

Human Rights and Refugee Protection (RLD 5)

October 1995

Part I: General Introduction

Introduction

➤ **Purpose of this module and how to use it**

This module, in two parts, is designed to help familiarize UNHCR staff with the principles and provisions of international human rights law, and how they can be used to complement and enhance our protection activities on behalf of refugees. It is intended to encourage UNHCR staff to rely, where appropriate, on human rights law in their day-to-day work of protecting refugees.

With this in mind, the module is designed primarily to be a practical reference tool to which protection officers in the field can turn when faced with a situation affecting the human rights of refugees or groups of refugees. In order to give practical effect to this wide-ranging and complex subject matter, the module addresses those issues which most commonly arise in the course of the protection activities of UNHCR.

This module can also be used for self-study, this being a subject matter which is not necessarily familiar to most UNHCR protection officers. The questionnaires at the end of each chapter in Part I, this General Introduction, are particularly tailored to this end.

Last but not least, this module can and should be used in the context of training activities, particularly (but not exclusively) targeting UNHCR staff. Part II on Specific Issues is designed in such a way as to assist this purpose, through the systematic presentation of case studies on each topic as well as through references to UNHCR's databases. The latter can facilitate an interactive utilization of elements of this module within a training context.

➤ **What is the scope of this module?**

The refugee problem is complex. A knowledge of international human rights law can assist UNHCR staff in tackling many protection problems faced by refugees, but it does not provide answers for every situation. Similarly, this body of law is itself complex and a full examination of its many provisions and institutions would require several textbooks.

Therefore, the module only covers some of the problems faced by refugees, and only describes some of the ways in which international human rights law can assist UNHCR staff in solving those problems. In choosing which problems the module deals with we have tried to address problems which are real rather than theoretical, based on the actual experience of UNHCR field offices. Also, the module is geared towards issues that arise in countries of asylum. The module does not cover issues arising in countries of origin such as UNHCR's "preventive" work, or work on behalf of the internally displaced. While these are important issues, and human rights law is certainly relevant to such issues, it was felt that they deserved separate treatment.

➤ **Acknowledgements**

Our thanks are due to David Petrasek for his contribution to the elaboration of this module.

The cover design is taken from the United Nations Postal Administration Commemorative Stamp issued in 1994. The artist is Ms. Françoise Peyroux.

Chapter 1 - Refugee Protection and Human Rights Law

In this chapter we will look at:

- the close relationship between UNHCR's work and the protection of human rights;
- some of the reasons why UNHCR is placing increasing reliance on international human rights law; and
- the ways in which international human rights law can assist UNHCR in protecting refugees.

A. PROTECTING REFUGEES IS HUMAN RIGHTS WORK

“Human rights violations are a major factor in causing the flight of refugees as well as an obstacle to their safe and voluntary return home. Safeguarding human rights in countries of origin is therefore critical both for the prevention and for the solution of refugee problems. Respect for human rights is also essential for the protection of refugees in countries of asylum“.

United Nations High Commissioner for Refugees.

UNHCR staff working to defend the rights of refugees by providing them with protection and assistance are engaged in human rights work. If you think about the key tasks undertaken by UNHCR, the human rights basis for UNHCR's work is clear.

Protection against forcible return

Refugees are at risk of human rights violations in their home country. The work UNHCR does to ensure they are not subject to *refoulement* is a direct and powerful means of protecting their basic human rights. In the last decade, refugees who have been forcibly returned to their countries have been killed, tortured, arbitrarily detained, or forced to live in conditions of extreme insecurity. Preventing *refoulement* is an effective, and sometimes the only, means of preventing further human rights violations.

Determination of refugee status

Those who flee their own countries in search of protection abroad do so precisely because their human rights are at risk in their own country. To decide that an individual has a “well-founded fear of persecution“ is in effect to conclude that one or more of his or her basic human rights are not being respected. Similarly, to determine that a group of people fleeing conflict or serious disturbances of the public order are *prima facie* refugees is in most cases to acknowledge that they are victims of violations of human rights or humanitarian law.

Promoting durable solutions

If conditions have fundamentally changed in the country of origin, promoting and monitoring the safety of their voluntary return allows refugees to re-establish themselves in their own community

and to enjoy their basic human rights. In addition, monitoring the safety of returnees is a means of ensuring that they do not again suffer the human rights violations which forced them to flee. In a relatively small number of cases, assisting refugees to be integrated locally or resettled in another country is a means of ensuring that refugees who cannot return to their own countries are able to find a new home where they can take up residence and enjoy a secure legal status and basic human rights.

UNHCR staff undertake activities such as these on a daily basis in countries around the world, meaning that UNHCR is perhaps the largest operational UN human rights agency. As the High Commissioner for Refugees explained in her statement to the the 50th session of the UN Commission on Human Rights (1994):

“The connection between the work of the Commission in promoting respect for human rights and the work of my Office, in protecting refugees and seeking solutions to refugee problems is clear. As I mentioned in my address to the Commission last year, human rights violations are a major factor in causing the flight of refugees as well as an obstacle to their safe and voluntary return home. Safeguarding human rights in countries of origin is therefore critical both for the prevention and for the solution of refugee problems. Respect for human rights is also essential for the protection of refugees in countries of asylum.”

In the Centre for Documentation on Refugees REFWORLD databases: under **Speeches of the High Commissioner for Refugees**, you will find the High Commissioner's statements to the UN Commission on Human Rights. Look for other references to human rights by searching the full text of all speeches by pressing the space-bar and entering **“human rights”** as key-word. The REFWORLD databases are accessible at Headquarters and in several field offices, on INTERNET and (by end 1995) on a CD-ROM produced by UNHCR's Centre for Documentation on Refugees.

B. UNHCR AND HUMAN RIGHTS

Although UNHCR's core functions involve protecting human rights, not everyone is accustomed to thinking of the Office as a “human rights” organization. Most UNHCR staff have not been involved on a systematic basis in the promotion or use of international human rights standards. Three recurring questions frequently come up when discussing incorporating human rights law more consistently into UNHCR's protection activities.

1. Human rights are political; UNHCR's work is humanitarian and non-political. How can the two function together?

Beginning with the Statute of the Office, UNHCR's mandate has been described as a humanitarian one, meaning that actions in favour of refugees should be non-partisan and non-political with the sole concern being the safety and welfare of the refugees. This understanding of refugee protection as humanitarian work allows countries of asylum to respond to the needs of refugees without passing judgment on the country of origin, which is often a neighbouring state, while the acceptance of UNHCR as a humanitarian agency helps to ensure support for our work.

Placing greater reliance on human rights standards as a basis for UNHCR's work does not jeopardize the humanitarian character of our activities, since international human rights law is itself non-political and non-partisan:

- international human rights law treats all countries equally by imposing the same standards and

obligations on each state regardless of the ideology of any particular government; and

- many provisions of international human rights law have been universally accepted and/or specifically undertaken by states, and advocating their implementation is not “political“ but simply asking governments to live up to their obligations.

Of course, the debate surrounding human rights can become politicized and controversial. Different governments or organizations opposed to particular governments may use the language of human rights to advance particular policies which may or may not in fact be supported by reference to human rights law. Also, governments may be inclined to use human rights law selectively, either by criticizing the human rights record of rival governments while remaining silent regarding friendly governments, or by emphasizing only certain aspects of their own human rights records.

However, many UNHCR staff are accustomed to having their work helped or hindered by different governments or political groupings – this does not stop UNHCR from insisting on its responsibility to provide international protection to refugees. It does mean however, that UNHCR must ensure its work is non-partisan:

- by being consistent in the rights it defends; and
- by defending those rights in all circumstances regardless of the politics of the refugee or the country concerned.

If UNHCR staff ensure that they use human rights law impartially, then the humanitarian and non-political nature of our work is not threatened.

2. Human rights are routinely violated.

Why trouble with human rights “law“ if it is not enforceable?

Some people believe that the international “law“ of human rights is not really law at all but simply a set of noble aspirations describing an ideal world which has little relation to reality. Those who work with refugees may be particularly tempted to hold such a view, since the growing number of refugees in the world is apparent proof of the failure of the system of international human rights protection.

It is true that even the most basic human rights are routinely violated, and that efforts by international bodies to ensure respect for human rights are often fruitless. However, this does not mean that international human rights law is of no use to UNHCR but simply that it has limitations. The difficulties of enforcing international human rights law are similar to the difficulties of enforcing most branches of international law. Like many human rights treaties, the 1951 Convention is not always honoured by states parties – but it continues to be of real help to countless numbers of individuals who rely on its provisions and UNHCR continues to insist on respect for the principles it establishes.

As a UN agency, UNHCR has a duty to promote the purposes of the UN, including the protection of human rights, of UN Charter Art 1.3. Greater reliance by UNHCR on international human rights law will contribute to greater respect for and more effective implementation of this law.

3. There are hundreds of so-called “human rights“, many of them vague or uncertain. Should UNHCR not stick to the refugee law standards it knows best?

International human rights law is more complex than international refugee law, because of the multiplicity of sources and standards compared to the few refugee law instruments whose provisions are relatively straightforward. In addition, there are dozens of human rights issues that are in one way or another the subject of UN attention. For non-specialists, this can be bewildering or frustrating.

However, despite these difficulties there do exist certain core standards which have been universally accepted. Many of them have been elaborated in binding legal instruments to which a majority of states are party. More importantly, it does not require a specialist knowledge of the whole body of international human rights law in order to rely on some of it to protect the rights of refugees.

C. HOW CAN INTERNATIONAL HUMAN RIGHTS LAW ASSIST UNHCR IN PROTECTING REFUGEES?

There are four main aspects to bear in mind:

1. Human rights law can reinforce existing refugee law

The most basic right for refugees is the right not to be subject to *refoulement*, which is set out in Article 33 of the 1951 Convention. But the 1951 Convention is not the only international treaty which provides protection against *refoulement*. See Chapter 9 in Part II on Specific Issues. Similarly, other rights provided for by refugee law, such as non-discrimination, are found in international human rights instruments.

Moreover, many refugee protection standards are set out in non-binding conclusions of UNHCR's Executive Committee. While states should follow Executive Committee conclusions, it is difficult to argue that they are legally obliged to do so. Yet, many of the standards set out in Executive Committee conclusions are also found in inter-national human rights treaties which do create **legal obligations** for states which are party to them.



For example:

Most of the protection standards set out in Executive Committee Conclusion 22 on protection of asylum-seekers in situations of large-scale influx – a basic reference point for protection work – are included in international human rights treaties as binding legal obligations on states parties. Below, excerpts from Excom Conclusion No. 22 have been “matched“ with some relevant provisions of international human rights law.

(a) *“not be subjected to restrictions on their movements....“*

Covenant on Civil and Political Rights, Art. 9 and 12
Convention on Elimination of Racial Discrimination, Art. 5.d (i)

(d) *“not be subjected to cruel, inhuman or degrading treatment“*

Universal Declaration of Human Rights, Art. 5
Convention Against Torture, Art. 2 and 16
Covenant on Civil and Political Rights, Art. 7

(e) *“no discrimination on the grounds of race, religion....“*

Universal Declaration of Human Rights, Art. 2 and 7
Covenant on Civil and Political Rights, Art. 2.1

Covenant on Economic, Social and Cultural Rights, Art. 2.2
Convention on Elimination of Racial Discrimination, Art. 2 and 5

(f) *“to be considered persons before the law...”*

Covenant on Civil and Political Rights, Art. 2, 9, 14 and 16
Convention on Elimination of Racial Discrimination, Art. 5 and 6
Convention Against Torture, Art. 13

(h) *“family unity should be respected”*

Covenant on Civil and Political Rights, Art. 17 and 23
Covenant on Economic, Social and Cultural Rights, Art. 10
Convention on the Rights of the Child, Art. 9 and 10

2. Human rights law can supplement existing refugee law

Refugees today face many problems, not simply the threat of *refoulement*. Prolonged or arbitrary detention; lack of due process; cruel, inhuman or degrading treatment; xenophobia – the 1951 Convention and 1967 Protocol are silent on such issues, whereas international human rights law includes provisions that might be applicable. As a matter of fact, international refugee instruments were never meant to address all the human rights of refugees. International human rights law constitutes the **broad framework** within which refugee law provisions should be seen.



For example:

There is no provision in the 1951 Convention regarding the rights of detained refugees. However, the International Covenant on Civil and Political Rights which is ratified by more than 125 states, grants essential rights to all detained persons, including refugees, such as the right to an independent review of the legality of the detention. Binding human rights law provides detained refugees with more rights than those set out in the non-binding Executive Committee Conclusion 44 on refugee detention. (See Chapter 3 in Part II on Specific Issues).

3. Many human rights provisions are universally applicable

Although over 125 states are party to the 1951 Convention and/or 1967 Protocol, there are still many states which host large numbers of refugees and which have not acceded to either instrument. When a state is not a party to the refugee law treaties it is difficult to secure a legal basis for the protection of refugees in that country. However, a number of international human rights standards are **universally applicable**, as they have attained the status of customary international law. UNHCR and many scholars hold the view that the principle of *non-refoulement* forms part of customary international law. Further, some states that are not party to refugee law treaties are party to human rights treaties which include provisions of benefit to refugees.



For example:

Two states which maintain geographic limitations to the 1951 Convention so that it only applies to European refugees are party to the UN Convention against Torture. This Convention includes a general prohibition on *refoulement* if there is a risk of torture upon return. This specific provision could be invoked in protecting non-European refugees.

4. Human rights law has quasi-judicial implementing bodies

Implementation of refugee law is primarily up to states, although UNHCR has a mandate under

its Statute, and although states must co-operate with UNHCR and facilitate its task of supervising the application of the provisions of the 1951 Convention. The presence of UNHCR staff in the field is often, of course, an effective way of ensuring refugee law standards are respected. However, when there is a serious question about the implementation of these standards, the issue cannot be effectively submitted to international adjudication. Not a single case of litigation has resulted so far from Art. 38 of the Convention, which provides for the settlement of disputes between states regarding their interpretation or application of the Convention.

Many of the international treaties which protect human rights, including rights which might benefit refugees, establish **supervisory mechanisms** which can issue authoritative opinions on the content and scope of particular rights guaranteed in the treaty. In some instances, these committees can receive and decide upon complaints submitted by individuals alleging a violation of the treaty. For further information, see Chapter 2, Section D on UN bodies dealing with human rights, and Chapter 3, Section E on implementation control and enforcement.

Self-Study Questions

1. *“UNHCR is an operational UN human rights agency”.*

Give at least three examples, based on UNHCR's work, why this is an accurate description of the Office:

2. *“Human rights law is non-political and non-partisan”.*

Give two reasons to support this statement:

3. *What two conditions must UNHCR respect in order to ensure that its use of human rights law is non-partisan?*

4. *“Human rights ‘law’ is not enforceable, and it’s a waste of time for UNHCR to rely on it”.*

What arguments can you use against this statement?

5. *List four ways in which using international human rights law can assist UNHCR in protecting refugees:*

Chapter 2 - Basic Outline of International Human Rights Law

In this chapter we will look at:

- the development of the system of international protection of human rights;
- some of the important current debates concerning the application of international human rights law;
- the major UN human rights instruments; and
- the major UN bodies dealing with human rights.

A. THE ORIGIN OF INTERNATIONAL HUMAN RIGHTS LAW

A universal idea

The concept of human rights is not new. Many states and communities have been established on

the basis that individual members have certain inherent rights which must be respected by those governing. This idea may be based on religious, political, moral or social grounds, and it is a mistake to assume that it owes its origin to any one particular doctrine or theory of government. Rather, human rights are best understood as a common and unifying expression of all peoples' deepest aspirations to live freely and securely in a just and peaceful world, and as a natural response to the violence, repression, acute poverty and insecurity that plague the world we live in.

Human rights and the UN Charter

The idea that these rights should become part of international law and should be protected at an international level is relatively recent, taking shape with the establishment of the United Nations itself. The UN Charter proclaims in its preamble that

“promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion“

is a primary purpose of the United Nations, and Member States of the UN pledge themselves to take action in co-operation with the UN to achieve this purpose.

Human rights as a basis for peace and security

That respect for human rights was such an integral part of the establishment of the United Nations was not an accident. The apparent powerlessness of the League of Nations, the UN's predecessor, to prevent conflicts or the repression directed against minorities in the prelude to the Second World War, coupled with the unparalleled atrocities committed during the war itself, led many to believe that the protection of individuals against the exercise of arbitrary power would be essential to the success of a world organization whose primary task was the maintenance of international peace and security.

Excerpts from the Preamble to the 1948 Universal Declaration of Human Rights, the UN's first major statement of basic human rights:

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law [...]"

The decision by states to make the respect for human rights a key task of the new United Nations was a clear recognition of the need for some form of international supervision of how states treated their own citizens. This was a significant step because traditionally international law had regulated only the behaviour of states *vis-à-vis* other states, leaving the rights of individuals within a state beyond the scope of international law.

B. CURRENT DEBATES CONCERNING APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW

Acceptance of the idea that there should be an international law of human rights and that the United

Nations should play a role in promoting and protecting those rights raised numerous questions.

Which rights should be protected at an international level? Are some rights more important than others? How can diverse legal, cultural, political and religious traditions be reconciled with the need for universal standards? How can the UN effectively protect human rights when it is an organization composed of and governed by states whose behaviour it seeks to regulate?

These questions are still being asked and, before making active use of international human rights law, it is important to have some understanding of the debate surrounding such questions.

Human rights: universal and indivisible?

Is there a hierarchy of human rights? There has been a debate for many years about whether some human rights are more important than others, and consequently should receive greater attention by the UN. For example, some states tend to emphasize civil rights – such as freedom of speech and association, or the right to a fair trial – whereas other states place more emphasis on economic rights – such as the right to food or the right to work.

As an example of this debate:

it is sometimes argued by governments in developing countries that freedom of speech is not of crucial importance where people might starve to death and that in such countries greater emphasis should be placed on the right to food. Further, some will add that rather than demanding civil and political rights, the developed world should concentrate on overcoming structural inequalities in the world economy which keep some countries poor and unable to feed their own citizens.

Others argue that ensuring sufficient food resources does not require any restrictions on the freedom of speech. They consider that a vigorous support for freedom of speech might actually enhance enjoyment of the right to food:

- those who are without food must be able to protest and make known their plight, especially if food shortages are due to inequitable allocation of resources within the country; and
- an unrestricted media can draw national and international attention to the plight of the suffering.

How to deal with varying approaches

UNHCR staff work in many countries in different regions of the world, and they are likely to find varying views towards human rights in different countries. How should UNHCR staff deal with different national approaches to human rights?

The most important point to remember is that UN bodies have adopted many resolutions emphasizing that **all** human rights – civil, political, economic, social and cultural – are of **equal importance**. The 1993 World Conference on Human Rights reaffirmed that:

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.” (Vienna Declaration and Programme of Action, Part I, para. 5)

In some cases, refugees will be denied economic and social rights – such as the right to work or the right to education; in other cases, civil rights – such as liberty and security of the person – will be at stake. Since the 1951 Convention provides for both types of rights, UNHCR staff should feel

confident that in defending refugees' rights they are not showing bias for or against any type of human right.

With respect to the universality of international human rights standards, there is a concern that some of these standards may be incompatible with the cultural or traditional practices of a society. However, as underscored during the World Conference, developments at the international level recognize the duty of states to provide and protect all human rights and fundamental freedoms **regardless** of their political, economic and cultural systems. UNHCR staff must follow this lead in their policy and practice in protecting the rights of refugees.

Human rights: interference with state sovereignty?

In principle, international law regulates conduct between states and does not deal with domestic matters within a state. In the past, such issues were believed to be matters within the "domestic jurisdiction" of states, and thus beyond the reach of international law. As we have seen, the UN Charter marked a significant change by proclaiming the importance of human rights. However, the Charter also provided that the UN may not intervene "*in matters which are essentially within the domestic jurisdiction of any state [...]*", and there has in the past been a good deal of disagreement as to whether addressing human rights questions amounts to interference.

It is important to remember that a central feature of this discussion is that UN Member States are often not impartial or consistent in raising human rights issues. States will tend to criticize human rights violations in non-friendly states while overlooking such violations in friendly or allied states. This is a reality of international relations and is unlikely to change. However, UN agencies have the moral and sometimes legal obligation to raise human rights issues **impartially** and **consistently**. UNHCR staff should not feel that raising human rights issues related to refugee protection is interference in the internal affairs of a given country for the following reasons:

- when a state has become a party to an international treaty for the protection of human rights it has expressly agreed to be bound by the provisions of the treaty;
- the UN General Assembly, where states are represented quasi-universally, has adopted numerous resolutions dealing with human rights questions, often on the basis of consensus; and
- the 1993 World Conference on Human Rights, a meeting of all UN Member States, declared that:

*"The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, **the promotion and protection of all human rights is a legitimate concern of the international community**".* (Vienna Declaration and Programme of Action, Part I, para. 4) (emphasis added)

C. MAJOR HUMAN RIGHTS INSTRUMENTS

The Universal Declaration of Human Rights

The task of setting out the rights and freedoms proclaimed in the Charter began as soon as the UN was created. In 1948 the Universal Declaration of Human Rights was proclaimed through a resolution passed by the General Assembly.

The Universal Declaration was established "*as a common standard of achievement for all peoples and all nations*". It sets out in 30 articles the human rights and fundamental freedoms which the UN's Member States must respect and whose "universal recognition and observance" they are to secure.

Rights proclaimed in the Universal Declaration of Human Rights include:

- right to life, liberty and security of the person;
- freedom from slavery or servitude;
- freedom from torture or cruel, inhuman or degrading treatment;
- recognition as a person before the law;
- equality before the law and equal protection of the law;
- freedom from arbitrary arrest, detention or exile;
- right to a fair trial;
- freedom from arbitrary interference with privacy, family, home or correspondence;
- freedom of movement and residence within a country;
- right to leave one's country and to return;
- right to seek asylum;
- right to a nationality;
- right to marry and found a family;
- equality of men and women in marriage and in its dissolution;
- right to own property and not be arbitrarily deprived of it;
- freedom of religion, opinion, expression and association;
- right to take part in government and equal access to public service;
- right to social security;
- right to work and to free choice of employment;
- right to rest and leisure;
- right to education;
- right to an adequate standard of living.

The Universal Declaration is not a treaty. As a resolution of the General Assembly it is not open to UN Member States to sign it or to agree to become legally bound to its provisions as such. When the Universal Declaration was being drafted it was agreed that its provisions would be further elaborated in treaties which would create binding legal obligations for states party to them. However, the fact that the Universal Declaration is not a treaty does not diminish its importance:

- its purpose was to provide an authoritative understanding of the human rights guaranteed in the UN Charter;
- it is the most well known UN catalogue of human rights, and it includes civil and political, as well as economic, social and cultural rights; and
- its importance has been consistently reaffirmed in resolutions of the General Assembly, and many national constitutions make reference to it or incorporate its provisions.

The International Bill of Human Rights

The codification of international customary law in the Universal Declaration into binding treaties is an ongoing process. In 1966,

- the International Covenant on Economic, Social and Cultural Rights, and
- the International Covenant on Civil and Political Rights

were adopted and transformed an important set of human rights into binding conventional instruments. Both the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights have been ratified by over 125 states. The two covenants together with the Universal Declaration are known as the International Bill of Human Rights.

Other human rights treaties

The International Covenants are the most important human rights treaties as they are global and cover the main universally agreed human rights and fundamental freedoms. However, the evolution of standard-setting in human rights which began with the Universal Declaration did not end with the covenants. There are a number of other international treaties, some of them quite recent, which deal with specific rights or freedoms, or address the situation of particular groups, or seek to prevent discrimination in more detail than do the covenants. They include:

➔ Conventions dealing with specific human rights

- Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

➔ Conventions dealing with particular groups

- The four Geneva Conventions providing, inter alia, standards of humane treatment for prisoners and civilians in time of armed conflict (1949) and the two Additional Protocols relating to the protection of victims of international and non-international armed conflict (1977)
- Convention relating to the Status of Refugees (1951) and Protocol (1967)
- Convention relating to the Status of Stateless Persons (1954)
- Convention on the Reduction of Statelessness (1961)
- Convention on the Rights of the Child (1989)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990, not yet in force)

➔ Conventions dealing with discrimination

- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)



Note!

It is important that UNHCR protection officers are aware of the status regarding the ratification of the various international human rights instruments by the country they are working in. The Centre for Human Rights issues every 6 months a consolidated Status of Ratification to international human rights instruments (ST/HR/4).

When you want to know whether a state is party to a certain international instrument and/or how many states are party to that instrument, in the REFWORLD databases enter the Legal Databases: under this heading you will find REFINT. When you have found the appropriate instrument there will be a box for state parties, which includes numbers of ratifications, signatures and the names of state parties. Check, for example, how many states now have ratified the International Covenant on Civil and Political Rights, as well as which countries in the region you are presently working in have done so.

Other relevant instruments

In addition to these and other treaties dealing with human rights, there are many declarations, resolutions or other decisions of UN bodies which set out human rights standards. Declarations in particular are a step in the evolution of international standard-setting. They can often lead the way toward a later treaty, as the Universal Declaration did for the International Covenants, and in any event express the political, if not yet legal, consensus of the international community on addressing a certain problem. Some of these instruments most relevant to the work of UNHCR include:

→ Standards dealing with specific human rights

- Declaration on Territorial Asylum (1967)
- Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989)
- Declaration on the Protection of All Persons from Enforced Disappearance (1992)

→ Standards dealing with particular groups

- Standard Minimum Rules for the Treatment of Prisoners (1955)
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990)
- Declaration on the Rights of Disabled Persons (1975)
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992)
- Declaration on the Elimination of Violence against Women (1993)

→ Standards dealing with discrimination

- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)

Identifying the most relevant human rights instruments can be a complex task. The first place to look would be in Part II of this module, which has separate chapters on specific protection issues. In addition, you may consult the REFWORLD databases to search quickly for the information you need on international human rights instruments. The database includes over 100 international treaties and declarations in English and in French, including all of the human rights instruments referred to in this module. The database also provides up-to-date information on which states are party to which instruments.

D. UN BODIES DEALING WITH HUMAN RIGHTS

The main UN bodies dealing specifically with human rights are set out below. They derive their mandates either from the UN Charter, or from particular human rights treaties.

Commission on Human Rights

The Commission on Human Rights is the most important UN human rights body. It is one of the original six “functional commissions” established by the Economic and Social Council (ECOSOC) in 1946, and reports to the General Assembly through ECOSOC.

The Commission has a very broad mandate to discuss any matters relating to human rights. It is an intergovernmental body, composed of 53 states elected for three-year terms on the basis of regional representation (there are five regional groupings in the UN consisting of Asia, Africa, Latin America, Eastern Europe, and Western Europe and Others, which includes Australia, Canada, New Zealand, and the U.S.).

Because of the Commission’s importance, a great many other UN Member States participate in its work as observers, although they cannot vote. The Commission normally meets for one six-week session each year in Geneva in February and March. Special sessions can be held with the agreement of a majority of members. Recent examples have included special sessions on the situation in former Yugoslavia (in 1992) and the situation in Rwanda (in 1994).

The Commission was originally charged with the task of drafting the International Bill of Human Rights, which it has done (see this chapter, Section C, above). In addition, numerous working groups and committees over the years have drafted standards on a wide range of issues. For example, two of the most recently-established working groups will consider possible optional protocols to the Convention on the Rights of the Child. In addition to standard-setting, the Commission reviews recommendations and studies prepared by its subsidiary body, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (see below in this section), and considers and adopts resolutions on general human rights issues and on some specific country situations.

Since the Commission generally meets only once each year, it conducts much of its work through its so-called “**mechanisms**“, which focus on a particular theme or on a specific country. A mechanism is merely an individual, usually called a special rapporteur, or a working group, carrying out a certain mandate from the Commission. “**Thematic mechanisms**“, which deal with a certain

issue, most relevant to the work of UNHCR include the following:

- **Working Group on Enforced or Involuntary Disappearances**
 - **Special Rapporteur on Torture**
 - **Working Group on Arbitrary Detention**
 - **Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions**
 - **Special Rapporteur on Religious Intolerance**
 - **Special Rapporteur on Violence against Women**
 - **Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance**
 - **Representative of the Secretary-General on Internally Displaced Persons.**

There are also “**country-specific mechanisms**“, nearly all of which are of interest to UNHCR because the country may produce, or already has produced, refugees.

Each mechanism has its own mandate, which is contained in the Commission resolution creating it. Generally speaking:

- they examine information and allegations received on the particular subject or country, and transmit sufficiently documented information and cases to the government concerned for comment;
- in appropriate cases the government is urged to investigate the matter;
- some of the mechanisms have established a procedure for making urgent appeals to the government concerned, for example when reliable information is received on cases of disappearances or torture;
- with the consent of the government concerned, they can visit a country to observe the situation first-hand; and
- they issue annual reports to the Commission, and in some cases interim reports to the General Assembly, which give a summary of the actions they have taken over the past year and the information they have received, and often include recommendations for improving the situations described. These reports are an extremely useful source of authoritative information on human rights violations in many countries, and are available through the Centre for Documentation on Refugees.

Thematic mechanisms may play a complementary role to actions taken by UNHCR to ensure the protection of asylum seekers and refugees as you can see from the following Excerpt from the Report of the Special Rapporteur on Torture to the Commission on Human Rights (1994).

“[...] the Special Rapporteur sent an urgent appeal to the Government [of the country where asylum was sought] on behalf of a group of 43 [...] asylum-seekers who were occupying the

UNHCR premises in [the capital city] because they had been threatened with being forcibly returned to [the country of origin]. Fears were expressed that, if this happened, they would be at risk of being detained upon arrival and tortured“.

You can find other examples on how the human rights mechanisms deal with asylum issues in the REFWORLD databases.

Enter the REFWORLD databases under United Nations Information, then look under Commission on Human Rights Reports. Make a search by subject and enter extrajudicial, summary or arbitrary executions. Enter one of the main reports submitted by the Special Rapporteur, and look for references to asylum issues by pressing the space-bar and entering “asylum” as keyword.

Sub-Commission on the Prevention of Discrimination and Protection of Minorities

The Sub-Commission on the Prevention of Discrimination and Protection of Minorities (often called the Human Rights Sub-Commission or simply the Sub-Commission) was established by and reports to the Commission on Human Rights. The Sub-Commission is composed of 26 members nominated by governments on the basis of regional representation, who are elected to four-year terms by the Commission on Human Rights. The members serve in their individual capacity as independent experts rather than as representatives of their governments. The Sub-Commission’s main tasks are to initiate studies on a whole range of human rights questions, not limited to minority or discrimination issues (as with the Commission on Human Rights, these studies are carried out by special rapporteurs or working groups), to adopt resolutions on particular topics or countries, and to make recommendations to the Commission on Human Rights. The Sub-Commission meets for one four-week session each year in August in Geneva.

Treaty bodies

The “treaty bodies“ are expert bodies established by the UN human rights treaties, set up to review the implementation of the treaty. The precise manner in which they do this varies, but generally they are given the competence to review reports submitted by states party to the treaty and to raise questions or concerns about those reports. They may also have the right to receive petitions from individuals alleging a violation of their rights under the treaty. The treaty bodies are implementation control mechanisms with a quasi-judicial function because the reports they publish will contain authoritative views on the scope and content of rights guaranteed in the treaty.

The treaty bodies are composed of experts nominated by governments to serve in their personal capacity, not as representatives of their government. Depending on the treaty body, they meet two or three times a year in Geneva, New York and/or

Vienna. The main treaty bodies and the conventions they monitor are:

- **Committee on the Rights of the Child:** Convention on the Rights of the Child.
- **Committee against Torture:** Convention against Torture.
- **Committee on the Elimination of Discrimination against Women:** Convention on the Elimination of All Forms of Discrimination against Women.
- **Committee on the Elimination of Racial Discrimination:** Convention on the Elimination of All Forms of Racial Discrimination.
- **Human Rights Committee** (not to be confused with the Commission on Human Rights, or, as it is sometimes referred to, the Human Rights Commission, see above in this section): International Covenant on Civil and Political Rights.
- **Committee on Economic, Social and Cultural Rights:** International Covenant on Economic, Social and Cultural Rights.

Mechanisms and treaty bodies – What’s the difference?

The mechanisms – working groups and special rapporteurs – created by the Commission on Human Rights and its Sub-Commission, and the treaty bodies established by human rights treaties are all set up to ensure human rights are respected. The main differences are:

- treaty bodies can deal only with states parties to the treaty, but there is a legal obligation on such states to co-operate with the body; and
- the Commission and Sub-Commission mechanisms can deal with issues within their mandate in any UN Member State, but the legitimacy of their work is occasionally challenged by governments who do not accept their scrutiny.

General Comments of the Treaty Bodies

A number of treaty bodies including the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of racial Discrimination, and the Committee on the Elimination of Discrimination against Women have prepared general comments or recommendations.

For example, the Human Rights Committee, under article 40, paragraph 4, of the International Covenant on Civil and Political Rights has authority to study reports submitted by the states parties to the Covenant and transmit its reports, and such general comments as it may consider appropriate, to the states parties. The Committee has to date prepared 24 General Comments on a number of issues such as reporting guidelines, interpretation of specific articles of the Covenant, the use of reservations, and the position of aliens under the Covenant. As concerns the use of these General Comments, the Committee has noted that they can serve to draw the attention of states parties to insufficiencies disclosed by a large number of reports, to suggest improvements in the reporting procedure, and to stimulate activities of these states and international organizations in the promotion and protection of human rights. The Committee has also noted that these Comments should be of interest to other states,

especially those preparing to become parties to the Covenant. (See Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies, UN Doc. HRI/GEN/Rev. 1).

High Commissioner for Human Rights

The post of UN High Commissioner for Human Rights was established by the General Assembly in December 1993, following a recommendation made at the World Conference on Human Rights. The High Commissioner for Human Rights is appointed by the General Assembly on the recommendation of the Secretary-General, and serves for a term of four years, with the possibility of one renewal for another four-year term.

The High Commissioner for Human Rights is the United Nations official with principal responsibility for UN human rights activities under the direction and authority of the Secretary-General, and has overall responsibility for the activities of the UN Centre for Human Rights (see below in this section). The High Commissioner for Human Rights has been assigned the role of promoting respect for human rights, coordinating and rationalizing the UN human rights programme, making the UN human rights machinery more effective and preventing human rights violations.

The establishment of the office of the High Commissioner for Human Rights is significant in that UN human rights activities will be led and coordinated by a senior UN official with a mandate to address all issues of human rights worldwide. In particular, the High Commissioner for Human Rights' preventive function could be of great importance to UNHCR. Moreover, the establishment of this office has led to increased cooperation in post-conflict peace building between UNHCR protection staff and human rights monitors in the field.

Centre for Human Rights

The Centre for Human Rights is a division of the UN Secretariat based in Geneva. It provides legal, technical and administrative support to intergovernmental bodies such as the Commission on Human Rights and its mechanisms, and to the treaty bodies. The Centre prepares studies requested of the Secretary-General on human rights questions, is responsible for dealing with all communications received by the UN on human rights, and operates an advisory services and technical assistance programme on human rights for governments.

UNHCR and the Centre cooperate on a number of items of mutual interest, both in Geneva and in the field. UNHCR's refugee law training courses are sometimes undertaken in conjunction with the Centre's advisory services in human rights, and UNHCR field offices often assist visiting special rapporteurs, for example, by facilitating their access to refugees whom they wish to interview about conditions in a country of origin. In the case of the former Yugoslavia, there is a Memorandum of Understanding between UNHCR and the Centre concerning the provision of information on alleged human rights abuses. In addition, UNHCR submits information and views to mechanisms and treaty bodies dealing with issues of concern to the Office. An example of this is the support which UNHCR provides to the Representative of the Secretary-General on Internally Displaced Persons.

UN System Agencies

The International Labour Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) each supervise the application of a number of international human rights conventions within their fields of competence, and also operate human rights programmes. In addition, other UN system agencies such as the United Nations Children's Fund (UNICEF) and the World Health Organization (WHO) have functions related to human rights.

Self-Study Questions

1. True or false?
 - A. The UN Charter states that promoting respect for human rights is one of the fundamental purposes of the UN.
True False
 - B. In the UN system, the protection of human rights is closely linked to maintaining international peace and security.
True False
 - C. The UN's involvement in protecting human rights was a new departure for international law.
True False
 - D. The UN has recognized that civil and political rights are the most important human rights.
True False
 - E. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights together make up the International Bill of Human Rights.
True False
 - F. The Special Rapporteur on Torture is a "treaty body" established under the Convention against Torture, and so can deal only with cases of alleged torture in countries which have ratified the Convention against Torture.
True False
 - G. The Sub-Commission on the Prevention of Discrimination and Protection of Minorities is a subsidiary body of the Commission on Human Rights.
True False
 - H. There has been a UN High Commissioner for Human Rights since the proclamation of the Universal Declaration of Human Rights.
True False
 - I. The ILO and UNESCO supervise some human rights conventions.

True False

2. List three reasons why UNHCR staff should not feel that raising human rights issues is an interference with state sovereignty:

3. *“Because the Universal Declaration of Human Rights is not a treaty, it is not that important a document“.*

What arguments can you use against this statement?



4. What are the main differences between a “mechanism“ to protect human rights established by the Commission on Human Rights, and the “treaty bodies“ set up by human rights treaties?



5. List four UN “treaty bodies“ dealing with human rights:



6. List four of the “mechanisms“ set up by the Commission on Human Rights to protect human rights:



Chapter 3 - Basic Legal Concepts

In this chapter we will look at:

- the rule of non-discrimination and how it benefits refugees;
- the difference between human rights rules in treaties, UN standards and customary law;
- limitations placed on the exercise of human rights;
- derogable rights; and
- some of the ways used to monitor implementation of human rights treaties.

A. RULE OF NON-DISCRIMINATION

A basic concept underlining international human rights law is the prohibition of discrimination. Non-discrimination means that, as a general rule, the rights and freedoms recognized by international human rights law apply to everyone and states may not make distinctions – for example, on the basis of race – between different individuals in protecting these rights.

As we have seen, the UN Charter proclaims that a fundamental purpose of the UN is “*promoting and encouraging respect for human rights and for fundamental freedoms for all **without distinction as to race, sex, language, or religion***” (emphasis added).

The Universal Declaration of Human Rights, Article 2, affirms that:

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”

The prohibition of discrimination is of crucial importance to refugees. As foreigners in another country, refugees are particularly vulnerable to discrimination:

- the national laws in the country of asylum might make insufficient provision for refugees, or it may not be clear whether the benefits of the laws apply to refugees;
- the refugees might have a different religion or be of a different ethnic group than most of the population in the asylum country, and consequently their presence might be resented or they might be viewed with suspicion; and
- refugees often lack proper identification and official documents and therefore might encounter problems with authorities.

However, even though refugees are foreigners in the asylum country, in general under international human rights law they enjoy the same fundamental rights and freedoms as nationals.

The Human Rights Committee has stated with regard to the prohibition on discrimination set out in Article 2 of the International Covenant on Civil and Political Rights that:

“[T]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant [...]”

B. TREATIES, STANDARDS, AND CUSTOMARY LAW

Treaties and standards

As pointed out in Chapter 2, the terminology of human rights instruments is complex with covenants, conventions, treaties, declarations, standards, rules and principles. However, there are basically only **two main types** of UN human rights instruments:

- (i) **treaties**, also called conventions or covenants, which are formal legal texts to which states become party, and which create binding legal obligations; and
- (ii) **UN standards**, also called principles, rules or declarations, which are passed by resolutions of a UN body, usually the General Assembly. They are not treaties because states cannot become party to them and in that sense they do not create binding legal obligations. But the rules they set out are often even more detailed than those found in treaties. What is their status? They are authoritative standards which states should respect because:
 - they are often negotiated over a period of many years, and all UN Member States can participate in this process; and
 - they are usually adopted by consensus, meaning states did not object to the rules they

contain;

- some may expressly purport to declare existing rules and principles.

Customary law

Some human rights are considered “norms of customary international law”. A norm or rule of customary international law is one which is **binding on all states**, regardless of whether it is set out in a treaty to which a state is party. It is generally recognized that several of the provisions of the Universal Declaration of Human Rights have become part of customary international law, including the prohibition of:

- slavery and the slave trade;
- extrajudicial killing or causing the “disappearance“ of individuals;
- torture or other cruel, inhuman or degrading treatment or punishment;
- systematic racial discrimination (e.g. apartheid);
- prolonged arbitrary detention;
- genocide.

C. LIMITATIONS ON HUMAN RIGHTS

Many human rights are not absolute. For example, the prohibition on *refoulement* set out in Article 33 of the 1951 Convention does not apply to a refugee for whom “*there are reasonable grounds for regarding as a danger to the security of the country [...] or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community [...]*”

Human rights guaranteed in international instruments might be subject to limitations set out in the instrument itself. These limitations might be of a **general nature**, affecting all the rights set out in the instrument. For example, the Universal Declaration of Human Rights provides in Article 29 that:

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society“

Therefore, although Article 19 of the Universal Declaration protects freedom of opinion and expression, including the right “*to seek, receive and impart information and ideas through any media and regardless of frontiers*“, Article 29 would limit its scope so that freedom of expression would not include the right to libel or slander other people, or to preach racial discrimination or to advocate violence.

The limitations might also be of a **specific nature**. For example, Article 12 of the International Covenant on Civil and Political Rights guarantees free movement and residence within a state and the right to leave any country, but also provides that these rights may be subject to restrictions

“[...] which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with other rights recognized in the present Covenant“

Thus, for example, states may prevent people from moving into environmentally-protected areas or from leaving the country if they are required to appear before a court of law.

These limitations of rights in international human rights law are not unusual. Constitutions at the national level will often provide similar limitations, or such limitations will have been imposed through judicial interpretation of the rights in question.

With regard to civil rights limitations vary depending on the instrument and the particular right, but generally these rights may be subject to limitations for the purposes of protecting public order (*ordre public*), public health or morals, or the rights and freedoms of others.

General points to keep in mind concerning the limitations of civil rights:

- in all cases the limitations must be “*prescribed by* [or provided by, or in conformity with] *law*”.

This means that laws or regulations must clearly set out the circumstances in which the right can be restricted, and in sufficient detail so that those exercising the right know its parameters. In addition, these laws should be readily accessible.

A vaguely worded general power to limit rights which gives no clear indication of when it might be exercised might not meet this requirement.

- in all cases the limitations must be “*necessary*” for achieving one of the listed purposes (e.g., protection of public health).

This means that the burden lies on the government to prove that the limitation is needed, and that the limitation must be proportional to the specific purpose it is aimed at achieving.

The possibility that a public demonstration might degenerate into violence may be insufficient to justify an outright ban on the demonstration – rather, it may only justify limitations on where or when it is held.

While refugees, even though they are non-citizens, enjoy these rights it might be that, along with other non-citizens, the government could more readily justify placing limitations on the exercise of these rights than it could with regard to citizens.



For example:

If refugees are planning to hold a public demonstration, and there exists some hostility towards the refugees by the local population, then the government might have more grounds to fear that the demonstration could result in violence.

BUT, in all cases, limitations must not be so severe as to totally suppress the exercise of the right.

Reservations

Sometimes when a state becomes party to an international human rights treaty it makes a reservation to some of the provisions in the treaty.

Reservation is a formal note or declaration clarifying the manner in which the state will interpret a particular provision of the treaty, or indicating that the state will not be bound by a particular provision.

Some treaties expressly indicate that certain of their provisions may not be subject to reservations

(e.g. Article 42 of the 1951 Convention provides that no reservations can be made to certain articles including the refugee definition in Article 1 and the prohibition against *refoulement* in Article 33). The Convention on the Elimination of All Forms of Discrimination Against Women contains in Art. 28.2 a general provision stating that “*a reservation incompatible with the object and purpose of the Convention shall not be permitted*”. Furthermore, it is generally accepted that even without a specific reference, no reservation is permitted if it defeats the object and purpose of the treaty.

A full list of reservations to human rights treaties is included in the REFWORLD databases. In the Legal Databases enter REFINT and look for the Additional Protocol to the International Covenant on Civil and Political Rights. Enter the List of Reservations to that Protocol and find out the nature of reservations made to Article 5.

D. STATES OF EMERGENCY AND DEROGABLE RIGHTS

Many national constitutions allow for the suspension of constitutionally-guaranteed rights and the imposition of martial law or emergency rule in certain circumstances such as war. Article 9 of the 1951 Convention allows states to take special measures regarding refugees “*in time of war or other grave and exceptional circumstances*”.

Similarly, international human rights law allows states to **derogate** from their obligations when there is a state of emergency. Article 4 of the International Covenant on Civil and Political Rights provides that:

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”

However, the Covenant also provides that states cannot **under any circumstances** derogate from some rights, including:

- the right to life;
- the right not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment;
- freedom from slavery and servitude;
- freedom of thought, conscience and religion.

When is derogation allowed?

States do not have complete discretion to restrict the enjoyment of human rights simply by declaring a state of emergency. The decision to derogate and the measures taken must be in accordance with international obligations. To justify derogation, the situation must be a “*public emergency which threatens the life of the nation*”.

The threat must be such that the existence of the state itself (not the government currently in power) is in question – for example, an armed conflict. This means that the whole population, the territorial integrity or the fundamental institutions of the state must be threatened, and that this threat must

be actual or imminent.

Since derogation is only allowed in exceptional circumstances, it follows that the normal limitations that apply to the enjoyment of human rights (e.g. public order, public health etc.) must be shown to be inadequate to deal with the situation. It also follows that derogation must be a temporary measure.

In addition, the measures must be “officially proclaimed”, meaning the legal procedures set up in the constitution or other law allowing for derogation must be followed, see for example Article 4 of the International Covenant on Civil and Political Rights.

The limitations imposed on the free and full enjoyment of human rights must be “strictly required by the exigencies of the situation” – a state of war may not justify unreasonable censorship or a total ban on political gatherings.

Finally, the measures taken must not discriminate on the basis of race, colour, sex, language, religion or social origin.

The Human Rights Committee has in its General Comment stated the following regarding the scope of derogation under Article 4 of the International Covenant on Civil and Political Rights.

“The Committee holds the view that measures taken under Article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened and that in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogation can be made“.

E. IMPLEMENTATION CONTROL AND ENFORCEMENT

As we saw earlier, it is difficult to enforce international human rights law. This is largely because the law is meant to regulate the conduct of states but it is those same states who developed the law and are responsible for its implementation. The UN’s ability to enforce the law is usually dependent on decisions taken by states. A distinction needs to be made between enforcement and implementation control mechanisms. The former can be exemplified by measures taken under Chapter VII of the UN Charter, and the latter with treaty bodies.

The mechanisms that do exist will appear, especially to those not used to working with international law, weak and ineffectual compared to measures used to implement and enforce domestic law. It is important to bear in mind that this simply reflects the reluctance of states not to grant too much power to UN bodies or mechanisms – and in some situations, this reluctance is giving way to a recognition of the need for a more effective UN human rights programme.

Monitoring the implementation of human rights treaties

The UN human rights treaties provide three main types of implementation control measures: periodic reports, individual petitions, and inter-state complaints. The first two, in particular, offer possibilities for refugee protection.

Periodic reports

Main UN human rights treaties:

- the International Covenant on Civil and Political Rights;
- the International Covenant on Economic, Social and Cultural Rights;
- the Convention against Torture;

- the Convention on the Rights of the Child;
- the Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention on the Elimination of All Forms of Discrimination against Women;

require states parties to submit reports at various intervals to the mechanism established by the treaty. Typically, states are required to provide information in the reports on measures taken to implement the rights protected in the treaty. Once the report is submitted, representatives from the state are invited to appear before the committee to answer questions arising from the report, and the committee may make comments or concluding observations on the report, which it can publish.

UNHCR can influence state reporting to treaty bodies, and the supervisory role of those, in several ways:

- at Headquarters level, problems affecting the protection of refugees in a particular country are routinely – and confidentially – brought to the knowledge of committee members prior to their consideration of the report prepared by the country in question. In doing so, the Human Rights liaison officer in the Division of International Protection relies heavily on concrete and up-to-date information provided by Field Offices;
- at field level, in addition to the above described role of feeding information regarding inadequate state compliance, important preventive steps can be taken by UNHCR Representatives and Protection Officers. States have an obvious interest in including as many positive aspects as possible in their reports to treaty bodies. By identifying and offering cooperation to those officials responsible for drafting such reports, UNHCR staff can raise awareness of particular problems faced by refugees and suggest corrective action which would enhance the overall image of state compliance with the human rights standards in question.

Individual petitions

Some of the main UN human rights treaties:

- the Convention against Torture;
- the International Covenant on Civil and Political Rights;
- the Convention on the Elimination of All Forms of Racial Discrimination;

include provisions allowing for individuals to petition the committee established by the treaty alleging a violation of provisions of the treaty. Individual petition is only possible, however, if the state party has formally indicated (for example, by signing a protocol to the treaty) that it recognizes the competence of the committee to receive and consider individual petitions.

The right of individual petition is a potentially very effective way of enforcing human rights treaties. For example, an asylum-seeker whose case has been rejected but fears that he or she would be subjected to torture if returned could address a communication, or petition, to the Committee against Torture. Similarly, a detained refugee or asylum-seeker could petition the Human Rights Committee established under the International Covenant on Civil and Political Rights alleging that his or her detention was “arbitrary”. While these Committees do not have the power to order compliance, or to demand other remedies or compensation, they can publish their “views” on the

merits of a case. When such Committees find that there has been a violation of the Convention they are charged with overseeing, their views carry a great deal of weight.

Inter-state complaints

Some of the main UN human rights treaties:

- the Convention against Torture;
- the International Covenant on Civil and Political Rights;
- the Convention on the Elimination of All Forms of Racial Discrimination;

make provisions allowing for one or more states party to the treaty to bring a complaint against another state party alleging a violation of provisions of the treaty. As with the individual petition system, states must usually indicate formally in advance that they recognize the competence of the committee to consider complaints brought by another state. The inter-state complaint system has, however, rarely been used.

The contribution of human rights NGOs

The UN's concern for human rights truly represents the concern of "the peoples of the United Nations", to use the very words of the Charter's Preamble. Without the courageous pressure and constant advocacy of the organized civil society, human rights law and its implementation mechanisms would not be what they are today. NGOs are a major source of human rights information, and quite a few of them have specialized in exposing internationally human rights violations and situations threatening the human rights of individuals or groups.

The REFWORLD databases include reports from Amnesty International, Human Rights Watch and Minority Rights Group, on a large number of countries/regions. Those reports are regularly updated. To find them, look under Country Information Databases or in REFLIT using search by author.

NGOs are also a major source of information for country and thematic rapporteurs, as well as for treaty bodies, the Commission on Human Rights and the Sub-Commission. In June 1994, a year-long series of consultations between UNHCR and NGOs in all regions of the world, known as Partnership in Action or PARinAC, culminated in the Oslo Plan of Action. This major document contains a Recommendation (No. 50) which reads:

"There is a need to document and expose cases of human rights violations against displaced women, children, elderly people, persons forcibly recruited by armed forces, as well as members of ethnic, religious and linguistic minorities and indigenous people. UNHCR and NGOs should take action to monitor, report and to counter human rights violations, and should adopt measures to provide adequate protection to victims of violence. The involvement of organizations of the above-mentioned groups should be sought. UNHCR and NGOs should cooperate with the relevant human rights mechanisms in this respect".

The International Tribunals on the Former Yugoslavia and Rwanda

In the same way as attacks against the basic rights of the person – torture, e.g. – are punishable as crimes in national penal systems, some among the gravest human rights violations have been

determined to be co-extensive with “international crimes“ for which **individuals** may be held accountable before international tribunals. Two such tribunals have been established by the UN Security Council in recent years to respond to massive violations of human rights in the Former Yugoslavia (1993) and in Rwanda (1994), respectively. These courts are the first of their kind since the tribunals set up at Nuremberg and Tokyo to try war criminals after World War II. They are competent to prosecute persons responsible for, inter alia, serious violations of international humanitarian law, genocide and acts defined as crimes against humanity, whether or not they were committed in the exercise of official duties. It is important to bear in mind that the international tribunals cannot judge the behaviour of states or their compliance with obligations undertaken under human rights law instruments.

Action by the Security Council to enforce human rights

The Security Council has wide-ranging powers to maintain or restore international peace and security. It can order the imposition of economic sanctions, the severance of diplomatic relations, the interruption of means of transportation and communication, and, if necessary, military action. Such powers, set out in Chapter VII of the UN Charter, can only be exercised if the Security Council determines that there is a “*threat to the peace, breach of the peace, or act of aggression*“.

It is open to the Security Council to determine that human rights violations in a particular country amount to a “threat to the peace“ and to take enforcement measures. In the past, such a step was extremely rare, largely as a result of the Cold War and the power of veto held by the five permanent members of the Security Council (China, France, Russia, UK and USA).

However, in several instances since 1991 the Security Council has passed resolutions dealing with human rights violations and in some cases has taken enforcement measures. For example, the Security Council’s decision to establish a “safe haven“ in one country was based, in part, on the repression carried out by the army which had led to a mass exodus of refugees.

F. CONFLICTING TREATY PROVISIONS

What happens if a state is party to two different treaties which have different, or even conflicting provisions dealing with a particular human right?

This question arises in this module in two different circumstances:

- (1) when both the 1951 Convention and an international human rights treaty deal with a particular right affecting refugees (for example, the right to form associations) and the human rights treaty offers more generous protection; and
- (2) when human rights standards at the regional level have different provisions (either more or less generous, as the case may be) than the UN instruments.

The general rule to apply in the second situation, where a regional human rights treaty provides a different type or level of protection of a particular human right than a UN treaty, is that the **provision which is most generous should prevail**. This rule arises out of the fact that if a state has undertaken two separate types of obligations concerning a particular human right, it can only meet both obligations (and therefore fully live up to its commitments) by following the provision that gives greater protection to the individual.



For example:

One regional human rights treaty expands the list of non-derogable human rights set out in the International Covenant on Civil and Political Rights. States parties to that regional treaty and to the International Covenant on Civil and Political Rights can

comply with both instruments only by respecting the greater level of protection offered by the regional treaty.

In the situation where a human rights treaty offers greater protection to refugees than the 1951 Convention, this same rule should apply. The only difference is that states might argue that a provision of general application in a human rights treaty cannot take precedence over a very specific provision in the 1951 Convention.



For example:

The general non-discrimination clause in the International Covenant on Civil and Political Rights means that refugees enjoy most of the rights it recognizes including the right to association that is somewhat restricted for refugees in the 1951 Convention. A state might argue that the restrictive provisions of the 1951 Convention should apply since they deal explicitly with the issue of whether refugees have to right of association, whereas the non-discrimination provision in the International Covenant on Civil and Political Rights is a general clause. However, there are two reasons for maintaining that the more generous provisions should still apply:

- the International Covenant on Civil and Political Rights, and most other human rights treaties, were drafted after the 1951 Convention, and therefore it can be argued that they take precedence over it (if a state wanted to limit its obligations when ratifying the later treaty, it could make a reservation); and
- Article 5 of the 1951 Convention recognizes that none of its provisions should be used to impair rights granted to refugees by other treaties.

The only possible exception for arguing that the more specific, and not necessarily the more generous provision should apply, is where the general provision is ambiguous or unclear as to whether it benefits refugees.

1 True or false?

A. The Human Rights Committee has decided that aliens are not protected by many of the human rights in the International Covenant on Civil and Political Rights.

True False

B. Because UN standards and declarations on human rights are not treaties, they are not authoritative.

True False

C. Many human rights are subject to certain limitations.

True False

D. If an emergency exists, all human rights are subject to derogation by a state.

True False

2. Complete the following sentences with the most correct phrase chosen from the lists

provided.

A. Refugees are strangers in the asylum country:

- so the government is not obliged to respect their human rights
- but nevertheless in general under international human rights law they enjoy the same rights and freedoms as nationals
- and by leaving their own country have forfeited all of their human rights.

B. The prohibitions on slavery, extrajudicial killing, torture and genocide in international human rights law:

- are unnecessary since such violations rarely occur
- are not absolute, but are subject to limitations
- are part of customary international law, and are therefore binding on all states.

C. A state may derogate from its human rights obligations:

- whenever the state feels it is necessary
- only when there is a public emergency threatening the life of the nation, and certain other conditions are met
- only if the Security Council allows the state to do so.

D. It is difficult for the UN to enforce international human rights law:

- because this law regulates the conduct of states and it is those same states who developed the law and are responsible for its implementation
- because this law is so vague and confusing and no-one can agree on the exact scope of the rights and freedoms protected
- because the UN has not yet established implementation and enforcement mechanisms in the field of human rights.

3. List the three main methods used to control the implementation of international human rights treaties:



4. Under what circumstances can the Security Council take action under Chapter VII of the UN Charter to enforce human rights?



5. **“In the event of a conflict between a human rights provision in a regional and a universal treaty, the provision which is most generous should prevail”.**

What arguments would you use to support this statement?



Chapter 4 - Protection of Human Rights at the Regional Level

In this chapter we will look at:

- the major human rights instruments adopted at the regional level in Africa, the Americas, and Europe; and
- the methods used in these regional systems for implementing and enforcing human rights.

This chapter will set out the major human rights instruments and bodies in Africa, the Americas, and Europe. It should be noted that no regional human rights systems have as yet been developed within Asia or in the Middle East.

Specific provisions of regional human rights law are discussed in the relevant chapters of Part II on Specific Issues.

It is important to be familiar with existing regional human rights instruments since they complement the UN's human rights work. Regional standards and implementation bodies can have advantages:

- it may be easier for states to agree on detailed provisions because of **a common approach** to certain issues; and
- states might be more willing to grant **effective investigation and adjudication powers** to a regional body.

In the event of conflicting human rights provisions in regional and UN instruments, rules of treaty interpretation provide that the most generous provision should take precedence.

A. AFRICA

Major human rights instruments

The Organization of African Unity (OAU, of which all African states are members) has adopted the following human rights treaties, including one dealing specifically with refugees:

- **OAU Convention governing the specific aspects of refugee problems in Africa (1969)**
- **African Charter on Human and Peoples' Rights (1981); and**
- **African Charter on the Rights and Welfare of the Child (1990, not yet in force).**

Around 50 states are party to the African Charter on Human and Peoples' Rights and over 40 states

are party to the OAU Refugee Convention.

The African Charter on Human and Peoples' Rights protects many of the basic human rights set out in the International Bill of Human Rights, such as non-discrimination, the right to life, the right to liberty and security, freedom from torture, the right to a fair trial, freedom of conscience, expression, association and assembly, freedom of movement, political rights, and the rights to work, to health care and to education.

This treaty also recognizes peoples' rights, such as the right to self-determination.

The African Charter is unique in that it emphasizes the duties of the individual towards the community and the state, cf. Articles 27-28. It also gives people fleeing persecution the right not just to seek asylum but also to obtain it. Article 12(3) of the African Charter provides that:

“every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions”

Mechanism for Monitoring Implementation

The African Charter on Human and Peoples' Rights established an African Commission on Human and Peoples' Rights, which began to function in 1987. The Commission has eleven members elected by the OAU Assembly of Heads of state and Government. They serve in their individual capacities, not as representatives of their governments. The Commission generally meets twice a year for eight-to-ten day sessions.

The Commission reports on its activities to the OAU Assembly of Heads of state and Government, which meets once a year and which has the authority to take decisions or other specific actions. Unlike the European and American systems, there is **no** Court of Human Rights in the African system.

The African Commission can:

- review the reports of states parties to the African Charter;
- consider communications alleging a violation of rights in the Charter from individuals or non-governmental organizations;
- consider and make recommendations on communications from a state party alleging that another state party has violated the African Charter; and
- interpret any provision of the Charter at the request of a state party, an OAU institution or an African organization recognized by the OAU.

After considering an individual communication (including determining whether it is admissible and taking into account any views submitted by the state concerned), the Commission will send its observations on the complaint to the OAU Assembly, which may allow these observations to be published. Also, where individual complaints appear to point to a series of serious or massive violations of human and peoples' rights, the African Commission must draw this to the attention of the OAU Assembly, which may then request the Commission to undertake an in-depth study and make a factual report, accompanied by its findings and recommendations.

In addition to these activities aimed at protecting human and peoples' rights, the African Commission also has a promotion function. It is empowered to collect documents, undertake studies, organize seminars, disseminate information, encourage national and local institutions, formulate and lay down principles and rules concerning legal problems relating to human and peoples' rights, and cooperate with other African and international human rights institutions.

B. THE AMERICAS

Major human rights instruments

The Organization of American states (OAS) of which almost all (thirty four) states of the Americas and Caribbean are members, has adopted numerous treaties and standards dealing with human rights, including the:

- **Charter of the Organization of American States (1948)**
- **American Declaration of the Rights and Duties of Man (1948)**
- **American Convention on Human Rights (1969) (also called the Pact of San José, Costa Rica)**
- **Inter-American Convention to Prevent and Punish Torture (1985); and**
- **Inter-American Convention on Enforced Disappearance of Persons (1994, not yet in force).**

Around twenty-five states are party to the American Convention on Human Rights. Since not all OAS Member States have ratified the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man is applied to those states by means of its incorporation into the OAS Charter.

The American Convention on Human Rights and the American Declaration include protection for many of the human rights set out in the International Bill of Human Rights, such as the right to life, freedom from torture, the right to liberty and security, the right to a fair trial, freedom of conscience, expression, assembly and association, freedom of movement, non-discrimination, political rights, and progressive realization of economic, social and cultural rights.

Both instruments recognize a right to seek and be granted asylum. In addition, the American Convention prohibits deportation of aliens under certain circumstances. Article 22(7) and 22(8) of the American Convention provide that:

“7. 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 offenses or related common crimes

8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions“

Article XXVII of the American Declaration provides 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“

In addition, the American Convention, in Article 27, expands the list of non-derogable human rights beyond the non-derogable rights listed in the International Covenant on Civil and Political Rights. Under the American Convention, non-derogable rights include rights of the family, the right to a nationality, children's rights, political rights and access to the courts.

It is also worth noting that Article 13(4) of the Inter-American Convention to Prevent and Punish Torture provides that:

“Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting state“

Mechanism for Monitoring Implementation

The Inter-American Commission on Human Rights began functioning in 1960. It is composed of seven members elected by the OAS General Assembly. They serve in their individual capacities, not as representatives of their governments. The Commission generally meets at least twice a year, in Washington, D.C., for two-week sessions.

The **Inter-American Court of Human Rights** was established in 1978, when the American Convention on Human Rights entered into force. It consists of seven judges elected by states parties to the American Convention. They serve in their individual capacities, not as representatives of their governments. The Court has its seat in San José, Costa Rica and meets in two regular sessions each year, each session lasting two weeks.

The Inter-American Commission can, under the American Convention:

- examine and report on the general situation of human rights in a country, and request the governments of OAS Member States to supply it with information on the measures adopted by them in matters of human rights (there is not a state reporting requirement under the American Convention);
- receive communications from any person, group of persons, or non-governmental organization alleging a violation of the American Convention; and
- receive communications from a state party alleging that another state party has violated the American Convention, if both state parties have recognized the competence of the Commission to hear inter-state complaints.

In the case of an individual or an inter-state communication, the Inter-American Commission determines its admissibility, requests information from the government concerned, and can carry out an investigation. The Commission attempts to help the parties concerned reach a settlement. If this is not successful, the Commission will convey its conclusions on the matter to the state concerned, and can refer the case to the Inter-American Court provided that the state concerned has accepted the competence of the Court. Only states parties and the Inter-American Commission, not individuals, have the right to submit a case to the Court.

In addition, the Inter-American Commission can, under the American Declaration as incorporated in the OAS Charter, receive an individual petition alleging a violation of any of the rights enumerated in the American Declaration by an OAS Member State which is not party to the American Convention. These petitions are handled in much the same way as communications under the American Convention, with the exception that these petitions cannot be referred to the Inter-American Court. Instead, the Commission concludes with a report, called a final decision, which provides a

conclusion and makes recommendations. The Commission may publish the decision if the state does not comply with these recommendations, and can report it to the General Assembly of the OAS.

The Commission also has a promotion function and can make recommendations and provide advice to governments.

The Inter-American Court of Human Rights, as indicated above, may hear cases referred to it by states parties to the American Convention or by the Inter-American Commission. Judgments of the Court in contentious cases are binding on the parties to the case. The Court may also be called upon to give advisory opinions regarding the interpretation of the American Convention or of other treaties concerning the protection of human rights in the Americas.

C. EUROPE

Major human rights instruments

The most important regional body concerned with human rights in Europe is the **Council of Europe** (CE), which has adopted a number of human rights instruments, including the:

- **European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (also called the European Convention on Human Rights), and its 11 Protocols;**
- **European Social Charter (1961); and**
- **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987).**

Over thirty countries are members of the Council of Europe, all of whom are party to the European Convention on Human Rights.

Unlike the standards found in the African and Inter-American systems, **none** of the European human rights instruments explicitly provides for a right to seek asylum. However, a number of provisions of the European Convention on Human Rights and its Protocols have been interpreted to be of benefit to refugees and asylum-seekers, the most notable of which is the European Convention's prohibition of torture (Art. 3). These provisions will be discussed in detail in the relevant chapters of Part II on Specific Protection Issues.

Mechanism for Monitoring Implementation

The European system has **three** implementing bodies: the European Commission on Human Rights, the European Court of Human Rights, and the Committee of Ministers. See below in this section for information on anticipated reforms in the implementation procedure.

The **European Commission on Human Rights** began functioning in 1955. It is composed of a number of members equal to the number of states parties to the European Convention, elected by the CE Committee of Ministers. They serve in their individual capacities, not as representatives of their governments.

The **European Court of Human Rights** was created in 1959. It consists of the same number of judges as the number of state parties of the Council of Europe, elected by the CE Parliamentary Assembly.

The **Committee of Ministers** is established by the Council of Europe, with one member from each Member State. It supervises the execution of decisions taken by the European Court, and can

decide whether a violation of the European Convention has taken place in a case which has not been referred to the European Court by the European Commission or a concerned state party.

There is no system of state reporting under the European Convention. In the case of a petition from a state, or from any person, group of persons or non-governmental organization claiming a violation of the European Convention, the European Commission first determines its admissibility, and only then proceeds to the merits. It can request information from the government concerned, and carry out an investigation. The Commission attempts to help the parties concerned reach a friendly settlement. If this is not successful, the Commission can refer the case to the European Court provided that the state concerned has accepted the competence of the Court. Only concerned states and the European Commission, not individuals, have the right to submit a case to the Court.

The European Court of Human Rights will examine the report of the European Commission, but is not bound by it, even on questions of fact. The Court's decision is final, and states parties agree to abide by it. The European Court may also give advisory opinions on legal questions concerning the interpretation of the European Convention and its Protocols.

Reform of the Mechanism Monitoring Implementation

When Protocol No. 11 to the European Convention on Human Rights enters into force, it will establish a streamlined system with a full-time Court. The Protocol will enter into force one year after all states parties to the Convention have ratified it. In the new system the European Court will deal directly with all cases, and the European Commission on Human Rights will cease to exist. The Committee of Ministers will no longer have jurisdiction in human rights matters, but will continue to supervise execution of the Court's judgments.

Organization for Security and Co-operation in Europe (OSCE)

In addition to the Council of Europe, another regional European body – the Conference on Security and Cooperation in Europe (CSCE) – which as of 1 January 1995 is called the Organization for Security and Co-Operation in Europe (OSCE) – has adopted numerous instruments dealing with human rights. The CSCE first met in Helsinki in 1973 as a forum for promoting dialogue and reducing tensions between NATO and Warsaw Pact Member States. The Helsinki Final Act, adopted in 1975, included human rights commitments. Following the dissolution of the Warsaw Pact and the Soviet Union, the CSCE has been expanding its role in the field of conflict resolution and developing new human rights standards in areas such as the protection of minorities.

There are over 50 Members of the OSCE, comprising all European states, except the Former Yugoslav Republic of Macedonia, which has observer status, all the newly independent states of the former Soviet Union, and the United States and Canada.

OSCE Member States have signed numerous instruments (usually in the form of “final acts“ or “declarations“ made at the conclusion of major meetings) containing detailed human rights commitments. The most important of these are the:

- Helsinki Final Act (1975)
- Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the CSCE (1989)
- Charter of Paris for a New Europe (1990)
- Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990)
- Document on the Moscow Meeting of the Conference on the Human Dimension of the

CSCE (1991)

- CSCE Helsinki Document 1992 (“The Challenges of Change”); and
- CSCE Budapest Document 1994 (“Towards a Genuine Partnership in a New Era”).

These documents contain guarantees covering such topics as the right not to be tortured or ill-treated, the right to a fair trial, independence of the judiciary, the rights of detainees, accountability of law enforcement personnel, civilian control of military forces, obligations of a government during a state of emergency, the right to non-discrimination, the rights to freedom of expression, assembly and association, and minority rights.

One of the most important CSCE commitments, first adopted at the Moscow meeting and reaffirmed in Helsinki in 1992, was that CSCE states recognize that their human rights commitments “[...] **are matters of direct and legitimate concern to all participating states and do not belong exclusively to the internal affairs of the state concerned**”.

The CSCE Helsinki Document 1992 included reference to refugee protection issues: CSCE states reaffirmed the importance of existing international standards for the protection of refugees and committed themselves to tackling the root cause of displacement.

Mechanism for Monitoring Implementation of Human Rights Standards within OSCE

OSCE human rights standards are political rather than legal commitments. A number of mechanisms have been established to try to ensure these commitments are met. They include the:

- “Vienna mechanism“: adopted in 1989, this allows governments in OSCE states to ask other CSCE governments for information and bilateral meetings on human rights issues;
- “Moscow mechanism“: adopted in 1991, this allows the OSCE to send expert missions to investigate human rights issues in a OSCE state, with or without the consent of that state;
- OSCE High Commissioner on National Minorities: established in 1992, this post was designed to be a security mechanism to prevent minority problems from developing into conflicts;
- OSCE Review Conferences: held once every two years, where all OSCE states meet to review how the OSCE is dealing with all areas of its concern, including human rights; and
- OSCE Human Dimension Implementation Meetings: held once every two years, alternating with the Review Conference, and involve all OSCE states in a process of examining compliance with OSCE human rights commitments.

For further information on human rights mechanisms in Europe and how UNHCR relates to those, see “UNHCR and its Partners in Europe”, a Briefing Handbook published by the Regional Bureau for Europe in 1995.

Self-Study Questions

1. What are two advantages of trying to secure protection of human rights at the regional level?



2. What is the unique feature of the African Charter's protection of the right of asylum?



3. *True or false?*

A. The human rights treaties and bodies established at the regional level in Africa, the Americas and Europe all provide for a right for individuals to submit complaints alleging a violation of treaty obligations.

True False

B. The African Court of Human Rights is developing an important role in the protection of human rights in Africa.

True False

C. Since the adoption of the American Convention on Human Rights ("Pact of San José"), the older American Declaration of the Rights and Duties of Man is of no further importance.

True False

D. When Protocol 11 to the European Convention on Human Rights and Fundamental Freedoms comes into force there will no longer be a European Commission on Human Rights, but just a one-tier system at the European Court of Human Rights.

True False

E. Participating states in the CSCE have expressly recognized that human rights issues in their own countries are legitimate matters of concern for other states.

True False

Answer Key

Chapter 1

1. Provide three examples which illustrates that "UNHCR is an operational human rights agency".

Answer

1. UNHCR undertakes activities aimed at ensuring that refugees are not subject to *refoulement* and thereby preventing risks of further human rights violations.
2. In determining refugee status, UNHCR is engaged in an examination of whether the basic human rights of an applicant or group of refugees have been violated.
3. UNHCR's activities in promoting voluntary repatriation and monitoring the situation of

returnees are directed at ensuring that arefugees upon return can enjoy their basic human rights.

2. Provide two reasons to support the statement that “Human rights law is non-political and non-partisan“.

Answer

Two reasons that support this statement are:

1. International human rights law treats all countries equally by imposing the same standards and obligations on each state regardless of the ideology of any particular government.
2. Many provisions of international human rights law have been universally accepted and/or specifically undertaken by states.

3. What two conditions must UNHCR respect in order to ensure that its use of human rights law is non-partisan?

Answer

UNHCR must ensure that its work is non-partisan by:

- being consistent in the rights it defends;
- defending those rights in all circumstances regardless of the politics of the refugee or the country concerned.

4. What arguments can you use against the statement that “Human rights law“ is not enforceable, and it’s a waste of time for UNHCR to rely on it?

Answer

Some of the arguments that you can use include:

- The difficulties pertaining to the enforcement of international human rights “law“ are not particular to the field of human rights, but are similar to the difficulties of enforcing most branches of international law, including international refugee law.
- Safeguarding human rights in countries of origin is an essential aspect for both the prevention of and solutions to refugee problems.
- Under the Charter of the United Nations, UNHCR, as a UN agency, has a duty to promote the purposes of the United Nations which includes the protection of human rights.

5. List four ways in which using international human rights law can assist UNHCR in protecting refugees.

Answer

1. Human rights law can reinforce existing refugee law. Some of the rights found in refugee law are also found in international human rights instruments and some of the standards

found in Excom Conclusions are also found in international human rights treaties.

2. Human rights law can supplement existing refugee law. International refugee law was not meant to address all the human rights of refugees. Issues such as arbitrary detention, lack of due process, cruel, inhuman or degrading treatment, while dealt with in several international human rights instruments are not included in the refugee instruments.
3. Many human rights provisions are universally applicable. Some of the standards within human rights law have attained the status of customary international law.
4. Human rights law has quasi-judicial implementing bodies. Many of the international human rights treaties establish supervisory mechanisms which can issue authoritative opinions on the scope and content of particular rights. Some of these mechanisms can even receive and decide upon individual complaints.

Chapter 2

1. The correct answers are:

- A) True,
- B) True,
- C) True,
- D) False,
- E) True,
- F) False,
- G) True,
- H) False,
- I) True

2. List three reasons why UNHCR staff should not feel that raising human rights issues is an interference with state sovereignty.

Answer

1. When a state has become a party to an international treaty for the protection of human rights, it has expressly agreed to be bound by the provisions of the treaty.
 2. Many of the declarations and resolutions dealing with human rights have been adopted by the UN General Assembly with the consensus of all states.
 3. In the Programme of Action adopted by consensus at the 1993 World Conference on Human Rights, it is stated that “the promotion and protection of all human rights is a legitimate concern of the international community“.
3. What arguments can you use against the statement that “Because the Universal Declaration of Human Rights is not a treaty, it is not that important a document“?

Answer

Some of the arguments that you can use to underline the importance of the Universal Declaration of Human Rights include:

- its purpose was to provide an authoritative understanding of the human rights guaranteed in the UN Charter;
- it has consistently been reaffirmed in resolutions of the General Assembly, and many national constitutions make reference to it or incorporate its provisions;
- it is the most well known UN catalogue of human rights, and it includes civil and political, as well as economic, social and cultural rights.

4. What are the main differences between a “mechanism” to protect human rights established by the Commission on Human Rights, and the “treaty bodies” set up by human rights treaties?

The main differences are that:

- treaty bodies can only deal with states parties to the treaty, but there is a legal obligation on such states to co-operate with the body;
- the mechanisms can deal with issues within their mandate in any UN Member State, but the legitimacy of their work is occasionally challenged by governments who do not accept their scrutiny.

5. List four UN “treaty bodies” dealing with human rights.

Answer, e.g.

1. Committee against Torture
2. Human Rights Committee
3. Committee on the Rights of the Child
4. Committee on the Elimination of Discrimination against Women.

6. List four of the “mechanisms” set up by the Commission on Human Rights to protect human rights.

Answer, e.g.

1. Special Rapporteur on Torture
2. Special Rapporteur on Violence against Women
3. Representative of the Secretary General on Internally Displaced persons
4. Working Group on Arbitrary Detention.

Chapter 3

1. The correct answers are:

- A) False,

- B) False,
- C) True,
- D) False

2. The correct phrases are:

- A) Refugees are strangers in the asylum country but nevertheless in general under international human rights law, they enjoy the same rights and freedoms as nationals.
- B) The prohibitions on slavery, extrajudicial killing, torture and genocide in international human rights law are part of customary international law, and are therefore binding on all states.
- C) A state may derogate from its human rights obligations only when there is a public emergency threatening the life of the nation, and certain other conditions are met.
- D) It is difficult for the UN to enforce international human rights law because this law regulates the conduct of states and it is those same states who developed the law and are responsible for its implementation.

3. List the three main methods used to control the implementation of international human rights treaties.

Answer

- a number of human rights treaties require that states parties submit periodic reports on measures taken to implement the rights protected in the treaty;
- some of the human rights treaties include provisions allowing for individuals to petition the Committee established by the treaty alleging a violation of the provisions of the treaty;
- several human rights treaties make provisions allowing for one or more states party to the treaty to bring a complaint against another state party alleging a violation of the provisions of the treaty.

4. Under what circumstances can the Security Council take action under Chapter VII of the UN Charter to enforce human rights?

Answer

The Security Council can take action under Chapter 7 in situations where the Council finds that there exists “a threat to the peace, breach of the peace, or act of aggression“.

5. What arguments would you use to support the statement that “in the event of a conflict between a human rights provision in a regional and a universal treaty, the provision which is most generous should prevail“?

Answer

If a state has undertaken two separate types of obligations concerning a particular human right, it can only fully live up to the commitments it has undertaken by following the provision that gives greater protection to the individual.

Chapter 4

1. What are two advantages of trying to secure protection of human rights at the regional level?

Answer

1. It may be easier for states to agree on detailed provisions because of a common approach to certain issues.
2. States might be more willing to grant effective investigation and adjudication powers to a regional body.

2. What is the unique feature of the African Charter's protection of the right to asylum?

Answer

For people fleeing persecution, it provides not only the right to seek asylum, but also the right to obtain it (Art. 12.3).

3. The correct answers are:

- A) True,
- B) False,
- C) False,
- D) True,
- E) True

Part II: Specific Issues

Introduction

➤ **What is the purpose of this module?**

In Part I of the Training Module on Human Rights and Refugee Protection we looked at the broad relationship between refugee protection and international human rights law, including human rights protection at the regional level. This second part is designed to assist UNHCR staff in making use of existing human rights instruments, standards and mechanisms when analysing and responding to a variety of common protection problems confronting asylum-seekers and refugees.

➤ **How can this module help you?**

In this part, we have selected eleven common protection issues which might be addressed using human rights arguments and procedures. When faced with a problem related to any of these, you will find information concerning what human rights arguments you may resort to in addition to those

already available under international refugee law.

If you are aware of and can talk knowledgeably about the human rights standards which supplement and support international refugee law, you will be more successful in protecting the human rights of asylum-seekers and refugees.

➤ **How is the module designed?**

Each chapter in this module follows the same format and is designed to “stand alone” as a resource manual for dealing with that issue. Each chapter has the following elements:

- a set of learning objectives outlining the most important points in the chapter;
- one or more “scenarios” which help you to visualize the type of practical problem faced by refugees and asylum-seekers;
- a discussion of the right in international refugee law;
- a discussion of the right in international human rights law (and often in regional instruments as well);
- a case study exercise and analysis to help you check what you have learned;
- an annex in which the relevant provisions of international and regional human rights instruments are set out for easy reference.

➤ **How is the module meant to be used?**

The module is designed primarily to be a practical reference tool to which protection officers in the field can turn when faced with a situation affecting the human rights of refugees or groups of refugees.

The module can also be used for self-study, this being a subject matter which is not necessarily familiar to most UNHCR protection officers. The case studies at the end of each chapter are particularly tailored to this end.

Last but not least, the module can and should be used in the context of training activities, particularly (but not exclusively) targeting UNHCR staff.

➤ **Remember!**

The module is meant to supply you with the first steps in the analysis of how international refugee law and international human rights law might help you to tackle the protection problems facing a refugee or asylum-seeker. Of course, human rights can also be protected by national mechanisms, and the module is also meant to help you recognize how you might be able to use those mechanisms.

- Universal and regional human rights standards find their expression in the constitutions and/or the domestic laws of most countries. Such laws often also provide for the national institutions necessary to ensure their effective implementation. Many countries have set up national human rights institutions in recent years. Think about whether any of these exist where you are and whether you can use them to help the refugee or asylum-seeker.
- National human rights NGOs can also influence governmental policies and decisions, either through official institutions or through advocacy and lobbying. Will they help in your case?

- On a broader scale, the most effective education and information campaigns are likely to be those which are designed and carried out at the national or local level and which take the local cultural and traditional context into account. Keep this in mind when thinking about how best to tackle your issue.

So, while this module focuses on international mechanisms, you should always also use it as your “jumping off point” to promote implementation of human rights standards at the national level.

➤ **Acknowledgements**

Our thanks are due to David Petrasek for his contribution to the elaboration of this module, and to all the UNHCR colleagues who offered their suggestions and commentary.

Chapter 1 - Assembly, Opinion and Expression, and Religion

In this chapter you will learn:

- how to identify when a refugee or asylum-seeker’s problem involves the exercise of his or her civil rights;
- how to recognize which civil rights are involved in a problem;
- what limitations are permissible in international law for the rights to:
 - freedom of assembly,
 - freedom of opinion and expression,
 - freedom of religion.

A. INTRODUCTION TO THE ISSUES

In carrying out protection work for refugees some UNHCR staff may have encountered different situations which involved the particular human rights issues discussed in this chapter. For the benefit of those who haven’t and – more generally – to help staff focus on the practical aspect of pertinent human rights principles and standards, the following scenarios may be a helpful illustration:

Scenario 1

A group of refugees hold a demonstration in front of UNHCR’s branch office in the capital city of the country of asylum, protesting a reduction in their assistance allotment as well as the length of time it is taking to find resettlement places for them. A few refugees also carry signs which complain that they are not allowed to work in the country of asylum. Although the demonstration is peaceful, some of the demonstrators prevent your colleagues from entering the building. As 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 the demonstrators.

Scenario 2

Following a radio broadcast in which a few refugees, along with a few citizens of the country of asylum, criticize the government of the refugees’ country of origin, the police arrest

everyone involved.

Scenario 3

Nearly all of the refugees in a camp are of a religion which differs 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.



Religious freedom, the freedom to hold and express opinions, and the freedom to organize and participate in public gatherings are some of the most fundamental civil rights. These rights are protected in the major international and regional human rights instruments.

Under international human rights law, all of these rights are guaranteed to both citizens and non-citizens.

The Human Rights Committee has explicitly stated that:

"[Aliens] have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association".

B. FREEDOM OF PEACEFUL ASSEMBLY

There is no provision in the 1951 convention regarding freedom of assembly, but this right is protected under international and regional human rights instruments.

➔ *See the Annex to this chapter.*

What is included in the right of peaceful assembly?

International and regional human rights law generally protect the right to meet and gather with others in a peaceful assembly.

The right to peaceful assembly is closely related to the rights regarding freedom of expression and freedom of religion. It is primarily intended to cover public "assembly", which one author has described as "an intentional, temporary gathering of several persons for a specific purpose".

The right only protects "peaceful" assembly. There exists no international jurisprudence setting out parameters determining what constitutes a "peaceful" assembly. If the purpose of assembling is to incite others to riot and violence, it can hardly be considered "peaceful", even if the assembly itself does not resort to violence. Obviously, where the purpose of assembly is for the participants to engage in rioting, violence or looting, it is not protected under human rights instruments.

What limitations on peaceful assembly are permitted?

Under international human rights law, the right of peaceful assembly may only be subject to such restrictions which are considered necessary in a democratic society.

This means that the limitations may be imposed only in accordance with certain principles that are fundamental to democratic life, in particular the principle that people have a right to gather and

express political views even if these are critical of the government.

Limitations are permitted if they are:

- in the interests of **national security**,
e.g., laws prohibiting or regulating demonstrations on a military base;
- in the interests of **public safety**,
e.g., refusal to allow a deliberately provocative march which is likely to lead to violence;
- in the interests of **public order** (*ordre public*),
e.g., laws requiring demonstrators to notify the police beforehand or to apply for a permit to hold the demonstration;
- to protect **public health or morals**,
e.g., laws prohibiting demonstrations at sacred or religious sites; or
- to protect the **rights and freedoms of others**,
e.g., prohibiting marches which are overtly racist.

Under the European Convention on Human Rights, restrictions (not prohibitions) may be placed on political activity by aliens. However, if the state concerned is also a party to the International Covenant on Civil and Political Rights – which does not allow for such restrictions – the more generous international provision prevails. A few European States made reservations when ratifying the Covenant on precisely this point, making it necessary to check the precise extent of the international obligations undertaken by the state in which you are working.

C. FREEDOM OF OPINION AND EXPRESSION

There is no provision in the 1951 Convention relating to freedom of opinion and expression. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa contains the following provision in Article III (2):

“Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by the use of arms, through the press, or by radio.”

Other provisions are found in international and regional human rights instruments.

➔ *See the Annex to this chapter.*

What is included in freedom of opinion and expression?

International and regional human rights law generally protect the following:

- freedom to **hold opinions** without interference; and
- freedom to **express opinions**, including freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, orally, in writing or through any other medium.

This right is expressed in broad terms and was meant to be as expansive as possible covering all kinds of opinions and expressions, however critical or unacceptable they might be. For a discussion on racist speech versus freedom of expression, see *Chapter 8*.

What limitations on freedom of opinion and expression are permitted?

The freedom to hold opinions is not subject to limitations.

The freedom to express opinions is subject to limitations in regional instruments and in Article 19 (3) of the International Covenant on Civil and Political Rights. In other words, the limitations affect only **public** freedom of **expression**, and not **private** freedom of **opinion**.

In addition, the *travaux préparatoires* of the International Covenant on Civil and Political Rights show that the limitations which do apply to freedom of expression should not justify pre-censorship by the authorities. In other words, people should be free to express themselves without first seeking approval. If it then turns out that their expression is not permitted for a reason falling in one of the grounds set out in Article 19(3), they might be liable to criminal or civil prosecution. This is significant as it places the burden on the authorities to punish expression which has gone beyond the limits, rather than on individuals to obtain permission before expressing themselves.

Limitations may be imposed only on the grounds of:

- respect for the **rights or reputation of others**,
e.g., laws on defamation, slander or racial discrimination;
- protection of **national security**,
e.g., laws protecting military secrets;
- protection of **public order** (*ordre public*),
e.g., laws which require licensing of newspapers or broadcasters, or limit the free expression of police officials, or restrict reporting on judicial proceedings, or prohibit incitement to violence or criminal acts;
- protection of **public health**,
e.g., laws restricting tobacco advertisements;
- protection of **public morals**,
e.g., laws restricting pornographic publications.

It is recalled that under the OAU Convention Governing Specific Aspects of Refugee Problems in Africa (Art. III (2)), states undertake to prohibit refugees from using the press or radio to attack an OAU Member State. If the state concerned is also a party to the African Charter on Human and Peoples' Rights or the International Covenant on Civil and Political Rights, the more generous standards under these instruments would take precedence.

As was the case with freedom of assembly, discussed above in this section, the European Convention on Human Rights permits restrictions (not prohibitions) to be placed on political activity by aliens. However, if the state concerned is also a party to the International Covenant on Civil and Political Rights, the more generous international provision prevails. A few European States made reservations when ratifying the Covenant on precisely this point, so it is necessary to check the precise extent of the international obligations undertaken by the state in which you are working.

D. FREEDOM OF RELIGION

The 1951 Convention guarantees to refugees equality of treatment with nationals as regards freedom of religion. Article 4 of the 1951 Convention provides that:

“The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their

religion and freedom as regards the religious education of their children“.

Freedom of religion is also guaranteed in international and regional human rights instruments.

➔ *See the Annex to this chapter.*

The 1951 Convention guarantees only equality of treatment with citizens. If national law restricted religious freedom for citizens then the 1951 Convention would not prohibit similar restrictions on refugees.

However, national law itself should be in line with a state's international obligations. The guarantees of freedom of religion in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and regional human rights instruments are clearly meant to ensure the greatest possible protection of religious freedom.

Furthermore, the 1969 Vienna Convention on the Law of Treaties, Article 30, supports the argument that when successive treaties relate to the same subject matter, the earlier treaty (the 1951 Convention) applies only to the extent that its provisions are compatible with those of the later treaty (any of the human rights treaties cited are later than the Convention).

What is included in freedom of religion?

International and regional human rights law generally protect the following:

- freedom to hold (or not to hold) a religion or belief;
- freedom to adopt a religion; and
- freedom, alone or with others, to manifest one's religion or belief through observance, worship, practice and teaching.

According to the Human Rights Committee:

“Article 18 [of the International Covenant on Civil and Political Rights] protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms religion and belief are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions“.

What limitations on freedom of religion are permitted?

Article 18 of the International Covenant on Civil and Political Rights is non-derogable, meaning states may not place any restrictions on the right to freedom of religion on account of a public emergency.

Furthermore, the limitations set out in Article 18(3) apply only to the freedom to **manifest** a religion or belief. They may **not be applied** to the freedom to **hold**, or to **adopt**, a religion or belief. The only limitations permitted on the freedom to manifest a religion or belief are set out in Article 18(3) of the International Covenant on Civil and Political Rights, and related provisions in regional instruments, on grounds of:

- public safety, order, health or morals; or

- the fundamental rights and freedom of others.

Unlike other rights (such as freedom of expression), there is no limitation on grounds of national security.

Refugees may have a different religion than the majority of the population in their host country, and might therefore be particularly vulnerable to measures which affect their religious freedom. The Human Rights Committee has pointed out that where there is a state religion, or a religion to which most people in the country belong, this should not impair the religious freedom of minority groups.

In addition, limitations on the grounds of protecting “public morals“ might be onerous for refugees if they belong to a minority religion. In this connection, the Human Rights Committee has said that:

“[...] the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition“.

Case Studies

Case Study 1

A group of refugees hold a demonstration in front of UNHCR’s branch office in the capital city of the country of asylum, protesting a reduction in their assistance allotment as well as the length of time it is taking to find resettlement places for them.

A few refugees also carry signs which complain that they are not allowed to work in the country of asylum.

Although the demonstration is peaceful, some of the demonstrators prevent your colleagues from entering the building. As 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 the demonstrators.

As protection officer, how would you argue in favour of obtaining the release of the refugees from jail?



What information would you need?



Case Study 2

Following a radio broadcast in which a few refugees, along with a few citizens of the country of asylum, criticize the government of the refugees’ country of origin, the police arrest everyone involved.

As protection officer, how would you argue in favour of releasing the refugees from jail?



What information would you need?



Case Study 3

Nearly all of the refugees in a camp are of a religion which differs 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.

As protection officer, how would you argue in favour of allowing the refugees to practice their religion?



What information would you need?



Analysis of Case Studies

Case Study 1

1. You can make use of the following arguments in support of a request to obtain the release of the refugees from jail:

- the protest was non-political and aimed primarily at UNHCR;
- the protest was peaceful;
- the refugees as well as the citizens of the country of asylum are entitled under international human rights law to freedom of peaceful assembly and freedom to express their opinions.

2. You would need to obtain the following information:

- provisions in national law on freedom of assembly and freedom of expression;
- overview of regional or international treaty obligations which the state has undertaken in the area of freedom of assembly and freedom of expression.

Case Study 2

1. What arguments you use to request the release of the refugees from jail will depend on the nature of the refugees' statements.

For example, statements such as "the government is pursuing a misguided policy which 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 OAU Convention on Human Rights. The second statement might well be prohibited, if provided for by law, as injurious to the reputation of another. The third statement, if true, should be protected as an expression of information.

2. You would need to obtain the following information:

- provisions in national law on freedom of expression;
- overview of regional or international treaty obligations which the state has undertaken in the area of freedom of expression.

Case Study 3

1. You could make use of the following arguments in favour of allowing the refugees the right to freely practice their religion:

- the right to freedom of religion is a fundamental human right recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and in several regional human rights treaties;
- the 1951 Convention on the Status of Refugees contains a specific provision requiring states to grant refugees the same freedom of religion as applicable for the nationals of the country of asylum;
- problems between the local population and refugees on account of different religious beliefs must be resolved at the local level through negotiations between elders and community leaders.

2. You would need to obtain the following information:

- provisions in national law on freedom of religion and regarding discrimination;
- overview of regional or international treaty obligations which the state has undertaken in the area of freedom of religion.

Annex - RELEVANT PROVISIONS OF INTERNATIONAL HUMAN RIGHTS LAW

1. FREEDOM OF PEACEFUL ASSEMBLY

UNIVERSAL DECLARATION OF HUMAN RIGHTS, ARTICLE 20:

"1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association".

International Covenant on Civil and Political Rights, Article 21:

"The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others".

Convention on the Rights of the Child, Article 15:

"1. State Parties recognize the rights of the child to freedom of association and to freedom

of peaceful assembly.

2. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others“.

African Charter on Human and Peoples’ Rights, Article 11:

“Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others“.

American Convention on Human Rights, Article 15:

“The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others“.

American Declaration of the Rights and Duties of Man, Article XXI:

“Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature“.

European Convention for the Protection of Human Rights, Article 11:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others [...]

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security and public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions of these rights by members of the armed forces, of the police or of the administration of the state“.

Note, however, that the European Convention on Human Rights in Article 16 provides that: *“Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens“.*

2. FREEDOM OF OPINION AND EXPRESSION

Universal Declaration of Human Rights, Article 19:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers“.

International Covenant on Civil and Political Rights, Article 19:

- “1. Everyone shall have the right to hold opinions without interference.*
- 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
- 3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be as are provided by law and are necessary:*
 - (a) For respect of the rights or reputation of others;*
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals“.*

Convention on the Rights of the Child, Article 13:

- “1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.*
- 2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
 - (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order (ordre public), or of public health or morals“.*

African Charter on Human and Peoples' Rights, Article 9:

- “1. Every individual shall have the right to receive information.*
- 2. Every individual shall have the right to express and disseminate his opinions within the law“.*

American Convention on Human Rights, Article 13:

- “1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.*
- 2. The exercise of the right [...] shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:*
 - (a) respect for the rights or reputations of others; or*
 - (b) the protection of rational security, public order, or public health or morals.*
- 3. The right of expression may not be restricted by indirect methods or means, such as the*

abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainment may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offenses punishable by law“.

American Declaration of the Rights and Duties of Man, Article IV:

“Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever“.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary“.

Note, however, that the European Convention for the Protection of Human Rights and Fundamental Freedoms in Article 16 provides that:

“Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens“.

3. FREEDOM OF RELIGION

Universal Declaration of Human Rights, Article 18:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance“.

International Covenant on Civil and Political Rights, Article 18:

“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others“.

Convention on the Rights of the Child, Article 14:

“1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others“.

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Article 1:

“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

3. Freedom to manifest one’s religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others“.

African Charter on Human and Peoples’ Rights, Article 8:

“Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms“.

American Convention on Human Rights, Article 12:

“1. Everyone has the right to freedom of conscience and of religion. This right includes the freedom to maintain or to change one’s religion or beliefs, and freedom to profess or disseminate one’s religion or beliefs, either individually or together with others, in public or

in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, morals, or the rights or freedoms of others.

4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions“.

American Declaration of the Rights and Duties of Man, Article III:

“Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private“.

European Convention on Human Rights, Article 9:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others“.

Chapter 2 - Children

In this chapter you will learn:

- which UNHCR policies, guidelines and resources are of particular importance to the human rights of refugee children;
- what international and regional human rights standards are applicable to refugee children;
- what the UN Committee on the Rights of the Child is and how it can help in the protection of refugee children.

A. INTRODUCTION TO THE ISSUES

In carrying out protection work for refugees some UNHCR staff may have encountered different situations which involved the particular human rights issues discussed in this chapter. For the benefit of those who haven't and – more generally – to help staff focus on the practical aspect of pertinent human rights principles and standards, the following scenarios may be a helpful illustration:

Scenario 1

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.

Scenario 2

A government wants to screen all the children evacuated from an orphanage for HIV in an emergency situation, with the intention of separating them into a separate area for fear of contamination of the other children.



The UNHCR Guidelines on Protection and Care of Refugee Children incorporates the relevant international human rights standards on a wide range of refugee children's issues and should always be the primary reference point for protection and assistance concerns relating to children. This chapter will therefore provide only a brief overview of international and regional human rights standards and will discuss how the work of the main international body monitoring children's rights, the Committee on the Rights of the Child, can contribute to protection of refugee children.

B. CHILDREN IN INTERNATIONAL REFUGEE LAW

It is widely acknowledged that refugee children require special care and assistance because of their vulnerability, their dependence on adults, and their developmental needs.

The 1951 Convention does not specifically refer to children, who are protected by its provisions in the same manner as adults. However, some of the rights guaranteed in the 1951 Convention are particularly important to children, such as the right to public elementary education.

1951 Convention, Article 22:

"The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education".

➔ *See chapter 4 below for a discussion of the right to education.*

In addition, the degree of respect for other rights in the 1951 Convention, inter alia, housing, public relief, and social security may for humanitarian reasons have a stronger impact on children than upon others in the refugee community.

In recent years, the Office has undertaken a number of initiatives designed to assist staff in protecting the rights of refugee children, including:

- establishing the positions of Senior Coordinator for Refugee Children and Legal Adviser (Refugee Women and Children);
- issuing the *UNHCR Policy on Refugee Children* (1993) and *Guidelines on Protection and Care of Refugee Children* (1994);
- submitting the issue of protecting and assisting refugee children to the Executive Committee, which led to the adoption of specific Conclusions Number 47/1987 (Refugee Children) and Number 59/1989 (Refugee Children) as well as inclusion of specific references to the

protection of refugee children in several other conclusions.

C. THE CONVENTION ON THE RIGHTS OF THE CHILD

The main international human rights instrument on the rights of refugee children is the 1989 Convention on the Rights of the Child which has been ratified by over 185 states within only a six-year period. This has been the fastest response by the international community to any human rights treaty.

The Convention on the Rights of the Child is an important protection tool for two reasons.

C.1 SCOPE OF THE CONVENTION

First, **all** of the rights set forth in the Convention on the Rights of the Child apply to **all** children – defined as those below the age of eighteen years – within a State Party, including children who are refugees, asylum-seekers, rejected asylum-seekers or undocumented. The Convention on the Rights of the Child is extremely comprehensive, and includes most of the substantive rights found in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as other rights. Chapter 2 of the *Guidelines on Protection and Care of Refugee Children* offers an overview of the rights of the child as instruments to protect refugee children and is referred to for further information. Some of the rights which are of particular importance to children of concern to the Office are:

- the right to be protected from discrimination (Article 2);
- the right to have his or her best interests taken into account in all actions which concern him or her (Article 3);
- the right to survival and development (Article 6);
- the right to have his or her birth registered, along with the right to acquire a nationality (Article 7);
- the rights of children and their parents to leave any country and to enter their own for purposes of family reunification (Article 10);
- the right to participate in judicial and administrative proceedings affecting the child; (Article 12);
- the right to special protection and assistance for children who are seeking refugee status or who are considered refugees (Article 22, see below); and
- the right to protection and care for children who are affected by armed conflict (Article 38).

Second, the Convention on the Rights of the Child has a specific provision dealing with children who are refugees or asylum-seekers.

Convention on the Rights of the Child, Article 22:

“1. 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.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. 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 present Convention“.

D. THE COMMITTEE ON THE RIGHTS OF THE CHILD

D.1 COMPOSITION AND COMPETENCE

The Committee on the Rights of the Child, made up of ten experts serving in their personal capacities, was established under the Convention on the Rights of the Child to monitor its implementation. States Parties must submit reports to the Committee on progress made in securing the rights of the child. There is no provision in the Convention for individual communications or for inter-state complaints.

D.2 COOPERATION WITH UNHCR and Work Procedures

The Office cooperates closely with the Committee on the Rights of the Child on matters affecting children under UNHCR protection by contributing views and information to the Committee's working group which conducts a preliminary examination of each State Report. After the Committee's working group has completed its preliminary review, it sends the state concerned a list of issues and questions which it wishes to raise with the state's representative during the formal consideration of the State Report.

The ensuing dialogue between the Committee and the State Party has often been of great value in drawing attention to protection issues relating to refugee children. Depending on the state and the refugee population, topics of concern to the Committee with regard to refugee children have generally been related to registration of births, access to education, discrimination between refugees from various countries of origin, procedures and arrangements for unaccompanied children, possibilities for family reunification, and detention.

The Committee then issues concluding observations on the State Report. These are public documents which can be referred to in discussions with the state concerned, and used to provide guidance to states in similar circumstances. The following excerpt of the Committee's concluding observations on a State Report deals with the situation of refugee children in that country.

“In order to ensure that all refugee children or children seeking refugee status enjoy their rights under the Convention, the Committee recommends that the [country of asylum] consider the possibility of ratifying the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

“The Committee acknowledges the willingness the State Party has shown for many years to accept refugees, particularly from neighbouring countries, and expresses the hope that the [...] Government will continue to grant refugee status to children – and their families – as such needs arise in the future, as well as ensuring at the same time a comprehensive system of registration.

“The Committee would like to suggest that the State Party consider the possibility of strengthening the role of the Ministry of Children and Family Affairs, in relation to refugee children [...] The Committee suggests that the State Party consider undertaking another comprehensive review of the policy in relation to children seeking asylum in the light of the principles and provisions of the Convention. In this connection, it is suggested that solutions should also be sought to avoid expulsion causing the separation of families. It also suggests that the State Party might wish to further discuss the provision of education and health services, including with respect to all children under its jurisdiction, in order to ensure that different standards of service do not arise between municipalities“.

The Committee on the Rights of the Child is an important forum for international scrutiny of states' respect for the human rights of refugee children.

Case Studies

Case Study 1

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 protection officer, what legal and practical arguments can you use to seek the authorities' cooperation in a program of birth registration?



Case Study 2

A government wants to screen all the children evacuated from an orphanage for HIV in an emergency situation, with the intention of separating them into a separate area for fear of contamination of the other children.

As protection officer, what would your position be and how would you react to this situation?



Using the Convention on the Rights of the Child, what articles could you use in your arguments to the government against it taking this action?



Analysis of Case Studies

Case Study 1

You can make use of the following arguments in order to seek the authorities' cooperation in a program of birth registration:

- the Convention on the Rights of the Child as well as several regional human rights instruments specifically require that all children, regardless of nationality or personal status, be registered immediately after birth;

- a program of birth registration will greatly facilitate the hoped-for eventual repatriation of the refugee community. Refugee children clearly require a document which establishes their name and nationality in order to enable them to leave the country of asylum;
- the registration at birth of refugee children does not automatically imply the accordance of citizenship of the country of asylum. This question is regulated by the citizenship law of the country.

You can also look at UNHCR's Guidelines on the Protection and Care of Refugee Children pp 103-107 for further advice.

Finally, you can look at any report that the state has submitted to the Committee on the Rights of the Child and whether this issue was included in the report or in the comments raised by the Committee.

Case Study 2

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:

- UNHCR's Policy and Guidelines on Refugees and AIDS (IOM/FOM 21/88-20/88 of 15/2/88) takes as its point of departure 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;
- the Guidelines also stress the importance of ensuring every individual's right to privacy and confidentiality regarding test results;
- the isolation of the children risks having the effect that the whole group will suffer from the stigmatization attached to testing sero-positive for HIV/AIDS.

Arguments should also be sought from the Convention on the Rights of the Child to which the state is most probably a party.

All the Articles and principles of the Convention on the Rights of the Child do, as explained above, 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 for the benefit of the child. See also *UNHCR's Guidelines on Protection and Care of Refugee Children* (especially chapters 5 and 7) for further advice.

However, in this specific case Article 16 will be useful in that it provides that children have the right to protection from interference with their privacy and from unlawful attacks on their honour or reputation. In addition, Article 12 of the Convention on the Rights of the Child provides that any child capable of forming his or her own opinions has the right to freely express these opinions and to have them taken into account in any matter or procedure affecting the child. The point to be made is that refugee children need to be consulted if they are involved in any health intervention, as well as their parent or those exercising guardian-ship responsibilities for those children.

Annex - REGIONAL HUMAN RIGHTS INSTRUMENTS

The 1990 African Charter on the Rights and Welfare of the Child is not yet in force (as of 1/6/96), having not yet been ratified by a sufficient number of states. Like the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child is a comprehensive collection of rights. Article XXIII of the African Charter deals with refugee and asylum-seeking children in language

very similar to that found in Article 22 of the Convention on the Rights of the Child (quoted above) and the Charter also includes a specific provision (Article XXIII(4)) dealing with internally displaced children:

“The provisions of this Article apply mutatis mutandis to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused”.

When the African Charter on the Rights and Welfare of the Child enters into force, upon its fifteenth ratification, an African Committee of Experts on the Rights and Welfare of the Child will be established. It will be empowered to receive state reports as well as communications from individuals, groups or non-governmental organizations recognized by the OAU, a Member State or from the United Nations.

Neither the Inter-American nor the European systems have specific instruments on the rights of the child which are relevant to children of concern to the Office.

Chapter 3 - Detention

In this chapter you will learn:

- what definition is to be applied to determine when someone is “detained”;
- where to find the rules relating to detention of refugees, including the permissible reasons for and conditions in which they may be detained;
- how to interpret the international and regional instruments which set the standards for detention of refugees.

A. INTRODUCTION TO THE ISSUES

In carrying out protection work for refugees some UNHCR staff may have encountered different situations which involved the particular human rights issues discussed in this chapter. For the benefit of those who haven't and – more generally – to help staff focus on the practical aspect of pertinent human rights principles and standards, the following scenario may be a helpful illustration:

Scenario

You are a protection officer in a country where all asylum-seekers are automatically detained if they arrive without valid travel documents and apply for asylum at the border. They are kept in detention throughout the refugee status determination period, and in some cases, have been detained for up to four years. The only asylum-seekers who are not detained are those who arrive with a visa and only later apply for asylum. This practice is supported by national law, and by statements of the authorities who maintain that it is a necessary border control measure, and that it serves as a deterrent to others who might try to arrive without a visa.

B. DETENTION OF REFUGEES AND INTERNATIONAL REFUGEE LAW

Neither the 1951 Convention nor its 1967 Protocol include provisions dealing explicitly with the detention of refugees and asylum-seekers. However, Article 31 of the 1951 Convention provides that:

“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 in the sense of Article 1, 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 [...]."

Article 31 is interpreted by UNHCR to mean that:

- in general, the detention of refugees should be avoided; and
- in any case, refugees should not be detained simply on account of their illegal entry or presence in a state.

Executive Committee Conclusion 44 on Detention of Refugees and Asylum-Seekers established further rules and set out the legitimate reasons for detaining refugees. It says that, if detention is deemed necessary, it may only be resorted to **on grounds prescribed by law:**

- to verify identity;
- to determine the elements on which the asylum claim is based;
- to deal with cases where refugees have destroyed their documents or used fraudulent documents; or
- to protect national security and public order.

In addition, Conclusion 44 also provides that:

- detention of refugees should be subject to judicial or administrative review;
- refugees should not be detained with common criminals; and
- detained refugees should be provided with the opportunity to contact the UNHCR or non-governmental organizations working with refugees.

For cases of detention involving children, refer also to *Guidelines on Protection and Care of Refugee Children*, Chapter 7, section IV.

With regard to detention of asylum-seekers, please also refer to the *UNHCR Guidelines on Detention of Asylum-Seekers*.

C. INTERNATIONAL AND REGIONAL HUMAN RIGHTS STANDARDS

There are several ways in which international and regional human rights standards can be of assistance in ensuring that the basic principles established by the 1951 Convention and the Executive Committee regarding refugee detention are met. Five different protection problems involving detention, and the corresponding standards which can be used to address them, are discussed in this chapter:

- Standards to ensure that detention is **subject to judicial control**;
- Standards to ensure that detained refugees can **communicate with UNHCR**;

- Standards to ensure that refugees are detained only for **legitimate reasons**;
- Standards to ensure that refugees are **not detained with common criminals**; and
- Standards to ensure that the **conditions of detention** do not amount to cruel, inhuman or degrading treatment.

C.1 STANDARDS TO ENSURE THAT DETENTION IS SUBJECT TO JUDICIAL CONTROL

There are two aspects to the judicial control of detention. The first aspect is that those detained must have the opportunity to **challenge the lawfulness** of their detention before a court, and, if it is unlawful, to be released. The second aspect is that the detention order itself must be under the **control of a judicial authority**.

(a) The right to challenge the lawfulness of detention

The right to petition a court to seek release from detention (often called habeas corpus or amparo) is a fundamental right common to many legal systems and is guaranteed in a number of international and regional human rights instruments.

➔ *See in particular Article 9 of the International Covenant on Civil and Political Rights and Article 37 of the Convention on the Rights of the Child in the Annex to this chapter.*

The right applies to all detained persons, **including** refugees and asylum-seekers.

The Human Rights Committee, in its General Comment 8 of 1982 said,

“Article 9 [of the International Covenant on Civil and Political Rights] which deals with the right to liberty and security of persons has often been somewhat narrowly understood in reports by States Parties [...] The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, [...] immigration control [...] in particular the important guarantees laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention”.

(b) The detention must be subject to judicial control

It is not sufficient that detained persons, including refugees and asylum-seekers, have the right to challenge the detention in court. In addition to this right which is exercised at the initiative of the detainee, the detention itself must **automatically** be subject to judicial control. The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides, in Principle 4, that:

“Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority”.

This Principle requires that involvement in the detention process by “a judicial or other authority” begins either before the arrest (it “shall be ordered by”) or at least immediately upon arrest (“under the effective control of”). The “judicial” control must continue throughout the detention with respect to all measures affecting the rights of the detainee. That the judicial oversight be automatic is confirmed in the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 11, which provides that:

“1. A person shall not be kept in detention without being given an effective opportunity to be

heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention“.

That the detention must either be ordered by a “judicial or other authority“, or that “promptly“ after detention the order to detain must be subject to confirmation by a “judicial or other authority“ and such an authority must keep the detention under review, is of crucial importance to refugees and asylum-seekers who are often detained simply by order of immigration or border officials upon arrival in the country. Regardless of the basis for the detention order under national law, international standards require “**prompt**“ recourse to a “**judicial or other authority**“.

What is “prompt“?

“Prompt“ is not defined in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. However, the Inter-national Covenant on Civil and Political Rights uses the same term in dealing with detention of criminals. In this regard, the Human Rights Committee has said that “*delays must not exceed a few days*“. This standard is important for detained refugees and asylum-seekers who often spend weeks in detention before a hearing on the detention order.

What is a “judicial or other authority“?

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment defines this phrase as “*a judicial or other authority under the law whose status and tenure shall afford the strongest possible guarantees of competence, impartiality and independence*“. This definition makes it clear that an “*other authority*“ must have the essential attributes of a judge. This is important for detained refugees and asylum-seekers who may only be allowed to appear before a senior immigration official, or other official linked to immigration control who may not be sufficiently impartial and independent.

What is the legal status of the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment?

The UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment is not a treaty, and so does not create binding legal obligations for states. However, the Principles were adopted by consensus by the General Assembly, after having been drafted over a period of several years with the participation of many states. The Principles are not simply advisory – they envisage concrete government measures being taken to implement the provisions. The Principles are also important because:

- they apply to all countries; and
- they apply at all times, since they do not include any provision allowing for derogation (such a provision was omitted from an earlier draft).

C.2 STANDARDS TO ENSURE THAT DETAINED REFUGEES CAN COMMUNICATE WITH UNHCR

Under human rights standards, detainees have the right to assistance of legal counsel. However, in addition to the right to counsel, detained refugees and asylum-seekers have an explicit right to communicate with UNHCR. **Principle 16** of the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment provides that:

“If a detained or imprisoned person is a foreigner, he shall also be informed of his right to communicate by appropriate means [...] with the representative of the competent international organization if he is a refugee or is otherwise under the protection of an intergovernmental organization“.

Although Principle 16 refers to “refugees“, it should cover asylum-seekers, too, since they might well be entitled to be recognized as refugees.

What does “communicate by appropriate means“ cover?

At a minimum, this right should ensure that refugees can **write to or telephone a UNHCR office**. The obligation to inform a refugee of this right should require that the address and telephone number of the UNHCR office be readily available in places where refugees are detained. “Communicate“ might also include a right **to be visited by UNHCR**, especially where UNHCR itself determines that this is the only effective means of exercising its function of international protection.

The same right for refugees to communicate with UNHCR is protected by Rule 38(2) of the UN Standard Minimum Rules for the Treatment of Prisoners, approved by the Economic and Social Council in 1957.

Finally, it follows from Article 37 (d) of the Convention on the Rights of the Child that detained refugee and asylum-seeking children must have access to “appropriate assistance“.

C.3 STANDARDS TO ENSURE THAT REFUGEES ARE DETAINED ONLY FOR LEGITIMATE REASONS

Judicial control of detention and access to UNHCR, as discussed above, are of fundamental importance to detained refugees and asylum-seekers. They should help to ensure that police and immigration officials who have the power to detain do not abuse that power and that people in need of protection are identified and not subject to *refoulement*.

However, even if UNHCR can communicate freely with detained refugees and asylum-seekers, and their rights regarding judicial control are respected, cases may arise where national law permits detention for reasons which UNHCR does not consider legitimate. For example, national law may allow for the detention of refugees due to their illegal entry and a court might permit the continuance of the detention despite Article 31 of the 1951 Convention or Executive Committee Conclusion 44. In such circumstances, it may be possible to argue that under international human rights standards the detention is “**arbitrary**“.

What is “arbitrary detention“?

Detention may be “arbitrary“ under international human rights law even if it is in conformity with national laws – for example if a person is detained for exercising a right protected by international law (such as freedom of expression).

The **Working Group on Arbitrary Detention**, a group of five independent experts established by the Commission on Human Rights, has determined that “arbitrary detention“ might arise in cases “of

deprivation of freedom when the facts giving rise to the prosecution or conviction concern the exercise of the rights and freedoms protected by Articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and Articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights [...].

Article 14 of the Universal Declaration on Human Rights, included in the above list, guarantees the right to seek and enjoy in other countries asylum from persecution. If detention in the asylum country results from exercising this right, such detention might be “arbitrary”.

The following is an excerpt of a communication from the Working Group on Arbitrary Detention on a situation involving detention of asylum-seekers:

“I wish to transmit to your Government allegations made with regard to the situation of asylum seekers in your country, which would appear to fall within the mandate of the Working Group [...] The Working Group would appreciate receiving a response from your Government in respect of the allegations made, both of fact and the applicable legislation, and information on the scope and progress of any investigation conducted in this regard [...].

The following allegations were made to the Working Group on Arbitrary Detention regarding the situation of asylum seekers [...]. It is reported that the asylum seekers are being held in conditions similar to those of other detainees. Families are routinely separated. Asylum seekers are said to be treated as illegal immigrants [...]. Some of the asylum seekers have already been imprisoned for several months without being charged with any offence, except illegal entry to the country (for which indefinite detention seems a disproportionate punishment).

It is alleged that in the above-mentioned situation, as described, several provisions contained in the international legal instruments which are taken into account by the Working Group on Arbitrary Detention in order to assess the arbitrary character of situations of arrest or detention, have not been respected. This applies in particular to Articles 1, 2, 7 and 9 of the Universal Declaration of Human Rights and Article 9 of the Inter-national Covenant on Civil and Political Rights to which [...] is a Party”.

C.4 STANDARDS TO ENSURE THAT REFUGEES ARE NOT DETAINED WITH COMMON CRIMINALS

There is no explicit protection in international human rights instruments regarding the need to separate detained refugees and asylum-seekers from convicted criminals.

However, in situations where detained refugees and asylum-seekers have not been convicted of any offence they should benefit from the rule that persons who are not convicted shall be detained separately from convicted persons. This rule is set out in the International Covenant on Civil and Political Rights, Article 10(2)(a); in the American Convention on Human Rights, Article 5(4); and in the UN Standard Minimum Rules for the Treatment of Prisoners, Rule 8 (c).

➔ See the Annex for full text of these provisions.

Even if detained refugees and asylum-seekers have been convicted of violating immigration laws, Rule 8 of the UN Standard Minimum Rules for the Treatment of Prisoners also provides that:

“Persons imprisoned for debt and other civil prisoners shall be kept separate from persons

imprisoned by reason of a criminal offence“.

C.5 STANDARDS TO ENSURE THAT CONDITIONS OF DETENTION DO NOT AMOUNT TO CRUEL, INHUMAN OR DEGRADING TREATMENT

The otherwise lawful detention of refugees and asylum-seekers may violate international human rights standards in situations where the conditions of detention amount to cruel, inhuman or degrading treatment or punishment, which is prohibited by a large number of international human rights instruments.

➔ *See in particular Article 16 of the Convention against Torture, Article 7 of the International Covenant on Civil and Political Rights and Article 37 of the Convention on the Rights of the Child in the Annex to this chapter.*

When are the conditions of detention of refugees and asylum-seekers “cruel, inhuman or degrading“?

There is no precise definition of ill-treatment in international human rights instruments. Depending on the particular case, any or all of the following may amount to ill-treatment:

- solitary confinement;
- prolonged detention without charge;
- incommunicado (or garde à vue) detention;
- denying contact with family or friends; or
- other circumstances such as overcrowding, inadequate food, inadequate medical attention, lack of hygiene or lack of opportunity to exercise.

Detailed rules regarding the conditions of detention and treatment of detainees and prisoners are set out in the UN Standard Minimum Rules for the Treatment of Prisoners. These rules cover such issues as accommodation, personal hygiene, clothing and bedding, food, exercise and sport, medical services, discipline and punishment, contact with the outside world, religious practice, education, etc. Treatment which violates these rules may, depending on the particular case, amount to ill-treatment – especially in cases where several of the Standard Minimum Rules are not being respected.

Case Study

Case Study

You are a protection officer in a country where all asylum-seekers are automatically detained if they arrive without valid travel documents and apply for asylum at the border.

They are kept in detention throughout the refugee status determination period, and in some cases, have been detained for up to four years.

The only asylum-seekers who are not detained are those who arrive with a visa, and only later apply for asylum. This practice is supported by national law, and by statements of the authorities who maintain that it is a necessary border control

measure, and that it serves as a deterrent to others who might try to arrive without a visa.

What additional information would you need?



How would you argue in favour of changing the law to reflect UNHCR's concerns on the detention of refugees and asylum-seekers?



Analysis of Case Study

Case Study

1. You can use the following arguments in favour of changing the law:

- the 1951 Convention on the Status of Refugees provides in Article 31 that Contracting States shall not impose penalties on refugees on account of their illegal entry or presence;
- the Executive Committee of UNHCR's Programme has in its Conclusion 44 on Detention of Refugees and Asylum-Seekers recommended that detention "normally be avoided" and when resorted to, be limited to certain specific situations prescribed by law;
- the International Covenant on Civil and Political Rights and the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment set out a range of standards regarding detention applicable to the situation of asylum-seekers and refugees. Among these standards are the requirement 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.

2. You would need to obtain the following information:

- the basis in national law for the detention of refugees and asylum-seekers;
- the standards in national law for the judicial control of detention and for the condition and treatment of detainees, including access for detained asylum-seekers and refugees to communicate with UNHCR;
- overview of regional or international treaty obligations which the state has undertaken concerning condition of detention.

Annex - RELEVANT PROVISIONS OF INTERNATIONAL HUMAN RIGHTS LAW

Universal Declaration of Human Rights, Article 5:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

International Covenant on Civil and Political Rights:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation“. (Article 7)

“Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law“. (Article 9(1))

“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful“. (Article 9(4))

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person“. (Article 10(1))

“(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (Article 10(2)(a))

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication“. (Article 10(2)(b))

Convention against Torture, Article 16:

“1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion“.

Convention on the Rights of the Child, Article 37:

“State Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated

from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action“.

UN Standard Minimum Rules for the Treatment of Prisoners, Rule 8:

“The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,

(a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate;

(b) Untried prisoners shall be kept separate from convicted prisoners;

(c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence;

(d) Young prisoners shall be kept separate from adults“.

African Charter on Human and Peoples' Rights:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment, shall be prohibited“. (Article 5)

“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained“. (Article 6)

“Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights [...]“. (Article 7 (1))

American Convention on Human Rights:

“No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person“. (Article 5(2))

“Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons“. (Article 5(4))

“Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in

accordance with their status as minors“: (Article 5(5))

“1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies“. (Article 7)

American Declaration on the Rights and Duties of Man, Article XXV:

“No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law [...]. Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court [...]. He also has the right to humane treatment during the time he is in custody [...]“.

Inter-American Convention to Prevent and Punish Torture, Article 7:

“The States Parties shall take measures so that, in the training of police officers and other public officials responsible for the custody of persons temporarily or definitively deprived of their freedom, special emphasis shall be put on the prohibition of the use of torture in interrogation, detention, or arrest.

The States Parties likewise shall take similar measures to prevent other cruel, inhuman, or degrading treatment or punishment“.

European Convention for the Protection of Human Rights and Fundamental Freedoms:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment“.
(Article 3)

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
[...]

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry

into the country or of a person against whom action is being taken with a view to deportation or extradition.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation". (Article 5)

Chapter 4 - Education

In this chapter you will learn:

- where to find the international and regional standards guaranteeing the right to education;
- how to determine whether refugees are being discriminated against in education, and what arguments to use against such discrimination;
- why and how to argue that refugees should have access not only to elementary but also to higher education;
- what the content of refugee education should include.

A. INTRODUCTION TO THE ISSUES

In carrying out protection work for refugees some UNHCR staff may have encountered different situations which involved the particular human rights issues discussed in this chapter. For the benefit of those who haven't and – more generally – to help staff focus on the practical aspect of pertinent human rights principles and standards, the following scenario may be a helpful illustration:

Scenario

A state which 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 them 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.

B. THE RIGHT TO EDUCATION IN INTERNATIONAL REFUGEE LAW

In view of the critical importance of ensuring that children have at least a basic education, refugee law as well as human rights law makes a distinction favouring elementary education. The 1951 Convention therefore guarantees to refugees equality of treatment with nationals as regards elementary education.

1951 Convention, Article 22:

"1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

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

➔ See *UNHCR’s Refugee Children: Guidelines on Protection and Care, Chapter 9*, for more information on education.

C. THE RIGHT TO EDUCATION IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS LAW

The right to education is also guaranteed in international and regional human rights law, **see the Annex**. It is, however, one of the group of economic, social and cultural rights. Unlike civil and political rights, such as the right to freedom of religion, which can be implemented by a state immediately, the implementation of economic, social and cultural rights may require resources that not all states have.

States may therefore implement such rights “progressively,” but must make the effort to do so. Under the International Covenant on Economic, Social and Cultural Rights, Article 2, states commit themselves to progressive achievement of the rights in the Covenant, individually and through international assistance and cooperation, to the maximum of their available resources. Under the same Article, states also commit themselves to guaranteeing the rights in the Covenant without discrimination of any kind. This means that states should be constantly improving their provision of the right to education, and that refugees and asylum seekers should benefit as well as nationals of the state concerned.

All rights in the Convention on the Rights of the Child apply to all children within the jurisdiction of the State Party. The Committee on the Rights of the Child, in reviewing state reports under the Convention, has emphasized the importance of the right to primary education, and has noted the need to provide such education to asylum-seekers and refugees.

➔ See *above in Chapter 2 on Children*, for more information on the Convention and the Committee on the Rights of the Child.

The UNESCO Convention against Discrimination in Education, Article 1, prohibits discrimination based on “*race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth*” which impairs equality of treatment in education, in particular by:

- depriving any person or group of persons of access to education of any type or at any level;
- limiting any person or group of persons to education of an inferior standard; and
- inflicting on any person or group of persons conditions which are incompatible with the dignity of man.

Under the UNESCO Convention against Discrimination in Education, Article 4, states are to formulate, develop and apply a national policy to make:

- primary education free and compulsory;
- secondary education in its different forms generally available and accessible to all; and
- higher education equally accessible to all on the basis of individual capacity.

The UNESCO World Plan of Action on Education for Human Rights and Democracy was adopted in Montreal in 1993. It emphasizes education for human rights and democracy in specific contexts,

and includes refugees and internally displaced persons as one category of persons in a difficult situation whose rights are endangered and who need appropriate information and education.

C.1 DIFFERENCE BETWEEN THE 1951 CONVENTION AND HUMAN RIGHTS LAW

The 1951 Convention guarantees equality of treatment with nationals only with respect to elementary, not to higher, education. However, the human rights instruments cited above – The Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights, the UNESCO Convention against Discrimination in Education, and others – support the argument that asylum-seekers and refugees should not be discriminated against in any type of education.

Furthermore, the 1969 Vienna Convention on the Law of Treaties, Article 30, can be used to argue that when successive treaties relate to the same subject matter, the earlier treaty (the 1951 Convention) applies only to the extent that its provisions are compatible with those of the later treaty (any of the human rights treaties cited are later than the Convention).

In addition, there are other categories of persons who may not be discriminated against in education. Some refugees also fall into one or more of these groups and should benefit from the protection accorded to them in human rights law.

→ *See the Annex to this chapter, part 2.*

C.2 EDUCATION ABOUT HUMAN RIGHTS

International and regional human rights law also provides certain guidance on the content of the education which people should receive, with a particular emphasis on education about human rights. This is important for refugees, not only to know their rights in a country of asylum, but also to help build the foundation for a durable solution by providing them with the information to protect their own rights and to respect the rights of others when they return to their home country.

It should also be noted that the General Assembly proclaimed a United Nations Decade for Human Rights Education beginning in January 1995.

Case Study

Case Study

A state which 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 them 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 protection officer, how would you argue on behalf of the second group of children?



What action can you take with respect to promoting the refugee children's right to education?



What additional information would you need?



Analysis of Case Study

Case Study

1. You can use the following arguments on behalf of the second group of children:

- under the Convention on the Rights of the Child, states have undertaken to make primary education compulsory and available free to all and make higher education accessible to all on the basis of capacity by every appropriate means;
- under the Convention of the Rights of the Child states have also undertaken to ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind and irrespective of the child's personal or legal status in the country.

2. You can take the following actions in order to promote the refugee children's right to education:

- promote accession to the 1951 Convention on the Status of Refugees as it contains provisions guaranteeing access to education for refugee children;
- encourage assistance from international and bilateral education programmes in case the exclusion of certain refugee children from education is due to lack of necessary resources;
- make use of the recommendations on education for refugee children set out in the UNHCR Guidelines for the Protection and Care of Refugee Children;
- seek cooperation with the government body charged with overlooking education and welfare of children and assist the body in preparing the country report to the Committee on the Rights of the Child.

3. You would need to obtain the following information:

- overview of national law and practice regarding education for nationals as well as for foreign residents;
- overview of regional and international treaty obligations undertaken by the state in the field of education;
- copy of the state's report to the Committee on the Rights of the Child and of the Committee's comments to the report;
- details on how many refugee children – broken down by nationality – are affected by the government policy.

1. THE RIGHT TO EDUCATION

Universal Declaration on Human Rights, Article 26:

“1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit [...]”

International Covenant on Economic, Social and Cultural Rights, Article 13:

“1. The States Parties to the present Covenant recognize the right of everyone to education [...]

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education [...]”

Convention on the Rights of the Child, Article 28:

“1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates [...].

3. States Parties shall promote and encourage inter-national cooperation in matters relating to education [...]. In this regard, particular account shall be taken of the needs of developing countries”

African Charter on Human and Peoples' Rights, Article 17(1):

"Every individual shall have the right to education".

African Charter on the Rights and Welfare of the Child, Article XI:

"1. Every child shall have the right to education [...]"

3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:

(a) provide free and compulsory basic education;

(b) encourage the development of secondary education in its different forms and progressively make it free and accessible to all;

(c) make higher education accessible to all on the basis of capacity and ability by every appropriate means;

(d) take measures to encourage regular attendance at schools and the reduction of the drop-out rate;

(e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community [...]"

American Declaration of the Rights and Duties of Man, Article XII:

"Every person has the right to an education [...]. The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide. Every person has the right to receive, free, at least a primary education".

European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 1, Article 2:

"No person shall be denied the right to education [...]"

2. ELIMINATION OF DISCRIMINATION

Convention on the Elimination of All Forms of Discrimination against Women, Article 10:

"States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure [...]:

(a) The same conditions for [...] access to studies and for the achievement of diplomas in educational establishments of all categories [...];

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes [...];

(f) *The reduction of female student drop-out rates [...]*“.

International Convention on the Elimination of All Forms of Racial Discrimination, Article 5:

“[...] States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

[...]

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

[...]

(v) The right to education and training“.

African Charter on the Rights and Welfare of the Child, Article XI:

“3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:

[...]

(e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

[...]

6. States Parties to the present Charter shall take all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability“.

3. EDUCATION ON HUMAN RIGHTS

Universal Declaration of Human Rights, Article 26:

“2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children“.

Convention on the Rights of the Child, Article 29:

“1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child’s personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the

principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country where the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment [...]“.

International Covenant on Economic, Social and Cultural Rights, Article 13:

“1. The States Parties [...] agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace“.

International Covenant on Civil and Political Rights, Article 18:

“4. The States Parties to the present Covenant under-take to have respect for the liberty of parents, and when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions“.

UNESCO Convention against Discrimination in Education, Article 5:

“1. The States Parties to this Convention agree that:

(a) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace“.

Convention on the Elimination of All Forms of Discrimination against Women, Article 10:

“States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure [...]:

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education [...] in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

(h) Access to specific educational information to help ensure the health and well-being of families, including information and advice on family planning“.

African Charter on the Rights and Welfare of the Child, Article XI:

“2. The education of the child shall be directed to:

(a) the promotion and development of the child’s personality, talents and mental and physical abilities to their fullest potential;

(b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples’ rights and international human rights declarations and conventions;

(c) the preservation and strengthening of positive African morals, traditional values and cultures;

(d) the preparation of the child for a responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups;

(e) the preservation of national independence and territorial integrity;

(f) the promotion and achievement of African unity and solidarity;

(g) the development of respect for the environment and natural resources;

(h) the promotion of the child’s understanding of primary health care [...].

4. States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for children schools, [...] to ensure the religious and moral education of the child in a manner consistent with the evolving capacities of the child“.

American Convention on Human Rights, Article 12:

“4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions“.

American Declaration of the Rights and Duties of Man, Article XII:

“Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity.

Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living and to be a useful member of society“.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 1, Article 2:

“In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions“.

Chapter 5 - Fair Hearing

In this chapter you will learn:

- what are the essential elements of a fair refugee determination hearing;
- where to find the rules and standards which should apply to refugee determination hearings;
- which arguments are likely to be most successful in trying to obtain a fair hearing, depending upon the circumstances of the asylum-seeker.

A. INTRODUCTION TO THE ISSUES

In carrying out protection work for refugees some UNHCR staff may have encountered different situations which involved the particular human rights issues discussed in this chapter. For the benefit of those who haven't and – more generally – to help staff focus on the practical aspect of pertinent human rights principles and standards, the following scenario may be a helpful illustration:

Scenario

A state has enacted a new law establishing new 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 claim 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 a possibility of filing 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.

B. FAIR PROCEDURES FOR ASYLUM-SEEKERS UNDER INTERNATIONAL REFUGEE LAW

The 1951 Convention does not provide any specific guidance as to the procedures to be applied by states when undertaking refugee status determination. According to the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, paragraph 189:

"[...] It is obvious that, to enable States parties to the Convention and to the Protocol to implement their provisions, refugees have to be identified. Such identification, i.e. the determination of refugee status, although mentioned in the 1951 Convention (cf. Article 9), is not specifically regulated. In particular, the Convention does not indicate what type of procedures are to be adopted for the determination of refugee status. It is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure".

However, the *Handbook* makes reference to Executive Committee Conclusion 8, indicating the basic requirements which procedures should satisfy, including the requirements that:

- competent officials who deal with matters pertaining to immigration and border control should have clear instructions for dealing with asylum-seekers, respect the principle of *non-refoulement* and should refer them to a higher authority with particular competence for determining refugee status;
- asylum-seekers should receive guidance as to the procedures to be followed;

- asylum requests should be examined by a single central authority;
- asylum-seekers should be given the necessary facilities, including the services of a competent interpreter, for submitting their case, and be informed of and given an opportunity to contact UNHCR;
- those whose cases are rejected should be allowed reasonable time to appeal for reconsideration of the decision; and
- asylum-seekers should be permitted to remain in the country while their cases are being considered.

The Executive Committee adopted in 1983 Conclusion No. 30 on Manifestly Unfounded Claims, which underlines the need for appropriate procedural guarantees in refugee status determination by stressing the importance of observing basic safeguards also when dealing with claims that may appear to be manifestly unfounded. The Executive Committee recommended that:

- the applicant be given a complete personal interview, whenever possible, by an official of the authority competent to determine refugee status;
- an unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or removal from the territory.

As this conclusion deals with a particular category of claims, those presumed to be without any foundation, it must follow that higher standards of procedural guarantees must apply to ordinary applications for asylum.

C. INTERNATIONAL HUMAN RIGHTS STANDARDS AND FAIR ASYLUM PROCEDURES

International human rights law does not deal directly with standards for asylum procedures but the standards for procedures dealing with the expulsion of non-nationals in Article 13 of the International Covenant on Civil and Political Rights are of relevance:

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purposes before, the competent authority or a person or persons especially designated by the competent authority”.

At present, there is a debate about whether Article 13 of the Covenant grants rights of procedural fairness to all asylum-seekers. The rights set out in Article 13 apply to aliens “lawfully” in the country. The Human Rights Committee, which monitors implementation of the International Covenant on Civil and Political Rights, has said in commenting on this requirement that:

“The particular rights of Article 13 only protect those aliens who are lawfully in the territory of a State Party. This means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by [Article 13’s] provisions”.

Some asylum-seekers will be “lawfully” admitted to a country; for example, as visitors, on work permits, or as temporary residents. If they entered in accordance with national law, and they subsequently seek asylum in the country, then the procedures to examine the claim should meet

the requirements of Article 13.

However, many asylum-seekers might not, under national law, be admitted “lawfully” into a country because they have improper or insufficient documents. Others might enter “lawfully” but then overstay their visas.

Nevertheless, there are **several reasons** for arguing that Article 13 should apply.

First, while their entry or stay might be unlawful under national law, the right to seek asylum is protected under international law in Article 14 of the Universal Declaration of Human Rights. In addition, Article 31 of the 1951 Convention prohibits penalizing refugees who enter or stay illegally in a country *“provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”*.

Second, if an asylum-seeker is entitled to recognition as a refugee then national law should, in accordance with the 1951 Convention, provide protection against expulsion in which case their presence or stay would become “lawful”. The Human Rights Committee has said that:

“However, if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with Article 13”.

Third, Article 2 of the International Covenant on Civil and Political Rights guarantees to all persons whose rights, as recognized in the Covenant, have been violated an “effective remedy”. A person claiming such a remedy *“shall have his right thereto determined by competent judicial, administrative or legislative authorities”*. The Human Rights Committee has stated that the protection against torture in Article 7 of the International Covenant on Civil and Political Rights includes protection against being returned to a country where a person is at risk of torture. Therefore, persons at such risk have the right to an “effective remedy”, which implies that the rights recognized in Article 13 of the Covenant should apply.

Fourth, when it examines the periodic reports of States Parties, the Human Rights Committee has often asked states’ representatives questions based on Article 13 about the procedures followed in examining asylum claims.

 **Note!**

The rights guaranteed in Article 13 of the International Covenant on Civil and Political Rights only apply to hearings leading to expulsion or deportation. In some countries, asylum and deportation procedures are separated, that is, a refusal to grant refugee status may not lead to deportation, and the asylum-seeker might, after being refused refugee status, be allowed to use a separate procedure to challenge the deportation. In such cases, Article 13 of the Covenant would most likely not apply to the asylum procedure. However, if the asylum and deportation procedures are combined, or if a refusal to grant refugee status in an individual case leads to a virtually automatic deportation order, then Article 13 of the Covenant should apply.

What procedural rights are protected by Article 13?

According to the Human Rights Committee, it follows from Article 13 of the International Covenant on Civil and Political Rights that:

“[...] an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one”.

Article 13 of the Covenant should offer the following procedural rights to asylum-seekers:

First, the decision must be *“reached in accordance with law”*, which means that in making a decision leading to the deportation of an asylum-seeker, a State Party must follow the substantive and procedural requirements of its national law. For asylum-seekers this should also mean that the refugee definition in Article 1 of the 1951 Convention and the protection against *refoulement* in

Article 33 of the 1951 Convention form part of that law.

Second, a person about to be deported must “*be allowed to submit the reasons against his expulsion*“, which should mean that asylum-seekers are given sufficient time to prepare these reasons, and that these reasons are presented in a hearing (preferably an oral hearing).

Third, a person about to be deported has the right to “*have his case reviewed by [...] the competent authority or a person or persons especially designated by the competent authority*“. For asylum-seekers this should mean that:

- they have the right to a review of the decision;
- those making the decision on their case should be members of, or under the direct authority of, a “competent authority“, which for asylum-seekers should mean a single central authority; and
- they should be allowed to remain in the country pending a review of the decision.

Fourth, persons challenging a deportation order have the right to “*be represented for the purpose before*“ the competent authority. For asylum-seekers this should mean that they have the right to choose their own legal counsel to assist them in seeking a review of the deportation decision.

 **Note!**

The procedural rights offered by Article 13 of the International Covenant on Civil and Political Rights may be suspended **only** in cases where there are “*compelling reasons of national security*“, which covers only serious political or military threats to the entire nation.

D. REGIONAL HUMAN RIGHTS STANDARDS AND FAIR ASYLUM PROCEDURES

There are several provisions in regional instruments that deal with the right to fair procedures, primarily in connection with criminal but also in expulsion procedures, the latter being of particular relevance to asylum-seekers and refugees.

There is substantial jurisprudence on Article 6 (**see text in Annex**) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the broad principles governing its interpretation and its applicability in both the civil and criminal spheres are now largely established, although not yet specifically in the case of asylum-seekers or refugees’ right to a fair trial.

However, the fact that a person might be expelled to a country where he or she would face the risk of not having access to a fair hearing could constitute a breach of Article 6 of the European Convention. In *Soering v. United Kingdom*, judgment of 7 July 1989, Publications of European Court of Human Rights, Series A, Vol. 161; Human Rights Law Journal Vol. 11, No. 3-4, ‘990, the European Court did not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive risked suffering a flagrant denial of a fair trial in the country requesting extradition. However, the facts of the case did not disclose such a risk, and accordingly the Court did not decide the issue under Article 6.

There is no jurisprudence specifically concerning refugees and asylum-seekers under Article 13 of the European Convention on Human Rights (**see text in Annex**) which deals with the right for persons whose rights and freedoms under the Convention have been violated, to have an “effective remedy“. The European Court of Human Rights has found a violation of Article 13, in connection with Article 14 (non-discrimination) in a case where the state discriminated in immigration benefits on the basis of gender and where the rule could not be challenged. *Abdulaziz, Cabales and Balkandali v. United Kingdom*, judgment of 28 June 1985, Publications of European Court of Human Rights, Series A, No. 94.

The European Court did not find a violation of Article 13. However, where a national court would have

jurisdiction to quash a challenged decision to extradite an accused person to a country where it was established that there was a serious risk of inhuman or degrading treatment, it concluded that an effective remedy was available under national law in the form of an application for judicial review.

Case Study

A state has enacted a new law establishing new 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 claim 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 a possibility of filing 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.

What additional information would you need?



As protection officer, how would you analyse the fairness of this procedure under international standards?



Analysis of Case Study

Case Study

1. You would analyse the fairness of the procedure by examining it up against the procedural standards set out in the International Covenant on Civil and Political Rights and in the Conclusions of the Executive Committee of the UNHCR Programme, in particular Conclusion Numbers 8 and 30.

The following points should be looked at:

Does the asylum-seeker receive necessary 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 through 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?

2. You would need to obtain the following information:

- examine the national legislation setting out the status determination procedure and look also at whether the constitution or other legislation provides a basis for the right to a “fair hearing“;
- overview of regional and international treaty obligations undertaken by the state which deals with rights and obligations in administrative procedures.

Annex - RELEVANT PROVISIONS OF INTERNATIONAL HUMAN RIGHTS LAW

International Covenant on Civil and Political Rights, Article 13:

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purposes before, the competent authority or a person or persons especially designated by the competent authority“.

African Charter on Human and Peoples’ Rights:

“Every individual shall have the right to have his cause heard. This comprises:

(a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; [...]

(c) the right to defence, including the right to be defended by counsel of his choice;

(d) the right to be tried within reasonable time by an impartial court or tribunal“. (Article 7(1))

“A non-national legally admitted in a territory of a State party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law“. (Article 12(4))

American Convention on Human Rights:

“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature“. (Article 8(1))

“An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law“. (Article 22(6))

“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 offenses or related common crimes“. (Article 22(7))

“In no case may an alien be deported or returned to a country, regardless of whether it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions“. (Article 22(8))

American Declaration on Human Rights:

“Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights“.

(Article XVIII)

“Every person accused of an offense has the right to be [...] tried in courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment“. (Article XXVI)

“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“. (Article XXVII)

European Convention for the Protection of Human Rights and Fundamental Freedoms:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...]“. (Article 6(1))

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity“. (Article 13)

Chapter 6 - Family Life

In this chapter you will learn:

- what special provisions there are in international refugee law and international and regional human rights law to protect family life, and why;
- how to argue for family reunification when a refugee family has been separated;
- what strategies might be effective in pursuing family reunification as a policy.

A. INTRODUCTION TO THE ISSUES

In carrying out protection work for refugees some UNHCR staff may have encountered different situations which involved the particular human rights issues discussed in this chapter. For the

benefit of those who haven't and – more generally – to help staff focus on the practical aspect of pertinent human rights principles and standards, the following scenario may be a helpful illustration:

Scenario

The country you are dealing with allows in principle reunification for nuclear family members for recognized refugees, and a law is currently being drafted to that aim. Rejection of an application for family reunification cannot, however, be appealed according to the new law. A refugee, mother of 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, and you know that in this specific case rapid action is needed for the family members who remain in their country where there is danger to their lives. You also wish to have a more speedy procedure in future cases.

B. THE RIGHT TO FAMILY LIFE AND INTERNATIONAL REFUGEE LAW

The only provision in the 1951 Convention specifically dealing with the situation of the family to a refugee is in Article 12(2):

“Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State [...]”.

Although the 1951 Convention does not specifically address the principles of family unity and protection of the family, the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons that adopted the text of (what was to become) the 1951 Convention recommended in **chapter IV Part B** that:

“Governments [...] take the necessary measures for the protection of the refugee’s family, especially with a view to:

- 1. Ensuring that the unity of the refugee’s family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.*
- 2. The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption”.*

In addition, Executive Committee Conclusion Number 24 (XXXI) (1981) on Family Reunification states that:

“1. In application of the principle of the unity of the family and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated refugee families.

2. For this purpose it is desirable that countries of asylum and countries of origin support the efforts of the High Commissioner to ensure that the reunification of separated refugee families takes place with the least possible delay. [...]

4. Given the recognized right of everyone to leave any country including his own, countries of origin should facilitate family reunification by granting exit permission to family members of refugees to enable them to join the refugee abroad.

5. It is hoped that countries of asylum will apply liberal criteria in identifying those family

members who can be admitted with a view to promoting a comprehensive reunification of the family [...].

C. THE RIGHT TO FAMILY LIFE UNDER INTERNATIONAL HUMAN RIGHTS LAW

The right to family life is affirmed by several international human rights law instruments, starting with the Universal Declaration of Human Rights:

Article 12:

“No one shall be subjected to arbitrary interference with his privacy, family, home [...] Everyone has the right to the protection of the law against such interference [...].”

Article 16:

“1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”

From these legal provisions, which you will find **below in the Annex** to this chapter, it can be inferred that protection of the family includes:

- civil and political rights;
- economic, social and cultural rights;
- the principle of non-discrimination against women; and
- the principle of the best interests of the child.

C.1 PROTECTION OF THE FAMILY IS ABOUT CIVIL AND POLITICAL RIGHTS, INCLUDING THE FAMILY’S UNITY OR REUNIFICATION

The Human Rights Committee, in its General Comment 16 from 1988, specified the scope of protection against unlawful interference with one’s privacy, family or home, guaranteed in Article 17 of the International Covenant on Civil and Political Rights (**see text below in Annex**). It commented that such protection is not only from the state, but that the state is also responsible to protect the family against interference by private entities. It should also be noted that the term “unlawful” means that no act interfering with family life may take place unless it is based upon law. An act which is provided for by law can still be “arbitrary”, and any interference should be reasonable in the particular circumstances.

The same Committee also had an opportunity to comment on the provision in Article 23 of International Covenant on Civil and Political Rights (**see text below in Annex**) that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the state” (...). It stated that:

“the possibility to live together implies the adoption of appropriate measures, both at the internal level and, as the case may be, in cooperation with other states, to ensure the unity

or reunification of families, particularly when their members are separated for political, economic or similar reasons“. (**Comment 19 of 1990**)

With respect to both Articles 17 and 23, the Human Rights Committee has stated that the word “family“ requires a broad interpretation in the sense of respective cultural understandings of various State Parties.

In addition, it should also be noted that the Human Rights Committee in its General Comment 15 of 1986 (The position of aliens under the Covenant) stated that:

“[...] in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise“.

The right to family life guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (**see text below in Annex**) has given rise to some interesting jurisprudence with regard to family unity and reunification.

Cases brought before the European Court of Human Rights have established that expelling an alien from a state where he or she has close relatives may, depending on the circumstances, infringe upon the right to family life under Article 8.

The European Court found a violation of Article 8 where an alien father was not granted a residence permit entitling him to live in a State Party to the European Convention where he had a young daughter, born to his divorced wife, who had the nationality of the State Party *Berrehab case*, European Court of Human Rights, Judgment of 21 June 1988, Series A, Vol. 138, 1988).

However, the European Court has held that Article 8 does not include a general obligation for a State Party to respect a married couple’s choice of matrimonial residence or to accept non-national spouses for settlement (*Abdulaziz, Cabales and Balkandali case*, Judgment of 28 May 1985, Series A, Vol. 94, 1985).

The European Commission’s case law shows that refusing an alien entry is not an interference with family life under Article 8 if there is no legal or other obstacle to the spouse or family taking up residence in another country and having a family life there. The Commission has stated (Application No. 5301/71, CD43, p. 82 (84)) that:

“where a couple is refused residence in a country of which one of them is a national, there is no violation of Article 8 simply because they can find some legal residence elsewhere. If the only legal residence which they find is in a country unconnected with either of them, the exclusion from residence in the ‘home’ country of one of them might constitute a violation of Article 8“.

C.2 PROTECTION OF THE FAMILY ALSO INCLUDES ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The International Covenant on Economic, Social and Cultural Rights stipulates in its Articles 10 and 11 (**see text in Annex below**) that the family should receive the widest possible protection and assistance and that steps should be taken to improve living conditions for the family.

C.3 PROTECTION OF THE FAMILY INCLUDES THE PRINCIPLE OF NON- DISCRIMINATION AGAINST WOMEN

The Convention on the Elimination of Discrimination against Women stipulates in Article 16(1) that State Parties should take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.

C.4 PROTECTION OF THE FAMILY INCLUDES THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD

A number of the provisions of the Convention on the Rights of the Child deal with the child's relationship to his or her family, and have particular relevance for refugee families. They relate to:

- Registration of birth and nationality (Article 7)
- Preservation of identity, including family and nationality (Article 8)
- Separation from parents (Article 9)
- Family reunification (Article 10(1))
- No arbitrary interference with the family (Article 16)
- Protection from abuse and neglect (Article 19)
- Protection of the child without a family (Article 20)
- Adoption (Article 21)

The Committee on the Rights of the Child in reviewing state reports under the Convention on the Rights of the Child has paid particular attention to preserving family unity in asylum procedures. In its concluding observations on the report of one state, the Committee expressed its concern that the police had not received instructions to delay the expulsion of some members of a family in order to ensure that the whole family remained together and to avoid undue strain on the children.

The Committee then recommended that:

“the State Party consider undertaking another comprehensive review of the policy in relation to children seeking asylum in light of the principles and provisions of the Convention. In this connection, it is suggested that solutions should also be sought to avoid expulsions causing the separation of families [...]”.

Case Study

The country you are dealing with allows in principle reunification for nuclear family members, and a law is currently being drafted to that aim.

Rejection of an application for family reunification cannot, however, be appealed according to the new law.

A refugee, mother of 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, and you know that in this specific case rapid action is needed for the family members who remain in their country where there is danger to their lives.

You also wish to have a more speedy procedure in future cases.

How do you argue with the authorities in order to deal with the present case?



How could you promote the right to family reunification for future cases?



Analysis of Case Study

Case Study

1. You can make use of the following arguments in your discussions with the authorities on the specific case:

- the Final Act of the Conference that adopted the text of (what was to become) the 1951 Convention recommended that governments take necessary measures to ensure the protection of the families of refugees especially through family reunification;
- the Executive Committee has recommended in its Conclusion Number 24 that every effort be made to ensure the reunification of separated refugee families;
- the family members still remaining in the country of origin are apparently themselves in a precarious situation and may very well qualify as refugees in their own right;
- the Convention on the Rights of the Child provides in Article 10 that states shall deal with requests for family reunification with children in a “positive, humane and expeditious manner“.

2. You can undertake the following activities to promote the right to family reunification for future cases:

- take active part in the discussions on the proposal for a new legislation on family reunification with a view to promote the standards set out in regional and international human rights instruments, notably in the Convention on the Rights of the Child and in Executive Committee Conclusions;
- promote the involvement of child-care specialists in the discussions on the elaboration of the law;
- promote the adoption of fair and efficient procedures for considering requests for family reunification which allow the authorities the flexibility to make quick decisions and which grant the refugees a right of appeal against any negative decision.

Annex - RELEVANT PROVISIONS OF INTERNATIONAL HUMAN RIGHTS LAW

Universal Declaration of Human Rights:

“No one shall be subjected to arbitrary interference with his privacy, family, home [...] Everyone has the right to the protection of the law against such interference [...]. (Article

12)

“1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state“. (Article 16)

International Covenant on Civil and Political Rights:

“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home [...].

2. Everyone has the right to protection of the law against such interference [...]“. (Article 17)

“1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children“. (Article 23)

International Covenant on Economic, Social and Cultural Rights:

“The State Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions [...]“. (Article 10)

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the

essential importance of international co-operation based on free consent“. (Article 11(1))

The Convention on the Elimination of All Forms of Discrimination against Women

“States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations [...]“. (Article 16(1))

Convention on the Rights of the Child:

“1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless“. (Article 7)

“1. 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.

2. 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 re-establishing speedily his or her identity‘. (Article 8)

“1. States Parties shall ensure that a child shall not be separated from his or her parents against their will [...]

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation [...] of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child [...]“. (Article 9)

“In accordance with the obligation of States Parties under Article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family“. (Article 10(1))

“1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home [...].

2. The child has the right to the protection of the law against such interference [...]“. (Article 16)

“1. States Parties shall take all appropriate [...] measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the

establishment of social programmes to provide necessary support for the child and for those who have the care of the child [...]. (Article 19)

“1. A child temporarily or permanently deprived of his or her family environment, [...] shall be entitled to special protection and assistance provided by the state.

3. [...] When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background“. (Article 20)

“States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary“. (Article 21)

African Charter on Human and Peoples’ Rights, Article 18:

“1. The family shall be the natural unit and basis of society. It shall be protected by the state which shall take care of its physical and moral health.

2. The state shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

3. The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions.

4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs“.

American Convention on Human Rights:

“2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home [...]

3. Everyone has the right to protection of the law against such interference [...]“. (Article 11)

“1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, in so far as such conditions do not affect the principle of nondiscrimination established in this Convention.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the

necessary protection of children solely on the basis of their own best interests.

5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock“. (Article 17)

American Declaration of the Rights and Duties of Man:

“Every person has the right to the protection of the law against abusive attacks upon [...] his private and family life“. (Article V)

“Every person has the right to establish a family, the basic element of society, and to receive protection therefore“. (Article VI)

“Every person has the right to the inviolability of his home“. (Article IX)

European Convention for the Protection of Human Rights and Fundamental Freedoms:

“Everyone has the right to respect for his private and family life, his home [...]“. (Article 8 (1))

“Men and women of marriageable age have the right to marry and to found a family [...]“. (Article 12)

Chapter 7 - Freedom of Movement

In this chapter you will learn:

- why the right to freedom of movement, including most importantly the right to leave, the right to remain and the right to return, is often essential for refugees and asylum-seekers;
- what restrictions on refugees’ freedom of movement are permissible, and in what circumstances;
- what arguments can be used to ensure the right to freedom of movement for refugees and asylum-seekers.

A. INTRODUCTION TO THE ISSUES

In carrying out protection work for refugees some UNHCR staff may have encountered different situations which involved the particular human rights issues discussed in this chapter. For the benefit of those who haven’t and – more generally – to help staff focus on the practical aspect of pertinent human rights principles and standards, the following scenario may be a helpful illustration:

Scenario

Refugees and asylum seekers have no right to choose their place of residence in the country concerned.

Forced movement has been done despite UNHCR intervention, under conditions that provoked the repatriation of 500 refugees, who otherwise may not have decided

to repatriate.

While recognizing the right of the government to relocate the refugees for reasons of public interest, the relocation and subsequent repatriation in the middle of winter entailed additional serious consequences.



Freedom of movement in a refugee context has traditionally been understood mainly to concern the right freely to move within the country of asylum, and to choose one's place of residence. However, issues pertaining to freedom of movement are present in all phases of the refugee movement from the forced uprooting through flight, asylum and eventually return.

In her statement to the 49th session (1993) of the Commission on Human Rights the High Commissioner for Refugees noted the complexity and scope of freedom of movement:

"In speaking of "the right to remain", I mean to under-line the need to protect the basic right of the individual not to be forced into exile and to emphasize an aspect of human rights that deserves further development in connection with our efforts to address the causes of refugee flight. The right to remain is implicit in the right to leave one's own country. It is inherent in Article 9 of the Universal Declaration of Human Rights that no one shall be subjected to arbitrary exile".

B. FREEDOM OF MOVEMENT IN INTERNATIONAL REFUGEE LAW

Article 26 of the 1951 Convention states that:

"Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances".

Article 31 of the 1951 Convention states that:

"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 in the sense of Article 1, 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. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country".

C. FREEDOM OF MOVEMENT IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

Freedom of movement under international human rights law includes the following situations:

- Right to move within the border of a state and to choose one's place of residence;
- Right to leave one's country;
- Right to remain in one's country;
- Right to return voluntarily;
- Right not to be expelled without a decision in accordance with the law.

C.1 RIGHT TO MOVE WITHIN THE BORDERS OF A STATE AND TO CHOOSE ONE'S PLACE OF RESIDENCE

The simplest form of freedom of movement is the ability to move within the borders of a state freely. This right was recognized in the Universal Declaration on Human Rights in Article 13(1) which provides that:

"Everyone has the right to freedom of movement and residence within the border of each state".

The right to freedom of movement was codified in Article 12(1) of the International Covenant on Civil and Political Rights:

"Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence".

Article 12(1) refers to all persons "lawfully" within the territory, meaning the right is granted only to those lawfully in the state. Accordingly, for aliens lawfully in the territory the same protection is ensured as for nationals of the state concerned. What is "lawful" is for the national laws to establish. Difference in treatment between aliens and foreigners, or between different groups of foreigners, can only be permitted in accordance with the limitations in Article 12(3), which provides that:

"The above mentioned rights shall not be subject to any restriction except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant".

The limitations in Article 12(3) make it difficult, at a first glance, to argue for arrangements that allow for all persons to move freely within the territory of a state.

"Any restriction ... provided by law" is to be understood *stricto sensu*, i.e. there should be a national law to restrict the provisions in Article 12(1) and/or 12(2). Limitations based on national security would normally refer to a situation where a danger threatens the whole nation, but public order is somewhat wider in application, as it not only concerns order, but also public safety and prevention of crime as the French wording *ordre public* suggests.

Furthermore, many states have also made reservations upon ratification of the Covenants. It is useful, therefore, to keep track of such declarations and encourage states to withdraw such reservations.

It should be noted that, the general rule as stated by the Human Rights Committee, is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. The International Covenant on Civil and Political Rights includes no right of asylum, or a right of entry into the territory of a State Party. Nor does it recognize the right of aliens to reside in the territory of a State Party. The Committee on Human Rights stated, however, in its General Comment

concerning “*The position of aliens under the Covenant*” 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”.

C.2 THE RIGHT TO LEAVE AND REMAIN IN ONE’S COUNTRY, INCLUDING THE RIGHT TO RETURN VOLUNTARILY

The international community has provided protection for the right of everyone to leave any country, including his or her own, and to return to his country. The first instrument to recognize this right was the Universal Declaration of Human Rights, which provides in Article 13 (2) that:

“Everyone has the right to leave any country, including his own, and to return to his country”.

This idea was codified in Article 5 d(ii) of the Convention on the Elimination of All Forms of Racial Discrimination and in Article 12(2) and 12(4) of the International Covenant on Civil and Political Rights. **(See texts in Annex below).**

It is interesting to note that the right not to be arbitrarily deprived of the right to enter his/her country in Article 12(1) of the International Covenant on Civil and Political Rights is ensured de facto without limitations, although freedom of movement is not a non-derogable right. Because nationals according to Article 12(4) always have the right to enter their territory, they are always “legally” within their territory. This means that Article 12(1) really is applicable only to aliens.

As concerns any limitation imposed by states under these provisions, the Human Rights Committee stated in its General Comment on the position of aliens under the Covenant that states may impose general conditions upon aliens in transit, but it also noted that:

“once aliens are allowed to enter the territory of a State Party they are entitled to the right set out in the Covenant”.

Aliens, which includes asylum-seekers and refugees, thus have the right to liberty of movement and free choice of residence, and they are free to leave the country under the rights guaranteed by the International Covenant on Civil and Political Rights. On this issue the Human Rights Committee went on to state that:

“[o]nce an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave that territory may only be restricted in accordance with Article 12(3). Differences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified under Article 12(3). Since such restriction must, inter alia, be consistent with the other rights recognized in the Covenant, a State Party cannot, by restraining an alien or deporting him to a third country, arbitrarily prevent his return to his own country”.

The Human Rights Committee, in dealing with individual petitions, has not had many opportunities to address alleged violations of the right of freedom of movement within a state as provided for in Article 12(1), although it has had a number of cases under Article 12(2), concerning the right to leave any country, including one's own.

There have been a series of so called “*passport cases*”, in which the Committee has found a violation of that Article because the state has failed to issue passports. In some cases limited movement during a period of internal banishment has also been a violation of the Covenant. The Committee has also stated that proceedings that are unduly delayed may not result in restrictions upon the right to leave one's country.

In 1981 the Human Rights Committee pronounced its views in an individual petition on expulsion in connection to non-discrimination. The decision showed that an expulsion although “*in accordance*

with law“ may violate the human rights of a person if he or she is disadvantaged through the decision about expulsion, and thereby disadvantaged in comparison to another person, who under similar circumstances, is not expelled. Although the Committee in this case agreed it would be justified for the state to restrict the access of aliens and to expel them for security reasons, it noted that *“the legislation which only subjects foreign spouses of [the state’s] women to those restrictions, but no foreign spouses of [the state’s] men, is discriminatory with respect to [the state’s] women and cannot be justified by security requirements“*.

Children are also protected with a special kind of freedom of movement through Article 10 of the Convention on the Rights of the Child. According to Article 9(1) the child is not to be separated from his or her parents.

To this end, Article 10(1) provides that:

“[...] applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner“.

According to Article 10(2), the child has a right to visit parents that live in different countries:

“[...] 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“.

C.3 THE RIGHT NOT TO BE EXPELLED WITHOUT A DECISION IN ACCORDANCE WITH THE LAW

With regard to Article 13 of the International Covenant on Civil and Political Rights, which states that expulsion may take place only with a decision in accordance with law, the Human Rights Committee stated in its comment on the position of aliens under the Covenant that the purpose of this Article *“is clearly to prevent arbitrary expulsions“*. It also said that Article 13 regulates only the procedure and not the substantive grounds for expulsion.

In contrast to the regional instruments, the International Covenant on Civil and Political Rights contains neither an express prohibition of the state expelling its own nationals, nor an absolute prohibition of collective expulsion of aliens. The following provisions, however, can be found in the regional human rights instruments.

The African Charter on Human and People’s Rights prohibits mass expulsion in Article 12(5):

“The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups“.

The American Convention on Human Rights has an equally short provision stating, in Article 22(9), that *“[T]he collective expulsion of aliens is prohibited“*. Article 22(5) prohibits the expulsion of nationals by stating:

“No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it“.

Article 4 of Protocol 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that *“Collective expulsion of aliens is prohibited“*. In practice, this means that states must conduct individual examinations of asylum claims.

Article 3(1) prohibits expulsion in more general terms as follows:

“No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the state of which he is a national.”

Article 4 of Protocol 4 does not prohibit the expulsion of a group of individuals, provided the expulsion orders are based on individual determination each weighed on its own merits. The mere fact that the expulsion orders are identical does not mean the cases have not been individually examined.

The European Commission for Human Rights, in a case dealing with forcible repatriation of several persons to state A from state B (Application No. 7011/75, YB 19, p. 416), defined collective expulsion as *“any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group”*.

Case Study

Refugees and asylum seekers have no right to choose their place of residence in the country concerned. Forced movement has been done despite UNHCR intervention, under conditions that provoked the repatriation of 500 refugees, who otherwise may not have decided to repatriate.

While recognizing the right of the government to relocate the refugees for reasons of public interest, the relocation and subsequent repatriation in the middle of winter entailed additional serious consequences.

What arguments can you use to request the authority to bring an end to the forced movement of refugees?



Analysis of Case Study

You can make use of the following arguments to request that the authorities stop the forced movements of refugees:

- the 1951 Convention provides in Article 26 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;
- the 1951 Convention provides in Article 31 that only those restrictions which are necessary shall be applied to refugees who entered or are present in the country illegally;
- the right to freedom of movement is enshrined in several international human rights instruments, notably in Article 13 of the Universal Declaration on Human Rights and in Article 12 of the International Covenant on Civil and Political Rights;
- any restrictions to freedom of movement should be provided by law;
- a particular concern that the forced relocation is directly compromising the right of asylum itself and raises an issue of respect for the principles governing voluntary repatriation and *non-refoulement*.

Annex - RELEVANT PROVISIONS OF INTERNATIONAL HUMAN RIGHTS LAW

Universal Declaration on Human Rights, Article 13:

- (1) Everyone has the right to freedom of movement and residence within the border of each state.*
- (2) Everyone has the right to leave any country, including his own, and to return to his country.*

International Covenant on Civil and Political Rights, Article 12:

- “1. Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
- 2. Everyone shall be free to leave any country, including his own.*
- 3. The above-mentioned rights shall not be subject to any restriction except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*
- 4. No one shall be arbitrarily deprived of the right to enter his own country“.*

Convention on the Elimination of All Forms of Racial Discrimination, Article 5:

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

[...]

(d) Other civil rights, in particular:

- (i) The right to freedom of movement and residence within the border of the state;*
- (ii) The right to leave any country, including one’s own, and to return to one’s country [...].*

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

“States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile“.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 4, Article 2:

- “1. Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
- 2. Everyone shall be free to leave any country, including his own.*

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with the law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of "ordre public", for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society".

American Convention on Human Rights, Article 22:

"1. Every person lawfully in the territory of a State Party has the right to move about in it and to reside in it subject to the provisions of the law.

2. Every person has the right to leave any country freely, including his own.

3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.

4. The exercise of the right recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.

5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.

6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law".

African Charter on Human and People's Rights, Article 12:

"1. Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law.

2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions.

4. A non-national legally admitted in a territory of a State party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law [...]"

Chapter 8 - Racial Discrimination

In this chapter you will learn:

- why and how racial discrimination often affects refugees;
- which types of discrimination are included under the heading of "racial discrimination" in

international human rights law;

- what refugee and human rights standards and instruments exist that prohibit such discrimination;
- which arguments are likely to be effective against racial discrimination.

A. INTRODUCTION TO THE ISSUES

In carrying out protection work for refugees some UNHCR staff may have encountered different situations which involved the particular human rights issues discussed in this chapter. For the benefit of those who haven't and – more generally – to help staff focus on the practical aspect of pertinent human rights principles and standards, the following scenario may be a helpful illustration:

Scenario

A state has introduced a new law to deal with an increase in asylum-seekers. Under the new law, asylum-seekers will be divided into three categories.

Group A: Those from certain states (there is an "A" list) will not be allowed to file claims for asylum.

Group B: Those from certain other states (there is a second, "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 lists will have their claims heard in the regular status determination procedure.



There is no doubt that protection against racial discrimination is increasingly of fundamental importance to refugees and asylum-seekers. As the High Commissioner for Refugees noted in her statement to the United Nations Commission on Human Rights in February 1994:

"Refugees and asylum seekers remain in a particularly vulnerable situation even after they enter a country of refuge. That vulnerability is compounded when they are members of ethnic, racial, religious, cultural or political groups who are already at odds with the authorities or the local community [...]. I am deeply disturbed by attacks on refugees and asylum seekers and incidents of xenophobia and racism, which appear to be increasing. If we do not show courage and political leadership in resisting these dangerous trends, the victims will not be just the refugees but also the very foundations of democratic societies".

Since refugees are in a different country than their own, usually speaking a different language and often belonging to a different racial or ethnic group than the population of the host country, they are particularly vulnerable to suffering from racial or other discrimination. This discrimination may be a direct or indirect result of government laws, policies or actions, or it may arise from the actions of private individuals or groups, e.g., racist propaganda or racist violence.

Because refugees are not citizens of the host country, it is inevitable that they will not

enjoy all of the same rights granted to citizens under national law. For example, usually only citizens are entitled to vote and to hold public office. In fact, legitimate distinctions between citizens and non-citizens have been specifically recognized by the Convention on the Elimination of All Forms of Racial Discrimination. Article 1(1) of the Convention defines racial discrimination as:

“[...] any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life“. [Note: “national or ethnic origin“ as used here is not related to citizenship.]

However, Article 1(2) of the Convention continues:

“This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens“.

More than 135 states are parties to the Convention on the Elimination of All Forms of Racial Discrimination.

What is racial discrimination?

The definition of “racial discrimination” in Article 1(1) of the Convention on the Elimination of All Forms of Racial Discrimination cited above is intended to cover acts of discrimination based on motivations of a racial nature. Since there is much debate as to the term “race”, it should be understood in a broad sense and this is why the terms “colour”, “ethnic origin” and “descent” were added. Also, these acts must have the “purpose” or “effect” of affecting the enjoyment of basic human rights. This means that even if a law or policy is not intended to discriminate on the basis of race, it might still be objectionable if it has this effect.

Article 1(2) of the Convention on the Elimination of All Forms of Racial Discrimination cited above reflects the reluctance of states to undertake obligations which imply equality of treatment between citizens and non-citizens, and is one of the reasons why some people believe that international human rights law allows states to discriminate against non-citizens (including refugees) with regard to the enjoyment of basic human rights.

While it is true that some rights are only enjoyed by citizens, other rights in international and regional human rights instruments are granted to everyone within the jurisdiction of the state, including non-citizens and refugees.

With regard to any given right, e.g., the right to vote, discrimination solely on the basis of race may be prohibited while discrimination on the basis of citizenship may be allowed. In other words, Article 1(2) of the Convention on the Elimination of All Forms of Racial Discrimination permits only some distinctions to be made the basis of **citizenship**. If non-citizens are discriminated against because of their race,

colour, or ethnic origin, then such discrimination would be prohibited.

The following sections set out the situations and specific rights when refugees (as non-citizens) are protected against discrimination on the basis of race.

B. NON-DISCRIMINATION IN INTERNATIONAL REFUGEE LAW

Article 3 of the 1951 Convention provides that:

“The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin“.

This means that States Parties to the 1951 Convention must ensure that the rights protected by the Convention are enjoyed by all refugees regardless of their nationality, ethnic or racial origin. For example, freedom of religion (in Article 4) or the right of access to courts (Article 16) must apply to all refugees.

Article 3 is a specific expression of the general rule of non-discrimination in human rights law – human rights instruments usually provide that the rights they recognize must be respected without discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This list is taken from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (in each case, Article 2).

The 1951 Convention itself is also quite specific with regard to which rights refugees are entitled to on an equal footing with citizens, and which rights refugees enjoy only to the same extent as other non-citizens.

With regard to the following rights, the 1951 Convention provides **equality of treatment with citizens**:

- freedom of religion (Article 4);
- intellectual property rights (Article 14);
- the right of access to the courts (Article 16);
- the right to elementary education (Article 22);
- the right to public relief (Article 23); and
- rights associated with employment, labour legislation, and social security (Article 24).

However, with regard to the following rights, the 1951 Convention provides **only equality of treatment with other non-citizens**:

- movable and immovable property rights (Article 13);
- the right of association (Article 15);
- the right to work (Article 17);
- the right to form a private business or practise a profession (Article 18 and 19);
- the right to housing (Article 21);
- the right to post-elementary education (Article 22); and

- freedom of movement (Article 26).

C. NON-DISCRIMINATION UNDER INTERNATIONAL HUMAN RIGHTS LAW

In addition to the protection against discrimination with respect to certain rights in the 1951 Convention, refugees are entitled to the protection against discrimination provided by international and regional human rights instruments, which set out many rights which apply equally to citizens and non-citizens.

For some rights, they reinforce prohibitions found in the 1951 Convention against discrimination between citizens and refugees. For other rights, they prohibit discrimination between citizens and refugees, even though such discrimination is allowed by the 1951 Convention. They also prohibit discrimination with respect to some rights not mentioned at all in the 1951 convention.

Prohibitions against discrimination are included in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child. The Human Rights Committee, which monitors the international covenant on civil and political rights has stated that:

“[T]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant [...]”.

Under the International Covenant on Economic, Social and Cultural Rights, the only discrimination allowed between nationals and non-nationals concerns economic rights in developing countries. Article 2(3) provides that:

“Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals”.

The Convention on the Rights of the Child provides that all rights are to be guaranteed to all children within the jurisdiction of the state. Article 2 says that:

“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”.

D. PROTECTION AGAINST XENOPHOBIA AND RACIST VIOLENCE

As strangers in a foreign country, refugees will often feel insecure and threatened. Such feelings will increase if they regularly confront intolerance and prejudice. In situations where refugees face racist propaganda and violence, fears for their security become acute.

The 1951 Convention does not provide protection for refugees against xenophobia and racist violence. However, numerous provisions in international human rights instruments, in particular the Convention for the Elimination of All Forms of Racial Discrimination, do offer certain forms of protection which benefit refugees.

The International Covenant on Civil and Political Rights, Article 20(2), provides that:

“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

Under Article 2 of the Convention for the Elimination of All Forms of Racial Discrimination, States Parties undertake:

- to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
- not to sponsor, defend or support racial discrimination by any person or organization;
- to prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization; and
- to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

These provisions apply to both public and private groups and organizations, and place concrete obligations on States Parties to take action against racial discrimination.

In addition, under Article 4(a) of the Convention for the Elimination of All Forms of Racial Discrimination, States Parties are required to make illegal:

- the dissemination of ideas based upon racial superiority or hatred;
- incitement to racial discrimination;
- acts of violence against any race or group of persons of another colour or ethnic origin;
- incitement to such acts of violence; and
- provision of any assistance, including financial assistance, to racist activities.

Under Article 4(b), States Parties are required to make illegal any organizations and propaganda which promote and incite racial discrimination, as well as participation in such organizations or propaganda.

Therefore, States Parties to the Convention for the Elimination of All Forms of Racial Discrimination are required to take several steps to suppress racism, and to make illegal and punish racist violence, racist organizations and racist propaganda. Such steps should benefit refugees when:

- they are threatened with or exposed to violence on account of their race or ethnic origin; or
- private or public groups or organizations are established which publish or use racist propaganda directed against refugees.

Restrictions on racist speech versus freedom of expression

Many human rights are subject to limitations. Freedom of speech and expression, as set out in international instruments, may be subject to restrictions which are necessary to ensure respect for the rights and freedoms of others. It may therefore be permissible to limit freedom of speech to protect people from racist propaganda and violence. The Committee for the Elimination of Racial Discrimination, set up to implement the Convention for the Elimination of All Forms of Racial Discrimination, has specifically concluded with regard to this issue that:

“In the opinion of the Committee, the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression“.

Case Study

A state has introduced a new law to deal with an increase in asylum seekers. Under the new law, asylum-seekers will be divided into three categories.

Group A: Those from certain states (there is an “A” list) will not be allowed to file claims for asylum.

Group B: Those from certain other states (there is a second, “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 lists will have their claims heard in the regular status determination procedure.

As protection officer, how would you analyse this new law in terms of international human rights law on discrimination?



What additional information would you need?



Analysis of Case Study

1. Your analysis of the new law in terms of international human rights law on discrimination may give rise to the following observations:

- 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 Universal Declaration on Human 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 the 1951 Convention;
- 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 to a large extent depend on whether the purpose or effect of the law was to discriminate on the basis of race, colour, descent or ethnic origin. Another concern is the fairness and procedural safeguards of the shortened procedure and the observance of international standards in this respect, notably Executive Committee Conclusions No. 30.

2. You would need to obtain the following information:

- background and criteria for deciding what countries should be on what list;
- 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;

- details regarding the procedure and the rights of applicants;
- statistics on the recognition rate for asylum-seekers from Group B;
- overview of what regional or international treaty obligations the state has undertaken in the area of non-discrimination.

Annex

1. RELEVANT REFERENCES IN INTERNATIONAL HUMAN RIGHTS LAW

Where the 1951 Convention provides equality of treatment with citizens with respect to certain rights, this is reinforced by international human rights instruments as follows:

Freedom of religion

- Universal Declaration of Human Rights (Article 18)
- International Covenant on Civil and Political Rights (Article 18)
- Convention on the Rights of the Child (Article 14)

Intellectual property rights

- Universal Declaration of Human Rights (Article 27(2))
- International Covenant on Economic, Social and Cultural Rights (Article 15(1)(c))

Right of access to the courts

- Universal Declaration of Human Rights (Article 10)
- International Covenant on Civil and Political Rights (Article 14)
- Convention on the Rights of the Child (Article 40)

Right to elementary education

- Universal Declaration of Human Rights (Article 26)
- International Covenant on Economic, Social and Cultural Rights (Article 13)
- Convention on the Rights of the Child (Article 28)

Right to public relief

- Universal Declaration of Human Rights (Article 25)
- International Covenant on Economic, Social and Cultural Rights (Article 9)

Rights associated with employment, labour legislation and Social security

- International Covenant on Economic, Social and Cultural Rights (Article 9)
- Convention on the Rights of the Child (Articles 26 and 32)

Where the 1951 Convention provides only equality of treatment with other non-citizens with respect to certain rights, international human rights instruments are more favourable to refugees by providing **protection against discrimination between citizens and non-citizens (including refugees)**, as follows:

Right of association

- Universal Declaration on Human Rights (Article 20)
- International Covenant on Civil and Political Rights (Article 22)
- International Covenant on Economic, Social and Cultural Rights (Article 8)
- Convention on the Rights of the Child (Article 15)

Right to work

- Universal Declaration of Human Rights (Article 23)
- International Covenant on Economic, Social and Cultural Rights (Articles 6 and 7)

Right to housing

- Universal Declaration of Human Rights (Article 25)
- International Covenant on Economic, Social and Cultural Rights (Article 11)

Right to post-elementary education

- International Covenant on Economic, Social and Cultural Rights (Article 13)
- Convention on the Rights of the Child (Article 28)

Freedom of movement

- Universal Declaration of Human Rights (Article 13)
- International Covenant on Civil and Political Rights (Article 12)

Finally, there are a number of other rights not mentioned in the 1951 Convention that apply equally to citizens and non-citizens, of which the most important are:

Right to life, liberty and security of the person

- Universal Declaration of Human Rights (Article 3)
- International Covenant on Civil and Political Rights (Articles 6 and 9)
- Convention on the Rights of the Child (Articles 6 and 37)

Right to family life

- Universal Declaration of Human Rights (Article 16)
- International Covenant on Civil and Political Rights (Article 23)
- Convention on the Rights of the Child (Articles 9, 10, 18, 19, 20 and 21)

Right to peaceful assembly

- Universal Declaration of Human Rights (Article 20)
- International Covenant on Civil and Political Rights (Article 21)
- Convention on the Rights of the Child (Article 15)

2. RELEVANT PROVISIONS IN REGIONAL HUMAN RIGHTS LAW

Regional human rights instruments also reflect the general rule of non-discrimination.

African Charter on Human and Peoples' Rights, Article 2:

“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status“.

African Charter on the Rights and Welfare of the Child, Article III:

“Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status“.

American Convention on Human Rights, Article 1:

“1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, ‘person’ means every human being“.

American Declaration of the Rights and Duties of Man, Article II:

“All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor“.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status“.

Note, however, that the European Convention for the Protection of Human Rights and Fundamental Freedoms in Article 16 provides that:

“Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens“.

The jurisprudence of the European Court of Human Rights has established that Article 14 of the European Convention cannot be invoked on its own, but must be read in connection with another article protecting a substantive right. No such cases have been decided concerning claims by asylum-seekers or refugees.

Chapter 9 - Refoulement

In this chapter you will learn:

- why it is essential to protect refugees and asylum-seekers from refoulement;
- how protection from refoulement has entered international law both explicitly and implicitly;
- how international and regional instruments other than the 1951 Convention Relating to the Status of Refugees can be used to argue against refoulement.

A. INTRODUCTION TO THE ISSUES

In carrying out protection work for refugees some UNHCR staff may have encountered different situations which involved the particular human rights issues discussed in this chapter. For the benefit of those who haven't and – more generally – to help staff focus on the practical aspect of pertinent human rights principles and standards, the following scenario may be a helpful illustration:

Scenario

An asylum-seeker, whose application for asylum has been rejected by a national Eligibility Committee, 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.

B. NON-REFOULEMENT in International Refugee Law

Article 33 of the 1951 Convention provides that:

“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“.

UNHCR protection staff will be familiar with this provision and with the debates concerning its scope and content. In brief, protection against *refoulement* is available to:

- refugees recognized under the 1951 Convention;
- asylum-seekers whose claims have not yet been considered;
- persons who have fled their countries and are entitled to protection under the OAU Convention or the Cartagena Declaration, or who are otherwise in need of international protection.

It is generally accepted that protection against *refoulement* also applies to persons arriving at the border, even in situations of a large scale influx of refugees. The OAU Convention Article II(3) specifically includes a provision prohibiting *“rejection at the frontier“*. A similar provision is included in Article 3 of the UN Declaration on Territorial Asylum adopted by the General Assembly in 1967 (Resolution 2312(XXII)). Several Executive Committee conclusions have also reaffirmed this principle, **see Conclusions No. 6, 22 and 30.**

It is also generally accepted that the prohibition on *refoulement* is part of customary international law, that is, all states must respect the principle of *non-refoulement*, even if they are not party to the 1951 Convention.

C. THE RIGHT TO SEEK ASYLUM IN INTERNATIONAL HUMAN RIGHTS LAW

The right to seek asylum is found in the Universal Declaration of Human Rights, Article 14, which provides that:

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

2. 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“.

D. EXPLICIT PROTECTION AGAINST REFOULEMENT in International Human Rights Instruments

Three international human rights instruments include an explicit prohibition of *refoulement* if a person

is at risk of suffering the human rights violation that the instrument is seeking to prevent.

Taken together, these three instruments protect any person from being forcibly returned to a country where he or she is at risk of torture, enforced disappearance, or extra-legal, summary or arbitrary execution.

D.1 UN CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in Article 3 that:

“1. No State Party shall expel, return (“refouler”) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights“.

What acts are considered torture?

The term “torture” is defined in Article 1 of the Convention as including any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of a public official for such purposes as obtaining information or a confession, punishing, intimidating or coercing him or a third person.

Article 22 of the Convention against Torture establishes a procedure for individual complaints and constitutes an important international human rights law mechanism which can be employed on behalf of asylum seekers and refugees once all domestic remedies have been exhausted. A State Party must declare, under Article 22, that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their rights under the Convention have been violated by a State Party. There are more than 80 States Parties to the Convention, of which approximately half have recognized the competence of the Committee under Article 22.

A recent decision under the individual complaint procedure of the Committee against Torture concerned an asylum-seeker; this case represents the first time the Committee has considered the case of an asylum-seeker under Article 22 of the Convention against Torture. As a result of this decision, the government concerned was obliged to refrain from expelling the applicant to his country of origin, or any other country where he runs a risk of being expelled or returned to his country of origin or of being subjected to torture. It is noteworthy that the analysis employed by the Committee reflects the approach undertaken in determination of refugee status. The Committee in dealing with the case took into consideration, *inter alia*, the reports of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Special Rapporteur on Torture and the Working Group on Enforced or Involuntary Disappearances.

To view the case and how the Committee reached its conclusion on whether there were

“substantial grounds” for believing the applicant could be in danger of being subjected to torture, search REFCAS in REFWORLD using “Convention Against Torture” as key-word.

D.2 UN DECLARATION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

The UN Declaration on the Protection of All Persons from Enforced Disappearance provides in Article 8 that:

- “1. No state shall expel, return (‘refouler’) or extradite a person to another state where there are substantial grounds to believe that he would be in danger of enforced disappearance.
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“.

What is an enforced disappearance?

An “**enforced disappearance**” in human rights law is when people are ‘*arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the person concerned or a refusal to acknowledge deprivation of their liberty, thereby placing such person outside the protection of the law [...]*’.

D.3 UN PRINCIPLES ON THE EFFECTIVE PREVENTION AND INVESTIGATION OF EXTRA-LEGAL, ARBITRARY AND SUMMARY EXECUTIONS

The UN principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions provide in Principle 5 that:

“No one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country“.

What is an extra-legal, summary or arbitrary execution?

The phrase “**extra-legal, summary or arbitrary execution**” is not defined in UN instruments, but is considered to cover all unlawful and deliberate killings carried out at the order of a government or with its acquiescence. According to the Special Rapporteur on this subject, his mandate covers deaths in custody, deaths due to the use of force by law enforcement officials, violations of the right to life during armed conflict (e.g. killing of non-combatants), genocide and violations of the right to life in connection with the death penalty (e.g. execution after unfair trial, or of a minor which is

prohibited under international law).

D.4 HOW TO USE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS PROVIDING EXPLICIT PROTECTION AGAINST *REFOULEMENT* TO REINFORCE OR EXTEND ARTICLE 33 OF THE CONVENTION

“*Persecution*” is not defined in the 1951 Convention, but it is generally accepted that violations as serious as torture, arbitrary execution or enforced disappearance would amount to “persecution” so persons at risk of such violations should already be accepted as refugees and entitled to protection against *refoulement*.

Therefore, for states who are already party to the 1951 Convention the three instruments referred to above offer **supplementary protection** against *refoulement*. They can be cited in support of an argument based on Article 33, when the specific violations the instruments deal with are relevant.

- If a person is at risk of disappearance if returned to a particular country, it might be worth citing Article 8 of the UN Declaration on the Protection of All Persons from Enforced Disappearance in addition to Article 33 of the 1951 Convention.
- If the person is at risk of torture if returned to a particular country, and if the country of asylum is a party to the Convention against Torture, then Article 3 of that Convention should be cited since, as a treaty, it creates binding legal obligations for states which are party to it. If there are “*substantial grounds for believing*” that a person is at risk of torture if returned to a particular country, then the obligation in respect of *non-refoulement* is absolute.

Note!

Unlike Article 33 of the 1951 Convention, there is no limitation on the protection against *refoulement* in these three instruments – **the prohibition is absolute**. So, for example, even those convicted of serious criminal offenses in the asylum country would be entitled to protection against *refoulement* if they were at risk of torture, arbitrary execution or enforced disappearance.

Some states are not party to the 1951 Convention, or are party to it but with a geographic limitation. In such cases, the principle of *non-refoulement* should still apply because of its status as a norm of customary international law. The protection against *refoulement* offered by these three instruments can also be cited:

- as evidence of the importance the international community attaches to the principle of *non-refoulement*, and to support its status as a customary norm; and
- if a state is not party to the 1951 Convention (or maintains a geographic limitation), but is party to the Convention against Torture, then Article 3 of that Convention should be relied on if a person risks torture if returned to a particular country.

E. **IMPLICIT PROTECTION AGAINST *REFOULEMENT* in International Human Rights**

Instruments

E.1 PROTECTION AGAINST TORTURE

As you have seen, the Convention against Torture contains an explicit prohibition on *refoulement*. However, other general human rights instruments which include a prohibition on torture have been interpreted to include an implicit prohibition on *refoulement* where the person is at risk of torture:

International Covenant on Civil and Political Rights, Article 7:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

The Human Rights Committee, in its General Comment 20 of 1991 on Article 7 said:

“In the view of the Committee, States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States Parties should indicate in their reports what measures they have adopted to that end.”

E.2 PROTECTION OF FAMILY LIFE

Cases may arise where an individual is threatened with forcible return to a particular country which would separate him or her from family members who remain in the asylum country. In some circumstances, international human rights standards may offer protection against deportation or expulsion if it violates rights related to protection of the family.

→ See chapter 6 on Family Life.

F. **NON-REFOULEMENT and the Right to Seek Asylum in the European Context**

The European Convention for the Protection of Human Rights and Fundamental Freedoms, unlike instruments found in the other regional systems, does not explicitly provide for a right to seek asylum or for a duty of *non-refoulement*.

However, the European Court of Human Rights has found an implicit right not to be returned to a risk of torture in Article 3 of the European Convention.

Therefore, a country of asylum which is party to the European Convention could be in breach of Article 3 if it forcibly returns a person to a country where he or she risks being subjected to torture.

No derogations can be made from Article 3 of the European Convention in time of war or other national emergency, and there are no provisions for limitation of the right. Thus, there is an absolute prohibition of torture and of inhuman or degrading treatment or punishment under the European Convention.

Cases under Article 3 of the European Convention

The European Court on Human Rights has dealt with a few cases under Article 3 of the European Convention relevant for the protection of refugees and asylum-seekers, which have established that Article 3 embraces the situation where a person runs a risk of being tortured as a result of expulsion or *refoulement*. The Court has not yet found such a violation of Article 3 because it has not found a “real and substantial risk” of torture in the cases before it. It should be recalled, however, that many

cases are resolved through friendly settlement by the European Commission on Human Rights, and never reach the Court.

→ See Part I of this module, Chapter 4 on Human Rights Protection at the Regional Level.

Resorting to the European human rights system may also be useful as the state concerned may be asked to suspend the expulsion while the case is pending.

The European Court has found that extradition of a criminal suspect to stand trial constituted a violation of Article 3 where a possible outcome of the trial was capital punishment (*Soering v. United Kingdom*, judgment of 7 July 1989, Publications of European Court of Human Rights, Series A, Vol. 161; Human Rights Law Journal Vol. 11, No. 3-4, 1990). The Court reasoned that:

“The question remains whether the extradition of a fugitive to another state where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3. That the abhorrence of torture has such implications is recognized in Article 3 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, [...]. The fact that a specialized treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention“.

The European Convention includes no direct prohibition on extraditing or expelling individuals likely to be subject to ill-treatment in the receiving country. However, the European Court in *Soering* reiterated its jurisdiction in matters involving even third, non-party states:

“There is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment“.

While the *Soering* case established important principles, the European Court in three subsequent cases under Article 3 dealing with asylum-seekers found no violations of Article 3 of the European Convention.

In 1991, the European Court held that the principle established in the *Soering* case concerning extradition applied *a fortiori* to expulsion, in a case where an asylum-seeker who had been tortured in his country of origin sought to halt his expulsion from a State Party to the European Convention. (*Cruz Varas v. Sweden*, Publications of European Court of Human Rights, Series A. Vol. 201; Human Rights Law Journal, Vol. 12, No. 4, 1991). The European Court found that, despite the previous torture, the situation in the country of origin had changed significantly in the sixteen years since the asylum-seeker had fled, and that there was therefore no evident current risk of torture.

In another 1991 case *Vilvarajah v. UK*, Judgment of 30 October 1991, Publications of European Court of Human Rights, Series A, Vol 215; Human Rights Law Journal Vol. 12, No. 11-12, 1991) the European Court decided that return of five asylum-seekers was not a violation of Article 3, as the Court found no substantial grounds for believing that they would be exposed to real risk of treatment prohibited under Article 3. One factor in the European Court’s decision appeared to be UNHCR’s voluntary repatriation programme in the country of origin. However, in relation to Article 3, the Court stated:

“The Court’s examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe“.

It should be noted that after the asylum-seekers had appealed to the European Commission on Human Rights (at an earlier stage of the proceedings), they were granted exceptional leave to stay pending the outcome of their case.

Finally, in another case, the European Commission had indicated to the state concerned that it would be desirable in the interest of the parties and to ensure the proper conduct of the proceedings to refrain from deporting the asylum-seekers before referral of the case to the European Court. The European Court found that the applicants were not “victims” in the sense that they themselves were not likely to receive treatment contrary to the spirit of Article 3 of the European Convention, and therefore did not consider the merits of the case (*Vijaynathan and Puparajah v. France*, Judgment of 27 August 1992, Publication of the European Court of Human Rights, Series A. Vol. 241-B; Human Rights Law Journal Vol. 14, No. 1-2, 1993).

Case Study

An asylum-seeker whose application for asylum has been rejected by a national Eligibility Committee 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 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 information would you need?



Analysis of Case Study

1. You can make use of the following arguments to persuade the authorities to suspend or delay the expulsion:

- as the asylum-seeker has been recognized under the UNHCR 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;
- if the country of asylum is a State Party to international or regional refugee or human rights instruments, for example the 1951 Convention, the OAU Convention, the Convention against Torture, or the International Covenant on Civil and Political Rights, an argument can be made that *refoulement* would violate the provisions of these treaties;

- 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;
- in order to delay and legally challenge the expulsion, the rejected asylum-seeker may, in certain circumstances, make an individual complaint to an international human rights treaty body such as the Committee against Torture 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.

2. You would need to obtain the following information:

- provisions in national law which protect against cruel, inhuman or degrading treatment or torture;
- overview of relevant regional or international treaty obligations which the state has undertaken (e.g. Convention against Torture, International Covenant on Civil and Political Rights);
- country of origin information to evaluate the risk of torture and possible threats to life, liberty and security of the person in case of return;
- other durable solutions available for this case (e.g. resettlement).

Annex - RELEVANT PROVISIONS OF REGIONAL HUMAN RIGHTS INSTRUMENTS

African Charter on Human and Peoples' Rights:

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited". (Article 5)

Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions". (Article 12(3))

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

"No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2 [definition of the term "Refugee"]".

American Convention on Human Rights:

"No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent

dignity of the human person“. (Article 5(2))

“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 offenses or related common crimes“. (Article 22(7))

“In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions“. (Article 22(8))

American Declaration of the Rights and Duties of Man, Article XXVII:

“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“.

Inter-American Convention to Prevent and Punish Torture, Article 13:

“[...] Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting state“.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment“.

Chapter 10 - Women

In this chapter you will learn:

- which UNHCR policies, guidelines and resources are of particular importance to ensuring the human rights of refugee and asylum-seeking women;
- what international and regional human rights standards are applicable to refugee women;
- what arguments and strategies you can use to help ensure the protection of refugee women’s rights.

A. INTRODUCTION TO THE ISSUES

In carrying out protection work for refugees some UNHCR staff may have encountered different situations which involved the particular human rights issues discussed in this chapter. For the benefit of those who haven’t and – more generally – to help staff focus on the practical aspect of pertinent human rights principles and standards, the following scenario may be a helpful illustration:

Scenario

In a country, very few of the women seeking asylum have been recognized on the basis of gender-based persecution. The decisions of the authorities often reveal inconsistencies that seem to indicate a lack of understanding of the issues involved in determining whether or not a fear of persecution existed or could exist on grounds related to gender. Although the issue had 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.

B. WOMEN IN INTERNATIONAL REFUGEE LAW

As a matter of international law, refugee women are entitled to the same kind of protection as all other refugees. The provisions of the 1951 Convention apply to "any person" who comes within the refugee definition.

However, in practice, asylum-seeking and refugee women often face a number of disadvantages in obtaining international protection, including:

- the absence of gender as a ground of persecution in the refugee definition;
- unwillingness to recognize women as a particular social group;
- unequal access to procedures;
- failure of status determination officials to take into account that women are often persecuted and experience their persecution differently from men;
- greater responsibility for care of children and older family members; and
- increased risk of being subjected to sexual violence both in the country of origin and the country of asylum.

In response, the Office has taken a number of initiatives in recent years to assist staff in protecting the rights of refugee women, including:

- establishing the positions of Senior Coordinator for Refugee Women, and Legal Adviser (Refugee Women and Children);
- issuing Guidelines on the Protection of Refugee Women (July 1991) and UNHCR Policy on Refugee Women (1990);
- issuing Guidelines on Prevention and Response with regard to Sexual Violence against Refugees (1995);
- training staff in People-Oriented Planning, designed to promote gender awareness in providing assistance and protection;
- issuing a training module on Interviewing Applicants for Refugee Status which includes a chapter on interviewing women;
- submitting to the Executive Committee the Note on Certain Aspects of Sexual Violence against Refugee Women (A/AC.96/822), which resulted in Executive Committee

Conclusions number 73 (XLIV) – 1993 on Refugee Protection and Sexual Violence; as well as raising the issue at previous meetings of the Executive Committee leading to the adoption of Conclusions Number 39/1985 (Refugee Women and International Protection), 54/1988 (Refugee Women), 60/1989 (Refugee Women) and 64 (Refugee Women and International Protection).

C. WOMEN IN INTERNATIONAL HUMAN RIGHTS LAW

C.1 NON-DISCRIMINATION

The general rule of non-discrimination in human rights law provides that everyone in a country is entitled to the same human rights.

→ *See Part I of this module, Chapter 3 on Basic Legal Concepts.*

In addition to the general rule of non-discrimination set out in the instruments constituting the International Bill of Human Rights (*see Annex below*), there is a specific instrument addressing the situation of women; the Convention on the Elimination of All Forms of Discrimination against Women, to which over 130 states are parties.

This Convention establishes standards for states in a number of areas that are important to refugee women, including:

- suppression of all forms of traffic in women and exploitation of prostitution of women (Article 6);
- nationality (Article 9);
- education (Article 10);
- employment (Article 11);
- health care (Article 12);
- particular problems of rural women (Article 14);
- equality before the law (Article 15); and
- all matters relating to marriage and family relations (Article 16).

Of particular importance is recognition that the goal of equality of opportunity and treatment may require positive measures in favour of women. Article 4(1) of the Convention provides that:

“Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention [...]”.

The Committee on the Elimination of Discrimination against Women, made up of twenty-three experts serving in their personal capacity, was established to monitor implementation by State Parties of the Convention on the Elimination of All Forms of Discrimination against Women. State Parties must submit reports to the Committee; the Convention does not provide for individual communications or for inter-state complaints.

C.2 VIOLENCE AGAINST WOMEN

Concern for the human rights of women at the international level has in recent years moved beyond the focus on non-discrimination to include the issue of violence against women. Reflecting the importance of this concern to the international community, the General Assembly adopted in December 1993 a Declaration on the Elimination of Violence against Women (A/RES/48/104).

In the preamble of that declaration, the General Assembly is “[...] concerned that some groups of women such as [...] refugee women [...] are especially vulnerable to violence“. The Declaration contains a list of what shall be understood to encompass violence against women in Article 2, and underlines in Article 3 that women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It follows from Article 4 (1) that states should “[a]dopt measures directed towards the elimination of violence against women who are especially vulnerable to violence“.

The Commission on Human Rights has also acted on this issue, establishing a Special Rapporteur on Violence against Women in March 1994. In resolution 1994/45 of the Commission the Special Rapporteur is mandated to “[s]eek and receive information on violence against women, its causes and its consequences from Governments, treaty bodies, specialized agencies [...]“. The Special Rapporteur can also recommend measures, ways and means to eliminate violence against women.

Case Study

In a country, very few of the women seeking asylum have been recognized on the basis of gender-based persecution.

The decisions of the authorities often reveal inconsistencies that seem to indicate a lack of understanding of the issues involved in determining whether or not a fear of persecution existed or could exist on grounds related to gender.

Although the issue had 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.

As protection officer, what would you do in order to promote the thinking of gender-based persecution for the protection of refugee women?



Analysis of Case Study

Case Study

You can undertake the following activities in order to promote the thinking of gender-based persecution for the protection of refugee women:

- undertake training activities for decision-makers in order to promote gender awareness and applicable standards of international human rights law which provide protection to women;
- promote equal access to procedures for refugee women and encourage the adoption of special guidelines on women refugee claimants fearing gender-based persecution;

- make use of relevant UNHCR guidelines, policy papers, Executive Committee conclusions, training programmes, and training modules in your activities with decision-makers.

RELEVANT PROVISIONS IN INTERNATIONAL HUMAN RIGHTS LAW

Universal Declaration of Human Rights, Article 2:

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as [...] sex [...]”.

International Covenant on Civil and Political Rights:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as [...] sex [...]”. (Article 2(1))

“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”. (Article 3)

International Covenant on Economic, Social and Cultural Rights:

“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 [...] sex [...]”. (Article 2(2))

“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant”. (Article 3)

Convention on the Rights of the Child, Article 2(1):

“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s [...] sex [...]”.

African Charter on Human and Peoples’ Rights:

“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as [...] sex [...]”. (Article 2)

“The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions”. (Article 18(3))

American Convention on Human Rights, Article 1(1):

“The States Parties to this Convention undertake to respect the rights and freedoms

recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of [...] sex [...]“.

American Declaration of the Rights and Duties of Man, Article II:

“All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to [...] sex [...]“.

The rights of women in the American system are also laid down in three additional instruments:

- 1948 Inter-American Convention on the Granting of Civil Rights to Women
- 1948 Inter-American Convention on the Granting of Political Rights
- 1933 OAS Convention on the Nationality of Women

European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex [...]“.

Chapter 11 - Work

In this chapter you will learn:

- on what basis refugees are entitled to work;
- arguments you can use to broaden the basis for entitlement to the right to work;
- the specific prohibitions against discrimination in the right to work (including race and gender);
- arguments you can make to protect refugee children from harmful work.

A. INTRODUCTION TO THE ISSUES

In carrying out protection work for refugees some UNHCR staff may have encountered different situations which involved the particular human rights issues discussed in this chapter. For the benefit of those who haven't and – more generally – to help staff focus on the practical aspect of pertinent human rights principles and standards, the following scenarios may be a helpful illustration:

Scenario 1

An industrialized country allows refugees to work, but only on the same, extremely limited, terms as other non-nationals. The country justifies this based on its own domestic law, as well as a policy of protecting its labour market.

Scenario 2

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, usually at an extremely low wage and in difficult working conditions. Some of the refugee childrens' parents allow them to work, since their families need the money and the parents cannot work themselves. The authorities of the country tend to look the other way, since the local population has not protested too much over the competition.

B. THE RIGHT TO WORK UNDER INTERNATIONAL REFUGEE LAW

The right to work, one of the most fundamental economic rights, is crucial for refugees. Refugees need to be in a position to support themselves and their families – especially if there is no prospect that conditions in their home country are likely to change in the near future so that it might be safe for them to return voluntarily. While national or international assistance programmes might provide interim relief, in the long run continued reliance on such aid can be demoralizing. Forbidding refugees to work places them in a situation of enforced idleness which can only exacerbate their feelings of distress at not being able to return home, and may contribute to resentment on the part of the host population.

In recognition of the importance of this right, three Articles of the 1951 Convention are devoted to ensuring refugees' right to work.

Article 17 on wage-earning employment:

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

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

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

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

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

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

Article 18 on self-employment:

"The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in

agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies“.

Article 19 on the practising of liberal professions:

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

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

These articles provide that refugees’ right to work – whether in wage-earning employment, self-employed or practising a liberal profession – is limited to ensuring equality of treatment with other non-nationals

Therefore, under the 1951 Convention, restrictions on the working rights of non-nationals may also be applied to refugees. There are two important exceptions to this:

The **first exception**, with regard to wage-earning employment, is that under Article 17 any restrictions placed on non-nationals shall not be imposed on refugees if:

- they have completed three years’ residence in the country; or if
- they are married to a national of the country; or if
- they have a child(ren) who is a national of the country.

The **second exception**, for those refugees who want to be self-employed or to practise a liberal profession, is that under Articles 18 and 19, states undertake to accord “treatment as favourable as possible“. This imposes a positive obligation on states to make every effort to lift restrictions on the right of refugees to start their own business, or to practise a profession.

C. THE RIGHT TO WORK UNDER INTERNATIONAL HUMAN RIGHTS LAW

Since international refugee law guarantees only that refugees have the same rights as other non-nationals concerning employment, states can prevent refugees from working if other non-nationals are not allowed to work.

However, international human rights law also contains a number of provisions on the right to work which are relevant to asylum-seekers and refugees. The general rule of non-discrimination (**see Part I of this module, Chapter 3 on Basic Legal Concepts**) provides that everyone in a country is entitled to the same human rights. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights has an explicit provision on non-discrimination:

“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“.

Although nationality is not included in this list of prohibited grounds of discrimination, the list is not exhaustive – for example, it says “or other status“. Furthermore, as a general rule, the provisions in the International Covenant on Economic, Social and Cultural Rights apply equally to nationals and non-nationals.

When the International Covenant on Economic, Social and Cultural Rights was being drafted, some states argued that it should include a provision allowing for States Parties to restrict the economic rights of non-nationals, in particular the right to work. It was argued that such a provision would be in line with state practice since most states did not grant unrestricted working rights to non-nationals. However, this argument was not accepted; rather, the only specific restriction on the economic rights of non-nationals which was allowed was intended to end the domination of certain groups of non-nationals established during periods of colonization. Article 2(3) of the International Covenant therefore provides that:

“Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals“.

Although there is no explicit allowance in the International Covenant on Economic, Social and Cultural Rights for restricting the right to work of non-nationals (except for the limited circumstances envisaged in Article 2(3) cited above), it must be recalled that this right is subject to the same limitations that apply to all the rights in the International Covenant. The scope of these limitations is set out in Article 4:

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

Therefore, any restriction of the right to work of non-nationals must be:

“determined by law“ – meaning imposed pursuant to a general law which sets out clear rules;

“compatible with the nature of these rights“ – meaning not applied so as to jeopardize the very existence of the right;

“solely for the purpose of promoting the general welfare“ – meaning necessary for the purpose of furthering the well-being of the population as a whole.

Any restrictions placed on refugees’ right to work would have to be justified under this limitation clause.

For example, a state may limit refugees’ right to work in an effort to discourage the arrival of asylum-seekers in its territory, in the belief that such a policy will make asylum-seekers choose another country. While such a policy may be in accordance with law, it may not meet the test of being necessary to promote the general welfare.

However, in times of high unemployment, a state might reasonably argue that it is necessary to restrict the working rights of non-nationals, including refugees, because it is obliged to ensure employment opportunities for its own nationals, arguing that this is a means of promoting the general welfare.

 **Note!**

If restrictions on refugees’ right to work are justified because of high unemployment rates, a state must show that refugees are taking jobs that would normally go to nationals. In other words, the restriction must be shown to be **truly necessary**. Whenever a state places limitations on human rights, it is under an obligation to show that the limitation is both proportionate and necessary to the goal it seeks to achieve.

In addition, the rule of non-discrimination would prohibit states from restricting the working rights of only particular groups of refugees, for example from a particular region or country, or only for women.

Case Studies

Case Study 1

An industrialized country allows refugees to work, but only on the same, extremely limited, terms as other non-nationals.

The country justifies this based on its own domestic law, as well as a policy of protecting its labour market.

As protection officer, how can you argue for more generous possibilities for employment for refugees?



What additional information would you need?



Case Study 2

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, usually at an extremely low wage and in difficult working conditions.

Some of the refugee childrens' parents allow them to work, since their families need the money and the parents cannot work themselves.

The authorities of the country tend to look the other way, since the local population has not protested too much over the competition.

As protection officer, how can you try to persuade the authorities and the parents that the children should be prohibited from working?



What additional information would you need?



Analysis of Case Studies

Case Study 1

1. You can use the following arguments to seek more generous possibilities for employment of refugees:

- emphasize the importance of the right to work for refugees as a means to support themselves and their families. Stress the positive aspects of allowing refugees to be gainfully employed including: contributing to the economy through their contribution of labour, paying of taxes, and ability to purchase goods, thus minimizing the burden on the state and the need of refugees to resort to public assistance;

- 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;
- in compliance with international human rights standards, point out that the state must show that the restriction on the rights of refugees to work is truly necessary. In this regard, 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.

2. You would need to obtain the following information:

- provisions of national law in the area of labour standards and non-discrimination;
- overview of regional or international treaty obligations which the state has undertaken in the area of labour standards.

Case Study 2

1. You can use the following arguments to persuade the authorities and the refugee childrens' parents that the children should be prohibited from working:

- indicate that it is in the best interests of the child not to work and offer assistance in organizing school or recreational activities;
- if the work is hazardous to the child's health or development, or if the child is missing school in order to work, point out that the state may be in breach of its obligations under international human rights law;
- explore whether UNHCR may be able to provide additional assistance to families in need.

2. You would need to obtain the following information:

- provisions in national law which protect against child labour;
- overview of regional or international treaty obligations which the state has undertaken in the area of child labour, in particular, the Convention on the Rights of the Child and relevant ILO Conventions.

Annex - RELEVANT PROVISIONS IN INTERNATIONAL HUMAN RIGHTS LAW

Universal Declaration of Human Rights, Article 23:

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

International Covenant on Economic, Social and Cultural Rights, Article 6(1):

"The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or

accepts, and will take appropriate steps to safeguard this right“.

International Convention on the Elimination of All Forms of Racial Discrimination, Article 5:

“[...] States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

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

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

Convention on the Elimination of All Forms of Discrimination against Women, Article 11:

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

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, [...]“.

Other provisions of the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women cover conditions of employment, social security, discrimination on the grounds of marriage or maternity and the particular problems of rural women, topics not dealt with in this training module.

African Charter on Human and Peoples’ Rights, Article 15:

“Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work“.

American Declaration of the Rights and Duties of Man, Article XIV:

“Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit. Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and his family“.

European Social Charter, Appendix:

“Scope of the Social Charter in terms of persons protected:

[...]

2. Each Contracting Party will grant to refugees as defined in the Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951, and lawfully staying in its territory,

treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Contracting Party under the said Convention and under any other existing international instruments applicable to those refugees“.

IOM/39/96 - FOM/42/96 Memorandum of Understanding with UNICEF

UNHCR/IOM/39/96
UNHCR/FOM/42/96

OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

GENEVA

Inter-Office Memorandum No.39/96

Field Office memorandum No. 42/96

To: All Representatives and Chiefs of Mission in the Field
All Directors of Bureaux/Divisions
All Heads of Desks and Chiefs of Section at Headquarters

From: The High Commissioner

Ref.: Adm.1.1, Ext. 3.6 Date: 13 May 1996

Subject: Memorandum of Understanding with UNICEF

1. I should like to refer to the Memorandum of Understanding (MOU) signed with UNICEF. Copies are attached in English and French. It is designed to promote coordinated responses in areas of joint concern. It has been my wish to enter into an agreement with UNICEF on roles, responsibilities and areas of collaboration between the two agencies and to ensure predictability of resources available in an emergency situation.

2. UNHCR is ultimately responsible for the international protection and welfare of refugees, and this will continue to be the case also for refugee children. UNICEF's assistance to refugees will be agreed in each case with the host government and with UNHCR. The MOU defines roles and responsibilities of the two agencies in relation to the beneficiary populations (refugees, returnees, internally displaced persons and affected local populations). Issues covered by the MOU are advocacy, promotion and strategy formulation, particularly with regard to the Convention on the Rights of the Child, as well as operational and reintegration and rehabilitation activities.

3. UNICEF will take full responsibility for providing measles vaccine together with related equipment and supplies in a new refugee situation. You will note that many other issues dealt with in the MOU do not imply the same automatic response, but rather list possible levels of cooperation and sharing of responsibilities, often subject to a request from UNHCR and to modalities to be worked out in agreement between representatives of the two agencies. This will require ongoing contact and systematic exchange of information, both at the level of Representatives and directly between professional staff of our two organizations in the field.

4. An important area of collaboration with UNICEF will be activities related to the reintegration of returnees. This has also been flagged as an area where joint planning and proposed initiatives shall be the subject of a field-level Letter of Understanding, setting out, inter alia, the specific institutional framework for cooperation, agreed activities of each agency in support of returnee communities, and the intended linkages between the activities of the two agencies. You will note that there also is a strong UNICEF commitment to facilitate the reintegration of returnee children and families into national programmes, in particular educational programmes and those related to the monitoring of unaccompanied returnee children.

5. Support to unaccompanied children is an area where options for the possible levels of collaboration range from sharing of information and assessing needs for further situation- specific guidelines to UNICEF taking responsibility for programmes. While UNICEF clearly is an additional resource, we may wish to ensure that support to unaccompanied children remains within the framework of Community Services coordination to ensure a community- based approach and that these children remain within UNHCR's overall protection framework.

6. The MOU provides for an ongoing review of policy in areas of common concern as well as implementation issues. I have nominated Mr. Nicholas Morris, Director, Division of Programmes and Operational Support, as focal point for issues related to the MOU, and he should be kept informed of initiatives taken at the country level, solutions found and challenges faced. Comments on the MOU itself should also be addressed to him.

7. Selecting pilot countries for the implementation of the MOU at field level has been discussed with UNICEF, focusing on countries where results of the MOU might be evaluated in the coming year. Repatriation and reintegration in Angola may be one such pilot, warranting the development of modalities of cooperation with a view to compatibility of programmes and, where appropriate, a phased hand-over of reintegration programmes to UNICEF in collaboration with the government.

8. I encourage Field Offices to identify areas of collaboration with UNICEF and, where appropriate, to enter into agreements with our counterparts in UNICEF, in the spirit of the global MOU.