American Convention on Human Rights (ACHR)

Article 12 of the African Charter on Human and People's Rights (African Charter)

Human Rights Committee, General Comment No. 27 on freedom of movement (Article 12)

CERD Committee, General Recommendation No. 22 on Article 5 and refugees and displaced persons

Freedom of movement entails the right of everybody who is “lawfully” in a given territory to move freely, without hindrance, and without having to ask specific permission from the authorities. The right to freedom of movement, as found in international human rights instruments, includes four distinct rights:

- The right **to move freely within a given territory**;
- The right **to choose a residence within a territory**;
- The right **to leave any country**, including one's own; and
- The right **to enter one's own country**.

(See also “The right to liberty and security of person: Non-penalization for Illegal Entry, Judicial Protection against Detention, and Conditions of Detention” in Chapter 11 above).

The right to freedom of movement is reiterated in Article 15(5) of the CEDAW, by which States Parties are obliged to accord to men and women the same rights under the law in relation to the movement of persons and the freedom to choose their residence and domicile. The Convention on the Rights of the Child stipulates *inter alia* in Article 10: “A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct

contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.”

### **15.1 The right to move freely within a given territory**

Generally, human rights instruments protect the freedom of movement of persons “lawfully” within the territory of a State (see Article 12(1) of the ICCPR, Article 22(1) of the ACHR, and Article 2(1), Protocol No. 4 of the ECHR). Exceptionally, Article 12 of the African Charter protects the freedom of movement of “every individual.”

The lawfulness of an alien’s presence is subject to domestic law, which may limit an alien’s ability to enter the territory of a given State; but such restrictions must comply with the State’s international obligations. The Human Rights Committee has thus held that an alien who entered a State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of Article 12 of the ICCPR (*Celepli v. Sweden*).

The Human Rights Committee emphasized in its General Comment 27 (para 6) that “the State party must ensure that the rights guaranteed in article 12 are protected not only from public but also from private interference. In the case of women, this obligation to protect is particularly pertinent. For example, it is incompatible with article 12, paragraph 1, that the right of a woman to move freely and to choose her residence be made subject, by law or practice to the decision of another person, including a relative”.

#### **15.1.1 Restrictions on the movement of refugees**

Those “lawfully” within the State territory must be able to move around in the entire territory and establish themselves in a place of their choice. The Human Rights Committee explicitly clarified that once a person is lawfully within a State, any restrictions on his/her freedom of movement, as well as any treatment different from that accorded to nationals, have to be compatible with the rules provided by article 12(3) ICCPR (see General Comment 27).

They therefore have to be “necessary,” that is, they must be justified on the basis of protecting national security, public order, public health or morals, and/or the rights and freedoms of others, and must be necessary in a democratic society (see Article 12(3) of the ICCPR and Article 2(3), Protocol No. 4 of the ECHR). In addition, any restriction to freedom of movement must not be discriminatory (see Chapter 10 above).

Thus, any restriction on the movement of asylum-seekers and refugees is exceptional and must comply with human rights obligations. This implies that:

- States can only impose restrictions that are “**necessary**” in the individual case (see above);
- Restrictions on movements must **not be imposed unlawfully and arbitrarily**. The criteria must be **established by law**;
- The restriction must be related to a recognized object and purpose, and there must be a **reasonable relationship of proportionality** between the ends and the means;
- An **appeal to a judicial body** is available.

## **15.2 The right to choose a residence within a territory**

Within a State, lawfully present refugees and asylum-seekers have a right to determine their own residence, subject to the reasonable limitations contained, for example, in Article 12(3) of the ICCPR (see above). The right to reside in a place of one’s choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory (see Human Rights Committee General Comment 27)

## **15.3 The right to leave any country, including one’s own**

The right to leave is a key right for asylum-seekers and internally displaced persons who cannot find safety within their own State. Generally, the individual has the right to travel abroad, emigrate, and choose his/her destination State (see Human Rights Committee, General Comment No. 27).

The State of nationality has the obligation to issue or prolong travel documents. In this context, the Human Rights Committee in its General Comment no. 27 has noted that, “since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuance of



passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere. It is no justification for the State to claim that its national would be able to return to its territory without a passport.”

The obligation to issue a travel document can only be limited in compliance with Article 12(3) ICCPR. For example, denial may be justified in cases of pending criminal procedures. States have an obligation to revise administrative procedures so that they do not unjustifiably restrict the right to leave the individual’s own country. States must particularly ensure that women face no obstacles to travel, such as cultural practices or legal requirements that a woman must obtain her husband’s or a male relative’s consent in order to receive a passport or other type of travel document (see Human Rights Committee, General Comment No. 28).

In analyzing the right to leave any country, the **Human Rights Committee** has considered the issue of denying or revoking passports for citizens living abroad. These cases, known as the “passport cases,” elaborate positive and negative duties for both the State of residence and the State of nationality. As stressed by the Human Rights Committee, “the State of residence is primarily obliged to avoid interfering with the freedom to leave; the State of nationality is under a positive duty to ensure effective possibilities to leave by issuing the necessary documents; States that deny their citizens a passport thus violate Article 12(2) [of ICCPR] insofar as this denial is not justified pursuant to Article 12(3)” (see *Varela Nuñez v. Uruguay*).

The Human Rights Committee expressed concern about France’s practice of not allowing refugees to disembark at French ports because this restricted the refugees’ ability to leave their own country and prevented them from having their individual claim heard (see Article 12[2] of the ICCPR).

Both the UN Human Rights Committee and the Committee on the Elimination of Racial Discrimination (CERD) have expressed concern about the practice of *carrier sanctions*. According to CERD Committee, the question of “delegation of responsibilities [...] should be exercised by State officials” (Concluding Observations France, 2000). In its General Comment No. 27, the Human Rights Committee included a paragraph on the legal and practical restrictions on the right to leave any country. The Committee urges States to “include information in their reports on measures that impose sanctions on international carriers which bring to their

territory persons without required documents, where those measures affect the right to leave another country.” The Committee also has criticized Austria’s sanctions against passenger carriers for carrying refugees (see Concluding Observations France, 1997 and Concluding Observations Austria, 1998).

#### **15.4 The right to enter one’s own country**

Article 12(4) ICCPR stipulates that “no one shall be arbitrarily deprived of the right to enter his own country”. This provision is of particular importance to refugees seeking voluntary repatriation. The right implies the right to remain in one’s own country and the right to come to the country for the first time if the individual was born outside the country.

Whether or not the right to enter one’s own country applies to aliens entering a country other than that of their nationality depends upon the interpretation of the scope of the phrase “his [her] own country.” The Human Rights Committee has interpreted this phrase to mean something broader than “country of his [her] nationality.” According to the Committee, the right is not limited to nationality in the formal sense, that is, nationality acquired at birth or by conferral; it also includes, at the very least, an individual who, because of his/her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be applicable, for example, to nationals of a country who have been stripped of their nationality in violation of international law. The interpretation of the phrase “one’s own country” extends to the protection of individuals whose country of nationality has been incorporated in or transferred to another national entity, for example, following the dissolution of a State, and who have not yet clarified or are being denied the nationality of the successor state. The language of Article 12(4) also allows for a broader interpretation that might include other categories of long-term residents, such as stateless persons arbitrarily denied the nationality of the country in which they are habitual residents.

#### **15.5 Procedural safeguards in expulsion of aliens**

Article 13 of the ICCPR, Article 12(4) of the African Charter, Article 1, Protocol 7 of the ECHR, and Article 22(6) of the ACHR give aliens, who are “lawfully” within the territory of a State Party, procedural rights to protect them from an obligatory departure, whether described in national law as expulsion or otherwise. National law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection. Illegal entrants and aliens who have stayed longer than the law or their permits allow are not covered by these provisions.

However, according to the **Human Rights Committee**, if the legality of an alien's entry or stay is in dispute, any decision leading to his/her expulsion or deportation must be taken in accordance with Article 13 of the ICCPR. The competent authorities of the State Party must apply and interpret domestic law in good faith while adhering to the provisions of international human rights treaties, such as the principle of non-discrimination and the right to equality before the law (Articles 2 and 26 of the ICCPR). Article 13 of the ICCPR directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those expulsions carried out "in pursuance of a decision reached in accordance with law," its purpose is clearly to prevent arbitrary expulsions. On the other hand, Article 13 entitles each alien to a decision in his or her own case and would thus not be satisfied when laws or decisions provide for collective or mass expulsions (see below).

**The expulsion of an alien lawfully in the territory must comply with the following requirements (Article 13 ICCPR):**

- It must be reached in accordance with the State Party's established **legal procedure**,
- A person who is to be deported must "**be allowed to submit the reasons against her/his expulsion.**"
- The person has the right to have his/her **case reviewed** by, and be represented for the purpose before, the **competent authority** or someone designated by it.
- The person must be given **full facilities for pursuing her/his remedy against expulsion** so that this right will, in all the circumstances of her/his case, be an effective one,
- **No collective or mass expulsion** is allowed (see below).
- These procedural rights may only be abrogated "**when compelling reasons of national security**" require it.
- **Discrimination may not be made** between different categories of aliens (Article 2 ICCPR).
- If the obligatory detention entails arrest, the **human rights safeguards relating to deprivation of liberty** may also be applicable.
- The principle of **non-refoulement** must be respected (see Chapter 9 above).

## **15.6 Prohibition of collective or mass expulsion of aliens**

The collective expulsion of aliens is prohibited under human rights law. This prohibition is stated in categorical terms in Article 22(9) of the ACHR, Article 4, Protocol No. 4 of the ECHR, and Article 12(5) of the African Charter. The African Charter asserts that "mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups." A collective expulsion of aliens would violate the requirement that each alien receive a decision in his/her

case and has full facilities for having the expulsion decision reviewed (see above).

In a 1996 case involving the deportation of West African nationals by the Angolan government, the **African Commission** noted that illegal expulsions of aliens calls into question a whole series of rights recognized and guaranteed in the African Charter, such as the right to property, work, education, and the protection of the family. In the specific circumstances of the case, the African Commission found that the collective expulsion of aliens had violated Article 2 (non-discrimination), Article 7(1a) (due process), Article 12 (nos. 4 and 5 on the prohibition against illegal and mass expulsions), Article 14 (the right to property), and Article 18 (protection of the family) (see *Union Inter Africaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v. Angola, Communication No. 159/96*).

In the case of *Conka v. Belgium*, the **ECtHR** held that the detention and return of rejected Roma asylum-seekers to Slovakia constituted a violation of Article 5 of the ECHR (the right to liberty and security) and a violation of the prohibition against “collective expulsion” under Protocol No. 4 of the ECHR.



## Chapter 16

### **The right to family unity and the right to respect for private and family life**

## **Relevant Instruments and Documents**

### **Refugee Law**

Section IV B of the Final Act of the 1951 UN Conference of Plenipotentiaries on the Status of Refugee and Stateless Persons (on the principle of unity of the family)

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Chapter VI  
ExCom Conclusions Nos. 9 (1977), 15 (1979), 24 (1981), 84 (1997), 85 (1998), 88 (1999), and 104 (2005)

UNHCR Guidelines on Reunification of Refugee Families (1983)

UNHCR Refugee Children: Guidelines on Protection and Care (1994)

UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum (1997)

UNHCR Background Note: Family Reunification in the Context of Resettlement and Integration (2001)

Council of Europe, Committee of Ministers, Recommendation No. R (99) 23 on family reunion for refugees and other person in need of international protection (1999)

### **Instruments on Statelessness**

Article 12 of the Convention relating to the Status of Refugees

### **Human Rights Law**

Articles 12 and 16 of the Universal Declaration of Human Rights (UDHR)

Articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR)

Article 10(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

Articles 5, 9, 10, 16, 19, 20, and 22 of the Convention on the Rights of the Child (CRC)

Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Articles 16, 17, and 19 of the European Social Charter (ESC) and Article 16 of the European Social Charter Revised

Article 12(1) of the European Convention on the Legal Status of Migrant Workers

Articles 11 and 17 of the American Convention on Human Rights (ACHR)

Article 15 of the Protocol of San Salvador

Articles 17(1) and 18 of the African Charter on Human and People's Rights (African Charter)

Article 18 of the African Charter on the Rights and Welfare of the Child

Human Rights Committee, General Comment No. 19 on the protection of the family, the right to marriage, and equality of the spouses (Article 23)

Human Rights Committee, General Comment No. 16 on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Article 17)

CEDAW Committee, General Recommendation No. 21 on equality in marriage and family relations

Committee on the Rights of the Child, General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin

Inter-American Court, Advisory Opinion OC-17/02 on juridical condition and human rights of the child, 28 August 2002

Family members may become separated from each other during forced displacement, either because of the chaos of an emergency situation or because a person must leave other family members behind as he/she flees persecution. Rejection of asylum claims or deportation may force one family member to leave the country while the rest of the family stays behind.

**The protection of the family is particularly important:**

- When deciding the question of “derivative status” (whereby family members accompanying someone who is recognized as a refugee are also granted refugee status or similar protection status with the same rights);
- When refugee families seek reunification;
- When States decide to expel or deport a refugee already in the country of asylum who is with his/her family; and
- In resettlement cases.

## **16.1 Relevant human rights standards**

The protection of the family is provided for under numerous human rights instruments (see list above), principally by protecting the right to family unity and reunification (the duty to protect family union) and the right to family and private life (the duty not to interfere with family or private life).

The **International Covenant on Civil and Political Rights** acknowledges that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State” (Article 23(1) ICCPR), and stipulates that “the right of men and women of marriageable age to marry and to found a family shall be recognized” (Article 23(2) ICCPR). Furthermore, Article 17 ICCPR protects *inter alia* the family from arbitrary or unlawful interference. According to the Human Rights Committee, the right to found a family implies the right to live together. Therefore, States must take all appropriate measures to ensure the unity or reunification of the family (Human Rights Committee, General Comments No. 19).

Article 8 of the **European Convention on Human Rights** describes the right to respect for private and family life, home, and correspondence, and details a number of possible limitations. The ECtHR has stressed that this provision provides protection against arbitrary action by States while it also imposes on States positive obligations to provide protection to the family. The ECtHR has defined the right of foreigners to avoid deportation in order to protect family unity and, to a lesser extent, their right to enter a State for purposes of family reunification (see below). Authorities may not interfere with the right to respect for private and family life except when interference is “in accordance with law and is

necessary in the interests of a democratic society, in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.”

The **IACtHR** has noted that “to respect unity of the family, the State must not only abstain from acts that involve separation of the members of the family, but must also take steps to keep the family united or to reunite them, if that were the case.” Specifically referring to the rights of children, the IACtHR noted that “there must be a presumption that remaining with his or her family, or rejoining it in case they have been separated, will be in the best interests of the child. However, there are circumstances in which said separation is more favourable to the child. Before reaching this decision, all parts involved must be heard” (Inter-American Court, Advisory Opinion OC-17/02 on juridical condition and human rights of the child, 28 August 2002).

The Convention on the Rights of the Child refers in Article 5 even to the extended family stipulating that “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.” This obligation is complemented by Article 9, which, subject to stipulated exceptions in the child’s best interest, requires States Parties to “ensure that a child shall not be separated from his or her parents against their will”.

More specifically with regard to family reunification, States Parties to the CRC assume the obligation to handle a child’s or his/her parents’ application to enter or leave a State Party for the purpose of family reunification “in a positive, humane and expeditious manner” (Article 10(2), CRC). This article provides that a child whose parents reside in different States shall have the right to maintain regular, save in exceptional circumstances, personal relations and direct contact with both parents. Therefore, under Article 10, States Parties are required to respect the right of the child and his/her parents to leave any country, including their own, and to enter their own country, for the purpose of maintaining personal relations. This provision also stipulates that the right to leave any country shall be subject only to such restrictions as are prescribed by law and that are necessary to protect national security, public order, public health or morals or



the rights and freedoms of others, and are consistent with other rights recognized in the CRC. This provision should be read in conjunction with the obligation established in Article 22 to take appropriate measures to ensure the protection of child refugees and asylum-seekers.

## **16.2 Family protection in cases of removal or deportation of non-citizens from the territory of a State Party to human rights treaties**

**Human Rights Committee** case-law shows that there are cases in which a State Party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of the family is entitled to remain in the territory of a State Party does not necessarily mean that requiring other members of the family to leave involves such interference, and any violation needs to be assessed on a case-by-case basis.

When assessing whether or not interference with family life can be objectively justified in cases where one part of a family must leave the territory of the State Party while the other part is entitled to remain, the Human Rights Committee tries to strike a balance between the significance of the State Party's reasons for the removal of the person concerned and the degree of hardship the family and its members would endure as a result of such removal. For example, the Committee has found that the decision of the State to deport, for immigration reasons, the parents of a child who had acquired Australian citizenship after 10 years' residency (*Winata et al. v. Australia*), violated Article 17 (the right to privacy), Article 23 (the protection of the family), and Article 24 (the protection of the child) of the ICCPR.

In a case involving the deportation of a convicted criminal of Ugandan nationality, who was married to a Danish citizen and was father of two children, both of whom were born in Denmark, the Committee found no violation of Article 17 or 23. Although the Committee recognized that the deportation constituted an interference with his family life, such interference was not considered arbitrary or unlawful because he was convicted of a drug-related offence. In this case, the Committee relied on the fact that the author had submitted the communication solely in his own behalf and not on behalf of his wife or children. Therefore, the Committee did not take into account the enjoyment of the right to family or the hardship that the author's expulsion would cause his wife and children (*Jonny Rubin Byahuranga v. Denmark*).

In contrast, the **ECtHR** found that the deportation of an Iranian refugee who was married to a Danish woman, was the father of two children, and was also convicted of drug-related offences, would result in the separation of the family, breaching Article 8 of the ECHR (*Amrollahi v. Denmark*). In another case, the ECtHR determined that the deportation of a deaf and mute person of Algerian origin who had committed a serious crime (gang rape) and had repeatedly disturbed public order, but who had been living in France with his family since the age of five and had no ties to Algeria, would not be proportionate to the legitimate aim pursued and would violate Article 8 of the ECHR (*Nasri v. France*).

In expulsion cases concerning immigrants and refugees, the ECtHR usually considers

- The **personal circumstances** of the applicant (age, health, disability);
- The existence or non-existence of **family in the receiving country**;
- The **ties with the host country** (integration, language, schooling);
- If the applicant is a **minor**, whether or not his/her relationship with the parent would be disrupted by the expulsion; and
- If the expulsion occurs because of a **criminal conviction**, the nature and gravity of the crimes committed.

After considering all these circumstances, the ECtHR decides if the deportation constitutes legitimate interference in the family life of the applicant and, if so, whether this interference is proportionate to the legitimate aim pursued.

In the context of Article 18 of the African Charter, the **African Commission on Human Rights** has found that the forcible exile of political activists and expulsion of foreigners violated the duties to protect and assist the family, as it broke up the family unit (*Amnesty International v. Zambia plus Angola, Communication 212/98*).

### **16.3 Family protection in cases of non-citizens seeking entry into the territory of a State Party to human rights treaties**

Although States have the sovereign right to control entry of non-nationals into their territories, human rights provisions impose restrictions on States' discretion.

According to the **ECtHR**'s case-law, Article 8 of the ECHR does not impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence or to authorize family reunion with non-citizens in its territory (see *Gül v Switzerland*). According to the Court, this provision does not guarantee a right of non-citizens to choose the most suitable place to develop family life. The refusal of admission may only constitute interference when normal family life cannot realistically be continued elsewhere.

In reunification cases, the ECtHR considers whether or not

- Family life exists;
- Normal family life can realistically be established or maintained somewhere else, particularly in the applicant's country; and
- Interference with family life has been committed by the respondent State and no other party.

In the case of *Nsona v. the Netherlands*, the good faith of the applicant requesting the reunification was also considered. Thus, if the applicant uses deceit or fraud to gain access to the State, the judgment would move in favour of the State Party. In a case involving the reunion of a child with his/her parents, the ECHR found that the existence of family life does not cease because family members are living apart, if it can be demonstrated that actions have been taken to remain in touch (see *Moustaquim v. Belgium and Gül v. Switzerland*). In general, the ECtHR tends to be more liberal when an expulsion order is challenged than when addressing family reunification in the respondent State.

The **Human Rights Committee** has recognized that the common residence of husband and wife must be considered the normal behaviour of the family. Protection under Article 17 of the ICCPR also applies in situations when one of the spouses is an alien. Whether the existence and application of immigration law affecting the residence of a family member is compatible with the Covenant depends on whether such interference is either "arbitrary or unlawful" as stated in Article 17(1) of the ICCPR, or conflicts in any other way with the State Party's obligations under the Covenant (*Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*).

#### **16.4 What constitutes a "family" under international human rights law?**

International human rights law recognizes that the concept of the family may differ in some respects from State to State, and even

from region to region within a State, and that it is therefore impossible to define the concept. Under human rights law, the term “family” should be given a broad interpretation so as to include all those persons comprising the family as understood in the society in question.

According to the **Human Rights Committee**, cultural traditions should be taken into account when defining the term “family” in a specific situation (*Hopu and Bessert v. France*). The ECtHR has found that the “family” is not confined to blood or marriage and can include *de facto* relationships where factors such as co-habitation and length of relationship are of relevance (*X. Y. Z. v. the United Kingdom*). According to ECtHR, certain factors come into play when determining whether the relationships among individuals constitute a family: whether a couple lives together; the length of the relationship; or whether they have demonstrated a commitment to each other by having children together or by any other form. The Court has also determined that protecting the family, with such an open definition, does not necessarily oblige the State to ensure that non-married couples enjoy the same rights as married couples. In the relationship between parents and minor children, there may be a family life even when there is no cohabitation (*Berrehab v. The Netherlands*) and regardless of whether or not the children are legitimate (*Boughanemi v. France*).

**UNHCR's Executive Committee** has underscored the need to protect the unity of refugee families by:

- Reuniting family members separated in flight;
- Applying liberal criteria when deciding which family members can be admitted;
- Recognizing all family members as refugees when the principal applicant is recognized and providing each family member with the possibility of separately submitting any refugee claim he/she may have;
- Establishing family unity as a priority in the early stages of all refugee operations; and
- Promoting the self-sufficiency of adult family members to enhance the capacity to support their dependents.

## **16.5 Unaccompanied and separated children (girls and boys)**

In case of unaccompanied or separated children, efforts to reunite the family are of utmost importance. In this context, the Committee on the Rights of the Child in General Comment no. 6 has emphasized that “in order to pay full respect to the obligation of States under Article 9 of the Convention to ensure that a child shall not be separated from his or her parents against their will, all efforts should be made to return an unaccompanied or separated

child to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views”.

The possibility of reuniting children with their parents in the country of origin is, however, not an option in the case of asylum seeking or refugee children. The Committee on the Right of the Child has emphasised that “family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a “reasonable risk” that such a return would lead to the violation of fundamental human rights of the child. Such risk is indisputably documented in the granting of refugee status or in a decision of the competent authorities on the applicability of *non-refoulement* obligations (including those deriving from article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Articles 6 and 7 of the International Covenant on Civil and Political Rights). Accordingly, the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein. Where the circumstances in the country of origin contain lower level risks and there is concern, for example, of the child being affected by the indiscriminate effects of generalized violence, such risks must be given full attention and balanced against other rights-based considerations, including the consequences of further separation. In this context, it must be recalled that the survival of the child is of paramount importance and a precondition for the enjoyment of any other rights.” (CRC General Comment No.6, Chapter 7, para 82)

According to the Committee on the Rights of the Child, those unaccompanied or separated children who have been determined not to meet the refugee criteria should, in principle, only be returned to their country of origin once concrete arrangements for their care and custody are secured.





## Chapter 17

## The right to work

## Relevant Instruments and Documents

### Refugee Law

Articles 17-19 and Article 24 of the Convention relating to the Status of Refugees  
ExCom Conclusion No. 104 (2005)

### Instruments on Statelessness

Articles 17-19 of the Convention relating to the Status of Stateless Persons

### Human Rights Law

Article 23 of the Universal Declaration of Human Rights (UDHR)

Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

Article 32 of the Convention on the Rights of the Child (CRC)

Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Articles 6 and 7 of the Protocol of San Salvador

Article 15 of the African Charter on Human and People's Rights (African Charter)

Article 13 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Committee on Economic, Social and Cultural Rights General Comment No. 18 on the right to work (Article 6 ICESCR)

### Others

ILO Convention No. 138 concerning minimum age for employment (1973)

ILO Convention No. 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour (1999)

The right to work is crucial for refugees and asylum-seekers. Refugees need to be able to support themselves and their families, especially if there is no prospect that conditions in their home country will change in the near future. The right to work is also essential for maintaining dignity and, with it, the mental and physical health. Furthermore, it preserves the intellectual and working capacities necessary for local integration within the society of the host country, for resettlement in third countries, or for possible return to the country of origin in dignity and safety.

While national or international assistance programmes might provide interim relief, long-term reliance on such aid can be demoralizing. Forbidding refugees to work forces them to be idle, which only exacerbates their distress and frustration at not being able to return home, and may provoke resentment from the host population. In addition, without work and thus without access to basic necessities, such as food, shelter, education, and basic health care, refugees may feel compelled to return to countries where there is a serious threat to their lives or to move in an irregular manner to a third country.



The right to work is also crucial in situations where a rejected asylum-seeker cannot be removed from the country because of legal or factual obstacles. If a person cannot be removed from a State, but the State then deprives that person of any reasonable opportunity to make a living and denies access to basic necessities, the situation may amount to cruel, inhuman and degrading treatment (see *de facto refoulement* in Chapter 12 above).

#### **The right to work in the 1951 Convention and in human rights treaties: Which applies?**

As noted, it is important to take into account all relevant instruments and the complementarity among them.

- Article 17 has the highest number of reservations of any provision of the 1951 Convention. The corresponding right in human rights instruments, such as Article 6 of the ICESCR and Article 6 of the Protocol of San Salvador, are **broader in scope** and have attracted a much **lower number of reservations**.
- Under the 1951 Convention, the right to work is generally limited to ensuring equality of treatment with other non-nationals, while under human rights instruments this right is **protected equally for nationals and non-nationals** (see Chapter 10 above).
- Under human rights law, the enjoyment of the right to work without discrimination means that asylum-seekers and refugees must **not be discriminated against** in the enjoyment of any component of the right to work, including recruitment, remuneration, and in promotion opportunities.

### **17.1 Relevant human rights standards**

Article 6 of the ICESCR governs “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”.

The right to work should not be understood as an absolute and unconditional right to obtain employment. The uncontested meaning of the “right to work” is that the State is required to provide a job for everyone available and willing to work. The right to work, in a broad sense, implies

- The right to **have access to employment** and
- The right **not to be deprived of employment unfairly**.

The first component encompasses such elements as education and vocational training. The second addresses issues related to employment security, such as protection against unfair dismissal.

According to General Comment 18 of the Committee on Economic, Social and Cultural Rights, the right to work includes the following elements:

**Availability:** States Parties must have specialized services to assist and support individuals in order to enable them to identify and find available employment.

**Accessibility:** The labour market must be open to everyone under the jurisdiction of States Parties. The Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, or civil, political, social or other status, which has the intention or effect of impairing or nullifying enjoyment of the right to work on a basis of equality. Accessibility includes the right to seek, obtain, and impart information on the means of gaining access to employment through the establishment of data networks on the employment market at the local, regional, national, and international levels.

**Acceptability and quality:** Protection of the right to work has several components, notably the right of the worker to just and favourable conditions of work, particularly safe working conditions, the right to form trade unions, and the right to freely choose and accept work.

According to the Committee, the core obligations of the right to work are to:

- “Ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life in dignity”;
- “Avoid any measure which results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanism for the protection of such individuals and groups”; and
- “Adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers...Such an employment strategy and plan of action should target in particular disadvantaged and marginalized individuals and groups...”

Note that asylum-seekers and refugees are disadvantaged and marginalized groups within society and the Committee has considered them as such.

## **17.2 Limitations on the enjoyment of the right to work, including the requirement of work permits**

Under the **International Covenant on Economic, Social and Cultural Rights**, the right to work constitutes an economic right whereby the limitation of the obligation foreseen in Article 2 paragraph 3 for developing countries would in principle be applicable, though subject to restrictive interpretation. Moreover, any restriction placed on non-nationals, including asylum-seekers' and refugees' right to work would have to be justified under the limitation clause established in Article 4 of the ICESCR. In particular, any differentiation would have to be necessary "for the purpose of promoting the general welfare in a democratic society". As a result, distinctions based on the inherent requirements of a particular job, or restrictions placed upon non-nationals on employment in certain higher civil-service posts, or in posts bearing some relation to the security of the State, may be permissible. No differentiation in the treatment between citizens and non-citizens could, however, be justified in relation to applicable safety-standards at the workplace (i.e. the right to safe and healthy working conditions).

In practice, many States Parties to the ICESCR restrict, to some degree, asylum-seekers' right to work. The Committee on Economic, Social and Cultural Rights seems to allow States a margin of discretion in this respect, especially when the unemployment rate is high or when States provide asylum-seekers with living subsidies. However, the Committee has not hesitated to express its concern when asylum-seekers are banned from working and the State does not provide any benefit, or when the requirements for obtaining work permits are excessive.

The **Convention on the Elimination of All Forms of Racial Discrimination** obliges States to guarantee to everyone, without racial discrimination, the right to work, to free choice of employment, to just and favourable work conditions, and to equal payment for work of equal value (Article 5). The Convention thus protects against any discrimination that refugees and asylum-seekers may face in the workplace. Examining State Party reports, the CERD Committee has even expressed concern over proposed legislation that would prohibit employers from employing persons in the process of appealing decisions that rejected petitions to remain in the country (see CERD Concluding Observations United Kingdom and Northern Ireland, 1996).

While requiring asylum-seekers to obtain a work permit does not violate human rights standards, States should be careful when enacting such requirements and must consider all dimensions of

such measure, including their impact on the enjoyment of human rights by the affected persons. Indeed, insisting that asylum-seekers obtain a work permit before they can be legally employed might force them to work illegally, which, in turn, could result in other infringements of their rights, such as working for below minimum wages, or in unsatisfactory conditions, or for excessively long hours.

If a State requires that asylum-seekers obtain authorization to work, it should be granted objectively and without discrimination. Imposing these kinds of requirements on asylum-seekers can seriously undermine their ability to find work. Short-term work authorization often makes it difficult to find a job, asylum-seekers may not be able to pay for a work permit, and permits may bind asylum-seekers to specific employers, thus increasing the possibility for abusive treatment. In all such cases, other human rights may also be violated, such as the right to humane treatment (see Chapter 11 above) and freedom of movement (see Chapter 15 above).

The Committee on Economic, Social and Cultural Rights limits the possibility of States to introduce retrogressive measures by referring to the obligations under Article 2(1) of the ICESCR which requires State Parties to undertake steps “with the view to achieving progressive realisation of the rights recognised in the present Covenant”. In its General Comment No.3 the Committee stated that “any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources” (General Comment No. 3, para 9). These standards would also have to be respected when States seek to introduce measures limiting refugee and asylum-seeker’s access to work or the requirement of work permits.

### **17.3 Children (girls and boys) and the right to work: The prohibition of child labour**

Refugee children are at increased risk of being forced to work to earn income for their families. This can leave them, particularly girls, at risk of exploitation and abuse. Several human rights instruments protect children against economic exploitation (see Article 32 of the CRC, Article 10[3]) of the ICESCR, Article 7 of the Protocol of San Salvador, and Article 7 of the ESC). Under the CRC, States Parties are obliged to provide for a minimum age or ages for employment, appropriate regulation of working hours and conditions, and appropriate penalties or other sanctions. According to General Comment No.18 of the CESCR, States Parties must

take measures under Article 10 of the ICESCR to prohibit labour of children under the age of 16. States Parties must also prohibit all forms of economic exploitation of children and forced labour.

Under international labour law, children's participation in economic activity that does not affect their health and development or interfere with their education (light work) is permitted from the age of 12 (*ILO Convention No. 138 concerning minimum age for employment*, 1973). Under ILO standards, children under 12 years of age are prohibited from working; those between 12 and 14 are prohibited from engaging in potentially harmful work, such as working in mines, working with chemicals and pesticides in agriculture, or working with dangerous machinery.

*ILO Convention No. 138* establishes that the minimum age for employment may not be less than the age at which compulsory schooling is completed, and in no case younger than 15 years. *ILO Convention No. 182* (1999), which covers the prohibition against and immediate action to eliminate the worst forms of child labour, including enslavement, forcible recruitment, and prostitution, requires that States take steps to abolish child labour.





## Chapter 18

## Selected additional civil and political rights of refugees

## Relevant Instruments and Documents

### Refugee Law

Articles 4 and 15 of the Convention relating to the Status of Refugees

Article III of the OUA Convention Governing the Specific Aspects of Refugee Problems in Africa

### Human Rights Law

**The right to vote and stand for election:** in country of asylum and in country of origin: Article 25 of the ICCPR, Article 13 of the African Charter, Article 23 of the ACHR, Articles 16 of the ECHR and Article 3, Protocol No. 1 of the ECHR, and Human Rights Committee General Comment No. 25 on the right to participate in public affairs, voting rights and the right of equal access to public service (Article 25)

**Freedom of conscience and religion:** Article 18 of the UDHR, Articles 18 and 27 of the ICCPR, Article 14 of the CRC, Article 5 of the CERD, Article 9 of the ECHR, Article 12 of the ACHR, Article 8 of the African Charter, Article 9 of the African Charter on the Rights and Welfare of the Child, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Declaration on the Right to Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and Human Rights Committee General Comment No. 22 on the right to freedom of thought, conscience and religion (Article 18)

**Freedom of opinion and expression:** Article 19 of the UDHR, Article 19 of the ICCPR, Articles 12 and 13 of the CRC, Article 5 of the CERD, Article 10 of the ECHR, Article 13 of the ACHR, Article 9 of the African Charter, Article 7 of the African Charter on the Rights and Welfare of the Child, and Human Rights Committee General Comment No. 10 on freedom of opinion (Article 19)

**Freedom of association:** Article 20 of the UDHR, Article 22 of the ICCPR, Article 8 of the ICESCR, Article 15 of the CRC, Article 5 of the CERD, Article 11 of the ECHR, Article 16 of the ACHR, Article 8 of the Protocol of San Salvador, Article 10 of the African Charter, and Article 8 of the African Charter on the Rights and Welfare of the Child

**Right to peaceful assembly:** Article 20 of the UDHR, Article 21 of the ICCPR, Article 15 of the CRC, Article 5 of the CERD, Article 11 of the ECHR, and Article 15 of the ACHR

Refugees and asylum-seekers may suffer violations of rights that restrict their ability to express themselves politically, to engage in religious practices, to express their opinions or to associate with others. Under human rights law, States must ensure that asylum-seekers and refugees enjoy these rights to the same extent as nationals (see Human Rights Committee General Comment No. 15). However, there are some exceptions, particularly with regard to political rights. For example, Article 16 of the ECHR reserves the right of States Parties to restrict the political activities of aliens, although this restriction must be interpreted narrowly.

### 18.1 The right to vote and stand for election: In country of asylum and in country of origin

As established in Article 25 of the ICCPR, this right guarantees to *every citizen* the right to vote and to be elected “at periodic and genuine elections, which shall be by universal and equal suffrage



and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.” It also establishes the right to equal access to public service in one’s country.

States have a degree of discretion concerning the conditions they may set for voting, such as minimum age or registration requirements. The requirement of habitual residence in the territory could thus be considered legitimate. However some restrictions, such as denying women the right to vote, restricting the right to vote on the grounds of physical disability or imposing literacy, educational or property requirements, would be unreasonable.

In general, this right is established for every “citizen” so it is not generally enjoyed by refugees and asylum-seekers. However, there is nothing in international law that prohibits a country from guaranteeing this right to refugees if it wishes to do so.

## **18.2 Freedom of thought, conscience and religion**

These rights include the freedom to have or to adopt a religion or belief of one’s choice, and the freedom, either individually or in community with others, in public or private, to manifest one’s religion or belief in worship, observance, practice, and teaching. The freedom to manifest one’s religion includes the right to build places of worship, display symbols, observe holidays and days of rest, restrict diet, wear distinctive clothing, participate in rituals associated with certain stages of life, and use a particular language. Individuals may also set up schools and other institutions to teach their religion or belief.

The protection of these rights implies that one cannot be subjected to treatment intended to change one’s process of thinking, be forced to express thoughts, to change opinion, or to divulge a religious conviction. Thus, the right to freedom of thought, conscience, and religion is closely associated with the right to privacy. No sanction may be imposed for holding any view or for changing religion or convictions. Freedom of thought, conscience and religion protects against indoctrination by the State. Asylum-seekers and refugees enjoy this right to the same extent as nationals of the State concerned (see Human Rights Committee, General Comment No. 15).

The right to manifest one’s belief in worship, observance, practice or teaching may be subject to some **restrictions** (see Vol. I, Chapter 3):

- To **protect public safety, order, health or morals**, or
- To **protect the fundamental rights and freedoms of others**.

Asylum-seekers and refugees cannot be discriminated against because of their religion or belief by any State, institution, group of persons or individual. This protection applies irrespective of whether refugees practice a religion different from that practiced by the majority of the population in the host country.

### **18.3 Freedom of opinion and expression**

The freedom of opinion and expression is a complex right that includes the freedom to hold opinions without interference, and the freedom to seek, receive, and impart information and ideas of all kinds through any media. The exercise of this right “carries with it special duties and responsibilities” (see Article 19 of the ICCPR and Article 10 of the ECHR). In general, certain restrictions or limitations on the freedom of expression are permitted under human rights law (see Vol. I, Chapter 3).

In general, **restrictions** must be provided by law and may only be imposed on the grounds of:

- Respect for the **rights and reputations of others** (laws on defamation, slander or racial discrimination);
- Protection of **national security** (*e.g.* laws protecting military secrets);
- Protection of **public order** (*e.g.* laws that require licensing of newspapers or broadcasters, limit the free expression of police officials, restrict reporting on judicial proceedings, or prohibit incitement to violence or criminal acts);
- Protection of **public health** (*e.g.* laws restricting tobacco advertisement);
- Protection of **public morals** (*e.g.* laws restricting pornographic publications);
- **Moral protection of childhood and adolescence** (Article 13[4] of the ACHR);
- **Preventing the disclosure of information received in confidence**; and
- Maintaining **authority and impartiality of the judiciary** (Article 10 of the ECHR).

Human Rights supervisory bodies may examine States’ claims that restrictions on an individual’s freedom of expression are justified on the above-mentioned grounds.

In addition, States must prohibit:

- Any **propaganda for war**; and

- Any **advocacy of national, racial or religious hatred** that constitutes incitement to discrimination, hostility or violence (see Article 20 of the ICCPR and Article 13[5] of the ACHR). (See Chapter 10 above).

The country of asylum is obliged to prevent any individual or political organization, including those run by refugees, from engaging in hate propaganda or instigating violence. This restriction, which serves to protect the rights of others, does not constitute a violation of refugees' rights.

As mentioned, freedom of expression includes the right to receive information. In the context of refugee status determination procedures, this right must be seen in conjunction with the right to due process (see Chapter 14 above). Thus, according to the **African Commission**, asylum-seekers have a right to receive a reasoned decision. The Commission has determined that the failure of the government to provide to two deportees the reasons for the action taken against them "means that the right to receive information was denied to them" (see *Amnesty International v. Zambia, Communication 212/98*).

Asylum-seekers' and refugees' freedom of opinion and expression is subject to the same restrictions as for nationals of the country of asylum. Therefore, they can lawfully express their opinions and campaign for a peaceful change in their country of origin and can express their opinions on the domestic politics of the host country. Any imposition of greater restrictions on refugees and asylum-seekers, or on any other non-national, would appear to constitute unlawful discrimination in the absence of reasonable and objective justification (see Chapter 10 above).

Under the **Convention Governing the Specific Aspects of Refugee Problems in Africa**, "Signatory States undertake to prohibit refugees residing in their respective territories from attacking any Member State of the OAU by any activity likely to cause tension between Member States and in particular by use of arms, through the press or by radio". (Article III [2]). This limitation has to be interpreted in compliance with treaty obligations regarding the right to freedom of expression as stipulated in the ICCPR (Article 19) and the African Charter on Human and People's Rights (Article 9(2)).

Under the **European Convention on Human Rights**, restrictions (not prohibitions) may be placed on political activities by aliens. However, if the State concerned is also a party to the ICCPR, which does not allow for such restrictions, the more generous provisions prevail. When ratifying the ICCPR, some

European States made reservations on precisely this point, making it necessary to check the extent of the international obligation undertaken by the State in which you are working.

#### **18.4 Freedom of association**

The freedom to associate allows individuals to join together to pursue collective interests in groups, such as sports clubs, political parties, NGOs, and corporations. While the freedom of association encompasses the right to form and join an association freely, the associations themselves must be free from excessive interference from governments. This freedom accords refugees the right to form political organizations, including organizations that campaign for a peaceful change of government in their country of origin. This right also includes the freedom to choose not to associate.

Generally, States are allowed some measure of discretion concerning the freedom of association, *weighing* the interests of national security, public order, the protection of public health or morals or the protection of the rights and freedoms of others (see below). These grounds must be interpreted narrowly by States that seek to invoke them.

#### **18.5 Right of peaceful assembly**

This right allows individuals “to gather intentionally and temporarily for a specific purpose”. A demonstration or a procession may constitute an assembly. The freedom of assembly is not an absolute right.

In general, according to Article 21 of the ICCPR (see Vol. I, Chapter 3), **restrictions** must be provided by law, be necessary in a democratic society, and may only be imposed on the grounds of:

- **National security** (laws prohibiting or regulating demonstrations on a military base);
- **Public safety** (refusal to allow a deliberately provocative march that is likely to lead to violence);
- **Public order** (law requiring demonstrators to notify the police beforehand or to apply for a permit to hold the demonstration);
- The **protection of public health or morals** (laws prohibiting demonstrations at sacred or religious sites); or
- The **protection of the rights and freedoms of others** (prohibiting marches that are overtly racist).

Although this freedom is confined to *peaceful* assemblies, States must respect human rights when controlling violent assemblies. They must, for example, respect the prohibition against ill-

treatment. The authorities may legitimately ban a planned assembly if they have reason to believe that it will not be peaceful.

The ECHR permits restrictions (not prohibition) to be placed on the political activity of aliens. However, if the State concerned is also a party to the ICCPR, which does not allow for such restrictions, the more generous provisions prevail. A few European States made reservations when ratifying the ICCPR on precisely this point, making it necessary to check the extent of the international obligation undertaken by the State in which you are working.

### **18.6 Refugee duties in the country of asylum**

According to the 1951 Convention, a refugee also has duties “in and to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order” (Article 2). A similar provision is found in Article III(1) of the **Convention Governing Specific Aspects of the Refugee Problem in Africa**. The latter provision goes even further by proclaiming that refugees “shall also abstain from any subversive activities against any Member State of the OAU”. These duties must, however, be interpreted in compliance with international human rights standards.

### **18.7 Friendly relations and cooperation among States**

Although States must respect these rights with the limitations mentioned above, under international law, host States are responsible if actions taken by refugees are deemed injurious to another State. This would be the case, for example, if the refugee is engaged in subversive activities aimed at the violent overthrow of the government or attack on the territory of another State (see UN *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*). Under the UN Charter, the host State is obligated to take all reasonable measures to prevent such situations from arising.

In accordance with Security Council Resolution 1373 of 28 September 2001, UN Member States are required to deny safe haven to those who finance, plan, support or commit terrorist acts, or who provide safe haven for terrorists. The Council called on States to take appropriate measures to ensure that asylum-seekers have not planned, facilitated or participated in terrorist acts. It also called upon States to ensure, in accordance with international law, that the institution of refugee status is not abused by perpetrators,

organizers or facilitators of terrorist acts. However, States are obliged to respect international human rights and refugee law in all measures taken to suppress terrorism (see “Terrorism and the prohibition of *refoulement*” in Chapter 9 above).

**Refugees’ right to be consulted and to participate**

The right of refugees to be consulted and to participate in decisions on matters that affect their lives is firmly established in UNHCR policy and guidelines, particularly in the Agenda for Protection, but it is also enshrined in several human rights treaties. The right is also recognized for refugee children (Article 12 of the CRC). Children must be provided with all relevant information concerning their status and situation so they can develop and express well-informed opinions.



## Chapter 19

## The right to education

## Relevant Instruments and Documents

### Refugee Law

Article 22 of the Convention relating to the Status of Refugees

UNHCR Refugee Children: Guidelines on Protection and Care (Chapter 9)

ExCom Conclusion No. 104 (2005)

### Instruments on Statelessness

Article 22 of the Convention relating to the Status of Stateless Persons

### Human Rights Law

Article 26 of the Universal Declaration of Human Rights (UDHR)

Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)

Articles 28 and 29 of the Convention on the Rights of the Child (CRC)

Articles 10 and 14 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Articles 13 and 16 of the Protocol of San Salvador

Article 2, Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Article 17 of the European Social Charter (ESC)

Article 17 of the African Charter on Human and Peoples' Rights (African Charter)

Article 12 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Article 11 of the African Charter on the Rights and Welfare of the Child

UNESCO Convention against Discrimination in Education (1960)

Article XI of the Covenant on the Rights of the Child in Islam

Committee on Economic, Social and Cultural Rights, General Comment No. 13 on the right to education (Article 13)

Article 7 of the Cairo Declaration on Human Rights in Islam

While the right to education is established both in refugee law and in human rights law, the latter has further evolved this right. The 1951 Convention accords asylum-seekers and refugees the same treatment as nationals only with regard to primary (elementary) education. Human rights instruments, such as the ICESCR and the CRC, go far beyond the Convention, requiring not only that primary education be available to everyone, but that it also must be compulsory and free of charge. For other levels of education, the 1951 Convention provides for treatment “as favourable as possible and in any event not less favourable than accorded to aliens generally in the same circumstances.” The ICESCR recognizes that secondary education “shall be made generally available and accessible *to all*,” and that higher



education “shall be made equally accessible *to all on the basis of capacity*” (emphasis added).

### 19.1 Relevant human rights standards

Article 28 of the **Convention on the Rights of the Child** stipulates that every child has the right to an education. Under this provision

- **Primary** education must be made **compulsory and available free to all**;
- **Secondary** education must be made **available and accessible to every child**, and appropriate measures must be taken to achieve these ends, including introducing free education and offering financial assistance in case of need;
- **Higher** education must be made **accessible to all who qualify** by every appropriate means;
- Measures must be taken to encourage regular attendance at schools and to reduce drop-outs rates;
- Measures must be taken to ensure that school discipline is administered in a manner consistent with the child’s human dignity; and
- States Parties must promote and encourage international cooperation in matters relating to education.

Article 29 of the CRC describes the aims of education for the child and recognizes the liberty of individuals to establish and direct educational institutions. Article 23 addresses disabled children’s right to an education.

Articles 13 and 14 of the **International Covenant on Economic, Social and Cultural Rights** and General Comment No. 13 recognizes the right of everyone to education, stipulating that:

- **Primary education** must be compulsory and free to all;
- Concrete steps must be taken towards achieving free **secondary education** for all;
- **Higher education** must be made accessible to all who qualify; and
- **Technical and vocational education** must be made generally available without discrimination, particularly against refugees.

According to the principle of non-discrimination, all persons of school age residing in the territory of a State Party, including

non-nationals and regardless of their legal status, are covered (see Article 2 of the CRC, Article 13 of the ICESCR, and Article 3[e] of the *UNESCO Convention against Discrimination in Education*).

At the regional level, the **Protocol of San Salvador** contains detailed provisions on education (Articles 13 and 16). In Europe, this right is contained in Article 2, **Protocol No. 1** of the **ECHR** (“no person shall be denied the right to education”) and in more detail under Articles 17 and 19 of the **European Social Charter**. The **African Charter** contains only provisions regarding the duty of the State to promote and protect the “morals and traditional values recognized by the community” (Article 17).

**Committee on Economic, Social and Cultural Rights, General Comment No. 13 on the right to education (paragraph 1):**

“Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.”

## 19.2 Elements of the right to education

Three main elements of the right to education are relevant for asylum-seekers and refugees:

- No one shall be denied access to existing public educational institutions in a discriminatory way;
- States should prevent and eliminate legal and practical obstacles that can hinder the enjoyment of this right; and
- Primary education must be compulsory and free for all.

## 19.3 Enjoyment of the right to education by refugees and asylum-seekers

Asylum-seekers should not only have access to existing public education institutions without discrimination, but States must also eliminate practical and administrative obstacles that they might face. All child asylum-seekers should benefit from free primary education. Since language barriers can render the enjoyment of the right to education impossible to realize, the right to free primary education for asylum-seekers should be coordinated with language training. Considering the size, profile,

language, skills and dispersion of refugee children in the country, States can apply a certain discretion on how to best arrange for the education of refugee children – whether to mainstream refugees into the existing national education institutions or to establish specific facilities providing, for example, education in refugee camps.

It is not a violation of the right to non-discrimination to adopt temporary, special measures to ensure *de facto* equality in access to education for men and women and for disadvantaged groups, such as refugees and asylum-seekers as long as such measures do not lead to unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were created have been achieved.

In a landmark case concerning the right to education (The *Belgian Linguistics Case*), the **ECtHR** determined that Article 2, Protocol No. 1 of the ECHR does not require States to ensure, at their own expense, education of a particular type; but that it does establish that those persons who are under the jurisdiction of one of the contracting States have the right to avail themselves of the means of instruction given at a certain time. This provision may thus be useful for challenging legislation or policies that deny asylum seekers' access to educational institutions.

In a case heard by the IACtHR relating to two stateless girls, the petitioners alleged that State education policy and practice that require presentation of a birth certificate in order to obtain access to schools has a discriminatory effect on children of Haitian descent who are denied their documentation (see *Dilcia Yean and Violeta Bosica v. Dominican Republic*). The Court observed that requirements for late registration of births and discrimination deprived the two girls of their rights to a nationality and legal personality and that this prevented them from attending school. This case thus makes evident a crucial link between the right to legal identity (see Chapter 13 above) for asylum-seekers, refugees, and migrants, and the right to education.

The **Committee on Economic, Social and Cultural Rights** has observed that requirements for public education and vocational training should be similar for nationals and asylum-seekers, and that States should avoid unnecessary administrative obstacles that hinder asylum-seekers from enjoying their right to an education. The Committee has expressed its concern not only with regard to primary education, but also to post-secondary education. In its concluding observations on the report of

Canada, the Committee implicitly suggested that refugees and asylum-seekers should enjoy access to the same loan programmes for post-secondary education as available to citizens and permanent residents (CESCR Concluding Observations Canada, 1998).

### **19.4 Children and the right to education**

Although the right to education is recognized as a right for “everyone” and that learning is a life-long task, children are naturally the principal beneficiaries. States must ensure that access to education is maintained during all phases of displacement, and it should be granted without discrimination, taking into account the special needs of displaced persons. Detailed provisions on States’ obligations concerning the right to education are included in the **International Covenant on Economic, Social and Cultural Rights** (Articles 13 and 14) and in Articles 28 and 29 of the **Convention on the Rights of the Child** (see above).

Education also plays a key role in the promotion of refugee children and their parent’s integration into, and the development of harmonious relations with, host societies.

In its General Comment No.13 on the right to education, the Committee on Economic, Social and Cultural Rights elaborates on this aspect in its chapter on

“Article 13 (1): Aims and objectives of education

States parties agree that all education, whether public or private, formal or non-formal, shall be directed towards the aims and objectives identified in article 13 (1). The Committee notes that these educational objectives reflect the fundamental purposes and principles of the United Nations as enshrined in Articles 1 and 2 of the Charter. For the most part, they are also found in article 26 (2) of the Universal Declaration of Human Rights, although article 13 (1) adds to the Declaration in three respects: education shall be directed to the human personality’s “sense of dignity”, it shall “enable all persons to participate effectively in a free society”, and it shall promote understanding among all “ethnic” groups, as well as nations and racial and religious groups. Of those educational objectives which are common to article 26 (2) of the Universal Declaration of Human Rights and article 13 (1) of the Covenant, perhaps the most fundamental is that “education shall be directed to the full development of the human personality”.

Article 11 of the **African Charter on the Rights and Welfare of the Child** specifically mentions that a child disciplined at school should be treated with humanity and respect. It also establishes equal access to education for female, gifted, and disadvantaged children, and stipulates that girls who become pregnant before completing their education are entitled to continue with their schooling.

Unfortunately, girls are often excluded from the educational opportunities enjoyed by boys, and thus their prospects for self-sufficiency are greatly reduced. A State's failure to ensure equal access to education constitutes a violation of the prohibition of discrimination established in several human rights treaties (Article 2 of the CRC, Article 3 of the ICESCR, and Article 10 of the CEDAW).





## Chapter 20

## The right to property and peaceful enjoyment of possessions

## Relevant Instruments and Documents

### Refugee Law

Articles 13 and 14 of 1951 Convention relating to the Status of Refugees

ExCom Conclusions Nos. 18 (1980) and 40 (1985)

### Human Rights Law

Article 17 of the Universal Declaration of Human Rights (UDHR)

Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Article 15 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Article 21 of the American Convention on Human Rights (ACHR)

Article 14 of the African Charter on Human and People's Rights (African Charter)

Article 1, Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

CERD Committee, General Recommendation No. 22 on Article 5 and refugees and displaced persons

Principles on housing and property restitution for refugees and displaced persons (Pinheiro principles) (E/CN.4/Sub.2/2005/17 (2005))

### Other

Article 75 of the Rome Statute of the International Criminal Court

Principle 28 of the Guiding Principles on Internal Displacement (1998)

Under human rights law, all refugees have the right to the restitution of the properties (housing and land) of which they were arbitrarily or unlawfully deprived. If restitution is practically impossible to achieve, refugees must then be appropriately compensated as determined by an independent, impartial tribunal.

The right to property is not only important to refugees and asylum-seekers when they return to their countries and seek to recover their properties, but also to protect the possessions they acquire during displacement.

## 20.1 Relevant human rights standards

Although the protection of property is included in Article 17 of the UDHR ("Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property"), the ideological debate during the Cold War period in the 1950s and 1960s resulted in a failure to include a provision on the right to property in either of the two main UN Covenants, the ICCPR and the ICESCR. However, the right to property is addressed several UN Conventions.



Under Article 16 of the **Convention on the Elimination of All Forms of Discrimination against Women**, States are obliged to take all appropriate measures to eliminate discrimination against women and ensure that both spouses have the same rights in respect of “ownership, acquisition, management, administration, enjoyment, and disposition of property.” In addition, under Article 15, States are obliged to accord women equal rights to conclude contracts and administer property.

The **Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families** recognizes the right of migrant workers and their families to property and the right to adequate compensation in case of expropriation (Article 15). However, this Convention is not applicable to “refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned” (Article 3(d)).

The UN General Assembly, the Security Council, the Commission on Human Rights and the Sub-Commission have adopted a number of resolutions regarding housing and property restitution in the context of the return of refugees and internally displaced persons, primarily in country specific contexts. More generally, the issue was addressed by the Sub-Commission on the Promotion or Protection of Human Rights, which summarised applicable standards deriving from international law in the “*Principles on housing and property restitution for refugees and displaced persons*”, also referred to as the “Pinheiro Principles” (E/CN.4/Sub.2/2005/17 [2005]).

Regionally, the most developed case-law regarding the right to property comes from the European system.

The **European Convention of Human Rights** includes the right to property in **Article 1 Protocol No. 1**: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”. This standard qualifies the right, not only by referring to “enjoyment” rather than “ownership,” but also by giving the State more powers to limit property rights than is given for other rights. The State may deprive an individual of his/her possessions “in the public interest and subject to conditions provided for by law” and may limit this right “in accordance with the general interest or to secure the payment of taxes or other contributions or

penalties.” A balance must be struck between the interests of the community and the fundamental rights of the individual.

In the context of this Article, the term “possessions” has an autonomous meaning and is not limited to property rights as defined in national legal systems. Thus, it is possible to introduce a claim under Article 1 despite the fact that the alleged property right is not recognized as such in domestic law.

The notion of “deprivation” includes both formal and *de facto* expropriation. “Subject to the conditions provided for by law” requires the existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions.

The second sentence of Article 1, “general principles of international law”, is not applicable when a State expropriates the property of its own nationals. The principles in question apply solely to non-nationals. According to the ECtHR, there may be good reasons for distinguishing between nationals and non-nationals when considering compensation for the expropriation of property enacted in the context of social reform or an economic restructuring.

Article 1, Protocol No. 1 of the ECHR implies that compensation must be paid if property is taken from anyone within the jurisdiction of a Contracting State. As noted by the ECtHR, depriving a person of his/her property may be part of the pursuit of a legitimate aim “in the public interest,” but there must also be a reasonable proportionality between the means employed and the aim sought. This requires that States strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. According to the ECtHR, compensation terms are material to the assessment as to whether a fair balance has been struck between the various interests at stake and, notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his/her possessions (see *Lithgow v. the United Kingdom*).

On the basis of the European Convention, the ECtHR has generated substantive case law regarding the right to property. The standards developed in the case of *Loizidou v. Turkey* are relevant to asylum-seekers and refugees. In this case, the ECtHR found that there had been a breach of Article 1 of Protocol No. 1 because the applicant, a Greek Cypriot, had effectively lost all control over, as well as all possibilities to use and enjoy, her property. In a later case, *Cyprus v. Turkey*, the ECtHR concluded that there had been a continuing violation of Article 1 of

Protocol No. 1 because the Greek-Cypriot owners of property in northern Cyprus were being denied access to, and control, use, and enjoyment of their property, and were denied any compensation for the interference with their property rights.

According to the ECtHR, taking property without the payment of an amount reasonably related to its value would normally constitute a disproportionate interference that could not be considered justifiable under Article 1 of Protocol No. 1. That article expressly provides that deprivation of property must be effected “in the public interest.”

Although the **International Covenant on Civil and Political Rights** includes no provision on the right to property, the Human Rights Committee has protected this right through the free-standing non-discrimination clause contained in Article 26 (see Chapter 10 above). When legislation is adopted by a State Party, it must comply with the requirement of Article 26 that its content shall not be discriminatory. Therefore, when refugees and asylum-seekers have left their countries and the State has confiscated their property, any law enacted to provide for restitution may not exclude non-residents and non-citizens (see *Simunek et al. v. the Czech Republic*).

The **Convention on the Elimination of All Forms of Racial Discrimination** obliges States Parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social, and cultural rights (Article 5). The CERD Committee has emphasized that “refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void” (General Recommendation No. 22 on Article 5 and refugees and displaced persons).

## **20.2 Housing, land and property restitution programmes**

According to the *Principles on housing and property restitution for refugees and displaced persons* (E/CN.4/Sub.2/2005/17 [2005]), “States should ensure that all housing, land and property restitution procedures, institutions, mechanisms and legal frameworks are fully compatible with international human rights, refugee and humanitarian law and related standards, and that the right to voluntary return in safety and dignity is recognized therein.” The principles established a number of

measures that States should take to ensure that the national procedures comply with international standards, such as:

- Ensuring **accessibility** for everyone to restitution claims procedures;
- Establishing and supporting equitable, timely, independent, transparent, and non-discriminatory **procedures, institutions, and mechanisms** to assess and enforce housing, land, and property-restitution claims;
- Ensuring **age- and gender-sensitive** procedures;
- Requesting **technical assistance and cooperation** from relevant international agencies;
- Including housing, land, and property-restitution procedures, institutions, and mechanisms in **peace agreements and voluntary repatriation agreements**;
- Ensuring adequate **consultation and participation** in decision-making;
- Establishing systems for the registration of housing, land, and property rights;
- Ensuring that the **rights of tenants and other non-owners**, as well as secondary occupants, are properly recognized within restitution programmes;
- Adopting all **legislative measures** necessary to ensure protection of the right to housing, land, and property restitution;
- **Abstaining from any arbitrary and discriminatory laws** that may prejudice the restitution process;
- Establishing a **specific body** entrusted with enforcing housing, land, and property restitution decisions and judgments; and
- Providing full and effective **compensation** to all refugees and displaced persons.

### **20.3 The role of the international community, including international organizations**

The *Principles on housing and property restitution for refugees and displaced persons* also refer to the responsibility of the international community to

- Promote and protect the **right to housing, land and property restitution**, as well as the **right to voluntary return** in safety and with dignity;

- Ensure respect of **the prohibition against unlawful or arbitrary displacement**, particularly the prohibition against forced evictions;
- **Work with national governments** and share expertise on the development of national housing, land, and property-restitution policies and programmes and help ensure their compatibility with international human rights, refugee, and humanitarian law and related standards;
- Strive to ensure that **peace agreements and voluntary repatriation agreements** contain provisions related to housing, land and property restitution, including by establishing national procedures, institutions, mechanisms, and legal frameworks.



## **PART C**

# **EXERCISES FOR SELF-STUDY AND ADDITIONAL INFORMATION**

This section includes review questions and specific refugee-related cases for self-study. The cases are intended to provide examples of the questions and dilemmas with which you may be confronted in your daily work. For your convenience, the questions and cases have been classified by theme.

Where appropriate, readers are directed to additional sources for more in-depth discussion of the topic. Some relevant human rights cases have been included to assist the reader.

Readers should refer to the main instruments and documents listed in Vol. I Part I of this module.

## Volume II Part A                      **Groups with Specific Protection Needs**

1. Domestic violence is a human rights violation only if the perpetrator is a State official.

*True*     *False*

2. The rape of a woman is a common crime perpetrated by private actors for which the State may never be held responsible.

*True*     *False*

3. To ensure compliance with Article 9 of the CRC, which requires States to ensure that a child is not separated from his/her parents against their will, States may return an unaccompanied or separated refugee child to his/her country of origin.

*True*     *False*

4. Which of the following answers is correct? According to the CRC, a child is defined as:

- a. “every human being below the age of eighteen years”
- b. “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”
- c. “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained later”
- d. “every human being below the age of twenty-one”

5. Which of the following answers is NOT correct?

- a. In guardianship, accommodation arrangements and legal representation, the views of children under 15 years of age need not be taken into account.
- b. States must refrain from returning a child to the borders of a State where there is a real risk of direct participation in hostilities.
- c. At all times children should be informed of arrangements with respect to guardianship and legal representation and their opinion should be taken into consideration.
- d. According to Article 24 of the CRC, States are obliged to ensure that child asylum-seekers have the same access to health care as children who are nationals.



6. Which of the following statements is correct concerning a non-national in a State Party to the major human rights treaties?
- By leaving her own country she has forfeited most of her human rights.
  - In general, she enjoys the same rights and freedoms as nationals.
  - Although she has forfeited most of her human rights, she retains the right to go back to her country of origin.
  - In general, she enjoys only civil rights in the host country.

### **Case Study 1**

In country A, very few of the women seeking asylum have been recognized on the grounds of gender-based persecution.

The authorities' decisions often reveal inconsistencies that seem to indicate a lack of understanding of the issues involved in determining whether or not a well-founded fear of persecution exists on grounds related to gender.

Although the issue has been the subject of several decisions in the courts, no consensus has emerged on what constitutes gender-based persecution and whether this ground falls within the Convention criteria for refugee status.

Violence against women is an issue of intense controversy in the country.

*What would you propose that UNHCR does in order to promote gender-sensitive interpretation of the 1951 Convention?*

### **Case Study 2**

Samara has suffered continuous beatings and rape at the hands of her husband, a former army sergeant. The authorities in her country have not done anything to protect her in spite of the fact that on several occasions she has ended up in the hospital with severe physical injuries. Hers is one of many such cases and she has fled from her country and is seeking asylum.

She has been informed that her claim for refugee status has been denied because the agent of persecution is a non-State agent and she can safely relocate to a different province in her State of origin. However, Samara fears that her husband will locate her and subject her to more violent abuse. She has no right to appeal the decision. The authorities informed her that she will be deported in a week.

*Is Samara's country in any way responsible for the abuses committed by her husband?*

*As a protection officer, what legal and practical arguments can you use to convince the authorities to suspend Samara's deportation?*

### **Case Study 3**

Government X wants to screen all refugee children who were evacuated from an orphanage in an emergency situation, with the intention of separating HIV-positive children and locating them in a separate area so they will not infect other children.

*As a protection officer, what would your position be and how would you react to this situation?*

### **Further reading**

- Anker, D., "Refugee law, gender, and the human rights paradigm," *Harvard Human Rights Journal*, vol. 15, 2002, pp. 133–154.
- Detrick, Sharon, *A commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff, 1999.
- Edwards, A., "Age and gender dimensions in international refugee law," *Refugee Protection in International Law*, Feller, et al., Cambridge University Press, 2003, pp. 46-80.
- Haines, Rodger, "Gender-related persecution," in Feller et al.: *Refugee Protection in International Law*, Cambridge University Press, 2003, pp. 319-350.
- *Separated Children in Europe Programme: Statement of Good Practice*, UNHCR and International Save the Children Alliance, Brussels, Second Edition, October 2000.
- *Working with Separated Children: Field Guide, Training Manual, and Training Exercises*, Save the Children UK, 1999.

## Volume II Part B Substantive Rights

### 1. The Right to Seek and Enjoy Asylum from Persecution

Which human rights instrument(s) recognize(s) a right to “to seek and be granted” asylum:

- a. The Universal Declaration of Human Rights
- b. The African Charter on Human and People’s Rights
- c. International Covenant on Civil and Political Rights
- d. The American Convention on Human Rights

#### Case Study 4

*Continenta*, a State in Latin America that has ratified all Inter-American human rights treaties, is facing waves of refugees from *Islita*, a small island State not far from the *Continenta* coast. The government of *Continenta* has decided to interdict the refugees in international waters and summarily return them to their country. As a UNHCR officer, you have been called to give your opinion on the legality of this procedure under the Inter-American system for the protection of human rights. Please answer the following questions:

Which right(s) of the interdicted persons may be violated by the *Continenta* policy?

Within the Inter-American system, which human rights instrument(s) is (are) binding for *Continenta*?

Which is the competent supervisory human rights body to handle this case?

#### Further reading

- Edwards, A., “Human rights, refugees, and the right to ‘enjoy’ asylum,” *International Journal of Refugee Law*, Volume 17, Number 2, 2005 pp. 293-330.
- Franco, L. (ed.), *El asilo y la protección internacional de los refugiados en América Latina*, ACNUR, Universidad Lanús, IIDH, 2004.
- G. Noll, “Seeking asylum at embassies: A right to entry under international law?,” *International Journal of Refugee Law*, Volume 17, Number 2, 2005, pp. 542-573.

- R. Plender, R. & Mole, M., “Beyond the Geneva Convention: Constructing a *de facto* right of asylum from international human rights instruments,” in: Nicholson, F. and Twomey, P. (eds.), *Refugee Rights and Realities. Evolving International Concepts and Regimes*, Cambridge University Press, 1999, pp. 81–105.

### **Selected human rights cases**

- *Haitian Interdiction v. US*, Report 51/96, Case No 10.675, Decision as to the Merits, 13 March 1997, Inter-American Commission on Human Rights, Report 1996, pp. 598-602 (available on RefWorld).
- *Joseph v. Canada*, Report No 27/93, Case 11.092, Decision as to the admissibility, Inter-American Commission on Human Rights, Annual Report 1993, p. 32.

## **2. The Principle of *Non-refoulement***

1. The principle of *non-refoulement* as related to refugees applies regardless of whether or not the host country is party to the 1951 Convention/1967 Protocol.

*True*  *False*

2. If one of the exceptions to the principle of *non-refoulement* provided for in Article 33(2) of the 1951 Convention is applicable to a particular refugee, he/she may nevertheless be returned to the country of origin even if this means that he/she

- a. may be at risk of torture upon return.
- b. may be at risk of persecution for example, by way of being subjected to a disproportionate criminal sanction based on political opinion, whereby apart from the sanction, his/her treatment, including while serving the sentence, would conform with fundamental human rights standards (i.e. treatment neither amounting to torture nor constituting inhuman or degrading treatment or punishment, nor putting his/her life at risk).
- c. may be at risk of cruel, inhuman or degrading treatment or punishment, not yet reaching the threshold of torture.

### **Case Study 5**

An asylum-seeker whose application for asylum has been rejected by a national eligibility commission claims to have been beaten and raped, and says she fears further mistreatment if she is returned to her home country.

After carefully reviewing her claim, you come to the conclusion that she is in need of international protection and you recognize her under the UNHCR mandate.

However, the authorities are satisfied with their status determination and appeals procedures and are planning to proceed with her expulsion.

*What legal arguments can you make on her behalf that might persuade the country of asylum to suspend her expulsion, or at least to delay it so that you can search for another solution?*

*What further information would you need?*

### **Case Study 6**

A shipmaster has been informed that he is carrying a clandestine stowaway. When brought to the master, the stowaway claims that he is a dock worker and a trade union leader in the country where the ship last anchored. He states that the new military regime has outlawed all trade union activities so if he is returned to his country, he fears he will face detention and ill-treatment. The authorities of the first port of call (State A) do not allow the stowaway to disembark. The State of the ship's next port of call (State B) is a political ally of the new government of the stowaway's country of origin.

*As UNHCR officer, what legal and practical arguments can you use to seek the cooperation of the authorities of the first port of call (State A) in this case?*

*What additional information would you need?*

### **Case Study 7**

Iyenemi, her three children, mother-in-law, and her two parents are part of a mass refugee movement fleeing by boat. The boat is intercepted in international waters and all of its passengers will be returned to their country of origin regardless of their claim to refugee status.

*As a protection officer, how would you analyze the fairness of this procedure under international standards?*

*Identify which human rights mechanisms may be available for Iyenemi and her family.*

*What additional information would you need?*

### **Further reading**

- Goodwin-Gill, G., *The Refugee in International Law*, Oxford University Press, second edition, 1996, pp. 117-155.

- Gorlick, B, “The Convention and the Committee against Torture: A complementary protection regime for refugees,” *International Journal of Refugee Law*, 1999.
- Hathaway, J., *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp.278-363. *Law of Refugee Status*, Butterworths, 1991, pp. 24-27, 155-171, 195-204.
- Lauterpacht, E. and Bethlehem, D., “The scope and content of the principle of *non-refoulement*: Opinion,” in: Feller et al., *Refugee Protection in International Law*, Cambridge University Press, 2003, pp. 87-177.

### **Selected human rights cases**

- *Ahmed v. Austria*, ECtHR, Judgment of 17 December 1996 (holding deportation of a Somali convicted of serious criminal offence would be a violation of Article 3 if the applicant is at risk of being subject to torture or inhuman and degrading treatment by non-State agents upon expulsion).
- *Jabari v. Turkey*, ECtHR, Judgment of 11 July 2000 (holding violation of Article 3 in case of return of a woman who had committed adultery to Iran).
- *Agiza v. Sweden*, Committee against Torture, communication No. 233/2003, views of 20 May 2005 (holding violation of Article 3 and 22 of the CAT for the failure to provide a review of the decision to expel the complainant by an effective, independent, and impartial judicial body, and by expelling the complainant immediately upon the government's decision, thereby depriving him of a meaningful opportunity to exercise his right to seek interim measures before the Committee).
- *Mutombo v. Switzerland*, Committee against Torture, communication No. 13/1993, views of 27 April 1994 (no violation where applicant has established existence of gross violations of human rights in country of return, absent sufficient evidence of the applicant's "personal risk").
- *Tala v. Sweden*, Committee against Torture, communication No. 43/1996, views of 15 November 1996 (contradictions and inconsistencies in testimony of asylum-seeker attributed to post-traumatic stress disorder resulting from torture).

- *Aemei v. Switzerland*, Committee against Torture, communication No. 34/1995, views of 9 May 1997 (activities carried out by the complainant in receiving State may also give rise to the risk of being subjected to torture, i.e. a *sur place* claim).
- *Paez v. Sweden*, Committee against Torture, communication No. 39/1996, views of 28 April 1997 (membership of applicant in the Peruvian Shining Path organization was not material to the enjoyment of Article 3, which prohibits *refoulement* to torture in absolute terms, in contrast with Article 1F and Article 33[2] of the 1951 Convention)

### 3. The Principle of Non-discrimination

Under human rights law, all “distinctions” and “preferences” in treatment are considered discriminatory.

True  False

#### Case Study 8

A State has introduced a new law to handle an increase in the number of asylum-seekers. Under the new law, asylum-seekers will be divided into three categories:

Group A: Those from certain States (the “A” list) will not be allowed to file claims for asylum.

Group B: Those from certain other States (the “B” list) will have their claims heard, but only in a shortened procedure that has fewer safeguards than the regular procedure.

Group C: Only asylum-seekers who do not come from a country on one of the other two lists will have their claims heard in the regular status determination procedure.

*As a UNHCR officer, how would you analyze this new law in light of international human rights law provisions on non-discrimination?*

*What additional information would you need?*

#### Case Study 9

Julius has been granted refugee status in Frisa where he has been living for more than three years. However, he has had several frightening and violent encounters with the local police who suspect that his presence is illegal. Because of hostility in the local community to persons of his race, he has suffered discrimination in employment and housing.

*As a UNHCR officer, what legal and practical arguments can you use when submitting this case to the State's authorities?*

### **Further reading**

- Bayefsky, Anne, "The principle of equality or non-discrimination in International Law," *Human Rights Law Journal*, vol. 11, No.1-2, 1990, pp.1-34.
- Clark, T. and Niessan, J., "Equality rights and non-citizens in Europe and America: The promise, the practice and some remaining issues," *Netherlands Quarterly of Human Rights*, 1996.
- Goodwin-Gill, G., *The Refugee in International Law*, Oxford University Press, second edition, 1996, pp. 230-234.

### **Selected human rights cases**

- Karakurt v. Austria, Human Rights Committee, communication No. 965/2000, views of 4 April 2002 (violation of Article 26 on the ground of citizenship).

## **4. The Right to Liberty of Person: Non-Penalization for Illegal Entry, Judicial Protection against Detention, and Conditions of Detention**

Under human rights law, the detention of asylum-seekers is *per se* arbitrary.

*True*  *False*

### **Case Study 10**

You are a protection officer in a country where all asylum-seekers are automatically detained if they arrive without valid travel documents.

They are kept in detention throughout the refugee status determination procedure; some have been detained for up to four years.

The only asylum-seekers who are not detained are those who arrive with a visa and who only later apply for asylum. This practice is supported by national law and by the authorities who maintain that it is a necessary border-control measure that serves as a deterrent to others who might try to arrive without a visa.

*How would you argue in favour of changing the law to reflect UNHCR's concern about the detention of refugees and asylum-seekers?*



*What other measures would you consider if the State is party to the ICCPR?*

*What additional information would you need?*

### **Case Study 11**

In Kagiland, a mandatory detention regime is strictly applied to all asylum-seekers (including to minors and pregnant women) who enter the country illegally. Detention is not based on grounds particular to the individual; rather it is based solely on the fact of illegal entry and is generally justified as necessary because of the possibility that the applicant might abscond.

Children are also detained, including a significant number of unaccompanied children. Several human rights organizations have consistently denounced the conditions in the detention centres. There are no basic recreational facilities for children and the education offered is of a lesser quality than that provided for citizens in public schools.

Kagiland is a State Party to the ICCPR and has recognized the competence of the Human Rights Committee to receive individual complaints. It is also a State Party to the CRC.

*Describe the principal protection concerns which arise in the case study, citing relevant international standards. Please focus in particular on (1) arbitrary detention, (2) denial of legal advice and incommunicado detention, (3) separation of new arrivals from persons who have been detained for longer periods, and (4) detention of children.*

### **Case Study 12**

Adib has suffered detention without charge or trial because of his religious activities. He has fled from his country and is an asylum-seeker in Greatland. While his status is being determined, he has no right to work and his request for welfare support has been denied. In a rally organized by a group of asylum-seekers, Adib was beaten by counter-protesters from the local community; the police refused to assist him.

*Given that Greatland is party to the major universal and regional human rights treaties, can you think of any international obligations that the authorities may have breached regarding the treatment of Adib?*

### Further reading

- Goodwin-Gill, G., “Illegal entry (Article 31),” in: Feller, et al., *Refugee Protection in International Law*, Cambridge University Press, 2003, pp. 185-252.
- Hathaway, J., *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp. 370-460.
- Pistone, M., “Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers,” *Harvard Human Rights Journal*, 1999.

### Selected human rights cases

- *Amuur v. France*, ECtHR, Judgement of 25 June 1996 (ruling detention of an asylum-seeker in a so-called extra-territorial “international zone” of an airport is a violation of Article 5[1]).
- *Conka v. Belgium*, ECtHR, Judgement of 5 February 2002 (the detention and return of rejected Roma asylum-seekers to Slovakia constituted a violation of Article 5 and a breach of the prohibition against “collective expulsion” under Protocol No. 4).
- *C. v. Australia*, Human Rights Committee, communication No. 900/1999, views of 28 October 2002 (lengthy detention causing mental illness of applicant and deportation to Iran constituted a violation of Articles 7 and 9).
- *Torres v. Finland*, Human Rights Committee, communication No. 291/1988, views of 2 April 1990 (failure of State to provide an alien in detention for more than five days the right of access to court proceedings for judicial review of the lawfulness of his detention constituted a violation of Article 9).
- *A.v. Australia*, Human Rights Committee, communication No. 560/1993, views of 3 April 1997 (absence of individual consideration of reasons for detention of asylum-seekers constituted a violation of Article 9).

## 5. The Right to Legal Identity and Status

Providing asylum-seekers’ children born in the host country with a legal identity implies giving them the nationality of the State.

True  False

### Case Study 13

In the country in which you are working, there are a large number of unregistered births to undocumented refugees. The lack of documents prevents refugee children from claiming nationality, which they are entitled to under national law (the national law establishes the principle of *jus soli*). The lack of documentation also denies children access to education, since public schools require national identity documents.

*What arguments can you use to ask that the authorities end the practice of not registering the births of refugee children?*

*What additional information would you need?*

### Case Study 14

The births of refugee children in a large camp are not being registered by local authorities in the country of asylum. The authorities point out that births of local children are usually not registered either, unless the parents make a long journey to the provincial capital.

*As a UNHCR officer, what legal arguments can you bring forward to seek the authorities' cooperation in addressing the issue and what practical suggestions can be made for creating a programme of birth registration?*

### Further reading

- Hathaway, J., *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp.614-625.
- Joseph, S, Schultz, J, and Castan, M, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, 1999, pp. 201-205.

### Selected human rights cases

- Case of *The Yean and Bosico Children v. Dominican Republic*, Inter-American Court of Human Rights, Judgment of 8 September 2005.
- *Dilcia Yean and Violeta Bosica v. Dominican Republic*, case No. 12.189, Report No. 28/01, Inter-American Commission, Annual Report 2001.

## 6. The Right to Due Process

Access to a fair and effective refugee status determination procedure is indispensable to the realization of the right to seek and enjoy asylum.

True  False

### Case Study 15

A State has enacted a new law establishing procedures to deal more expeditiously with an increase in the number of asylum-seekers. From now on, those who arrive without documents or who have fraudulent documents will have their claims for asylum decided immediately by an official at the border after an interview. The applicant will not have an opportunity to see a lawyer or to contact UNHCR for help. If the decision is negative, the applicant will be returned immediately. There is an opportunity to file an appeal, but, under the law, the appeal does not have suspensive effect and the applicant is therefore not allowed to stay in the country while awaiting the outcome of the review.

*As a protection officer, how would you analyze the fairness of this procedure under international standards?*

*What additional information would you need?*

### Further reading

- Hathaway, J., *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp.626-656.
- Joseph, S, Schultz, J, and Castan, M, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, 1999, pp. 277-339.

### Selected human rights cases

- *Baena-Ricardo et al. vs. Panama*, Inter-American Court of Human Rights, Judgement of 2 February 2001 (scope of application of the right to due process under article 8 of the American Convention on Human Rights).

## 7. Survival Rights (Economic, Social, and Cultural Rights)

According to the “progressive realization” principle included in major economic, social, and cultural rights treaties, States that do not have enough resources are exempted from any obligation to take action.

True  False

### Case Study 16

You are a protection officer in a country where refugees accompanied by their families are allowed to request a monetary subsidy to assist them and their families to locally integrate.

According to the law, the application form to request the family allowance is to be signed by the husband. Since they were recognized as refugees, Ana and her two sons are no longer living with their father Danko. Danko receives a monthly family allowance and he is not providing any money to his family. Ana has mentioned this situation to the authorities who refuse to give her the money.

*As a protection officer, how would you analyze the fairness of this assistance regime under international standards?*

### Further reading

- Cholewinski, R., “Economic and Social Rights of Refugees and Asylum-Seekers in Europe,” *Georgetown Immigration Law Journal*, Vol. 14, 2000, pp. 709.
- Eide, A., Krause, C., and Rosas, A. (eds), *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff, second edition, 2001.
- Hathaway, J., *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp.461-513.
- Sepúlveda, Magdalena, “The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights,” *Intersentia*, 2003.

### Selected human rights cases

- *D. v. The United Kingdom*, ECtHR, Judgement of 2 May 1997 (holding that the withdrawal of the medical treatment that the applicant was receiving in the UK would hasten his death and that his removal to his own country where there were no facilities to treat his illness would amount to a violation of Article 3).
- *BB v. France*, ECtHR, Judgement of 7 September 1998 (finding that the deportation to the country of origin of a citizen of Congo suffering from AIDS would leave the individual without access to adequate medical care in violation of Article 3).
- *R. (on the applications of Adam, Tesema, and Limbuela) v. Secretary of State for the Home Department* (2004), 2004 EWCA 540, All ER (D) 323, Judgments of 21 May 2004

(UK judicial decision holding that failure to provide shelter and assistance to destitute asylum-seekers violates Article 3 of the European Convention on Human Rights).

## 8. The Right to Freedom of Movement and the Prohibition of Collective Expulsion of Aliens

In which of the following regional human rights instruments is collective expulsion, a) prohibited and b) further explained. Tick the correct statements

- a. Article 12 of the African Charter on Human and Peoples' Rights
  - a)
  - b)
- b. Article 22(9) of the American Convention
  - a)
  - b)
- c. Article 3 ECHR
  - a)
  - b)
- d. Article 4 Protocol No. 4 of the ECHR
  - a)
  - b)

### Case Study 17

Refugees and asylum-seekers have no right to choose their place of residence in the country in which you work. Despite UNHCR's intervention, some people have been forcibly moved in conditions that prompted the repatriation of 500 refugees who might otherwise have decided not to repatriate.

While recognizing the right of the government to relocate the refugees for reasons of public order, the relocation and subsequent repatriation in the middle of the winter led to serious consequences for the health of the refugees.

*What arguments can you use to request the authorities to end such forced movements of refugees?*

### Further reading

- Joseph, S., Schultz, J., and Castan, M., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, 1999, pp. 244-267.

### Selected human rights cases

- *Conka v. Belgium*, ECtHR Judgement of 5 February 2002 (the detention and return of rejected Roma asylum-seekers)

to Slovakia constituted a violation of Article 5 and a breach of the prohibition of "collective expulsion" under Protocol 4).

- *Union Inter Africaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v. Angola*, African Commission on Human and Peoples' Rights, Communication No. 159/96, Eleventh Activity Report 1996-1997, Annex X (illegal expulsions of aliens, including collective expulsions, constituted violations of Articles 2 [non-discrimination], 7(1) [due process], 12(4)(5) [prohibition against illegal and mass expulsions], 14 [right to property], and 18 [protection of the family]).

## 9. The Right to Family Unity and the Right to Respect for Private and Family Life

Under human rights law, the term "family" must be given a narrow interpretation so as to include only the "nuclear" family.

True  False

### Case Study 18

The country in which you are working allows, in principle, reunification of nuclear family members and a law is currently being drafted to that end.

According to the new law, however, if an applicant is rejected for family reunification, he/she cannot appeal the decision.

A refugee mother with three children is applying to have her spouse and the third child reunited with her.

There are undue delays in sharing information with UNHCR and locating the family members. You are aware that, in this case, rapid action is required for the family members who remain in their country of origin where their lives are threatened.

*How do you persuade the authorities to handle this case?*

### Case Study 19

Several reliable human rights organizations have reported that the country in which you are working notifies the embassies of countries of origin of asylum-seekers of their identity, whereabouts, and application for asylum.

*Which human rights of asylum-seekers are threatened by such action?*

### Further reading

- Hathaway, J., *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp.533-559.
- Jastram, K. and Newland, K., “Family unity and refugee protection,” in: Feller, et al., *Refugee Protection in International Law*, Cambridge University Press, 2003, pp. 555-604.
- Lambert, H., “The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion,” *International Journal of Refugee Law*, 1999, pp. 427-450.

### Selected human rights cases

- *Gül v. Switzerland*, ECtHR, Judgement of 9 February 1996 (finding no violation of Article 8 in case of refusal by authorities to allow family reunification).
- *Jonny Rubin Byahuranga v. Denmark*, Human Rights Committee, Communication No. 1222/2003, views of 9 December 2004 (finding violation of Article 7, no violations of Articles 17 and 23(1) of the ICCPR).
- *Beldjoudi v. France*, ECtHR, Judgement of 26 March 1992 (finding violation of Article 8 due to the deportation of the applicant to Algeria who was residing in France for more than four decades with no *de facto* links with Algeria, apart from his nationality).
- *Slivenko v. Latvia*, ECtHR, Application No. 48321/99, of Judgement of 9 October 2003 (finding violation of Article 8(1) of the ECHR).

## 10. The Right to Work

Indicate three advantages of complementing the protection envisaged by Article 17 of the 1951 Convention with that of human rights provisions?

### Case Study 20

An industrialized country allows refugees to work, but only on the same, extremely limited, terms as other non-nationals. The country justifies this policy based on its own domestic law and as a way of protecting its labour markets.

*As a protection officer, how can you argue for more generous employment possibilities for refugees?*



*What additional information would you need?*

### **Case Study 21**

A developing country, with large numbers of refugees in camps, does not allow refugees to work. However, many local employers in agriculture and light industry offer employment to refugee children, including those of less than 10 years of age, usually at an extremely low wage and in difficult working conditions.

Some of the parents of the refugee children send them to work full time since their families need the money and the parents cannot work themselves.

The authorities of the country tend to ignore the issue since the local population has not protested too much.

*As a protection officer, how can you try to persuade the authorities and the parents that the children should be prohibited from working and continue attending school? What additional information would you need?*

### **Further reading**

- Eide, A., Krause, C., and Rosas, A. (eds), *Economic, Social and Cultural rights: A Textbook*, Martinus Nijhoff, 2001.
- Hathaway, J., *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp.730-785.

### **Selected human rights cases**

- *Gashi Urim and Nikshiqi, Astrid v. the Secretary of State for the Home Department* in the Immigration Appeal Tribunal in the United Kingdom Appeal No. HX/75478/95, 22 July 1996.

## **11. Selected Additional Civil and Political Rights of Refugees**

When asylum-seekers have a different religion than the majority of the population in their host country, the authorities may impose severe restrictions on their right to manifest their religious belief.

*True*  *False*

### **Case Study 22**

A group of refugees holds a demonstration in front of UNHCR's branch office in the capital city of the country of asylum, protesting a reduction in their assistance and the length of time

it takes to find resettlement places for them. A few refugees also carry signs complaining that they are not allowed to work in the country of asylum.

Although the demonstration is peaceful, some demonstrators prevent your colleagues from entering the building. When negotiations with the demonstrators fail, the police are called to control the crowd and to ensure that people are able to enter and leave the building. Shortly after their arrival, the police start arresting demonstrators.

*As a protection officer, how could you argue for releasing the refugees from jail? What information would you need?*

### **Case Study 23**

Following a radio broadcast in which a few refugees, along with a few citizens of the country of asylum, criticize the government of the refugee's country of origin, the police arrest everyone involved.

*What legal arguments would you take into account when assessing the incident and which options for action are available to ensure the release of the refugees?*

*What information would you need?*

### **Case Study 24**

Nearly all of the refugees in a camp are of a religion different from that of the majority of the population in the country of asylum. The authorities in the country of asylum have prohibited the refugees from conducting their own religious ceremonies, saying that it would be offensive to the local population.

*What legal consideration would govern any action on the issue?*

*What information would you need?*

### **Further reading**

- "Political Rights of Refugees," UNHCR Legal and Protection Policy Research Series PPLA/2003/04.
- Hathaway, J., *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp.560-583 & 874-905.
- Joseph, S., Schultz, J., and Castan, M., *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Oxford University Press, 1999.

## 12. The Right to Education

Under human rights treaties, the right to education is envisaged for every citizen of the State concerned.

True  False

### Case Study 25

A State that is not party to the 1951 Convention recognizes refugees from certain countries as refugees, but considers refugees from all other countries to be illegal immigrants. UNHCR considers some persons in this latter group to be refugees. Children from the former group are allowed to go to school, but children from the latter group are not allowed to do so.

*As a UNHCR officer, how would you argue on behalf of the second group of children?*

*What action can you take to promote the refugee children's right to education?*

*What additional information would you need?*

### Further reading

- Eide, A., Krause, C., & Rosas, A. (eds), *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff, 2001.
- Hathaway, J., *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp.584-613.

### Selected human rights cases

- Case of *The Yean and Bosico Children v. Dominican Republic*, Inter-American Court of Human Rights, Judgment of 8 September 2005

## 13. The Right to Property and Peaceful Enjoyment of Possessions

### Case Study 26

In Maria's country of origin, the new authorities are planning to pass a law to provide restitution for the confiscation of properties by the former regime, fifteen years ago.

Since the outbreak of the conflict, Maria has been living in another country where she was recognized as refugee. After her departure, the State confiscated all her properties. Maria would like to return to her country, but she has been informed that she will not be eligible for restitution because non-residents will be excluded from any benefit.

*As a protection officer, what legal and practical arguments can you use to seek a remedy for Maria?*

*What additional information would you need?*

### **Further reading**

- Hathaway, J., *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp.514-532 and 813-828.
- Leckie, S., *Housing land and property rights in post-conflict societies: Proposals for a new United Nations institutional and policy framework*, UNHCR, PPLA/2005/01, March, 2005.
- Centre on Housing Rights and Evictions, Sources No. 7: Legal Resources on Housing and Property Restitution for Refugees and IDPs, Geneva: COHRE, 2001.

### **Relevant human rights cases**

- *Simunek at al. v. the Czech Republic*, Human Rights Committee, Communication No. 516/1992, views of 19 July 1995 (finding a violation of Article 26 when the State enacted a law that provided for restitution for confiscation but excluded non-residents and non-citizens from the remedy).

## Answer sheet

### Volume II Part A: Groups with Specific Protection Needs

1. False
2. False
3. True
4. b (“every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”).
5. a (“In guardianship, accommodation arrangements and legal representation, the views of children under 15 years of age need not to be taken into account”).
6. b (“In general, she enjoys the same rights and freedoms as nationals”).

### Case Study 1

*1. What would you propose that UNHCR does to promote a gender-sensitive interpretation of the 1951 Convention?*

**Answer:** You can undertake the following activities in order to promote consideration of gender-based persecution for the protection of refugee women:

1. Undertake training activities for decision-makers in order to promote gender awareness and applicable standards of international human rights law that provide protection to women;
2. Promote equal access to procedures for refugee women and encourage the adoption of special guidelines on women refugee claimants fearing gender-based persecution;
3. Promote gender-sensitive RSD procedures, including guaranteeing that women asylum-seekers are aware of their right to submit an independent asylum claim at any time in the procedure and that they are interviewed by a female official and interpreter; and
4. Make use of the relevant UNHCR guidelines, policy papers, Executive Committee conclusions, training programmes, and training modules in your activities with decision-makers.

### Case Study 2

*Is Samara’s State in any way responsible for the abuses committed by her husband?*

**Answer:** States are obliged to protect individuals from torture and cruel, inhuman and degrading treatment or punishment inflicted by individuals acting in their official capacity with the consent, instigation or acquiescence of State agents. Although the ill-treatment was not directly committed by State authorities, under human rights treaties, the State must take measures to prevent and punish domestic violence.

*As a protection officer, what legal and practical arguments can you use to convince the authorities to suspend Samara’s deportation?*

**Answer:** You could use the following arguments in favour of Samara:

1. States must not expose Samara to the danger of torture, cruel or inhuman or degrading treatment or punishment by returning her to her country. They should not expel her until they are certain that she would not be subject to ill-treatment by her husband.
2. Samara may be a refugee given that the harm feared would amount to persecution and would be inflicted for a Convention reason (membership to a particular social group and political opinion).

### **Case Study 3**

*As a protection officer, what would your position be and how would you react to this situation?*

**Answer:** In your negotiations with the authorities on the introduction of HIV-screening and isolation for a particular group of children, you can make use of the following arguments:

1. UNHCR's Policy and Guidelines on Refugees and AIDS (IOM/FOM 21/88-20/88 of 15/2/88) assumes that asylum-seekers and refugees should not be the object of specific measures unless these fall within the existing national AIDS programme of the host country and include residents and citizens alike.
2. The guidelines also stress the importance of ensuring every individual's right to privacy and confidentiality regarding test results.

Isolating the children may result in stigmatization associated with testing positive for HIV/AIDS and could thus lead to acts of discrimination.

Arguments should also be sought from the Convention on the Rights of the Child, to which the State is most probably a party.

All articles and principles of the Convention on the Rights of the Child apply to all children. One of the guiding principles of the Convention is the "best interests of the child" (Article 3). This overriding principle will be useful in any argument benefiting children. See also UNHCR's Guidelines on Protection and Care of Refugee Children (in particular Chapters 5 and 7) for further advice.

In this specific case, Article 16 of the CRC will be useful in that it provides that children have the right to protection from infringement of their privacy and from unlawful attacks on their honour or reputation. Article 12 of the CRC provides that any child capable of forming his/her own opinions has the right to freely express those opinions and to have them taken into account in any matter or procedure affecting the child. It is important to stress that refugee children, and their parents or guardians, must be consulted if they are involved in any health interventions.

## Volume II Part B: Substantive Rights

### 1. The Right to Seek and Enjoy Asylum from Persecution

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#### Case Study 4

*Which right(s) of the interdicted persons may be violated by the Continenta policy?*

**Answer:** The right to “seek and receive asylum” envisaged in Article XXVII of the American Declaration of the Rights and Duties of Man as well as the right to “seek and be granted” asylum elaborated in Article 22(7) of the American Convention on Human Rights.

*Within the Inter-American system, which human rights instrument(s) is (are) binding for Continenta?*

**Answer:** Only the American Declaration of the Rights and Duties of Man. Although it was adopted as a non-binding instrument, it is deemed to be the authoritative interpretation of the human rights obligations enshrined in the OAS Charter.

*Which is the competent supervisory human rights body to handle this case?*

**Answer:** Only the Inter-American Commission on Human Rights, which is competent to receive, examine, and investigate individual complaints alleging violations of the rights guaranteed under the American Declaration.

### 2. The Principle of *Non-refoulement*

1. True
2. b

#### Case Study 5

*What legal arguments can you make on her behalf that might persuade the country of asylum to suspend her expulsion, or at least to delay it so that you can search for another solution?*

**Answer:** You can make use of the following arguments to persuade the authorities to suspend or delay the expulsion:

1. As the asylum-seeker has been recognized under UNHCR’s mandate as meriting international protection, then this should be fully explained to the country of asylum, noting that expulsion of the individual concerned would constitute *refoulement*. As appropriate, UNHCR should inform the country of asylum that the Office would try to seek a durable solution for this case outside the country (resettlement).
2. If the country of asylum is a State Party to international or regional refugee or human rights instruments, such as the 1951 Convention, the OAU Convention, the CAT,

ICCPR or ECHR, it can be argued that *refoulement* would violate the provisions of these treaties.

3. A related argument can be made that the principle of *non-refoulement* is part of customary international law, and that return to the country of origin would amount to a breach of this principle, which must be respected by all States, even if they are not party to the 1951 Convention or any human rights instrument.

4. In order to delay and legally challenge the expulsion, the rejected asylum-seekers may, in certain circumstances, make an individual complaint to an international human rights treaty body, such as the CAT Committee or the Human Rights Committee. The asylum-seeker may also be entitled to resort to a regional system of human rights protection in order to challenge the expulsion order. In both cases she may request interim measures to suspend the expulsion.

*What information would you need?*

**Answer:**

1. Provisions in national law that protect against cruel, inhuman or degrading treatment or punishment or torture;
2. Overview of the State's relevant regional or international treaty obligations;
3. Country-of-origin information to evaluate the risk of torture or other ill-treatment and possible threats to life, liberty, and security of the person in case of return; and
4. Other durable solutions available for this case (resettlement).

### **Case Study 6**

*As a UNHCR officer, what legal and practical arguments can you use to seek the cooperation of the authorities of the first port of call (State A) in this case?*

**Answer:**

A. You could make use the following arguments in favour of allowing the stowaway to disembark in the first port of call:

1. If the State A does not allow the stowaway to disembark, the asylum-seeker will be forced ashore at the ship's next port of call and the refusal to allow him ashore in country A will lead to his return to his country of origin from State B, an action by country A that is tantamount to *refoulement*. Therefore, the State will breach its international obligations on the prohibition against *refoulement*.
2. You should try to arrange for an interview on board. If the asylum-seeker is found to be a refugee, you must try to find a durable solution, including possibly resettlement in a third country.

*What additional information would you need?*

You would need to obtain the following information:

1. Provisions in national law on the prohibition against *refoulement*; and



2. Overview of the State's regional and international treaty obligations concerning the prohibition against *refoulement*.

### Case Study 7

*As a protection officer, how would you analyze the fairness of this procedure under international standards?*

**Answer:** You would like to analyze the fairness of the procedure by examining it in the context of human rights provisions in treaties to which the State is party.

*Identify which human rights mechanisms are available for Iyenemi and her family.*

**Answer:** If Iyenemi fears that she and her family will be tortured if they are returned to their country of origin, she can submit her case

(a) To the Committee against Torture, requesting that the Committee adopt interim measures to avoid "possible irreparable damage." This measure would entail withholding the expulsion until the Committee has ruled on the communication;

(b) To the Human Rights Committee, requesting that it adopt interim measures to avoid "irreparable damage." This measure would entail withholding the expulsion until the Committee has ruled on the communication; or

(c) To the Special Rapporteur on Torture, who may be able to send an urgent appeal requesting that the asylum State not deport them without at least seeking assurances from the destination State that they will not be tortured. Similar request can be made to the SR on Violence against Women, the Working Group on Arbitrary Detention, and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.

*What additional information would you need?*

You would need to obtain the following information:

1. Overview of the State's regional and international treaty obligations concerning the prohibition against *refoulement*.

### 3. The Principle of Non-discrimination

False

### Case Study 8

*As a UNHCR officer, how would you analyze this new law in the context of international human rights law provisions on non-discrimination?*

**Answer:**

Your analysis of the new law in the context of international human rights law norms on non-discrimination may prompt the following observations:

1. The discrimination against Group A is particularly serious as asylum-seekers of certain nationalities can not apply for asylum. Such discrimination violates the right to seek asylum in Article 14 of the UDHR, Article XXVII of the American Declaration, Article 22(7) of the American Convention on Human Rights, and Article 12(3) of the African

Charter on Human and People's Rights as well as the non-discrimination provisions in several international human rights instruments, including Article 3 of the 1951 Convention. The discrimination is, in effect, also a geographic limitation to the 1951 Convention, which is not permitted under Article 42 of 1951 Convention.

2. The discrimination against Group B is also serious as asylum-seekers of certain nationalities will have their claims reviewed in a shortened procedure. Whether such discrimination is permitted under international human rights law will depend, to a large extent, on whether the purpose or effect of the law is to discriminate on the basis of race, colour, descent, ethnic origin or any other ground. Another concern is the fairness and procedural safeguards of the shortened procedure and the observance of international standards, notably Executive Committee Conclusion No. 30 and the right to due process.

3. The legislation also has discriminatory effects with regard to the State's obligation to respect and guarantee *non-refoulement* to torture, in that the State accords this right only to some persons.

4. The law also violates the right to equality before the law established in Article 26 of the ICCPR.

*What additional information would you need?*

You would need to obtain the following information:

1. Background and criteria for deciding what countries should be on what list;
2. Whether asylum-seekers in group A or B are of a different race, colour, descent or ethnic origin from the majority of the population in the country of asylum, and/or whether they hold a specific political opinion;
3. Details regarding the procedure and the rights of applicants;
4. Statistics on the recognition rate for asylum-seekers from Group B; and
5. Overview of the State's regional or international treaty obligations concerning non-discrimination.

## **Case Study 9**

*As a UNHCR officer, what legal and practical arguments can you use when submitting this case to the State's authorities?*

**Answer:** You could make use the following arguments:

1. A State violates the major human rights instruments, such as the ICCPR, the ECHR, and the ACHR if it takes steps to protect its nationals from violent crimes but does not protect refugees who are of a different ethnic background. This obligation is applicable whatever the legal status of a person.
2. The facts may also show violations of the State's obligations to ensure, without discrimination on the basis of race or ethnic origin (Article 2 of the ICCPR), the right to security of the person (Article 9 of the ICCPR) and the freedom from inhuman and degrading treatment (Article 7 of the ICCPR).

3. The CERD obliges States to take measures to counteract xenophobic behaviours.

#### 4. The Right to Liberty of Person: Non-Penalization for Illegal Entry, Judicial Protection against Detention, and Conditions of Detention

False

##### Case Study 10

*How would you argue in favour of changing the law to reflect UNHCR's concern about the detention of refugees and asylum-seekers?*

**Answer:** You can use the following arguments in favour of changing the law:

1. Article 31 of the 1951 Convention relating to the Status of Refugees stipulates that Contracting States shall not impose penalties on refugees on account of their illegal entry or presence provided that certain conditions are met.
2. UNHCR's Executive Committee has recommended that detention "normally be avoided," but when resorted to, be limited to certain specific situations prescribed by law (ExCom Conclusion No. 44).
3. The ICCPR and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment establish a range of standards of detention applicable to asylum-seekers and refugees. Among these are the requirements that the detention be based on legitimate grounds prescribed by law, be subject to judicial control, and that certain basic standards of treatment be observed.

*What additional information would you need?*

**Answer:** You would need to obtain the following information:

1. The basis in national law for the detention of refugees and asylum-seekers;
2. The standards in national law for the judicial control of detention and for the conditions and treatment of detainees, including asylum-seekers' and refugees' access to UNHCR; and
3. Overview of the State's regional or international treaty obligations concerning the conditions of detention.

##### Case Study 11

Under the ICCPR detention of asylum-seekers is not arbitrary *per se*, for the fact of illegal entry may indicate a need for investigation or there may be factors particular to the individual that may justify detention for a period. However, without these factors, mandatory detention would be arbitrary because of the lack of consideration of grounds particular to the individual and the lack of judicial review. It would imply violations, in particular of Article 9(1) and 9(4) ICCPR.

The fact and length of detention raise significant international legal issues.

- a. The denial of legal advice and incommunicado detention

This practice violates Article 7 ICCPR and Principle 17(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

The failure to inform asylum-seekers of their right to request legal advice breaches Article 10(1) ICCPR, which provides that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.

b. The practice of keeping new arrivals in separate detention facilities.

This practice raises serious human rights concerns for it is in many ways akin to incommunicado detention which has been found to breach of Article 10(1) ICCPR, even if employed for short periods of time.

The denial of access to legal advice combined with the denial of human rights scrutiny inherent in incommunicado detention create significant impediments to the exercise of fundamental rights. In particular, these practices raise the possible violation of the prohibition of *refoulement*.

c. The detention of children

According to the obligations assumed under the CRC, children must not be detained except as a measure of last resort, and for the shortest possible period, and in all actions affecting children, the best interest of the child must be a primary consideration. In addition, it is highly probable that the conditions of detention centres are contrary to the best interests of the child.

## Case Study 12

*Given that Greatland is party to the major universal and regional human rights treaties, can you think of any international obligations that the authorities may have breached regarding the treatment of Adib?*

Answer:

1. The failure of Greatland to protect Adib from the protesters may entail a violation of the State’s obligation to protect, without discrimination, the right to security of the person and freedom from inhuman and degrading treatment.
2. The fact that Adib is not allowed to work also raises questions regarding the right to work as elaborated in, for example, the ICESCR.
3. The cumulative effects of his situation might be considered *de facto refoulement*.

## 5. The Right to Legal Identity and Status

False

## Case Study 13

*What arguments can you use to ask the authorities to end the practice of not registering the births of refugee children?*

Answer: You can use the following arguments to request that the authorities register the births of refugee children:

1. Not registering births contravenes several human rights provisions, such as the right to be recognized as a person before the law (Article 16 of the ICCPR), the right of the child that relates birth registration to having a nationality (Article 24 of the ICCPR), the right of every child to birth registration and nationality (Article 7 of the CRC), and to the preservation of their identity (Article 8 of the CRC), and the obligation of States to provide appropriate protection and assistance to refugee children (Article 22 of the CRC).

2. In addition, the lack of access to education violates Article 13 of the ICESCR and Article 28 of the CRC, as well as relevant provisions of regional human rights instruments.

*What additional information would you need?*

**Answer:** You would need to obtain the following information:

1. The basis in national law for the acquisition of nationality.
2. Overview of the State's regional or international treaty obligations concerning the right to identity, nationality, education, and the protection of refugee children.
3. You can also refer to UNHCR's Guidelines on the Protection and Care of Refugee Children, and look at any report that the State has submitted to the Committee on the Rights of the Child to see whether this issue was included in the report or in the comments raised by the Committee.

#### **Case Study 14**

*As a UNHCR officer, what legal arguments can you bring forward to seek the authorities' cooperation in addressing the issue and what practical suggestions can be made for creating a programme of birth registration?*

**Answer:** You can use the following arguments:

1. The Convention on the Rights of the Child and several regional human rights instruments specifically require that all children, regardless of nationality or personal status, be registered immediately after birth.
2. A programme of birth registration will greatly facilitate the eventual repatriation of the refugee community. Refugee children require a document that establishes their name and nationality so that they can leave the country of asylum.
3. Registering refugee children at birth does not automatically imply the granting of citizenship of the country of asylum. The granting of nationality is regulated by the citizenship laws of the country.

You can also refer to UNHCR's Guidelines on the Protection and Care of Refugee Children, and look at any report that the State has submitted to the Committee on the Rights of the Child to see whether this issue was included in the report or in the comments raised by the Committee.

## 6. The Right to Due Process

True

### Case Study 15

*As a protection officer, how would you analyze the fairness of this procedure under international standards?*

**Answer:** You would examine the procedure against the procedural standards set out in Executive Committee Conclusions Nos. 8 and 30.

The following points should be addressed:

Does the asylum-seeker receive guidance regarding his/her rights and obligations under the procedure?

Does the asylum-seeker have time to prepare his/her case and can he/she receive advice from UNHCR or a counselling body?

Is there an oral interview conducted in the applicant's language with the assistance of a fully qualified interpreter?

Is there a clearly identified and competent authority responsible for examining and deciding on requests for refugee status, and does it have access to updated and reliable country-of-origin information?

Is the asylum-seeker given time to appeal a negative decision and can he/she remain in the country pending the outcome?

From a human rights perspective, the following points are relevant:

The asylum-seeker is denied access to legal assistance.

The rejected asylum-seeker does not enjoy an effective remedy in the event he/she disagrees with the decision.

The absence of due process guarantees means that the State fails to guarantee the prohibition against *refoulement*.

*What additional information would you need?*

You would need to obtain the following information:

1. The national legislation establishing the status determination procedure, and whether the constitution or other legislation provides a basis for the right to a "fair hearing."
2. Overview of the State's regional and international treaty obligations concerning the rights and obligations involved in administrative procedures.

## 7. Survival Rights (Economic, Social and Cultural rights)

False

### Case Study 16

*As a protection officer, how would you analyze the fairness of the assistance regime under international standards?*

**Answer:** You would examine the procedure against human rights standards.

1. Women refugees should not be discriminated against in economic life. According to Article 13 of the CEDAW, States are obliged to eliminate discrimination against women in economic life. This includes the obligation to ensure that women have the right to allowances on a basis of equality with men. State distribution of aid to men rather than women violates this provision.
2. Article 26 of the ICCPR stipulates that the law shall guarantee to all persons equal protection against discrimination on any grounds.
3. Article 24 of the ICCPR requires States to adopt special measures to protect children in the territory within their jurisdiction.
4. Article 11 of the ICESCR (the right to an adequate standard of living) in conjunction with Articles 2 and 3 of the ICESCR (the rights to equality and non-discrimination) may also be invoked.

## 8. The Right to Freedom of Movement and the Prohibition of Collective Expulsion of Aliens

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### Case Study 17

*What arguments can you use to request the authorities to end the forced movement of refugees?*

**Answer:** You can use the following arguments:

1. Article 26 of the 1951 Convention states that refugees lawfully within a territory shall be accorded 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.
2. Article 31 of the 1951 Convention provides that only those restrictions that are necessary shall be applicable to refugees who entered or are present in the country illegally.
3. The right to freedom of movement is enshrined in several international human rights instruments, notably in Article 12 of the ICCPR, Articles 2, 3, and 4, Protocol No. 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 22 of the American Convention on Human Rights, and Article 12 of the African Charter on Human and People's Rights.
4. Any restrictions to freedom of movement should be provided by law.
5. Forced relocation directly compromises the right to asylum itself, and raises an issue of respect for the principles governing voluntary repatriation and *non-refoulement*.

6. In this particular case, other human rights, such as the right to a humane treatment (Article 10 of the ICCPR) may also have been violated.

## 9. The Right to Family Unity and the Right to Respect for Private and Family Life

False

### Case Study 18

*How do you persuade the authorities to handle this case?*

**Answer:** The refusal to permit her to reunite with her children and husband could violate Article 23 of the ICCPR. The State should improve its regulations regarding reunification of refugee families in order to meet its obligations under Article 23 of the ICCPR. She also has the right to an effective remedy if she believes her rights have been violated.

### Case Study 19

*Which human rights of asylum-seekers are threatened?*

**Answer:** If the practice reported by NGOs is correct, the State practice would violate asylum-seekers' right to privacy and might also lead to violations of the rights of family, associates, and friends of the asylum-seekers in their home countries or threaten the security of the asylum-seekers and refugees in the asylum country.

## 10. The Right to Work

Indicate three advantages of complementing the protection envisaged by Article 17 of the 1951 Convention with that of human rights provisions?

**Answer:** The provisions on the right to work included in human rights instruments, such as Article 6 of the ICESCR and Article 6 of the Protocol of San Salvador are:

1. Broader in scope and have attracted a much lower number of reservations than Article 17 of the 1951 Convention.
2. The right to work is protected equally for nationals and non-nationals.
3. The enjoyment of the right to work without discrimination means that asylum-seekers and refugees must not be discriminated against in the enjoyment of any component of the right to work, including recruitment, remuneration, and in promotion opportunities.

### Case Study 20

*As a protection officer, how can you argue for more generous employment possibilities for refugees?*

**Answer:** You can use the following arguments:

1. Emphasize the importance of the right to work for refugees as a means of supporting themselves and their families. Stress the positive aspects of allowing refugees to be



gainfully employed, including: contributing to the economy through labour, paying taxes, and their ability to purchase goods, thus minimizing the burden on the State and the need for refugees to resort to public assistance.

2. Provide an analysis of how the labour policy may be unduly restrictive and discriminatory and thereby in breach of the country's obligations under international human rights law.

3. In compliance with international human rights standards, the State must show that the restriction on the rights of refugees to work is truly necessary. Protecting the labour market may not be a valid restriction if it is disproportionate and unnecessary to the goal it seeks to achieve. For example, the State would need to show that refugees are taking jobs that would normally go to nationals.

*What additional information would you need?*

**Answer:** You would need to obtain the following information:

1. Provisions of national law in the area of labour standards and non-discrimination; and
2. Overview of the State's regional and international treaty obligations concerning labour standards.

### **Case Study 21**

*As a protection officer, how can you try to persuade the authorities and the parents that the children should be prohibited from working and continue attending school?*

**Answer:** You can use the following arguments:

1. Indicate that it is in the best interest of the child not to work and offer assistance in organizing school or recreational activities.
2. If the work is hazardous to the child's health or development, or if the child is missing school in order to work, the State may be in breach of its obligations under international human rights law.
3. Explore whether UNHCR may be able to provide additional assistance to families in need.

*What additional information would you need?*

**Answer:** You would need to obtain the following information:

1. Provisions in national law which protect against child labour; and
2. Overview of the State's regional and international treaty obligations concerning child labour, particularly the Convention on the Rights of the Child and relevant ILO Conventions.

## **11. Selected Additional Civil and Political Rights of Refugees**

False

## Case Study 22

*As a protection officer, how could you argue for releasing the refugees from jail?*

**Answer:** You could use the following arguments:

1. The protest was non-political and aimed primarily at UNHCR.
2. The protest was peaceful.
3. International human rights law entitles refugees, as well as the citizens of the country of asylum, to assemble peacefully and to express their opinions.

*What information would you need?*

**Answer:** You would need to obtain the following information:

1. Provisions in national law on freedom of assembly and freedom of expression; and
2. Overview of the State's regional and international treaty obligations concerning freedom of assembly and expression. Remember that the most generous provision prevails.

## Case Study 23

*What legal arguments would you take into account when assessing the incident and which options for action are available to ensure the release of the refugees?*

**Answer:** Statements such as “the government is pursuing a misguided policy that will never work” or “the head of the government is an incestuous, murdering beast” or “the government threw me into jail and tortured me into signing a confession” could be considered in different ways, depending on which laws and limitations apply.

The first statement should be protected, since it is clearly an opinion under international and regional human rights law, and not an “attack,” which is prohibited under the OUA Convention. The second statement might well be prohibited if, as provided by law, it is considered injurious to the reputation of another. The third statement, if true, should be protected as an expression of information.

*What information would you need?*

You would need to obtain the following information:

1. Provisions in national law on freedom of expression; and
2. Overview of the State's regional and international treaty obligations concerning freedom of expression. Remember that the more generous provision prevails.

## Case Study 24

*What legal consideration would govern any action on the issue?*

**Answer:** You could use the following arguments:

1. The right to freedom of religion is a fundamental human right recognized in all major human rights treaties, such as the ICCPR, the African Charter, the ACHR and the ECHR.

2. Restrictions or limitations to the right to manifest one's religion or belief may be imposed only after several requirements are met, such as being established by law, or necessary to protect public order, health or fundamental rights and freedoms of others.
3. The 1951 Convention relating to the Status of Refugees contains a specific provision requiring States to grant refugees the same freedom of religion as enjoyed by nationals of the country of asylum.
4. Problems between the local population and refugees that arise from different religious beliefs should be resolved at the local level through negotiations between elders and community leaders.

*What information would you need?*

You would need to obtain the following information:

1. Provisions in national law on freedom of religion and regarding the prohibition against discrimination; and
2. Overview of the State's regional and international treaty obligations concerning freedom of religion. Remember that the more generous provision prevails.

## 12. The Right to Education

False

### Case Study 25

*As a UNHCR officer, how would you argue on behalf of the second group of children?*

**Answer:** You can use the following arguments:

1. Under the CRC and the ICESCR, States are obliged to make primary education compulsory and available free of charge to all and to make higher education accessible to all those qualified.
2. Under the CRC and the ICESCR, States are also obliged to ensure the rights set forth in those instruments for each child within their jurisdiction without discrimination of any kind and regardless of the child's personal legal status in the country.

*What action can you take to promote the refugee children's right to education?*

**Answer:** You can take the following actions:

1. Promote accession to the 1951 Convention relating to the Status of Refugees, as it contains provisions guaranteeing access to education for refugee children;
2. Encourage assistance from international and bilateral education programmes if the exclusion of certain refugee children from education is due to lack of necessary resources;
3. Use the recommendations on education for refugee children set out in UNHCR's Guidelines for the Protection and Care of Refugee Children;
4. Seek cooperation with the government body in charge of overseeing children's education and welfare and assist that body in preparing the country report to the

Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights; and

5. When required, provide information on the lack of education for refugee children to the Human Rights Liaison Office, in order to be sure that it is included in the confidential information provided by UNHCR to both Committees.

*What additional information would you need?*

You would need to obtain the following information:

1. Overview of national law and practice regarding education for nationals;
2. Overview of the State's regional and international treaty obligations concerning education;
3. Copy of the State's report to the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights and the Committees' Concluding Comments; and
4. Details on how many refugee children, categorized by nationality, are affected by the government's policy.

### **13. The Right to Property and Peaceful Enjoyment of Possessions**

#### **Case Study 26**

*As a protection officer, what legal and practical arguments can you use to seek a remedy for Maria?*

**Answer:** You can make use of the following arguments:

If the State enacts a law providing for restitution for the confiscation, excluding non-residents, then the principle of non-discrimination would be violated. After exhausting domestic remedies, Maria would be able to submit an individual complaint to the Human Rights Committee, claiming a violation of Article 26 of the ICCPR.

*What additional information would you need?*

You would need to obtain the following information:

1. Provisions in national law on the prohibition against discrimination and the right to property; and
2. Overview of the State's regional and international treaty obligations concerning the right to property and the prohibition against discrimination.

